FROM THE PRINCIPLE OF SUPREME LAW TO THE PRINCIPLE OF SUPREME LIBERTY

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Abstract

In this study we briefly look onto the concept of freedom not only as a moral value or category, but also as an ontological dimension of man. In this way we make the distinction between ontological freedom and the legal freedoms established or recognized by the legal norms. The legal liberties are a phenomenal expression of human existence whose legitimacy and motivation are conferred by the ontological dimension of human freedom. In this context, the main features of the legal freedoms and the practical importance of the ontological meaning are to be found in the freedoms consecrated in the law.

Conscience is a defining existential reality of man, whose meaning can be seen only through an interdisciplinary unceasing effort of thinking and knowledge. In this study, we propose to make such an analysis of the conscience as an ontological foundation and characteristic of man, in its individual and social dimension, whose basis is made up of philosophical, theological and legal ideas, concepts and theories. Freedom of conscience is the main feature of the manifestations of man as a person within the specific environment of his/her existence. From the legal point of view, freedom of conscience is a complex fundamental right requesting a wide legislative system in order to establish and guarantee it. In our opinion, both the basis and the legitimacy of the legal system protecting the freedom of conscience are given by the philosophical truths and the truths of faith, as expressed in theological writings and meditations. In this study, we identify the theological and philosophical bases of the freedom of conscience and their reflection in the legal field.

In exceptional situations, such as the state of emergency or the state of alert established for a long time on the Romanian territory, the rulers have restricted the exercise of some essential fundamental rights, restrictions that seriously affect the private and social life of the people.

Keywords: *freedom as moral value, characteristics of ontological freedom, the features of legal freedoms, exceptional situations, restriction on the exercise of certain rights and freedoms.*

1. Introduction

Any attempt in the sphere of humanities to characterize and explain man in his individuality or in social relations also relates to the issue of freedom. It is natural to do so, because freedom is essentially related to the human being, but also to the existential phenomenality of man. The existence of man makes no sense without considering the freedom by which man becomes from the individual person also a creator of meanings and senses. The importance of this existential reality also lies in the fact that man is the only being created whose fundamental ontological dimension is freedom. By this he is not only a natural being, but also a spiritual being. Freedom, as ontological determination, makes the difference between an individual and a person. Only man, as a person, is a free being, not the individual. Constantin Noica said in this sense that „where freedom is not there is a number"[1], because the number is the conceptual expression of the abstract and undetermined generality that characterizes any human existential structure based solely on the existential phenomenality of the „ego", and not on the „self" down deepest of human being.

Father Dumitru Stăniloaie said that man „is secrecy and light, it is a mystery of light"[2]. We might try to say that man is also a mystery of freedom, because by this own feature of him, to be free, he differentiates and opposes to the natural and temporary determinism, to the necessity of the repeating laws of nature, transfigures the existence from „what is" to what „must be" adding value and meanings to it. Through freedom as an

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[1] C. Noica, *Jurnal de idei*, Humanitas Publishing House, Bucharest, 2013, p. 98.

[2] D. Staniloaie, *Philokalia*, vol. 11, Humanitas Publishing House, Bucharest, 2009, p. 52.

existential given one can conceive and understand all the majesty and splendor of human existence, both in relation to himself, in relation to society, in relation to God, and to the whole universe.

Although philosophy, legal sciences, anthropology, morals, and other disciplines abound in conceptualizations and theories and descriptions of human freedom, one cannot say that a full understanding of the meanings and senses of liberty has been reached, especially if regarded not only from the perspective of rationality, but as an existential given, as an ontological determination of man. That is why freedom is a mystery of man, but which does not mean skepticism or the inability of the reasoning to understand, but rather the fact that the capacity and vocation to deepen more and more in the deepest senses of ontological freedom. Although it is an existential given of the human being, freedom is alive, is not frozen into abstract structures it rather relates to the becoming of man and society.

2. Content

There is an indissoluble connection between freedom and love because, as Orthodox theology shows, the true freedom is determined by the love communion between man and God and through God, between man and his fellowmen, and the whole universe. Undoubtedly, philosophy first of all, but also other sciences, makes an important contribution to the conceptual understanding of human freedom, an understanding which remains, in the sphere of rationality of abstract concepts, either moral or utilitarian, and is engaging less existentially the human being. Freedom is thought by philosophy as a dimension of ethics, which is obviously correct because undeniably freedom is both principle and value of human ethics.

Kant, of course, remains one of the main thinkers who made an essential contribution to the phenomenology of human freedom in its moral dimension. The philosopher concluded the Critique of Practical Reason with a conclusion that synthesized his entire thinking and work: „Two things fill the soul with ever-new admiration and growing reverence, more often and more persistently our reflection is concerned with them: the starry sky above me and the moral law inside me”[3].

This profound and beautiful diction is, in fact, a rational basis for the unification of the two areas of human investigation, but also for the existence of man, respectively of nature and morality. It is also a basis for the entire moral conception of the philosopher from Konigsberg. For a moral built on the basis of three postulates, two of which lie above the interpersonal relationships – God and the immortal soul – can be interpreted as uniting the high of the „starry sky” in which these ideas are projected with the liberty of the deepest self of man, there is a need for a different conceptual structure other than the one used to investigate nature, which means, as Kant points out, that concepts of practical reasoning are needed, which have an existential constitutive value. In this construction, the concept of freedom proves to be indispensable, due to its association with the rational being, the core of the deepest self of man. The Romanian philosopher, Constantin Noica, said that in order to reach freedom „he must be unfaithful to own self on his way towards himself[4]”. The moral ascendant of the liberty makes that through it the other two rational ideas, namely the existence of God and the existence of the immortal soul, to leave one's state of transcendental ideas, finding oneself in the moral immanence through which these can be understood also within certain proven limits. That is why Kant calls freedom the „keystone” of the whole system of pure reasoning. We have emphasized that in Kantian thinking and even in philosophical rationalism also in Christian Protestant orientations, including in the pantheistic or deist ones, God is not conceived as a person, and soul and freedom are not as realities but as rational ideas.

