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The Right to the “Freedom of Conscience”, Legal Basis for the Educational and Missionary Activity of Religious Denominations

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In the literature, the legal concept of “freedom of conscience” is perceived and expressed by three perspectives. According to the first perspective, “religious freedom also includes the freedom of conscience.” As far as the second perspective is concerned, “the freedom of conscience and religious freedom are considered to be two distinct freedoms.” Finally, “the more widely accepted theory today is the one stating that the freedom of conscience has a broad sphere, including religious freedom. Moreover — a Romanian constitutionalist states — the freedom of the denominations is also a distinct freedom.”¹

In fact, religious freedom is not just an obvious expression of the freedom of conscience; it is also the “matrix” of all forms of manifestation of

¹ I. MURARU: *Comentariu la Articolul 29 din textul Constituției României (Comments on Article 29 of the Romanian Constitution)*. In: *Constituția României. Comentariu pe articole (The Romanian Constitution. Comments on Articles)*. C.H. Beck, București 2008, p. 283.

human freedoms²; *ipso facto*, it is the very “source” (*origo*) of all human freedoms.³

As far as the freedom of religious denominations⁴ is concerned, it should be made clear that it is merely an obvious and concrete manifestation of religious freedom, and not a distinct freedom, as still perceived and defined by some jurists.

According to a Romanian magistrate — with an evident philosophical training of metaphysical origin — “the three value dimensions of legal

² See N. V. DURĂ, C. MITITELU: *The human fundamental rights and liberties in the Text of some Declarations of the Council of Europe*. In: *Exploration, Education and Progress in the Third Millennium*, I, 5 (2015). ProUniversitaria, București, pp. 7—22.

³ Regarding the theologians and the philosophers’ perspective on the human being, see N. V. DURĂ: *The “Man” and His Creation in the Perception of “Creationism” and “Evolutionism.” Contributions of “Christian Philosophy.”* “Philosophical-Theological Reviewer”, 4 (2014), pp. 9—27; IDEM, *From “Proti Philosophia” to Nietzsche’s thinking. Some considerations as philosophical knowledge is concerned.* “Philosophical-Theological Reviewer”, 5 (2015), pp. 9—25.

⁴ See N. V. DURĂ: *Drepturile și libertățile fundamentale ale omului și protecția lor juridică. Dreptul la religie și libertatea religioasă (The Fundamental Human Rights and Freedoms and Their Legal Protection. The Right to Religion and Religious Freedom)*. “Orthodoxia” (Orthodoxy), LVI, 3—4 (2005), pp. 7—55; IDEM: „Privilegii” și „discriminări” în politica religioasă a unor State ale Uniunii Europene (“Privileges” and “Discriminations” in the Religious Policy of Several EU States). “Biserica Ortodoxă Română” (Romanian Orthodox Church), CXXIV, 1—3 (2006), pp. 491—510; IDEM: *The Fundamental Rights and Liberties of Man in the E.U. Law*. “Dionysiana”, IV, 1 (2010), pp. 431—464; IDEM: *Principii și norme generale ale Dreptului Uniunii Europene privind protecția juridică a drepturilor omului (General Principles and Norm of EU Law on the Legal Protection of Human Rights)*. In: RO-RUS-NIPPONICA, I, Universitaria, Craiova 2010, pp. 32—36; IDEM: *Religious Freedom in Romania*. “Theologia Pontica”, V, 3—4 (2012), pp. 9—24; IDEM: *The Patrimonial Right of the Religious Denominations*. In: *The current Statutes for the organization and functioning of the Romanian Orthodox Church. Tradition and Innovation*. Presa Universitară Clujeană, Cluj-Napoca 2016, pp. 67—86; IDEM: *The Right to Religion: Some Consideration of the Principal International and European Juridical Instruments*. In: *Religion and Equality. Law in conflict*. Eds. W. COLE DURHAM Jr., DONLU THAYER. Routledge, UK 2016, pp. 15—24; N. V. DURĂ, C. MITITELU: *Human rights and their universality. From the rights of the “individual” and of the “citizen” to “human” rights*. In: *Exploration, Education and Progress in the third Millennium*, I, 4 (2012). Galați University Press, Galați, pp. 103—127; IDEM: *The Freedom of Religion and the Right to Religious Freedom*. In: *SGEM Conference on Political Sciences, Law, Finance, Economics & Tourism*, I, 2014, Bulgaria, pp. 831—838; IDEM: *The right to Freedom of Religion in the Jurisprudence of the European Court*. “Journal of Danubius Studies and Research”, IV, 1 (2014), pp. 141—152; IDEM: *The State and the Church in IV—VI Centuries. The Roman Emperor and the Christian Religion*. In: *SGEM Conference on Political Sciences, Law, Finance, Economics & Tourism*, I, 2014, Bulgaria, pp. 923—930; C. MITITELU: *The Autonomy of Religious Denominations in Romania*. “Ecumeny and Law”, 4 (2016), pp. 275—296.

science and of a legal and social system” are “freedom, faith, and law,” and they “belong to the reality of justice.”⁵

However, the magistrate’s statement should be understood only from the perspective of its theoretical content, that is, the value dimensions represented by freedom and law, because in the modern era the third value dimension, that is, religious “Faith,” was exiled from the legal practice and, *ipso facto*, from jurisprudence.

