

# **Incrimination of Freedom of Conscience or How “Life Beats the Movie”**

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**ABSTRACT:** During the communist dictatorship in Romania, many citizens fulfilling their compulsory military service were criminally convicted of insubordination on the grounds that they refused to join the army or because they refused to take the military oath. Among these young people, many were condemned for refusing to work on Saturday, considering the Sabbath as a day of rest. Following the December 1989 revolution, Romania compensated people sentenced to prison or other forms of persecution for political reasons through material means. In 2009, amid tensions between the Romanian state and the Religious Organization Jehovah's Witnesses, the High Court of Cassation and Justice, the Supreme Court in Romania, described the crime of insubordination in the army as a common law crime and not a political one, thus condemning all forms of manifestation of freedom of thought or freedom of religion as a crime of common law.

**KEYWORDS:** Hacksaw Ridge, Jehovah's Witness, conscientious objector, Romanian law, freedom of conscience

## **Introduction**

Hacksaw Ridge is a 2016 film directed by Mel Gibson (Mel Columcille Gerard Gibson is an American actor, director-producer and writer, born on January 3, 1956, Wikipedia). The film received two Oscars, one BAFTA award and 50 other awards (Hacksaw Ridge in IMDB 2016). The film tells a true story during World War II when Desmond T. Doss (born February 7, 1919, in Lynchburg, Virginia, USA, deceased on March 23, 2006), a corporal who took part in the World War II as a sanitary in the US Army, refuses to carry or use a weapon during the war, requesting to serve the US Army as a non-combatant soldier. His request was denied and the soldier was the subject to an immense pressure from his fellow soldiers and his ranking superiors. Desmond Doss was arrested for “insubordination”. After many ordeals, Desmond Doss is assigned to the 77<sup>th</sup> Infantry Division of US Army, as a doctor. He actively takes part in two of the bloodiest battles in Guam and Philippines. During the battle of Okinawa, Desmond Doss rescued 75 soldiers from his division (Bernstein 2006) without carrying a gun. When he died in 2006, Desmond T. Doss was buried with military honors (Doss 2015, 145), being the first soldier to be convicted for insubordination and to be later awarded with the highest military distinction offered by the Congress of the United States of America (the decoration is handed over by the President of the United States of America in the name of the Congress, The National WWII Museum 2020). He was decorated twice with the Bronze Star Medal, which is the highest distinction awarded to a military for heroic achievement in a combat zone.

## **The Freedom of Conscience in Romania**

In 2009, the High Court of Cassation and Justice of Romania (HCCJ) issued a legal decision that almost was unnoticed: the Decision 32/2009 for the examination of the appeal in the interest of the law, regarding the application of the provisions of article 1 paragraph (1) letter a) of Decree-Law 118/1990, republished, with subsequent amendments and completions, to

the persons who, after March 6, 1945, and until 1989 inclusive, were definitively convicted for crimes of refusing to draft or to serve in the military or convicted for insubordination as stated and punished by article 334 and 354 of the Criminal Code, committed on the grounds of religious conscience (Official Journal 137). This decision, which clarifies how the courts of law should interpret the Law 118/1990 – granting rights to persons persecuted for political reasons by the dictatorship established from 6th of March 1945, as well as to those deported abroad or imprisoned (Official Journal 1208). The appeal which was adjudicated by the High Court of Cassation and Justice of Romania stated that “the persons who received a final sentence for crimes committed against the country’s defense capacity, stipulated by articles 334 and 354 of the Criminal Code [the Criminal Code from 1968, abolished on the 1<sup>st</sup> of February, 2014, *subl. nos.*], committed for reasons of conscience, cannot benefit from the rights granted to persons persecuted for political reasons” (Decision 32/2009). The decision affected those citizens who, for reason of conscience, refused to fulfill military service or participate in armed confrontations, the so-called “conscientious objector”.