The Kantian perspective on freedom, in our opinion, forms a distinct note in relation to all other metaphysical systems that addresses this issue of freedom because it is connected to the practical transforming reasoning of man, to the vocation and capacity of human being to manifest itself in natural existence, to create and confer meanings and values.

The realistic and materialist philosophical thinking and pragmatism conceive freedom in relationship to necessity. Freedom is understood not as an essential aspect, defining, totally different from the current and temporary determinism, but rather as a consequence of this determinism. In other words, in realism and ontological materialism, freedom is only a form of the necessity, of determinism, which it can overcome, but cannot transform or transfigure spiritually. The consequence is the subordination of freedom and, implicitly, of man to natural determinism. It is the materialist conception of freedom as a „necessity understood”. This

[3] I. Kant, *Critica rațiunii pure*, Antet Publishing House, Bucharest, 2013, p. 214.
[4] C. Noica, *Jurnal de idei*, Humanitas Publishing House, Bucharest, 2013, p. 102.

understanding of freedom as determined by the value, spiritual or juridical order is also found under more refined forms of the theological or philosophical thinking and indisputably is proper to legal thinking. The „order", no matter what kind, expresses necessity, limitation and even coercion, all of which are contrary through meanings, to human freedom as existential given.

The relationship between freedom and necessity, between freedom and law, moral or legal[5], is a recessive one. Necessity as order, no matter of its nature and configuration, is the dominant term and freedom is the recessive one. Of course, freedom does not result out of necessity, be it the spiritual order, it is not determined by such a necessity as in the materialist conception. As existence freedom is different from necessity, but in relation to the order whose expression is the necessary, freedom is always recessive and unfulfilled. In relation to the necessity of an existential order, as a recessive term, freedom is never full, it is not fulfilled, but it is always in precariousness.

In the previous studies dedicated to freedom we have talked about such precariousness specific to the existential order in which man is. We refer to different forms and disappointments of human freedom, but which do not have a pejorative meaning, they are the expression of freedom and not of natural determinism. Here are some of these forms: natural freedom, moral, cultural freedom, social and legal freedoms.[6]

In this context, the question is whether there are fulfillments of liberty, even in an absolute sense without a recessive relationship with the order of any nature, without limit and with an infinite opening towards existential absolute. Our answer is affirmative: it is the freedom of spirit human, who by paraphrasing Father Arsenie Boca, is in this world and always above it. It is the true ontological freedom, which, as we shall see below, has its basis not in the necessity of an outer order but in love communion between God and man, the inexhaustible fountain of freedom and love is God.

The approach of the issue of freedom that we encounter in the legal sciences, has multiple conceptual particularities and, we would say, often more important than the philosophical concepts on liberty, since the legal is a status of human existence, a characteristic of the social status, distinct from the natural, material status. It is a contemporary status of human existence, namely the „juridical status", which comprises an existential order based on two realities: the juridical norm and freedom.

Law cannot be conceived beyond the idea of freedom. The normative system, the most important aspect of law, has its meanings and legitimacy in human existence, the latter having freedom as existential given.

But what kind of freedom can be said in legal normativism and in the categories and concepts of the law? Inevitably, it is about the freedom of the legal norm, a liberty built, not an existential given. We must emphasize that the legal norm implies constraint, as any other existential order applied to human phenomenology. Appears then an important paradox that some authors in the field of Christian metaphysics noticed, namely the coexistence of the legal constraints and the freedom of man, on the other way, both of which are essential for the order specific to the legal status in which the contemporary man is.

Another aspect is interesting, namely that the legal norm does not show what freedom is, it does not define it, it does not show its meaning, but only the situations in which freedom is restricted. Moreover, it is good to notice that, unlike metaphysics and ethics, the legal norm does not express or conceptualize freedom as such, but only as freedoms or rights, which is the phenomenal aspects of human manifestations in the social environment, by its nature a relational environment. It is obvious that the legal normative system cannot define freedom as such, because there is existential incompatibility between normative constraint and on the other hand, liberty as an ontological given. This is also reflected in the doctrine, in the legal concept on liberty. A closer analysis of the legal theory on liberty, even of the just-naturalist conceptions, one notes the absence of the definition of freedom. The legal doctrine postulates the freedom of man and highlights the content of the legal freedoms, their limits, but it does not define freedom as an ontological given. The law, including the Constitution, or, in a wider sphere, the international treaties and conventions do not explain, characterize and define freedom, but only the freedoms of man which they consecrate.

It can be said that the legal normative system, which has as a component the necessity as a normative order and on the other hand the human liberties consecrated by this order, has the following characteristics:

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[5] For the relationship between law and morality, see R. Duminică, *Lege și legiferare în societatea românească actuală*, C.H. Beck Publishing House, Bucharest, 2024, pp. 72-79.

[6] See M. Andreescu, A.N. Puran, *Drept constituțional, Filosofia dreptului și istorie. Studii și eseuri*, C.H. Beck Publishing House, Bucharest, 2022, pp. 83-102.

