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Freedom of Conscience. Legal and Religious Implications. Exceptional Situations

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Abstract
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
Self-conscience /Conscience of inner self / Social conscience /Freedom of conscience as a fundamental right / Theological, philosophical and legal meanings of conscience and freedom of conscience /constitutional guarantees / Exceptional situations, restriction on the exercise of certain rights and freedoms

I. Introduction: About conscience, law and liberty

Conscience is the essence and particularity of man by which he relates to the nature, society, but also to his own being and, especially, to the Supreme Being. The blessed Augustine also said that "there is something inside of us deeper than ourselves", referring also to human conscience, especially inner self-conscience.

Important to underline is that before being transposed into legal norms, conscience is a natural dimension by which man becomes what he is and he definitely differentiates from any other existential form. Thus, the natural reality in its existential manifestations transforms under the laws of causality, as Kant would say. Unlike this, man through his conscience and in his supreme form, the inner self-conscience is not transformed, he rather becomes according to the laws of freedom, as the great philosopher said. So we can understand the thoughts of Father Theophilus Părăian: the man becomes to what he is, which is to his own self discovery and inner self-conscience achieving.

Man is the only creature that through rational senses can contemplate on existence, but also on his own thoughts, in other words possess the ability *to reflect and question*, on himself and the outside world, seeking answers and, if possible, certitudes to his questions.

The reflections on thoughts give existential meanings through which man conceives himself and sometimes defines himself, recognizes and asserts his place into the world and universe. We try to say that the contemplation on the thought, the returning of the thought on itself, or as rationalist philosophers say "the thinking that thinks on itself" is more than a philosophical meditation or a simple logical construction because the reflection has not a purely formal character, but an existential one. The thought which thinks on itself is aiming not only to the reason, but to the existence or being, as such. This is the *conscience* as ontological peculiarity of the being that is based on the reflective capacity of the reason. Through conscience I can state my own existence as a rational being by that "I am", not so much by the existential uncertitudes, as Descartes was saying, neither by the formal certainties of the reason, but through the compassionate, rational feeling, which reveals to me my inner self and meanings conferred by the reflection on the self, upon the world and universe.The conscience is proper to the human being, distinguishing it of any other existential form,

through which man is understood in his individuality, but also through his fellowship to all humanity. Conscience is the result of man's relationship, through the rational faculties and the understandable feelings with oneself, with nature, with society and with the Supreme Being. The existential meanings are not to be found in the simple consciences, but rather in the facts of the conscience that represent its content. Conscience is not an existential void, but is always the conscience of "something" or "through something". Content determinations generate two forms or sizes: the ego-conscience and inner self conscience.

In general, the philosophical and psychological thinking that emphasized the *inner self* is wider than - ***I***, integrates it and is much more than **I**: "And the inner self who broke the circle of the ego, is always proned to enlargement, as being the moving horizon in which you sooth yourself into the deep"[1]. For Carl Gustav Jung, "the self" refers to an entity that does not replace the designated one until now by the concept of "**I**", it rather includes this one within its scope as a superconcept. In the great psychologist's vision, "**I**" means that complex factor to which relates all contents of conscience. It is the centre of the field of conscience, and to the extent this one includes the empirical personality in its sphere, **I** is the subject of all personal acts of conscience. "The relating of the psychical content to **I** represents the criterion of this one's conscience, because no contents is aware whether not represented to *a subject*"[2].

We notice, as a matter that is common to philosophical and psychological thinking, the understanding of conscience through the idea of subject, we may say, through the idea of person conferred to the man.

For Jung, although the **I** is based on the entire "field of conscience", it is not this field, is rather the reference point defined by the somatic, psychological factor. Through the "**I**" is obtained an image of the established personality, but the total personality is more complex. The "inner self" is for the "**I**" an objective given which the liberty of will of "**I**" in the field of conscience, cannot change. Jung says: "That's why I suggested to name with **self**, the *total personality* which, though not entirely noticeable, is

[1] Constantin Noica, *Cuvânt împreună despre rostirea românească* [*Oration together on Romanian Wording*], Editura Humanitas, București, 1996, p. 15.

