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# The resistance of totalitarian mentalities and some difficulties of the rule of law construction in the Romanian cultural and political space

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**Abstract:**
After the fall of the communist regimes, Romania and the Republic of Moldova adopted constitutional frameworks inspired by the Western post-war constitutional model, a model that had been built as a reaction against Nazism, i.e. to normatively counteract the objective social hierarchies, conceived as natural frameworks of legitimate domination. As a result, Western constitutional systems focused on equality, even if they remain pluralistic at the level of constitutive principles. However, their imitation by the post-communist systems, which broke away from regimes that exacerbated equality, created a major problem for the new European democracies: objective law itself generates institutional reactions directed against individual freedom, social elites and their pluralistic structure, private property and economic freedom, which apparently cannot be understood as a guarantee of political freedom. They also lead to major dysfunctions in the political structure of society in terms of the relationship between state law and the self-regulation of the market economy. The basic structural conditions of liberal societies and legal systems are thus called into question. Starting from this general framework of analysis of post-communist constitutional systems, this study will show how the fundamental norms of our states or the interpretation given to them should be refocused in order to stimulate pluralism, the effective protection of private property and economic freedom.

**Keywords:** *pluralism, liberal democracies, social state, rule of law, welfare state, economic freedom, presumption of lawful acquisition of wealth.*

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## The resistance of totalitarian mentalities and some difficulties of the rule of law construction in the Romanian cultural and political space

### A. The pluralism of constitutive principles in liberal democracies and its constitutional transposition

Twentieth-century totalitarianisms theorized and practiced ideological monism. Their legal systems turned a doctrine considered as the only true one into norms and eliminated all others from the basic structure of society, that is, in their capacity as the foundation of the political and, consequently, of the state and its law. This monism was built against modern liberal political theories, which advocated the need for ideological pluralism – moral and comprehensive – and a fundamental pluralistic structure of society. Liberal society and its political organization must be pluralistic, which means that pluralism "is not a mere historical condition that must quickly disappear; on the contrary, it is [...] a permanent feature of the public culture of modern democracies" (Rawls, 1993: 251). Consensus cannot therefore have as its object, in modern liberal democracy, the ideological basis of society. Democracy is based precisely on the questioning of this basis. Consensus, when it has such an object, can only lead to totalitarianism. What John Rawls proposed then seems logical: consensus can only result on the basis of ideas that are common to comprehensive doctrines. It results in an intersectional consensus, which "exists in a society when the political view of justice that governs its basic institutions is accepted by each of the comprehensive, moral, philosophical and religious doctrines that have been lasting in that society over generations" (Rawls, 1993: 245-283). This consensus is primarily procedural. Everyone agrees that we can disagree, as long as we agree to settle our conflicts peacefully. And this regardless of the form that violence might take. The fair procedure of balancing the pluralistic society is called democracy. It is not a doctrine, which eliminates other doctrines, but a dialectical balancing of all doctrines.

The constitutional law of liberal democracies ensures the peaceful coexistence of social structures which promote various conceptions of the good society. It is equidistant to parties, to religious cults, to economic structures, to employers, unions, etc. For the liberal state, pluralism is a condition and a guarantee of the freedom that it is obliged to guarantee to its subjects. At the constitutional level, the priority of the just over the good means that the procedures for judging the fair balancing of the conceptions of the good are, from the point of view of the constitution of the legal order, logically prior to the judgment of the substance of the rules which transpose one or another view of the good society.

Such a political society is pluralistic at all its levels, including the one of the constitutive principles. The constitutional system of liberal democracies is necessarily founded on several principles, themselves in a dialectical balance, which weigh each other (Dworkin, 1985) according to the circumstances that particularize the basic structure of the given society, without being able to eliminate each other. As a rule, the principles used to find a modern liberal democracy are freedom, equality and solidarity. A society based excessively on individual freedom will create ever greater inequalities, therefore, in order to achieve social justice, equality must be revalued through some form of redistribution of goods and social benefits. If equality is exacerbated, in order to achieve a just society, individual freedom must be revalued, by building mechanisms of differentiation, by understanding equality as a right to difference, etc. In the just society, "all other principles operating at the level of society must be subordinated to this ideal of justice. Only in this way can justice play the role of binder of all other principles and, at the same time, of their regulatory principle, by limitation. It therefore has a positive role,

because it ensures social cohesion, and a negative one, because it ensures that none of the other principles will become predominant." (Dogaru, Dănișor & Dănișor 1999: 78)

When the peoples of the former popular 'democracies' revolutionized the political and, consequently, constitutional system, they tended to return, in opposition to egalitarian totalitarianism, to the liberal pluralistic regime sketched above. But, for this return to be effective, they had to balance the excessive equality imposed by this form of totalitarianism and the solidarity that no longer allowed difference, by establishing a constitutional framework based - not exclusively, but predominantly - on individual freedom. This oppositional privileging of freedom as a constitutive principle over equality and solidarity was not transposed into post-communist constitutions. The first cause is the misunderstanding of the fact that moral and comprehensive pluralism is a condition for the existence of a just society. The monist mentality had a much greater degree of resistance than in the societies that opposed Nazi totalitarianism. Most people in post-communist societies still fail to understand a society which, having several foundations, seems to have none any longer. They have the nostalgia of unity. The second cause is mimetism. If, about the socialist statist systems, it could be justly said that they were not located to the left, but to the East, about the post-totalitarian ones it can be said that they are not oriented to the right, but to the West. As a result, the new post-communist democracies were tempted to copy the constitutions of Western states and focus, like them, on equality and solidarity.