1. There is no consecrated existential freedom, impossible to analyze by the legal norm, but only the freedoms built by the juridical norm, as an expression of the legislator's will at a determined historical moment. In this context, it is interesting to note, however, that the first Constitution of the world, namely that of the USA, in its original form, does not consecrate and, therefore, does not normatively express any of the legal freedoms. The doctrinaires said at that time that the Basic Law cannot regulate freedoms because it expresses the liberty itself. Subsequently, through the amendments adopted, this situation has also changed with respect to the US' Basic Law. In the sphere of liberties and constitutional rights, of course, individual freedom is the keystone. If we study the Constitution of Romania, we notice the same things that I mentioned above, namely the impossibility of the normative definition or the rational explanation of individual freedom. Art. 23 para. (1) of the Constitution of Romania consecrates the individual freedom, individual safety and these ones' inviolability: „The individual freedom and individual safety are inviolable". Inviolability remains, however, the sphere of legal phenomenological relativism, because the very legal norm constrains the freedom and, moreover, the exercise of individual freedom can be restricted by the state means.

2. The legal freedoms, which, we say, have their source in the ontological freedom of man, are characterized by negative expressions, that is, the general obligation of state not to restrain them and, more rarely, the positive obligations of state to promote them. Sometimes there are also concrete situations where freedom is restricted. In other words, the legitimate situations in which state, in accordance with the law, may restrict the exercise of certain rights or freedoms.

3. The legal freedoms are always limited and conditional. The whole construction of the system of legal freedoms is based on the concept of the „coexistence of liberties" which is natural to the phenomenology of the legal order and at the same time to social one.

4. The normatively consecrated legal liberties are the expression of human dignity within state-organized society. Their owner, the man, or the „individual", as they call it in the doctrine, can oppose these freedoms to the state power, may demand for their observance. The effectiveness of such a behavior specific to human dignity in the social environment is conditioned by two major aspects: a) the degree of awareness of the legal freedoms by their owner; b) the efficiency of the legal means for guaranteeing these freedoms.

5. There is also an important aspect that we find especially in international legal instruments on human rights and freedoms, namely the expression used in their preamble, in the sense that the signatory states „recognize" the rights and freedoms they consecrate. This expression is very important because it evokes the idea of man's existential freedom, previous to the legal freedoms, and in relation to which the rights and freedoms specific to the legal status of man, find their legitimacy. „To recognize" is to admit that freedom is a given of the human being, and not just a legal construction.

6. The legal norm, especially in the conditions of the „juridical normative" will, which contemporary society knows, is moving further away from human values. It is an abstract, general and impersonal structure whose legitimacy is not a value one, but one of a formal recognition within the normative system contemplated. Abandoning the values results in normative relativism based almost exclusively on the legislator's pure will at a decisive historical moment.

7. There is, however, an aspect that philosophical concepts or other concepts of freedom cannot realize; freedom united with the legal norm can do it. It is about guaranteeing legal freedoms, obviously not the ontological freedom. The legal norms, which consecrate liberties, together with justice, have this purpose to be able to guarantee individual freedoms in relation to the interferences or abuses of all kinds that may exist in a state-organized society. Only the normative system, and in particular the constitutional one, can guarantee to every man that the freedoms recognized or consecrated by the law can be defended, first of all before the power of the state, which at any time can become discretionary, but also against the interferences of other lawful subjects in the sphere of their own freedom. The guarantee of individual freedoms by the legal norm is a requirement of the lawful state. The reality of the guarantees and the efficiency of the legal means, for the defense of the subjective rights and liberties, is a matter that depends on the particularities of each state, the system of government, the concrete forms of achievement of the state power, the relationships between state and citizens and, last but not least, the efficiency of the act of justice.

Regarding the complex relationship between the legal normative system and society, on the other hand, can be noticed that in the contemporaneity the legal system tends to have its own functional autonomy, in addition to the subjective or objective determinations which society transmits. The autonomy of the juridical tries to transform itself from a secondary, phenomenological and ideological structure into one with its own

reality, with the power to impose its order to the social and natural order. In this context, the normatively consecrated legal liberties seek to determine the existential freedom of man by explaining, arranging and conditioning it. It is a situation contrary to natural reality; the phenomenology of the juridical must be conditional, determined by the existence of man, as a person, and by the particularities of social existence and not the other way round. It is an expression of dictatorship through law even in democratic societies, because the legitimacy of the legal norm lies, in such a situation contrary to nature, only in the will and interests of the governors, which paradoxically expresses on behalf of the people.

The reality described above, which is specific to contemporary society, has negative consequences in the sense that man, as a person, the only holder of ontological freedom, is no longer aware to his own freedom and expects that the normative order, state or even justice to confer the freedom that he needs. It can be said that in such a situation, the contemporary man not being aware to his own freedom, does not exist genuinely, but he lives throughout delegation, his existence being determined externally by the state and legal normativism, as mentioned above, abstractly, impersonally and most often deprived by the value meaning.

Of course, the just-naturalist views emphasize on freedom as ontological given of the human being and try to achieve the transition from freedom as an ontological essence to liberties as a social phenomenon, specific to the juridical status of man, normatively determined. We say that none of the forms of just-naturalist views fully succeeds in making such a transition, and the attempt to preserve the immutability and prestige of ontological freedoms within the legal freedoms, is most often unsuccessful.

In this ideological context, we keep in mind that the legal freedoms, as a structural element of the juridical status of man, are based on the metaphysical principle of the coexistence of liberties, postulated also by just-naturalist, but also by the 1789 French Declaration of Human Rights. It is a natural expression of the social existence of man, understood through the limits and not through the absolute of the existential freedom. In other words, in this phenomenal legal plan the freedom of man, as individual, approaches up to the freedom limit of his neighbor. It is about the distinction specific to law between „mine" and „yours", through which legal liberty is not a spiritual opening but a closure within individual's limits. We believe that the legal norm, in this way, cannot address to the person, focused on the ontological idea of freedom, but only to man as individual, contained in the multiple structures of the social scaffolding. Obviously, such a reality is not by itself negative, because the dimension of the social phenomenality of man is a reality in which the human essence manifests itself.

