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Thesis supervisor: Dr. Nicola Jägers

THE PILOT JUDGMENT PROCEDURE OF THE EUROPEAN COURT OF HUMAN RIGHTS: A CASE STUDY ON ITS EFFICIENCY

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Student: Rugină Florin

ANR: 954628

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Introduction

Until the end of the 20th Century, the European Convention on Human Rights had been signed by 47 states with a population of around 800 millions people. According to Article 34 of the Convention, the European Court of Human Rights (*the ECtHR* or *the Court*) can receive applications, under certain conditions, from all these people. While this is a remarkable thing, it also proved to have its downsides: the Court is literally suffocated with applications and cases, a problem that the reform brought by the 14th Protocol has not managed to solve. Mainly this problem relates to two aspects: the high number of applications and the many repetitive/clone cases. As the latest Annual Report of the Strasbourg Court reveals, there are more than 150.000 applications pending before a judicial formation.[1] Of the applications the Court receives, more than 90% will eventually be rejected. And of the ones declared admissible, 60% are repetitive/clone cases, representing cases "related to structural issues on which the Court has already delivered judgments finding a violation of the Convention and where a well established case law exists".[2] To reduce the number of these repetitive cases the Strasbourg Court has developed the pilot judgment procedure, by which it seeks to "achieve a solution that extends beyond the particular case or cases so as to cover all similar cases raising the same issue".[3]

This paper analyzes the pilot judgment procedure. Being a quite novel mechanism of the Court I wish to test its general effectiveness. In achieving this, in the first part, I consulted documents of the Council of Europe and, implicitly, the European Court of Human Rights, and also the work of researchers on the ECtHR, in order to see what is the pilot judgment procedure, why was it necessary and how it developed and what challenges have been identified until now with regard to it.

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[1] European Court of Human Rights, *Annual Report 2011*, p.152, available at www.echr.coe.int/NR/rdonlyres/219E9A92-716A-4337-99DE-053358F536B3/0/2011_Rapport_Annuel_EN.pdf, 12 June 2012.
[2] European Court of Human Rights, *Factsheet on Protocol 14*, available at http://www.echr.coe.int/NR/rdonlyres/57211BCC-C88A-43C6-B540-AF0642E81D2C/0/CPProtocole14EN.pdf, 12 June 2012.
[3] European Court of Human Rights, *Information note issued by the Registrar on the Pilot-Judgment Procedure*, available at http://www.echr.coe.int/NR/rdonlyres/DF4E8456-77B3-4E67-8944-B908143A7E2C/0/Information_Note_on_the_PJP_for_Website.pdf,%2020th%20of%20November%202011, 12 June 2012.

The second part of the paper consists in a case-study on Romania. I chose Romania because due to its history and record in front of the Court, Romania provides a good case study on the pilot judgment procedure, as the Strasbourg Court has issued a pilot judgment against Romania in October 2010 and as its nationals bring a lot of applications before the Court, specifically with respect to the right to property.[4] The case study presents how a pilot-judgment can influence a State, in this case Romania, to find solutions for its systemic/structural problems. I did so by comparing the Romanian legislation in the field of property restitution/compensation from before the pilot-judgment in *Atanasiu and Others v. Romania* with the draft legislation from after the Court's pilot judgment against Romania. Also in this case-study I conducted two interviews: one with a representative of the institution representing Romania before the ECtHR and the other one with a person representing the Romanian civil society. The interviews focused on the reform process in the field of restitution of/compensation for nationalized properties and also on the effects that the *Atanasiu and Others v. Romania Case* had in the process. The interviews aimed at gaining more in depth data, that otherwise was not available from written sources. With the data gathered in the two parts my research answers the following question: Is the pilot judgment procedure an effective way for ending systemic or structural violations of the ECHR?

Given the importance of the European Court of Human Rights for the European human rights system as a whole and given the pressing problem posed by the great number of pending applications that affect its effectiveness and reputation, I believe that by answering this question I will bring a small contribution to the development of human rights in Europe and also, by focusing on Romania, I will provide an insight into the issues that stand between Romania's compliance with the European Court of Human Rights' rulings.

[4] European Court of Human Rights, *Annual Report 2011*, p.157. According to the Annual Report of the ECtHR, Romania is the third state by number of cases pending before the Court.

PART I

Chapter I. The Pilot Judgment Procedure

The European Court of Human Rights is seen as the "world's most advanced international system for protecting civil and political liberties".[5] As I already said in the introduction to this paper, it has jurisdiction over the 47 members of the Council of Europe, which comprise around 800 million people. But, paradoxically, its success has attracted its problems. As the Annual Report for the year 2011 shows, since 1999 the number of applications allocated to a judicial formation has gradually increased from 8.400 in 1999 to 64.500 in 2011. Currently there are approximately 152.000 applications pending before a judicial formation.[6] As the Annual Report shows, most of these come from a limited, but important number of fundamental rights problems in some member States. Several States register problems with their judicial in issuing effective decisions in a fair amount of time. The former communist states register particular problems in returning nationalized property. Others, as Russia, Ukraine and Moldova, also have structural problems in protecting human rights in prison and ill-treatment by law-enforcement officials.[7] These structural problems continuously give rise to cases before the Court, cases which have been termed as repetitive or clone cases, as there is a sufficient case law in the Court's record on the matters concerned.

To alleviate the growing backlog of individual complaints, the Council of Europe has considered, in the past decade, a number of measures. With respect to repetitive cases, considering that the Court has to deal individually with each application, this being a time consuming business, and that deciding on each case did not resolve the underlying structural problem, the ECtHR introduced the pilot judgment procedure.

In a pilot judgment procedure, the Court identifies a large group of identical cases and chooses one or more cases to be dealt with priority. When settling the respective case

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[5] Helfer, Laurence, *Redesigning the European Court of Human Rights: Embeddednes as a Deep Structural Principle of the European Human Rights Regime*, The European Journal of International Law Vol.19 no.1, 2008, p.125.

[6] European Court of Human Rights, *Annual Report 2011*, pp.147-150.

[7] Gerards, Janneke, *The Pilot Judgment Procedure Before the European Court of Human Rights as an Instrument for Dialogue*, in *Constitutional Conversations*, P.Popelier, M.Claes Intersentia, eds., 2012, p.2. Available at SSRN: http://ssrn.com/abstract=1924806.

or cases, the ECtHR looks for a solution that applies to all the similar cases in the group. By this way the Court wishes to provide a set of guidelines to the responding state on how to eliminate the failures, to encourage the creation of a domestic remedy to be applied in similar cases, or to identify the malfunctioning of the domestic legislation which is the source of many violations.[8] Rule 61(1) of the Rules of the Court establishes that "[t]he Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunctions which has given rise or may give rise to similar applications."

The pilot judgment procedure aims at reconciling the interests of all the parties involved and at responding to their concerns: the interests of the State to solve its problems at the national level, the interests of the applicants to receive remedy for the violation of their rights, and the interests of the Court to reduce its volume of work.[9] In this chapter I will look more at what the pilot judgment procedure is and answer the following questions: How has the pilot judgment procedure developed, why was it necessary and what challenges have been identified with respect to it?

1. Development

The idea for the pilot judgment procedure emerged in the Steering Committee for Human Rights' reform talks that lead to the birth of Protocol 14. The Steering Committee was of the opinion that the Court had to identify rapidly different kinds of cases, notably repetitive cases, and suggested that these should be cases concerning a specific piece of legislation or a specific practice that the Court has already pronounced itself on in a judgment. In its submissions to the Steering Committee, the ECtHR urged for the introduction of a Convention provision formally establishing a "pilot judgment

[8] Nedelcu-Surdescu, Oana, *Brief Analysis of the Operation of the Pilot Judgment Procedure before the European Court of Human Rights*, Romanian Journal of Geopolitics and International Relations Vol.3 no.1, 2011, p24. Available at http://rseri.srpsec.ro/wp-content/uploads/2011/04/BRIEF-ANALYSIS-OF-THE-OPERATION-OF-THE-PILOT-24-32.pdf.
[9] *Ibidem*, p.31.

procedure"[10], but the Steering Committee rejected the Court's request and didn't include the procedure in Protocol 14. They considered it to be legally difficult to provide for a general legal obligation of this kind. Instead, the Steering Committee was of the opinion that "the pilot judgment procedure could be followed without there being a need to amend the ECHR" and suggested that the Committee of Ministers should make appropriate recommendations to provide the Court with the legal basis for its future pilot judgments procedure decisions.[11]

The Committee of Ministers followed suit and in its Resolution on judgments revealing an underlying systemic problem, it invited the Court to

> "identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments;"
>
> and
> "to specially notify any judgment containing indications of the existence of a systemic problem and of the source of this problem not only to the state concerned and to the Committee of Ministers, but also to the Parliamentary Assembly, to the Secretary General of the Council of Europe and to the Council of Europe Commissioner for Human Rights, and to highlight such judgments in an appropriate manner in the database of the Court."[12]

On the basis of this resolution the Court issued its first pilot judgment against Poland in *Broniowski vs. Poland*. The 2004 case concerned a compensation claim for the loss of property that was located in an area East of the river Bug, which before World War II belonged to Poland. Due to the change of border, more than one million people had to leave the territory that became part of the Soviet Union. Most of the people received land in Western Poland, but some remained uncompensated, although the Polish

[10] Wildhaber, Luzius, *Consequences for the European Court of Human Rights of Protocol no.14 and the Resolution on judgments revealing an underlying systemic problem*, speech held at the "Reform of the European human rights system" seminar, available in Proceedings of the high-level seminar, Oslo, 18 October 2004, p.25, available at http://sutyajnik.ru/rus/echr/etc/reformeurhrsystem.pdf.
[11] Paraskeva, Costas, *Returning the Protection of Human Rights to Where they Belong, at Home*, The International Journal of Human Rights, 12:3, 2008, pp.433-434.
[12] Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem, available at https://wcd.coe.int/ViewDoc.jsp?id=743257&Site=COE.

state recognized since 1944 their right to receive the value of their surrendered property.[13] Over decades, in spite of several Polish laws and a Polish Constitutional Court ruling, the unwillingness of the Polish authorities to take effective and necessary action made it so that only a few Bug River claims were satisfied.[14]

Jerzy Broniowski, inheritor of the Bug River claim of his mother, after exhausting local remedies, filed an application with the Court in 1996, which was accepted in 2002. He claimed a violation of Article 1 of Protocol 1, due to the unsatisfactory compensation offered by the Polish state for the property that his family had had to abandon.[15] The ECtHR found a violation of the right to peaceful enjoyment of one's possessions and, together with the Committee of Ministers, brokered a deal between Broniowski and Poland which also "contained the seeds for a settlement for all the claimants" in the Bug River issue. By issuing this single judgment the Court dealt with all the 167 related cases pending before it and gave a solution for some 80.000 Bug River potential applicants.[16] The Court found that the violation

> "originated in a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice, and which has affected and remains capable of affecting a large number of persons. The unjustified hindrance on the applicant's 'peaceful enjoyment of his possessions' was neither prompted by an isolated incident nor attributable to the particular turn of events in his case, but was rather the consequence of administrative and regulatory conduct on the part of the authorities towards an identifiable class of citizens, namely the Bug River claimants. The existence and the systemic nature of that problem have already been recognized by the Polish judicial authorities."[17]

With reference to the systemic violation found by the Court, in the judgment the Court defined a systemic violation as "a shortcoming as a consequence of which a whole class of individuals have been or are still denied the peaceful enjoyment of their possessions" and where "the deficiencies in national law and practice identified in the

[13] ECtHR, *Broniowski vs. Poland,*, 22.06.2004, Appl.no.31443/96, para.10-12.
[14] Fyrnys, Markus, *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*, 12 German Law Journal, 2011, p.1241 *available at* www.germanlawjournal.com/index.php?pageID=11&artID=1359.
[15] ECtHR, *Broniowski vs. Poland,*, 22.06.2004, Appl.no.31443/96, para.1-5.
[16] Paraskeva, Costas, *Op.cit.*, p.425.
[17] ECtHR, *Broniowski vs. Poland,*, 22.06.2004, Appl.no.31443/96, para.187.

applicant's individual case may give rise to numerous subsequent well-founded applications".[18]

With respect to the measures to be taken by the state, and this is the point were the Court went beyond its established case law,[19] the Court gave indications that "the respondent State must, primarily, either remove any hindrance to the implementation of the right of the numerous persons affected by the situation found, in respect of the applicant, to have been in breach of the Convention, or provide equivalent redress in lieu".[20] The Court adjourned similar applications until Poland adopted the necessary general measures, "which should be adopted in a reasonable time".[21] Indeed, the Court had in earlier cases found that a violation resulted from national legislation flaws and made suggestions for actions to be taken by the respondent State, but it never did this in the operative part of the judgment until *Broniowski vs. Poland*.[22]

