„FRAMES OF TRANSITIONAL JUSTICE: SOME APPLICATION IN INTERGENERATIONAL JUSTICE AND RETROACTIVITY"

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Abstract
The article attempts to evaluate the concept of transitional justice in the sphere of public and academical debates, in different social environments during the transition period in the recent history. The approach will include an overflight over some definitions and interpretation of that concept and an assessment of possible applications of this concept in the reparative (corrective) theories during the political transition. The evaluation of operational dimension of transitional justice will focus primarily the moral grounds invoked in political and juridical debates, and will pursue some applications of the transitional justice in intergenerational justice realm and at the level of the institution of retroactivity. Also, the assessment will focus the moral core of the motivation of judicial decisions in the space of positive law debates, concerning the constitutional and normative dimension.Examination of particular aspects of the transition has raised particular interest in the public agenda of romanian political change. Reparation issues in dealing with the past had always occupied a privileged role in public debate, in social and political problems. Justification for corrective measures during transition period were presented on various occasions in different points of view, but tools and proper institutions in generating legitimate formal-political obligations were absent, threatening the strength of the the political stability. Requirements for application of a corrective, reparative justice, appeared as a consequence of subjective awareness of rights and liberties that positive law of the communist system ignored or assign them like law infrigement. An approach of such rights, with their features should be evaluated in the context of both totalitarian and democratic state. A dialogue with the past becomes more necesary and will contribute to the success of any public policy designed for any possible reparation in the future. Transitional justice could also be a frame for testing the theoretical outcomes of an analytical justice which could bring normative results in intergenerational justice. One of the most important issues which requires an approach in transitional justice perspective remains the institution of retroactivity.

Keywords: *transitional justice, intergenerational justice, reparations, moral grounds, retroactivity*

I. Introduction

The paper attempts an overview of the concept of transitional justice in an intergenerational perspective, an assessment of the moral debate about transitional justice issues in situation generated by changes in political regimes. Arguments will be tested also in an intergenerational view by examination of the institution of retroactivity. We consider that the importance of this approach lies in the moral assessment of controversial issues in the area of intersection between political philosophy and science of law, clarifying possible opportunities in the evolution of positive law.

As a main objective we attempt a critical approach of the studies on this issues and a systematization of some operational dimensions of transitional justice in its relations with the past.

II. The concept of transitional justice: an intergenerational perspective

Transitional justice represents an area of interest in actual research in the field of positive law, but also in political philosophy. The importance of the transitional justice literature is given by the possible applications of this concept in intergenerational justice issues. Intergenerational justice itself has a particular importance mostly in the points of historical discontinuity, in changing the political system, both in Romania and in other places in Eastern European states. An explanatory overview of

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political reparations makes necessary an intergenerational approach during the political transition period.

The main difficulty could be taking into account a "dialogue" with the past in conditions of a different constitutional and legal orders. Every political and legal order can be regarded as a historical evolution of a previous order. Intergenerational relations will have to overcome this difficulty by providing relevant moral arguments. Analogies with similar problems in history would be acceptable only if arguments will prove their moral relevance. Extending possible generalization to contemporary situations might be assessed only regarding all particular circumstances (local and historical) requiered in any theories of justice.

For example, if we intend to appeal to different substitutions in the lines of morality in a relevant context and compatible with the situation in which we relate. We could consider therefore that there may be a permissible substitution in the domain of reparations in present day compatible to that of the reparation due to the moral descendants of slaves in America, for example[1] (method known as *empirically informed normative argument*).

Normative political philosophy and social science explanations of social inequality have contributed to the formulation of arguments of reparative justice.

Whether we refer to redress historically injustice by means of transitional justice, we have to refer to:

- Who is entitled to compensation?
- who pays for repairs?
- under which procedural principle the due amount must be calculated?

Requirements in any frames of transitional justice will be found in theories of intergenerational justice, but they have to complete conditions of demonstrable and measurable arguments.

Also, corrective justice arguments, in any historical epoch, would have to include a retrospective analysis of eventual injuries circumstances and must bring them under the „microscope" of rational public debate, concerning the nature of historical injustice, moral motivations and procedures for repair.

Essential to any initiative for repairing was a public conscience that activated the collective memory. Any legal initiative for reparations arose from moral intuition concerning the restorative justice. *Prima facie* obligation[2] for the perpetrator is to restore the situation in conditions of a *status quo ante*.

A philosopher of law as Jeremy Waldron (1992, 2002) opened a new perspective on the obligation to rectify the historical injustice based on compensation through applying principles of justice. Waldron warns of the danger of neglecting the "double edge" of justice in the process of repair, by potential conflicts of interest outlined by the resources in question. Waldron proposed to rank priorities of injustice on an axis of time, requiring first the resolution of recent issues and then an extended process in time.

Methodological difficulties in dealing with the past are often amplified by an ambivalent quality of the state in transitional situation. On the one hand, the state appears as an active and responsible political actor, but on the other hand the state itself acts as a deliberative and reflective agent. In a strong argument for restorative justice, the state is considered to be primarily responsible both directly and indirectly, for his role in facilitating and supporting a system of

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[1] A similar methodology was used in the assesment for the treatment of racial .inequality in a 2010 article, *"Racial Inequality and Reparations*" byDerrick Darby, University of Kansas, published in PhilosophyCompass 5 / 1 (2010), p.55-66.