The High Court of Cassation and Justice had the mission to standardize the sentences of all courts throughout the country which, in similar cases, pronounced contradictory decisions in case of recognition of the political character of the conviction of the faithful of the Jehovah’s Witnesses Organization for refusing to join the army or to swear allegiance to the country. The contradictory sentences were also caused by the fact that the Law 221/2009 – political convictions and administrative measures assimilated to them issued between March 6, 1945 and December 22, 1989, art. 1 (Official Journal 396/2009), which includes the Criminal Code articles incriminating political offences, does not stipulates the crime of insubordination, it has to be noted that in the Criminal Code from 1936 the insubordination crime did not exist, it only existed in The Military Justice Code of Romania from March 3, 1937 (Official Journal 66/1927). In these conditions, the High Court of Cassation and Justice specifies that the refusal to fulfill compulsory military service or the refusal to swear allegiance to the country were valid obligations for all Romanian citizens, regardless of their religion belief and that *“the protection of such values by means of penal law does not belong to a certain order, but to the sovereign right of a state to regulate the participation of its citizens and the forms of participation for the fulfillment of an obligation required by the fundamental law. Introducing the obligation to perform military service was meant for all citizens that were able to perform it, without any discrimination on religious or other grounds.”* (Decision 32/2009).

However, as it is acknowledged in the Decision, the Romanian Court considers in particular the members of Jehovah’s Witnesses Religious Organization. References to Jehovah’s Witnesses Organization in the Romanian Court’s Decision from 2009 are not accidental, coming after Romania had lost due to the ECHR Decision regarding requests no. 63.108/00, 62.595/00, 63.117/00, 63.118/00, 63.119/00, 63.121/00, 63.122/00, 63.816/00, 63.827/00, 63.829/00, 63.830/00, 63.837/00, 63.854/00, 63.857/00 si 70.551/01, formulated by the religious organization “Jehovah’s Witnesses – Romania” and others against Romania from July 11, 2006 (Official Journal 101/2007), when, after negotiations, Romania acknowledged that “The Government admits that the initial sanctioning of individual applicants, in their capacity as ordained ministers, for failing to perform military service may have been a violation of the rights stipulated in the Convention.” Therefore, Romania and Bulgaria were in the same situation, being forced to recognize the right of the Jehovah’s Witnesses Organization to refuse active military service, the right not to be bound by the provisions of blood transfusion law. Bulgaria also officially recognized the religious organization as a consequence of the ECHR decision from The Application No. 28626/95 of the ECHR: Khristiansko Sdruzhenie “Svideteli Iehova na” (Christian Association Jehovah’s Witnesses) against the State of Bulgaria. However, it seemed that the battle against “non-combatants for reasons of conscience” had been won by Armenia through another ECHR sentence Bayatyan vs Armenia, that had been published on October, 27<sup>th</sup>, 2009, stipulating

that article 9 of the European Convention on Human Rights, interpreted in the light of article 4 paragraph 3, letter b, does not guarantee the right to refuse compulsory military service on conscience grounds, therefore, non-combatants' fundamental rights have not been violated.

Today, the religious organization "Jehovah's Witnesses" is one of the 18 religious cults that are legally recognized by the Romanian state. In Romania, the history of "Jehovah's Witnesses" begins in 1911 with the "Bible Students", the followers of Pastor Charles Taze Russel who was preaching a new Christian doctrine, totally different from the other Christian denominations since it did not recognize the Trinity. "Jehovah's Witnesses" recognized Jesus Christ as the Son of God, but not equal to his Father.

Between 1949 and 1990, the organization was outlawed in Romania, its members often being convicted for being part of the religious movement. Most of the convictions were due to the fact the members of the "Jehovah's Witnesses" organization refused to enlist in the army, to swear the allegiance to the country or to recognize the authority of the state.

As mentioned above, Jehovah's Witness Organization was not at its first litigation with the Romanian state. From 1990 till 2003, the organization "Jehovah's Witnesses" had the status of a religious association. In 2003, the Ministry of Culture and Cults was required by the Supreme Court of Justice (Decision 769 / 2000) to recognize the status of religious cult for the "Jehovah's Witnesses" Organization (Cuciuc 1996, 78-80). It should be noted that one of the reasons why their religious organization was not recognized as a religious cult until 2003 was its refusal to recognize the political authority of the state, its armed force and the political and social organization of the country.