The Court's decision gave the incentive to the Polish Government to draft a new law, approved by the Polish Parliament in mid 2005, which facilitated a friendly settlement between Mr.Broniowski and Poland. The Court struck the case out of the list in September 2005, concluding that there was an active commitment by Poland to remedy the systemic problem. It left to the Committee of Ministers the task of evaluating the Polish measures and their actual implementation, but mentioned that in its view the measures were a "positive factor".[23]

2. Features

On the basis of the *Broniowski vs. Poland Case*, the characteristics of a pilot judgment procedure can be distinguished. These are: a finding that the facts of the case discloses the existence within the relevant legal order of a shortcoming as a consequence

[18] *Ibidem*, para.189
[19] Buyse, Antoine, *The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges*, Greek Law Journal, November 2009, p.3.
[20] ECtHR, *Broniowski vs. Poland*,, 22.06.2004, Appl.no.31443/96, para.194.
[21] *Ibidem*, para.198.
[22] Buyse, Antoine, *Op.cit*, p.3.
[23] ECtHR, *Broniowski vs Poland*, 28.09.2005(friendly settlement), para.42.

of which a whole class of individuals have been or are still denied their ECHR rights; a conclusion that these deficiencies in national law and practice may give rise to numerous subsequent well-founded applications; recognition that general measures are called for and some guidance as to what such general measures may be; an indication that such measures should have retroactive effect; a decision to adjourn consideration of all pending applications deriving from the same cause.[24] Also characteristically for a pilot judgment may be using the operative part of the pilot judgment to "reinforce the obligation to take legal and administrative measures", deferring any decision on the issue of just satisfaction until the state undertakes action, and informing the main Council of Europe organs concerned of progress in the pilot case.[25]

Later Court practice has proved that these characteristics are not a must and can alternate. The literature has categorized the pilot judgments as *full* pilot judgments and *quasi* pilot judgments. In the case of f*ull* pilot judgments, the must-have characteristics are: explicit use of the procedure by the Court, the Court identifies the systemic violation of the Convention, and the general remedial measures are mentioned in the operative part of the judgment.[26] In the category of full pilot judgments enter such cases as *Broniowski vs. Poland, Hutten-Czapska vs Poland, Olaru and Others vs Moldova,* or *Atanasiu and Others vs Romania.*

The second category, the *quasi* pilot judgments, is a more flexible reaction to a systemic situation and it is aimed at signaling to the respondent State that the ECtHR is not concerned only with the individual case, but also with the "systemic situation" that gives rise to many cases. In a quasi-pilot judgment the Court identifies the systemic problem, draws the attention of the Committee of Ministers and other Council of Europe institutions to the fact that a systemic problem underlies the particular case[27] and 'motivates' in this way the responding State to take appropriate measures, but it does not order general measures to be taken. Examples of quasi-pilot judgments are *Scordino vs Italy, Fiamblat vs Romania, Katz vs Romania,* or *Manole and Others vs Moldova.*

[24] Paraskeva, Costas, *Op.cit*., p.435.
[25] Buyse, Antoine, *Op.cit.*, p.2.
[26] Nedelcu-Surdescu, Oana, *Op.cit.*, p.35.
[27] Tulkens, Francoise, *A typology of the pilot judgment procedure,* Crossroads Foreign Policy Journal, 2010, p.3.

2.1 Stages of a pilot judgment procedure

In a pilot judgment procedure three stages can be identified: the finding of a systemic violation and the suggestion of remedies and solutions by the Court, the execution of the judgments, and, in the third stage, the Court has to decide whether the national authorities have successfully solved the underlying systemic problem.[28]

In the first stage, the Court chooses one or more similar cases that will be decided on with priority, and the solution will concern the other similar cases as well. The Court offers the parties the chance to inform it about the nature of the violation and, to the State, to justify the existence of the violation. In doing so the Court may ask for information from other states parties, NGOs and other organizations as third party interveners. In the judgment, the Court provides suggestions as to the nature of the remedies, most often in the operative part, according to Rule 61(3) of the Rules of the Court.[29] In dictating remedies, the Court tends to leave a lot of space for action to the States, giving less specific indications than in individual cases, leaving them to "solve the underlying problem in a manner that fits in well with their constitutional and legal systems, their historical and political traditions, and the limitations of their national budget".[30]

The second stage is the one where the Committee of Ministers supervises the execution of the judgment. As soon as possible after the Court has issued its judgment, the respondent State must present an action plan to the Secretariat of the Committee of Ministers, setting out the measures that the State intends to take to implement the judgment. The State also has to provide continuously information about the developments in the process of the execution of judgments. The Secretariat can assist the State during this whole process, at its request. After the action plan has been presented, the case will be on the agenda of every meeting of the Committee of Ministers, until it is closed. When it is considered that the State has taken all measures necessary to abide by the judgment,

[28] Gerards, Janneke, *Op.cit*, p.1.
[29] Rules of the Court, Rule 61(3): "The Court shall in its pilot judgment identify both the nature of the structural or systemic problem or other dysfunction as established as well as the type of remedial measures which the Contracting State concerned is required to take at the domestic level by virtue of the operative provisions of the judgment.
[30] Gerards, Janneke, *Op.cit*, p.13.

a final action report is adopted by the Secretariat. Based on this final report, the Committee of Ministers will adopt a resolution closing the case.[31]

However, this does not mean that the Committee of Ministers is sole in having a saying on assessing the State's compliance. In *Hutten-Czapska*, while acknowledging that it is "for the Committee of Ministers to evaluate the general measures adopted by the Polish State and their implementation as far as the supervision of the execution of the Court's principal judgment is concerned", the Court kept its part in assessing the government's remedial measures when "exercising its own competence to decide whether or not to strike the case out of its list"[32]. The Court made a first "assessment based on national reforms undertaken and a positive commitment by the state concerned", but it was still up to the Committee of Ministers to test in detail how the reforms work in practice.[33]

In the third stage, after the responding State has taken the appropriate measures, the Court will analyze the results. If it considers that the measures taken comply with the Convention and after it verifies that the problems of the applicants will be solved at the national level, the Court will struck the similar cases out of the list.[34] However, as seen in *Broniowski*, the analysis of the Court is only "a *prima facie* assessment based on national reforms undertaken and a positive commitment by the state concerned, without testing in detail how this works out in practice".[35] It is still up to the Committee of Ministers to assess in detail the respective measures.

2.2. Subsidiarity and judicial law-making

The pilot judgment procedure can be seen as an instrument of response to States' non-fulfillment of the subsidiarity principle. The subsidiarity principle entails, as it

[31] *Ibidem*, pp.14-16.
[32] ECtHR, *Hutten-Czapska vs. Poland*,, 19.06.2006, Appl.no.35014/97, para.43.
[33] Buyse, Antoine, *Op.cit.*, p.4.
[34] Nedelcu-Surdescu, Oana, *Op.cit.*, p.32.
[35] *Ibidem*, p.4.

results from Article 1 of the ECHR,[36] that it is the State that holds the responsibility to protect and ensures respect for the rights safeguarded by the Convention. The State must have effective domestic remedies for redressing violations of the Convention and to guarantee the execution of the Court's judgments.[37] As in the words of the former President of the Court: "States must comply with the Court's case-law and make sure that judgments of the Court are adequately executed, notably by adopting the appropriate general measures and by taking remedial action in respect of cases which could give rise to similar issues."[38] In other words, the Convention system is based on the idea that there exist effective protection systems at national level. The great number of repetitive cases at the Court indicates the opposite, namely that the subsidiarity principle does not operate adequately.[39] When this happens, that is when States fail, the Court gains legitimacy to take matters into its own hands.[40] It is the Court's own way of calibrating the Convention system by balancing the legislative power of the state parties and its law-making function.[41]

The argument that the ECtHR has a law-making function in the European human rights system is supported by Markus Fyrnys. He argues that the pilot judgment procedure accentuates the constitutional function of the Court, emphasizing the view of the Court that the Convention is a "constitutional element of European public order". It is not only a procedure assessing the compliance of the responding State with the Convention, but also a procedure of judicial law-making, as it demands the domestic authorities to amend specific legislation to remedy the systemic defect of its domestic legal order.[42] The Court "proactively reviews domestic legislation, administrative acts and judicial rulings using distinctive methods of interpretation and an evolving

[36] Fyrnys, Markus, *Op.cit.*, p.1237.
[37] Keller, Hellen, Fischer, Andreas, and Daniela Kühne, *Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals,* The European Journal of International Law Vol.21 no.4, 2011, p.1031.
[38] Memorandum of the President of the European Court of Human Rights to the States with a view to preparing the Interlaken Conference, 2009, p.4, available at http://www.echr.coe.int/NR/rdonlyres/80B918C6-6319-4D50-B37B-5F951C1C5B30/2792/03072009_Memo_Interlaken_anglais1.pdf.
[39] Keller, Hellen, Fischer, Andreas, and Daniela Kühne, *Op.cit.*, p.7.
[40] Helfer, Laurence, *Op.cit.*, p.149.
[41] Fyrnys, Markus, *Op.cit.*, p.1246.
[42] *Ibidem.*, pp.1245-1247.

understanding of Convention rights and freedoms". At the same time, the Court doesn't lose touch with the subsidiarity principle.[43]

3. Challenges

The pilot judgment procedure at the ECtHR has received some criticism, even since its first use, in the *Broniowski vs. Poland Case.* First of all there have been expressed doubts over the legal basis of the obligation upon a respondent state to execute the judgment of the Court. In *Broniowski* the Court obliged Poland to secure the attainment of the right to property "through appropriate legal and administrative measures".[44] Thus Poland had to take measures not only for the applicant in the case, but as well for numerous individuals that are potential applicants. However, Article 46 of the Convention says that "[t]he High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties".[45] The wording of the article suggests that the State has a duty to abide only to decisions concerning the applicant, and that it not the duty of the State to take measures in relation to individuals who are not parties to the case. The Court responded to this critique by stating that the systemic violations are "a threat to the future effectiveness of the Convention machinery" and that the measures adopted by Poland must aim at remedying "the systemic defect underlying the Court's finding of a violation so as to not to overburden the Convention system with large numbers of applications"[46], in this way suggesting that the basis for Poland's obligation to obey the extensive ruling of the Court comes from the need to keep the Convention system alive. To this rhetoric of the Court adds the idea presented by Judge Zupančič in his concurring opinion to the *Broniowski Case*, where he sustains that Poland's obligation to alleviate the approximately 80.000 Bug River claims comes simply from the idea of doing justice.[47] The same judge argues that it is logical that in some

[43] *Ibidem,* p.1248.
[44] ECtHR, *Broniowski vs. Poland,*, 22.06.2004, Appl.no.31443/96, para.194.
[45] The European Convention on Human Rights as amended by Protocols nos. 11 and 14, art.46(1).
[46] ECtHR, *Broniowski vs. Poland,*, 22.06.2004, Appl.no.31443/96, para.194.
[47] ECtHR, *Broniowski vs. Poland,*, 22.06.2004, Appl.no.31443/96, Concurring Opinion of Judge Zupančič.

situations just affording monetary compensation is not enough. For an ongoing violation any compensation can remedy the violation only up to the point of awarding it, but it won't solve the later violation. Following the same logic, in cases of structural violations individual compensation does not solve the problems for other possible applicants to the Court.[48] Thus it is argued that the legal justification for the pilot judgment procedure comes from the need to make the Convention system more effective, to safeguard the Court and to make justice. Another argument was the resolution Res (2004)3 itself, which the Court cited repeatedly in *Broniowski*. If the Committee of Ministers approved the resolution, than means that the States have agreed to the use of the pilot judgment procedure. The problem with the resolution was that the Court was not invested with powers to apply them, interpret them and to give them legal effect in a given situation.[49] This problem was overcome with the adoption by the Court of Rule 61, in 2011, concerning specifically the pilot judgment procedure.

Another critique in relation to the 'pilot judgment' is the vagueness of the operative part of the judgments. As seen in *Broniowski*, but also in later decisions using the pilot judgment procedure, the operative part of the judgments holds only that the violation originated in a systemic problem connected with "the malfunctioning of domestic legislation and practice caused by the failure to set up an effective mechanism to secure the rights of a definite group of individuals in line with Convention standards".[50] With respect to remedies, the decisions provide that the respondent State has an obligation to provide redress or take "appropriate legal measures and administrative practices" to ensure the implementation of the rights of the Convention.[51] This lack of clarity, found also in the guidelines the Court states in the decisions as to what is required, makes difficult the job of the Committee of Ministers in supervising the

[48] Buyse, Antoine, *Op.cit.*, p.12.
[49] Björgvinsson, Thór David, *The "Pilot-Judgment" Procedure of the European Court of Human Rights*, International Human Rights Monitoring Mechanisms, 2009, p.11, available at http://booksandjournals.brillonline.com/content/10.1163/ej.9789004162365.i-728.274.
[50] A similar wording can be found in cases such as *Hutten-Czapska vs. Poland*,, 19.06.2006, Appl.no.35014/97, para.3 of the operative part, in *Lukenda vs. Slovenia*, 6.10.2005, 23032/02, para.4 of the operative part, or in *Sejdovic vs. Italy*, 10.11.2004, 56581/00, para.2 of the operative part. The list is not exhaustive.
[51] A similar wording can be found in cases such as *Grzinčič vs. Slovenia*, 3.05.2007, 26867/02, para.102, in *Olaru and Others vs. Moldova*, 28.10.2009, Applications nos. 476/07, 22539/05, 17911/08 and 13136/07, para.4-5 of the operative part, or in *Finger vs. Bulgaria*, 10.08.2011, Application no. 37346/05, para.5 of the operative part.

enforcement of the judgments according to Article 46. It is also difficult for the respondent State to decide what measures it should take to satisfy the wish of the Court.[52]

This critique was supported by Judge Zagrebelsky in *Lukenda vs. Slovenia*, where, in his partly dissenting opinion, he argues that the reasoning of the judgment is confusing and the indications to the government are too general. In his own words:

> "in point 5 of the operative provisions of this judgment, the Court is requesting the Government to change the national system in law and in practice. Nothing more, nothing less.
> I do not think that this can be regarded as a judgment of a court. It is not an order that can be executed as judicial orders usually are. The timing and monitoring of the quality and suitability of the 'execution' measures that the Government should introduce can only be guessed at. […]
> I find an argument that corroborates my position in the long-standing difficulties the Committee of Ministers faces in obtaining a reform of the Italian system (legal and practical) with a view to ensuring that judicial procedures are concluded within a reasonable time"[53].