In earlier studies, we recalled the so-called precariousness of freedom, that is, forms of human freedom, unfulfilled, but which have existence and manifest themselves. We were talking about natural freedom, moral freedom, cultural freedom and obviously, not least, legal and social freedom. It is a matter of knowing which the source is and, at the same time, the legitimacy of these forms of freedom.

There are two explanations. First one, the normativist, according to which the normative order, as the case may be, of the natural determinism, moral or cultural values or legal norms, represent sources of freedom in precariousness.

The second conception attempts to explain all forms of human freedom, not by the order created by the necessity of any kind of a natural and social determinism, but through profoundness and essence aspects that belong only to the being and the reality of man as a person. To this explanation, we mean to go through some modest references.

The ontological freedom is the freedom of the spirit, is the original freedom of man. In the world of the spirit, freedom is not a recessive term related to necessity, for the simple reason that the necessity in any form of the natural determinism specific to this world no longer manifest itself, it was overcome and transfigured by the boundless wealth of values of the spirit Freedom as fullness and spiritual fulfillment is no longer the freedom of an order, it has no limits imposed by the law, nor the existential conditions specific to this world.

The theological thinking has presented many aspects regarding the relationship between the two forms of ontological freedom, which is: the freedom of choice, involving the freedom of human conscience, and discernment of distinguishing good from evil and, on the other hand, the supreme, ontological freedom as the ultimate goal of human existence, that is to live effectively in good and in truth.

It has been said that accepting the freedom of choice, including choosing evil, and refusing the good given by God, is contrary to human nature and, as a result, cannot be accepted. It is the theological conception promoted in particular by the Catholic thinking and some forms of Protestantism. Criticizing this conception, Nikolai Berdiaiev notes that „human freedom is not only the freedom in God, but also the freedom related to

God. Man must be free in regard to God, to the world and to his own nature"[7]. Therefore, the possibility of choosing between good and evil as a determination of the human being is essential to explain the communion between man as a person and God. This connection between man and God is not imposed it is not a result of an inexorable normative determinism, or of an order in which man participates as a simple element. If so, there would be no possibility of a connection and, moreover, of a communion of faith and love between man and God, and man would be a simple element subjected to an absolute determinism, be it spiritual and not a free person, endowed with conscience.

The same author we mentioned above emphasized: „If we only admit the liberty given through truth, given through God, and reject the freedom of choice and acceptance of truth, we are fatally engaged into tyranny and the freedom of the spirit is replaced by its determination"[8].

In fact, the idea of a single freedom of the order of good and truth had consequences in the plan of philosophical and theological thinking. It is, in fact, the expression of a freedom that arises from necessity, either of a divine order imposed on man or of a social order, also imposed, in the idea of good and full happiness. We have to notice that the Communist order wished to impose on man its own order, which it considered to be of the good, truth and absolute happiness. Therefore, any attempt to understand the spirit, through coercion and normative necessity, cannot be accepted as a way of ontological freedom. „Catholic and Byzantine theocracy, like atheist socialism, are naturally inclined to deny human freedom, to coerce and organize human life in good, that is, to identify freedom, either with the necessity of a divine organization or with the necessity of a social organization of life."[9] The consequence is that man becomes a simple element of natural determinism in which his consciousness is basically annihilated by the desire to consider freedom only in the sphere of good and truth and to exclude the possibility of evil as a free choice of man. It is true that the same author quoted above notices that „man deprived of the freedom of evil is but an automaton of good."[10]

In this context, we try to highlight some meanings of the ontological freedom by combining its two forms: the freedom to choose and, respectively, the freedom to live in good and indeed, the fulfillment and the fullness of freedom.

This fundamental right is stipulated and recognized in most of the international declarations and treaties referring to the human fundamental rights and freedoms, starting with the Universal Declaration in 1948. It is at the foundation of other fundamental rights, such as freedom of speech, freedom of association, freedom of mass media. At its core is a natural law that provides for the individual to be able to express, in private or in public, a certain conception about the world, to have or not have a religion, to belong or not to a religious faith or an organization of any kind, recognized by the existing constitutional order at a given time. It expresses at the same time the freedom to think, to have opinions, theoretical concepts, feelings, ideas expressed publicly, privately or not, so that no one can interfere or censorship, or know without the person's will, these thoughts. It is a natural right, because man distinguishes from other forms of life by the very existence of conscience and freedom to think, to have feelings.[11]

Human conscience must not be directed by administrative means, though it must be the result of his freedom to think and to share his own thoughts expressed. Freedom of conscience involves also the moral and conscience responsibility for the thoughts expressed. The responsibility, including the juridical one, intervenes only when the thought or opinion are being expressed, in which case they may harm the dignity, honor and freedom of thought of another subject of law or even the social order or lawfull order, therefore the freedom of conscience is closely related to the freedom of expression, the latter one representing precisely the possibility acknowledged to man to express his thoughts. Consequently, freedom of conscience has complex content, whose legal content is expressed in three dimensions: freedom of thought, freedom of conscience and freedom of religion.

