

Judging the *Conducător* : Fascism, Communism and Legal Discontinuity in Post-War Romania

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Introduction

Romania's troubled legal past continues to stay an enigma for both legal historians and legal theorists alike. Coming to terms with the intricate legacy of the unjust law¹ brought by what we term today as the totalitarian experience, calls for a thorough engagement with the dialectical relation of continuity and discontinuity linking our arguably democratic present to the crises of the past. This hermeneutical and historical enterprise requires in itself not only a necessary interdisciplinary gaze but also a specific focus on 'the fraying edges of the law'², on its pathology³ and on its shifts from one regime of legality to another. In following this line, my aim is to put under scrutiny the obscure passage from conservative authoritarian and fascist⁴ regimes towards the Stalinist dictatorship of the late 1940s in Romania. Consequently my purpose is to analyse the role played by the process of

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¹ See Gustav Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht', *Süddeutsche Juristen-Zeitung*, 1 S (1946), at 105 ['*unrichtiges Recht*'].

² Willy Maley, 'Beyond the Law : The Justice of Deconstruction', *Law and Critique* 10 (1999) 49-69, at 50.

³ See HLA Hart, *The Concept of Law* (Oxford University Press, 1994) at 117-123.

⁴ I borrow this distinction from Roger Griffin. See, Roger Griffin, *The Nature of Fascism* (New York: Palgrave Macmillan, 1991) at 32-36.

criminalisation of the authoritarian past both in the attempt at ideological legitimisation carried out by the Romanian Communist faction as well as in the broader legal and political framework of the time. I thus intend to explore how the criminal law-based discursive construction addressing the military dictatorship of 1941-1944 as a criminal enterprise affected the Romanian state's later legal morphology and its ideological tenets. Equally, my intention is to inquire on the memorial consequences of this mapping of the Antonescu regime and to underline the semiotic and political weight of this legacy. I propose to do so by drawing on the paradoxes entailed by the state of exception, understood here as a philosophical category aiming to investigate the ontological tenets of law and able to offer an insight into the structural legal, historical and symbolic limits of reconstructing the *nomos* in modernity⁵. From this point of view I shall argue that the post-war trials and the legal framework of the time seeking to address past injustices related to the World War 2 failed to mark a return to a stable polity grounded in a coherent normative construct. The central failure of this project of judging the past relates to the particular way in which it came short of addressing the material history of the Holocaust and articulated the experience of the war. According to the reading I advance in this chapter, this specific failure of the post-war trials took the form of an ideological sublimation of the central positions of the legal and memorial drama at stake, that is, the perpetrators and the victims. By eliding this pivotal ethical distinction in reading the past in order to articulate a constitutional narrative of national and constitutional continuity, the Antonescu trial failed to address the politico-legal mechanism at the core of the Holocaust – the legalized production of *homines sacri*⁶. This chapter asserts that the post-war trials limitations were the result of a nexus of socio-legal factors such as the presence of a politically charged

⁵ Giorgio Agamben, *State of exception* trans. Kevin Attell (University of Chicago Press, 2005 [2003]), at 87.

⁶ One could thus speak of 'Auschwitz as a site not of extermination, but as the site for the production of material to be destroyed, the ultimate logic of modernity, capitalism and bio-power in the service of the racial vision of the Nazi State': David Fraser, 'Dead Man Walking: Law and Ethics after Giorgio Agamben's Auschwitz', *International Journal for the Semiotics of Law* 12 (1999) at 404.

situation, the theoretical scarcity of Stalinism as an intellectual frame influencing legal representation as well as the discursive power of nationalist ideology already embedded in the legal framework.

In order to approach the legal and constitutional confusion reigning in the interregnum emerging at the end of World War 2, I shall first address the conceptual framework of the state of exception as developed in the work of Italian philosopher Giorgio Agamben. This step seems necessary first as a matter of historiographical inquiry inasmuch as Agamben's paradigm is able to underline the ambiguous status of legal discourse in the interwar and World War 2 Romanian context, that of both being caught in the totalitarian maelstrom and of positively taking part in the reign of state sanctioned violence. Second, as a matter of jurisprudential inquiry, the concept of exception enables us to circumvent, even if only provisionally, the entrenched theoretical positions of reading the law in totalitarian contexts as a 'legislative monstrosity'⁷, 'statutory lawlessness'⁸, or 'laws [that] may be law but [are] too evil to be obeyed'⁹, which, each in their own way, tend to eschew law's manifold embeddedness in a modernity gone awry. It might also compel us to reflect on the legal and political nature of such regimes and avoid semantic and legal confusions that all too often insinuate themselves in the analysis of totalitarianism¹⁰. Last, and this time as a matter of critical inquiry, the paradigm of the exception could be at least serviceable in offering a map of the areas in which law, understood as a structured symbolic discourse, fails in articulating and thus limiting historical violence.

⁷ Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart', *Harvard Law Review* 71 (1958), at 654.

⁸ Radbruch, 'Gesetzliches Unrecht', at 107.