Judge Zagrebelsky also argues, in another critique, that cases requiring the use of the pilot judgment procedure should be referred to the Grand Chamber, as this would be the best way to "allow the respondent Government to fully discuss the 'systemic problem' and the possible solutions it calls for"[54]. By dealing with these cases in the Grand Chamber, the ECtHR would give a signal that it takes a systemic problem even more seriously, "which might help the respondent state to do the same".[55] The judge envisioned in this way another concern, related to the state's willingness to cooperate. In *Broniowski* the Polish Government showed more willingness to cooperate than later in *Hutten- Czapska*.[56] It is questionable how willing a state may be to cooperate when the material costs involved are significantly high, especially in times of economic struggle such as is the present state of most European states.[57]

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[52] Björgvinsson, Thór David, *Op.cit.*, p.11.
[53] ECtHR, *Lukenda vs Slovenia*, 6.10.2005. Appl.no. 23032/02, Partly Dissenting Opinion of Judge Zagrebelsky.
[54] *Idem.*
[55] Buyse, Antoine, *Op.cit.*, p.6.
[56] *Idem.*
[57] In his speech delivered on December 10, 2011, at Leiden University, the former president of the ECtHR, Jean-Paul Costa, mentioned the 'economic, social, financial, currencies crisis', together with terrorism, as one of the leading factors for the priority shift from 'reforms in favor of freedom' to economic policies and national sovereignty.

A further critique to the pilot judgment procedure is directed at the fact that in a decision using the procedure, usually the other similar cases pending before the Court are adjourned, [58] fact that affects the interests of the other applicants. This is particularly problematic as the Court adjourns the cases for periods over one year or for an unlimited period, as it was the case with *Broniowski*. In this way applicants that have waited years until their application was declared admissible and decided on, would have to wait an extended period of time with no certain prospect of receiving compensation.[59] When deciding to adjourn an amount of cases, the Court should be balancing carefully the interests of the applicants and the efficiency of the Court. The practice of the Court seems to prove that it considers this, as, as mentioned, it has adjourned cases in some pilot judgments. Rule 61(6) gives the Court the ability to adjourn similar applications, but places an obligation on the Court to inform constantly the applicants about "all relevant developments affecting their cases". The Court may also examine an adjourned application if it is in the interest of justice. Of course, the cases where the applicant's safety or well-being is under immediate and irreparable threat should not be adjourned. [60]

A time limit should be a must, as it pressures the State and considers the interests of the parallel applicants.[61] The Report of the Group of Wise Persons to the Committee of Ministers advocated for it, in order to "ensure that victims who have already applied to the Court do not have to wait indefinitely for just satisfaction".[62] This was included in paragraph 4 of the new Rule 61 of the Rules of the Court, but the wording makes it a non-compulsory specification for the Court to use. If the Court decides to set a time limit, it is requested to pay attention to "the nature of the measures required and the speed with which the problem which it has identified can be remedied at the domestic level".

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[58] There have been cases where the Court did not adjourned the other cases. For example, in *Finger vs. Bulgaria* the Court considered that "[c] ontinuing to process all length of proceedings cases in the usual manner will not interfere with the respondent State's duty to comply with its obligations under the Convention and in particular those resulting from this judgment."

[59] Amnesty International, European Human Rights Advocacy Centre, the AIRE Centre, *Submission regarding rules of the European Court of Human Rights on the pilot judgment procedure*, 2010, p.4, available at http://www.londonmet.ac.uk/fms/MRSite/Research/HRSJ/EHRAC/Advocacy/Joint%20subs%20ECtHR%20rules%20on%20pilot%20judgments%2030_6_10.pdf.

[60] *Idem.*

[61] Buyse, Antoine, *Op.cit.*, p.13.

[62] CM(2006)203, Report of the Group of Wise Persons to the Committee of Ministers, para.105, available at https://wcd.coe.int/ViewDoc.jsp?id=1063779&Site=CM.

Some concerns regarding the procedure target the fact that there must be careful consideration by the Court when choosing what case to address under the ambit of the pilot judgment procedure as this case has to be representative for all the other related ones.[63] The Court has to pay much attention when selecting the most representative of all cases, choosing one that can provide the opportunities to address fully the systemic problem. Until the moment, as revealed by a recent Open Society report, the reason why a case and not another is chosen to be treated under the pilot judgment procedure is not always evident. According to the report, the Court assesses multiple factors when deciding which case to be treated under the procedure, with practical and political issues being considered, as well as legal factors. The likeliness of a State being cooperative is deemed to have a major importance.[64] The State's cooperation matters a lot as its rejection can undermine the procedure.

As has been mentioned in this paper, the implementation of the Court's pilot judgments requires not just individual compensation, but more importantly a significant legislative and bureaucratic effort to change policy and practice. It is up to the Committee of Minister to execute the difficult task of assessing the State's implementation. Even so, in some cases the Court has assessed whether the State has showed willingness for reforms in the first instance.[65] This might be seen as an act outside the powers of the Court, as argued by judges Jaeger and Zagrebelsky in their dissenting opinion to *Hutten-Czapska*. The two judges said that the Court

> "is not competent (and does not have the necessary knowledge) to express a view in the abstract and in advance on the consequences of the reforms already introduced in Poland and to give a vague positive assessment of a legislative development whose practical application might subsequently be challenged by new applicants."[66]

The two judges also draw attention to the fact that the Court should "exercise caution in relation to future applications it might have to examine impartially in

[63] Buyse, Antoine, *Op.cit.*, p.13.
[64] Open Society Justice Initiative, *Factsheet on Pilot Judgments*, 2012, available at http://www.soros.org/initiatives/justice/articles_publications/publications/echr-factshees-20120227/echr4-pilots-20120227.pdf.
[65] For example, in *Finger vs. Bulgaria*, 10.08.2011, Appl.no.37346/05, paras.57 and 109, or in *Burdov vs. Russia(no.2)*, 4.05.2009, Appl.no.33509/04, para.139.
[66] *Hutten-Czapska vs. Poland,*, 19.06.2006, Appl.no.35014/97, Dissenting Opinion of judges Jaeger and Zagrebelsky.

adversarial proceedings".[67] In other words the Court must pay attention not to prejudice any future proceedings coming from applications received from applicants unhappy with the new remedies developed by the respondent State.

Another warning is that the procedure might "disturb unduly the balance provided in the Convention system between its own role and that of the Committee of Ministers".[68] In relation to this lack of clarity as "regards the respective roles of the Court and the Committee of Ministers as regards the application of the pilot judgment procedure", in their "Submission regarding the rules of the ECtHR on the pilot judgment procedure," Amnesty International, the AIRE Centre and EHRAC argued for much more clarity about the roles of the two institutions and collaboration in all aspect of the pilot judgment, from the diagnosis of the systemic issue, the selection of a particular case, to the assessment of the extent to which the national authorities have complied with the pilot judgment.[69] In Rule 61 of the Rules of the Court this advice seems to have been left unnoticed by the Court, as paragraph 9 states only an obligation on the Court to inform the Committee of Ministers "of the adoption of a pilot judgment as well as of any other judgment in which the Court draws attention to the existence of a structural or systemic problem in a Contracting State".[70] Going forward on this critique, Markus Fyrnys argues that the pilot judgments affect the supervisory mechanism of the Committee of the Ministers. The Committee of Ministers is a political forum for constructive dialogue, as "the execution of judgments is treated as a co-operative political task". By issuing a lawmaking obligation "pilot judgments impose the legal arguments on the political process at the supervisory level". This restricts the competence of the Committee of Ministers to supervise the implementation of the judgments.[71]

In spite of all these critiques, the Court's Registrar considers that the pilot judgment procedure brought added value in the Court's repertoire. It has given the Court the prospect of solving large groups of cases and thus ensuring the effectiveness of the

[67] *Idem.*
[68] *Idem.*
[69] Amnesty International, European Human Rights Advocacy Centre, the AIRE Centre, *Submission regarding rules of the European Court of Human Rights on the pilot judgment procedure*, 2010, p.2.
[70] Rule 61 of the Rules of the Court, available at http://www.echr.coe.int/NR/rdonlyres/853E5F72-020B-4C47-B19F-F269B05D3F70/0/Article_61_Pilot_judgment_procedure.pdf.
[71] Fyrnys, Markus, *Op.cit.*, p.1250.

Convention.[72] We shall see if this is indeed the case based on the case study in the following part of this paper.

[72] Fribergh, Erich, *Pilot judgments from the Court's perspective*, speech delivered at the Stockholm Colloquy, 9-10 June 2008, p.3, available at http://www.echr.coe.int/NR/rdonlyres/43C75D00-0F57-4176-8A7C-0AE28DBD4EE8/0/StockholmdiscoursFribergh0910062008.pdf.

Part II

Chapter II. The Romanian property restitution legislation: how it was until October 2010 and what where its flaws

Out of the 777 cases that Romania has lost at the European Court of Human Rights, almost 60% concern a violation of the right to the protection of property.[73] As visible from this statistic, Romania has a major problem in this field, being, together with Poland, the only country in the region that did not find a solution to the property restitution problem.[74] This chapter aims at assess what the property restitution legislation was in Romania until the moment when the pilot judgment in *Atanasiu and Others vs. Romania* was issued and what were the flaws of this legislation. Before moving to the proper assessment, an observation must be made: in Romania, the restitution of buildings is regulated separately from agricultural properties.[75] This chapter is concerned with the restitution/compensation for nationalized buildings by the communist regime, as in *Atanasiu and Others vs. Romania*, and it will answer the following question: What was the Romanian property restitution legislation before the Court's decision in *Atanasiu* and what where its flaws?

1. The communist nationalization

It is not in the purpose of this paper to assess the communist policy regarding private property, but a brief mentioning of facts is necessary for understanding the issue at stake.

The communist doctrine preached the replacement of private property with public ownership, or better said community ownership. The benefit of this ownership was to be

[73] http://www.echr.coe.int/NR/rdonlyres/2B783BFF-39C9-455C-B7C7-F821056BF32A/0/TABLEAU_VIOLATIONS_EN_2011.pdf, March 21, 2012.
[74] SAR Policy Brief no.34, *Property Restitution: What Went Wrong in Romania?*, report of the Romanian Academic Society, p.3, available at http://www.sar.org.ro/files/330_Policy%20memo34EN.pdf.
[75] Kuti, Csongor, *Post-communist restitution and the rule of law*, CEU Press, 2009, p.90.

shared by all according to the need of each.[76] To this idea added the fact that property was seen in the doctrine as a means of exploitation of the poor by the rich. A third argument found by the Communist Party was that nationalization was needed to restore the economical health of the country. Thus, nationalization in Romania started immediately after the communists assumed power in 1945. Large land estates were nationalized in 1945, while in 1948 the same happened with the industry.[77] In 1950 the Decree no.92/1950 nationalized some 9.000 dwellings that were belonging to the *bourgeoisie* in Bucharest and in other cities. There were exempted from nationalization the buildings belonging to "workers, clerks, small craftsmen, professional intellectuals and to the retired".[78] Art.3 of the Decree specified that the buildings "passed to the property of the State as goods belonging to the whole people, without any compensation and free of any duties or real rights of any kind".[79] These provisions of the Decree ran counter to the 1948 Constitution, which guaranteed private property, limited expropriations to instances of public utility for which owners were fully compensated and excluded residences from the category of buildings that could be nationalized.[80]

The Decree no.92/1950 was followed by the Decree no.111/1951, which provided the State with the possibility of taking possession over abandoned residences.[81] This was directed especially at confiscating properties belonging to the Romanian Jews who were emigrating in the period to the newly created state of Israel. It is estimated that between 1948 and 1952 some 130.000 Romanian Jews had left the country.[82]

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[76] As in Karl Marx' famous quote: "From each according to his ability, to each according to his need."
[77] Chelcea, Liviu, *Ancestors, Domestic Groups, and the Socialist State: Housing Nationalization and Restitution in Romania*, Comparative Studies in Society and History, 45, p.728.
[78] This Art.2 allowed later for some heirs to ask for restitution without the passing of proper restitution legislation by the Romanian legislator, on the basis that their relatives' property had been unlawfully nationalized as they were falling under the categories mentioned in this article. The case law of the ECtHR comprises a few cases in this direction: in *Budescu and Petrescu vs. Romania,* the petitioner submitted that their property had been unlawfully nationalized as her husband was a construction engineer; in *Popovici and Dumitrescu vs. Romania*, the applicant alleged that he, "on account of his profession, did not fall into the category of persons whose property could be nationalized"; the same was alleged in the cases of *Străin and Others vs. Romania*.
[79] Decree no.92/1950, available in Romanian at http://www.juris.ro/legislatie-detaliu/DECRET-nr-92-din-19-aprilie-1950-pentru-nationalizarea-unor-imobile.
[80] Stan, Lavinia, *The roof over our heads: Property restitution in Romania*, Journal of Communist Studies and Transition Politics, 22:2, p.183.
[81] *Idem*.
[82] Bottoni, Stefano, *Reassessing the Communist Takeover in Romania: Violence, Institutional Continuity, and Ethnic Conflict Management*, East European Politics and Society, 24:1, 2010, p.74.