The constitutional framework of post-revolutionary Romania and independent Moldova was no exception. The constitutions in the Romanian cultural space are, consequently, today centred around unity, equality and solidarity. Liberty is hardly detectable as a constitutional principle in these constitutions. Thus, in the Constitution of Romania, art. 4, which imposes the foundation of the state, mentions the unity of the people, instead of the indivisibility of the legal order in relation to the subjects, imposes the solidarity of citizens as the foundation of the state and establishes as a founding principle equality as non-differentiation in relation to the criteria of affiliation to the primary identification groups, but it does not include any rule that imposes difference or freedom as the foundation of the state. Apart from a reference to the free development of human personality, within art. 1(3), which imposes, also in continuation of a philosophy built against liberalism, supreme values, instead of principles (Dănișor, 2022: 33-49), no provision in the title on the general principles of the Romanian Constitution refers to freedom. The systemic problem that the Constitution had to remedy in 1991 was the identity imposed by communism and the equality that prevented freedom from existing, which would have imposed a principled valorization of freedom, meant to ensure the differentiation of people based on merit and the (re)creation of social elites, which can ensure the pluralistic structuring of the new society. Thus, acting at the constitutional level, Romania slowed down, if not missed, the process of establishing pluralism, which should be, as the Constitution itself states, a condition and a guarantee of constitutional democracy.

The difficulties of structuring the party system in the Romanian cultural space are also due to the normative exacerbation of equality in a system that wants to get rid of too much equality, even if some additional causes (Dănișor, 2009a: 9-17) are brought to this paradoxical structuring of the principle base of society. The Romanian political parties mimic the pluralistic structuring on the cleavages typical of the West, which our society cannot make functional, and are centred, at most, around some conjunctural alternative government programmes, but not around different ideologies. They are all,

like the constitution, egalitarian, unitarist, therefore centralist and located to the west, never to the right. As a result, democracy is conceived as a doctrine, not as a procedure of fair arbitration between doctrines, and its dialectical mechanisms are perceived as generators of disorder, not as guarantees of freedom. The state is necessarily unitary, this form that excludes pluralism from the legal order being non-revisable (Dănișor, 2018a: 17-43), and the separation of powers is understood rather as a dysfunction, which prevents the state from being effective, than as a guarantee of freedom (Dănișor, 2009a: 9-17).

The state governed by the rule of law, i.e. what should be the system of fair means of guaranteeing human rights, even against democratic political power, is perceived as an adversary of the power of the people, which affects its sovereignty, and when it is required by international treaties, usually of the Council of Europe and the European Union, it is perceived as a system of external domination, as a new kind of imperialism, which affects the independence of the state (Dănișor, 2017a: 9-28). The distortion of the understanding and normative function of the rule of law is accentuated by its transformation into a "social" state governed by the rule of law, which presupposes a dominance of substance over form, of the unity built by merging people into a society based on a substantial doctrine against the fair dialectic of procedural arbitration between doctrines. This type of rule of law focuses on the idea of derogating from *formal* equality to ensure real equality, an idea that had been central to Marxism and consequently to communist regimes. The outcome is the temptation to slide, more or less subtly, from the social state governed by the rule of law to the socialist state and from ensuring real equality of opportunities to imposing material equality. Hence the resistance of the institutional reluctance to private property, still perceived as necessarily constituted by the theft of values that naturally belong to the people, in order to satisfy the selfish needs of some, and the perception of those who have made wealth as presumed thieves, who must prove that they are innocent and that their private property is not theft. The economy, regulated as "market" economy by the Romanian Constitution, is in tension between the self-regulation of the markets and the need for state intervention to ensure real equality, through a redistribution that, under the conditions described above, can only be disproportionate. Economic freedom is so undermined by this substantification of democracy and socialization of the state, which no longer seems to be able to be political (the exact character that was denied to it by Marxist theory, which would have wanted a social state, in which the political and legal superstructure was to disappear), so that even more than 30 years after the Revolution, we still have more employees in the public sector than in the market economy, and the state distorts the self-regulation of the markets on a daily basis.

To correct these tendencies, imprinted on the system by a problem-centred constitutional framework, we should interpret the constitutional provisions in a liberal way. Sometimes it happened, as in the case of the interpretation of equality made by the Constitutional Court of Romania, which became "right to difference" (Decision no. 70/1993). But it did not happen very often, and when it did, not as sharply and substantially.

We will address, in the following, from a constructive point of view, three fundamental problems of this constitutional framework and the trends it imprinted on the political and legal system in the space of post-communist Romanian culture: the social state governed by the rule of law, the relations between the generalized welfare state,

also called the welfare state, and the market economy and the presumption of lawful acquisition of wealth.

### B. The social state governed by the rule of law

In 1991, the Romanian constitution opted for the substantial form of the rule of law - the social state governed by the rule of law, without expressly providing for the liberal character of the state and established through art. 16 of the Constitution equality as a sovereign principle in terms of rights and freedoms, not freedom, a structuring principle that would have enabled the hierarchy of society according to skills and merit, impossible in the previous totalitarian regime.

The option for the social state governed by the rule of law is not, *per se*, risky for the protection of rights and freedoms imposed in the state governed by the rule of law as the goal of law. On the contrary, it involves the correction of the liberal formalist vision on equality, by ensuring not only justice as a formal balance, but social justice, which involves a redistribution of social benefits and a material conception of equality (Dănișor, 2009b: 48), favouring the access of vulnerable subjects to the benefits of public space, even though social assistance and protection measures. In the social state governed by the rule of law, equality "authorizes derogatory discriminations from formal equality, if they ensure equal opportunities for those who are in unequal situations and equal access to some social benefits for those who suffer because of a relevant difference" (Dănișor, 2018b: 666). Differential treatments are imposed, not in an egalitarian way, but so that factual, natural or social inequalities do not impinge on rights, the preservation of the particularities that differentiate the beneficiaries of equality having to be respected (Nica, 2012: 19-28).

