

FREEDOM OF CONSCIENCE –
A FUNDAMENTAL RIGHT IN THE EUROPEAN
CONVENTION ON HUMAN RIGHTS AND THE
CONSTITUTION OF ROMANIA

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Abstract: In a broad sense, freedom of conscience is the possibility for the citizen to have and to publicly express his conception of the world around him. Thus, if in one conception it is considered that religious freedom includes the freedom of conscience, in another conception it is considered that freedom of conscience and religious freedom are two distinct freedoms. The most widely accepted theory today is that freedom of conscience has a broad scope, including religious freedom.

Keywords: *freedom of conscience, religious freedom, consciousness, fundamental human rights*

1. Notion

J. J. Rousseau defined consciousness as “the divine instinct, immortal, divine voice; guide of an ignorant and limited being, but intelligent and free; judge of good and evil that transforms man into God”.

Consciousness “seen psychologically, is the complex structure of dynamic organization of psychic life manifested in man’s relationships with himself, with others, and with the world around him. His consciousness is not a simple function, a derivation, or a substitute for human psychic life, but the very way in which it is organized is “the state by which man becomes self-conscious.” even and what is going on around him”.

Through consciousness man appears at the same time as an object and as a subject of social life, as a being who is enclosed in his own universe and who opens himself both to the world, which manifests itself for himself and for the another, which exists is constructed and evolves. Consciousness is not just a subjectivity, a spiritual experience, or reflection, but is formed and becomes only related to the objective reality that ultimately determines its configuration.

Language plays an important role, representing the specific condition and manifestation of consciousness as a symbolic activity, a concrete form determined by more or less generalized and integrated systems of 'images'. The most important role in the determinism of consciousness and played by articulate language as the word appears as an instrument and mechanism of conscious reflection.

Consciousness also has a moral sense that reveals the disposition or capacity of the human soul to judge the morality of our own deeds, to guide man's moral activity by urging him to abide by moral laws. Moral consciousness contains in its essence intellectual phenomena, affective and will elements, judgments that distinguish facts as good or bad, just or unjust, allowed or forbidden, emotional states of pleasure, satisfaction, or remorse.

Marsilio de Padone recognizes freedom of conscience in a society that presents itself as a union of free men. In order to preserve the divine precepts, writes the great thinker of the fourteenth century, no one can be compelled by punishment or torture or by "The Scriptures."¹

Freedom of conscience is the right of the citizen to have and externalize, publicly, a conception of the world. There is a close link between freedom of conscience and freedom of thought, which can only be controlled if it is externalized.

There are several conceptions according to which freedom of conscience is seen as detached from the freedom of religious cults, not including freedom of conscience the possibility of believing or not believing, that is to say of having or not a belief, each man being free to form a religious conviction on nature or society or on the contrary to be an atheist, while freedom of worship would be the right to practice a religion publicly.

1 Diaconu Ion, *Protecția drepturilor omului în cadrul Uniunii Europene, în Revista Română de Drept Comunitar nr. 1/2009.* (Diaconu Ion, *Protection of human rights within the European Union, in the Romanian Journal of Community Law no. 1/2009.*)

Seen from another point of view, freedom of conscience represents a fundamental right which consists in the authorization of the person to have an own conception of the world and to express it in suitable forms.

2. The categories of consciousness

There is a social consciousness which contains the freedom of ideas, theories, conceptions, feelings, states of mind characteristic of society at a decisive stage in its historical development.

Depending on the way of reflecting the material life of society, there are two levels of structuring of social consciousness: on the one hand the theoretical - ideological level which represents the organized, systematized spiritual life of society, materializing in conceptions theoretical, legal, political, ethical and on the other hand the psychosocial level which is presented as a product of a direct reflection of the elements or changes in the social structure taking the form of perceptions, representations, feelings, attitudes or collective preferences, which focus above all on the life experience of human communities, seen as a lived experience and not systematized in theoretical principles. The two levels are in constant exchange of information and inter-influence.

The two sub-structures of consciousness, also known as objective world consciousness and self-consciousness, as psychic organization, have their basis in the relationship between the individual and the outside world through the realization of the international model of different degrees of generality in the external environment.²

Consciousness is a social product with objective content and determined by real social conditions. In the Marxist conception “the production of ideas, of representations of consciousness is from the start directly combined with material activity and with the material links of men which constitute the language of real life”³. But, while society evolves, philosophy, religion, justice, become detached from the real and material mechanisms of life, becoming determining factors of this one.