The Decree no.224 of the same year deprived of their possessions owners which couldn't pay their debts to the State, while the Decision of the Council of Ministers no.606/1959 expanded the list of expropriated residential buildings. Law no.9/1968 came as an answer to the rapid demographic growth and limited personal property[83] to one single dwelling and one leisure home.[84] Later, Law no.4/1973 stated that a family may own only one dwelling and that the State could confiscate any additional dwelling not sold within a year. By the Decree no.223/1974 the State confiscated the property of Romanians who refused to return after travelling abroad or who crossed the frontier illegally. More in this matter, buildings had been confiscated from people with opposed political opinions to those of the regime.[85] The list of legislative acts presented here is not exhaustive. These legislative acts created odd situations, where many of the former owners became tenants of a part of their original property.[86] If the living space was large enough other people were moved in the dwelling with the former owners.[87] In some situations even these legislative acts where ignored, as members of the communist party made abuses in confiscating buildings for themselves.[88]

Religious minorities also had to suffer due to nationalization. Decree no.358/1948 had confiscated the properties of the Greek-Catholic Church, transferring some of its properties to the Romanian Orthodox Church.[89]

By the end of the communist regime, all these decrees and laws had led to an estimated number of residential properties confiscated, nationalized and expropriated of 241.068 units, though some estimation speak of 600.000.[90]

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[83] This terminology, of personal property, replaced the one of private property for evident propagandistic reasons.
[84] The Presidential Commission for the Analysis of the Communist Dictatorship in Romania (the PCACDR), *Final Report*, 2006, p.618.
[85] Stan, Lavinia, *Op.cit.*, p.183.
[86] In the first case at the ECtHR against Romania concerning the restitution of nationalized property, *Brumarescu vs. Romania*, the parents of the applicant had been allowed by the communist authorities "to continue to live in one of the flats in the house as tenants of the State", *Brumarescu vs. Romania*, App.no.28342/95, 28 October 1999, para.12.
[87] Pásztor, Gyöngyi, and László, Péter, *Romanian Housing Problem: Past and Present*, Sociologia, LIV, June 2009, p.87.
[88] The PCACDR, *Op.cit.*, p.617.
[89] The Resource Center for Ethnocultural Diversity, Report on the process of restitution of properties that belonged to religious cults in Romania, p.15, in Romanian http://www.edrc.ro/docs/docs/provocdivers/010-032.pdf.
[90] Romanian Parliament's estimation, available in Stan, Lavinia, *Op.cit.*, p.184.

2. Post-communist steps towards restitution

Immediately after the fall of the communist regime voices were raised for the restitution of nationalized or confiscated properties, as a way of redressing past injustices, compensating for the harm done by the previous regime and breaking up with the past. In this way Romania was aligning with the rest of Eastern Europe, except Russia and Ukraine, where the possibility of tracing former owners was completely erased.[91] Restitution was generally viewed, also in Romania, as a transitional justice mechanism of restoring the victims of nationalizations, expropriations or confiscations, to the conditions they would have enjoyed if their rights would not have been violated.[92] It presented the advantages of repairing an injustice committed by the former regime and restoring the confidence of the population towards private property. But it entailed also disadvantages, as it was discriminatory to the whole population as only the owners where to receive reparation for the damage suffered under communism and it slowed down the process of privatization.[93] These disadvantages gave space to debates whether restitution should be allowed, if yes, in what way (restitution in nature or payment of compensation) and to what degree. States that were more eager in breaking off with the past, such as Bulgaria and Czechoslovakia, favored a more complete restitution, while States that wanted to rapidly attract foreign investment favored limitations and compensations, such a Hungary and Germany.[94]

In the case of Romania, without going in too much detail, the first years of democracy were marked by a political debate between two sides, a debate that would complicate very much the issue of restitution. While the Romanian Constitution of 1991, as well as the one of 2003, fully acknowledged the violations that the communist regime had realized with respect to the right to private property,[95] the problem of restituting

[91] Karadjova, Mariana, *Property restitution in Eastern Europe: Domestic and International Human Rights Law Responses*, Review of Central and East European Law, No.3 2004, p.328.
[92] Williams, Rhodri, *The Contemporary Right to Property Restitution in the Context of Transitional Justice*, Occasional Paper Series of the International Center for Transitional Justice, 2007, p.1.
[93] Karadjova, Mariana, *Op.cit.*, p.328.
[94] *Ibidem*, p.336.
[95] Art.44. "(3) Nobody may be expropriated except in the public interest, according to the law, with just and prior compensation. (4) Nationalization or any other measures of forcible transfer to public property of goods on the basis of social, ethnical, religious, political or any other discriminatory features are forbidden."

nationalized property was approached less categorically. The problem was represented by the fact that the nationalized buildings were now occupied by tenants. On the one side of the debate there were the ones favoring restitution, to the detriment of the tenants, and on the other there were the ones supporting the tenants. The new Government had a double approach with respect to tenants: many tenants were left to stay, while other tenants were evacuated to make place for public officials. The divide between the two sides deepened on the discussion whether the tenants should be allowed to buy the houses they were living in or not. During this debate and in the absence of a law clarifying the issue, some judges admitted cases. At the pressures of the then president of Romania, the Supreme Court banned lower courts from hearing cases in the absence of a property restitution law. This brought the odd situation where thousands of nationalized dwellings that had been won in court by their owners were now renationalized.[96] Also, many times the General Prosecutor used the *action in cancelation*[97] procedure to change the definitive and irrevocable sentences of the Courts who decided in favor of the owners. The Government agreed that the former owners had rights to their property, but argued that it would face a social catastrophe if it was to evacuate all the tenants. Also arguments were brought that evacuation would necessitate compensations to be given to the tenants for improving and maintaining the property. An alternative proposal to solve this issue was for the tenants to remain tenants, but to pay rent to the owners, not to the State. [98]

By the year 1995 the two sides had formed stable, but different interpretations for solving the problem of the owners expropriated by the communist authorities. For the ones representing the Power, property restitution amounted to a housing problem, where the Government had to ensure that both the owners and the tenants had a place to live in. In their view the right to property depended on the claimant's condition: if the claimant to a property had already a roof over its head, then his claim was declared unreasonable. Their view was that the right to own a home was derived from the right to use the home, vice-versa to the opinion of the Opposition, who saw the right to use as derived from the

[96] Stan, Lavinia, *Op.cit.*, p.189.
[97] The *action in cancelation* (in French *recour en cassation*) was a procedure that allowed the General Prosecutor of Romania, that is named by the President of Romania, to annul definitive and irrevocable Court decisions when it was considered that the Court has exceeded its competences or when the judges in the case have committed offences connected to the respective case. This procedure has been highly criticized and has been repealed in 2003.
[98] Stan, Lavinia, *Op.cit.*, p.190.

right to own.[99] In 1995 the majority in the Parliament followed the view of the Power and adopted the Law no.112. In this law the tendency to protect the tenants prevailed, as this law entailed that the restitution of buildings was restricted to cases were the units were occupied already by their rightful owners or were uninhabited.[100] It allowed the tenants to buy the buildings they occupied, at a very low price.[101]. In such a case compensation was accorded to the owners, though it was limited to not exceed "the arithmetical sum of the medium wages per economy, calculated for the past 20 years, beginning with the date when the calculation was made".[102] The law was criticized by the ECtHR, which observed that the legislation and case-law lacked in clarity with respect to "the consequences of the recognition of a private individual's title to property which had passed into the ownership of the State but had been sold by the State to a third party".[103]

3. Law no.10/2001 and the *Proprietatea* Fund

The prospect of integration in the European Union made the authorities in Romania more and more responsive to the pressures coming from Brussels. In this way the Romanian Parliament passed in 2001 the "Law on the Legal Status of Property Abusively Taken Over by the Communist State During the 6th of March 1945 and the 22nd of December 1989 Period", more easily referred to as Law no.10/2001. The Law has been modified since its adoption eight times until the Court's decision in *Atanasiu Case*, through: the correction published in the Official Gazette 914/2005, the Government Emergency Ordinance no.209/2005, Law no.263/2006, Law no.74/2007, the Decision of the Constitutional Court no.1055/2008, Law no.1/2009, and Law no.302/2009. I will present here the Law as it was at October 1st, 2010.

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[99] *Ibidem*, pp.191-192.
[100] Art.2 says that "[t]he persons mentioned in Art.2[n.r. the former owners] benefit of restitution in nature, through the recovery of the right to property over the dwellings in which they live as tenants or over the ones that are uninhabited, while for other dwellings they receive compensation according to Art.12". Available in Romanian at http://legeaz.net/legea-112-1995.
[101] Chelcea, Liviu, *Op.cit.*, p.717.
[102] Kuti, Csongor, *Op.cit.*, p.175.
[103] The ECtHR, *Strain and Others vs. Romania*, App.no.57001/00, 21 July 2005, para.46.

The law emphasizes the principle of restitution in nature as a main solution, while equivalent compensation is an exception. Art.1(1) and Art.1(2) state that the "[d]wellings abusively taken over by the State, by the cooperative organizations or whatever other juridical persons in the period 6 March 1945 – 22 December 1989" are to be restituted in nature. In the cases where restitution in nature is not possible equivalent reparatory measures are to be established. Such equivalent reparatory measures consist in compensation with equivalent goods and services. Art.7(1) states that

> "[u]sually, buildings abusively taken are to be restituted in kind. There will not be returned in kind, but only in equivalent, the buildings that have been alienated under the provisions of Law no.112/1995 regulating the legal status of buildings used for housing".[104]

Equivalent reparatory measures are to be offered, according to Art.18, when the building has been destroyed, excepting the ones destroyed by natural calamities. When the building has been sold with respect to legal provisions, as in the case of the ones sold to the tenants under the provisions of Law 112/1995, if it were for the State to order restitution in kind, this would amount to a veritable expropriation, so here too equivalent reparatory measures apply. Also this provision refers to nationalized companies that had individuals among the shareholders, as it provides that it applies for "persons that were associated to the juridical person that held ownership of the buildings at the moment when they were abusively taken". If the claimed buildings belong to privatized companies, the claimants have the right to equivalent reparations or compensations.[105]

Art.2(1) specifies which buildings fall under the understanding of "buildings abusively taken". These are buildings nationalized through Decree no.92/1950 and nationalized buildings belonging to industrial, banking, insurance, mining and transportation companies, buildings confiscated from individuals opposing the communist regime, buildings donated under coercion to the State, buildings confiscated for "failure to pay taxes as a result of abusive measure imposed by the State by which the rights of the owner could not have been exercised", buildings requisitioned because they were considered abandoned, buildings that were confiscated on the basis of laws

[104] Law no.10/2001 is available in Romanian at http://www.irinavoicu.ro/legislatie/legea_10_din_2001_actualizata_la_data_de_03_02_2009.pdf.
[105] Daghie, Andreea, *Considerations regarding the juridical regime of some categories of private property*, EIRP Proceedings, vol.8(2008), pp.5-6, available in Romanian at http://www.proceedings.univ-danubius.ro/index.php/eirp/article/view/1068/987.

unpublished in the Official Gazette at the moment of confiscation, any building taken by the State, without paying compensations, under a valid title[106] or without such a valid title. Buildings of religious or ethnic minorities are not covered by this law.