Undoubtedly, the judge is the one who “delivers justice” (*jus dicere*). As such, “she/he must obey to his/her own conscience, in which content it has to be found also the values of the Christian faith, so that the law may be applied not for the purpose of achieving an abstract justice, but for the human being’s own good, for his/her freedom.”⁶

But, what is freedom? According to Judge Dr. Marius Andreescu’s definition, freedom is an “ontological state of the Law.” Moreover, “the Law has a natural purpose only through the idea of freedom. This purpose is represented by the human being in his/her social manifestations, but also in the spiritual ones”; hence his conclusion that “only by accepting freedom as the essence of Law, the entire legal system makes sense, and its natural purpose, that is, the human being, is also relevant. In other words — the same Romanian jurist remarks — the human being does not exist for the law, but the law exists for the human being; its purpose is not to constraint the human being, but to guarantee his/her natural freedom.”⁷

In other words, we are talking about the original freedom, which was provided by the Natural Law,⁸ and which must also be taken into account by magistrates when they do an act of *justitiae* (justice) and *aequitate* (righteousness/equity).⁹

⁵ M. ANDREESCU: *Principii și valori constituționale (Constitutional Principles and Values)*. Universul Juridic, București 2016, p. 15.

⁶ Ibidem.

⁷ Ibidem, p. 13.

⁸ See N. V. DURĂ, C. MITITELU: *Istoria Dreptului românesc. Contribuții și evaluări cu conținut istorico-juridico-canonice (The History of Romanian Law. Contributions and Assessments with a Historical-Juridical-Canonical Content)*. Universitară, București 2014; C. MITITELU: *Dreptul bizantin și receptarea lui în Pravilele tipărite, în Țările Române, din secolul al XVII-lea (The Byzantine Law and Its Reception in the Printed Codes of Laws from the Romanian Principalities of the Seventeenth Century)*. Universitară, București 2014.

⁹ A se vedea N. V. DURĂ: „Dreptatea (*Justitia*)” și „Echitatea (*Aequitas*)” în percepția lui Lactanțiu (†325) (“Justice” and “Equity” in Lactantius’s Perspective (†325)). In: *Tradiție și continuitate în teologia tomitană. Două decenii de învățământ teologic universitar la Constanța (1992—2012) (Tradition and Continuity in Tomitan Theology. Two Decades of Theological Higher Education)*. Arhiepiscopia Tomisului, Constanta 2012, pp. 257—272; IDEM: “*Justitia*” and “*Aequitas*” in the perception of the Greek philosophers and of the Roman jurists. “Teologia Młodych”, 4 (2015), pp. 4—9.

Andrescu's statement (according to which the law exists in order to safeguard the human being's natural freedom and not to compel him/her) also has a wide coverage in both the EU law¹⁰ and in the European Court of Justice jurisprudence.¹¹ In fact, those who are more or less familiar with this legislation and with the Court's jurisprudential doctrine can easily realize that the purpose of the Court's law and decisions is not to punish the guilty party by coercive measures. On the contrary, their purpose is to educate and correct the culprit, and, *ipso facto*, to make them aware of the gravity of their deed, and thus to make them, by a conscious act, to no longer commit any abominable deeds that would prejudice both the society they live in and their own freedom of conscience.¹²

The same judge rightly states that "lifting the freedom from a simple juridical declarative aspect to a fact of consciousness cannot be achieved only by the normative determinations of a legal system or by the existential situations where the human being has to manifest himself/herself. It is more than that; it is an act of faith," which — in his perception — represents "the foundation, the profound meaning of the existence and of the right understood by the idea of freedom!"¹³

Indeed, freedom can become a state of conscience only through faith, whereby it could be underlined the meaning of the idea of freedom, and whereby the entire legal system should be perceived and expressed.

It is not surprising that, according to the Romanian magistrate, freedom exceeds — as an axiological state — "the phenomenology of the law and state order," because it is "the only one able to support the social and normative system of a state"; hence the legitimate conclusion that "law supremacy" derives precisely from the "principle of freedom supremacy."¹⁴

¹⁰ N. V. DURĂ, C. MITITELU: *Legislația canonică și instituțiile juridico-canonicе, europene, din primul mileniu (Canonical Legislation and Juridical and Canonical European Institutions from the First Millenium)*. Universitară, București 2014.

¹¹ C. MITITELU: *Europe and the Constitutionalising Process of EU Member States*. "Ovidius" University Annals, Economic Sciences Series, XIII, 2 (2013), pp. 122—127.

¹² Regarding the theologians and the philosophers' perspective on the "freedom of conscience," see N. V. DURĂ: *The Theology of Conscience and the Philosophy of Conscience*. "Philosophical-Theological Reviewer", 1 (2011), pp. 20—29; IDEM: *Man in the view of some Christian Theologians with Philosophical Background*. "Annals of the Academy of Romanian Scientists, Series on Philosophy, Psychology, Theology and Journalism", V, 1—2 (2013), pp. 75—97; IDEM: *Despre Filosofie și Teologie. De la divergențe de natură ideatică, la idei și păreri convergente (About Philosophy and Theology. From Ideatic Discrepancies to Convergent Ideas and Opinions)*. "Studii filosofice" (Philosophical Studies), II, 1 (2016), pp. 111—129.

¹³ M. ANDREESCU: *Principii și valori... (Principles and Values...)*, p. 14.

¹⁴ Ibidem.

We are talking of course about the supremacy of each person’s freedom of conscience, which nobody can censor or constrain, which makes it a kind of *norma normans* for the entire legal system.

The same Romanian magistrate, that is, Marius Andreescu, also mentions the “principle of the coexistence of freedoms.” In his opinion, this principle should “be understood not only through the idea of a person’s freedom limitation with respect to another’s freedom but also especially in its true and profound sense: the condition of my freedom is the freedom of the other, according to a value universal law.”¹⁵ Moreover, in his perception, only this “condition” of every person’s freedom contributes to the “transition from the democracy of the masses, specific to the rule of law, to the democracy of freedom.”¹⁶

However, this transition to the “democracy of freedom” requires (as a *sine qua non* condition of one’s freedom) the respect for the other’s freedom. This involves primarily the awareness of the limits of the human being’s freedom, also determined by the obligation to give everybody what they deserve, that is, *suum cuique tribuere*, as formulated by the famous Roman jurist Ulpian (170—223 AD).

