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FROM LEGAL LIBERTIES TO ONTOLOGICAL FREEDOM

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Abstract

Any attempt in the sphere of humanities to characterize and explain man in his individuality, but also in the social existential context, relates to the issue of freedom. Freedom is essentially related to the human being, but also to the existential phenomenality of man. Man is the only created being whose fundamental ontological dimensions are freedom and spirit. In this study we briefly look into the concept of freedom not only as a moral value or category, but also as an ontological dimension of man. In this way we make the distinction between ontological freedom and the legal freedoms established or recognized by the legal norms. The legal liberties are a phenomenal expression of human existence whose legitimacy and motivation is conferred by the ontological dimension of human freedom. In this context, the main features of the legal freedoms and the practical importance of the ontological meaning are to be found in the freedoms consecrated in the law.

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INTRODUCTION

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

Father Dumitru Stăniloae said that man "is secrecy and light, it is a mystery of light." We might try to say that man is also a mystery of freedom, because by this own feature of him, to be free, he differentiates and opposes to the natural and temporary determinism, to the necessity of the repeating laws of nature, transfigures the existence from "what is" to what "must be" adding value and meanings to it. Through freedom as an existential given one can conceive and understand all the majesty and splendor of human existence, both in relation to himself, in relation to society, in relation to God, and to the whole universe.

ON LIBERTY AND LEGAL FREEDOMS

Although philosophy, legal sciences, anthropology, morals, and other disciplines abound in conceptualizations and theories and descriptions of human freedom (see Gînfălean, Tudoraşcu, Cojan, 2013), one cannot say that a full understanding of the meanings and senses of liberty has been reached, especially if regarded not only from the perspective of rationality, but as an existential given, as an ontological determination of man. That is why freedom is a mystery of man, but which does not mean skepticism or the inability of the reasoning to understand, but rather the fact that the capacity and vocation to deepen more and more in the deepest senses of ontological freedom. Although it is an existential given of the human being, freedom is alive, is not frozen into abstract

structures it rather relates to the becoming of man and society.

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

Kant, of course, remains one of the main thinkers who made an essential contribution to the phenomenology of human freedom in its moral dimension. The philosopher concluded the *Critique of Practical Reason* with a conclusion that synthesized his entire thinking and work: "Two things fill the soul with ever-new admiration and growing reverence, the more often and more persistently our reflection is concerned with them: the starry sky above me and the moral law inside me" (Kant, 2013: 214).

This profound and beautiful diction is, in fact, a rational basis for the unification of the two areas of human investigation, but also for the existence of man, respectively of nature and morality. It is also a basis for the entire moral conception of the philosopher from Königsberg. For a moral built on the basis of three postulates, two of which lie above the interpersonal relationships - *God and the immortal soul* - can be interpreted as uniting the high of the "starry sky" in which these ideas are projected with *the liberty* of the deepest self of man, there is a need for a different conceptual structure other than the one used to investigate nature, which means, as Kant points out, that concepts of practical reasoning are needed, which have an existential constitutive value. In this construction, the concept of freedom proves to be indispensable, due to its association with the rational being, the core of the deepest self of man. The Romanian philosopher, Constantin Noica, said that in order to reach freedom "he must be unfaithful to own self on his way towards himself". The moral ascendant of the liberty makes that through it the other *two rational ideas*, namely the existence of God and the existence of the immortal soul, to leave one's state of transcendental ideas, finding oneself in the moral immanence through which these can be understood also within certain proven limits. That is why Kant calls freedom the "keystone" of the whole system of pure reasoning. We have emphasized that in Kantian thinking and

even in philosophical rationalism also in Christian Protestant orientations, including in the pantheistic or deist ones, God is not conceived as a person, and soul and freedom are not as realities but as rational ideas.

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

The realistic and materialist philosophical thinking and pragmatism conceive freedom in relationship to necessity. Freedom is understood not as an essential aspect, defining, totally different from the current and temporary determinism, but rather as a consequence of this determinism. In other words, in the realism and ontological materialism, freedom is only a form of the necessity, of determinism, which it can overcome, but cannot transform or transfigure spiritually. The consequence is the subordination of freedom and, implicitly, of man to natural determinism. It is the materialist conception of freedom as a "necessity understood". This understanding of freedom as determined by the value, spiritual or juridical order is also found under more refined forms of the theological or philosophical thinking and indisputably is proper to legal thinking. The "order," no matter of what kind, expresses necessity, limitation and even coercion, all of which are contrary through meanings, to human freedom as existential given.