[2] C. G. Jung, *Puterea sufletului. Antologie, psihologia analitică*, [*The Power of Soul. Anthology, Analytical Psychology*], Editura Anima, București, 1994, p. 129.

still present. **I** is, by definition, subordinated to the self and is related to it as part of the wholeness."[3]

In Noica's concept, the understanding of the relationship between *self* and ***I*** is done on three levels: 1) the understanding the self in the passivity of **I**, „as a deeper conscience of this", one can understand that the self related to **I** is an archetype; 2) the self can be an active expression of the **I**: as ideal, ethical conscience, freedom. Here the self is a modeler of the **I**; 3) The self as an expression of lucidity of **I**, is determined by „the liberty that found the necessity". Under the term of lucidity hides the one of conscience, meaning the field of onscience, as it is called by Jung[4]. For Noica, the "**I**" is a dialectical process of elevation to innerself. In this becoming, the man and his creation are the expression of liberty of superior inner self that represents the being. Therefore, the becoming is understood by Noica as oriented towards the being, through a progressive transition from **I** to the deeper self.

Related to these brief philosophical reflections, one can notice that philosophy and psychology highlight the complexity of conscience, as a fundamental ontological dimension of human being. This complexity and profoundness of content does not exclude, but rather involves the unity of conscience, based at its turn, on the unity of being. The conscience, which only man as a rational being is possessing, is unitary, but manifestes itself in two forms: the *conscience of **I***, whose content is the existential phenomenality of man, as a finite being, in nature and society, subjected to the material and temporarily determinism and through this, to existential precariousness, and, on the other hand, the *inner self-conscience* specific to the man that found himself and the true meaning of existence that is beyond the finitude and natural determinism, transfiguring through this knowledge and conscience, the being and thus becoming what is through the nature, a person and spiritual personality, and as such, free.

Yet man can remain a simple individual constrained by the laws of nature and society, whether through will, faith and culture, he does not transcend the limits of **I** and he does not discover its true meaning in the Supreme Being and in eternal life, thus reaching to the conscience of inner self, inexhaustible in its depths. The transition from the conscience of **I** to

[3] C. G. Jung, *Puterea sufletului...*, p. 133.

[4] For development see Constantin Noica, *Cuvânt împreună despre rostirea românească*, pp. 17–35.

inner self-conscience is, essentially, the becoming of man from individual to spiritual person, free, in an infinite and indefinite relationship of love with God, with people and whole creation. The philosophical concepts too, notice such a differentiation between man as a finite being, and on the other hand, the human personality defined by his freedom. Where there is no freedom, ie where there is only the finite conscience of **I** and not of the person, it is a number, such as Noice said.

It is discussed in politology and philosophy about a social conscience, too. In our opinion, this concept is a gnoseologic construction, whose existence is theoretically and ontologically derived and conditioned by a single ontological form of conscience, namely the human conscience in his individuality and personality. Interesting to notice that the Juridical expresses this fact, meaning that it guarantees not the social conscience as an abstract and theoretical structure, but only the individual conscience inextricably linked with the person. It is remarkable that the law has more or less elaborately taken the theological and philosophical fundamental values regarding the understanding of man as a person throughout his social existence, in that as it constantly states the thesis according to which the holder of the fundamental rights can only be but the man in his individuality, I would say as a person and not as an individual, and not as a group, nor as a community or society as such. Certainly, since the legal status of man is his exterior existence in the social and natural environment, the holder of any fundamental right can exercise it, if we have into consideration this legal status, in the social environment in which he is located. Thus, any social individual liberty is also social through the legal existence of man in his social externality.

One should also notice that the freedom of conscience is part of the so-called natural rights of man, pre-existing, according to some authors, to the consecrations in the constitutional norms, or of a different type. This thesis, which the limited space does not allow us to develop, is worthy to be remembered in order to clarify, to some extent, the relationship between the liberties (rights) of man and, on the other hand, the juridical norms (positive law). It's not the law that determines and gives the content of individual freedoms and fundamental rights, but conversely, the legitimacy of any law stems directly from the way the fundamental rights and freedoms, pre-existing, are being reflected in the juridical norm. We appreciate that this is a social imperative to outline in this way, the

possibility of man's liberty within the social environment. Assuming that the freedom is determined by the law, understood as a normative act rather than as a moral law, the dominant reality in which freedom manifestes is the non-authentic and constraining, because any juridical law, by its nature, is a form of limitation and restriction or conditioning, in a word of constraining the human freedom. In such a situation a distructive contradiction can manifest between the law, in its legal meaning and man's freedom, including the freedom of conscience.