What kind of solidarity, how much of it, in favour of whom and for what purpose can the state impose and, correlatively, how far can it push the correction of inequalities, through the establishment of differentiated legal regimes, in order to fulfil its social mission? The answer required by the rule of law is: a solidarity compatible with the modern idea of organic solidarity between different subjects, which cooperate and "contribute, by playing a social role different from that of the others, to the satisfaction of the needs of all" (Dănișor, 2020), without the differences being erased, and not a mechanical solidarity between uniformed subjects, instrumentalized by the group and fully integrated into the community, typical of totalitarianism (Dănișor, 2020); a punctual solidarity, a means, not an end, only if and only to the extent that it is absolutely necessary, as the only solution to ensure the rights of the vulnerable ones who are in a relevantly different situation or made vulnerable by social inequities or injustices, and not to tend to economic equality; (Ionescu & Dumitrescu, 2017: 22); a solidarity that does not result from calculations of social utility (Dănișor, 2018b: 484) and that is not placed at the service of the totality, of the generic public interest, of a good version of society, but of the vulnerable ones, so that equality remains that of opportunities, as equal start and access, excluding restrictive consequences on the rights of the other subjects and which would equalize evenly. The limit of remedying inequalities, through relevantly different legal treatments, is to support the manifestation of freedom. Redistributions due to solidarity cannot create material equality, justice must be activated to balance the excesses of solidarity (Dănișor, 2018b: 302). This type of response is imposed by the demands of equality, including as a right to difference and by art. 53 of the Constitution on the restriction of the exercise of rights and freedoms

(Dănișor, 2008: 3-22) in the state governed by the rule of law: only freedom can limit freedom.

On several occasions, the legislature's answers to the above question, validated by the Constitutional Court (hereinafter, the CCR), did not activate punctual solidarity, to correct excesses of freedom and inequalities that affected access to the benefits of public space and freedom of equal participation in its construction. The social mission of the state was activated with the jeopardy of rights, showing egalitarian tendencies: through the establishment of some obligations of solidarity, we moved towards real equality. For example, the CCR considered, constitutionally, an identical treatment applied to subjects in different situations, which extended the tax norm to non-taxable subjects, in the name of the idea that those who benefit together from an income must be united in terms of tax burdens, regardless of who is the formal holder of the income (Decision no. 49/1994), (Dănișor, 2018b: 300, (Nica, 2013: 71-72). Also, the CCR validated the taxation of pensions for the part that exceeded a certain amount, citing the social state and the fact that such taxation is "a social measure by which the national public budget is increased", which "creates the budgetary possibilities for the corresponding increase in pensions, as well as for ensuring a minimum decent standard of living for all citizens of the country', validating the restriction of the right to a pension in order to ensure the right to a pension and a decent standard of living, without taking into account that the state is legally social and the needs of the national public budget cannot justify the restriction of an earned right (Dănișor, 2009b: 168) (Nica, 2013: 193-194).

The explicit establishment, through the constitutional revision of 2003, of generic legal solidarity between citizens as the foundation of the Romanian state, in art. 4(1) of the Constitution (Dănișor, 2009b: 167), aggravated the risk of sliding from the liberalism of the rule of law to totalitarian manifestations, in which "the transformation of equal opportunities and access due to a balanced redistribution into a material equality" would take place, from "the solidarity that creates a right to those in a situation of vulnerability due to a relevant difference in situation, to a solidarity as obligation", as long as "in the name of legal solidarity between citizens, some will contribute more and others will benefit more. But this inequality is an exception, not a rule. The problem is that in our Constitution it is transformed not only into a rule, but into the foundation of the state" (Dănișor, 2009b: 167).

The problem manifested itself especially in the context and trace of the economic crisis. The spectrum of real equality became visible through the imposition of solidarity; its siren song ("let some contribute more so that others may benefit more") has become audible, echoing the achievement of material equality through solidarity that excuses unjustified discrimination objectively and reasonably. Thus, a legislative proposal of 2010, supported by the Government and rejected in Parliament only in 2012, provided for the restriction of property rights, through taxation, in order to create a solidarity fund for the benefit of "the most disadvantaged categories of the population, primarily pensioners", without respecting the constitutional requirements of the restriction of the exercise of rights (Nica, 2013: 70-71), the rights for which the proposed measure was required not being individualized (Dănișor, 2018b: 285). The totalitarian reflex inclined towards the creation of a good society, in which economic equality prevails over rights.

The siren song was also heard on the occasion of the CCR's invocation of social solidarity [and not the solidarity established by art. 4(1) of the Constitution], in order to

validate the reduction of judges' salaries, on the occasion of validating the reduction of salaries of state employees, for the defence of economic security which claimed the restoration of the budget balance and in the context of considering the amount of contributory pensions as impossible to reduce, the Court refusing to analyse it from the perspective of art. 53 of the Constitution. Incorrectly interpreting these provisions, the CCR validated relevant differences in treatment between pensioners and state employees, as well as between state and private employees, whose constitutional character it did not justify from the perspective of the equality requirements established in its own case law (Nica, 2013: 140-149) (Decision no. 872/2010). Economic calculation prevailed. The state transferred the task of finding the most appropriate solution to satisfy the rescue of the economic being of the state onto some subjects on whom it imposed solidarity, restricting their freedom. Solidarity in favour of the instrument – the state, which should have served the purpose – the protection of rights, without relevant unjustified different treatment. The state also evaded the obligation to justify the fairness of the arbitration procedure between the multiple possibly good options for protecting national security, which made the measure unnecessary in a democratic society, as required by art. 53 of the Constitution, whose purpose is freedom (Dănișor, 2017a). Typically totalitarian, priority was given to the good, not the just, to the totality, not to individual rights. In the name of "the future well-being of society, representing, in the last resort, each of the individuals that make it up (...)" (Decision no. 872/2010), the state transformed the subjects whose rights were affected into the saviours of the general interest, invoking solidarity to relieve itself of the role of the right and just saviour.

So that equal opportunities will be achieved through solidarity, and the relevant character of the differences in situation will not impose a different relevant treatment with a uniformization effect, but only with an effect of correction of disproportionate imbalances, it should be analysed in relation to a unitary criterion, which it is not present in the case law of the CCR, including that regarding social protection measures (Dănișor, 2018b: 302) (Nica, 2013: 238-244). In the context of the same economic crisis, the CCR considered, again, that the taxation of the part of the pensions that exceeded a certain amount, exempt from tax, respected equality and the fair settlement of fiscal burdens. Solidarity was activated in favour of the right to health protection, through unequal treatment, against rights also depending on an effort of solidarity (Nica, 2013: 180, 193-197), tending towards equalization.