2 Petrescu Oana Măriuca – *Procedura aplicabilă în fața instanțelor comunitare*, Editura Wolters Kluwer, București, 2008. (Petrescu Oana Măriuca - *Procedure applicable before the community courts*, Wolters Kluwer Publishing House, Bucharest, 2008).

3 Voicu Marin – *Curtea Europeană a Drepturilor Omului - 50 de ani de existență (1959-2009)*, Editura Universul Juridic, București, 2009. (Voicu Marin - *European Court of Human Rights - 50 years of existence (1959-2009)*, Universul Juridic Publishing House, Bucharest, 2009).

One of the forms of social consciousness is also religion, the expression of a “consequent dogmatism”, a complex social phenomenon, because it is produced by the consciousness of man, it lives by it. , evolves and dies at the same time as this one, because there is no other consciousness apart from human consciousness. Social consciousness, therefore, and also religious consciousness, is the expression of a society where man manifests himself as a religious subject, conveying religious thoughts, experiences, feelings of belief, fear, fear of natural forces which exists in consciousness, in the human mind.

Directly influenced by the variable elements of which it is composed, moral consciousness is in a permanent state of formation, and development, by education. Within this category are found several types of consciences that obey the moral law. A just or true conscience compels man to accomplish something or prevents it, in accordance with the provisions of the moral law. Unjust or false conscience is contrary to true conscience, causing man to do what is forbidden by the moral law. Safe conscience manifests itself when a duty is necessarily imposed when one is prevented from committing a bad deed.

Hesitant consciousness is that which cannot be decided between two opposing manifestations, or which finds equally strong justifications, both to commit a fact, and to prevent it. From the point of view of the intensity of functioning, consciousness is awakened when it is ready to respond promptly and on the spot to any situation or question and asleep when it does not respond to all violations of the moral law. There is also a scrupulous conscience dominated by the fear of violating established norms, having as a characteristic feature the feeling of insecurity and finally the pharisaical type consciousness which allows the performance of wrong actions but forbids slight deviations, being scrupulous to judge others but tolerant of judging oneself.

Through moral consciousness we make the connection between action and law, which penetrates our interior, makes us feel coercive, and makes us put it into practice.

3. The Regulation of Freedom of Conscience in the European Convention on Human Rights

Freedom of conscience is one of the first freedoms in the catalog of human rights, especially because religious freedom as part of that freedom

has known and continues to have a specific, long-standing history, many cases of intolerance, excommunications and prejudice.⁴

Against this historical background, the role of law has stood out above all from a civilizing and pacifying point of view. Over time, three conceptions of the notion of freedom of conscience have been retained. Thus, in a first conception, religious freedom would also encompass the freedom of conscience. In another, freedom of conscience and religious freedom were considered two separate freedoms. Finally, according to a broader theory, also accepted today, freedom of conscience has a wider scope, also encompassing religious freedom.⁵

Paragraph 1, art. Article 9 of the Convention states that everyone has the right to freedom of conscience, including the modification of the conviction and its manifestation individually or collectively, in public or in private.⁶

It follows from the highlighting and realization of the general legitimacies mentioned in the Convention that these provisions ensure the passage of the individual and society into the empire of freedom. Freedom, seen as a known and understood necessity, defines very well the adaptive instrumental value of consciousness.

Generally, respect for freedom of conscience is affirmed by the recognition of the unlawfulness of all discriminatory attitudes based on a thought expressed or supposed to worry in some way a person based on his opinions.⁷

4 Marilena Marin, Alina Popescu, *The European Convention On Human Rights-The Freedom Of Thought, Conscience And Religion*, SEA-Practical Application of Science, vol. 2, issue 3 (5), Fundația Română pentru Inteligența Afacerii, Editorial Department, pp. 437-444, 2014. (Marilena Marin, Alina Popescu, *The European Convention On Human Rights-The Freedom Of Thought, Conscience And Religion*, SEA-Practical Application of Science, vol. 2, issue 3 (5), Romanian Foundation for Business Intelligence, Editorial Department, pp. 437-444, 2014).

5 Ovidiu Predescu – *Convenția Europeană a Drepturilor Omului și implicațiile ei asupra dreptului penal român*, Lumina Lex, București, 1998, p.103. (Ovidiu Predescu - *European Convention on Human Rights and its implications on Romanian criminal law*, Lumina Lex, Bucharest, 1998, p. 103).