If it comes to a situation where the law is a construction that reflects the preexisting natural rights of man, then we can speak of a genuine freedom, guaranteed by the legal enactment and not constructed by the juridical norm. It worth emphasizing that in the classical, universal legal instruments regarding the human fundamental rights and freedoms, usually there is a formula according to which the „States *recognize* the fundamental rights and freedoms", therefore they are normatively constructing them and do not impose them as a juridical given. This is not only a mere simple legal formula, but one expressing a fundamental thought of the derivative character of the law from the previous fundamental existential values, I would say, included in the truths of faith.

There is a unilateral contradiction such as Constantin Noica says, between law and liberty, if we accept the idea of the law's derived nature related to the values of freedom. **Thus, the law can not contradict human freedom, yet the freedom of man can contradict the law.**

II. Theological meanings of conscience

The issue of the unity of conscience and being is oviously a goal for theological meditation. Here is what the pious hermit Isaiah was saying, in this respect:

> "Let's persevere, beloved ones, in fear of God, guarding and keeping the doing of virtues, not causing lunacies to our conscience, but taking heed to ourselves in fear of God. Let's do it till this will be freed with us, to produce between it and us a union, so that it will reach to be our guardian, showing in everything the danger to fall. But if we do not listen to it, it will

> split from us, letting us to fall into the hands of our enemies and will no longer be helping us"[5].

Commenting on this text, Father Professor Dumitru Stăniloae remarked the duality between our conscience and our being. The conscience is the one through which we can guard our being against the existential precariousness attractions, while the purpose of existence is to achieve the unity between the conscience and our being. In this regard priest Professor Dumitru Stăniloae said: "there are three in a man, different from the Supreme Third. The conscience that the third in man (different from **I** and from the own being) is strong in man, mostly when it has in itself the supreme Third, or God"[6].

The man who has reached to the inner self-conscience is a person and through it, is free to communicate with God and with others. Rev. Prof. Dumitru Stăniloae said that man, as a person, is "spirit and freedom" and at the same time, mystery and light, is a "mystery of light". The inner self-conscience of man is a depth of love and humbleness because is the infinite and indefinite link of the human person with the Supreme Person. This communion is however the higher order of the natural determinism, because it is neither constraining nor finite, is yet infinite in love, is the order revealed by the Savior in His commandments and mainly through *the commandment to love, and the commandment to perfection and commandment to holiness*.

One can say that the genuine philosophical reflection about the conscience is supported by the truths of faith in the natural and supernatural revelations, truths so beautifully expressed in many patristical writings.

One of the most beautiful reflection about the conscience, we see at Ava Dorotheos:

> "When God created man, planted in him something divine, like the hottest and brightest thought, having the quality of a sparkle to enlighten the mind and to show to it the distinction of

[5] Isaia Pustnicul, "Cuvântul IV", in: *Filocalia*, vol. XII, [*Word IV*, in „Philocalia", vol. XII], Editura Humanitas, Bucureşti, 2009, p. 60.

[6] Dumitru Stăniloae, *Filocalia*, vol. XII [*Philocalia,* vol. XII], p. 60.

> good from evil. This is called conscience and it is the law of His nature"[7].

Should we examine the relationship between conscience and knowledge, we can say that there is no identity between the two faculties of human nature, but they presume each other. The amount of scientifical knowledge, or of any type, forms the conscience. Through inner self conscience the knowledges get their natural meaning. On the other hand, conscience is something else than the discursivity of reason or sensitivity of the intellect. Is the reflection on thought, on concept, categories built by the intellectual sensibility or the connoisseuring reason and is, in essence, the profound existential communion between the persons. In inner self-conscience, as defined by Philocaly parents, is disappearing the dichotomy of own rational knowledge between subject and object. Through knowledge, understood in the interpersonal communion relationship, the knowledges acquire their unity and meaning, because the conscience of **I,** mostly the conscience of inner self can belong, but only to the person. Such an idea is brilliantly built by Rev. Prof. Dumitru Stăniloae:

> "The same thing it attested by the word conscience. I do not know myself without a relationship with others. Ultimately, I know or am aware of myself in my relationship with God. The light of my knowledge related to the work or to myself, is projecting over the human face, communitarily, in the supreme personal communion. We are not aware of ourselves other than in relationship with another, and ultimately, before God. **I** alone would not have conscience; through conscience he is a spiritual *place* of his own in relationship with others. In his self-conscience he grows along with his self conscience growing, and this grows along with his growing in his knowledge of God and his neighbors, and also of the things"[8].

[7] Avva Dorotei, "Învățături", III, in: *Filocalia*, vol. X ["Teachings", III, in: *Philocalia*, vol. X].

[8] D. Stăniloae, *Teologia dogmatică ortodoxă* [*The Orthodox Dogmatic Theology*], vol. I, Editura Institutului Biblic şi de Misiune al Bisericii Ortodoxe Române, Bucureşti, 2003, p. 243.

Unlike the conscience of **I**, bordered by the existential finitude, the self-conscience has its own freedom in the order given by the divine commandments. The man who has become a person is aware that he depends on God and through it, he is master on himself, being mastered by God and then from a slave of the sin he becomes "a slave of freedom", through equity, the work of virtues and through the Holy Grace. He is a slave of freedom because he lives through an infinite loving communion with God and with others and this is part of an order which the philosophers call „the law of freedom".

Conscience is a natural dimension through which man becomes what he is and he definitely differentiates from any other existential form. Thus, the natural reality in its existential manifestations transforms according to the laws of causality, as Kant says. In contrast, man through his conscience and in the supreme form, the self conscience, does not transform, he rather becomes according to *the laws of freedom*, such as the great philosopher said. Priest Teofil Părăian said that man becomes what he is, which is that his existence meaning being oriented on the achieving and discovery of self-conscience.

Consequently, the freedom is distinctive to self-conscience. There cannot be conceived a self-conscience in the natural determinism's borders or subjected to some constraints, conditionings or any legal limitations imposed by the law and, in general, by the social law.

This is highly emphasized in the Patristic writings, which reveal that the freedomof the man that became a spiritual person is inherent to self-conscience. For the depth of thought we quote one of the most beautiful Philocalia meditations on human freedom, as a self-aware person, in his love communion with God and with others,

> "God made man free, so that he is proned to good. But being proned to good, through his free will, he is not able to achieve it without the help of God. Therefore it was written: it is not from he who is willing, neither from the he who is running, but from God that is full of mercy (Rom. 9, 16). Therefore, if man orientes his heart to good, and calls God's name for help, God paying attention to his good desire, gives strength to his work. Thus, the two of them meet; man freedom and God power. For the good

comes from God but is accomplished through His saints. Thus glorifies God in everyone and he glorifies them all"[9].

The juridical status of man narrows and even constraints to phenomenal limits the inexhaustibility of self-conscience, but also of the own freedom, proper to human nature as a spiritual person, because the law, no matter how generous it may be, remains within the limits of human finitude, even when is trying to conceptualize, to recognize and guarantee this preciousless human divine gift, that is the freedom of conscience, about which Priest Arsenie Boca said that "it is the deepest spiritual good that man has in his hand throughout his life." Therefore, the freedom of conscience being a spiritual good, more than the material goods, must be cultivated, developed and mostly defended against any kind of constraints and interference, some coming precisely from the distorted application in relation to the profound existential meanings of the principles and norms of law.

III. Legal meanings of the freedom of conscience

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 the 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.

[9] Varsanufie and Ioan, "Scrisori duhovniceşti,763", in: *Filocalia*, vol. X, ["Spiritual writings, 763" in: *Philocalia*, vol. X], Editura Humanitas, Bucureşti, 1996.