⁹ HLA Hart, 'Positivism and the Separation of Law and Morals', *Harvard Law Review* 71 (1958), at 620.

¹⁰ With specific reference to Antonescu's dictatorship, Romanian constitutional historians limit themselves to stating that it is 'difficult to define'. For such an example, see Eleodor Focșeneanu, *Istoria Constituțională a României: 1859-2003*, 3rd edn (Bucharest, 2007), at 124.

Beyond the Law: the State of Exception

To begin with, the state of exception is a limit-concept for legal theory inasmuch as it questions the basic assumptions of continental legal thought and disturbs the cardinal distinction between the normative and the descriptive. As Agamben argues, 'exceptional measures [...] find themselves in the paradoxical position of being juridical measures which cannot be understood in legal terms'¹¹. His analysis, finds its departing point in the somewhat peculiar juridico-political structure present in constitutional practice and constitutional framework of the Western tradition since eighteenth century¹² consisting in either the suspension of constitutional guarantees or of the whole constitutional process for a series of actions taken by state authorities with the aim of protecting the constitutional order.

By focusing at this ambiguous practice of going beyond the law in order to uphold its mere existence, Agamben defines the state of exception as a zone of indistinction in the structure of the law¹³, thus isolating a conceptual area where it is logically impossible to make any relevant distinction between law and fact. It is through this "suspension" of the legal, that a zone of indistinction between fact and norm, between force and form, is opened within the fabric of the symbolic framework that would have otherwise been arguably able to sustain the distinction between law and violence and ultimately between politics and life¹⁴. As Agamben writes, following Carl Schmitt, '[s]ince "there is no rule that is applicable to chaos", chaos must first be included in the juridical order through the creation of a zone of indistinction between outside and inside, chaos and the normal situation — the state of exception'¹⁵.

¹¹ Giorgio Agamben, *State of exception* trans. Kevin Attell (University of Chicago Press, 2005 [2003]), at 1.

¹² *Ibid.*, at 11-24.

¹³ *Ibid.*, at 41.

¹⁴ *Ibid.*, at 88.

¹⁵ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford University Press, 1998 [1995]), at 19.

The paradox of the exception should be now apparent. Do such legal measures fall under the category of legally or constitutionally justified measures? Or are they purely and simply facts that are indistinguishable from law inasmuch as the law has been debased to the 'force of law'¹⁶ always already underlining its existence yet never actualised outside the realm of exception¹⁷? And if this is the case, what is the legal meaning, if there is one, of the acts undertaken under the seal of the exception? It is precisely in this sense that the suspension of the law blurs the borders between the stability traditionally attributed to legal normativity and its exterior: '[T]he situation created in the exception has the peculiar characteristic that it cannot be defined either as a situation of fact or as a situation of right'.¹⁸ However, it should be noted that the paradox entailed by the state of exception is not a merely a case arising out of law's incompleteness, one for which the law does not provide any provision or guidance thus compelling the judge to exercise discretion¹⁹, but purely and simply the status of the legal order within modernity. As Agamben observes, '[l]aw is made of nothing but what manages to capture inside itself through the inclusive exclusion of the *exceptio*: it nourishes itself on this exception and is a dead letter without it'²⁰.

While the concept of exception is a central one for both philosophical and jurisprudential inquiry by bringing to the fore the possibility of law's disappearance as a normative category, for the purposes of this chapter I shall try to explore its historiographical and memorial value. This is because the initial theoretical thrust of the concept of exception captures the conceptual grey-zone within the law as primarily a consequence of the accumulation of historical tension and acceleration of

¹⁶ Agamben, *State of exception*, at 32-44.

¹⁷ Anton Schütz, 'Thinking the Law With and Against Luhmann, Legendre, Agamben', *Law and Critique* 11 (2000), at 117.

¹⁸ Ibid.

¹⁹ Hart, *Concept of Law*, at 252.

²⁰ Agamben, *Homo Sacer: Sovereign Power and Bare Life* at 19.

time specific to the modern able to paradoxically unravel its ancient origins. Moreover, Agamben's construction of the concept gives a central place to the history of the interwar and World War 2 if only by examining at some length the paradigmatic case of article 48 of the Weimar Constitution²¹. Indeed, echoes of this troubled history seem to be the frontispiece from which the Agambenian archaeological inquiry excavating the problematic tension between law and lawlessness starts. Perhaps not least, the intellectual and material history of the concept is intimately linked to the dissolution of experience specific to the interwar not only through its theorisation within legal and theoretical circles on the continent during the interwar and wartime, but also through the proliferation of 'states of exception' which have opened the path to the creation of camps and the extermination undertaken during the war. For inasmuch as the exception was a part of the legal discourse of the interwar and wartime authoritarianism, it was also embodied through a manifold set of material practices which found themselves at the core of the production of extermination, racial and ethnic cleansing and the ascent of total war²². From this vantage point, reading the post-war trials through the lenses of the exception would enable us to shed a new light on the hidden structural limits of the politico-legal pitfalls of the Eastern European post-war period. Equally, such a conceptual framework could also enable us to look beyond the all too often assumed cynical political goals aimed by Stalinism in its project of communist takeover and to critically engage with the legal and ideological choices the actors of post-war faced within their own intellectual and discursive constraints.