The freedom of religion, as a matter of content of the freedom of conscience, means the exteriorizing of a faith, religions and, secondly, the freedom to join a religious organization and the ritual practiced. It is necessary that religion or religious organization be known by the state through the law and the activity of a certain religious

[7] N. Berdiaev, *Spirit și libertate. Încercare de filosofie creștină*, Paideia Publishing House, Bucharest, 2009, p. 147.
[8] *Idem*, p. 146.
[9] *Idem*, p. 160.
[10] *Idem*, p. 150.
[11] C. Bîrsan, *Convenția europeană a drepturilor omului. Comentariu pe articole*, vol. I, C.H. Beck Publishing House, Bucharest, 2010, p. 189.

cult not to be considered as contrary to the lawful order or good morals. The organization of the religious cults recognized by the State, is free and reflected in their own statutes. Over time, the relations between the state and the religious authority can be categorized into three types:

- State is mistaken to the religious authority[12];
- State supports the religious authority but differentiates from it;
- State takes a position of indifference towards the religious authority.

Romania's Constitution consecrates the separation of state from the authority but obliges the state authorities to support religious cults recognized by law, including by financial means. It also proclaims religious autonomy, meaning that each denomination is free to organize the form of the ritual, education, relations with the cult followers, the relationship with the state. Religious autonomy must be exercised only by respecting human rights, morals and lawful order. Art. 29 of the Constitution refers to the relationships between religions, according to the following principles: equality between believers and nonbelievers; it requires cultivating tolerance and mutual respect; are forbidden all forms, means or acts of religious enmity.

The doctrine in specialty reveals some interesting aspects about the legal content of the freedom of conscience, sometimes called freedom of thought.

Thus, an important dimension of the juridical content is „the right to have a belief". This is a right with a general character, protecting the interior citadel, ie the domain of the personal opinions and religious beliefs. It is important to notice that, legally, the right to have an opinion may not be subject to restrictions, conditioning, limitations or exceptions. The European Court of Human Rights in Strasbourg emphasizes that the freedom of religion is „one of the vital elements that contributes to forming the identity of believers and their conception of life"[13]. Understood in a wider sense by the European Court, this right is used both by believers and by the atheists „agnostics, skeptics and neutral people".

According to the Strasbourg Court, „the belief" – a term used by the international legal instruments - distinguishes from the mere „opinions and ideas" and denotes the „views that reach a certain degree in intensity, seriousness, consistency and relevance"[14]. We emphasize an interesting statement in this regard of the Court: a faith that is essentially or exclusively in the cultivation and distribution of a narcotic drug cannot enter the scope of a legal protection given by the European Convention on Human Rights.

The right to have opinions relates, therefore, to the practicing of spiritual or philosophical opinions that have a valuable, identifiable content and thus may be subjected to juridical protection. The right to have an opinion involves state neutrality in regard to moral and political beliefs. This obligation of neutrality excludes any assessment of state authorities regarding the legitimacy of beliefs and ways of expressing them. Understood thus, the right to have an opinion takes a triple aspect in legal terms. It represents, firstly, the freedom of every person to have or adopt a belief or religion in its sole discretion, without involving the freedom to deny the validity of the compelling legislative provisions, backed on objections arising from certain religious beliefs.

A second issue concerns the freedom of not having a belief or religion. In this way, in legal terms, the individual is protected against „any duty to directly participate in religious activities against his will" (see, on that regard the Court decision on May 9th, 1989, A187).

Finally, the right to express an opinion expresses the legal guarantee of individual's freedom to change his belief or religion without suffering any coercion or prejudice. In this spirit, the United Nations General Assembly adopted on November 25th, 1981 the Declaration on the Elimination of all forms of intolerance and of discrimination based on religious faith or beliefs, international document which prohibits „any distinction, exclusion, restriction or preference based on religious faith or belief".

Another aspect is the „human right to manifest one's beliefs". This right includes every person's freedom to manifest one's beliefs, individually or collectively, in public or private. The right has to do with freedom of expression and refers in particular to the manifestation of religious beliefs. It is interesting to notice that in the European Court's opinion, the freedom to manifest religious beliefs includes also „the right to try to convince your neighbor".

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[12] For developments, see R. Duminică, *The divine foundation of the law*, in Agora International Journal of Juridical Sciences, vol. 5, no. 2/2011, pp. 331-336, available at *https://univagora.ro/jour/index.php/aijjs/issue/view/86/104*, last consulted on 25.03.2023.

[13] ECtHR, dec. on September 20th, 1994, A.295.

[14] ECtHR, dec. on February 25th, 1982, A.48.

Social expression of freedom of thought, conscience and religion, with very diverse consequences, the freedom to manifest the beliefs may be subjected to some restrictions within law provisions. European jurisprudence provides many examples of restrictions on the right of individuals to express one's beliefs, justified by the protection of public order, lawful order or moral order, or even health.

As highlighted in a decision delivered on May 25th, 1993, the European Court held that: „In a democratic society where several religions coexist within the same population, the limiting of the right of individuals to express their beliefs may prove to be necessary to reconcile the interests of different groups and ensure that everyone's beliefs are respected". The 'public order' clause allows in these situations the protection of freedom of thought, conscience and religion and condemns the „poor quality" proselytism, characterized by abusive pressure which take the harassment form, or the abuse of power. In the same spirit, the protection of children's right to education, where conflicting with the right of parents to respect their religion, prevails on the latter one.

The freedom of individuals to manifest one's religion includes participation in religious community life and assumes that the latter one „can function peacefully, without the state arbitrary interference"[15]. The state has the obligation to guarantee not only religious pluralism, but internal pluralism within a particular religious denomination; on this purpose, it must not arbitrate in matters of dogma conflicts within a religious community and must not interfere in favor of a community or other religion.