[2] A *prima facie* duty can be suggestive defined as a "specific circumstances that can be presented on the basis of its moral relevance, " according to Ross, WD "What Makes right right Acts, " in The Right and the Good, (Oxford, Clarendon Press, 1930), p.21.

subordination to the groups that had been injured, especially after passing a period of time in a constitutional system. In any theory of law, stronger that the obligations for justice enforced between individuals, are the obligations of the state, espacially in restoring injustice and unjust exploitation. A moral obligation of the state is to recover the visible signs of injustice produced by the policy of the state institutions in the past. State acknowledgment could be formulated only by public policies in demonstrable and quantificable manner. An eventually state inaction would constitute a further enhancement of the effects of injury.

Specific to intergenerational relations is the fact that time is „continous, linear, unidirectional and irreversible"[3]. The fact that time cannot intervene on what happened in the of the last generation exclude any contractual relationship possibility with the past. Including arbitrarly the last generation in a contractual relationship *sui generis*, it opens, according to Bell, the path of counterfactual reasoning, very difficult to be admitted even at an intuitive level. But a formal exclusion of the past generations cannot ignore in a moral analysis their posthumous interests[4]. Intergenerational justice as a subspecies of justice, is a culturally determined concept, with a significant contribution even in classical theories of justice. Nozick asks "How far in the past we have to wipe the injustice?" Difficult as well is answering how to change things, if both the beneficiaries and losers are not directly engaged in the historical wrong, for example, the case of their descendants[5] ?

The concept of intergenerational justice can refer, in some specific approaches for example, from general to particular, to an ethical problem of distribution of resources available in insufficient quantities between different age groups in society. Intergenerational justice can act as controversial stake in allocation of resources for educating young generation vs. resource allocation for protecting the elderly[6]. In some situations intergenerational justice argument concerns in the very existence of rights and obligations between the present and the past generation or the next generation, as well as the admission of the existence of such rights in the application of theories of justice in issues concerning relationship between different generations.

III. Transitional justice and restoring issues

Issues of transitional justice seems to be a complex task in the assessments of the legal consequences generated by regime change. Restoring democratic regime in conditions of transition from a "monolithic" past to a "plural" present, represents a fertile ground for debates in the general theories of law. Restitution issues were limited in public debate only to discussions about legislative acts with applicability in real estate claimings of the injured persons in their property rights, in romanian courts or European laws[7]. Restitution itself represent an important side of intergenerational justice, the complex of such problem could not be simplified only by reducing the concept of intergenerational justice to a simple restitution. The restitution problem is also an applied ethics matter that require an ethical perspective approach. An ehical similarity in the case of regime change brings another types of historical shortcomings of those who have fulfilled their obligations imposed by the totalitarian regime and as a „reward" for their social status became disastrous without having any restitutional problems. The issue of reparations is required to be approached under different angles of moral relevance starting a debate in legislative bodies, academic or media space. We will try to draw some explanatory models that could shape certain patterns in the matter of reparations.

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[3] Bell, 2003, p. 140, Bell, W. (2003). *Foundations of Future Studies*. New Brunswick, NJ: Transaction Publishers, source: http://www2.warwick.ac.uk/fac/soc/pais/staff/page/ecpr/

[4] Callahan, J. C. (1987). On Harming the Dead. *Ethics, 97*(2), p.341-352

[5] Nozick, Robert „*Anarhie, stat şi utopie*", (Bucureşti, Humanitas, 1997), p.200.

[6] Source: Medicine Encyclopedia, vol. 2, Aging Healthy, Intergenerational Justice, http://medicine.jrank.org/ pages/934/Intergenerational-Justice html

[7] Socaciu, Emanuel-Mihail,"Restituţia imobilelor naţionalizate: preliminarii ale unei evaluări morale", Sfera Politicii, nr.128, 2007

In literature was suggested that one of the possible techniques to address the issue of restitution could be a counterfactual approach to the issue[8]. There are numerous difficulties in determining the facts, historical context or the complexity of analyzed cases. In the absence of possibilities in counterfactual approach, were propositions of direct return of natural resources, goods, etc.The solution of physical return is not accepted from the point of view of the teories of justice because arises problems like the current market value of the property, either the temporal possesion or *time preference*[9] (Rawls, 1971)

An utilitarian approach to intergenerational restitution policy cannot be achieved in a cost-benefit analysis because of the impossibility of setting a time preference agreement. Without a well defined set of preferences it cannot be a formulated a cost-benefit analysis because it would lose the strength of normative and practical applicability.

A counterfactual analysis based on what would have happened if the theft would not exist requires strong moral intuitions[10]. Another possible approach would be an imposition of an external rate of time preferences in order to compare the value of assets over several generations. To implement a positive rate of time preference across generations, an analyst should opt for an explicit moral reasoning on how the price of the object of restitution was formed, grown and diminished in the time (*restitution liabilities*). Ethical constraints that requires time preference approach gives us a satisfactory solution of justice. In these circumstances, the restitution process over generations is not only a matter of transfer of resources from past to present value, using for this purpose only a positive economic analysis. Restitution policy becomes more complex when deals with pecuniary value judgments. Based on this assumption we have to answer about how much money must afford the state to pay to the victims, why, and whether this policy could be admitted as morally considerable effort made by the state for his own past injustices.

Restitution issues in the perspective of Ackerman (1995, cited by Fishkin, the "Boundaries of justice") have an interest not only in the technical approach, but also for the status of the participants at a moral debatre, in a context of a neutral dialogue.

IV. Moral considerations on reparations

In intergenerational perspective, the restitution argument is strengthened when the effects of nationalization were very negative and it generated a persistent injustice. Arguments are built on intuitions, current practices and moral injustice by studying history, even some authors believe that the restitution argument claim lies in the context of intergenerational justice more than in historical injustices[11].