The misunderstanding of interventionism in the social state was translated into the principle terms of the CCR as follows: "the degree of intensity of these interventionist measures may differ depending on the political vision and the economic conditions of the state at a given moment", the purpose of the social state being "to ensure both the economic and social well-being of citizens, as well as social cohesion, without denying the right of the public authorities to establish the concrete conditions for the achievement of this desideratum" (Decision no. 1594/2011), (Decision no. 785/2019), (Muraru & Tănăsescu). Public authorities do not have rights, but powers; their exercise, regardless of desiderata, is subject, in the state governed by the rule of law, to the protection of rights, not to arbitrariness, nor to the egalitarian spirit, nor to the primacy of the economic over the legal. Social cohesion excludes the imposition of solidarity that fails in real equality: to impose equality, insofar as it is not natural, would be to institute discrimination (Decision no. 107/1995).

To interpret the social state governed by the rule of law and solidarity as allowing restrictions of rights outside the liberal constitutional framework and economic equalization to be reached through arbitrary, insufficiently justified differences in treatment or based on differences in situation whose relevance is not clear attests, if not that the spectrum of real equality still haunts the Romanian state, at least the insufficient assimilation of liberalism and the mechanisms of the rule of law meant to safeguard freedom. Not excessive, but freedom. It remains one of the ideals of the 1989 Revolution, in the spirit of which, following the 2003 revision, art. 1(3) of the Constitution makes it mandatory to interpret the supreme values guaranteed in the democratic and social state governed by rule of law. To balance the excesses of equality and prevent their slide into totalitarian identity, freedom must remain the goal of the system: to freedom through equality, not the other way around.

### C. The (interventionist) welfare state against the (self-regulated) market economy and economic freedom

*The Welfare State* (Dănișor, 2017b) (Rosanvallon, 1981), which appeared in Europe at the end of the 19th century aimed at regulating the consequences of the industrialization process: accelerated urbanization, poverty, health and public security problems. Practically, the 'social problem' becomes the catalyst and engine for transforming the role of the state, into an active role of promoting a minimum of economic well-being, reducing social tensions and promoting social citizenship, a role highlighted through an accelerated regulation process.

The Welfare State becomes a type of state that tends to regulate all spheres of society, due to the new role of the state to protect the social and natural environment, the consequence in terms of rights and freedoms consisting in an amplification of state intervention at the level of the behaviours of individuals and groups of individuals. Thus, the essential role of the state, to protect individual freedom and to apply sanctions in the case of injuries to freedom, to create an institutional framework for the exercise of individual freedom, is refocused on the promotion and protection of some social values, with the consequence of amplifying state interventionism within the social scope, through regulation.

"The type of state that, through a more or less well-chosen term, we call the Welfare State - pointed out Tim Koopmans - is mainly due to the activity of the legislature. The first draft was made in the field of social policy, with the laws within labour, health, social security law; but, gradually, state interventions extended to the sphere of the economy (with laws on competition, transport and agriculture); and, finally, we have reached the present situation, with the expansion of the public sector, the exercise of a generalized state control over the economy, the responsibility assumed by the state in the matter of employment, the development of social assistance plans, the financing of activities that do not have a profitable purpose, regarding for example arts, or public works and the renewal of unhealthy urban centres" (Koopmans, 1978: 313-314).

In its capacity as a fundamental right, economic freedom represents a right of an economic nature, which includes several valences, all of which represent manifestations of the person's will to engage in economic relations (production, exchange, marketing, distribution, provision of services etc.) in order to obtain a certain benefit, valences resulting from concrete forms such as freedom of association, right to work, freedom of

trade and industry, freedom of enterprise, freedom of competition or contractual freedom. These valences compete to build an autonomous concept, that of economic freedom. As a fundamental right, economic freedom must be understood as autonomy-freedom, which involves the relationship of the individual with the public power, so that the latter has a series of specific positive and negative obligations in this relationship, namely non-interference, establishing the general framework for the exercise of freedom, promoting, guaranteeing and protecting it through the levers of law.

The concept of economic freedom of the individual implies and grounds another concept, that of 'freedom of the economy', which translates into the need for a free organization of the economic system as a whole, its minimal dependence on the intervention of power and its development only as a result of the manifestation of the free economic individual's will. Thus, the state has a positive obligation to intervene in the economic sphere through legislative acts, in order to ensure a certain type of organization of the economic space - the market economy - and a certain level of economic development, by which to encourage, first of all, the possibility for the 'private' to participate in the performance and development of economic activities through the free play of demand and supply on the market.

The Romanian constitutions have never expressly provided for this concept, the express enshrinement occurring with the revision of the 1991 Romanian Constitution, revision approved by national referendum in 2003. The new constitutional text provides in art. 45 entitled "Economic freedom": "Free access of persons to an economic activity, free enterprise, and their exercise under the law shall be guaranteed". In addition, art. 135 of the Constitution, entitled "Economy", provides: "(1) Romania's economy is a free market economy, based on free enterprise and competition. (2) The State must secure: a) a free trade, protection of fair competition, provision of a favourable framework in order to stimulate and capitalize every factor of production; (...)"

The normative coordinates of economic freedom (Muraru & Tănăsescu, 2023: 396-403) (Gîrleșteanu, 2008: 38-59), as it results from the content of art. 45 of the Romanian Constitution, reveal two fundamental elements: the person's free access to an economic activity and free enterprise. The first pillar of economic freedom as a fundamental right is the free access of the person to an economic activity. The analysis of this concept must first concern the clarification of the notions of "free access" and "economic activity", and secondly the implications of the exercise of the concept itself of "free access to an economic activity", both aspects in the debate revolving around the holder, "the person". "Free access" involves the possibility of entering a pre-existing framework, following the exercise of a voluntary and conscious choice, which belongs to the essence of the very notion of freedom. The "economic activity" represents a human activity which seeks to satisfy the consumption needs of the individual, by acquiring necessary material goods and services, including both commercial and industrial activities (Art. 2 letter a) of the Emergency Ordinance no. 44/2008) ("economic activity" - "profit-making activity, consisting in the production, administration or alienation of goods or in the provision of services"). Exercising the "free access to an economic activity" implies the abstract faculty of the person (natural or legal) to become a participant in economic life. The holder of this prerogative is not only the individual (Art. 2, Law no. 133/1999) ("entrepreneur" - "an authorized natural person or a legal person"), as a natural person, but also the legal person, as an association of individuals. The exercise of free access to an economic activity implies a legal realization of the person's option to participate in economic activities provided by

the positive law, because this exercise can only be done "under the law", as specified in the final part of art. 45 of the Constitution. Thus, any person will become an active economic participant in the legal forms and will be able to carry out those types of activities provided by law.