6 Dragoș Chilea, *Dreptul European al liberăților fundamentale*, Editura Europolis, 2001. (Dragoș Chilea, *European Law of Fundamental Freedoms*, Europolis Publishing House, 2001).

7 Remy Cabrillac, Marie-Anne Frison-Roche, Thierry Revet - *Libertes et droits fondamentaux*, 7e edition. Dalloz, Paris, 2001, p.354. (Remy Cabrillac, Marie-Anne Frison-Roche, Thierry Revet - *Freedoms and fundamental rights*, 7th edition. Dalloz, Paris, 2001, p. 354).

4. The Freedom of Conscience in the Constitution of Romania

According to article 29 of the Constitution of Romania, under the general name of “freedom of conscience” is enshrined freedom of thought and opinion, as well as freedom of religious beliefs.

Freedom of conscience is a fundamental human right, but it concerns in equal measure the fundamental rights of the State, the right and the obligation of the State to impose on all rules of cohabitation.⁸

From a legal point of view, freedom of conscience, as formulated in our fundamental law, represents a single right, a single freedom which, as we have seen, encompasses several aspects, which must be analyzed together. Article 29 of the Constitution of Romania, gives every natural person the right to have their own conception of the world.⁹

Thus, man’s conscience should not be influenced by administrative means, but should be the result of his freedom to think and express his thoughts. Any constraint constitutes a violation of this natural right; no one can be forced to adopt an opinion or to adhere to a religious belief, contrary to his convictions.¹⁰

To be a follower of a religious cult or to be an atheist, that is to say a follower of a scientific conception of nature or of society is a personal problem for each individual, but what is required is the general observation according to which the human being has always aspired to the knowledge of the reality which surrounds him, to the comprehension of the mysteries of the world and of the life.

And as such freedom, without the freedom to express oneself publicly would be of no value, Article 29 (2) of the Constitution goes on to assert that “Freedom of conscience is guaranteed; it must be manifested in the spirit of tolerance and reciprocal respect”¹¹. Within

8 Henri Oberdorff, Jaques Robert – *Libertés fondamentales et droits de l’homme*, 5^e edition, Montchrestien, Paris, 2002. (Henri Oberdorff, Jaques Robert - *Fundamental Freedoms and Human Rights*, 5th edition, Montchrestien, Paris, 2002).

9 Marilena Marin, *Protecția Juridică a Drepturilor Omului între Cutumă, Lege și Jurisprudență*, Management Intercultural, Volumul XVI, Numărul 30 / 2014, ISSN Online: 2285 – 9292, Iași, pp. 122-126. (Marilena Marin, *Legal Protection of Human Rights between Customs, Law and Jurisprudence*, Intercultural Management, Volume XVI, Number 30/2014, ISSN Online: 2285 - 9292, Iași, pp. 122-126).

10 Ovidiu Predescu – op.cit., p. 105.

11 Constituția României republicată, îngrijită de Florin Ciutacu, Editura Themis Cart, București, 2007. (The Constitution of the Republic of Romania republished, edited by Florin Ciutacu, Themis Cart Publishing House, Bucharest, 2007).

this legal framework the freedom of philosophical materialist scientific convictions as well as confessional ones recognized by Romanian legislation is affirmed.

To assert that the state guarantees freedom of conscience means that the state obliges itself to respect this freedom, but in equal measure it commits itself to prevent the violation of it by any other person.¹²

Generally, conceptions of the world are religious or secular. Man's consciousness cannot and must not be directed by administrative means, but it must be the result of his freedom to think and to express his thoughts. Any constraint is a violation of this natural and imprescriptible right, it is a cripple of the human spirit. That is why the Constitution establishes that no one can be forced to adopt an opinion or adhere to a religious belief, contrary to his beliefs.¹³

To ensure the free and boundless development of spiritual creation, the liberation of men from the domination of mysticism, their liberation from the grip of ignorance, the State and socio-cultural mechanisms, as well as education provide training of the new scientific consciousness of men, based on knowledge of the principles of the development of the world and of society.