Once the frameworks of post-totalitarian political regime were established in the new democratic order, public debate on social demands were focused on moral repairs, proposing different solutions. Whether it was a case of goods or real estates, the repair has been alleged in its pure form, strictly speaking a "turning back the watches" to the *status quo ante*. Experience has shown that this is an ideal that can not be put into practice. For injuries to individuals, physical or mental demages, finding an equivalent for compensation could not be stated as a principle. No any precise criterion was managed for compensation for moral right that a person is entitled to receive in order of confiscationed property or for life years lost in prisons during the dictatorial regimes. It has been argued that a nonmonetary injury can not be perfectly equated in terms of symbolic repair.

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[8] Source J-store: article: "Discounting and Restitution", p. 184 Cowen Tyler, "Philosophy and Public Affairs", vol.26, no.2

[9] TOJ, cap.V, paragr.45, p.293, „Time preferences"

[10] source J-store: article "Discounting and Restitution", p. 184 Cowen Tyler, "Philosophy and Public Affairs", vol.26, no.2

[11] Lyons, David (1981), „The New Indian Claims and Original Rights to Land", în *„Reading Nozick"* , (Oxford: Blackwell), p. 355–379.

General theories of law have revealed that the application of retributive justice by criminal justice retribution and a subsequent repairing process, have the virtue of refocusing society in a moral space. Punishment and reparing has the virtue of restoring social relationship between the offender and the injured. Mechanisms of reparative justice, aimed at offsetting are the key in rebuilding the moral core of a society. The moment for initiate a corrective justice overlap with the regime political change, on condition that free political debate can take place, the moral evaluation is operational in the sense described by Kierkegaard "history can be lived only forward and assessed backward". Where victims of political injuries (including ethnic or racial persecution on grounds of political motivations) are no longer alive, moral reparation could to be made only with moral means, honoring the memory of victims in the official acts of the state. Reparation, whether pecuniary or moral status, has a strong legitimacy given by systematic presence of the political repression. Assuming that most citizens of Eastern European states would be freely chosen socialism and expropriation, does not make the totalitarian transformation to be a legitimate policy. Moral significance of a democratic decision that most citizens choose to put their wealth to be shared and managed by the state, cannot be extended to everyone, proclaming same moral situation, when it is clear that any person represents an authority in the matter of his/her own fortune.

Communist totalitarian state, no matter how legitimate would have been its foundation cannot claim legitimacy in the historical process where his raw power confiscated the wealth of families, farms and the means of production, turning abusively the owners into state tenants. Affirming that the process of expropriation was just a simple wrong side of a good socialist transformation, it results then that all its victims are in position of main candidates prima facie to damages compensation. Legitimating the expropriation by arguing that social revolutions do not happen at the polls can not be accepted as a final outcome. Even if by democratic processes may result social class or political groups that are inadequate compensated iit requires a legitimate remedy. The legitimacy of a regime is not just about how he comes to power. The Nazi regime, for example, came to power through free elections, but its illegitimacy came from the policies that profoundly affected the human dignity.

A theory of retrospective moral evaluation would be the key to understanding intergenerational justice in conditions of regime change. A moral evaluation of history would be a very complex endeavor, so we try to offer just a preview of a narrowly defined context, whose nature and character can be morally judged.

A historical normative theory of property as lockeanis consider that any title of property is sufficient that any legislative changes that aim an expropriation would be excluded on grounds of moral justification. A moral theory applied during totalitarian period tried to defeat lockean argument by claiming that ownership is given also by the quantity of work submitted as a production factor, been able to convert the worker in a collective owner of a share. Collective property would thus become stronger through a new element merged in ownership, the amount of work. Marxist theory neglects that the amount of work was remunerated under an employment contract and can not merge in property right.

In the explanatory introduction of the romanian nationalization law from 1950, what disturbed the regime was the very existence of the property title, which have been considerred a potential "*exploatator*" („exploiter"), attribute admitted only in the benefit of the state.

If the case of communist expropriation from GDR, between the years 1945 to 1949[12], the justification for confiscation of large enterprises and agricultural areas exceeding 100 hectares has been made under the so-called "denazificaton". The meaning of "denazification" was punishment,

[12] Mark Blacksell, "The Reality of Property Restitution in Central and Eastern Europe," Material prezentat la „Conference on Political Transformation, Restitution, and Justice", la Jagiellonian University, (Cracovia, Polonia, 6–8 iunie 2002).

from a retributive point of view. Property contains, in the eyes of the totalitarian legislative, a dangerous potential behavior of the material property owner.

IV.1. On monetary compensation

If the repair by in-kind compensation is objective, repairing in financial equivalent raises several issues of justice, considered to be a subjective compensation. As a starting point, the total financial compensation is known as a "maximalist" one. A maximalist approach considers the value of the expropriated property at a market value during the expropriation, adding the possible lost income while the property belonged not to the rightful owner. In a moral evaluation of compensation, maximalist approach is unsustainable given that the owner could had acces to a form of use, like possession, or the case in which the State has offered some form of material compensation.

Moreover, even assuming that we could calculate a market price in its historical context, it is difficult to determine the income generated by exploitation of these assets in uncertain conditions. Here we are in the presence of a similar argument, with the same force as Jeremy Waldron's argument, speaking about the rights to compensation claimed by aboriginal peoples. The calculation would be made in an ideal context revenue management, fact hard to be accepted even in the counterfactual approaches[13]. Also, in case of maximalist approach to compensation, the victims of expropriation would be in a best-off situation and nonvictims of expropriation, from the same period would be in an unfair position, because they had suffered other kind of losses during totalitarianism, like their life plans that have been altered by a brutal authoritarian state[14]. A fundamental difference that characterized the discontinuity between the two regimes was property regime, although not alone. When trying to evaluate the restitution process in time, we may find connection with new political context, social and legal issues. For example in the cases of reparations applicants could be the heirs of victims. And a compensation given to the heirs of victims could exceed the maximum amount decided by the testator to be inherited. Also in any moral evaluation must be take into consideration that heirs would have been best-off in case they would have enjoyed all the assets, but any unfavorable situation were possible too and could affect the value of heritage. In other situations we can not ignore the potentiality variations of tax provisions.

