Bulletin of the *Transilvania* University of Braşov
Series VII: Social Sciences • Law • Vol. 16(65) Special Issue – 2023
https://doi.org/10.31926/but.ssl.2023.16.65.3.10

THE EFFECTS OF THE DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE PROPERTY LAWS CONCERNING ABUSED PROPERTY DURING THE COMMUNIST REGIME

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Abstract: *The way in which the reparative laws regarding damages caused by the interference with private property rights were applied during the communist period, does not ensure predictability for the efficient and fair compensation of injured persons, who, in the context of abundant legislation, are forced to continue to refer to the ECtHR. ECtHR rulings produce effects on domestic law and national jurisprudence, by obliging the state authorities to effectively adopt reparative measures, hence the provisions of art. 1 of Protocol no. 1 to the Convention and art. 46 of the Convention.*

Keywords: *effective reparative measures, ECtHR judgments*.

1. Preliminary considerations regarding the Chronology of Legal Norms for the Defense of Private Property Rights

In Roman law, the right to private property was defined as that close relationship between the owner of the right and that good, which gives him the opportunity to benefit from all the legal consequences arising from its exploitation, by his own power, in absolute, exclusive interest and perpetually (Molcuţ, 2011, p. 108). According to the Civil Code of 1864, article 480 stated that property is the right someone has to enjoy and dispose of something exclusively and absolutely, but within the limits determined by law, and article 481 regulated the legal norm of protection of the property right, namely that no one can be forced to give up his property, except for the cause of public utility and in exchange receiving a fair and prior compensation. Even if the provisions regarding the right to private property from the Civil Code of 1864 were essentially maintained in the current Civil Code, the evolution of the political system in Romania was characterized by the elaboration of a multitude of legal norms in this field, which restricted the exercise of the right to private property, without providing for the possibility of granting fair compensation for the damage caused by limiting the exercise

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of the right, these rules being described in the doctrine as a direct attack on the provisions of the right to property (Firoiu, 1976, p. 327-328, p. 378.) consisting of the violation of its absolute, inalienable and exclusive character, to the detriment of the collective property. Thus, an approach to the legal system contrary to the legal regulation of public law and private law inherited from Roman law was created. According to article 17 para. 1 of the Charter of Fundamental Rights of the European Union, it is stipulated that every person has the right to own, use, dispose of and bequeath the goods that he has legally acquired, that no person can be deprived of his assets except for a cause of public utility, in the cases and conditions provided by law and in exchange for a just compensation granted in due time for the loss he suffered, and the use of the assets may be regulated by law, within the limits imposed by the general interest. The correspondent of these rules can also be found in the content of Article 1 of the Additional Protocol to the European Convention for the Protection of Human Rights, according to which any natural or legal person has the right to respect for his property. It is also stated that no one can be deprived of his property except for reasons of public utility and under the conditions provided by the law and the general principles of international law, without these provisions affecting the right of states to adopt the laws they deem necessary to regulate the use of goods according to the general interest or to ensure the payment of taxes or other contributions or fines. According to the provision Art. 44 of the Romanian Constitution, the right to private property is guaranteed and protected equally by the law, regardless of the holder, no one can be expropriated except for a cause of public utility, established according to the law, with fair and prior compensation. In Law no. 287/2009 regarding the Civil Code, at art. 555 para. 1, it was established that private property is the right of the holder to possess, use and dispose of a good exclusively, absolutely and perpetually, within the limits established by law. Also art. 562 para. 3 of the Civil Code provided that expropriation can only be done for a cause of public utility established according to the law, with fair and prior compensation, fixed by mutual agreement between the owner and the expropriator, and in case of disagreement on the amount of compensation, this can be established in a judicial way. From the evolution of all these legal norms of domestic and European law, which corroborate with the rich jurisprudence in the field, including the jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union (for more details see Case no. 44/79 of December 13, 1979 -Liselotte Hauer v. Land Rheinland Pfalz), we can conclude that the right to private property is a fundamental real right also guaranteed by the Community legal norms, whose limits cannot be restricted, except under the imperative conditions of the law, only for a cause of public utility dictated by the general interest and only in exchange for granting, in an optimal and predictable term, a fair compensation for the damage caused. As a result, the violation or limitation of the right to private property leads to the existence of a special legislative system that regulates the legal liability for the violation of the legal order, which further implies the application of coercive measures, including on the state authorities, in order to repair the damage caused by the interferences brought to the right of ownership, in order to satisfy the general interest of society, in accordance with the requirements of the law (Rădulescu, 2013, p. 310).