The legislative act also permits that restitution in nature to be awarded, when possible, to those who had received compensation, but the compensation was smaller than the real value of the dwelling, with the condition that they return the amount received as compensation.[107] According to Article 5(1), owners that had received compensation through international accords cannot claim restitution or compensation.[108]

According to Art.16, buildings that are being used by State educational units, State sanitary and medical units, or State financial, cultural or any other type of State unit used for the public service were to be passed under the property of their rightful owners, but the owners obliged themselves to allow a period of 3 or 5 years since they were allowed ownership, in which the institution could still keep its establishment. Art.13 allowed a period of 3 years also to buildings that hosted diplomatic and consular missions, international intergovernmental organizations and political parties. After this period of maximum 5 years from the recovery of the property right, the owners will enter into possession of the restituted buildings.[109]

Art.15 refers to tenants living in a restituted building:

> "[i]n the case that to the tenant is being offered another appropriate dwelling, than he is obliged to leave immediately the dwelling occupied."

If no other dwelling was available, the owner was obliged to rent his dwelling to the tenant for a period of 5 years, during which the tenant will pay a maximum rent of 25% of his family income.

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[106] In *Paduraru vs. Romania*, the ECtHR defines the concept of *title* to property under the Romanian legislation as referring to "the legal act by which the right to ownership is acquired, namely, through sale, gift or succession, or through the nationalization law and its practical implementation in the actions of the legally empowered administrative authorities". The validity of the title is "subject to the compliance of the nationalization decree and its administrative implementing acts with the Constitution, the international treaties to which Romania was a party and the laws in force at the date on which the property in question passed into State ownership", *Paduraru vs. Romania*, App.no.63252/00, 1 December 2005, para.32.

[107] Duțu, Simona, *The Restitution of Buildings Abusively Taken*, in *Collection of Legal Studies*, Sitech Craiova, 2010, p.159.

[108] During the communist regime, Romania had signed a series of agreements with different countries for the regulation of financial problems in suspension.

[109] Daghie, Andreea, *Op.cit.*, p.5.

A deadline was included, according to Art.22, by which "the person entitled will notify in 6 months since the entrance into force of this law the legal person [n.r. usually the local authorities] owning the building".[110] After this notification was received or after the receiving of the supporting documents, Art.25 made mandatory that "[w]ithin 60 days […] the holding unit have to rule by decision or, where appropriate, by reasoned disposition on the request for restitution in kind". In the case that the holding unit failed to do so, the High Court of Cassation and Justice stated in an opinion that "the domestic courts had jurisdiction to determine the merits of claims and, where appropriate, to order the restitution of the property in question or award statutory compensation".[111] If restitution in kind was not possible, Art.26 provided the State responsible agency or organization to "give in compensation to the person entitled other goods or services", or any other compensation according to the law and accepted by the owner, to the market value of the building and land. The claimant could challenge in court within 30 days the decision of the institution not to allow restitution in kind.

In cases were the buildings belonged to companies that had been privatized by the State, Art.29(1) provides that the owners are not entitled to restitution in kind, but, of course, to compensation in accordance with the market value of the buildings.

From the start, one initial drawback of the law was that it did not provide a financial and administrative structure to ensure its implementation, though Art.11(6) provided for the "value of the expropriated constructions, that cannot be restituted in nature, and of their afferent land is to be established conform with the market value at the date of the solution of the claim, established according to international evaluation standards". Law no.247/2005, complementing Law no.10/2001, came to clarify the administrative procedure for claims under the Law no.10/2001. It created two structures to deal with compensation claims: the Central Compensation Board, entitled with the jurisdiction to award compensation titles, and the National Agency for Property Restitution, which ensured guidance for the local and central authorities, and is the connection between the local authorities and the Central Compensation Board. It provided also that the

[110] This deadline was extended with another 6 months.
[111] ECtHR, *Atanasiu and Others vs. Romania,* Apps.nos. 30767/05 and 33800/06, 12 October 2010, para.72.

> "lawfulness of local authority decisions awarding compensation or proposing an award must be reviewed by the prefect, who must then forward the decisions to the Central Board.[112]"
> "If the prefect considers the decision of the mayor or other local administrative authorities to be unlawful, he may appeal against it in administrative contentious proceedings within one year of the decision.[113]"

The decisions of the prefect were to be forwarded to the Central Board. After receiving the decision of the prefect, the Central Board must verify at its own turn the decision refusing restitution and then forward the file to approved assessors for them to fix the amount of compensation. Based on their assessment the Central Board may issue a compensation certificate, it can return the file to the local authorities for a new examination, or reject the claim.[114] If a claimant is not pleased with the decision of the Central Board, he can file an appeal or address a court. If the claimant addresses a court, the High Court of Cassation and Justice provided that the court "has jurisdiction not only settle the appeal against the decision/provision for rejecting applications that requested the restitution in kind of confiscated properties, but also to settle the request" of the claimant.[115]

Also, Law 247/2005 established the *Proprietatea* Fund, a body for collective investment in transferable securities, with the purpose of "providing financial resources necessary for the provision of compensation"[116]. The Fund is the entity destined to realize the payment of equivalent financial compensations. Art.12(4) provided that

> "[w]ithin 30 days from its establishment, the *Proprietatea* Fund will initiate the necessary legal proceeding for admission to trading its shares on the market operated by the Bucharest Stock Exchange, so that the owners may dispose of their share, through sale, at any time[…]".

Later, as the proceedings for listing the Fund on the stock exchange stagnated, the Government, by way of the Emergency Ordinance 81/2007, made it possible for

[112] *Ibidem*, para.56.
[113] *Ibidem*, para.57.
[114] *Ibidem*, para.58.
[115] Daghie, Andreea, *Op.cit.*, p.7.
[116] Law no.247/2005, art.2. Art.3(b) defines the *Proprietatea* Fund as that "entity destined to the establishment of equivalent compensation for buildings abusively taken by the Romanian State in the reference period mentioned in Art.1(1) and the related claims resulting from the application of Art.32 of Law no.10/2001". The Law no.247/2005 is available in Romanian at www.mapam.ro/lege_247_2005.pdf.

beneficiaries of the Fund to receive part of the amount due in cash, up to 500.000 RON.[117] The possibility for receiving a part of the amount due in cash was suspended for two years in order to balance the budget, through the Governmental Emergency Ordinance no.62 of 30 June 2010.[118] The initial share capital of the Fund was constituted of shares that the Romanian State held in different companies, privatized or not, and also from the recovery of some rights of Romania, resulted from Romania's foreign trade.[119] By the end of the year 2010 the *Proprietatea* Fund had not been listed on the stock exchange.

According to the official data, there had been filed 202.369 claims with the National Authority for Property Restitution, of which, by the end of the year 2010, there had been given a final decision to 121.343.[120]

4. Drawbacks and critique brought against the legislation

Among the former communist countries from Central and Eastern Europe that have considered one way or another to come to terms with the past, Romania singles out in very specific terms: the fact that the scope of the reparation laws includes all nationalized properties and that there is no cap in compensation. The ECtHR rightly singled this as being the main cause for Romania's problem in ending the restitution of nationalized properties.[121] To make things even difficult, some Romanian scholars have argued that Art.6 of Law no.10/2001, which presents the meaning of "buildings" which the law covers, includes movable goods such as laboratory equipment.[122] In *Atanasiu* the

[117] The Governmental Emergency Ordinance is available at www.legea10.com/?Repertoriu_legislativ:OUG_nr._81%2F2007.
[118] The Governmental Emergency Ordinance no.62/2010, Art.III(1), available in Romanian at http://www.lawcenter.ro/utile/legislatie/oug-62-2010.
[119] Law 247/2005, title VII, Art.9, for source: note 43.
[120] The National Agency for Property Restitution, *Annual Activity Report*, 2010, p.9, available in Romanian at http://www.anrp.ro/uploads/pdf/Raport_de_activitate_2010.pdf.
[121] ECtHR, *Atanasiu and Others vs. Romania*, Apps.nos. 30767/05 and 33800/06, 12 October 2010, para.220.
[122] In "Possible interpretations of Article 6", Codruța Jucan argues that devices located in a chemist shop at the moment of nationalization can also fall under the ambit of Art.6, thus being possible to claim

Government acknowledged the extensiveness of the problem, but returned that the extensiveness was caused by the scale of nationalization that the communist regime had pursued and the high number of compensation claims coming from the owners, which the Government estimated that would amount to one sixth of Romania's GDP.[123] Although the legislation provided that compensation in goods or services could be awarded, the Government acknowledged that there were few available properties and public reserves belonging to the municipalities.[124] To this contributed the fact that the State was most of the time unaware of the available properties it held in its ownership as there lacks Land Registry records and inventory[125], or these differ in several documents.[126]

The Court singled out the fact that the 60 days time-limit available to the relevant authorities to respond to restitution or compensation claims is not enough, as it is repeatedly exceeded, making it so that the persons concerned are prevented from "having the administrative decisions reviewed by the courts".[127] To this added the fact that the competent authorities, especially the Central Board, did not had sufficient human and material resources to deal with the tasks they were faced[128], while the

> "[t]he complexity of the legislative provisions and the changes made to them have resulted in inconsistent judicial practice and in a general lack of legal certainty as to the interpretation of the core concepts in relation to the rights of former owners, the State and third parties who acquired nationalized properties"[129]

More than this, due to the high level of work, there is a lot of tolerance with regard to the performances of the ones hired to apply Law no.10/2001.[130]

The Court in Strasbourg also observed that there is no time-limit set for the processing of claims by the Central Board. The High Court of Cassation and Justice

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compensation, Jucan, Codruța, *Possible interpretations of Art.6 of Law no.10/2001*, Fiat Iustitia, no.2/2010, p.96.

[123] ECtHR, *Atanasiu and Others vs. Romania*, Apps.nos. 30767/05 and 33800/06, 12 October 2010, para.200.

[124] *Ibidem*, para.201.

[125] *Ibidem*, para.202.

[126] Romanian Academical Society report, *Property restitution: What went wrong in Romania*, RAS policy Brief No.34, p.10, available at www.sar.org.ro/files/330_Policy%20memo34EN.pdf.

[127] ECtHR, *Atanasiu and Others vs. Romania*, Apps.nos. 30767/05 and 33800/06, 12 October 2010, para.119.

[128] *Ibidem*, para.223.

[129] *Ibidem*, para.221.

[130] Romanian Academical Society, *Op.cit.*, p.10.

observed this lack of statutory time-limit and ruled that the Central Board "was required to determine claims for compensation and restitution within a reasonable time as construed by the case law of the European Court of Human Rights".[131]

One other deficiency of the Romanian restitution legislation is the slow progress towards having the *Proprietatea* Fund listed on the stock exchange. Though it was supposed to be listed in the year of its creation, which was 2005, only in January 2011 the Fund was listed on the Bucharest Stock Exchange.[132]

The ECtHR also observed critically that some provisions of Law 10/2001 have given rise to "at least five different interpretations, some of them conflicting", by the Romanian legal opinion and the domestic courts.[133] For example, with respect to equivalent restitution with other goods, some courts have considered that these measures are obligatory when possible, while others have considered that it is for the local authorities to determine whether a property is indispensable to the public good, and thus not awardable.[134] It also signaled that the legislation "does not take into account the prejudice suffered by the persons deprived of their property, before its entry into force, due to a prolonged absence of compensation"[135], but it requires owners to compensate the tenants for the improvements and repairs made to the buildings.[136]

But the Court didn't observe all the drawbacks of the legislation. Though Law no.10/2001 maintains that there must be restitution in kind when possible, the tendency to protect the tenants remained, as the latter could still buy the dwellings rented by them, the purchase being final if the former owner did not challenge the selling of the building through an annulment action in 18 months.[137] This major limitation to the principle of *restitutio in integrum* that Law no.10/2001 was purposed to allow for abuses to be made by the local authorities destined to handle claims for restitution: the authorities can sell

[131] ECtHR, *Atanasiu and Others vs. Romania,* Apps.nos. 30767/05 and 33800/06, 12 October 2010, para.225.
[132] www.bursa.ro/banci-asigurari/the-proprietatea-fund-one-year-after-its-listing-155688&articol=155688.html, March 25, 2012.
[133] ECtHR, *Paduraru vs. Romania,* App.no.63252/00, 1 December 2005, para.43.
[134] Popovici, Andrei, *Romania's Coming Property Restitution Reform*, Policy Memo no.23, The Soros Foundation, 2011, p.14, available at www.crpe.ro/eng/library/files/crpe_policy_memo_no_23-_cedo_en.pdf.
[135] ECtHR, *Porteanu vs. Romania,* App.no.4596/03, 16 February 2006, para.34.
[136] Law no.10/2001, Art.48(1): "The tenants are entitled to compensation for the added value brought to the houses through the necessary and useful improvements."
[137] The Romanian Academic Society, *Op.cit.,* p.9.

the claimed property to the ones renting it, while ignoring the notification of the rightful owners.[138]

Also, there is ambiguity in relation to acceptable documents proving an inheritance right in the restitution process, ambiguity that causes divergence between the administrative and judicial practices.[139]

A report by the Romanian Academic Society criticized the fact that Law 10/2001 placed too much decisional power into the hands of the local authorities, while it is the local authorities that are not interested in giving up important assets "just to restore the rights of the former owners who left the community long time ago or are part of a local minority and thus incapable of setting up an efficient pressure groups". The local authorities interpreted the wording "as a rule" and the general ambiguousness in the law[140] as an opportunity to take discretionary powers, which led the local authorities to delay the restitution processes or to propose to former owners unacceptable locations as compensation.[141] The report also signals the fact that the implementation regulations of Law no.10/2001 contained different provisions than the law itself. For example, the implementation regulation excluded from restitution those that had their property nationalized because they left the country due to the oppressive regime, while the law includes them among the beneficiaries of the restitution.[142]

Thus, it can be seen from the previous lines that the problems surrounding the restitution process are extensive, but they can be traced into the defective, ever-changing and unclear legislation. Failure to enforce final judicial or administrative decisions restoring property or awarding compensation, the protection of tenancies or the ineffectiveness of the administrative apparatus and others, all have their roots in the deficient body of law on restitution. This is why the Court emphasized the fact that the legislation is the main source of problems in *Atanasiu*, when it said that Romania

> "must therefore ensure, by means of the appropriate legal and administrative measures, respect for the ownership rights of all persons in a similar situation to that of the applicants […]. These aims could be

[138] *Ibidem,* p.11. The report presents extensively such cases.
[139] *Ibidem,* p.9.
[140] Law no.10/2001, Art.7(1): "As a rule, the buildings taken abusively are restituted in kind."
[141] The Romanian Academic Society, *Op.cit,* p.12.
[142] *Ibidem,* p.14.

achieved, for instance, by amending the current restitution mechanism, in which the Court has identified certain weaknesses"[143]

We shall see more about what the Court had to say in this matter in the following chapter.