Bibliography

- Cabrillac, Remy, Marie-Anne Frison-Roche, Thierry Revet, *Libertes et droits fondamentaux*, 7e edition. Dalloz, Paris, 2001, p. 354. (Cabrillac, Remy, Marie-Anne Frison-Roche, Thierry Revet, *Freedoms and fundamental rights*, 7th edition. Dalloz, Paris, 2001, p. 354).
- Chilea, Dragoș, *Dreptul European al liberăților fundamentale*, Editura Europolis, 2001. (Chilea, Dragoș, *European Law of Fundamental Freedoms*, Europolis Publishing House, 2001).
- Chilea, Dragoș, *Drept internațional public*, Editura Hamangiu, București, 2007, p. 296. (Chilea, Dragoș, *Public International Law*, Hamangiu Publishing House, Bucharest, 2007, p. 296).
- ****Constituția României republicată*, îngrijită de Florin Ciutacu, Editura Themis Cart, București, 2007. (The Constitution of the Republic of

12 Dragoș Chilea, *Drept internațional public*, Ed. Hamangiu, București, 2007, p.296. (Dragoș Chilea, *Public International Law*, Hamangiu Publishing House, Bucharest, 2007, p. 296)

13 I. Muraru, E.S. Tănăsescu, *Constituția României – comentariu pe articole*, Editura C.H. Beck, București, 2008. (I. Muraru, E.S. Tănăsescu, *Romanian Constitution - commentary on articles*, C.H. Beck, Bucharest, 2008.)

Romania republished, edited by Florin Ciutacu, Themis Cart Publishing House, Bucharest, 2007).

- ✦ Diaconu, Ion, *Protecția drepturilor omului în cadrul Uniunii Europene*, în Revista Română de Drept Comunitar nr. 1/2009. (Diaconu Ion, *Protection of human rights within the European Union*, in the Romanian Journal of Community Law no. 1/2009).
- ✦ Marin, Marilena, Alina Popescu, *The European Convention On Human Rights-The Freedom Of Thought, Conscience And Religion*, SEA-Practical Application of Science, vol. 2, issue 3 (5), Fundația Română pentru Inteligența Afacerii, Editorial Department, pp. 437-444, 2014. (Marin, Marilena, Alina Popescu, *The European Convention On Human Rights-The Freedom Of Thought, Conscience And Religion*, SEA-Practical Application of Science, vol. 2, issue 3 (5), Romanian Foundation for Business Intelligence, Editorial Department, pp. 437-444, 2014).
- ✦ Marin, Marilena, *Protecția Juridică a Drepturilor Omului între Cutumă, Lege și Jurisprudență*, Management Intercultural, Volumul XVI, Numărul 30 / 2014, ISSN Online: 2285 – 9292, Iași, pp. 122-126. (Marin, Marilena, *Legal Protection of Human Rights between Customs, Law and Jurisprudence*, Intercultural Management, Volume XVI, Number 30/2014, ISSN Online: 2285 - 9292, Iași, pp. 122-126).
- ✦ Muraru, I., E.S. Tănăsescu, *Constituția României – comentariu pe articole*, Ed. C.H. Beck, București, 2008. (Muraru, I., E.S. Tănăsescu, *Romanian Constitution - commentary on articles*, C.H. Beck, Bucharest, 2008).
- ✦ Oberdorff, Henri, Jaques Robert, *Libertés fondamentales et droits de l'homme*, 5^e edition, Montchrestien, Paris, 2002. (Oberdorff, Henri, Jaques Robert, *Fundamental Freedoms and Human Rights*, 5th edition, Montchrestien, Paris, 2002.)
- ✦ Petrescu, Oana Măriuca, *Procedura aplicabilă în fața instanțelor comunitare*, Editura Wolters Kluwer, București, 2008. (Petrescu Oana Măriuca - *Procedure applicable before the community courts*, Wolters Kluwer Publishing House, Bucharest, 2008).
- ✦ Predescu, Ovidiu, *Convenția Europeană a Drepturilor Omului și implicațiile ei asupra dreptului penal român*, Lumina Lex, București, 1998, p.103. (Predescu, Ovidiu, *European Convention on Human Rights and its implications on Romanian criminal law*, Lumina Lex, Bucharest, 1998, p. 103).
- ✦ Voicu, Marin, *Curtea Europeană a Drepturilor Omului - 50 de ani de existență (1959-2009)*, Editura Universul Juridic, București, 2009. (Voicu, Marin, *European Court of Human Rights - 50 years of existence (1959-2009)*, Universul Juridic Publishing House, Bucharest, 2009).