The wording of art. 45, in which the individual's freedom to engage in economic activity and free enterprise are distinctly guaranteed, must be interpreted in the sense of delimiting the scope of these notions and the existing relations between these two aspects of economic freedom. In this sense, free enterprise is an extension of the free access to an economic activity, complementing it and being conditioned by it.

The concept of free enterprise appears, in a broad sense, as a fundamental and freely expressed choice at the level of option, attitude and individual action of members of society or as an attitude, behaviour, predisposition towards creativity, responsibility, autonomy and self-confidence. However, considering the marginal name of the article - economic freedom - the direct consequence consists in the need to analyse the concept of free enterprise by referring to its manifestation in the strictly economic space; a general analysis, given the broad and fluid meaning of the concept, is unacceptable due to the inaccuracies it could give rise to.

Such a legal approach can be substantiated starting from the concept of freedom of enterprise, which thus presents itself as a fundamental right of an economic nature explicitly guaranteed in various acts of a constitutional nature or enshrined jurisprudentially by the courts of constitutional litigation. The concept of freedom of enterprise is the fruit of French constitutional case law. The French Constitutional Council recognizes it and assigns it constitutional value starting with Dec. no. 81-132 of 16 January 1982 as arising from art. 4 of the 1789 Universal Declaration of the Rights of Man and of the Citizen; the concept is further developed by the Hexagon legal doctrine (Cabrillac, Frison-Roche & Revet, 2001: 668-669) (Favoreu, 2000: 235-240) (Drago & Lombard, 2003: 9-47). It should be mentioned that the first references to the freedom of enterprise can be found in art. 1 of the Royer Law of 27 December 1793 – "freedom and the will of enterprise are the foundation of commercial and artisanal activities (...)" specifying that the Le Chapelier Law of 14-17 June 1791, although it suppressed professional groups that behaved like real castes, liberalized not only individual access, but also equality of exercise

The legal doctrine (Lajoye, 2002: 123) (Cabrillac, Frison-Roche & Revet, 2001: 671) (Drago, 2003: 33-38) (Grisel, 2006: 158-159) has appreciated that the freedom of enterprise implies the possibility for any individual to freely choose an economic activity allowing to obtain the means of subsistence, to establish by creating or acquiring an enterprise, and to thus exercise sovereignly the chosen economic activity. The freedom of enterprise first manifests itself as the freedom to create an enterprise, and later as the freedom of exploitation, consisting in the faculty to direct and manage the enterprise at will (i.e. the right to choose its economic policy or strategy, partners, suppliers, customers, etc.), its corollary being represented by the freedom of competition that comes to protect it.

The French case law and doctrine, which, as we stated previously, introduce the concept of *"liberté d'entreprendre"*, is not sufficient in terms of clarifying the concept of "free enterprise", but it has the merit of constituting a starting point in the proposed approach. There is no doubt that the Romanian free enterprise has as its correspondent the French *freedom of enterprise*, but the enshrinement of the first concept in the

Romanian fundamental act itself implies the need to use and analyse it from the point of view of the normative consequences it creates in Romanian society.

Thus, a first step must be to find an adequate definition for "free enterprise" from the perspective of its concrete and imposed manifestation framework, namely the economic one. We can say that the free enterprise consists of the freedom of any person not to be hindered in the will to interact economically with another in order to realize and carry out projects of an economic nature to achieve a close goal, the increase of the patrimony. These economic projects, which are means of achieving the proposed goal, are the result of the creative act of *homo economicus*, are creative activities, forms of human manifestation in economic terms. Free enterprise also implies the possibility for any person to become an active participant in economic life in the way considered to be the most appropriate (either as a natural person or as a legal structure), using the legal means available for the implementation of a certain policy.

The constitutional regulation of economic freedom has an impact on the market economy. Exercising the right of free access to an economic activity and free enterprise, the normative components of economic freedom in accordance with art. 45 of the Constitution, includes two aspects: on the one hand, that the natural or legal person holding the right has the desire and the possibility of autonomous and free manifestation of the will to become an actor of economic life, and, on the other hand, the necessity of the pre-existence of a regulatory framework of the economic activity. These two aspects acquire, in the light of the components of economic freedom, a normative character and translate into two types of general obligations incumbent on the public power: a general positive obligation to do and a general negative obligation to abstain.

Economic freedom implies a positive obligation for the state, one that requires it to play an active role. It is about the obligations specified in art. 135(2), letter a): "The State must secure a free trade, protection of fair competition, provision of a favourable framework in order to stimulate and capitalize every factor of production." (Muraru & Tănăsescu, 2023: 1190-1201). The state must regulate the conditions of access to and exercise of economic activities in a minimal manner, by virtue of its character as a social state governed by the rule of law, tributary to the interests of civil society. This minimal manner is transposed into two basic conditions imposed on the public power: this access should not be materially expensive for those who wish to exercise it, and the procedure by which the legal subject becomes an effective participant in economic life should not be too slow, too bureaucratic, be characterized by speed, so that the interested party has to meet certain minimum material conditions in a short period of time in order to be able to carry out the proposed activity, an activity which, being of an economic nature, is subject to a certain risk depending mostly on the time factor. However, it must be emphasized that sometimes the nature and importance of certain types of economic activities for the economic system as a whole require that the procedure by which the legal subject becomes an economic participant should be more cumbersome precisely because of the risks that the exercise of such economic activities might have.