In the Declaration of Human and Civic Rights — proclaimed in 1789 by the “representatives of the French people formed into a National Assembly” (Preamble) — it is also stated that “No one may be disturbed on account of their opinions, even religious ones (*même religieuses*), as long as the manifestation of such opinions does not interfere with the established Law and Order” (Article 10).¹⁷

In fact, these “religious views” are the manifest expression of the assertion of a fundamental human right and freedom, that is, the right to the freedom of religious conscience. This right should be related to or limited by another person’s freedom and also by the freedom condition provided by *Jus divinum* and *Jus naturalis*, that is, the divine Law and the natural moral Law.¹⁸

¹⁵ Ibidem, p. 15.

¹⁶ Ibidem.

¹⁷ *Declarația drepturilor omului și ale cetățeanului* (Declaration of Human and Civic Rights), apud https://ro.wikipedia.org/wiki/Declara%C8%9Bia_drepturilor_omului_%C8%99i_ale_cet%C4%83%C8%9Bianului

¹⁸ See N. V. DURĂ: *Valorile religio-creștine și „moștenirea culturală, religioasă și umanistă a Europei”. „Laicitate” și „libertate religioasă”* (Religious-Christian Beliefs and the “Cultural, Religious and Humanist Legacy of Europe”. “Laicity” and “Religious Freedom”). In: *Modernitate, postmodernitate și religie* (Modernity, Post-modernity and Religion), Vasiliana ’98, Iași 2005, pp. 19—35; IDEM: *Ideea de Drept. „Dreptul”, „Dreptatea” și „Morala”* (The Idea of Law. “Law”, “Justice” and “Morale”). “Analele Universității Ovidius. Seria: Drept și Științe Administrative” (Ovidius University Annals. Series: Law and Administrative Sciences), I, 1 (2004), pp. 15—46; IDEM: *Ideea de „Drept” și „Drep-*

Among its “purposes,” the Council of Europe includes the “protection of human rights and fundamental freedoms” (Explanatory Memorandum, 2),¹⁹ including the right to freedom of conscience, which must also be ensured by “judges” and by “other persons who exercise their legal functions” because their “essential” role is precisely to ensure and guarantee the respect for “human rights and fundamental freedoms.”²⁰

Undoubtedly, in order to ensure and protect this kind of freedom (i.e., the freedom of conscience), “the judges” and “the persons exercising legal functions” must have sound and fair knowledge of the origin and nature of this freedom, including its content and the consequences of its manifestations in the field of human rights and fundamental freedoms.

The freedom of conscience is a natural human right, provided even by *Jus naturale*.²¹ We become aware of it through a cognitive act, that is, through knowledge, which *ipso facto* implies an educational and training process.²² In other words, freedom is taught and learnt. This is true not only for “the freedom of conscience,” but also for “the freedom of religious conscience.”

This educational and didactic process has been known and practiced since Antiquity. The Psalmist testifies to this reality; among other things, he confessed: “I have understood more than all my teachers: because thy testimonies are my meditation” (Psalm 118, 99).

The Psalmist, who had acquired the knowledge of God’s “Mysteries of Life” through “Revelation” (Discovery), actually succeeded in surpassing his teachers also in the interpretation of the Torah. It was precisely this revealing knowledge that had granted him the “freedom” to think of the testimonies of the Divine Revelation, and, *ipso facto*, to have faith.

tate” în percepția gândirii vechiului Drept românesc (The Idea of Law and Justice from the Perspective of the Old Rmanian Law). “Revista de Teologie Sfântul Apostol Andrei” (St. Andrew Journal of Theology), VI, 1 (2002), pp. 51—59.

¹⁹ Recommendation no. 94 (12) of the Committee of Ministers to the Member States on the independence, efficiency and role of judges (Adopted by the Committee of Ministers on 13 October 1994 at the 516th Meeting of State Secretaries), apud *Curtea Europeană a Drepturilor omului* (European Court of Human Rights), Moroșan, București 2006, p. 377.

²⁰ *Ibidem*, p. 373.

²¹ See N. V. DURĂ: *The Right to Freedom of Religion during of Emperors Cyrus “the Great” (559—529 BC) and Alexander “the Great” (336—323 BC). “Studii filosofice” (Philosophical Studies), I, 2 (2015), pp. 231—242.*

²² See, N. V. DURĂ: *Instruction and Education within the themes of some International Conferences. An evaluation of the subjects approached by these from the angle of some Reports, Recommendations and Decisions. In: Exploration, Education and Progress in the third Millennium*, II, University Press, Galați 2009, pp. 203—217.

Naturally, the act of faith has to be perceived also as an act of Freedom, which requires “*alterum non laedere*” (not to harm another person), that is, not to harm another person’s freedoms, and “*suum cuique tribuere*”²³ (to give everyone what is due to him/her), that is, the respect due to one’s human dignity,²⁴ imposed by the Divine Law and by the Natural Moral Law.

According to philosopher Henri Bergson, “a being feels bound unless it is free, and any obligation, considered separately, implies freedom.”²⁵ In other words, only freedom empowers the human being (and makes him/her responsible), both in relation to oneself and to the members of the society, hence its supremacy towards any rule of law. The very same philosopher also underscored the fact that “we find the social demand only within the moral obligation,”²⁶ provided both by the Divine Law and by the Natural Moral Law.

In his work, “On Liberty,” published in 1859, John Stuart Mill wrote that “as soon as a part of one’s beliefs prejudices another’s interests, the society has the authority to rule on it; however, it is questionable whether the general good will be promoted or not through social intervention.”²⁷ Thus, according to Mill, religious belief can harm one’s freedom only to the extent that the respective person has harmed the “public good,” that is, “*ad utilitatem publicum*,” to which the Roman Law also made reference.