Law, Dictatorship, Fascism

²¹ Ibid., at 14-16.

²² Evocative of this relation between the intellectual history of the concept of exception and Romanian legal history is Carl Schmitt's presence in Bucharest in 1943 on the occasion of a conference on the 'Historical Condition of European Jurisprudence', let alone his acquaintance with Romanian intellectual figures of the far-right: Gopal Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt* (London: Verso, 2000), at 246-247.

Four constitutional moments have marked political life in Romania prior to and during its participation in World War 2. Firstly, one can note the instauration of the Royal Dictatorship of King Carol II through the proclamation of the new constitution in 1938²³ replacing the Constitution of 1923²⁴, as well as the subsequent suppression of political parties²⁵. Another significant moment is King Carol II's abdication in 1940²⁶ as a result of the territorial losses towards the USSR, Bulgaria and Hungary during the summer of 1940 and of the pressures orchestrated by Marshal Antonescu, prime-minister at that time, backed by other political forces inimical to the royalist faction²⁷. The abdication was ensued by the instauration of Marshal Antonescu's military dictatorship and the proclamation of the National Legionary State²⁸. In a first stage, the new regime was supported by the Romanian main fascist movement, the Iron Guard. As a consequence, Romania soon signed the Tripartite Pact and entered into the Axis' sphere of influence²⁹. As early as January 1941, the Iron Guard, put an end to their collaboration with the military dictator and fully contested the Marshal's authority as head of state. The conflict resolved itself in an intervention of the Army, backed by German assent, quelling the fascist rebellion. After three years of war against the USSR, following the fall of the front in Ukraine, King Michael – who has only nominally ruled the country – conducted a *coup d'état* deposing the Marshal and signed an armistice with the Allies. This opened the way to a partial restoration of the Constitution of 1923.

²³ The Romanian Constitution of 1938, *Monitorul Oficial* (M.Of. hereafter), 27 Februray 1938.

²⁴ The Constitution of Romania, M. Of., 29 March 1923.

²⁵ Decree Law concerning the suppression of associations, factions and political parties of the 30th of March 1938, M.Of., 30 March 1938.

²⁶ See, 'King's Carol II Manifesto to Romanians of the 6th of September 1940', in Ioan Scurtu, *România și marile puteri (1933-1940): Documente* (Bucharest: Editura Fundației România de Măine, 2000), at 232.

²⁷ Vlad Georgescu, *Romanians : A History*, trans Alexandra Bley-Vorman (Columbus: Ohio State University Press, 1991), at 210.

²⁸ Statute no. 550 of 14th September through which the Romanian State becomes a National Legionary State, M.Of., 14th September 1940.

²⁹ Georgescu, *Romanians : A History*, at 212-213.

These constitutional moments are not only symptomatic for a broad range of political, legal and symbolic ambiguities specific to the fascist takeover in Romania or to Romania's participation in the war and, but are also at the origins of the later legal and memorial intricacies of the post-war context. Thus it may prove serviceable to take a closer look at their intrinsic tensions as well as at the ways in which they affected the overall framing of the legal system.

For many a historiographer of the Romanian interwar, the royal dictatorship of 1938 stands as a first assertion of full authoritarian powers, and it thus marks the beginning of Romania's *fall* in the realm of totalitarianism³⁰. Consequently, the Constitution of 1938 is retrospectively read as being endowed with a great deal of symbolic signification. As such, it is the very legal mechanism that separates democracy from totalitarianism. At a closer look, one may observe that the process of dissolution of legality and the 'breakdown of democracy'³¹ was anything but linear and it was rather build upon an accumulation of gradual increase of executive unregulated power during the interwar. The dissolution of the law during the interwar took various forms such as the use of the state of siege, the recourse to government by decree³², the direct nomination of governments or the practice of passing of legislation criminalising political activities³³.

The constitutional system of the interwar could be safely termed as 'semi-authoritarian'³⁴, and was one that decidedly relied on a constant recourse to

³⁰ Id., 198-199; Keith Hitchins, *Rumania 1866-1947* (Oxford University Press, 1994), at 421.

³¹ Juan J. Linz, *Totalitarian and Authoritarian Regimes* (Boulder: Lynne Rienner, 2000), at 137.

³² Constantin Dissesco, 'L'évolution du droit public roumain,' in *Les transformations du droit dans les principaux pays depuis cinquante ans: livre du cinquantenaire de la Société de législation comparée* (Paris: L.G.D.J, 1922), at 301.

³³ I have discussed the historical and jurisprudential consequences of this thread of legal measures elsewhere: Cosmin S Cercel, 'The Enemy Within: Criminal Law and Ideology in Interwar Romania' in Stephen Skinner (ed.) *Fascism and Criminal Law: History, Theory, Continuity* (Oxford: Hart, 2014), 101-126.