In these conditions, the High Court of Cassation and Justice issued Decision 32/2009 which, at first sight, affected only members of the new religious cult – Jehovah's Witnesses Organization – which demanded compensations for all the years spent in communist prisons for the crime of refusing to take up arms or refusing to take the oath.

From our point of view, the Supreme Court hastened to rule on an appeal in the interest of the law, even if there were contrary decisions in the courts of the country and, in particular, the Court hastened to arm itself in motivating the decision with an ECHR decision which was apparently favorable, even if the Romanian state had suffered several defeats in court against the religious organization "Jehovah's Witnesses".

First, the High Court of Cassation and Justice did not conduct a documentary investigation or seek the opinion of the specialists of the National Council for the Study of Security Archives on the political and historical context in which the political judgments were pronounced after March 6, 1945.

The Supreme Court limited itself to considering that all criminal convictions for the crime of "insubordination" pronounced against the military men have a common law character because they concern a general obligation valid for all Romanian citizens to participate in the national defense effort. The court does not analyze the phenomenon, the role of the army after the end of the war, the effects of the Sovietization of Romania. Understanding the repressive phenomenon of the communist authorities established in Romania after 1945 is a difficult process and requires a lot of patience and attention. Even after 30 years of efforts in studying the phenomenon of communist repression in Romania, some aspects are still unclear to us, interpretable or unanswered.

In our study, we have identified at least three major stages of communist political repression against people who, for various reasons, fought against the communist regime or who, without a well-defined reason, were assimilated as reactionary elements and treated as such by the communist authorities:

The period between 1945 and 1953 is the Stalinist period of implementation of communism in Romania, a period marked by nationalization, forced collectivization and population displacements, overlapping with the dissolution of associations, foundations, as well as political parties and the condemnation of their members.

Specific to this period are the hasty criminal trials, in which the sentences were known before the trial and which were distinguished by unmotivated or briefly motivated criminal sentences, often written on a single page.

The sentences, the invoked articles of law or the judicial procedures, in many cases, were not related to the accusation brought against the convict or to the alleged criminal act. Thus, most convictions referred to insubordination, sabotage, conspiracy against the social and state order, attempted coup, fraternization with the enemy, etc.

The period between 1954 and 1980 is the period of relaxation of communist repression and the “democratization” of social and political relations. This period is marked by the pardon of a large category of political convicts by the Decree 155/1953 and by the massive repatriation of Germans, Jews and Greeks ethnics to their countries of origin. At the same time, this period is marked by Romania’s obtaining the “most favored nation clause” from the USA.

From the point of view of the communist repression against the opponents of the Bucharest regime, we can observe that the formulated accusations were refined and diversified including: illicit income, possession of currency, possession of forbidden literature, distribution of propaganda materials of political, religious or ethnic character. During this period the penal trials for political offenses are complex, the defendants are allowed the right to defense themselves and the trials extended over a long period of time, precisely to simulate the fair and unpretentious nature of the trial. In fact, the sentences were prepared by the State Security staff and entrusted to the judges as a task. We can also identify another feature of this period: the forced hospitalization of political dissidents in institutions for treating mental illness. These hospitalizations are based on false medical examinations, prepared by State Security personnel.

The period between 1980 and 1989, the period of political reforms in the USSR is marked in Romania by the continuation of the political repression of all persons who criticized the policy of the communist regime in Bucharest or the cult of personality of Nicolae Ceausescu. However, the staff of the State Security had perfected themselves and drawn up a very laborious plan of social, professional or religious denigration of the dissidents.

From the point of view of political repression, the criminal proceedings staged for various common law crimes continue: embezzlement, possession of foreign currency, etc. as well as criminal investigations with house arrest or forced residence.

Even without a historical-political documentation, we consider that Decision 32/16.11.2009 of the HCCJ refers strictly to the situation of drafted Romanian citizens who refused to swear allegiance to their homeland or refused compulsory military service for religious reasons (most of them belong to Jehovah’s Witnesses Organization and the Reform Movement).

