TRANSITIONAL JUSTICE IN ROMANIA. REPARATIONS FOR THE VICTIMS OF THE COMMUNIST REGIME AND LEGAL ORDER

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Abstract

This study aims to analyse, through a transitional justice approach, the reparations granted by the Romanian state to the victims of the communist regime. The paper will examine the role of reparations in transitional justice programs, the main sources of international law and legal doctrine regarding reparations, as well as the evolution of the Romanian legislation on compensations for the abuses caused by the communist dictatorship. Eventually, we will try to assess the significance of reparations for the legal order of Romania.

Keywords: *transitional justice, reparations, Romania, communist regime, legal order.*

1. Introduction

The study uses a transitional justice approach to analyse the reparations granted by the Romanian state to those individuals who suffered massive human rights violations during the communist regime. Various academic domains such as political science, sociology, history or law have dedicated scholarly research to this issue. However, our endeavor is more consistent with a legal approach at the crossroads between international and private law, being also informed by the basic terms of the general theory of law.

An analysis of the legal steps made by the Romanian state to redress human rights violations carried out by the communist regime is increasingly relevant. In February, 2016, the The High Court of Cassation and Justice of Romania issued a definitive sentence against Alexandru Vișinescu, the first Romanian person convicted after 1989 of crimes against humanity for his abusive acts as a prison commander. During the same year, eight European Ministers of Justice signed a common declaration for the establishment of an international tribunal for the investigation of crimes committed by communist regimes. In March, 2016, the Bucharest Court of Appeal issued an undefinitive sentence against Ion Ficior, convicted for crimes against humanity allegedly committed as a commander of the Periprava labor colony. Even if the aims of this paper are not related to the criminal dimension of transitional justice, one cannot minimize the impact of these decisions for the academic debate regarding the tools used by the Romanian state to manage its past social, political and legal traumas. In this context, we consider that it is highly important to underline the peculiarities surrounding the legal treatment of the communist regime's victims and not only of its' perpetrators.

The first objective of this paper is to examine how the main sources of international law and legal doctrine relate to

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the issue of reparations dedicated to victims of the communist regime. Secondly, we will examine the evolution of the legal documents which regulated the Romanian regime of reparations. Such an endeavor also implies an analysis of the Constitutional Court's rulings regarding the compensations allocated to victims. In the end, we will try to highlight the role and significance of such reparations in relation to Romania's post-communist legal order.

2. Theoretical considerations regarding transitional justice and reparations

Most democratic states which experienced recent historical traumas, defined by massive human rights violations, have paid attention to programs, policies and laws intended to compensate the harms endured by some members of the society. Such official efforts usually focus on two types of actions: the prosecution of human rights violators and the reparations awarded to victims. In some cases, the prosecutorial and reparative dimensions of justice are complemented by an officialised narrative of the past, usually produced by "truth committees" whose conclusions are appropriated by state officials through political means.

These types of measures are grouped by researchers under the general concept of transitional justice, a term firstly coined by Neil Kritz in 1995.[1] The concept itself is informed by the idea that transition from conflict to social peace, or from state repression to democracy as in the case of Eastern Europe, requires a peculiar approach to justice.

In 1993, Claus Offe[2] conceived several options available for delivering what came to be called transitional justice. His basic idea was that the collapse of a repressive regime leaves us with the legacy of perpetrators and victims, but also makes possible "the means of civil law (regulating allocation of property rights, income and status) as well as the means of criminal law (dispensing negative sanctions, such as fines and imprisonment".[3] Starting from this distinctions, the options envisaged by Claus Offe were disqualification, retribution and restitution.

Disqualification, which is not of a strictly criminal nature, refers to acts meant to deprive natural or legal persons of possessions and status wrongfully obtained. It may take the form of lustration, income reduction, restriction of access to certain public sector positions. Retribution, however, refers to criminal sanctions dispensed against individual perpetrators for criminal acts, based on court trials and criminal legislation. Restitution implies establishing who may qualify as victim and transfer of material resources to them.

According to Pablo de Greiff[4], criminal justice, usually unsuccessful in terms of results, represents a struggle against perpetrators and not a satisfying effort on behalf of the victims. From his point of view, "for some victims, reparations are the most tangible manifestation of the state to remedy the harms they have suffered"[5].

[1] Neil Kritz, *Transitional Justice, volume I* (Washington: United States Institute of Peace, 1995).