³⁴ Michael Mann, *Fascists* (Cambridge University Press, 2004), at 44.

unregulated state power³⁵. However, it was still a regime that at least formally was committed to the tenets of modern constitutionalism³⁶ insofar as it guaranteed the classical liberal freedoms and still tried to legitimise their limitation or suspension through exceptional circumstances. For its part, the royal dictatorship stands for a new constitutional regime that cuts itself with the tenets of traditional forms of legality and the creeds of the liberal state. It also marks the entry into a new regime of power and the emergence of a fragile albeit violent resolution of the conflict opposing the King on one hand, the democratic political forces on the other and the rising power of Romanian fascist movement, the Iron Guard. In this conflict, which is laden with ideological ambiguities and political intricacies inasmuch as during one decade each side collaborated to some extent with the other³⁷, one can easily grasp the symptoms of a society caught by an ethos of crisis³⁸. The dictatorship of 1938 is thus an ambiguous attempt at countering fascism through its own means, including unbridled state violence, anti-Semitic legislation and administrative practices as well as the staging of ultranationalist ideology³⁹.

The emergence of the National Legionary State came as a result of the New Order of Europe entailed by the opening hostilities of World War 2 and the sudden defeat of France, one of the main guarantors of Romania's sovereignty after the Great War. The territorial losses, the growing local dissent at the wake of the war as well as the growth of popularity of the far-right, prompted the King to set a new government with Marshal Antonescu as a Prime-Minister. Although a second-rank figure in the political spectrum of the interwar, Antonescu was revered to as an

³⁵ Between 1918 and 1928 no fewer than 12 decrees were issued, instituting or upholding the partial or general state of siege: Valentin Pantelimonescu, *Starea de asediu: doctrină, jurisprudență și legislație* (Bucharest: Cartea Românească, 1939), 32–45.

³⁶ Georgescu, *Romanians: A History*, at 198–99.

³⁷ Rebecca Ann Haynes, 'Reluctant Allies? Iuliu Maniu and Corneliu Zelea Codreanu against King Carol II of Romania,' *The Slavonic and East European Review* 85 (2007) 105–134.

³⁸ For an insightful analysis of the relation between fascism and the crisis of liberal democracies during the interwar see Roger Griffin, 'Modernity Under the New Order: The Fascist Project for Managing the Future', in *A Fascist Century*, ed. Matthew Feldman (Basingstoke: Palgrave Macmillan, 2008) 24–45 at 44.

³⁹ Georgescu, *Romanians : A History*, at 208.

uncontested moral and military authority to such an extent that his growing popularity, pro-German activities and defiance of the King determined the latter to assign him on home arrest prior to nominating him as Prime-Minister⁴⁰. One of the first measures taken by Antonescu in this capacity was to force the King to delegate him the reserved powers. Later on, he pressured for his abdication. As Carol's son, Prince Michael, was approaching majority, he was crowned as a King, while the Marshal effectively held executive powers as the Head of the State – *Conducător*.

While the new regime symbolically termed itself as overtly fascist, it also uneasily mitigated the tension between the conservative-leaning militarism of the Marshal and the 'revolutionary'⁴¹ tendencies of the Iron Guard⁴². The latter was constantly pressuring for direct action against the Jewish minority as well as for retaliation against former central figures of the Royal Dictatorship. The dualism between military authoritarianism and fascism purely and simply could be mainly observed at the organisational level of the administration. As such, unsurprisingly, the Army, the Gendarmerie as well as the Secret Services were under the control of Antonescu and its loyal followers. On the other hand, the Ministry of Interior, the police and the government's representations in the territory (*Prefecturi*) were controlled by the Iron Guard⁴³. The latter was further backed by the Legionary Police, a para-military force organised after the model set-up by the SA and the SS⁴⁴. The tension reached a peak as a result of the series of executions perpetrated by the Legionary Police and the assassination of former prime-minister and noted Romanian nationalist historian Nicolae Iorga. Moreover, the Guard exacted taxes upon the Jewish population without any legal ground and started an entire

⁴⁰ Denis Deletant, *Hitler's Forgotten Ally* (Basingstoke: Palgrave Macmillan, 2006), at 47-48.

⁴¹ Mircea Platon, 'The Iron Guard and the Modern State. Iron Guard Leaders Vasile Marin and Ion I. Moța and the "European New Order"', *Fascism* 1 (2012), at 69.

⁴² Aristotle Kallis, *Genocide and Fascism: The Eliminationist Drive in Fascist Europe* (London: Routledge, 2009), at 221.

⁴³ International Commission on The Holocaust in Romania, *Final Report*, eds. Tuvia Friling, Radu Ioanid and Mihail E. Ionescu (Iași: Polirom, 2004), at 109.