Human history also revealed that, over the centuries, “often, the groups ruling a state abused power in the name of a supposedly general good that should be imposed on the society, considering themselves entitled to direct the entire social life to a general, predetermined goal, regardless of the consequences (cf. the fascist and communist totalitarian states).” However, by imposing certain “priorities,” valuations and decisions on “what is important (good, necessary, right),” some states actually violated the “sphere of individual freedom, leaving people at the disposal of arbitrary decisions of the bureaucracy that exercises power in the controlled state. In this case — a Romanian jurist rightly notes — we cannot talk about law supremacy, but about the supremacy of the authorities’

²³ Justiniani Institutiones, lb. I, I, 3.

²⁴ N. DURĂ, C. MITITELU: *Principii și norme ale Dreptului Uniunii Europene privind drepturile omului și protecția lor juridică (Principles and norms of European Union law on human rights and their legal protection)*. Arhiepiscopia Tomisului, Constanța 2014.

²⁵ H. BERGSON: *Cele două surse ale moralei și religiei (The two sources of morality and religion)*. Translated by D. MORĂRAȘU. Institutul European, București, 1998, p. 52.

²⁶ Ibidem, p. 53.

²⁷ J. S. MILL: *Despre libertate (On Liberty)*. Translated by A. P. ILIESCU. Humanitas, București 2001, p. 85.

subjectivity, the supremacy of the leaders of a powerful group. On the other hand — the respective jurist points out — disregarding the general public interests, maintaining order and balance within the society, ensuring general prosperity, through legality, has destructive effects, even on individual freedoms.”²⁸

The abuse of power committed on behalf of greater social good leads not only to totalitarian dictatorship, whether fascist or communist, but also to the violation of individual freedom. However, lack or ignorance of this freedom leads naturally to the breach of social order, and *ipso facto*, to the violation of state laws and of the rule of law. This has a negative impact on every person’s freedom of conscience, and prevents the transition from the rule of law to the “democracy of freedom.”

The Universal Declaration of Human Rights (1948) provided for “the Freedom of conscience,” which underpins other rights and fundamental freedoms, such as the right to freedom of speech, the right to freedom of association, the right to freedom of religious education etc.²⁹ Since then, the freedom of conscience has been provided and guaranteed by the main international and national legal instruments not only as one of the fundamental human freedoms,³⁰ but also as their *origo* (source).

Defined as a “natural right,” the freedom of conscience offers and provides for “the person’s ability to express in particular or in public a certain conception of the surrounding world, to have (or not) a religious

²⁸ D.V. SAVU: *Libertăți fundamentale și cetățenești în Uniunea Europeană (Fundamental and Citizenships Freedoms in the European Union)*. A.S.E., București 2007, pp. 15—16.

²⁹ See C. MITITELU: *The Right to Religious Education. The Romanian Legislation and Religious Education*. In: *Educația religioasă în context European (Religious education in the European context)*. Didactică și Pedagogică R.A., București 2014, pp. 180—188.

³⁰ See N.V. DURĂ: *Principalele organisme și organizații internaționale cu preocupări și atribuții în domeniul promovării și asigurării protecției juridice a drepturilor omului (Main international bodies and organizations with concerns and attributions in the field of promoting and ensuring the legal protection of human rights)*. *Dionysiana*, I, 1 (2007), pp. 18—25; IDEM: *The European juridical thinking, concerning the human rights, expressed along the centuries*. “Acta Universitatis Danubius. Juridica”, VII, 2 (2010), pp. 153—192; IDEM: *Proselytism and the Right to Change Religion: The Romanian Debate*. In: *Law and Religion in the 21st Century. Relations between States and Religious Communities*. Eds. S. FERRARI, R. CRISTOFORI. Ashgate Publishing Limited, England 2010, pp. 279—290; IDEM: *General Principles of European Union Legislation Regarding the Juridical Protection of the Human Rights*. “Journal of Danubius Studies and Research”, III, 2 (2013), pp. 7—14; IDEM: *The Universal Declaration of Human Rights*. In: *10th Edition of International Conference The European Integration — Realities and Perspectives*. Danubius University Press, Galati 2015, pp. 235—242; C. MITITELU: *The European Convention on Human Rights*. In: *10th Edition of International Conference The European Integration — Realities and Perspectives*. Danubius University Press, Galati 2015, pp. 243—252.

faith, to belong (or not) to a religious denomination or to an organization of any kind, recognized by the existing constitutional order at a certain time.”³¹

However, in neither of these international and national legal instruments, there is no explicit reference to “the freedom of religious conscience,” but only to “the freedom of conscience.”

That “freedom of religious conscience” is the “matrix” of all freedoms, and, *ipso facto*, the source of “moral principles,” is confirmed even by some Romanian jurists nowadays. Indeed, according to their assertion, “Freedom, as a fundamental principle of the rule of law, is the foundation of all moral principles and implies the elaboration of such norms of law guaranteeing all persons to manifest themselves according to their own choices, in their relationships with the other members of the community.”³²

The freedom of conscience — which is also cited as a legal basis for other freedoms, such as “the freedom of speech” and “the freedom of association” — has legal implications and it is endowed with a philosophical nature,³³ hence its approach also through the lens of the respective jurist or philosopher. For example, according to a Romanian jurist, who also has a solid philosophical background, we have to make a clear distinction between “the conscience’s freedom” and “the freedom of conscience”; according to this jurist, between these two concepts, “there is a difference both in terms of terminology and content.”³⁴

As far as the conscience’s freedom is concerned, it is said that it “expresses the ontological value of conscience,” and that in this hypostasis, “it can only be free, without any constraints of natural or temporary determinism.”³⁵ In fact, in the concrete and universal human world, conscience can have “determinations, but it does not have limitations, conditions or constraints; these determinations have a moral nature.”³⁶

³¹ M. ANDREESCU: *Principii și valori... (Principles and Values...)*, p. 296.