2. Property Laws in the European Context - Legal Means of Defending Private Property Rights

During the period of the communist political system in Romania, a series of normative acts were issued with the aim of limiting and restricting the right of private ownership over immovable property, namely the takeover of immovable property by the socialist state and the transformation of this fundamental right into a socialist right, collectively, allegedly in the service of the working class, by issuing acts of a normative nature, such as: laws, decrees of the Council of State, decisions and provisions of the Council of Ministers, orders and instructions of ministers, judgments, provisions and decisions of the bodies of local authorities and state administration, normative acts of some public organizations, issued under the conditions of the law (Firoiu, 1976, p. 377-378).

This series of normative acts issued between March 6, 1945 and December 22, 1989 was later characterized as abusive (Frentiu, 2018, p. VII), considering that the owners were not compensated, that the acts based on which the takeover was carried out were not public, and the measures thus taken violated the Constitution (from 1948 to 1989), the Civil Code, but also international norms such as the Universal Declaration of Human Rights of December 1948, the International Covenant on Economic, Social and Cultural Rights or the International Covenant on Civil and Political Rights adopted on December 16, 1966. After the collapse of the communist regime, the legislative power of the democratic political system in Romania issued a new series of normative acts in order to blur and remedy the abusive effects of the previously adopted normative acts regarding the limitation of the exercise of the right of private ownership over immovable property. Such a regulation is the one provided by Law no. 10/2001 regarding the legal regime of some immovables taken over abusively between March 6, 1945 - December 22, 1989, having as scope of application, as follows from article 1 para. 1, the reparative measures regarding the right of private property over immovable assets taken over by the state, by cooperative organizations or any other legal entities between March 6, 1945 and March 22, 1989, as well as those taken over by the state based on Law no. 139/1940 on requisitions and not returned. The restitution measure provided for by Law no. 10/2001 (a mechanism that was supposed to lead either to the restitution of the property or to the granting of compensation) aims for the main rule to be the restitution in kind of immovable property taken abusively, the reparation of the incurred damage by equivalent being the exception to the rule, applicable only in situations in which restitution in kind is no longer possible, as follows from the provisions of art. 1 paragraph (1), art. 7 and 9 of the Law.

However, the lack of clarity of some of the provisions contained in this regulation led to the issuance of the Methodological Norms for the Unitary Application of Law no. 10/2001 regarding the legal regime of some buildings taken over abusively in the period March 6, 1945-December 22, 1989, but the absence, in some places, of the correlation of these two normative acts, along with the different administrative practices adopted by local authorities in the resolution of notifications, have led to the creation of a national jurisprudence, also non-unitary, resolved by the decisions of the Supreme Court (Frentiu, 2018, p. 3-4). Given the differentiated evolution of the national judicial

practice, entitled persons such as Maria Atanasiu, Ileana Iuliana Poenaru (claim no. 30767/05) and Ileana Florica Solon (claim no. 33800/06), filed claims to the European Court of Human Rights (on August 11, 2005 (claim no. 30767/05) and, respectively, on August 4, 2006 (claim no. 33800/06) under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as a result of the abusive takeover by the state of some buildings belonging to them, for which the right to reparation was not respected according to the court decisions issued in Romania, thus the pilot decision of October 12, 2010 was pronounced.

We show in this way that a pilot judgment issued by the European Court of Human Rights has as its main objective the determination of the member states of the European Union in the resolution of legal issues of national interest, in accordance with the rights and freedoms provided for in Article 1 of the European Convention, and as a purpose immediately speeding up the reparation procedure for the rights of the claimants and significantly reducing the volume of referrals to the Court in connection with the case brought to resolution and the very large number of requests directed against Romania regarding the same object of the litigation. (For details, see the Case of Wolkenberg and others v. Poland (dec.), no. 50003/99, § 63, ECHR 2007-XIV and, mutatis mutandis, the case of Olaru and others v. Moldova, no. 476/07, 22539 /05, 17911/08 and 13136/07, item 55, July 28, 2009). Through this ruling, the ECtHR obliged the defendant, i.e. the Ro manian state, to adopt measures to guarantee the effective protection of the rights enunciated in art. 6 para. 1 of the Convention and in art. 1 of Protocol no. 1, in the context of all cases similar to the case under analysis, in accordance with the principles enshrined in the Convention, measures that had to be implemented within eighteen months from the date the decision became final. It was also established to postpone the examination, for a period of eighteen months from the date of the final decision, of all requests resulting from the same general issue, without prejudice to the competence of the Court to declare any case of this type inadmissible or to take note of an amicable solution that the parties could reach, based on art. 37 or art. 39 of the Convention.

The immediate effect of the Case of Maria Atanasiu and others against Romania from October 12, 2010 on domestic legislation was the entry into force on May 20, 2013 of Law no. 165/2013 regarding the measures to complete the restitution process, in kind or by equivalent, of buildings taken over abusively during the communist regime in Romania, which established different procedures available to applicants trying to resolve restitution requests.