The heritage problem lies in the moral intergenerational context. There are some streams of opinion against the "Death Taxes" (for ex. in the U.S.), population of many countries been affected by significant inheritance taxes, taxes that are present in almost all legislations. A state law can be set to any level of inheritance taxes, but taxing the surviving spouse or descendants are morally questionable, especially when they have suffered through expropriation and deprivation[15]. It is morally difficult to sustain a charge of family members in this context. Those who are entitled to inherit cannot claim a right to the whole legacy as long as any state can fix their fiscal policy, fact bring into question the correctness of monetary compensation. Clearly, legislative instability on legacy strongly affect the maximalist position.

A second important issue that brings into question the maximalist position is that it treats victims of expropriation in a normative isolation, separating them from other victims of the communist period, without restitution entitlements. Suffering caused by expropriation is only a simple issue on the state's limited resources, but not an exclusive priority on the political agenda. Also it cannot be overlooked those citizens who were not owners of real estate, but are entitled to compensation from numerous other reasons, having no access to economic or social capital, nor bequests. Random distribution of wealth has, according to Rawls, no moral significance[16]. Moreover,

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[13] Jeremy Waldron, "Superseding Historical Injustice,"Ethics 103

[14] An idea developped in the book „Filosofie fără haine de gală: despre filosofie şi politică", by Miroiu, Adrian, (1998, All Educational, Bucureşti.)

[15] Liam Murphy, Thomas Nagel, „The Myth of Ownership", (New York: Oxford University Press, 2002)

[16] John Rawls, A Theory of Justice, (ed. Cambridge, Mass.: Harvard University Press, 1999), p. 87

some authors consider that until the expropriation moment the owner could fully enjoy of his property. Then he was removed from the benefits of his destiny, but this removing exceeded his moral predictible expectations. In this case we are getting out from transitional justice frameworks that we have proposed. But the problem of allegedly withdrawing a lucky destiny cannot be accepted as a expropriation principle, morally permissible.

V. Arguments against restitution

1. It was argued that expropriation itself was more moral acceptable than dubious historical conditions in which property was acquired: unjust feudal traditions,: economic exploitation, gender discrimination, etc. In this intergenerational perspective, the argument in favor of reparations would be weak, if the "nationalization" may be able to produce acceptable moral arguments.

2. If the owners of real estate property planned their lives around the exploitation of their assets, the same legitimate expectations had those who had not property at all and were also deprived of their own capital - human capital - which could be exploited in other circumstances, if the communist regime would not came to power. And as the number of the latter was undoubtedly much higher than applicants for restitution. There were some opinions issued that property owners would be charged to bear the repair costs for other members of society, less favored by fate.

Non-owners of real estates were already in the worst-off position even before the expropriation of the rich ones, and so they would suffer a double injustice by worsening their position again by the paying the reparations only rich people[17]. In a moral line of thinking those without any property are entitled to compensation for spending their working capital, justifying their claim for compensation as long as they remained in the worst-off position. We cannot accede such an opinion as long as the "nationalization" was not completely dematerialized. This unjust legal act produced however profitable legal effects to different social classes and categories of population, and in many cases even the previous owners had access to his ex-propriety in conditions of mere material use, only *usus*.

3. For some authors restitution is an exercise of sentimentalism, because over time the market value of assets could decrease by the fluctuation of the market system, or of the tax policies could change and the transmission business to the next generation could be affected. Summarizing it can be seen that the requirements of restitution cannot be limited only to expropriations, but also must be extended to all those who fulfilled their duties in a manner of *bona fides* during the communist systems and they have been injured and so they have legitimate moral claims on state resources. The moral problem of reparation after a totalitarian regime was formulated by those who opinated against the restitution in a simple way: rewarding the favored ones of the fate at the expense of the disadvantaged ones. Reparation is a powerful argument, but is not decisive. According to some authors, the reparation is only a preference for a particular social policy and cannot be considered as a solution to social justice.

4. Another moral reason for rejecting the ideea of reparation was the identity the entitled holders. Regime change was treated as an end of a war and moral controversy scheme is identified as that by which citizens that were involved in war without their consent, had to bear the costs of war compensation, if their country was defeated. This obligation stands as well for those who were not even involved in the war. A social group included by force in the redress process who had no role in the formation of injustice will bear the costs of repair. Some opinions have emphasized that restitution process is not grounded only on suffering, but on the existence of conflicting interests between the victim and perpetrator[18]. In reparative moral requirements an important shift is made

[17] An argument of Jon Elster, in "On Doing What One Can: An Argument Against Restitution and Retribution as a Means of Overcoming the Communist Legacy,"East European Constitutional Review 1, 1992, p. 15–17.

[18] Kutz, Christopher „Justice in Reparations: The Cost of Memory and the Value of Talk”

when subordination of power is replaced by that of justice. A restorative acceptable model seems difficult because it requires strong correlation with the degree of public awareness. While victims of injustices seek their inclusion in a community of political and moral agents, aiming reparations, the holders of reparative obligations tend to separate morally from political institutions responsible for damages, requiring a fair assessment of each relevant case, hoping that general evil could be mitigated by justificative particularization.