³² T. TOADER, M. SAFTA: *Constituția României, cu legislație conexă și jurisprudență actualizate la data de 14 mai 2015 (The Romanian Constitution, with related legislation and updated jurisprudence on May 14, 2015)*. Hamangiu, București 2015, p. 143.

³³ See N. V. DURĂ: „Conștiința” în percepția Teologiei și a Filosofiei (“Conscience” in *Theology and Philosophy*). “Revista de Teologie Sfântul Apostol Andrei” (St. Andrew Journal of Theology), XIII, 1 (2009), pp. 27—37; IDEM: „Teologia” și „Filosofia”. *Convergențe sau divergențe ideatice?! (“Theology” and “Philosophy.” Ideational convergence or divergence?)*. In: *Simpozionul național „Constantin Noica” „La început era Cuvântul” (National Symposium “Constantin Noica”: “In the beginning there was the Word”)*, 4th edn. Constanța 2012, pp. 175—207.

³⁴ M. ANDREESCU: *Principii și valori... (Principles and Values...)*, p. 290.

³⁵ Ibidem.

³⁶ Ibidem.

That freedom of religion cannot be limited or subjected to “any constraint”; this is expressly stipulated by the International Covenant on Economic, Social and Cultural Rights³⁷ (see Article 13, paragraph 2), hence the parents’ freedom “to ensure the religious and moral education of their children in conformity with their own convictions” (Article 13, paragraph 3).

The same jurists of philosophical and Hegelian training also speak of the “moral content of conscience” which, according to their claims, “represents precisely the freedom of conscience and the spiritualization and rationalization of the human being in relation to himself/herself, to his/her peers and to the entire universe.”³⁸

Thus, in the philosophical perception of these jurists, its moral content underlies the human being’s spiritualization and rationalization process. In other words, we can say that a conscience that lacks its moral content does not know and does not apply the “Laws of Freedom” (Hegel); hence the obvious necessity of relating our freedom first of all to the Natural Moral Law,³⁹ also revealed by *Jus naturale*,⁴⁰ and then by *Jus scriptum*⁴¹, that is, the Human Law.

However, it must be emphasized that, by its norms, “the Law does not create, it does not determine the freedom of conscience; it only recognizes it because it pre-exists ontologically on constitutional norms.”⁴² Indeed, constitutional rules do not define the freedom of conscience and its content; they only recognize it (see Article 29, paragraph 2 of the Romanian Constitution).

Romanian constitutionalists also limited themselves only to the recognition and explanation of the provisions of international law on the freedom of conscience.

³⁷ See N. V. DURĂ, C. MITITELU: *International Covenant on Economic, Social and Cultural Rights*. In: *8th Edition of International Conference The European Integration — Realities and Perspectives*. Danubius University Press, Galati 2013, pp. 130—136; C. MITITELU: *The Children’s Rights. Regulations and Rules of International Law*. “Ecumeny and Law”, 3 (2015), pp. 151—169.

³⁸ M. ANDREESCU: *Principii și valori... (Principles and Values...)*, p. 290.

³⁹ See N. V. DURĂ: *Loi morale, naturelle, source du Droit naturel et de la Morale chrétienne*. In: *La morale au crible des religions (Studia Arabica XXI)*. Coord. M. Th. URVOY. Éditions de Paris, 2013, pp. 213—233.

⁴⁰ N. V. DURĂ: *Despre „Jus naturale”. Contribuții filosofico-juridice (About “Jus Naturale”. Philosophical-legal contributions)*. “Revista de Teologie Sfântul Apostol Andrei” (St. Andrew Journal of Theology), XVIII, 1 (2014), pp. 39—52.

⁴¹ See N. V. DURĂ, C. MITITELU: *The human fundamental rights and liberties...*, pp. 7—22.

⁴² M. ANDREESCU: *Principii și valori... (Principles and Values...)*, p. 290.

The Freedom of Conscience is “affected by the conditions, limitations and even by the constraints imposed by the legal norm.”⁴³ But, such conditions, limitations or constraints of the Freedom of conscience are imposed not only by the legal norm, but also by the moral law.

In the Romanian Constitution, the Freedom of Conscience is preceded by “the Freedom of Thought and Opinion” (Article 29, paragraph 1), followed by “Religious Freedom” (Article 29, paragraph 3); hence the conclusion of some contemporaneous Romanian jurists that the purpose of Article 29 of the Romanian Constitution is “to protect and guarantee the individual freedom of thought, conscience and religion”⁴⁴

However, in the European Convention of Human Rights, reference is made to “the right to the freedom of thought, conscience and religion,” the latter freedom including the freedom of any person “to manifest their religion or faith” also “through education” (Article 9, paragraph 1). It is therefore a right to all the three freedoms, provided both by natural and by the positive law.

In our view, it would be advisable to reintroduce the phrase from the European Convention on Human Rights in the Romanian constitutional text, and to refer thus to the “right to freedom of thought, conscience and religion,” not only to their “freedom.”

Regarding any person’s freedom to make known the doctrine of his/her religion also through “religious education,” the European Court of Justice ruled that “it stems first of all from the inner forum,”⁴⁵ that is, the conscience; hence the conclusion drawn by the judges at the European Court that the act of faith (and, respectively, the religious faith) does not concern “school education,” which is protected by the provisions of Article 2 of the first Additional Protocol. It concerns only the justification of “carrying out the training and dissemination activity of a particular denomination.”⁴⁶

Among other things, Article 2 of the First Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Paris, 20 March 1952) also provides for “the parents’ right” to ensure their children “education and training according to their religious and philosophical convictions.”⁴⁷

⁴³ Ibidem.