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

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

In this context, the question is whether there are fulfillments of liberty, even in an absolute sense without a recessive relationship with the order of

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

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

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

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

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

including the Constitution, or, in a wider sphere, the international treaties and conventions do not explain, characterize and define freedom, but only the *freedoms of man* which they consecrate.

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

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

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

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

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

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

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

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

particularities of each state, the system of government, the concrete forms of achievement of the state power, the relationships between state and citizens and, last but not least, the efficiency of the act of justice.

Regarding the complex relationship between the legal normative system and society, on the other hand, can be noticed that in the contemporaneity the legal system tends to have its own functional autonomy, in addition to the subjective or objective determinations which society transmits. The autonomy of the juridical tries to transform itself from a secondary, phenomenological and ideological structure into one with its own reality, with the power to impose its order to the social and natural order. In this context, the normatively consecrated legal liberties seek to determine the existential freedom of man by explaining, arranging and conditioning it. It is a situation contrary to natural reality; the phenomenology of the juridical must be conditional, determined by the existence of man, as a person, and by the particularities of social existence and not the other way round. It is an expression of dictatorship through law even in democratic societies, because the legitimacy of the legal norm lies, in such a situation contrary to nature, only in the will and interests of the governors, which paradoxically expresses on behalf of the people.

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

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

In this ideological context, we keep in mind that the legal freedoms, as a structural element of the juridical status of man, are based on the metaphysical principle of the coexistence of liberties, postulated also by just-naturalist, but also

by the 1789 French Declaration of Human Rights. It is a natural expression of the social existence of man, understood through the limits and not through the absolute of the existential freedom. In other words, in this phenomenal legal plan the freedom of man, as individual, approaches up to the freedom limit of his neighbor. It is about the distinction specific to law between "mine" and "yours", through which the legal liberty is not a spiritual opening but a closure within individual's limits. We believe that the legal norm, in this way, cannot address to the person, focused on the ontological idea of freedom, but only to man as individual, contained in the multiple structures of the social scaffolding. Obviously, such a reality is not by itself negative, because the dimension of the social phenomenality of man is a reality in which the human essence manifests itself.

ASPECTS OF THE ONTOLOGICAL DIMENSION OF FREEDOM

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

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

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

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

steadily, existentially into good and truth. The facts of the freedom of spirit, even if defined and outlined, are openings to the infinity of the spiritual truths. The freedom of spirit is not a freedom of the law it is a *freedom of grace*, working together with man and Holy Spirit. In a single word, the freedom of the spirit is the freedom of man as a person in this world, but not within the boundaries of this world, which spiritualizes itself and the whole universe. It should also be emphasized that the spirit is not always the reasoning, always abstract, limited and impersonal, but the authentic living through the understanding feeling in truth and in life. Lord Jesus said, "I am the way, the truth, and the life (John 14: 6). Being with God this is the freedom of spirit as a fulfillment, as fullness.

The truths of faith, found in all Orthodox theological thinking, affirm and claim that "man was created as a free being." It is about the ontological freedom, inherent to human being, and not the freedom of value of the rational categories or legal norms.

The meanings of ontological freedom or spirit are also illustrated in Orthodox theological thought. In his works, Saint Augustine distinguishes between the so-called minor freedom and, on the other hand, the major liberty of man. The ontological freedom has two different meanings: "By freedom is meant both the initial, irrational freedom that precedes good and evil, determining their choice, as the intelligent freedom, the final freedom in good and in truth." (Berdiaev, 2009: 145). It is the freedom of man to choose between good and evil, between truth and lie, between value and non-value, and ultimately, to choose between the world, subjected to natural and biological determinism, with all its precariousness, and on the other hand, the true and eternal life in God.

The second form of ontological freedom expresses a supreme spiritual principle: which is the freedom of truth and good, the natural order in which man should be. "And ye shall know the truth, and the truth shall make you free" (John 8:32). And the spiritual knowledge, God's knowledge, does not have the boundaries of thinking, as Professor Galeriu pointed out.

The Savior also said, "So if the Son will make you free, you will be free indeed" (John 8:36). This freedom is the one given by the incarnated Logos, as a gift of God, and at the same time, the man's vocation to know God, which is "the way, the truth, and the life." It is the absolute spiritual freedom of life in communion of love with God and, at the same time, of the life full with the uncreated energies of divinity. St. Paul the Apostle stated that "where the Spirit of the Lord is, there is freedom" (II Cor. 3:17).