5. The superseding thesis of historical injustices accepts a reduction of the force of ownership right. The reduction of entitlement for property rights is accepted in the case of changing circumstances, theory expressed by David Lyons and Jeremy Waldron. The core argument of weakening the entitlement by separating people from their land represents a form of prescription. As Waldron argues, justification of property must comply with a set of requirements regarding the rights, liberties and privileges, requirements characterized as "circumstantially sensitive". But in a same line of argumentation, if legitimate entitlement is sensitive to changes in circumstances, then the effects of illegitimate purchases or other infrigement of rights of some to become legitimate in changing circumstances. This represent the main argument in Waldron's thesis of superseding the historical injustices. The thesis regards only past injustices and it does not mean that past violations have been fair. For example: a community that used fraudulently the water source of another community forced by an ecological disaster. The act of injustice was morally superseded by the new circumstances. (Waldron 2004, op.cit).

But if compensation is possible, then it depends on „moral relevant circumstances and their evolution" (Waldron). Superseding argument is identified by the concept of *force majeure* clause, in the positive law.

V.1. Distributive justice vs. corrective justice

Even admitted in Eastern European legislation, reparatory policies often lost ground against other public policies, even in the sphere of justice. In ranking priorities in terms of distributive justice, the requirement for access to public resources for repairs was below the requirements for political actions in reducing the poverty, below the need for health care or the state pension problems or other policies relating to investment in human capital, education, etc.

Some analysis consider distributive justice itself as a priority of application to the criteria of reparative justice. Distributive justice contains the principles for establishing a public policy framework, including management issues of property litigation against the state or other individuals, the economic and social needs. Priorities of distributive justice are given by government institutions, including the tax system, health or education, institutions managed by the distributive process system.

Corrective justice concerns the principles of justice that aim to rectify any intrusion in the individual rights, to preserve physical and spiritual integrity of property, principles that contained within the institution of tort-law in the Anglo-Saxon legal system[19]. The restoring of a lost property is a matter of corrective justice, but we have to introduce a distinction between the expropriation made under totalitarian political pressure and the expropriation made for reasons of urban architectural necessities in the political transition process.

Central and east European countries have experienced both the requirements for distributive and corrective justice. It appears as problematic a conflict of priority between the two, when it appear a problem in choosing between them. By its nature, distributive justice establishes the entitlements, corrective justice protects from possible violations. Corrective justice impose the restoring of the *status quo ante* principle. If the principle of *status quo ante* is regarded as illegitimate, then state institutions are no more justified in their moral status and a transitional justice is required. Difficulties in dealing with reparations requirements will impose a stronger conception of distributive

[19] Stephen Perry, "Responsibility for Outcomes, Risk, and the Law of Torts," in Philosophy and the Law of Torts, ed. Gerald Postema (New York: Cambridge University Press, 2002).

justice. Strict theories of distributive justice, egalitarian or utilitarian, requiere a total subordination of principles of corrective justice in order to achieve their distribution purpose.

If Lockean legitimacy approach is binary (justice can be compatible or incompatible with a set of principles), a complete liberal vision have to answer to corrective statements in non-ideal circumstances. According to Rawls, the beneficiary of distributive justice is the „basic structure of society". Taking into account their different spheres of interest, distributive and corrective justice can relate in different shape[20]. First, corrective justice can appear as tool of distributive justice: the principles of corrective justice seek to maintain fair distribution of goods. On this ground, restorative justice emphasizes its normative force by the difference between the present unfair context and fair desirable distribution. Second, restorative justice can be seen as independent from normative distributive justice: corrective justice must resolve the turmoil of property, obstructing the illegally distributive approach, for example, in terms of a reasonable institutional expectations.

Even if it concludes that the East European socialism has failed because the scheme of distributive justice, imposed in opposition with individual choices, we just think that accumulation of citizens during this totalitarian political system - cars, apartments and other properties - worth in turn to be protected in case of an arbitrary illegitimate usurpation, whether direct or indirect. On this grounds, the strength of corrective justice requires the protection of legitimate expectations as an auxiliary of distributive justice.

None of these criteria is entirely satisfactory. In the absence of a fair distributive criterion it is hard to foresee a significant regulatory power of the corrective justice. If principles of distributive justice are sufficient to evaluate the distributions of post-expropriation, any corrective requirement should be determined solely by a distributive way. Conversely, if the principles of distributive justice applies only to basic social institutions, (Rawls's argument), so that the current distribution is only a matter of consensual transaction in an institutional framework, it should be difficult to foresee any moral force for arbitrary models involved in the modification of the private property. In this argumentation, the principles of distributive justice have insatisfactory relevance in corrective context.

A third possibility, more plausible in the sense of some authors (e.g. C. Kutz), would be full integration between distributive justice and restitution. Reparative justice principles represent a distinct normative basis as long as it express an ideal of interpersonal behavior and responsibility, but the force of those principles is effective only in a scheme of distributive justice.

So we could distinguish two possibilities:

- An inability of a state to ensure a minimum living standard, with a strong corrective bias, but neglecting its distributive liabilities. With limited financial resources cannot be ensured the minimum functioning of the basic structure of society. Once assured the basic needs, including the management and functioning of democratic institutions, granting compensation for injuries may proceed.

- Second, correlation between corrective justice and distributive justice is more profound. Injuries caused by expropriations are relevant facts evan for a distributive justice process, from the point of view of relative position of the victims and the degree to access to compensation.

It should not be neglected the view claiming that that imposition of reparation in kind was prefered by the state for reasons of economic efficiency of state administration, the cost of maintenance of assets was a hard financial burden for the state, fact that would have affected the distribution process.