⁴⁴ *Ibid.*, at 110.

campaign of expropriation and deportation of Jewish communities⁴⁵. These policies culminated in the Bucharest Pogrom perpetrated as a first stage of the Legionary Rebellion. Taking control over the Police Headquarters, police stations and several ministries, the Guardists launched their attack on the Army. The Guardist Ministry of Interior ordered setting on fire the Jewish districts in Bucharest, the action being followed by a series of deportations, executions and random shootings exacted mainly by the Corps of Legionary Workers⁴⁶, the trade-union based branch of the Iron Guard. Started on the 21nd of January, the uprising was quelled by the 24th by the Army. The main outcome was the proclamation of the National and Social State under the rule of Marshal Antonescu supported by a technocratic government.

The deposition of the fascist movement was not however a return to any form of classical constitutionalism or to any democratic stand. As the country soon ventured in the 'crusade against Bolshevism'⁴⁷, by joining the German Barbarossa Plan, the situation would evolve further in changing Romania into an overt ultranationalist polity. As such, the military dictatorship soon implemented further anti-Semitic legal and administrative measures on Romanian territories as well as in the occupied territories under Romanian administration. The racial policies devised against Jewish and Roma population, this time with legal and administrative minute backed by military warring ethos, are at the origins of the darkest moment in Romanian history⁴⁸. The intermingling between dictatorship understood as the suspension of the legal system, the war-time conditions marked by the dissolution of the categories of limited war, and the discursive hegemony of state-racism in national ideology, all point towards a limit-state of political, legal and ethical categories founding the state. The National Social State under Antonescu is thus a

⁴⁵ Ibid., at 110-115. See also Kallis, *Genocide and Fascism*, at 221.

⁴⁶ International Commission on The Holocaust in Romania, *Final Report*, at 110.

⁴⁷ Deletant, *Hitler's Forgotten Ally*, at 81.

⁴⁸ Vladimir Solonari, *Purifying the Nation: Population Exchange and Ethnic Cleansing in Nazi-Allied Romania* (Baltimore: Johns Hopkins University Press, 2010), 168-199. With regard to the policies of "Romanianization", see also Ștefan Cristian Ionescu, *Jewish Resistance to "Romanianization"* (Basingstoke: Palgrave Macmillan, 2015).

*nekropolitical*⁴⁹ enterprise in which the state and law were reduced to a mere formless existence, but were nonetheless necessary constituents and accomplices of the 'eliminationist drive'⁵⁰. It was thus actualised the ultimate hidden structure of the modern state under the guise of 'state racism'⁵¹, enabling both the legal and political apparatus to recreate the old sovereign right of killing within the resolutely modern framework of biopolitical power.

The Antonescu regime is now held liable for Romania's participation in the Holocaust which has been accounted as a death toll ranging from 280 000 to 380 000 Jews⁵², executed, killed or disappeared as a result of the government's policies in Romania and Romanian-occupied territories. As it has been stated, 'of all the allies of Nazi Germany, Romania bears responsibility for the deaths of more Jews than any country other than Germany itself'⁵³. Moreover, as Dan Stone convincingly argues, 'the murder of the Jews of Romania (excluding northern Transylvania, ceded to Hungary in 1940) and Transnistria was essentially an independent undertaking'⁵⁴. However not only it took 60 years for Romanian authorities to fully recognise the scale of the persecutions exacted against Jewish and Roma population, but many of the political, legal and symbolical intricacies of the Holocaust still continue to haunt both the state's self-representation as well as Romanian legal discourse. Approaching the first legal encounters with the memory of the Holocaust inside the legal framework itself is not only a crucial task in understanding the path from one regime to another, but also the ways in which national and state ideology have been constructed through the ethico-legal rendering of this dark period.

⁴⁹ Achille Mbembe, 'Néropolitique', *Raisons politiques*, 2006, n° 21, at 34.

⁵⁰ Kallis, *Genocide and Fascism*, at 251-255.

⁵¹ Michel Foucault, *Il faut défendre la société* (Paris: Gallimard, 1996), at 213-35.

⁵² International Commission on The Holocaust in Romania, *Final Report*, at 179.

⁵³ *Ibid.*, at 385.

⁵⁴ Dan Stone, *Histories of the Holocaust* (Oxford University Press, 2010), at 36.

Judging the Disaster: Law and Historical Violence

This line of inquiry draws us to a closer analysis of the fourth constitutional moment closing the series of war-time dictatorships. Indeed, the short, partial and fragile return to democratic and constitutional ‘normality’ between 1944 and 1947 marks both a politically charged and cultural significant interregnum laden with far-reaching consequences for the fate of Romanian *nomos* as well as for later Romanian communist ideology and praxis. As such, the return of democracy is also paradoxically linked to the entry into stage of history of institutionalized, if not already state-steered, communism. In short, the *coup d’état* staged by King Michael of Romania backed by different factions of the Romanian army and Romanian politics – such as the National Democratic Bloc (that would comprise National Liberals, the Peasants’ Party, Social Democrats and Communists) on the 23rd of August 1944 ousted the military dictator and was soon ensued by an Armistice agreement with the Allies⁵⁵. The Constitution in 1923 was partially put again into force by a decree dating from August 1944⁵⁶ which thus formally ended Antonescu’s rule.