⁴⁴ T. TOADER, M. SAFTA: *Constituția României... (The Constitution of Romania...)*, p. 143.

⁴⁵ Apud C. BÎRSAN: *Convenția europeană a drepturilor omului. Comentarii pe articole (The European Convention on Human Rights. Comments on articles)*. 2nd edn. C.H. Beck, București 2010, p. 746.

⁴⁶ Ibidem, p. 747.

⁴⁷ Ibidem, p. 1753.

However, in its decisions, the European Court of Justice⁴⁸ referred this parental right “to the provisions of Articles 8, 9 and 10 of the Convention, which guarantee the right to private and family life, the right to freedom of thought, conscience and religion and the right to freedom of information and expression.”⁴⁹

Nevertheless, the European Court made it clear that “parents can claim states to respect their religious and philosophical beliefs” because “it is a right that corresponds to a responsibility closely connected to the valorization of the right to education (which belongs to the children).”⁵⁰

In its Preamble, the Treaty of Lisbon,⁵¹ signed on 13 December 2007 — amending the Treaty on the European Union and the Treaty establishing the European Community — refers expressly to Europe’s “heritage,” which it identifies and enumerates not through the lens of historical reality, but influenced by the mentality of the human being still imprisoned in the political ideology of the French Revolution from 1789 and of the Bolshevik Revolution from 1917.

The amended text of this EU Treaty speaks first of all of the “cultural heritage” and then of “the religious” one (Article 1, paragraph 1a), although the former was born later, and more precisely in temples and Churches; thus, the term “culture” is derived from two Latin words, namely, *cultura/ae*⁵² (cultivation, education, formation, cult (religious)), and *cultus-us*⁵³ (cultivation, cult (religious), honour of Divinity).

⁴⁸ On the Decisions of the European Court of Justice on the parents’ right to ensure their children a religious education according to their own religious beliefs, see C. MITITELU: *Provisions of Principle with European Constitutional Value on the “Person’s” Right to Freedom and Security*. “Journal of Danubius Studies and Research”, VI, 2 (2016), pp. 158—165; IDEM: *About the Right to the Freedom of Religion*. In: *LUMEN: Rethinking Social Action. Core Values*. Coord. A. SANDU et al. Medimond, Bologna, 2015, pp. 833—838.

⁴⁹ C. BÎRSAN: *Convenția europeană... (The European Convention...)*, p. 1756.

⁵⁰ Ibidem, p. 1765.

⁵¹ See N. V. DURĂ: *Drepturile și libertățile omului în gândirea juridică europeană. De la „Justiniani Institutiones” la „Tratatul instituind o Constituție pentru Europa” (Human Rights and Freedoms in European Legal Thought. From “Justiniani Institutiones” to the “Treaty establishing a Constitution for Europe”)*. “Analele Universității Ovidius. Seria: Drept și Științe Administrative” (Ovidius University Annals. Series: Law and Administrative Sciences), 1 (2006), pp. 129—151; IDEM: *The right to freedom of religion*. “Annales Canonici”, 10 (2014), pp. 27—40; IDEM: “Rights,” “Freedoms” and “Principles” Set Out in the Charter of Fundamental Rights of the EU. “Journal of Danubius Studies and Research”, VI, 2 (2016), pp. 166—175.

⁵² See G. GUȚU: *Dicționar Latin-Român (Latin-Romanian Dictionary)*. Științifică și Enciclopedică, București, 1983, p. 288.

⁵³ Ibidem, pp. 288—289.

Among other things, the Treaty of Lisbon also stipulates that “the Union respects and does not prejudice the status enjoyed by the Churches and by the religious Associations or Communities from the Member States, under the national law” (Article 16 C, paragraph 1).

The Treaty also stipulates that the European Union recognizes their “specific identity and contribution” and “maintains an open, transparent and constant dialogue with these Churches and Organizations” (Article 16 C, paragraph 3).

The European Union therefore recognizes the legal status of religious denominations under the national law. At the same time, the EU recognizes both the identity of religious denominations and their specific contribution, and maintains a transparent and constant dialogue with them.

Of course, the EU’s attitude towards religious denominations must be adopted by all member states; hence the obligation of the relevant institutions and bodies from these states to carry out this dialogue directly, transparently and constantly, not only through the media, which is often interested both in the rating profit and in propagating the ideas of their political partisanship.

The same Treaty of Lisbon stipulates that the European Union “is competent to carry out actions to support, coordinate or complement the action of the Member States” in various “fields,” including “vocational education and training” (Article 2 E-C 306/48).

On the other hand, education also involves religious education, and, *ipso facto*, the parents’ right to provide their children with a religious education or training according to their own religious faith, in state schools.

According to the provisions of the Romanian Constitution, the state explicitly assures both “the freedom of conscience” (see Article 29, paragraph 2) and “the freedom of religious education, according to the specific requirements of each denomination” (Article 32, paragraph 7). Moreover, the text of the very same paragraph 7 (Article 32 of the Romanian Constitution) stipulates that “in State schools, religious education is organized and guaranteed by law.”

Under the same Romanian Constitution, parents also have the right to provide their children with education according to their own beliefs or religious faith. Indeed, according to the provisions of Article 29, paragraph 6, “Parents or guardians have the right to ensure, according to their own beliefs, the education of the underage children under their responsibility.”

The Treaty of Lisbon⁵⁴ — whose text was in fact drafted as a constitution of the EU — also provided for “the freedom to establish educational institutions respecting the democratic principles and the parents’ right to ensure their children their education and learning according to their religious convictions [...], in accordance with the national laws governing the exercise of these freedoms and rights” (Article II-74, paragraph 3).