The freedom of religion must be interpreted so that the religious communities have the opportunity to ensure their own legal protection, of their members and assets and in particular, of its legal personality, in case where under the national law only the recognized religious denominations can be practiced[16].

The three concepts, namely: thought, conscience and religion, which are the topic for the protection in art. 9 ECHR, the most important European legal instrument in this area, are closely interlinked. The notions of „thinking", „conscience" and „religion" that appear in the content of the Convention emphasize the broader content attributed to freedom of thought. The European Court of Human Rights (hereinafter ECtHR) has estimated that the notion of philosophical belief „designates the ideas based on knowledge and reasoning with regard to the world, life and society ... which a person adopts and applies in accordance with own conscience requirements. These ideas can be described briefly as an individual concept about life, about human behavior in society"[17].

The freedom of thought, conscience and religion is one of the foundations of a democratic society in the sense of Convention (ECHR), „it appears, in its religious dimension, among the essential elements of identity of believers and conceptions of life, but it is also a precious asset for atheists, agnostics, skeptics and the indifferent ones. This stems from the pluralism paid dearly along centuries, yet necessary to such a society"[18].

ECtHR jurisprudence reveals two major aspects of the right guaranteed by art. 9:

- The freedom of the individual to adopt a belief that he manifests;
- The freedom of the individual to be or not part of a group, including to another religious cult and defend it when deemed necessary[19].

Most cases related to the infringement of provisions of art. 9 ECHR debated on religious freedom. The international Court in Strasbourg emphasized the importance of respecting the pluralism and tolerance between different religious groups. In its relations with various religions, denominations and beliefs, the state must be neutral and impartial „the role of authorities in this case is not to eliminate tensions, by eliminating pluralism, but to ensure that conflicting groups tolerate each other."[20]

Freedom of thought, conscience and religion requires the state's obligation to restrain from exercising any constraint on individual's conscience. The European Commission has shown that art. 9 protects what is called „interior forum" of the person, *i.e.*, areas of strict personal beliefs and closely related deeds. However, this text does not protect any social behavior based on certain beliefs. The right guaranteed in art. 9 is not absolute, because in a democratic society, where many religions co-exist in the same population, it is necessary that this freedom be accompanied by limits to reconcile the interests of different groups and ensure the respecting of

[15] See ECtHR, dec. on October 26th, 2000, A.78.

[16] See the Metropolitan Church of Bassarabia and others against Moldova, the Decision on December 13th, 2001: The refusal of the authorities to officially recognize a Church.

[17] Decisions and Reports of the European Commission for Human Rights no. 25. Report on May 16th, 1980.

[18] *Case Basarabia Mitropoly and others v. Moldova*, dec. on December 13th, 2001.

[19] D. Micu, *Garantarea drepturilor omului*, All Beck Publishing House, Bucharest, 1998, p. 91.

[20] *Case of Basarabia Mitropoly and others v. Moldova*, quoted previously.

everyone's beliefs. Furthermore, art. 9 para. 2 stipulates the possible restrictions of freedom of conscience, thought and religion. In accordance with these provisions, the liberties consecrated in art. 9 may be subjected to some restrictions if they are prescribed by law and are necessary in a democratic society and aim at one of the legitimate purposes expressly and restrictively set out in the Convention.

The compliance with the proportionality condition, as appropriate relationship between the restrictive measures and the legitimate aim pursued form the International Court topic of analysis. Of course, in this case, ECtHR considers the proportionality related to the nature of protected right, the situation in fact, the legitimate aim pursued, the kind and intensity of the restrictive measures imposed, having in consideration the respecting of the principle of pluralism and the two procedural criteria: „the necessity in a democratic society" and „the appreciation margin" recognized by the Contracting States.

The Court in Strasbourg acknowledges that states have a certain appreciation margin in regard to the requirements for the exercising of this freedom, but their power cannot be discretionary. The jurisprudence is oriented towards a strict interpretation of limiting of the freedom of conscience and religion, related to the specific circumstances of the case and the legitimate aim pursued. To determine the extent of the margins of appreciation of the respondent State, the international Court emphasizes the importance of the deed for the recognition of the national authorities. Only a denomination recognized has a legal personality, therefore it may organize and operate, can stay in court to protect its heritage. In relation to these criteria, ECtHR considers that the refusal to recognize the applicant church has such implications on religious freedom, so that it can neither be considered proportionate to the legitimate aim pursued, nor necessary in a democratic society, therefore, art. 9 ECHR has been violated.

In connection with the guarantee of freedom of conscience, thought and religion, we can say that the principle of proportionality is an essential criterion to limit the discretionary power of public authorities and to eliminate abuses by unduly restricting of the exercising of a right protected by the Convention. Thus, in any case, an administrative procedure cannot be used to impose rigid conditions and even prohibitive, to the exercising of certain denominations. Proportionality is not an abstract condition but is determined by each case peculiarities but as results from the ECtHR jurisprudence, there are important value premises that determine the assessment of the proportionality relations between the restrictive measures ordered and the legitimate aim pursued.

Exceptional situations represent a particular case in which the state authorities, and especially the administrative ones, can exercise their discretionary power, there being obviously the danger of excess of power.

In doctrine there is no unanimous opinion on the legal signification of exceptional situations. Thus, in the older French doctrine, the discretionary power is considered to be the freedom of decision of the administration within the framework allowed by law, and the opportunity evokes a *de facto* action of the public administration, in exceptional situations, necessary action (therefore opportune) but against the law. Jean Rivero considers that exceptional situations refer to certain factual circumstances which have a double effect: the suspension of the application of the ordinary legal regime and initiation of the application of a particular legislation to which the judge defines the requirements. Another author identifies three features for exceptional situations:

- The existence of abnormal and exorbitant situations or serious and unforeseen events;
- The impossibility or difficulty to act in accordance with the natural regulations;
- The necessity of a quick intervention for the protection of a considerable interest, under serious threat.