[143] ECtHR, *Atanasiu and Others vs. Romania*, Apps.nos.30767/05, 33800/06, 12 October 2010, para.232.

Chapter III. The Court's indications towards Romania in *Atanasiu*

The current chapter looks at the indications that the ECtHR gave to Romania in *Atanasiu*. In order to do this, it is necessary first to understand how the ECtHR interprets the right to property, especially in cases involving restitution of confiscated or nationalized property. Therefore in this chapter I shall first assess the Court's interpretation of the provisions under Article 1 of Protocol 1. Then I will look specifically at what the Court had said in *Atanasiu*.

1. Property and deprivation of property under the First Protocol

Article 1 of the First Protocol provides that

> "[e]very natural or legal person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."[144]

The Article can be summarized as comprising three rules. The first one is that everyone is entitled to the peaceful enjoyment of their possession. The second one "covers deprivation of possessions and subjects it to certain conditions". The third rule "recognizes that the States are entitled, among other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose".[145] The three rules are very much connected with each other.[146]

With respect to the first rule, the Court and the Commission, in its time, have given a broad interpretation to the concept of "possession". According to them the

[144] The European Convention on Human Rights, Protocol 1, Article 1.
[145] ECtHR, *Sporrong and Lönnroth vs. Sweden*, Apps.nos.7151/75, 7152/75, 23 September 1982, para.61.
[146] ECtHR, *Hutten-Czapska vs. Poland*, App.no.35014/97, 19 June 2006, para.157.

concept of possession covers not only real and personal property, but also company shares, patents, internet domains or fishing rights.[147] Its broadness covers existing possessions or assets, here including "claims in respect of which the applicant can argue that he or she has at least a legitimate expectation of obtaining effective enjoyment of property right".[148] However, as the case law of the Court reveals, this does not entail that there would be a right to acquire property under the Convention. The ECtHR is of the opinion that "the hope of recognition of a property right which it has been impossible to exercise effectively and conditional claim which lapses as a result of the non-fulfillment of the condition lie outside the meaning" of Article 1 of the First Protocol.[149]

Of course, around the European national legal systems the concept of property has different meanings. For this it was necessary for the Court to give to it an autonomous meaning. Even if the identification of a right to property is governed in the first instance by the national system, the concept of property as used by the Court is not dependent on the definition in domestic law.[150]

More with respect to the first rule, there is not only a negative obligation on the States not to interfere with the "peaceful enjoyment" of one's possessions, but there are also positive obligations on the States with respect to the first rule of the right here.[151] In a case against Turkey involving the loss of someone's home, that was built without authorization, due to a methane explosion, the Court ruled that the national authorities should've taken steps "to avoid the destruction of the applicant's house", as they tacitly accepted the un-authorized construction and the unsafe gas connection, for which the State was responsible.[152] However, in a case against Russia, which concerned the destruction of property and loss of life due to a mudslide, of which's risk the authorities knew, the Court found that the State failed to comply with the positive obligation to protect life under Article 2 of the Convention, but not with the obligation under Article 1

[147] White, Robin, and Ovey, Clare, *The European Convention on Human Rights*, Oxford University Press, 2010, p.481.
[148] Golay, Christophe, and Cismas, Ioana, *Legal Opinion: The Right to Property from a Human Rights Perspective*, 2010, p.11, available at SSRN: http://ssrn.com/abstract=1635359.
[149] *Idem.*
[150] Ploeger, Hendrik, and Groetelaers, Daniëlle, *The Importance of the Fundamental Right to Property for the Practice of Planning: An introduction to the Case Law of the European Court of Human Rights on Article 1, Protocol 1*, European Planning Studies, 15:10, p.1427.
[151] ECtHR, *Öneryildiz vs. Turkey*, App.no.48939/99, 30 November 2004, para.134.
[152] *Ibidem*, para.135-136.

of Protocol 1, suggesting in this way that when it comes to the destruction of property, "the authorities enjoy a wider margin of appreciation".[153] Thus, while there are positive obligations with respect to Article 1 of the First Protocol, these are not as strong as the ones under, for example, Article 2 of the Convention.

With respect to the second rule it is to be said that it is especially connected with the third rule, as they "are concerned with particular instances of interference with the right of peaceful enjoyment of property".[154] Under these rules the deprivation of property is seen as "the extinction of the legal rights of the owners".[155] The second rule permits deprivations pursued by the States. However, for the interference by the public authorities with private property rights to be rightful three conditions have to be met. First, the conditions provided by national law must be respected.[156] This does not mean simply that the authorities should give consideration to the existing law, but also that the law must be of a certain "quality", having "to be compatible with the rule of law".[157] There must be protection against arbitrary action and the law must "be sufficiently precise and foreseeable in its consequences", while "the deprivation must be surrounded by appropriate procedural guarantees". Also, the way the law is applied must not put "an individual and excessive burden" on the person.[158]

According to the second rule, the deprivation should not amount to being a violation of the general principles of international law[159], which require for non-nationals to be protected against arbitrary expropriations.[160] However, these "are not applicable to a taking by a State of the property of its own nationals".[161]

The deprivation must be in the public interest, and "this will require a balancing of the public interest against individual rights".[162] To establish if this "balancing" was rightful the Court will apply a test. I will explain the test while describing the steps the

[153] White, Robin, and Ovey, Clare, *Op.cit.*, p.480.
[154] ECtHR, *Hutten-Czapska vs. Poland*, App.no.35014/97, 19 June 2006, para.157.
[155] White, Robin, and Ovey, Clare, *Op.cit.*, p.488.
[156] *Ibidem,* p.491.
[157] ECtHR, *James and Others vs. The United Kingdom,* App.no.8793/79, 21 February 1986, para.67.
[158] White, Robin, and Ovey, Clare, *Op.cit.*, pp.491-492.
[159] *Idem.*
[160] *Idem.*
[161] ECtHR, *Lithgow and Others vs. The United Kingdom,* Apps.nos.9006/80, 9262/81, 9263/81, 8 July 1986, para.119.
[162] White, Robin, and Ovey, Clare, *Op.cit,* p.491.

Court takes when assessing whether a deprivation of property was in accordance with Article 1 of the First Protocol or not.

First of all, as in the cases of other rights guaranteed by the Convention, the Court will look at whether the violation alleged falls within the scope of the article at issue there, in the present case if the applicant had a property in the sense of the First Article of Protocol 1. Article 1 applies if the interference with the applicant's possession has an economic impact on that possession.[163] As I already specified in the previous lines, the Court holds that the First Protocol protects existing possessions and assets, "in respect of which the applicant can argue that he or she has at least a legitimate expectation of obtaining effective enjoyment of property right".[164]

Secondly, the ECtHR will assess whether there has been an interference with the right. It will do this by employing three criteria: lawfulness, general interest and proportionality.[165]

Lawfulness refers to the compatibility of the authorities' measure with the national law, which I already discussed previously. It can be added that the Court understand the term "law" in "its substantive sense and not in its formal one". This means that the Court will look not only at the statutory law and the case law of national courts, but also at "lower regulations and even established practices".[166]

The general interest criteria requires for the interference to be legitimate. In the past, under the doctrine of the margin of appreciation, the Court "has often deferred to the interpretation of general interest given by States"[167], as in *James,* where the ECtHR said that

> "[b]ecause of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is *in the public interest*. […] The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is *in the public interest* unless that judgment be manifestly without reasonable foundation."[168]

[163] Ploeger, Hendrik, and Groetelaers, Daniëlle, *Op.cit.,* p.1428.
[164] See note 5.
[165] Ploeger, Hendrik, and Groetelaers, Daniëlle, *Op.cit.,* p.1430.
[166] *Idem.*
[167] Golay, Christophe, and Cismas, Ioana, *Op.cit.,* p.15.
[168] ECtHR, *James and Others vs. The United Kingdom,* App.no.8793/79, 21 February 1986, para.46.

As to the proportionality criteria, the ECtHR has often stated that "a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights"[169]. The Court looks at whether the interference has paid attention to the "need for a reasonable relationship of proportionality between the means employed and the aim sought to be realized". This "requires an overall examination of the various interests in the issue, which may call for an analysis not only of the compensation terms", but also an examination "of the conduct of the parties to the dispute, including the means employed by the State and their implementation".[170] The Court sets the standard of proportionality at a higher level for cases related to deprivation or expropriation, allowing a narrower margin of appreciation to the States, than for cases of control of property.[171] Here, as in the case of the lawfulness criteria, procedural safeguards play an important role. The Court requires not only that there be effective access to the Courts, but "also that decisions (by civil authorities or national courts) are neither arbitrary nor unforeseeable".[172]

The third rule of the article discussed here, found in its second paragraph of the article, preserves the powers of States to control the use of property either in the general interest or "to secure the payment of taxes or other contributions or penalties". The case law of the Court reveals that a significant number of situations can fall under this provision, such as temporary seizure of property in criminal proceedings, planning restrictions or limitations on fishing rights.[173] To be permissible, as in the case of deprivation, three conditions need to be met. First, the measure must be lawful. Second, the measure has to be in the general interest, or be for the purpose of securing the payment of taxes or other contributions or penalties. Third, the measure must be classified as necessary by the State.[174]

Control of property does not usually require compensation, while the deprivation of property does[175], as the Court acknowledged in its case law.

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[169] ECtHR, *Brumarescu vs. Romania*, App.no.28342/95, 20 October 1999, para.78.
[170] ECtHR, *Beyeler vs. Italy*, App.no.33202/96, 5 January 2000, para.114.
[171] Golay, Christophe, and Cismas, Ioana, *Op.cit.*, p.15.
[172] Ploeger, Hendrik, and Groetelaers, Daniëlle, *Op.cit.*, p.1432.
[173] White, Robin, and Ovey, Clare, *Op.cit*, p.500.
[174] *Ibidem*, p.503.
[175] Golay, Christophe, and Cismas, Ioana, *Op.cit*, p.16.

2. Compensation and restitution

2.1. Compensation

When applying the proportionality criteria, if the interference is justified in the general interest and *restitutio in integrum* is not the main objective, the ECtHR will look at whether some form of compensation has been awarded to the victim of the interference[176], with the judges considering that "the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be justifiable under Article 1"[177] of the First Protocol and that the absence of compensation would make "the protection of the right to property […] largely illusory and ineffective"[178]. However, the level of compensation compared to the value of the property may depend of the circumstances, as the Court's judges admitted when they continued saying that

> "Article 1 […] does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest", such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value."[179]

In this sense, the Court holds regard to the social function of property, considering that, although compensation should be directly proportional with the loss suffered, "principles of social justice may […] demand that standards of compensation not directly proportional to the loss be applied".[180] Also, such "less than full compensation" may be accepted in cases in which a country passes through serious political and economic change, such as the Court held in a case against Greece, when it said that less than full compensation may also be necessary where property is taken for the purposes of "such

[176] Schutte, Camilo, *The European fundamental right to property. Article 1 of Protocol No.1 to the European Convention on Human Rights: its origins, its working and its impact on national legal orders*, Kluwer, 2004, p.56.
[177] ECtHR, *Lithgow and Others vs. The United Kingdom*, Apps.nos.9006/80, 9262/81, 9263/81, 8 July 1986, para.121.
[178] ECtHR, *James and Others vs. The United Kingdom*, App.no.8793/79, 21 February 1986, para.54.
[179] ECtHR, *Lithgow and Others vs. The United Kingdom*, Apps.nos.9006/80, 9262/81, 9263/81, 8 July 1986, para.121.
[180] Schutte, Camilo, *Op.cit.*, para.57.

fundamental changes of a country's constitutional system as the transition from monarchy to republic".[181] It follows from this that the general standard for compensation is a sum close to the market value of the possession in question, but this is not a guaranteed right.