Although the HCCJ is the supreme court in Romania and many experienced lawyers work here, they did not have the legal or moral capacity to conduct common conscience trials for the crime of insubordination without analyzing each case. We want to point out that, in the reasoning of Decision 32/2009, HCCJ mentions that *the crime of insubordination in the case of military service compulsory to all citizens* is a common law offense, therefore it is our conclusion that not all insubordination offenses are common law offenses, but only those specified. Without a careful analysis of the criminal and the network file of each applicant for compensatory rights, which offer an insight of the real reason for the conviction, the notes written by criminal investigators or by Security stuff, the statements of witnesses, network informers etc. any judgement can only be hasty and subjective.

Consequently, the conviction for various legal reasons of the military who, between 1945 and 1989, made public their religious orientation in the army could be objective (in case of refusal to draft or to swear an oath), but could also have the purpose to determine those men to abandon their religious beliefs, to draw public attention on them and to put them under pressure in order to discredit religion, religious beliefs and to create the new kind of man and the socialist society. We think of a similar conviction for a group of 16 Adventist military in 1950, known as the “Delicote Lot”, when the Adventist Christians were charged by the

prosecutor with insubordination, saying that “they knowingly and willingly committed the act in order to urge others to disobey, thus serving the enemy, the imperial enemy which seeks to bring anarchy among the ranks of our nation army” (CNSAS, 9).

We consider that the High Court of Cassation and Justice of Romania made a hasted decision when Decision 32/2009 was pronounced and by choosing the European Court of Human Rights Decision as an argumentation since the case of Bayatyan versus Armenia was in the trial phase at ECHR in the same year. The final decision of the Grand Chamber of ECHR was pronounced on 7<sup>th</sup> of September, 2011 and it had drastically changed the initial decision, stating that *“although article 9 did not explicitly referred to the right of conscious objection, the Court considered that opposition to military service, motivated by a serious and insurmountable conflict between duty to serve the army and the conscience of an individual, constituted a conviction or belief of sufficient conviction, seriousness, cohesion and importance as to attract the guaranties of article 9. That being the situation of the plaintiff, article 9 was applicable in his case. Moreover, given in particular the existence of alternatives capable to accommodate both involved parties in the vast majority of European states and that the conviction of the plaintiff occurred at a time when Armenia had already undertaken to introduce alternative service, the Court considered that there has been a breach of article 9 of the Convention in the present case.”*(Bayatian vs Armenia).

After this decision of the Grand Chamber, all ECHR decisions (Case Erçep v. Turkey, Feti Demirtas v. Turkey, Buldu et autres c Tuquie etc.) were to condemn the states for violating the freedom of belief, consciousness and religion, particularly in the case of compulsory military service. Therefore, Romania’s decision to consider the crime of insubordination during compulsory military service between 1945 and 1989 as a common law crime is against the ruling of European Courts of Law and it represents a fundamental violation of fundamental human rights.

The fact that the legislator did not include the crime of insubordination, mentioned in article 334 of the Criminal Code from 1968, (Official Bulletin 79/1968), on the list of political crimes could be considered as an inadvertence, since the Law 221/2009 states that *the instigation to insubordination* (Criminal Code 1968) is a political crime. In reality, it cannot be a common law crime as long as the legislator defines political crimes as “any political conviction sentenced by a final decision of the court, given between 6<sup>th</sup> of March 1945 and 22<sup>nd</sup> of December 1989, for acts committed before and after 6<sup>th</sup> of March 1945 and aimed at any kind of opposition against the totalitarian regime established on 6<sup>th</sup> of March 1945.” Freedom of conscience, freedom of religion and the practice of religion are fundamental human rights (see an ample analysis of the fundamental human right to freedom of thought, conscience, religion and practice of religion as a primary form of human rights in: Dura, Mititelu 2014; Dura 2003, 15-23; Dura 2005, 5-33; Dura 2006, 86-128; Dura 2017, 147-169; Dura 2020, 27-53), which the communist regime established in Romania has grossly violated in its attempt to create the new man in the socialist society.

