



ResRo

**Interessenvertretung
RESTITUTION in Rumänien e.V.**

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From:

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APP Asociația pentru Proprietatea Privată (Romania and Germany)

ResRo Interessenvertretung Restitution in Rumänien e.V. (Germany)

– We are three Non Governmental Organisations, representing the interests of Romanian abusively dispossessed owners –

**To: Council of Europe
General Direction of Human Rights DG II
For the Attention of General Director Boillat**

July 1, 2008

Re: Recent measures taken by the Romanian Judiciary in the field of property restitution which continue to breach the European Convention For Human Rights („the Convention“) and the jurisprudence of the European Court Of Human Rights

Executive summary

In breach of the Convention (art 6 and art. 1 of the First Protocol) as well as of the jurisprudence of the European Court of Human Rights (“the Court”) and at the request of the Romanian Attorney General, the Inalta Curte de Casatie si Justitie (“ICCJ” which shall hereinafter be referred to as the “Romanian Supreme Court”) issued recently a ruling aimed at limiting the instances in which claims for property restitution can be lodged before the Romanian courts and tribunals. Acknowledging the priority of the Convention over Romanian law, the Romanian Supreme concludes in its ruling (which has to be followed by the judges of the lower courts), that the Convention cannot be invoked in property restitution claims if such claims “affect an existing property right or the security of legal relations”. As will be shown below, we believe that by issuing such a ruling the Romanian Supreme Court has added to the confusion currently reigning among the Romanian judiciary and, most importantly, has acted in a way which will lead to the curtailment of some basic rights contained in the Convention. We further believe that the statement of the Romanian Supreme Court continues to reflect a permanent and systemic violation of the Convention as highlighted by the Committee of Ministers of the Council of Europe on the 10th May 2006.¹

¹ Rule 6.2.b.ii from the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements adopted by the Committee of Ministers on 10 May 2006 which stated that «the numerous requests concerning violation of the property right reflect a permanent and systemic violation of the Convention, as well as the fact that the Romanian State did not adopt general measures preventing new violations similar to that or those found or putting an end to continuing violations”.

A The ruling of the Romanian Supreme Court and its implications

A 1 The ruling

The statement of the Romanian Supreme Court reads as follows:

“During its meeting of 9th June 2008, the United Sections of the Supreme Court gathered to review file no. 60/2007, issued the following ruling:

In relation to the claims brought under the civil code whose scope was the recovery of buildings abusively confiscated during the period from 6th March 1945 to 22nd December 1989, which claims were lodged after the promulgation of law no. 10/2001 and ruled upon in an inconsistent manner by the courts and tribunals, the United Sections of the Supreme Court decide as follows:

The special law prevails over the general law as per the principle specialia generalibus derogant, even if this principle is not specifically set out in the special law.

Should discrepancies be highlighted between the special law and the European Convention of Human Rights (the „Convention”), the latter shall take priority. Such priority of the Convention can be given in the context of a recovery claim, based on civil law, conditional upon such claim not affecting an existing property right or the security of legal relations. After drafting of the arguments supporting the Supreme Court’s ruling and its signature, the ruling shall be published in the Official Monitor of Romania, Part 1.”

A 2 Interpretation of the ruling in the light of Romanian and European legislation

A 2.1 Recovery claims under law 10/2001

Law 10/2001 enables owners of confiscated properties to recover them through an administrative procedure. The law involves a notification process by a certain deadline (which expired in 2002) thus triggering a restitution process. Law 10/2001 in its art. 2 (2) reiterates the principle that those whose properties and land were confiscated without title continue to remain the legal owners of the same.

As it does not expressly prohibit recovery claims under the Civil Code (see below), law 10/2001 was considered until recently to be one of the tools enabling the recovery of confiscated properties.

Whilst law 10/2001 permits recovery in kind in certain limited circumstances, in practice its implementation has been a disappointment for most claimants: in Bucharest alone, more than 75 % of the claims lodged since 2001 have not yet been solved, and less than 6 % of those

solved lead to restitution in kind ... Left to achieve recovery in kind by different means, owners of confiscated properties lodged claims based on the Civil Code alongside those lodged under law 10/2001 hoping that one or the other might net a result sooner or later.

A 2.2 Recovery claims under the Romanian Civil Code (the “Civil Code”)

Recovery claims under the Civil Code proved more effective than those under law 10/2001 for several reasons: first, claims were not limited in time as was confirmed by the Court²; secondly, some of the Romanian courts followed the jurisprudence of the Court and concluded that by selling assets (a) to which it had no legal title and/or (b) whose title were disputed in court, to a third party, the Romanian State has deprived the original owner of his/her property right over that same asset. Both the Court, and in some cases the Romanian courts, ruled that it was irrelevant in this context whether the third party buyer of the asset acted in good faith when he acquired that asset³. The other benefit of such claims was that the claimants could appeal against unreasonable rulings and seek a final resolution before the Court (Romania holds the unenviable record of being one of the worst offenders when it comes to breaches of the Convention in property restitution cases⁴). The effectiveness of Civil Code based claims is also increased since it enables claimants to sue both the Romanian State and the current “owners” of the confiscated properties. The former is sued for having sold an asset which it didn’t own and the latter for having an invalid title over the asset. If found liable, the new owner has to relinquish his title.