However, under the Armistice agreement, parts of the traditional sovereignty of the state were questioned inasmuch as the Soviet Union had ‘monopoly of interpretation of the Agreement’ which it exercised through an intentionally unclear formulation of the legal status of the concluding parties⁵⁷. Moreover, the Agreement already imposed rather unusual obligations which, considering Romania’s participation in the war until the 23rd of August seem just and reasonable, but nonetheless question the traditional forms of sovereignty. As such, according to the

⁵⁵ Richard J. Crampton, *Eastern Europe in the XXth Century and After*, 2nd ed. (London: Routledge, 1997), at 228-31. See also Joseph Rothschild and Nancy M. Wingfield, *Return to Diversity [:] A Political History of East Central Europe Since World War II*, 3rd ed. (Oxford University Press, 2000), at 105-06; Georgescu, *Romanians: A History*, at 220.

⁵⁶ High Royal Decree no. 1626 concerning the establishment of the Rights of Romanians within the frame of the Constitution of 1866 as modified by the Constitution of 1923, 31st of August 1944, *M. Of.*, 2 September 1944, n° 202.

⁵⁷ See e.g. the wording of the Armistice Agreement determining the Allied powers in an ambiguous manner alternating the reference between Allied and Soviet powers.

Articles 14 and 15 of the Agreement, the Romanian state was bound to 'undertake to collaborate with the Allied (Soviet) High Command in the apprehension and trial of persons accused of war crimes' and to 'dissolve all pro-Hitler organizations (of a Fascist type) situated in Rumanian territory, whether political, military or para-military, as well as other organizations conducting propaganda hostile to the United Nations, in particular the Soviet Union, and will not in future permit the existence of organizations of that nature.'⁵⁸ In retrospect, the provisions of the Agreement are regarded by historians and constitutionalists nothing short of a Soviet 'mechanism of takeover'⁵⁹ in Romania⁶⁰.

From a legal perspective the constitutional framework of the time remained highly problematic as long as Sections III and VI of the August Decree restating the Constitution of 1923 leave out of its scope the functioning of the legislative and the judiciary⁶¹. It would be thus safe to affirm that the regime of exceptional measures outside the scope of the constitutional control continued to be in power before the new constitution of 1948 introducing the dictatorship of the proletariat would be affirmed. This legal uncertainty determined partly some of the political developments in Communist takeover as well as the process of dealing with the Fascist and authoritarian past. In this sense, the passing of the Statute no. 312 of 1945 seeking to prosecute and punish those responsible for bringing the disaster of the country and war crimes⁶² takes place in an ambiguous constitutional context.

⁵⁸ Section 14 and 15 of The Armistice Agreement with Rumania, available at <http://avalon.law.yale.edu/wwii/rumania.asp>. [last checked on the 5th of May 2014].

⁵⁹ Denis Deletant, *Hitler's Forgotten Ally*, (Basingstoke: Palgrave MacMillan, 2005), 245.

⁶⁰ 'The Allied Control Commission formed to oversee the armistice was entirely Soviet-dominated. Its American and British members did not even have the right to travel freely in Romania without the permission of the Soviet authorities': Georgescu, *Romanians : A History*, at 223.

⁶¹ High Royal Decree no. 1626.

⁶² Statute no. 312 of the 24th of April 1945 for the prosecution and punishment of those responsible for the disaster of the country and war crimes, *M.Of.*, 24th of April 1945.

At this stage, one may legitimately ask who or which is the institutional body asserting the sovereignty by framing the legal definition of a crime and by creating categories necessary to the process of criminalisation? The 'positive' legal answer lies within the emitent of the Statute, which was the Ministry of Justice. Interestingly for the purposes of this chapter, the office of the Ministry of Justice was held by one of the few local prominent leaders of the Communist Party, Lucrețiu Pătrășcanu⁶³. A more complex answer would seek to take into account the inherently 'constitutional' dimension of such a statute. Indeed, what symbolically it is created through the process of criminalisation of the former dictatorship is also a form of discursive production of alterity. The new regime therefore marks its difference in respect to the criminal other and draws its own legitimacy from positing this difference. Through this process of criminalisation of the past, a foundational myth of the state is reconstructed and narrated once again.

The fact that the communist movement was in charge of the prosecution and conviction of the crimes is of course not surprising inasmuch as Soviet troops were present in Romania and the movement was slowly trying to rebuild its presence in public life. The situation provided also the Communists with the opportunity not only to tackle the issue of the authoritarian and fascist state violence to which most of them would have been victims, but also create their basis for a new legitimising framework. To put it simply, in contradistinction to the authoritarian dictatorships of the late interwar the Communist movement had the chance to present itself as a guardian of democracy and a bearer of an authentic democratic ethos – after all the Communist party was part of the National Democratic Bloc. This is not to say that the trial of war criminals was mainly a matter of communist politics. Rather my claim is that the way in which the actions of the authoritarian regimes were legally framed as crimes in the early years of postwar through an intricate process

⁶³ Crampton, *Eastern Europe in the XXth Century and After*, at 225.

symbolisation in which national ideology and state responsibility played a key role. A notable part of the politico-legal context of the time was held by the shifting role of the Communist movement, which was the main proxy between the established power in Bucharest and the 'Allied (Soviet) High Command'.