The conviction of an individual who demands respect for the right to freedom of conscience, freedom of thought and freedom to practice his own religion is, without a doubt, a political conviction, as long as the state, as a political institution, refuses to recognize and guarantee these rights.

**The side effect of Decision 32/2009.** As I was saying, the decision of the supreme court by which the crime of insubordination is not considered a political crime went almost unnoticed in 2009 because of the small number of plaintiffs to whom it was addressed. In 2010 and later, there were several dozen cases pending before the Romania courts claiming rights for people who had suffered persecution on political grounds. Most of the persons entitled to benefit from the provisions of Decree Law 118/1990 had clarified their legal situation between 1989 and 2010, the dissatisfied were few and quite misunderstood by most.

However, at the beginning of 2021, Decision 32/2009 of the Hight Court of Cassation and Justice is back in the news. The Parliament amended the provisions regarding the persons

persecuted on political grounds by the communist dictatorship established on 6<sup>th</sup> of March 1945 thru The Law 232/2020 – modification and completion of Decree-Law 118/1990 on granting rights to persons persecuted for political reasons by the dictatorship established from 6<sup>th</sup> of March 1945, as well as to those deported abroad or imprisoned (Official Journal 1036 /2020) were included on the list of compensated beneficiaries, as well as those deported abroad or considered as prisoners. Overnight, thousands of heirs of politically persecuted persons between 1945 and 1989 asked the National Agency for Payments and Social Inspection to grant the rights due to their deceased parents. Many of these applicants are the children of people convicted of “insubordination” during compulsory military service. Indeed, most of them were convicted of refusing to draft or refusing to take the military oath. Many of their parents were convicted for being part of the Legionary party so they are not eligible for these compensations.

From our estimates, during the period between 1945 and 1989, the communist authorities convicted several dozens of people for their refusal to work on Saturdays during the compulsory military service, on conscience grounds, despite the fact that these persons presented for enlisting, took the military oath and performed their assigned military tasks, without objections. Most of these persons belonged to the Seventh-day Adventist Church in Romania and to the Reform Movement Association whose rest day was also on Saturday – the Sabbath day.

In this case also, we must analyze the historical and political context by which many members of legally recognized religious cults in the People’s Republic of Romania, later the Socialist Republic of Romania, who were serving their compulsory military service, were sent before military courts of law on charges of *activity against the working class* (Decree 62/1955, art. 193/I, not published), *crime of disrupting the constitutional order* (Criminal Code from 1936, art. 207), *public instigation or insubordination* (Criminal Code from 1968).

Therefore, the Seventh-day Adventist Christian Cult in Romania was recognized by the Romania State through Decision 24536/1928, according to the rules of operation of Baptist and Seventh-day Adventist Religious Associations (Curierul Crestin 1928), by Decree-Law 407/1946 to recognize and regulate the Seventh-day Adventist Christian Cult in Romania (Official Journal 126/1946) and subsequently by Decree 1203/1950 of the Great National Assembly – approval of the statutes of organization and functioning of: Baptist Christian Cult, Seventh-day Adventist Christian Cult, Evangelical Christian Cult, Pentecostal Cult or The Apostolic Church of God and the Representative Federation of Recognized Evangelical Cults, (Official Journal 1950). Given that the rest day of the Seventh-day Adventist Christian Cult is Saturday and based on the fact that the communist state guaranteed the religious freedom, the state had to ensure the right to practice religion and the freedom of conscience, at least at a minimum level such as the right to have a weekly rest day, especially since Romania was no longer in a force majeure situation. The Constitution of Romania from 1948, art. 27 stipulate that “the freedom of conscience and freedom of religion are guaranteed by the state. Religious cults are free to organize and they can function freely if their ritual and practice are not contrary to the Constitution, public safety or morals. No denomination, congregation or religious community may open or maintain general education institutions, but only special schools for the training of the personnel under control of the State. The organization and functioning of religious cults will be regulated by law.” (Official Journal 87bis/1948). We have also to mention the argumentation presented by M. Ralea, the acting ministry of arts and cults, published in Official Journal no. 126 from June 3, 1946 in which he states that “the Ministry of Cults... investigated the confession of faith and the norms of organization presented in their Statute... and finding that this statute does not contain anything that may prejudice public order, morals and the laws of the State...”