Economic freedom creates, secondly, a right of subjects guaranteed against the state. The state has the *negative* obligation to respect the diversity of trade and industry acts, their independent character from the public space and their creation based on the free play of will emanating from the private space, with the consequence of the impossibility of determining a priori the categories of activities that can be carried out on the state territory and the legal forms of economic manifestation (which would in fact constitute a manifestation of economic management). This general negative obligation

can be summarized as follows: the public must allow private economic enterprise on which it *cannot impose* forms of manifestation, but it can only *propose* them.

Contemporary developments within economic regulation attest to the diversity of relations maintained in this field between the public (state intervention) and the private (economic freedom/freedom of the economy). It is thus necessary to outline the size of this relation, which influences any regulatory attempt of the economic space. However, legal dogmatism does not seem to give credibility to the alternative coexistence of public and private, more or less pacifist, in the regulation of the economy, proposing another formulation: the public *or* the private (Bureau, 1997: 317-353).

The public makes direct reference to state intervention in the economic field, such interventions being placed under the sign of diversity: to prohibit, authorize, order, supervise, exploit, etc. Interventionism attests to an interference of persons in affairs that do not belong to them, suggesting an interference of public institutions in a sphere that does not normally pertain to them. Others, however, doubt about such a qualification of this phenomenon of interference, expressing the idea that interventionism consists in the exercise by the state of its general functions, resulting therefore, that the state's competence in the economy must be recognized to the same extent as in other fields (Bureau, 1997: 320).

The private is defined by contrast: "private from what?". One possible answer could be deprived of public intervention. If the role of the public is defined by reference to interventionism, the private finds its place in the notion of (economic) liberalism, the result of a doctrine based on the prohibition of violating or preventing the exercise of economic freedom and the free access of private enterprise. Thus, the classics and neoclassics condemn as a matter of principle any state intervention. Adam Smith, with his theory of the "invisible hand" (Smith, 1965), states that the pursuit of each individual's own interest leads to the realization of the general interest so that "the harmony of these two types of interests is natural", so any state intervention must necessarily be limited.

Thus, an intermediate conclusion is required: economic and philosophical thinking give nuanced answers, starting from the natural competence that the state has in the economic field and ending with the affirmation of its total incompetence. The nuances result from the difficulties of admitting a limited competence of the state and fixing the limits of this limited competence (Sève, 1992: 63). So, the whole public-private debate turns into the competence of the state to intervene in the economic field, from the perspective of the necessity, legitimacy or effectiveness of a certain intervention.

Positive law in the economic field must therefore consist of a permanent attempt to find solutions to reconcile the general interest with the private interest (of the enterprise), to ensure the balance between intervention and autonomy.

Currently, there is a crossing of the borders between public and private under different modalities in the economic field. This phenomenon occurs in the sense that borders seem to be abandoned, because they no longer correspond to reality: the traditional opposition between public and private thus becomes relative. In the economic field, we often have the impression that these borders are blurred, resulting in hybrid forms, whether it is the qualification of the interveners in economic life (the emergence of independent administrative authorities, public-private associative forms, etc.), or whether the nature of the interventions of public power (contractual economy) is considered (Bureau, 1997: 334). At the same time, a private influence on state action can

also be conceived, the elaboration of regulations becoming tributary to the demands of the market. Thus, the state creates rules that tend, "most of the time, to manage the situation, which are only accompanying measures, translating or formulating the demands of the market itself" (Henry, 1991: 645).

**D. Attempts to review the presumption of lawful acquisition of wealth and the control of their constitutionality**

Once freed from the old totalitarian regime, property should reconfigure its position among the guarantees of a liberal system. It is a complex process, which both Romania and the Republic of Moldova have followed and continue to strengthen, that of recognizing the function of property to allow people to participate in the construction of the public space and that of opposing state authority. "The liberal state is therefore a state that guarantees property, not because it is a state of owners, but a state of freedom, because property is a means of freedom" (Dănișor, 2007: 60). But this process of building a system of fundamental norms to stimulate the effective protection of private property proves to be equally important and difficult. Thus, although the Romanian Constitution states, in art. 44(1), the fact that the property is guaranteed and, in art. 44(8), the fact that "legally acquired assets shall not be confiscated", a prohibition derived from the "legality of acquirement" of wealth, which is "presumed", the old mentalities, that became common during the Marxist-inspired communist regime, continue to plague Romanian society.

The presumption of the lawful character of the acquisition of wealth, enshrined in the constitution, has been targeted by revision attempts three times. The three draft laws to revise the Constitution were initiated either by members of Parliament or by the President of Romania, which denotes the mentality of the people's representatives regarding property. It is about the survival of the totalitarian conception, according to which private property is theft (Proudhon, 2009), in an attenuated form in the new post-totalitarian society, that all persons who have accumulated a certain wealth must have acquired it by illicit means. In fact, it is about the institutional reactions directed against property, generated by the idea according to which the objective, general law, constructed in opposition to the particular, subjective and therefore selfish rights, would be superior to the latter. The institutional reaction of the people's representatives, the Parliament and the President of Romania, gives voice to the above-mentioned conviction, through constant attacks on one of the constitutional guarantees of the right to property. The institutional reaction can be easily explained by the politicians' need to obtain political capital, but this finding implies the existence of a totalitarian reflex at the level of the people's mentality.

The analysis of the constant attacks on the presumption of the lawful acquisition of wealth cannot be carried out outside the national and European context of the fight against crime, through the confiscation of goods related to the commission of crimes. And this from the perspective of the incompatibility that could exist between the constitutionally enshrined presumption and the state competence to confiscate certain goods.

Another institutional reaction, this time to protect the constitutional guarantees of the right to property, is that of the Constitutional Court of Romania, which has already developed a consistent and coherent case law in the field.

The first of the attacks on this presumption was represented by the initiative to revise the provisions of art. 41(7), the current art. 44(8) of the Romanian Constitution, which proposed to replace the presumption of lawful acquisition of wealth with the following text: "The wealth whose lawful acquisition cannot be proven shall be confiscated" (it is about the legislative proposal to revise the provisions of art. 41(7) of the Constitution, initiated by 39 senators, dated 28 August 1996). The initiative was the subject of the constitutionality control, and the Court laid the foundations of a case law designed to contribute to the change of mentalities and to the rebalancing of the relationship between equality and freedom, by the conjunctural balancing of each of them, in order to create a society that has the subject freed from objective law in the foreground.