Even more, the Court considers that a total lack of compensation can be justified, but only in very exceptional circumstances. The Court stated this in another case against Greece, where the judges provided that

> "the taking of property without payment of an amount of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 […] only in exceptional circumstances"[182]

The Court admits that the States "enjoy a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest", but it will still review and determine whether a fair balance has been struck between the general interests of the community and those of the individual.[183] In order to see whether there has been struck a fair balance between the aim of the interference and the impact of the interference upon the applicant, the Court will apply the "individual and excessive burden" test.[184] By this the judges of the ECtHR will often look if there are safeguards in the national law by which the reasonableness of the compensation can be checked so that the burden on the individual is not excessive.[185] The Court will pay attention to domestic authorities, usually the courts, to see whether they acted arbitrarily or unreasonably or failed to discharge their obligation to strike a fair balance between the interests of the parties.[186]

As I mentioned before, the Court will also look at the whole legal system to see whether it protects possessions effectively. It will not accept legal provisions that "lead to

[181] ECtHR, *The former King of Greece and Others vs. Greece*, App.no.25701/94, 23 November 2000, para.87.
[182] ECtHR, *The Holy Monasteries vs. Greece*, Apps.nos.13092/87, 13984/88, 9 December 1994, para.71.
[183] ECtHR, *Scordino vs. Italy (No.1)*, App.no.36813/97, 26 March 2006, paras.93-94.
[184] Schutte, Camilo, *Op.cit.*, p.57.
[185] White, Robin, and Ovey, Clare, *op.cit*, p.493.
[186] Schutte, Camilo, *Op.cit.*, p.57.

lawful or de facto expropriation without compensation" or situations that make "enjoyment of possessions purely theoretical, but ineffective and illusory in practice".[187]

Another fact to which the Court pays attention is if the compensation is "real", and not "illusory". Such "illusory" compensation may arise because inflation affects the awarded compensation[188], or because "the long time that someone had been deprived of his property had not been taken into account when calculating the compensation", or even because the "laps of time deprives the applicants of the increase of value".[189] However, consideration of individual circumstances will not always be a required feature of the calculation of compensation, such as in cases of major nationalization programmes that "may require a standardized rather than an individual approach to the calculation of compensation". These types of deprivations enjoy a wider margin of appreciation for the method of calculation of the compensation. However, in cases of individual expropriations the Court requires the States "to establish all the relevant factors for compensation", and also to pay attention to the "impact of the expropriation on the value of any remaining land".[190]

2.2. Restitution

The ECtHR does not impose on States a specific obligation to restore confiscated property prior to the entering into force of the Convention for that particular State, but it actually leaves them leeway in choosing the conditions and scope of property restitution if they decide to do so. The Court emphasized this when it said that

> "Article 1 of Protocol No.1 cannot be interpreted as imposing any general obligation on the Contracting States to restore property which was transferred to them before they ratified the Convention. Nor does Article 1 of Protocol No.1 impose any restrictions on the Contracting States' freedom to determine the scope of property restitution and to

[187] *Ibidem*, p.58.
[188] Çoban, Ali Riza, *Inflation and Human Rights: Protection of Property Rights against Inflation under the European Convention for Human Rights*, Essex Human Rights Review, Vol.2 No.1, p.70.
[189] Schutte, Camilo, *Op.cit.*, p.57.
[190] White, Robin, and Ovey, Clare, *Op.cit*, p.494.

> choose the conditions under which they agree to restore property rights of former owners."[191]

Clearly put, the Court will not admit applications relating to events that took place before the entry into force of the Convention for the respective State. More to this, it considers that the deprivation of ownership "is in principle an instantaneous act and does not produce a continuing situation" of deprivation.[192] However, once the State has ratified the Convention and

> "has enacted legislation providing for the full or partial restoration of property confiscated under a previous regime, such legislation may be regarded as generating a new property right protected by Article 1 of Protocol No.1 for persons satisfying the requirements for entitlement."[193]

As for compensation, the Court allows a wide margin of appreciation to the States "with regard to the exclusion of certain former owners" from the entitlement of property restitution rights. The claims of these categories of owners asking for "restitution cannot provide the basis for a 'legitimate expectation' attracting the protection of Article 1 of Protocol 1".[194]

In property restitution cases, if there is a procedure in national law for seeking recovery, those provisions "will be taken into account in determining whether there has been an interference".[195] But the Court requires for the applicant to be having a property right that is being pursued at the national level and that that right must be not "just a mere hope of restitution", but a legitimate expectation, "which must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision".[196] Thus, in the absence of a domestic law providing on restitution (or compensation), someone that lost its possession before 1989 could not win before the Court. This creates the paradox that "only a post-communist country that initiates

[191] ECtHR, *Kopecký vs. Slovakia*, App.no.44912/98, 28 September 2004, para.35(d).
[192] *Ibidem*, para.35(a).
[193] *Ibidem*, para.35(d).
[194] *Idem*.
[195] White, Robin, and Ovey, Clare, *Op.cit*, p.495.
[196] ECtHR, *Gratzinger and Gratzingerova vs. the Czech Republic*, App.no.39794/98, 10 July 2002, para.73.

regulation on the matter after adopting the Convention […] can become liable".[197] With specific reference to cases involving restitution of property that that has been long ago confiscated, the Court has specified that

> "the hope of recognition of an old property right which it has long been impossible to exercise effectively cannot be considered as a 'possession' within the meaning of Article 1 of Protocol No.1".[198]

Also, the Court requires that if a national procedure for restitution sets out certain conditions, those conditions have to be met by the applicant.[199] Therefore, for example, the Court will reject applications from Romania that have not been pursued in the national system within the time limit set by the Law No.10/2001. The Court will rarely go behind the conclusions of a national court that a condition has not been met. Related to this requirement is the one that the applicant must not be responsible for irregularities or abuses of national regulations.[200]

The case law of the Court shows that when the Court has found a violation of Article 1 of the First Protocol, it did so not because of the nationalization or confiscation by the authoritarian regime, but because the respective State had failed to comply with their own legislation for providing for compensation or restoration, or for failure to enforce final judicial or administrative decisions restoring property or awarding compensation.[201]

[197] Mungiu-Pippidi, Alina, *Contentious Property and Europeanization in South-Eastern Europe*, East European Politics&Societies, Vol.26 No.2, May 2012, p.13.
[198] ECtHR, *Prince Hans-Adam II of Liechtenstein vs. Germany*, App.no.42527/98, 12 July 2001, para.83.
[199] White, Robin, and Ovey, Clare, *Op.cit*, p.495.
[200] *Idem*.
[201] Mungiu-Pippidi, Alina, *Op.cit.*, p.14.

3. ECtHR's recommendations to Romania in *Atanasiu*

In the *Atanasiu and Others vs. Romania* pilot judgment, the Court did not order specific measures to be taken by the Romanian authorities with respect to property restitution, but rather acted under the doctrine of the margin of appreciation, leaving leeway to Romania, under the supervision of the Council of Ministers, to assess the proper measures to be taken in order to solve the systemic violation.[202] However, the Court relied on the principles relating to property restitution that I mentioned in the previous sub-chapters, and recognized the difficulties faced by Romania and any other former communist country in doing justice for all the diverse situations and categories of individuals involved, acknowledging at the same time that it is for "the domestic authorities, and in particular the Parliament, to assess the advantages and disadvantages involved in the various legislative alternatives available".[203] The Court agreed that Romania has a large margin of appreciation, but emphasized that this is not unlimited as it still has to pay respect to the Convention's provisions. The Court remembered that, under its previous case-law, less than full compensation is accepted if the public interest requires it and no compensation at all is accepted only in very limited circumstances. However, the Court said to Romania that it has previously held that States must pay attention so that by "the attenuation of […] old injuries […] not to create disproportionate new wrongs".[204]

The Court observed in *Atanasiu* that Romania has, through its legislation on restitution and compensation, chose to award "full compensation in respect of properties expropriated during the communist era", unlike other former communist countries in the region.[205] I have presented the "causes of the structural problem" in the previous chapter, of which the Court mentioned some in *Atanasiu*, so I will resume to "the general measures" that the Court considered that they need "to be taken in the interest of other potentially affected persons".

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[202] ECtHR, *Atanasiu and Others vs. Romania*, Apps.nos.30767/05, 33800/06, 12 October 2010, para.236: "the national authorities retain full discretion in choosing, subject to the supervision by the Committee of Ministers, the general measures to be laid down in the domestic legal system in order to put an end to the violations found by the Court."
[203] *Ibidem*, paras.170-171.
[204] *Ibidem*, paras.175-177.
[205] *Ibidem*, para.178.

While considering the case suitable for the application of the pilot judgment procedure, the Court moved on to recommending some remedial measures, agreeing first that "it is not for the Court to determine what remedial measures may be appropriate to satisfy [Romania]'s obligations under Article 46", but considering necessary to provide assistance to the State by suggesting "on a purely indicative basis the type of measures which the Romanian authorities might take in order to put an end to the structural situation".[206]

First of all, the judges called on Romania to ensure, through "appropriate legal and administrative measures", that every single person benefits of respect for their right to possession, holding in regard the principles under Article 1 of the First Protocol that I've presented in the previous sub-chapters. Having already in previous cases signaled the malfunctioning of the restitution mechanism[207], the ECtHR suggested for the restitution mechanism, that including the legislation and court practice, to be rapidly amended in order to establish a "simplified and effective procedure".

Secondly, the Court appreciated that time-limits for each administrative step in the restitution or compensation process "could have a positive impact" and encouraged Romania in this direction.[208]

Also, while inviting the Romanian authorities to look for inspiration from other former communist countries for examples of good practice and legislative adjustment, the Court recommended for the review of the disparate Romanian legislation and for the creation of a unified single body of law, with clear and foreseeable provisions.[209]

A fourth recommendation was for the placing of a cap on compensation, which in the case of Poland, after *Broniowski,* was well received by the ECtHR[210], and for the payment of these compensations in installments over an extended period of time in order

[206] *Ibidem,* para.230.
[207] In *Affaire Viaşu c.Roumanie,* Requête no.75951/01, 9 décembre 2008, *Affaire Faimblat c.Roumanie,* Requête no.23066/02, 13 janvier 2009, *Affaire Katz c.Roumanie,* Requête no.29739/03, 20 janvier 2009.
[208] ECtHR, *Atanasiu and Others vs. Romania*, Apps.nos.30767/05, 33800/06, 12 October 2010, para.234.
[209] *Ibidem*, para.235.
[210] Popovici, Andrei, *Romania's Coming Property Restitution Reform*, Policy Memo no.23, The Soros Foundation, 2011, p.8, available at http://www.crpe.ro/eng/library/files/crpe_policy_memo_no_23-_cedo_en.pdf.

"to strike a fair balance between the interests of the former owners and the general interest of the community".[211]

Also, while signaling the main problems affecting the remedy system, the Court recommended implicitly for more human and material resources to be put at the disposal of the Central Board. Regarding the Central Board, it was suggested for it not to process cases in random order anymore, because this was giving way to corruption.[212]

Interestingly, the Court has established a deadline for these recommendations to be implemented right before the general elections in Romania, fact that might prove benefic for finding a solution. We shall see if this has been the case in the following chapter.

[211] ECtHR, *Atanasiu and Others vs. Romania*, Apps.nos.30767/05, 33800/06, 12 October 2010, para.235.
[212] Popovici, Andrei, *Op.cit.*, p.8.