Whilst the framing of the Statute seeking to address Romania's participation in the war and the atrocities committed is rather ambiguous in terms of criminal law wording, as, for instance, the responsibility is defined in relation to persons rather than with acts, while the crime of 'bringing the disaster upon the country' is not defined anywhere else⁶⁴, it also hints to a series of other constitutional and ideological underpinnings. Indeed, the choice of words is symptomatic inasmuch as 'country' (*țara*) was by no means a criminal law category and hardly a modern constitutional one. Whereas in common language the country and the state might be interchangeable, under the already modern Romanian legal system of the time, 'the country' did not have a proper juridical meaning. It had, however one specific meaning as a constitutional archaism traceable back to the Middle Ages – that is the constitutional body which ultimately legitimized the Prince in the elective monarchies of 14-18th century⁶⁵. Given that Antonescu used the term *Conducător* (Leader) in defining his office – which was already a constitutional archaism as it evoked one of the offices of the Voyvod title of the Middle Ages – it can be inferred

⁶⁴ Article 1 defined those 'guilty of the disaster brought on the country' as a) persons who had backed Hitler or espoused fascism and who bore the political responsibility for allowing German troops to enter Romania; and b) persons who had given their support to the above deeds, either in speech, writing or by any other means. Article 2 proclaimed those 'guilty of the disaster brought on the country through the commission of war crimes' as persons who had taken the decision to declare war on the Soviet Union and the United Nations, who had treated prisoners in an inhuman manner, who had ordered or carried out acts of terror or cruelty against the population in the war zones, who had taken repressive measures against civilians out of racial or political motives, and who had ordered forced labour or the deportation of people. Conviction under article 1 carried imprisonment for a term of between five years and life, while that under article 2 attracted forced labour for life or the death penalty: Statute no. 312 of the 24th of April 1945.

⁶⁵ See for instance, G. I. Bratianu, *Sfatul domnesc si adunarea starilor in principatele Romane* (Bucharest: Editura Enciclopedica, 1995 [1947]), 22: the author stresses the meaning of *țara* as a legal community. See also Daniel Barbu, *Bizanț contra Bizanț* (Bucharest: Nemira, 2001), at 88 where the author emphasizes the discontinuity between the 'country' and the 'state', the first one being a distinct entity which played a key role in the dialectics of power between the prince and the nobles.

that it was the country, that is the constitutionally organised 'people' which had suffered the tort of dictatorship. In other words, the passive subject of the crime is already the legally constructed 'people', understood here as an abstract legal body. In this sense, not only the state reframes itself through the process of criminalisation, but also restates and redefines the people as a constitutive part of the polity.

The postwar trials developed in this legal framework have been regarded by commentators as a rather problematic attempt in dealing with the trauma of the war and in assigning responsibilities⁶⁶. It has thus been noted the limited extent of the scope of the war trials, the courts leniency towards some of the convicts as well as the random application of the law over territory especially in those areas in Northern Transylvania which during the war had been part of Hungary. As Maria Bucur points out, it can be noted a tendency in avoiding to deal with Romanian responsibility for the atrocities which was backed by an ideological conviction that responsibility lied within the foreign former allies – Nazi Germans and fascist Hungarians⁶⁷. Topical in embodying the ethical confusion of the attempt of approaching Romanian Holocaust, the trial of Antonescu offers a series of extremely poignant examples as regards the legal and ideological construction of fascism and Romanian collaborationism.

Due to its importance, and especially to its high coverage in media, the communist faction in charge now with the machinery of justice organized the trial with care. As noted, the members of the Court and the accusers were carefully chosen through members of the party, access to the trial was limited to a selected audience, and special measures for keeping order were taken. The Court judging the trial was an extraordinary People's Tribunal presided by Alexandru Voitinovici,

⁶⁶ Maria Bucur, *Heroes and Victims: Remembering War in Twentieth Century Romania* (Bloomington: Indiana University Press, 2009), at 156.

⁶⁷ *Ibid.*, at 156-158.

assisted by Constantin Balcu and 7 people's judges, all members of the communist movement. The public prosecutors were two lawyers Vasile Stoican, seconded by Constantin Dobrian, a procurator at the Court of Appeal in Timișoara and a public accuser, Dumitru Săracu, without legal training, from the ranks of the Communist Party⁶⁸. There were a series of accusations, organized around the lines of the actions of the former Marshal and of the legal framework that was into force. They concerned namely the unlawful war against the Soviet Union, the terror unleashed against workers and peasants, the 'German colonization of Romania', the economic disaster, the massacres, the deportations and the campaign of 'Romanianisation'⁶⁹. As we can notice, only a part of the accusation dealt explicitly with atrocities of the regime directed against its citizens and against inhabitants of the occupied territories, while the others were referring clearly to the abstract legal entity of the 'country'.