[2] Claus Offe, „Disqualification, Retribution, Restitution: Dilemmas of Justice in Post-Communist Transitions", *Journal of Political Philosophy* 1 (March, 1993): 19-21.

[3] Offe, „Disqualification", 22.

[4] Pablo de Greiff, introduction to *The Handbook of Reparations*, edited by Pablo de Greiff (New York: Oxford University Press, 2006), 2.

[5] Greiff, introduction, 2.

3. Reparations in the international law and legal doctrine

Since the establishment of an international human rights regime after the Second World War, it was considered that massive violations of human rights were no longer just a matter of internal jurisdiction. This view also manifests in relation to the rights of victims to remedy and reparations. Hence, the Universal Declaration of Human Rights stipulates at article 8 that "Everyone has the right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law".[6] Article 2, align 3 of the International Covenant on Civil and Political Rights further details the obligations of states in this matter:

"Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted."[7]

Article 14 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment also stipulates significant obligations for the state to offer remedy to those who were victims of torture:

"1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."[8]

Other international instruments with relevant provisions for the issue of reparations offered to victims of massive human rights violations include the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, the Hague Convention regarding the Laws and Customs of War on Land, the Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, the Rome Statute of the International Criminal Court. The right to an effective remedy is also guaranteed by the European Convention on Human Rights, which stipulates at article 13 that:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the

[6] „Universal Declaration of Human Rights", United Nations General Assembly Resolution A/RES/3/21 A 10/December 1948, accessed March, 2016, http://www.un.org/en/universal-declaration-human-rights/.

[7] "International Covenant on Civil and Political Rights", United Nations General Assembly Resolution A/RES/21/2200/16 December 1966, accessed March 2016, http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

[8] "Convention against Torture and other Cruel, Inhuman or Degrading Treatment", United Nations General Assembly Resolution A/RES/39/46/10 December 1984, accessed March, 2016, http://www.un.org/documents/ga/res/39/a39r046.htm

violation has been committed by persons acting in an official capacity."[9]

The Parliamentary Assemble of the Council of Europe issued in 1996 Resolution no. 1096 regarding the means to handle the heritage of former communist totalitarian regimes. With respect to reparations, the Assembly recommends that:

"[…] the prosecution of individual crimes goes hand-in-hand with the rehabilitation of people convicted of "crimes" which in a civilised society do not constitute criminal acts, and of those who were unjustly sentenced. Material compensation should also be awarded to these victims of totalitarian justice, and should not be (much) lower than the compensation accorded to those unjustly sentenced for crimes under the standard penal code in force."[10]

Even if international law was mainly concerned with states as the subjects of wrongs committed against other states, the human rights regime and the obligations of states in this field trigger legal consequences not only in relation to other states, but also in relation with individuals and groups who are under the jurisdiction of a state. The United Nations Human Rights Committee issued in 2004 a comment regarding the legal obligations imposed on states by the International Covenant on Civil and Political Rights which is illustrative for our issue. Thereby, the Committee considers that the obligation to provide effective remedies to individuals whose rights stipulated by the Covenant were violated is not discharged if reparations were not offered to those individuals.[11] Hence, we can infer that the rights of victims who suffered massive human rights violations and the obligation of states that are responsible for these violations became equally important.

Resolution 60/147/2006[12] of the United Nations General Assembly brought forward support to the centrality of victims in relation to the states' obligations in accordance to domestic and international law. According to the resolution, reparations include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Restitution includes measures intended to restore the victims to the original situation before the gross violations of international human rights law occurred, such as restoration of liberty, enjoyment of human rights, restoration of employment, return of property etc. Compensation envisages economic measures provided for physical or mental harm, lost opportunities, material damages and moral damages caused by mass violations of human rights. Rehabilitation refers to medical and psychological care,

[9] "European Convention on Human Rights", Council of Europe, accessed March, 2016, http://www.echr.coe.int/Documents/ Convention_ENG.pdf.

[10] "Measures to dismantle the heritage of former communist totalitarian systems", Parliamentary Assembly of the Council of Europe, Resolution 1096/1996, accessed March, 2016 http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16507&lang=en

[11] "General Comment No. 31 (80) - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", United Nations Human Rights Committee, CCPR/C/21/Rev.1/Add. 1326 May 2004, accessed March, 2016
http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq%2FhW%2FTpKi2tPhZsbEJw%2FGeZRASjdFuuJQRnbJEaUhby31WiQPl2mLFDe6ZSwMMvmQGVHA%3D%3D.