Excess of power can be manifested in these circumstances by at least three aspects:

- The appreciation of a factual situation as an exceptional case, although it does not have this significance (lack of objective and reasonable motivation);
- The measures ordered by the competent state authorities, by virtue of their discretion, to go beyond what is necessary for the protection of the seriously threatened public interest;
- If these measures unduly, unjustifiably limit the exercise of the constitutionally recognized fundamental rights and freedoms.

The existence of crisis situations – economic, social, political or constitutional – does not justify the excess of power[21]. In this sense, Prof Tudor Drăganu stated: „the idea of the rule of law requires that they (exceptional situations, *s.n.*) find appropriate regulations in the text of the constitutions, whenever they have a rigid

[21] For the same opinion, see R. Duminică, *Criza legii contemporane*, C.H. Beck Publishing House, Bucharest, 2014, pp. 85-95.

character. Such a constitutional regulation is necessary to determine only the areas of social relations, in which the transfer of power from Parliament to Government can take place, to emphasize its temporary nature, by setting deadlines for applicability and to specify the purposes for which it is performed".

Of course, the excess of power is not a phenomenon manifested only in the practice of executive authorities, being met also in the activity of the Parliament or of the courts.

We consider that the discretionary power recognized to the state authorities is exceeded, and the measures ordered represent an excess of power, whenever the existence of the following situations is found:

- The principles of the supremacy of the Constitution and of the law, of the rule of law and of the separation of state powers are not respected.
- The ordered measures do not aim a legitimate purpose.
- The decisions of public authorities are not appropriate with the factual situation or with the aimed legitimate purpose, in the meaning that they exceed what is necessary for the achievement of this purpose.
- There is no rational justification for the measures ordered, including in situations where different legal treatment is established for identical situations, or an identical legal treatment for different situations.
- By the measures ordered, the state authorities restrict the exercise of fundamental rights and freedoms without there being a rational justification representing, in particular, the existence of an adequate relationship between these measures, the factual situation and the legitimate aim pursued.

CCR, by two decisions, dec. no. 152/2020 and dec. no. 157/2020 found the unconstitutionality of some provisions of GEO no. 1/1999 and GEO no. 21/2004 on the National Emergency Management System, regarding the actions and measures ordered during the state of emergency regarding the restriction of the exercise of certain rights.

By dec. no. 152/2020[22] CCR, among others, admitted the exception of unconstitutionality formulated by the People's Advocate and found that the provisions of art. 28 of GEO no. 1/1999 on the state of siege and the state of emergency are unconstitutional. Also, it ascertained that the GEO no. 34/2020 on the modification and amendment of the GEO no. 1/1999 on the state of siege and the state of emergency is unconstitutional, in its ensemble.

In order to pronounce this decision, CCR held that the constitutional prohibitions provided in art. 115 para. (6), not to adopt emergency ordinances that may affect the regime of fundamental state institutions, the rights, freedoms and duties provided by the Constitution, electoral rights, have taken into account the restriction of the Government's competence to legislate in these essential areas instead of Parliament.

Legislating on the legal regime of the state of siege and the state of emergency, GEO no. 1/1999 is the primary regulatory act which restricts the exercise of fundamental rights and freedoms, an act based on which public authorities with competences in crisis management (President of Romania, Parliament of Romania, Ministry of Internal Affairs of Romania, military authorities and public authorities, provided for in the decree establishing the state of siege or emergency) issue normative administrative acts (President's decree establishing the state of siege or state of emergency, military ordinances and orders of other public authorities) implementing the primary rule, identifying, depending on the particularities of the crisis situation, the rights and fundamental freedoms whose exercise is to be restricted.

„However, taking into account all these arguments, the Court notes that, incidentally, the normative act with such an object of regulation affects both rights and fundamental freedoms of citizens and fundamental state institutions, falling within the scope of the prohibition provided by art. 115 para. (6) of the Constitution. Thus, the Court finds that the legal regime of the state of siege and the state of emergency, in the current constitutional framework, can be regulated only by a law, as a formal act of the Parliament, adopted in compliance with the provisions of art. 73 para. (3) letter g) of the Constitution, in the regime of organic law".

Regarding the GEO no. 34/2020 for the modification and amendment of the GEO no. 1/1999, the Court has ascertained that it has been adopted with the violation of art. 115 para. (6) of the Constitution.

The normative act modifies the legal regime of the state of siege and of the state of emergency under the aspect of contravention liability in case of non-compliance or immediate non-application of the measures established in GEO no. 1/1999, introducing complementary contravention sanctions, such as the confiscation of goods intended, used or resulting from the contravention and the temporary suspension of the activity.

[22] Published in the Official Gazette of Romania no. 387/13.05.2020.

The Court recalls that the main sanctions and the complementary sanctions are sanctions specific to the contravention law, applicable to the subject of law who violates the legal norm of contravention law by conduct contrary to it. They have a preventive-educational role and represent a form of legal constraint, targeting, in particular, the patrimony of the perpetrator. Therefore, considering the legal nature of the contravention sanctions, their effect on the patrimony of the perpetrator, as well as the jurisprudence of the Court, results that the statement of certain norms in this area implicitly affects the right to property, stated by art. 44 of the Constitution, as well as the economic freedom, provided by art. 45 of the Constitution restricting the exercise of these rights which violates the prohibition established by art. 115 para. (6) of the Constitution.