In most of the criminal investigation files studied in the archives at the CNSAS (the National Council for studying the Archive of State Security), adventist citizens who joined the army of the people’s republic and later the socialist republic had sworn the military oath

and received basic military training. As Romania had abandoned “the fight for peace” and was preparing to build the Socialism, all available human workforce was reassigned for the civilian elaborate works that would mark the Romanian communism for years to come (House of the Press, Danube-Black Sea Channel, Danube-Dambovită Channel, the House of the People etc.). Under these conditions, with few exceptions, the military men were mobilized to help with construction work. Among them, there were religious minorities who demanded that their rest day on Saturday be respected. Initially, the military authorities, taken by surprise, accepted most of the demands, especially that the workflow was a permanent one, including on Sundays or on religious holidays. Thus, for a good period of time, the Adventist and Reformist militaries benefited from their weekly rest on Saturdays, working on Sundays.

The situation began to change starting with 1952, the cause being the anti-Semitic policy of I.V. Stalin. At first, Stalin was pro-Zionism, the Soviet Union and other states supported the formation of the Israeli state in 1948. The reason for unconditioned support of the Zionist cause was Stalin’s firm belief that the new Jewish state will certainly be a socialist one and this will help diminish the influence of Great Britain in the area. Later on, seeing the democratic path chosen by Israel, Stalin became a declared enemy of the Jews, especially of Russian Jews, whom he suspected of conspiring against the soviet communism (Johnson 1991, 527). The communist authorities began to be suspicious about any religious manifestation similar to Judaism, and as Adventists and Reformists held Saturdays – the Jewish Sabbath – things became complicated and dangerous. To avoid further complications, party activists decided to exclude from the army any form of religious manifestation, and especially similar to Judaism. Thus, the permission to rest on Saturdays instead of Sundays began to be denied. Firm in their beliefs, the young soldiers refused to work on Saturday, invoking their religious principles which, in theory, the state had committed to recognize since 1948.

To set an example to all those who would have dared to oppose the party and state order, the Romanian Army began to send dozens of Adventist soldiers in front of military tribunals. Most of them were accused of insubordination on the basis of article 503 of the Military Justice Code of 1937, but they were also accused of other crimes mentioned above: activities against the working class, disrupting the constitutional order, public instigation or instigation to insubordination *etc.*

We have observed that the important thing, in these cases, is not the refusal of citizens to draft or to swear an oath, but the refusal to violate their principles of conscience and religious principles regarding their work on certain weekdays, in peace time and especially when their work norm could be redistributed on another weekday without any other major implications.

**In conclusion**, we have noticed that, through a brief argumentation, based on an intermediary European case-law, Decision 32/2009 of the HCCJ, sends political insubordination during the communist dictatorship in the domain of derisory criminal acts, making a judgment of common conscience for the crime of insubordination, without analyzing each individual case. Unfortunately, the courts of law will be forced to adhere to the decision of the Supreme Court, without having the chance to analyze the evidences, the nature of insubordination and the classification of this crime in the time and space of the communist political persecution.

However, in the light of ECHR jurisprudence subsequent to the case *Bayatyan vs Armenia*, most likely the majority of complaints that will be addressed to the European Court of Human Rights regarding the refusal of the Romanian state to recognize the violation of fundamental rights of citizens and the refusal to compensate them according to the Decree-Law 118/1990 and Law 221/2009 will be admitted, Romania, thus, entering again the long list of European states to pay compensations and court expenses. The saddest thing is that many of those entitled to be compensated will not appeal in court or many of those will no longer be alive when others’ complaints at ECHR will be admitted.

The simplest and most logical way would be for the High Court of Cassation and Justice of Romania, in the light of the European Court of Human Rights jurisprudence, to reconsider its own decision, clarifying the nature of insubordination crime during the communist regime as a political crime.

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