Thus, the EU legislation expressly provides without any ambiguity for the parents’ right to provide their children with religious education in public schools.⁵⁵

Among other things, in Decision no. 669 of 12 November 2014, the Constitutional Court of Romania stated that “the inclusion of religion as a school subject, part of the common core, is not *ipso facto* a problem likely to trigger the non-observance of the freedom of conscience, as long as the established provisions do not generate the obligation to attend the courses of a particular religion, contrary to another’s convictions.”⁵⁶

In the very same decision, the Constitutional Court also notes that the provisions of Article 9 paragraph 1 of the Education Law no. 84/1995 and Article 18 paragraph 1 of the National Education Law no. 1/2011 represent in fact “a consecration of the constitutional provisions of Article 32 paragraph 7.”⁵⁷ Under these provisions, “the State ensures the freedom of religious education, according to the specific requirements of each denomination. In state schools, religious education is organized and guaranteed by law.”

In the interpretation of the Romanian Constitutional Court, the establishment of the compulsory nature of religion as a school subject, part of the common core, aims at “fulfilling the above-mentioned constitutional exigencies, by the achievement by the state of the obligation to include this subject in the Educational Framework.”⁵⁸

The same Constitutional Court finds that both Article 32 of Law no. 489/2006 on religious freedom and the general regime of Denominations (republished in the *Official Gazette of Romania*, Part I, No. 201 of 21 March 2014), as well as Article 9 (paragraph 2) of Law no. 84/1995 and Article 18 of Law no. 1/2011 “grant the pupil the right to choose, by granting him/her the possibility of not attending these courses.”⁵⁹

⁵⁴ See N. V. DURĂ, C. MITITELU: *The Treaty of Nice, European Union Charter of Fundamental Rights*. In: *8th Edition of International Conference The European Integration — Realities and Perspectives*. Danubius University Press, Galati 2013, pp. 123—129.

⁵⁵ See, C. MITITELU: *The Right to Religious Education...*, pp. 180—188.

⁵⁶ Decision no. 669 of 12 December 2014, no. 16. Published in the *Official Gazette* no. 59 of 23.01.2015. See also https://www.ccr.ro/files/products/Decizie_669_2014.pdf

⁵⁷ *Ibidem*.

⁵⁸ *Ibidem*.

⁵⁹ *Ibidem*.

In addition, the Romanian Constitutional Court finds that, “under article 32 paragraph 5 of the Constitution [...], religious education refers both to the educational institutions established by Denominations for the purpose of training their own denomination staff [...] and to the religious education carried out in state schools; thus, there are observed both the freedom of conscience and the respect of the parents’ or the guardians’ right to ensure the education of their underage children according to their (religious) faith.”⁶⁰

In the interpretation of the same Constitutional Court, under Articles 29 and 32 of the Constitution, the state has “both the negative obligation of not interfering in one’s formation or adoption of a particular belief or religious faith,” and “the positive obligation to create the legislative and the institutional framework necessary for the exercise of the rights provided by articles 29 and 32 of the Constitution, when a person manifests his/her interest in studying or receiving the teachings of a particular religious denomination or religion. However, in no case can a person be placed *ab initio* in the situation of defending or protecting his/her freedom of conscience, because such an approach would contravene the state’s negative obligation; by virtue of this obligation, the state cannot impose the study of religion.” Hence the apodictic conclusion of the Constitutional Court, according to which “only after the major pupil, respectively the parents or the legal guardians of the underage pupil had expressed the wish to acquire through studies the specific precepts of a certain religious denomination, the State’s positive obligation to ensure the necessary framework arises.”⁶¹

In the same Decision no. 669/2014, the Constitutional Court recommends that “when adopting its regulations in education, the legislator must take into account that Article 29 paragraph 6 of the Constitution guarantees the right to religious education and not the obligation to attend religious courses. In this respect, the free expression of options necessarily implies the person’s own initiative in the sense of attending the subject ‘Religion,’ and not his/her tacit consent or express refusal.”⁶²

It should also be pointed out that Decision no. 669/2014 of the Constitutional Court expressly refers to the “freedom of religious conscience otherwise categorized” as part of the value system (Article 21). It is for the first time, in a Romanian legal text, when “the freedom of religious conscience” is also referred to as “part of the value system.”

⁶⁰ Ibidem, no. 17.

⁶¹ Ibidem, no. 19.

⁶² Ibidem.

Those who are familiar with the literature on the subject can easily realize that the authors of the Decision no. 669/2014 were no longer tributaries to the French legal doctrine, underlain by the ideological platform of the French Revolution of 1789, which referred only to “freedom of conscience” (*la liberté de conscience*),⁶³ and not to “freedom of religious conscience,” which was provided and guaranteed both by *Jus divinum* and *Jus naturale*, on the one hand, and by *Jus positivum* (written law), namely *Jus Romanum* (Roman Law), on the other hand.

The same Constitutional Court assigns to “the freedom of religious conscience [...], the imperative of tolerance, especially in relation to the human dignity guaranteed by article 1 paragraph 3 of the Fundamental Law, which dominates the entire value system as the supreme value. In principle, this ground excludes that the activities and behaviours stemming from a certain attitude of faith or non-religious philosophical beliefs be subject to sanctions that the state provides for such behaviour, regardless of the person’s motivation of faith” (Article 21 of Decision no. 669/2014).

The Constitutional Court thus associated the freedom of religious conscience to the “imperative of tolerance, which is related to human dignity”; the latter “must be taken into account by any person, regardless of his/her religious faith, because *dignitas humana*⁶⁴ is the supreme human value, whereby the acts of faith or disbelief that harm it must be judged and punished.”