A 2.3 The ruling of the Supreme Court breaches European legislation and the Romanian constitution

Several blatant breaches are set out below:

- First, whilst paying lip service to the principle of priority of European law over national law, the Supreme Court limits claims based on a violation of the Convention if such claims affect an “existing property right or the security of legal relations”⁵.
- Secondly, by limiting the ability to bring claims under the Civil Code to certain instances after the publication of law no 10/2001 the ruling breaches the basic principle set out in the Convention (article 6), the Romanian Constitution (art. 21)⁶ and the jurisprudence of the Court which states that property restitution claims are not limited in time (see above).

² Case Paduraru § 39.

³ “La vente par l’Etat d’un bien d’autrui à des tiers de bonne foi, même lorsqu’elle est antérieure à la confirmation définitive en justice du droit de propriété d’autrui, s’analyse en une privation de bien” cases Porteanu, Albu, Halmangiu and Bellu; the good faith point was ruled upon in the Strain case.

⁴ The Romanian State lost 155 cases concerning property restitution between 1st December 2005 and 17th June 2008 ...

⁵ The Convention states that national courts can set aside - ex officio or at the request of one of the parties - provisions included in national laws that they rule to be contrary to the CONVENTION and its additional protocols, case Dumitru Popescu §103

⁶ art. 21 of the Romanian Constitution: “1. Any person is entitled to appeal to justice to defend his rights, his liberties and his legitimate interests 2. No law can restrict the implementation of this right.”

- Thirdly, the Supreme Court ignores both the content of law 10/2001 and the Court's jurisprudence when it states that claims under the Civil Code based on a breach of the Convention are conditional upon such claims not affecting an existing property right ...

Both law 10/2001 and the Court confirmed that the confiscation of properties from their rightful owners between 6th March 1945 to 22nd December 1989 did not confer the Romanian State a valid legal title to such properties⁷.

- Fourthly, and as a consequence of the Supreme Court's statement about existing property titles, one must assume that those who acquired properties from the Romanian State in good faith are deemed to have acquired a valid title even if the Romanian State had no title over those properties in the first place. As set out above, the good faith argument was dismissed by the Court in several cases.

- Finally, the principle "*specialia generalibus derogant*" mentioned by the Supreme Court to justify the priority of the special law 10/2001 over the Civil Code ignores a basic legal reality: properties illegally seized by the Romanian State and sold on to third parties have now entered the property market and the civil circuit which means that those who bought them have to be called as defendants in claims brought by the original owners. The special law 10/2001 only relates to legal relationships between the Romanian State and original owners and provides no comfort or means of challenging the ownership of the "new" owners. The Civil Code provided the only basis for such claims. That avenue has now been severely curtailed by the Supreme Court.

A 3 *Practical implications of the ruling of the Supreme Court*

Adding to the grave breaches of national and international legislation the latest ruling of the Supreme Court is a serious setback for Romanian democracy and the rule of law and amounts to a de facto expropriation of properties.

The Romanian courts will no doubt follow the ruling of the Supreme Court and rule in favour of the "new" owners who will from now on argue that they bought assets in good faith and that their title cannot be challenged since such a challenge would amount to an attempt to "an existing property right and the security of legal relations".

In the same context, the Romanian Chamber of Deputies overwhelmingly voted on 24th June 2008 to pass a law which excludes recovery in kind of properties confiscated from their rightful owners between March 1945 and 23rd December 1989. Restitution will, going forward and if the law is actually promulgated, be limited to monetary compensation granted by the Romanian state. Given the abysmal record of the Romanian state when it comes to monetary compensation we are of the firm view that this draft law is another breach of the Convention.

⁷ Paduraru case §78

The whole process of reclaiming assets confiscated unlawfully by the Communist regime will only be possible in practice under law 10/2001 whose implementation has been slow and burdened by corrupt officials. Moreover, those who failed to bring claims within the deadline of law 10/2001, which expired in 2002, will no longer be able to claim the restitution of their properties.

The ruling will also trigger a flood of claims before Court. Whilst we have no doubt that, in due course and after several years given the backlog of cases, the Court will grant the claimants a fair hearing, recovery will be mostly by way of damages rather than in kind. The chances of the latter materialising going forward are, for the moment at least extremely low.

B. Conclusion

Our associations strongly object to this ruling of the Romanian Supreme Court and respectfully ask you that such violations of the European Convention be mentioned in the Country Report. We consider that without sanctions from the European Commission violations of the Convention of Human Rights and/or the Court's ruling by the Romanian Authorities and Courts will continue.

We remain at your disposal for any further information or clarification required on this or any related matters.

Yours faithfully,



– Dinu G. Ionescu, Président –

AFDDPR Association Française pour la Défense du Droit de Propriété en Roumanie



– Claudius Mott –

APP Asociația pentru Proprietatea Privată



– Karin Decker-That, chairman –

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Decisions of the Convention mentioned in this Memorandum:

- Affaire Păduraru (Application no 63252/00)
- Affaire Dumitru Popescu (No 2) (Application no 71525/01)
- Affaire Porțeanu (Application no 4596/03)
- Affaire Albu (Application no 8508/03)
- Affaire Halmangiu et Bellu (Application no 10012/03)
- Affaire Neamțiu (Application no 67007/01)
- Affaire Străin (Application no 57001/00)

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