From the analysis of the text proposed by the initiators, one can find the intention to suppress one of the constitutional guarantees of the right to property, that of the lawful acquisition of wealth, with the consequence of overturning the burden of proof. Thus, the holder of the property right would be exposed to the obligation to prove the lawful character of the acquired property, although, as the Constitutional Court also states, "this presumption is also based on the general principle that any legal act or fact is lawful until proof to the contrary, requiring, with regard to a person's wealth, that its unlawful acquisition should be proven" (Decision no. 85/1996). Consequently, the burden of proof must be on the person making the accusation and alleging the unlawful nature of the wealth. By removing this guarantee, the initiators sought to establish another presumption, that of the unlawful character of the wealth whose acquisition cannot be proven by its owner, with the consequence of the confiscation of this wealth. As a result of such a constitutional review, a state of legal insecurity would be created regarding the right of ownership that persons have over the goods that make up their wealth. Consequently, the Court decided the unconstitutionality of the initiative to review art. 41(7) of the Constitution on the grounds that it removes a guarantee of the right to property, thus violating the limits of revision: "Since the revision proposal results in the suppression of the constitutional guarantee of the right to property represented by the presumption of lawful acquisition of wealth, it is unconstitutional, violating the revision limits provided by art. 148(2) of the Constitution"

In its decision, the Constitutional Court also rules on the claim that this presumption would represent an obstacle for state bodies in the action to confiscate goods intended for, used or resulting from a crime or minor offence, in the following terms: "par. (8) of art. 41 of the Constitution provides that the goods intended for, used or resulting from crimes or minor offences can be confiscated only in accordance with the law. Otherwise, the presumption established by art. 41(7) of the Constitution does not prevent the investigation of the illicit character of the acquisition of wealth" (Decision no. 85/1996). Nothing prevents state agents from administering evidence for the purpose of proving the illicit nature of the goods held by a particular person, if there are suspicions of this. Moreover, the express constitutional provision in par. (8) of art. 41 (current paragraph (9) of art. 44) removes any uncertainty from this point of view. Under the law, goods resulting from crimes or minor offences can be confiscated, but the legislature must create the rules that allow this confiscation with strict observance of the presumption of lawful acquisition of wealth, in other words, without being able to impose on the holder of the right of ownership a disproportionate obligation, by reversing the burden of proof.

Despite the clear, concise and coherent arguments expressed by the Court in the mentioned Decision, there is a resistance of totalitarian mentalities in Romanian society, following the exacerbation of equality as a constitutive principle, which in the communist regime had succeeded in shattering the structure of civil society and uniformizing individuals to the erasure of any traits of their individuality, to such an extent that people became extremely willing to sacrifice their own rights and liberties for the sake of a so-called objective law.

The presumption of the lawful acquisition of wealth was the target of two more initiatives to revise the Constitution, on the same arguments aimed at the efficiency of the process of confiscation of goods acquired from the commission of crimes. It is about the legislative proposal initiated by a number of 233 deputies and 94 senators in 2003 and the revision project initiated by the President of Romania, at the proposal of the Government, in 2011. These initiatives denote a suspicion strongly rooted in the collective mind, which convinced the initiators to take the approach further, relying on popular support. According to the legislative proposal of 2003, the text of art. 41 had to be completed with a new paragraph with the text: "The presumption provided for in paragraph (7) shall not be applicable for the goods acquired as a result of the capitalization of the proceeds from crimes". The CCR decided that "the aim is to overturn the burden of proof regarding the lawful nature of the wealth, providing for the unlawful nature of the wealth acquired through the capitalization of the proceeds from crimes" (Decision no. 148/2003), a fact that is equivalent to the suppression of a constitutional guarantee of the right to property, violating the limits of revising the Constitution.

The 2011 revision project was simply aimed at eliminating the presumption of lawful acquisition of wealth, and the Constitutional Court reiterated its arguments that led it to decide the unconstitutionality of the other two previous attempts to suppress this constitutional guarantee, arguing that: "In the absence of such a presumption, the possessor of an asset would be subject to continuous insecurity, since whenever the unlawful acquisition of the said asset was invoked, the burden of proof would not be on the person making the claim, but on the possessor of the asset. (Decision no. 799/2011)

The recurrent argument of the initiators of these revisions seems to concern the efficiency of the approach to the confiscation of goods acquired from illegal acts. The presumption of the lawful acquisition of wealth being relative, it can be countered by evidence to the contrary. Therefore, the legislature's intervention in the matter of confiscation will not represent an unallowed interference in the right to property "if the evidentiary system is properly regulated, so as to allow countering the presumption of lawful acquisition of wealth and if the law establishes sufficient procedural guarantees for the possessor of the goods" (Safta, 2012: 121).

In our criminal procedural system, the issue of respecting the presumption of lawful acquisition of wealth is raised in the matter of the institution of extended confiscation (Art. 112^1 Criminal Code), which creates a particular mode of evidence, which calls into question this presumption, as well as the presumption of innocence and the presumption of the origin of goods from criminal activities for which no judgment of conviction was pronounced (Lefterache, 2016: 280).

Extended confiscation is a security measure that widens the scope of goods that can be confiscated through special confiscation, under certain conditions that convince the court that the goods in question come from criminal activities. Thus, it is about the goods of a person who was convicted for an act likely to procure a material benefit and

for which the law provides a prison sentence of 4 years or more, goods that were acquired by the convicted person in a period of 5 years before and, if necessary, after the time of the crime, until the date of issuing the act of referral to the court (Art. 112^1 Criminal Code). Because confiscation concerns goods that are unrelated to a crime for which the person has been convicted, but is ordered as a result of the court being satisfied that their acquisition was unlawful, extended confiscation may raise issues regarding compliance with the presumption of lawful acquisition of wealth. In fact, it is exactly this conviction of the court that calls into question the presumption analysed. It is about two presumptions, the one provided by the Constitution as protection of the right to property, and the one established by the Criminal Code, based on the conviction of the court. The problem is knowing which prevails. However, considering the fact that the presumption of the lawful acquisition of wealth is relative, contrary evidence is allowed to overturn it. "The conviction of the court that the goods come from criminal activities other than those that are the subject of the conviction is a judicial presumption. A presumption, even if it is difficult to overturn, remains within acceptable lines as long as it is proportionate to the legitimate aim pursued, there is a possibility of proving the contrary and the right to defence is ensured" (Lefterache, 2016: 285). Thus, considering the fact that the court forms its view based on evidence, that it must comply with the requirements of art. 53 of the Constitution, the extended confiscation representing a restriction of the right to property, that both the person aimed at by the measure of confiscation and the interested third parties benefit from the right to a fair trial, having the possibility of judicially challenging the confiscation decision, the violation of the presumption of lawful acquisition of the goods cannot be taken for the security measure of extended confiscation.