V.1.1. The problem of cultural property restitution

The most restrictive form of compensation is considered the restitution of the community property of churches, synagogues, museums, universities, other cultural places, because of its public good indivisible structure, its importance in community life. Requirements for reparation in this case

[20] Stephen Perry *"On the Relationship Between Corrective and Distributive Justice*," in Oxford Essays in Jurisprudence, Fourth Series, ed. Jeremy Horder, New York: Oxford University Press, 2000, p. 237–63.

be expressed in a money ammount. The value of these institutions is given by their cultural tradition in community. The seizure of these institutions give priority for allocation of resources in order to restore the previous situation. The requirement derives from the contribution they make to the cultural life of those communities[21].

Loss of common culture is considerated a greater loss than that of the property, even if the members of society have adapted their life to the imperatives of political and social commandments of the time. A stronger argument in favor of refunds is the need of traditional institutions, as future sources of culture. This is the argument of intergenerational justice of Rawls, the moral necessity of strengthening the right institutions.

If the properties may not be returned in kind, a subsidiary of compensation requirement is fully justified to reconstruct traditional infrastructure elsewhere, but fully accessible to the community. The argument for reparations lies both in the corrective and distributive justice in the case for the restoration of cultural life, and it is mandatory in the case of the massive dislocations of population.

Although common pool resources is limited, the necesity for repair has a moral justification in the same way like satisfying the need or interest for distribution.

In ordering the priorities for reparations Jon Elster[22] considers that reparative justice requirementsă for cultural groups take precedence over all other repair requirements.

V.2. Mainstreams in Romanian restitution debate

The romanian legislative debate has enumerated several visions for restoration of the totalitarian state injustice. Thus, some guiding ideas could be highlighted.

Restitution of property has never been discussed as a reverse political measure of nationalization, although therestitution was qualified in various parliamentary debate as a "political moment of truth and justice, for the resolution of economic issues"

Restitution in kind has been seen in some political positions as preferable in terms of efficiency, but not in terms of justice, the repairing process by restitution in kind was considered preferable than compensation with money from the public budget. Pecuniary compensation was admitted only as an exception to repairation. Arrangements for refund in cases of exceptions provided three modes of compensation: equivalent goods or services, government bonds and shares. The advantage of this project was considered by its promoters to avoid the encumbrance for many years of the state budget. The draft law also covers both the housing estate, which formed the subject of the controversial Law no. 112 and the destination other than residential buildings, like the economic buildings. Besides reparations any draft law was concerned for dealing with the concept of legal stability, trying to achieve continuity in the rule of law. Restoring justice issues were focused on some aspects of language that generated questionable interpretations. Parliamentary debates have varied between concepts like "return of the equivalent" or "the equivalent remedies."

Often, some parliamentary moral evaluation revealed that restitution had a negative character negativ by its utilitarian aspect. Moreover, in lacking moral landmarks, during certain debates there was not dificult for some of them to justify the uselessness of a remedial legislation. Thus, in a cost-benefit analysis, restitution would have costs an amount that exceeded the benefits, that would be received only by a small part of the population. In an opinion, the reparation policy would be destinated only to 5% of the population, the rest of 95% of the population would not have suffered any damages at all. The moral problem that intervenes here, according to parliamentary studies information, is whether 92% of the country's wealth must be transferred to 5% of the population. As it could be seen, a matter individual right is reported, even after 1989, quantitatively, configuring a new issue, the absence of this concern for the great mass of the population. Any ethical principle

[21] Jeremy Waldron, *"Minority Cultures and the Cosmopolitan Alternative*," in The Rights of Minority Cultures, (ed. Will Kymlicka Oxford: Oxford University Press, 1995, p. 93–119.)

[22] Elster, Jon, *Retribution and reparation in the transition to democracy*"....

would be sacrificed under such circumstances of absence of a great number of similar cases[23]. There have also been made moral judgements on neglecting any other disscutions outside the refunds of historical injustices, althogh "the injustice was done to all other members of past generations, who - under the old totalitarian social arrangements - have lasted for decades[24]."

Out of totalitarianism and during the political reform the debates had not exhausted the inventory of the ethical grounds for refund due to the vast particularization.

A comparative approach for integration of accepted practices of civil society in matters of intergenerational justice, would increases the interest in an "original position" of applying principles, either in the establishment of communist totalitarianism or a liberal democracy. A "time zero" for post-war German states, was considered in some papers as a moment of a „state choise", either for economic prosperity in terms of capitalism, or a social justice state (the former GDR)[25]. Administration of a real social justice was considered as the result of state intervention in the former GDR. Intervention of the socialist states in the organization of the social life had shown a poor management in dealing with a social justice in a communist state, shaping a stronger criticism of the founding principles of communist authoritarianism. Admitting that justice could not be fully identified with the legitimacy, at least its intergenerational dimension of justice must have an important part as a constituent of it.

Following retrospectively some relevant behaviors of actors engaged in moral debate over repair issues during the transition period it could be foreseen dominant aspects of this context. Thus, a controversial issue which has not received a definitive answer, was whether the repair requirements of the victims of abuses and injustices can accept a state response in delaying the fulfilling of their claims on the grounds that the repair would compete with other types of requirements that the state must face[26].

In Romania, the fact that the repair is not fully carried out, so it could not be considered as *corrective justice* policy, is announced from the title of the decree-law no. 118 of the 30th. of March 1990, as: "Decree-Law on the granting ***some rights*** to persecuted persons for political reasons by the dictatorship starting March 6, 1945, and for persons deported abroad or in prison…." In terms of intergenerational justice, reparation was realized by compensation for injured survivors (article 4 of the law), but under condition that it shall not be remarried later.

Motivation for remedy in the case of regime political regime is reflected in the normative acts issued on this purpose. In this respect, the Law 341 of 2004, shows even in the title called "law of gratitude for the heroes and martyrs, fighters who have contributed to the Romanian Revolution in December 1989", indicating also that beneficiaries of rewards are those who have helped the political change of regime "popular uprising in Timisoara, Bucharest and in other cities that were transformed into antitotalitarian revolution, backed by the army, who led to the fall of the communist regime and to the establishment of democracy".