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. The 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, the freedom of conscience has a 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 cult not be considered as contrary to the lawfull order or good morals. The organizing 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: 1. State is mistaken to the religious authority; 2. State supports the religious authority, but differentiates from it; 3. 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 religions cults recognized by law, including by financial means. It also proclaims the 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. The religious autonomy must be exercised only by respecting the human rights, morals and lawfull order. Art. 29 of the Constitution referrs 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 the 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 subjected 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" - Decision on 20th of September 1994 A.295 - A. 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" – Decision on 25th of February 1982, A.48. 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 can not 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 the juridical protection. The right to have an opinion involves state neutrality in regard to the 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 25th of November 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 the 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 the religious beliefs includes also "the right to try to convince your neighbor."

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. The European jurisprudence provides many examples of restrictions on the right of the individuals to express one's beliefs, justified by the protection of public order, lawfull order or moral order, or even health.

As highlighted in a decision delivered on 25th of May 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 the 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 religious, prevails on the latter one.

The freedom of individuals to manifest one's religion includes the participation in religious community life and assumes that the latter one

"can function peacefully, without the state arbitrary interference" (see the Decision on 26th of October 2000, A.78). The state has the obligation to guarrantee not only the religious pluralism, but the 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 (see the Metropolitan Church of Bassarabia and others against Moldova, the Decision on 13th of December 2001: The refusal of the authorities to officially recognize a Church).

IV. Freedom of thought, conscience and religion in European jurisprudence

The three concepts, namely: thought, conscience and religion, which are the topic for the protection in Article 9 of European Convention on Human Rights, 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 the freedom of thought. The European Court of Human Rights (hereinafter ECHR) has estimated that the notion of philosophical belief" designate 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[10].

The freedom of thought, conscience and religion is one of the foundations of a democratic society in the sense of Convention, "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,

[10] Decizii şi Raporturi ale Comisiei Europene pentru Drepturile Omului, nr. 25. Raport din 16 mai 1980 [Decisions and Reports of the European Commission for Human Rights no. 25. Report on 16th of May 1980].

agnostics, skeptics and the indifferent ones. This stems from the pluralism paid dearly along centuries, yet necessary to such a society"[11].

Most cases related to the infringement of provisions of Article 9 of the Convention 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"[12].

The 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 Article 9 protects what is called "interior forum" of the person, ie areas of strictly personal beliefs and closely related deeds. However, this text does not protect any social behavior based on certain beliefs. The right guaranteed in Article 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 everyone's beliefs. Furthermore, Article 9 paragraph 2 stipulates the possible restrictions of freedom of conscience, thought and religion. In accordance with these provisions, the liberties consecrated in Article 9 may be subjected to some restrictions if they are prescribed by law and are necessary in a democratic society and aim 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 the European Court of Human Rights 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

[11] Cazul Mitropolia Basarabiei şi alţii împotriva Moldovei [Case of Basarabia Mitropoly and others versus Moldova, Decision on December 13th 2001].

[12] Cazul Mitropolia Basarabiei şi alţii împotriva Moldovei [Case of Basarabia Mitropoly and others versus Moldova], quoted previously.

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 can not 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 C.E.D.O. considers that the refusal to recognize the applicant church has such implications on the religious freedom, so that it can neither be considered proportionate to the legitimate aim pursued, nor necessary in a democratic society, therefore, Article 9 of the Convention 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 can not 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 jurisprudence of the Court in Strasbourg, there are important value premises that determine the assessment of the proportionality relations between the restrictive measures ordered and the legitimate aim pursued.

V. The unconstitutionality of restricting the exercise of certain rights during the existence of a state of emergency and a state of alert. The excess of power

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 refers 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: 1. The existence of abnormal and exorbitant situations or serious and unforeseen events; 2. The impossibility or difficulty to act in accordance with the natural regulations; 3. 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: a) the appreciation of a factual situation as an exceptional case, although it does not have this significance (lack of objective and reasonable motivation); b) 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; c) 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. In this sense, Tudor Drăganu stated:

> "the idea of the rule of law requires that they (exceptional situations *n.n.*) find appropriate regulations in the text of the constitutions, whenever they have a rigid 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:

1. 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.
2. The ordered measures do not aim a legitimate purpose.
3. 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.
4. There is no rational justification for the measures ordered, including in situations where a different legal treatment is established for identical situations, or an identical legal treatment for different situations.
5. 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.