[12] "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", United Nations General Assembly, Resolution A/RES/60/147/21 March 2006, accessed March, 2016, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/ PDF/N0549642.pdf?OpenElement

legal and social services, while satisfaction moves the focus from victims to perpetrators through efforts to prosecute them and to establish the truth at political, legal, scientific and cultural levels. Finally, guarantees of non-repetition include institutional reforms and measures meant to consolidate democracy and rule of law mechanisms which could minimize the chances for other mass violations of human rights to occur again.

According to Office of the United Nations High Commissioner for Human Rights[13], the victims' right to reparation is becoming firmly established as the International Court of Justice continues to issue decisions on reparations. One example invoked refers to the advisory opinion regarding the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", in which the Court found that Israel has the obligation to make reparations for the damage caused to "all natural or legal persons having suffered any form of material damage as a result of the wall's construction".

4. Reparations for victims of communist oppression in Romania

Right after the Romanian Revolution, the Provisional Council of National Union adopted Decree-law 118/1990 on Granting some Rights to Persons Politically Persecuted by the Communist Dictatorship[14]. According to article 1, the law implied that those who could qualify as victims must have been deprived of freedom based on a judicial decision, warrant of preventive arrest, administrative measures, internment in psychiatric facilities or must have been subjected to mandatory residence or resettled to another locality. Ascertainment of these situations fell under the responsibility of a county committee which could decide the allocation of a monthly 200 lei compensation for each year of detention, interment, mandatory residence or resettlement. Besides the pecuniary compensation, victims were also entitled to receive a residence from the state locative fund and free medical services and medication.

Individuals who were convicted for crimes against humanity or who were proven to have conducted fascist activity within an organization or movement could not enjoy the reparations granted through this law. This is an important distinction which was maintained, as we shall see, in other laws and in the judiciary practice as well.

Emergency Ordinance no. 214/1999, repeatedly amended between 2000 and 2006[15], also provided reparations to the victims of the communist regime. Based on this legal document, those persons who were convicted for crimes committed for political reasons or subjected to administrative abusive measure, as well as individuals who participated in activities of armed opposition or forced overthrow of the communist regime between 1945 and 1989 are entitled to be granted the status of "fighter in the anti-communist resistance". According to article 2 of this law, the main acts which could qualify as crimes committed for political

[13] Office of the United Nations High Commissioner for Human Rights, *Rule-of-law tools for post-conflict state*s (New York and Geneva: United Nations, 2008), 8.

[14] "Decret-lege nr. 118 din 30 Martie 1990 privind acordarea unor drepturi persoanelor persecutate din motive politice de dictatura instaurată cu începere de la 6 martie 1945, precum şi celor deportate în străinătate ori constituite în prizonieri", Consiliul Provizoriu de Uniune Naţională, republished in the Official Gazette no. 631/23 September 2009.

[15] "Ordonanţa de urgenţă nr. 214/1999 privind acordarea calităţii de luptător în rezistenţa anticomunistă persoanelor condamnate pentru infracţiuni săvârşite din motive politice, precum şi persoanelor împotriva cărora au fost dispuse, din motive politice, măsuri administrative abusive", published in the Official Gazette, Part I no. 650 on 30/12/1999.

reasons are protests against the communist dictatorship and its abuses, the support for pluralist and democratic principles, propaganda for the overthrow of the communist social order, armed opposition against the communist regime, respect for human rights and fundamental freedoms. The status of "fighter within the anti-communist resistance" is to be granted by a committee formed by representatives of the Ministry of Justice and the Ministry of Administration and Interior, as well as representatives of the Association of Former Political Prisoners in Romania. The holders of the "fighter against the anti-communist resistance" status benefit from the restitution of confiscated goods and the rights provisioned by Decree-law 118/1990. Those persons who were convicted for crimes against humanity or for carrying out fascist activities within organizations or movements cannot benefit from the provisions of this law.

In 2009, the Romanian Parliament adopted Law 221 regarding political convictions and assimilated administrative measure issued between March 6, 1945 and December 22, 1989.[16] According to article 1, political convictions were those issued by courts of law during the mentioned period for actions which aimed at opposing the totalitarian regime instated on March 6, 1945. The law also listed criminal legal provisions based on which political convictions might have been pronounced. These included certain articles of the Criminal Code, laws regarding national security, the regime of fire arms and economic offenses. According to article 4 of this law, the political nature of convictions shall be established by courts of law based on the convicted person's request, or, after its death, on the request of any interested person or of the Prosecutor's Offices attached to the Tribunals. Furthermore, the persons who suffered such political convictions or their first and second grade descendants were entitled to compensation for moral damage or for the goods confiscated based on political convictions.