The law, however, did not repeal the previous legislation regarding the restitution of nationalized buildings before 1989, but restructured the compensation mechanism. As a general rule, restitution in kind of immovables (restitutio in natura) was provisioned, and by way of exception, a compensation system in situations where restitution in kind was not possible. A road map was regulated for the adoption of a series of measures aimed at putting the compensation mechanism into operation, including the introduction of an inventory sheet at the local and central level of agricultural land and available forest land (forests), in order to identify them. At the same time, specific and mandatory deadlines were established for each administrative stage of the examination of these restitution requests. The law also provided for the possibility of a judicial review

that would allow domestic courts to verify the legality of administrative decisions, but also to grant, if necessary, the requested restitution or compensation. Since its entry into force, the law has been subject to several amendments (more than 14 amending acts), which particularly concerned the mentioned terms and the way of determining the amount of compensation to be granted to the claimants. Some of these changes were the subject of an examination by the Constitutional Court (Frentiu, 2018, p. 5).

Thus, on January 31, 2017, the Constitutional Court found, with a majority of votes, that the provisions of art. 11 of Law no. 165/2013 regarding the last extension of the deadline for obliging local and county commissions to complete the administrative stage of the restitution procedure, as well as the provisions of art. 7 of the same law regarding the suspension of restitution procedures, were declared unconstitutional. In particular, on 21 December 2016, the relevant deadline was extended by another year, until 1 January 2018. This change violated the Court's findings in the "Case of Preda et al. v. Romania", in which it was established clearly and irrevocably, that the initial deadline was 1 January 2016. The Constitutional Court also found that the new extension of the relevant deadline had a negative impact on the necessary predictability of the administrative stage of the restitution procedure and prevented claimants to effectively defend their claims before domestic courts.

We also remind you that in the case of Preda and others v. Romania of 29.04.2014, the European Court of Human Rights held that the mechanism established by the new law offered a series of effective appeals that had to be exhausted by the plaintiffs whose complaints referred to one of the following situations: the existence of competing titles regarding the same parcel of agricultural land; cancellation of such title without any compensation; the taking by the state of a definitive decision confirming the right to compensation for the illegal takeover of any type of immovable property, without establishing the amount; failure to pay such compensation awarded by final judgment and prolonged failure to render judgment on a claim for restitution.

With the effect of unitary judicial practice, it is also worth noting Decision no. 12/2018 of the High Court of Cassation and Justice according to which by Government Decision no. 89/2014 supplementing the Norms for the application of Law no. 165/2013, Chapter III was introduced regarding the conditions and procedure for compensation with the goods offered in equivalent, because according to the provisions of the Government Emergency Ordinance no. 209/2005 (for the amendment and completion of some normative acts in the field of property, approved with amendments and additions by Law no. 263/2006), it was established that the heads of the entities entrusted with the settlement of notifications (which issued provisions, decisions or, as the case may be, orders regarding measures of compensation) had the obligation to draw up a monthly table with the goods available for compensation.

According to the unitary national jurisprudence, it has been established that entitled persons can receive, in compensation, other goods than those that appear in the list drawn by the owning unit, to the extent that they will prove the existence of such goods that are unjustifiably not included in the category of available goods. This consideration was considered to remove the discretionary, abusive or incomplete nature of the list of goods proposed by the local public authorities in compensation. Another consideration

was that the goods proposed by the public authorities were unattractive or disproportionate in value, and the compensation, in such conditions, was not appropriate itself and proportional to the real reparative measures. At the same time, it was noted that the trial was not conducted in compliance with all the procedural guarantees of the persons involved. In the situation where the owner assigned or sold the disputed right, the only valid reparative measure of compensation was that by awarding points, considering that the owner irrevocably opted exclusively for this form of reparation for the damage caused by the abusive nationalization of the property taken over in the communist period, there being no other option to compensate for this situation. It is also noted that Law no. 165/2013 did not establish any mechanism for sanctioning local or county commissions that did not act diligently in completing the administrative stage of the restitution procedure, so that the claimants have the opportunity to complain about the authorities' non-compliance with these obligations. In addition, the new extension, which once again extended the initial deadline assumed by the authorities, could no longer be considered reasonable, also considering the fact that it is related to an administrative and therefore preliminary stage of the restitution mechanism, the total duration of which seemed to meet less and less the requirements set out in the Court's relevant jurisprudence. By Decision no. 602 of July 16, 2020, the Constitutional Court found that the interpretation given to art. 41 of the law on the High Court of Cassation and Justice is unconstitutional, as it affects the private property rights of the holders of a compensation title who have not expressed their right of option regarding the method of compensation, in the uncertain conditions until the entry into force of Law no. 165/2013. Thus, the Constitutional Court took into account the fact that the right to opt for one of the alternatives proposed by the legislation in force before the adoption of Law no. 165/2013 was illusory, as the relevant general context was of an unclear and unpredictable nature and included a period of suspension of the right of option, circumstances which, in fact, determined the adoption of the new law. It was concluded that such circumstances of legal uncertainty should not lead to the sanctioning of persons entitled to remedial measures, who were only then entitled to compensation in the form of a sum of money (equivalent compensation). We can conclude, similarly to the considerations of the European Court of Human Rights, that a varied and inconsistent internal legislation in the matter of restitution and reparation of interferences in property rights, generates an inequity in the realization of property rights by the entitled holders, in relation to the various and extremely numerous situations in which the entitled persons may find themselves. As a result, it is, first of all, the competence of the national authorities, especially the legislative power, to evaluate the advantages and disadvantages inherent in the various alternative legislative solutions available for the speedy reparation of damages as a result of the lack of the right to private property, under abusive legislation.