The exceptional state, respectively the state of emergency and subsequently the state of alert established by the rulers on the Romanian territory, similar to the existing situation in other countries of the world, in order to limit the spread of the pandemic created by the Covid-19 virus, generated the adoption of numerous normative acts by which a significant number of fundamental rights and freedoms are restricted and correlatively a significant constitutional jurisprudence on the constitutionality of these measures.

In the following, we briefly analyze this jurisprudence but also the legislation in force in order to highlight aspects of the excess of power of state authorities.

The Constitutional Court by two decisions, Decision no. 152/2020 and Decision no. 157/13 May 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 Decision no. 152/2020[13], the Constitutional Court, 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, the Court 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

[13] Publicat în *Monitorul Oficial al României*, Partea I, nr. 387/13 mai 2020 [Published in the *Official Gazette,* Part. I, No 387/13 May 2020].

provisions of art. 73 para. 3 lit. 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.

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.

Thus, the Court finds that the provisions of art. 28 of GEO no. 1/1999, characterized by a deficient legislative technique, do not meet the requirements of clarity, precision and predictability and are thus incompatible with the fundamental principle of respect for the Constitution, its supremacy and the laws, provided by art. 1 para. 5 of the Constitution, as well as with the principle of proportional restriction of rights and fundamental freedoms, provided by art. 53 para. 2 of the Constitution. For the same arguments, the Court states that the imprecision of the legal text subjected to constitutionality control also affects the constitutional guarantees characterizing the right to a fair trial, stated by art. 21 para. 3 of the Constitution, including its component on the right to defense, fundamental right stated by art. 24 of the Constitution.

By Decision No 157/2020[14], the Constitutional Court, among others, has accepted the exception for unconstitutionality stated by the People's Advocate and ascertained that art. 4 of the GEO no. 21/2004 on the National Emergency Management System is constitutional to the extent to which the actions and measures ordered during the state of alert does not aim the restriction of the exercise of certain rights and fundamental freedoms.

The Court ascertained that the actions and measures ordered during the state of alert, based on the GEO no. 21/2004 cannot aim rights and fundamental freedoms. The Court also notes that the delegated legislator cannot in turn delegate to an administrative authority/entity what he himself does not have in jurisdiction. "As the Court has constantly stated, from the corroboration of the constitutional norms stated by art. 53 para. 1 and art. 115 para. 6 it follows that the impairment/restriction of rights or fundamental freedoms can only be achieved by law, as a formal act of Parliament".

The arguments of the Constitutional Court, as well as the solutions given to these constitutional disputes are important guarantees for respecting the rights and freedoms of citizens especially in exceptional situations when increases the danger that the executive will take discretionary measures that are in fact excess of power.

Our Constitutional Court noted that

[14] Publicat în *Monitorul Oficial al României* , Partea I, nr. 397/15 mai 2020/ [Published in the *Official Gazette,* Part. I, No 397/15 May 2020].

> "It is indisputable that the legislation providing for the legal regime of crisis situations requiring exceptional measures presupposes a greater degree of generality than the legislation applicable during the normal period, precisely because the peculiarities of the crisis situation are the deviation from normal (exceptionality) and the unpredictability of the serious danger affecting both society as a whole and each individual. However, the generality of the primary norm cannot be attenuated by infralegal acts that complement the existing normative framework. Therefore, the measures that organize the execution of legal provisions and customize and adapt those provisions to the existing factual situation, to the areas of activity essential for managing the situation that generated the establishment of the state of alert cannot deviate (by amendments or completions) from the framework circumscribed by the norms with the force of law, so they cannot target rights and fundamental freedoms".

By Decision no. 457/2020[15], the Constitutional Court admitted the exception of unconstitutionality raised by the People's Advocate and found that the provisions of art. 4 para. 3 and 4, as well as of art. 65 lit. s) and ș), of art. 66 lit. a), b) and c) regarding the references to art. 65 lit. s), ș) and t) and of art. 67 para. 2 lit. b) regarding the references to art. 65 lit. s), ș) and t) of Law no. 55/2020 on some measures to prevent and combat the effects of the COVID-19 pandemic are unconstitutional.

The Court notes that the Parliament's approval of the measures adopted by the Government's decision to establish the state of alert creates a confusing legal regime for the Government's decisions.