In conclusion, the right to property must, when constitutionally regulated, become freedom of private appropriation and constitute a limit to the regulation of the matter of property, so that it can fulfil the function of guaranteeing freedom, understood both as autonomy and as participation. In the Romanian post-communist cultural space, the resistance of totalitarian mentalities, both in the case of the majority of citizens and in the case of most public institutions, calls into question the effectiveness of the political function that property must play. The Constitutional Court strives to give a liberal meaning to the constitutional regulations, but without a change in mentality, through appropriate education it is difficult to estimate whether the case law of the special court will have the intended effect.

## E. Conclusions

A reporter from Radio România Actualități was asking the listeners, not long ago, who they thought was the most important invention in human history. Most of them answered "electric current". None found that any invention in the social sciences was of any importance, and no revolutionary way of social organization was mentioned. Everyone seems to think that the progress of knowledge in the field of exact and natural sciences, translated into technical inventions, is important, but no one seems to understand that it does not help us live better together, or in a more just society, but that sometimes, too often, it facilitates violence and despotism, that "totalitarianism is despotism plus electricity" (Polin, 1982: 17).

This mentality of devaluation of social sciences and inventions located at the level of the organization of society and the legal structure that frames it is not new and it

inevitably leads us towards totalitarianism. The lack of a solid education of people in social sciences, which causes them to fear their own freedom, which they are unable to understand as a structural condition of society, seeing it rather as a source of disorder, is the one that makes them want a society which totally embraces them. In order to avoid totalitarianism, we should therefore reorient knowledge and education, repositioning the social sciences where they belong, realizing that "if scholars were bent on discovering the laws of political and social evolution [...] before seeking the laws of physics and chemistry, states would now all be governed by scientists, instead of being, more often than not, governed by the ignorant, the impulsive, the stupid, or the raging lunatics" (Fourastié, 1957: 211-212). We should build a new mentality in people, which will set them free.

Legal rules are part of this education, for they create ideal-types of relationships between us and limits to the authority that society can have over us. Within the legal system, the most important normative ideal-types are constitutive principles, for they are the normative ideas that we base our social existence on, in order to constrain society to be what we are able to bear it to be.

However, the Romanian Constitution is confusing when it regulates these principles. It thus causes chaotic institutional reactions and amplifies the anxious tendencies of the masses, which leads us, inevitably, to the totalitarianism which we wanted so ardently to get rid of, through the revolution. We should restore the constitutional framework in order to build a system of balancing the constitutive principles. In the absence of this revolution, which, from a legal point of view, must take the form of a revision of the Constitution, the constructive interpretation of the relations between freedom, equality and solidarity can patch up the system, to make it work as much as possible, but nothing guarantees that it will take us where we want, i.e. in a just society that respects the rights and freedoms of all of us.

## Authors' Contributions:

Dan Claudiu DĂNIȘOR: *A. The pluralism of constitutive principles in liberal democracies and its constitutional transposition; E. Conclusions*

George Liviu GÎRLEȘTEANU: *C. The (interventionist) welfare state against the (self-regulated) market economy and economic freedom*

Elena Mădălina NICA: *B. The social state governed by the rule of law*

Mădălina Cristina DĂNIȘOR: *D. Attempts to review the presumption of lawful acquisition of wealth and the control of their constitutionality*

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*Romanian Constitutional Court, Decision no. 49/1994 (Off. Gazette no. 125 of 21 May 1994)*

*Romanian Constitutional Court, Decision no. 872/2010 (Off. Gazette no. 433 of 28 June 2010)*: "(...) judges act in solidarity with the inhabitants of a country" and that solidarity demands a proportional responsibility, for which it did not provide arguments. The CCR validated the arbitrary reduction in the salaries of the state employees, considering that it was imposed by national security, which also involved "aspects of the life of the state - such as economic, financial, social - that could affect the very being of the state due to the scale and gravity of the phenomena", without demonstrating that the threat to economic security was real and could only be eliminated by reducing the salaries of state employees, and not by another, more appropriate measure, without affecting a fundamental right in violation of art. 53 of the Constitution and of equality with subjects who are not part of the state employees, not included within the scope of the law, in which case it should have demonstrated why this difference in treatment was not only objectively and reasonably justified by a relevant difference in situation, but also proportional to the goal pursued.

*Romanian Constitutional Court, Decision no. 1594/2011 (Off. Gazette no. 909 of 21 December 2011):* "defining for the Constitutional Court's case law in this field, however, remains the wide margin of discretionary power that it retains for the legislature regarding the configuration of the forms and measures of social protection and assistance."

*Romanian Constitutional Court, Decision no. 785/2019 (Off. Gazette no. 114 of 14 February 2020):* "there is substantial case law of the Constitutional Court (...) in the sense that the legislature is free (our emphasis) to choose, depending on the state policy, financial resources, priority of the objectives pursued and need to

fulfil other obligations of the state also enshrined at the constitutional level, which are the measures that will ensure a decent standard of living for the citizens, and to establish the conditions and the limits of their granting"

*Romanian Constitutional Court, Decision no. 107/1995 (Off. Gazette no. 85 of 26 April 1996)*

*Romanian Constitutional Court, Decision no. 85/1996 (Off. Gazette no. 211 of 6 September 1996)*

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