Moral justifications for gratifications are set out in the principles which are governing the application of this law, as follows:

a. *Respect and gratitude* to the heroes and martyrs from December 1989, and care for the heroes survivors;

b. *Respect* for *historical truth* by deepening the research and documentation on the Revolution of 1989;

c. *Differentiation of stages* of the Revolution ;

d. *Defining the categories* of fighters, by distinguishing the commitment and participation in revolutionary activities;

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[23] Chamber of Deputies, Session from the 23th. of August 1999

[24] Miroiu, Adrian *„Filosofie fără haine degală",* (Ed. All Educational, Bucureşti, 1998)

[25] Marshall, Gordon "*Was Communism Good for Social Justice?*: a Comparative Analysis of the Two Germanies", The British Journal of Sociology, vol. 47, no.3, sept. 1996, p. 397-420

[26] Kutz, Christopher „*Justice in Reparations: The Cost of Memory and the Value of Talk*"

e. *Differentiate between civilians and soldiers* on the stages and forms of participation in actions undertaken for Revolution;

f. *Equity* in the granting the rights under this law.

A distinctive and importantant aspect of the legal nature of the rights granted to participants is not considering them as *income*. In art. 5, paragraph 2 states that "the rights granted under this law are not considered income, nor taxed and do not affect the granting of other rights."

Delimitation of those who can not benefit from the provisions of this law (art. 8) might be regarded as a sign of moral accountability in terms of efficient factors of injury caused by the totalitarian political regime. In this position are mentioned "civilians and soldiers, who are proven to have been involved in the former Securitate forces as political police activities, and those who organized, acted, instigated and fought, in any form, against the Revolution of 1989 .

VI. Retroactivity challenges

VI.1 The concept of intergenerational justice in the case of non-retroactivity. Case reparation issues

A dificult argument faced by the intergenerational justice, especially in present-past relationships was the argument of *non-retroactivity*. In favor of a mandatory rule of non-retroactivity of the law, regardless of cause, have opined authors in different historical periods. In Hobbes's Leviathan[27] is stated that "any law passed after the consummation of a fact cannot turn this fact into crime. A similar principle is postulated in the U.S. Constitution (Article 1, sect 9 (3)) which prohibits any *ex post facto* action. Similarly, the European Convention on Human Rights bans in art. 7 that anyone can be found guilty retrospectively, if the facts were not violating the general principles of law recognized by civilized nations, at that time. The purpose of these provisions is formulated synthetically by Friedrich Carl von Savigny: ".... confidence in the rule of law in force is important and desirable. This does not mean we have the same confidence in the permanence of that law, but as long as the law is in force its effectiveness is indisputable"[28]. Our interest here rests only in matters of principle and their moral relevance.

If it is real that time initiates legal relationships, in intergenerational justice we can not speak of absolute opposition to non-retroactivity, because intergenerational justice itself contains the essence of retrospective approaches. The problem of non-retroactivity in some cases served only as a "political buffer"[29], the legal responsibility of non-retroactivity is often protected by legal institution of the prescription. There can not been invoked the non-retroactivity when assessing the moral nature of the facts from the past, but relevant to transitional justice. Often, the post-totalitarian regime, by invoking the principle of non-retroactivity as a technical legal argument, tried to oppose the attempted repairs satisfaction (either economic or moral). Indeed, all modern democratic constitutions recognize unanimously that the law cannot look to the past. Sure, morally could be accepted the non-retroactively when speaking about a juridical sentence as long as it was not envisaged in the legislation of another legal order. Moreover, some political facts were not criminalized, even more, these facts were widely accepted as public service obligations to be performed in accordance with the requirements of that time. In the case of the totalitarian regime, the horrors discovered by retrospective examination of the past is the moral argument itself which requires democratic measures in order to safeguard the future democratic state. It is therefore morally

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[27] „No law, made after a fact done, can make it a crime ... For before the law, there is no transgression of the law.(Hobbes, Leviathan (1651), Cap. 27-28)

[28] von Savigny, Friedrich Carl, „Private International Law, and the Retrospective Operation of Statutes", 1880, p. 344.

[29] Letki, Natalia „*Lustration and Democratisation in East-Central Europe*", în Europe-Asia Studies, 2002 University of Glasgow.

accepted, for example, that a public servant of the totalitarian state has no longer a social capacity to respond to special conditions required for a democratic state, as a way of protection for future democratic institutions. In some Central and Eastern European countries, lustration was applied only when the public official has lied about his past. In a case like this institution of non-retroactivity couldn' be moral relevant in a case of consciously deliberate alteration of the official truth. An argument of political revenge in case of administrative removal from office cannot be sustained, as long as *transitional justice* expects honest answers to clarify the relationship with the past. In supporting the concept of retroactivity, was formulated an argument that could be described as one of the symmetry. Totalitarian regime itself has often acted retroactively regarding the political past of its citizens, so its entire existence of the totalitarian regime should be reviewed retroactively. Political transitions in East European areas were conducted with different intensity regarding the legislative changes. From a certain perspective any legislative change can be seen as a microtransition itself, which produced political effects even at a small scale. Legislative power, manifested in the form of a legislative will, had to justify any new passed law on grounds of efficiency or on a higher moral grounds. However, an important distinction must be stated. The institution of retroactivity required in a transitional justice political process must not be confused with a basic human right, argument that often was invoked misty, especially in the public debate.