As in the case of the previously discussed law, article 7 mentions that the provisions of law 221/2009 are not applicable to persons convicted for crimes against humanity or for carrying out racist, xenophobic or anti-Semitic propaganda. This specification is important as it allows us to ascertain that the political nature of a conviction is determined also by the reason of a conviction, and not only by the conviction's legal grounds. Decision no. 1709/2012 issued by the Ist Civil Section of the High Court of Cassation and Justice is relevant for such a case. It relates to a person who, having been convicted by the Bucharest Military Tribunal in 1960 for conspiring against social order based on article 209, pt. 1 of the Criminal Code, requested the application of law 221/2009. Since the military court found that he carried out legionary activities and propaganda, the High Court of Cassation and Justice, considering the fascist and anti-Semitic nature of the Legionary movement, established that the conviction of that person does not fall under the scope of Law 221/2009. As a consequence, the Court ruled that legionary activity cannot justify the right to compensation provisioned by the law and that he is not entitled to any reparations.

[16] "Legea nr. 221/2009 privind condamnările cu caracter politic și măsurile administrative asimilate acestora, pronunțate în perioada 6 martie 1945 - 22 decembrie 1989", published in the Official Gazette, Part I no. 396 on 11/06/1999.

5. The Constitutional Court's position regarding reparations

Among the beneficiaries of law 221/2009 was Ion Diaconescu, politician and former political prisoner, who was awarded 500,000 Euros by the Bucharest Tribunal in June 2010. Following this groundbreaking decision, the Romanian Government issued Emergency Ordinance 62/2010[17] to amend law 221/2009 and established a threshold of 10,000 Euros for the compensation of the convicted persons, 5000 Euros for the husband / wife and first grade descendants and 2500 Euros for second grade descendants.

One month later, the Romanian Ombudsman challenged Ordinance 62/2010 at the Constitutional Court, arguing that it violates the provisions regarding equality of rights stipulated by article 16 of the Constitution. Basically, the Ombudsman pointed out that the ordinance establishes a differential legal treatment between persons who already held a final decision based on Law 221/2009 and persons whose requests had not been settled at that moment. The Constitutional Court acceded to this perspective and ruled that the provisions of Ordinance 62/2010 which established thresholds for compensations are contrary to the Romanian fundamental law.[18] Furthermore, the Court considered that the application of the ordinance to situations in which there is an undefinitive judgement in the first instance also violates the principle of non-retroactivity, stipulated by article 15 (2) of the Constitution.

However, on 21 October 2010 The Constitutional Court settles an objection of nonconstitutionality raised by the Ministry of Public Finances to the Tribunal of Constanța in several files regarding the application of Law 221/2009.[19] The Court finds that here are two legal norms which provision the allocation of money to persons persecuted for political reasons by the communist dictatorship, namely Decree-law 118/1990 and Law 221/2009. As Decree-law 118/1990 established the conditions and the values of the monthly compensation, a second regulation with the same objective infringes on the supreme value of justice proclaimed by article 1 (3) of the Constitution. Furthermore, the parallel regulations regarding these types of compensations also infringe on article 1 (5) of the Constitution regarding the mandatory observance of laws. As a consequence, the Court declared as unconstitutional article 5 (1) (a) thesis one, according to which the state is obliged to allocate compensation for moral damages caused by political convictions.

Furthermore, the ruling of the Constitutional Court is also relevant for the nature that reparations have in Romanian legislation. According to its decision, the objective of compensations for moral damages suffered by the victims of the communist regime is not the restoration to a situation before the gross violations of human rights law occurred. The aim is rather to produce a moral satisfaction through the acknowledgement and condemnation of

[17] "Ordonanța de urgență nr. 62/2010 pentru modificarea și completarea Legii nr. 221/2009 privind condamnările cu caracter politic și măsurile administrative asimilate acestora, pronunțate în perioada 6 martie 1945-22 decembrie 1989, și pentru suspendarea aplicării unor dispoziții din titlul VII al Legii nr. 247/2005 privind reforma în domeniile proprietății și justiției, precum și unele măsuri adiacente", published in the Official Gazette, Part I no. 446 on 01/07/2010.