The theological thinking has presented many aspects regarding the relationship between the two forms of ontological freedom, which is: the

freedom of choice, involving the freedom of human conscience, and discernment of distinguishing good from evil and, on the other hand, the supreme, ontological freedom as the ultimate goal of human existence, that is to live effectively in good and in truth.

It has been said that accepting the freedom of choice, including choosing evil, and refusing the good given by God, is contrary to human nature and, as a result, cannot be accepted. It is the theological conception promoted in particular by the Catholic thinking and some forms of Protestantism. Criticizing this conception, Nikolai Berdiaev notes that "human freedom is not only the freedom in God, but also the freedom related to God. Man must be free in regard to God, to the world and to his own nature" (Berdiaev, 2009: 147). Therefore, the possibility of choosing between good and evil as a determination of the human being is essential to explain the communion between man as a person and God. This connection between man and God is not imposed it is not a result of an inexorable normative determinism, or of an order in which man participates as a simple element. If so, there would be no possibility of a connection and, moreover, of a communion of faith and love between man and God, and man would be a simple element subjected to an absolute determinism, be it spiritual and not a free person, endowed with conscience.

The same author we mentioned above emphasized: "If we only admit the liberty given through truth, given through God, and reject the freedom of choice and acceptance of truth, we are fatally engaged into tyranny and the freedom of the spirit is replaced by its determination" (Berdiaev, 2009: 146). In fact, the idea of a single freedom of the order of good and truth had consequences in the plan of philosophical and theological thinking. It is, in fact, the expression of a freedom that arises from necessity, either of a divine order imposed on man or of a social order, also imposed, in the idea of good and full happiness. We have to notice that the Communist order wished to impose on man its own order, which it considered to be of the good, truth and absolute happiness. Therefore, any attempt to understand the spirit, through coercion and normative necessity, cannot be accepted as a way of ontological freedom. "Catholic and Byzantine theocracy, like atheist socialism, are naturally inclined to deny human freedom, to coerce and organize human life in good, that is, to identify freedom, either with the necessity of a divine organization or with the necessity of a social organization of life." (Berdiaev, 2009: 160) The consequence is that man becomes a simple element of natural determinism in which his consciousness is basically annihilated by the desire to consider freedom only in the sphere of good and truth and to exclude the possibility of evil as a free choice of

man. It is true that the same author quoted above notices that "man deprived of the freedom of evil is but an automaton of good." (Berdiaev, 2009: 150)

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

Undoubtedly, freedom of choice cannot be denied as a dimension specific to the human being, through which man can complete oneself. The devoutly Varsanufie and John stated in this regard: "God has made man free, so that he may surrender towards good. But inclining towards good, by free will, he cannot do it without the help of God. For it is written, "It is not from he that pleases, neither from he that executes, but from the God who mercifully pleases" (Romans 9:16). If, then, man surrenders his heart onto good and calls God for help, God, having his good will in regard, gives strength to his work. Thus they both meet; freedom of man and power of God. For good comes from God, but it is fulfilled by His saints. And so God is glorified in them all, and He glorifies them" (Paraschiv, 2013: 281).

This is the synthetic, dogmatic and rational explanation of the unity of human ontological freedom, namely the freedom to choose and the freedom to live in good and truth. It is, in fact, the explanation of the theandric work between man and the Holy Spirit to reach the experience of freedom in truth. It also means the dynamic character of freedom, which is, in essence, the becoming of man in Christ, with Christ and towards Christ. This becoming involves a most important aspect of the freedom specific to the freedom of spirit and which we do not encounter in the existential precariousness of man. It is the *liberation* as the constituent moment of ontological freedom. It is the liberation from passions, the cutting of your own will, and the unconditional obedience to God's will, is the liberation proper to the man who has replaced his own thoughts with the thoughts of God. Liberation is synonymous with the acquisition of the virtue of humility as a foundation for the other virtues.

CONCLUSIONS

Father Dumitru Stăniloae said: "for man has a liberty that can be let enslaved, to which one can more or less give up. God gave man a freedom related to his own being, left to grow inside himself, as his own being, towards perfection or union with God. He also let man the dignity to preserve himself free, to strengthen himself in it.

Man can say, "I am free when I want to be free." But he can be free through the will to be free because it has freedom also as a gift related to his being (ontological). Freedom is also a gift, but also a work of it. Therefore, any time in the earthly life, man can lose and regain his freedom. But because the absolute freedom only God has, the created beings can only have, maintain and regain it in union with Him" (Stăniloae, 2009: 357).

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

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

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

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