VI.2. Arguments of the retroactivity of law

1. Adherents of doctrine of retroactivity of law recognize the validity of this principle only in exceptional circumstances, where the negative moral consequences remain strong, through legal action or inaction, where a natural right was transgressed. As such it was widely considered that the Nazi laws could not be evaluated in a perspective of an active principle of non-retroactivity. On this line of reasoning, the legal approach of retroactivity sustained the Nuremberg trial.

2. Was argued also that retroactivity should be understood as a temporal range of options and not as a binary construct strictly based on acceptance or refusal. So retroactivity is seen as a possible recourse to stability in particular cases where the new law is unclear, in a kind of rawlsian reflective equilibrium, setting a kind of dialog with the previous legislation.

3. Also, a retroactive regression was considered and the use of judicial precedent, a source of law in Anglo-Saxon legal system, and by moral extension, moral precedent is used in moral dilemmas solving.

4. Theoretically, legislation is prospective and general, but the sentence is retrospective and particular. An acceptance of the moral argument of retroactivity is compatible with the argument set out by the U.S. Supreme Court, who stated in some of its decisions that the legislative changes, often defeat expectations based on the priority of the rule of law. Legislative initiative in this case is analitically regarded as a feature limit, tolerable but hardly acceptable in a democratic state. Of course, a reference like this has a strong libertarian political connotation, where the process of formal legislation is considered as non-necessary. The character of the libertarian society that has no bias in laws changing, it is morally a pro-retroactive attitude.

5. In U.S. legal practice the institution of retroactivity had prevailed even in civil contracts. Non-retroactivity principle was often cited in courts in contractual clauses interpretation, but the practice had recognized numerous exceptions to this principle.

6. Another argument that favours the admission of retroactivity in the reparation approach is based on the concept of "private rights" of individuals, that are naturally inherent to people rights, with pre-political origin. Also, "private rights" or "absolute rights" inherent to every citizen is a natural result of the freedom that cannot be sacrificed for the public interest sake. The fundamental purpose of any just legislation is to maintain and regulate the absolute rights of individuals, action that requires a regressive retroactive approach. The appeal itself to legislation is considered, within

certain limits, as a retroactive approach, developing the explanatory power of the categories of "public rights" and "private rights"[30].

VI.3. The argument of non-retroactivity

The principle of non-retroactivity was controversed, but its moral grounds were oftenly ignored. Being invoked in judicial trials, the principle of non-retroactivity could be morally assessed derivating the evoluate form of a juridical solution on its moral bases, the core of any juridical decision containing particles of moral entitlement.

The main accusation of the principle of retroactivity is that it couldn't be morally accepted a punishment of an *ex-post fact.*

The moral efficiency and the legal impact in the constitutions of democratic states, makes the principle of non-retroactivity to be employed in the *universalist* paradigm.

VI.4. To a reconceptualization of the retroactivity

Practitioners and modern doctrines of law consider the delimitation prospectivity-retroactivity as purely illusory. Retroactivity has manifested in its material form, in fact, by changing the legal consequences of acts from the past, but the concept of retroactivity has been insufficiently morally assessed. Retroactivity in reparation process required by the collapse of totalitarian legal system was only a transitional feature for appealing to the old legislation with the purpose of configuring moral intuitions a remedy approach. At least some features of retroactivity could be morally permissible for the need to qualify and clarify the nature of past historical deeds. Subjective rights that were violated imply a moral dialog which need a reconceptualization of retroactivity. Recognition of these infringed rights determines the possibility of effective retroactive procedures in a *transitional justice* process. In essence, the moral debate is not only the conflict between legal provisions, current or past, but, ultimately, between the positive law and natural law.

Under the legal doctrine of the U.S. legal system was admitted a concept of *mild retroactivity,* in the case of taxation, arguing that in states with conflicting administrative regulations, traditional opposition to the retroactivity cannot be accepted[31]. Thus, retroactivity cannot be rejected purely axiomatic. It was considered that retroactivity may work for safeguarding social values, when are involved individual rights or public welfare. It is recognized in some doctrinal views that these categories of public rights and private rights may be part of a coherent scheme, in which retroactivity can become formally constitutional.

VII. Conclusions

Emerged recently, "*transitional justice*" was originally called "*retroactive justice*". This field of study has outlined some specific problems of the states recently emerged from totalitarianism, in which liberal justice had proved ineffective in developing solutions[32]. Retribution and redress measures generated by the functioning of totalitarian systems are difficult to achieve solely through classical legal steps. In a historical plan, the last event where was upheld retroactivity in a case of a totalitarian regime was the case of the Nuremberg Trials. The essence of the concept of non-retroactivity in a state of law is the protection against abuse. Putting the problem of intergenerational relations, in terms of relations with the past, in a transitional space, it requires moral analytical approach. The constraints of non-retroactivity principle cannot deal with a totalitarian past, being difficult to accept the presence of a structurated moral injustice, subject of interest for transitional justice.

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[30] Woolhandler, Ann „*Public Rights, Private Rights and Statutory Retroactivity",* 2005, source: http://law.bepress.com/uvalwps/uva publiclaw/art37

[31] http://law.bepress.com/cgi/viewcontent.cgi?article=1062&context=uvalwps

[32] The article: „*Curtea constituțională și lustrația*", Adrian Cioflâncă, Revista „22", 31 aug 2010

We consider that if the problems of relationship with the past cannot be solved, then at least could be simplified by moral assessments, in an interdisciplinary approach of the intersection of philosophy of law and political science. We cannot avoid some examinations of existing injustice, revelead by analytical moral evaluation inside the society, only accepting that a law has been declared constitutional. This can lead us through a rational approach of *reflective equilibrium* type to the idea that, perhaps, it would be required a constitutional revision, at least in some specific area, concerning *transitional justice*.

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