[18] The Constitutional Court's Decision no.1354/2010, published in the Official Gazette, Part I, no.761 on 15/11/2010.

[19] The Constitutional Court's Decision no.1358/2010, published in the Official Gazette, Part I, no.761 on 15/11/2010.

measures which violated human rights. Furthermore, the Court considered that the obligation to allocate compensation to persons persecuted by the communist regime has only a moral nature. This view is motivated by the Constitutional Court through several rulings of the European Court of Human Rights[20] which found that the provisions of the European Convention on Human Rights do not impose to member states specific obligations to repair injustices or damages caused by previous regimes.

6. Conclusions

Even if Hans Kelsen considers state to be a hermetic conglomerate superposed to the legal system, one cannot omit the fact that the state, constitutions or institutions have in the same time a historical, political, legal and social nature. As Nicolae Popa mentions, "The legal reality is an inalienable dimension of the social reality conditioned, by a historical context. Its existence cannot be separate by other parts of the society, bearing their influence and exerting its' own influence."[21]

One has to take into consideration that institutionalized coercion represents the tool through which legal order, grounded in a system of peculiar and depersonalized instruments that we call norms, is ensured. The process of establishing and applying these norms equates with what is understood through legal order, defined by a system of legal rules which governs society at a certain moment.[22] Furthermore, as Nicolae Popa legitimately highlights, the rules established through norms must find a minimal framework of legitimacy so that they may constitute a condition for the existence of a community. "Law is a principle of social cohesion which gives coherence and definition to society as, before being a normative reality, law is a state of mind"[23].

One can notice a certain relation of determination between the lawful order and the legal order. The lawful order, which implies the activation of mechanisms meant to ensure order and coercion, can be obtained based on legal order. However, one should not forget that individuals are constantly guided by laws in their socialization processes and internalize legal norms as rules of conduct. This is the reason for which individuals participate in the consolidation of a lawful order, as it represents "the persons' awareness, either individually, either collectively, regarding the prescriptive content of rulings issued by the authors of legal norms." [24]

On the other hand, taking into consideration that the Kelsenian legal order does not finds it merits in the political realm, one could deduce that no matter the type of government, any state is grounded in a legal order. However, historical experience shows us that law cannot be examined without resorting to the social and political context. The autonomy of law does not mean its isolation in relation to political and social realms. Reflection on the massive human rights violations which occurred in 20th Century Europe favored criticism against legal positivism, an approach condensed by John Gardner in the following words: "In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits."[25] Critiques of this

[20] "Ernewein and Others v. Germany", ECHR decision on 12 May 2009 regarding application no. 14849/08; "Klaus and Yuri Kiladze v Georgia", ECHR decision on 2 February 2010 regarding application no. 7975/06.

[21] Nicolae Popa, *Teoria generală a dreptului* (Bucharest: C.H. Beck Publishing House, 2014), 42.

[22] Raluca Miga-Beșteliu, *Drept internațional. Introducere în dreptul internațional public*, (Bucharest: All Beck Publishing House, 2002), 2.

[23] Popa, *Teoria generală,* 30, 41.

[24] Emil Gheorghe Moroianu, „Conceptul de ordine juridică", *Studii de Drept Românesc*, 1-2 (2008), 33-42.

[25] John Gardner, "Legal Positivism: 5 ½ Myths", *American Journal of Jurisprudence*, 1 (2001): 199.

approach argue that totalitarian and repressive regimes operated under formal rigor and their crimes enjoyed solid legal justification.

Post-communist Romania implemented various measures to redress the abuses of the previous regime. Even it is not our goal to evaluate the merits and efficiency of these policies, we may observe that at a societal level, the legal reparations provided by the Romanian state correspond to the general aim of transitional justice.

The allocation of reparations to Romanian victims of the communist regime was influenced by several law configuration factors, from which the socio-politic framework distinguishes itself. Hence, the transition to a new governing system, post-dictatorial political evolution, the interests of the ruling elite and the influence of the international community had a major role in redressing massive violations of human rights by the communist regime.

Many scholars observed that a transitional justice approach may result in a „juridicization of the past". This idea points out that reparations, besides bringing comfort to victims, proves a break with the previous legal and lawful order. The allocation of reparations to victims of the communist regime marked the emergence of a new legal order, grounded in democratic values.

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