3. Essential Aspects of the 2022 Judgment in the Case of Văleanu and others against Romania published in M.O. no. 561 of 22.06.2023

In the 2022 decision regarding the Case of Văleanu and others against Romania, based

on 30 claims against Romania submitted to the ECHR under art. 34 of the Convention, the violation of art. 1 of Protocol no. 1 to the Convention, respectively the continued inefficiency of the mechanism for restitution of assets confiscated or nationalized by the communist regime, despite the new appeals existing under Law no. 165/2013, regarding:

– non-enforcement by the local commissions of the final decisions: In this aspect, it was noted that the final court decisions, by which the holders deprived of the right to property, as beneficiaries of the reparative measures, were not fully granted remedies by the mandated local commissions, either to issue property deeds (property titles) and/or to reconstitute the ownership rights to which the holders were entitled, or to pay adequate compensation in return, or to provide, according to the legislation in force, a legal response to the requests made;

– the existence of discrepancies between the compensation awarded by the local commissions to the owners entitled to restitution and the values of the real estate, but also the use of different criteria, namely the technical characteristics and the regime of use of the real estate at the time of taking over the ownership of the state and the related notary grids in 2013;

– cancellation of the plaintiffs' property titles: following the initial notifications regarding the establishment or reconstitution of the ownership right, the property titles issued by the authorities notified to the entitled holders, were later canceled, in whole or in part, by the courts considering the errors created on the occasion of their issuance (errors of the public authorities);

– the lack of compensation for unrealized benefits: the recognition of the property right by several courts by the judgment of a successor of a claimant, was not implemented by the local commissions by issuing the property title, because before the issuance of the property title and the drawing up of the minutes of possession, the land in question was occupied by other holders who held their own title deeds. For the delayed implementation of the obligation to issue the property title, the plaintiff made a claim for requesting the payment of the consideration for the lack of use, a request that was rejected on the grounds that the local commissions were not at fault for not enforcing the court decisions because, on the one hand, the land belonged to third parties, whose title deeds were admitted by the courts, and, on the other hand, the alternative solutions proposed to the applicant were rejected by the authorities. (the conflict between final court decisions regarding the same asset, but for which different title deeds were issued to different holders).

The Court also concluded that the prolonged non-execution of the judgments pronounced in favor of the plaintiffs and the lack of effective remedies, the annulment of the plaintiffs' titles due to the state's failure to correctly enforce the applicable law and without granting any compensation, as well as the fact that the authorities did not ensure that the compensations granted are reasonably proportional to the current value of the real estate, constitute sufficient elements to note that, despite the guarantees introduced by law, the restitution mechanism continues not to be fully effective and convincingly coherent in order not to impose an excessive burden on the plaintiffs. As a result, these aspects led to another violation of Article 1 of Protocol no. 1 to the

Convention, a fact for which the legislative power of Romania must implement simpler, but efficient and quick measures, aimed at rationalizing and clarifying the procedures and criteria that must be applied after it has been established and confirmed, either directly by the applicant in question, or by a court in a relevant enforcement procedure, that a pending judgment is objectively impossible to enforce (continuity of the restitution/compensation process, without its fragmentation).

4. Conclusions

In relation to the judgment pronounced in the Case of Valeanu and others against Romania, but also to the other similar ECHR judgments, we appreciate that the national legislative power will have to adopt new appropriate legislative measures or eliminate the contradictory ones, in order to comply with the provisions of art. 1 of Protocol no. 1 and art. 46 of the Convention, given that the immediate effects of these decisions will be signaled in the judicial practice outlined by the courts regarding the updating of the value of the compensations granted according to the new notarial grids, following the ineffectiveness of the restitution process, in kind or by equivalent, regarding real estate taken abusively during the communist regime in Romania, as well as the inequity of the way of establishing compensatory measures by reference to the value of immovable properties that cannot be returned in kind.

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