Indeed, in their struggle of redeeming the 'country' the accusers would stress out its sufferings. Two recurrent images will follow closely the accusation act and the interrogatory: that of the oppressed Romanian peasant forced to become a soldier, and that of colonized Romania. By overemphasizing the national disaster, the accusers come to a point where there would not be any distinction between the victims and the oppressors, a point where the very oppressors would appear before the world as victims. As stated by one of the public accusers : 'there can be no difference between the massacre of those [Romanian soldiers] young people and that of the massacre in Majdanek'⁷⁰. And as he continues 'I can't make any distinction in sending to death the youth of the Nation and the shooting in forest outskirts of deported people'⁷¹. The *Conducător* is, thus, guilty first and most of all in bringing a disaster on the country. The tort made wasn't one perpetrated against millions of

⁶⁸ Deletant, *Hitler's Forgotten Ally*, at 249-250.

⁶⁹ *Procesul marii trădări naționale* (Bucharest: Eminescu, 1946), at 19-34.

⁷⁰ *Ibid.*, at 284.

⁷¹ *Ibid.*

expressionless victims, but to an abstract legal community which is through the very act of uttering of this words founded on a fundamental ethical confusion.

However, the central legal, political and semiotic problem here is not the responsibility of the *Conducător*, but the dynamics through which 'the country' receives its innocence by losing the *Conducător*. What the Trial is telling to the state and to the anonymous collaborators of the dictatorship is that most of them were victims themselves. Through accepting this complicity in the field of social reality, the legal order creates its 'people', its 'country' as it imagines them to be: 'We are a modest people who never had expansionist tendencies. We had a sole mission: that of preserving our national being of a modest and working people, who never went out of its borders, who never did barbaric acts and always defended its land and its national being'⁷². This is one of the legal embodiments of Romanian Stalinist ideology, which embellishes a reality filled with diffuse anti-Semitism and oppression. One could note the peculiar resemblance between the 'modest people' fighting for their land and the 'sacred war against bolshevism' the same people would engage in years before as well as the radical disjunction between the historical real of giving way to the 'eliminationist drive' and the political symbolic negation of this real.

To put it in Benjaminian terms, the very point of approaching the issue of historical injustice, the lawyers and the public accusers turn away from articulating a discourse from the perspective of the 'tradition of the oppressed'⁷³. Rather their attempt is to redeem what was impossible historically to be redeemed. They turn their face from history in order to offer expiation to the state and its mechanism and along with them to the nation. From this point of view the Law before which the

⁷² Id., 302.

⁷³ Walter Benjamin, 'Theses on the Concept of History', in *Illuminations*, trans. Harry Zohn, ed. Hannah Arendt (New York: Schocken Books, 1969 [1940]), at 256 (T VIII).

Conducător is brought and before which the victims could seek release, refrains to re-structure the power relations. The law doesn't judge historical violence, because ontologically it is inscribed in a history of violence. As Walter Benjamin noted, 'all [law] was the prerogative of the kings or of the nobles – in short of the mighty; and that, *mutatis mutandis*, will remain as long as it exists'⁷⁴. As law is consubstantial with historical violence, addressing it legally is deemed to fail, except under a possibility to judge history itself, and thus to cut off with a tradition that instills that history should be that of the victors. The law, surpassed by mythical violence, fails to bring justice. What we are given in fact is the reproduction of the same mechanism of a culture tainted by barbarism, and linked inescapably to it, a mechanism of mythical violence⁷⁵ reproducing itself under the masks of the revolution from above.

Conclusion

The trial of Antonescu, taken as a paradigmatic example of judging the past and constructing the new regime of legality, fails to address the material history of the Holocaust and the manifold forms through which the state as such participated in the criminal enterprise. By devising legally the crime as a tort against an abstract legal community that is already founded by the state, it came short in questioning the basic tenets of law's and state part in the dissolution of the polity. This decision had dire ethical consequences – some of which I tried to point out here. It also had further political consequences as long as by seeking to legitimize itself through an ethical confusion, the Communist movement itself moved away from the tenets of international communism. It has symbolically embraced the national route, inasmuch as it renounced to its revolutionary stand and joined the sphere of state-driven politics. Furthermore its legal consequences are even more compelling, for the focus on personal dimension of the perpetrators – even if accurate – prevented a

⁷⁴ Walter Benjamin, 'Critique of Violence' trans. Edmund Jephcott, in *Selected Writings*, vol. I, ed. Marcus Bullock and Michael W. Jennings (Cambridge, MA: Harvard University Press, 1999 [1921]), at 296.

⁷⁵ 'There is no document of civilization that is not tainted by barbarism': Benjamin, 'Theses on the Concept of History', at 257 (T VII).

discussion of the systemic dimension of the crimes. Law has thus failed to recognize its own suspension and continued its formless and confused existence from one dictatorship to the other.