At the same time, the normative provision of the inapplicability of the legal norms regarding decisional transparency and social dialogue, in fact their suspension during the state of emergency or siege, affects the fundamental rights in consideration of which these laws were adopted, as well as the regime of a fundamental state institution, so that the emergency ordinance by which such a suspension is operated contravenes the interdiction provided by art. 115 para. (6) of the Constitution.

Given all these arguments, the Court has ascertained that the GEO no. 34/2020 for the modification and amendment of the GEO no. 1/1999 is unconstitutional, in its ensemble, because it has been adopted with the violation of the constitutional statements of art. 115 para. (6) limiting such competences.

The notion of „law" by which the legal regime of exceptional states can be established is interpreted in a narrow sense, respectively as a normative act of the Parliament, excluding the normative acts of the Government with express reference to the executive ordinances. At the same time, a necessary interpretation of the interdiction provided by art. 115 para. (6) of the Constitution in the sense that by emergency ordinances, including those issued in exceptional situations, the Government may not establish primary regulations regarding the restriction of the exercise of certain rights. Such measures may be instituted primarily by law only, as a legal act of Parliament.

It is obvious that the normatively materialized intention of the Government to restrict the exercise of certain rights and fundamental freedoms with the violation of its legislative competence in this area and the non-compliance with the constitutional interdictions represent an excess of power which the Constitutional Court has ascertained and removed.

By the same decision, the Court found that the provisions of art. 28 para. (1) corroborated with art. 9 para. (1) of GEO no. 1/1999 does not indicate clearly and unequivocally, within the legal norm, the acts, facts or omissions that constitute contraventions nor do they allow their identification easily, by referring to the normative acts with which the incriminating text is in connection.

We reproduce an excerpt from the motivation of our constitutional court: „The provisions of art. 28 of GEO no. 1/1999 not only does not concretely foresee the facts that attract the contravention liability, but establishes indiscriminately for all these deeds, regardless of their nature or gravity, the same main contravention sanction. As regards the complementary sanctions, although the law provides that they are applied according to the nature and gravity of the offence, as long as the offence is not circumscribed, it is obvious that neither its nature nor its gravity can be determined to establish the complementary applicable sanction.

In conclusion, the Court finds that, since the provisions of the law subject to constitutional review impose a general obligation to comply with an indefinite number of rules, with identifiable difficulty, and establish sanctions for minor offenses, they violate the principles of legality and proportionality governing the contravention law."

3. Conclusions

In our opinion, human dignity and fundamental rights have been seriously violated, such as: the right to life, the right to family and private life, the right to health care, access to culture, the right to education, the right to a decent standard of living and especially the freedom of conscience, the autonomy of religious cults, their freedom and especially of the Orthodox cult and the autonomy of the Orthodox Church, majoritarian in Romania.

The space does not allow us to develop these aspects, but we emphasize that the restrictive measures imposed by law and applied by excess of power by state authorities, do not respect the principles of supremacy of the Constitution and the law and the requirements of art. 53 of the Constitution and especially the principle of proportionality, because they are not suitable for different specific situations, (for example the religious

communion of Orthodox believers participating in a service in the Church cannot be considered a simple civil meeting) and far exceed what is necessary respectively combating and preventing the spread of the pandemic.

Respect for the supremacy of the Constitution and the law, guaranteeing the rights and fundamental freedoms of citizens, elimination of manifestations of excess of power by the rulers during the existence of exceptional situations are clearly expressed by the Constitutional Court in the following considerations of dec. no. 457/2020: The Venice Commission recalled that „the concept of a state of emergency" is based on the assumption that in certain political, military and economic emergencies, the system of limitations imposed by the constitutional order must yield in in the face of the increased power of the executive.

However, even in a state of public emergency, the fundamental principle of the rule of law must prevail. The rule of law consists of several issues that are all of paramount importance and must be fully maintained. These elements are the principle of legality, separation of powers, division of powers, human rights, state monopoly on force, public and independent administration of justice, protection of privacy, right to vote, freedom of access to political power, democratic participation of citizens and supervision by these of the decision-making process, decision-making, transparency of government, freedom of expression, association and assembly, the rights of minorities, as well as the rule of the majority in political decision-making. The rule of law means that government agencies must operate within the law and their actions must be subject to control by independent courts. The legal security of persons must be guaranteed.

Conscience is an ontological dimension of the human being, a given that is an existential feature of man. Inner self-conscience is a divine gift that every man carries within himself as a vocation since the baptism, but which is actual through the theandric work of the grace and human. The freedom of conscience is constituted and accomplished not in a relationship with the material world subjected to determinism and natural causality and implicitly to all existential precariousness, but by being related to the authentical values universe, which follows naturally out of man's love relationship with God and his fellowmen.

As a conclusion, we emphasize that any form or precariousness of human freedom, philosophically, ethically or theologically thought, has its source in the ontological freedom about which we have spoken. This is also our conclusion on the legal freedoms of man, source of legal normativism, but whose legitimacy is not the legal normativism itself, but the ontological freedom of man.

The question arises, in relation to these considerations, how free are we today, even in the precariousness of social freedom? It is a question that we will try to answer in a future study.

The measure of freedom, in its ontological meaning, is given by culture and faith. Marin Voiculescu said: „The slaves of culture are the sons of liberty", and Father Arsenie Boca emphasized that „a man praying is a free man", also the Father said, „Christianity has made people aware of their freedom". We must remember what Saint Isaac Sirius says: „Watch for freedom that leads to evil slavery". Thus, we will be able to find out how we are placed in a relationship to freedom, which is the measure of the freedom of each of us.

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