Finally, according to the interpretation given by the Constitutional Court, the Romanian State’s “duty of neutrality and impartiality” regarding the observance of “the Freedom of conscience and religion [...] is achieved when the State monitors the observance of these freedoms, granting the parents, the legal representatives of underage children and the major pupils the possibility to apply for the attendance to religious classes” (no. 22 of Decision 669/2014).

According to the interpretation of the Romanian Constitutional Court, the State materializes its obligation of “neutrality” and “impartiality” towards the recognized religious denominations by asserting and guaranteeing the two freedoms, namely, the freedom of conscience and the freedom of religion. In terms of the religious education provided at

⁶³ Article 1 of the Law of 9 December 1905 of the French Republic. This Law is improperly called the Law of the Separation of the State from the Church.

⁶⁴ See N. V. DURĂ: *Dreptul la demnitate umană (dignitas humana) și la libertate religioasă. De la „Jus naturale” la „Jus cogens” (The right to human dignity (dignitas humana) and religious freedom. From “Jus naturale” to “Jus cogens”)*. “Analele Universității Ovidius. Seria: Drept și Științe Administrative” (Ovidius University Annals. Series: Law and Administrative Sciences), 1 (2006), pp. 86–128.

state schools, this obligation is materialized by ensuring and guaranteeing the possibility for parents or legal guardians to ask the state authorities that their children attend religious classes.

All the considerations and assessments made in this paper reveal therefore the possibility to ascertain that the freedom of religious denominations to confess their own religious faith and to carry out educational and missionary activities derives from the right to “the freedom of conscience,” underlain in fact by *Jus divinum* and *Jus naturale*, against which not even a *consuetudo* can acquire the power of law (see Canon 24 § 1 of the Code of Canon Law).

In lieu of the conclusions, we should note that the Right to Religious Freedom also implies the right of every human being to confess his/her religious faith, and, *ipso facto*, to make known the teachings of his/her religion or religious denomination, both through “missionary activities,” as well as through “religious education,” be it confessional or state education.

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NICOLAE V. DURĂ

The Right to the “Freedom of Conscience”, Legal Basis for the Educational and Missionary Activity of Religious Denominations

Summary

The right to freedom of religion has its juridical basis not only in *jus positivum* (the written law), that is, *jus civile*, but also in *jus divinum* and *jus naturale*, hence the obligation of any *judex* to be acquainted with and apply the latter’s provisions in matter of religious faith.

In order to highlight these ideas, in this study, we made express reference to the European and national legislation, on the one hand, and to the works elaborated by jurists of philosophical training, on the other hand.

Among other things, subsequent to the assessment of these texts and works, an expert reader will be able to notice that the transformation of the right to religious freedom, from a simple juridical act to a state of moral consciousness, also requires an act of faith, which, in fact, provides the idea of freedom with its original ontological dimension.

Our study also provides the reader with the opportunity to conclude that the right to freedom of conscience entitles any human being to make known the doctrine of his/her religion, both through missionary activities and religious education in confessional and state schools.

NICOLAE V. DURĂ

Le droit à « la liberté de conscience », les bases juridiques de l'activité éducative et missionnaire des confessions religieuses

Résumé

Le droit à la liberté religieuse a son fondement non seulement dans *jus positivum* (droit écrit), c'est-à-dire *jus civile*, mais aussi dans *jus divinum* et *jus naturale*. D'où l'obligation de faire connaissance avec les résolutions de chaque de ces types de droits quant aux questions religieuses et de les employer par chaque *judex*.

Afin de présenter en détail ces types de droits, on s'est référée dans le présent article, d'un côté, à la législation européenne et nationale, de l'autre, aux travaux des juristes se spécialisant dans l'approche philosophique du droit. Après avoir analysé leurs travaux, on peut apercevoir que la transformation du droit à la liberté religieuse inclus dans l'acte juridique en état de conscience morale de l'usager de droit exige également un acte de foi qui en réalité donne à la notion de liberté sa dimension ontologique primitive.

Le présent article permet de tirer la conclusion que le droit à la liberté religieuse autorise chaque homme non seulement à la connaissance de la doctrine de sa religion, mais aussi à l'activité missionnaire ainsi qu'à l'éducation religieuse dans les écoles confessionnelles et publiques.

Mots clés : mondialisation, enseignement de l'Église, activité d'évangélisation et de mission de l'Église, droit canonique, législation canonique et séculière

NICOLAE V. DURĂ

Il diritto alla “libertà di coscienza”, i fondamenti giuridici dell'attività educativa e missionaria delle confessioni religiose

Sommario

Il diritto alla libertà religiosa ha il suo fondamento non soltanto nello *jus positivum* (diritto scritto) ossia lo *jus civile*, ma anche nello *jus divinum* e nello *jus naturale*. Da ciò scaturisce l'obbligo per ogni *judex* di prender conoscenza e di applicare le disposizioni di ciascuno di questi tipi di diritti rispetto alle questioni religiose.

Per presentare dettagliatamente questi tipi di diritti, nel presente studio si è fatto riferimento da un lato alla legislazione europea e nazionale, e dall'altro al lavoro dei giuristi specializzati nell'approccio filosofico alla legge. Dopo aver analizzato i loro lavori si può notare che la trasformazione del diritto alla libertà religiosa, compreso nell'atto giuridico in stato di coscienza morale dell'utente della legge, esige anche un atto di fede che in realtà conferisce al concetto di libertà la sua dimensione ontologica originaria.

Il presente articolo consente di trarre la conclusione che il diritto alla libertà religiosa autorizza ogni persona non solo a conoscere la dottrina della propria religione, ma anche all'attività missionaria e all'istruzione religiosa nelle scuole confessionali e statali.

Parole chiave: globalizzazione, insegnamento della Chiesa, attività evangelico-missionaria ecclesiastica, diritto ecclesiastico, legislazione canonica e laica