The Court notes that the criticisms formulated by the People's Advocate are grounded, with the consequence of the unconstitutionality of art. 4 para. 3 and 4 of Law no. 55/2020, since, through these texts of law, the Parliament cumulates the legislative and executive functions, a situation incompatible with the principle of separation and balance of powers in the state, enshrined in art. 1 para. 4 of the Constitution; the legal regime of Government decisions is distorted, as acts of law enforcement, enshrined

[15] Publicat în *Monitorul Oficial al României* , Partea I, nr. 578/1 iulie 2020 / [Published in the *Official Gazette,* Part. I, No 578/1 July 2020].

in art. 108 of the Constitution; a confusing legal regime of Government decisions is created, such as to raise the issue of their exemption from judicial control under the conditions of art. 126 para. 6 of the Constitution, with the consequence of violating the provisions of art. 21 and art. 52 of the Constitution, which enshrines free access to justice and the right of the injured person by a public authority.

In relation to art. 65 lit. s)-ș), art. 66 lit. a), b) and c) and art. 67 para. 2 lit. b) of Law no. 55/2020, criticized for unconstitutionality, the Constitutional Court has noted that "the compliance of the law is mandatory, but it cannot pretend to a subject of law to comply with a law that is unclear, imprecise and unpredictable, because he cannot adjust his behavior depending on the normative hypothesis of the law". This is why the legislator must show special attention when adopting a normative act[16]. A legal provision must be precise, unequivocal, to establish clear, predictable and accessible norms whose application does not allow arbitrariness or abuse[17].

Legislative acts with the force of law and administrative acts of a normative nature by which contraventions are established and sanctioned must meet all the quality conditions of the norm: accessibility, clarity, precision and predictability. The determination of the facts whose commission constitutes contraventions must be made in compliance with these requirements, and not left, arbitrarily, at the discretion of the ascertaining agent, without the legislator having established the necessary criteria and conditions, the operations of ascertaining and sanctioning contraventions. Also, in the absence of a clear representation of the elements constituting the contravention, the judge himself does not have the necessary benchmarks in the application and interpretation of the law, when solving the complaint on the record of finding and sanctioning the contravention. Based on these considerations, our constitutional court found the unconstitutionality of these texts of law. In Romania, derogations specific to the state of emergency are regulated at the constitutional level, including in terms of increased powers offered to the executive, i.e. the President of Romania, and not the Government. To "build" by law a new institution – the "state of

[16] Decizia nr. 1 din 10 ianuarie 2014, publicată în *Monitorul Oficial al României*, Partea I, nr. 123 din 19 februarie 2014 [Decision no. 1 of January 10, 2014, published in the *Official Gazette of Romania*, Part. I, no. 123 of February 19, 2014].

[17] Decizia nr. 637 din 13 octombrie 2015, publicată în *Monitorul Oficial al României*, Partea I, nr. 906 din 8 decembrie 2015 [Decision no. 637 of October 13, 2015, published in the *Official Gazette of Romania*, Part I, no. 906 of December 8, 2015].

alert", with an obvious regime less restrictive than the state of emergency regulated by the constituent legislator – but allowing the circumvention of the constitutional framework governing legality, separation of powers in the state, conditions of restriction the exercise of certain rights and freedoms, contradicts the general requirements of the rule of law, as enshrined in the Romanian Constitution.

The aspects that formed the object of the constitutionality control of the Constitutional Court with reference to the exceptional state established on the Romanian territory are not the only abusive and unconstitutional measures of the state authorities ordered and applied during this period.

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 Decision 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".

VI. Some conclusions

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.

The legal status of the freedom of conscience has as essence the freedom of self-conscience in its theological meaning. Priest Professor Dumitru Stăniloaie says that "man in his essence is spirit and freedom". Man's freedom has as foundation the freedom of conscience which, through faith, becomes *self-conscience*. This way is surpassed the individualism, egotism, the "ego" and everything meaning the existence of man thrown into the world according to Heidegger and Sartre.

The freedom of conscience is the long path, but the only tranquil way of man towards himself, towards his deeper self, to found himself in the infinity of love for God and people.

Noica said: "You need to be unfaithful to your ego on the way to innerself".