Chapter IV. Effects of the *Atanasiu* pilot judgment in Romania

According to Article 46(2) of the Convention, the Committee of Ministers is entitled with the task of supervising the judgments issued by the ECtHR. Besides monitoring individual measures, it also monitors whether "the necessary legislative or administrative reforms have been instituted in order to prevent future violations".[213] The Committee consists of representatives of all member States of the Council of Europe and it holds meetings in which States have to justify themselves in relation to the cases involving them before the Court.[214] In the meetings the Committee gives priority "to supervision of the execution of judgments in which the Court has identified what it considers a systemic problem".[215] The supervision process requires the State to present an action plan containing the individual or general measures taken to solve the problem identified in the Court's judgment, which will be debated during every meeting and constantly revised by the concerned State. The case will figure on the Committee's agenda at each meeting until it is considered that the general measures taken ensure compliance with the judgment.[216] Such general measures include changes in legislation, administrative reforms, changes in courts' practice or practical measures such as the introduction of human rights training for the police forces, construction of prisons or the recruitment of judges.[217] In its task the Committee of Ministers is helped by the Department for the Execution of Judgments, which bears the responsibility of "preparing each case file and liaising with the relevant state authorities in respect of each case" before the Committee's meeting, and also has the task of "advising the Committee in its role as custodian of the interests of the Convention".[218] After concluding that the State "has taken all the necessary measures to abide by the judgment or that the terms of the friendly settlement have been executed", the Committee shall adopt a resolution closing

[213] Barkhuysen, Tom, and van Emmerik, Michiel, *A Comparative View on the Execution of Judgments of the European Court of Human Rights*, in *European Court of Human Rights. Remedies and Execution of Judgments*, T.Christou and J.P.Raymonds, eds., BIICL, London, 2003, p.20.
[214] Lambert Abdelgawad, Elisabeth, *The Execution of Judgments of the European Court of Human Rights*, Strasbourg: Council of Europe, 2008, p.33.
[215] Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, Rule 4.
[216] White, Robin, and Ovey, Clare, *Op.cit.*, p.54.
[217] Lambert Abdelgawad, Elisabeth, *Op.cit.*, p.30.
[218] *Ibidem.*, p.35.

the case.[219] However, in the case that a State "refuses to abide by a final judgment" or in case that the Committee of Ministers is unsure of the interpretation of a judgment, it can refer the case back to the Court, as the revised Article 46 establishes. It is up to the Committee to decide whether to refer the matter back to the Court.[220] This is in a nutshell the supervisory mechanism of the Committee of Ministers. Having reviewed shortly the supervisory system of the Convention in the previous lines, I can turn now again to the Court's decision in *Atanasiu and Others v. Romania,* which provoked a heated debate in the Romanian society and triggered an intensification in the collaboration between the Council of Europe institutions and Romania, which translated into a law proposal, as it shall be seen in the following sections. In this chapter I look at the collaboration between the Council of Europe and Romania in the matter at stake in this case study and at the legislative and administrative modifications made by Romania after the decision of the ECtHR in *Atanasiu.* I will end this chapter with a conclusion on the case study. As such, this chapter answers the following question: What are the legislative and administrative modifications made by Romania after the sentence of the ECtHR in *Atanasiu*?

1. The collaboration between the Council of Europe and Romania after Atanasiu

As Ms. Irina Cambrea, Romania's Government Co-Agent[221] before the ECtHR, had said in an interview, the involvement of the Council of Europe in Romania's property restitution reform after the pilot decision in *Atanasiu* consisted in four main components, which I will detail as follows.

First of all, after the Prime-minister had created in December 2010 an interministerial working group to propose solutions and draft a property restitution

[219] Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, Rule 17.
[220] Lambert Abdelgawad, Elisabeth, *Op.cit.*, p.56.
[221] The Institution of the Government Agent for the European Court of Human Rights is mandated to represent the interests of the Romanian State before the ECtHR, to pass information to the Committee of Ministers in connection to the stage of the execution and to put in contact other relevant Romanian institutions with the Department for the Execution of Judgments of the ECtHR. More detailed informations regarding the attributions are available in Romanian at www.mae.ro/node/1872.

reform law[222], the Institution of the Government Agent, in collaboration with the Council of Europe, organized in February 2011 an exchange of best practices through a round table with the theme "Property Restitution/Compensation: General Measures to Comply with the European Court's Judgments". During this round table representatives from different relevant Romanian institutions, from the ECtHR and from the Department for the Execution of Judgments of the ECtHR, as also, most importantly, from other 20 former communist countries presented their own expertise in the matter of property restitution or compensation, the difficulties faced in drafting and implementing legislation and the different solutions to those problems.[223] While acknowledging the difficulty posed by the need to keep a fair balance between the private interests involved and the interest of the community and reckoning that the State's financial situation and the general political context can justify limitations on compensation, the participants concluded the round table by coming with solutions to the problem that have been presented in the second chapter of this paper, and especially stressed that in the process of drafting legislation on the issue at hand attention must be paid to adopting "clear and simple legal frameworks for restitution and/or compensation schemes", as also

> "setting, wherever full *restitutio in integrum* was deemed impossible, a cap on compensation awards, or paying them in installments over a longer period or in some other form allowing budgetary processes to provide the necessary funds (bonds, shares…) in order to help to strike the fair balance required between the interests of all involved, including former owners, current tenants or owners and the general interest of the community".[224]

A second, more direct method of collaboration with the Council of Europe was through permanent bilateral contacts. By this the Institution of the Government Agent made regular briefings through revised action plans, which were transmitted to the

[222] Prime-ministers Decision no.270/2010. The interministerial working group is composed of representatives from the National Agency for Property Restitution, from the Ministry of Public Finances, the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Administration and Interior Affairs, the Ministry of Agriculture and Rural Development, the Ministry of the Environment and the National Authority for State Assets.

[223] http://www.coe.int/t/dghl/monitoring/execution/Source/Documents/HRTF/TR%2002.11/Briefingnote14022011_ENG.pdf, p.2.

[224] Conclusions of the Round table: Property Restitution/Compensation: General measures to comply with the European Court's Judgments, p.2, available at http://www.coe.int/t/dghl/monitoring/execution/Source/Documents/HRTF/TR%2002.11/Conclusions14022011_ENG.pdf.

Committee of Ministers. The last such revised action plan presents a draft law consisting in capping and paying in installments the compensation, provisions which will be found in the latest draft law, discussed in the following subchapter.[225]

Beside these two previous methods of collaboration, there had took place consultations between the Romanian authorities and the Council of Europe, as Ms. Irina Cambrea told, with the occasion of the annual visits that the Department for the Execution of Judgments made in Romania. During these visits there had been meetings between the representatives of the Department and relevant Romanian authorities, like the National Agency for Property Restitution, the Ministry of Public Finances or the Ministry of Justice. The visits consisted of concrete talks related to possibilities for settlement or problems that the Department for the Execution of Judgments sees reported to one measure or another put on the table by the State. Also, in March 2012 the President and the Registrar of the Third Section[226] of the ECtHR made a visit to Romanian and discussed with the same Romanian authorities about the enforcement of the Court's decision in *Atanasiu.*

2. The draft law of the interministerial working group

In April 2012 the President of the National Agency for Property Restitution presented the outcome of the interministerial working group. The elaboration of "the draft law for the determination and payment of compensations for buildings abusively taken during the communist regime"[227] was determined, as the President of the mentioned State authority acknowledged in a press conference, by the ECtHR's pilot judgment in *Atanasiu and Others vs. Romania.*[228]

[225] Communication de la Roumanie relative au Groupe Străin et Autres contre Roumanie, Plan d'action révisé, p.5, available at https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1977919&SecMode=1&DocId=1820886&Usage=2
[226] The Third Section of the ECtHR is where cases are filed against Romania.
[227] *Draft law for the determination and payment of compensations for buildings abusively taken during the communist regime*, available in Romanian at http://www.anrp.gov.ro/uploads/proiect_legislativ_CEDO.pdf.
[228] Press communication available at http://www.anrp.ro/presa/comunicate/18-2012/275-11-aprilie-2012.html.

The draft law tries to bring a unified framework for all the others subjects that were falling under different laws, thus paying attention to the Court's recommendation in *Atanasiu* for the establishment of a simplified and effective procedure. Also, what is clear from the beginning, as the title suggests, is that the draft law does not provide for restitution in nature or for compensation with other goods or services. As Article 2 speaks, the draft law aims at bringing predictability, equity and transparency in the process of establishing compensation.

The reform brought by the draft law is centered on two levels: administrative and financial. On the administrative level, it introduces deadlines of 12, 24 or 48 months, depending on the number of applications, until which the central and local authorities must complete the settlement of claims filed.[229] This is in line with the ECtHR's recommendation of bringing some predictability to the restitution process. Also the Central Commission for the Determination of Compensation gains more power over the local authorities as it can validate or not their solution to certain applications, and as the prefect no longer has any attribution. Also, as one of the critics brought to the system was that it allowed for corruption as the applications were processed in random order, the draft law establishes that "the applications are analyzed in order of their registration" to the central or local entities.[230]

The most important modifications are brought on the financial level. The draft law provides in Article 7 that "the persons entitled will receive compensation amounting to 15%" of the value of the building, paid in installments over a period of 10 to 12 years.[231] This article is the one that brought most of the criticism for this law. Mr. Iulian Lepa[232] said in an interview that the draft law violates the Constitution of Romania,

[229] Article 14(1) specifies 12 months for the legal entities that have to answer up to 2500 applications, 24 months for the ones that have to answer between 2500 and 5000 applications, and 48 months for the legal entities that must give an answer to more than 5000 applications.
[230] *Draft law for the determination and payment of compensations for buildings abusively taken during the communist regime ,* Article 14(4), available in English at https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2091682&SecMode=1&DocId=1890892&Usage=2.
[231] *Ibidem,* Article 7(1) and (2).
[232] Mr.Iulian Lepa is a lawyer specialized in issues related to the restitution of/compensation for properties confiscated by the communist regime. More information about him, in Romanian, at www.avocat-iulianlepa.ro.

specifically the principle of non-retroactivity of laws[233] and the principle of nondiscrimination. In supporting his first claim, Mr. Lepa cites decisions of the Constitutional Court in which the Court declared unconstitutional "legislation with an obvious retroactive valence". For example, in 2008 the Constitutional Court of Romania found unconstitutional a paragraph of Law no.247/2005, modifying a provision from Law 10/2001 related to buildings belonging to privatized companies, because

> "through the new law there appears a tendency to modify previously formed legal situations whose effects were already consumed by submitting notifications [and] it gives a retroactive character to the criticized provisions, contrary to Art.15(2) of the Constitution"[234]

The Constitutional Court also added that

> "whenever a new law changes the legal statute of some previous reports, all the effects likely to occur in the previous report, if they were made before the entry into force of the new law, cannot be changed following the adoption of new regulations, which must respect the sovereignty of the previous law. But the new law is immediately applicable to all situations that will be constituted, will change or will go out after the coming into force, as well as to all the effects produced by the legal situations formed by repealing the old law."[235]

What Mr. Lepa argued was that most of the former owners already have filed their cases with the National Agency for Property Restitution. This means that they received irrevocable administrative dispositions for full compensation under Law no.10/2001 from the local authorities or from notified companies, which creates a property right not yet materialized. Thus, if the draft law would be adopted it would violate the principle that says that "rights that have been given should not be taken away".[236]

As with respect to the violation of the principle of nondiscrimination, Mr. Lepa defined as "absurd" for someone to receive compensation capped at 15%, while many other former owners received before the full value of their buildings in an instance. Even

[233] Article 15(2) of the Romanian Constitution says that [t]he law provides only for the future, except for the more favorable criminal or administrative law".
[234] Decision no.830/2008, available at http://www.ccr.ro/cauta/.
[235] *Idem.*
[236] Popovici, Andrei, *Romania's Coming Property Restitution Reform*, Policy Memo no.23, The Soros Foundation, 2011, p.21, available at www.crpe.ro/eng/library/files/crpe_policy_memo_no_23-_cedo_en.pdf.

the Court has drawn attention for the States to pay attention so that by "the attenuation of […] old injuries […] not to create disproportionate new wrongs".[237]

The draft law seems to meets some of the desires that the European Court of Human Rights expressed in *Atanasiu,* as I showed earlier. This is so especially with reference to the fact that in *Atanasiu* the Court, as acknowledged also by Ms. Cambrea, made reference to *Broniowski* by saying that

> "further examples of good practices and legislative adjustment provided by other signatory States […] could provide a source of inspiration to the respondent Government (see, in particular, *Broniowski* and *Wolkenberg*)"[238]

In the *Broniowski Case* the Court accepted, due to the special circumstances, a cap on compensation at 20% of the original value of the land.[239] When drafting the law and proposing the 15% cap, the interministerial group kept this in mind. However, they omitted that in the case of Poland the capping on compensation applied *erga omnes*, to all the people included in the restitution process after the fall of communism. While if it would have been for the draft law to be adopted, it would have made the ones that have not yet received compensation be discriminated because they would have been receiving only 15%. It is hard to see why the Court has made such an erroneous recommendation, especially when a national judge is always present with the purpose of avoiding such mistakes. Anyhow, due to the fact that it is discriminatory and has a retroactive valence the draft law has met the opposition of all the NGOs representing the interests of the former owners. As such the Romanian authorities considered the possibility of preparing another draft law and asked the Court for a 9 months extension of the deadline, which was approved. The new deadline is 12 March 2013.[240]

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[237] See note 204.
[238] ECtHR, *Atanasiu and Others vs. Romania*, Apps.nos. 30767/05 and 33800/06, 12 October 2010, para.235.
[239] Kicker, Renate, *The Council of Europe: Pioneer and guarantor for human rights and democracy*, Council of Europe Publishing, Strasbourg, 2010, p51.
[240] http://www.digi24.ro/stire/CEDO-acorda-Romania-un-noua-amanare-in-problema-retrocedarilor_22335, 12 June 2012.

3. Case study conclusion

We have seen in the second chapter of this paper that the issues surrounding the restitution of/compensation for properties confiscated by the former communist regime are multiple and extensive, Romania being the only former communist state that has, since 1990, elaborated ten draft laws referring to the restitution of properties without, however, finding "a clear and definitive solution"[241]. The Court has observed this, obliged Romania to find solutions and even suggested, under the margin of appreciation doctrine, some solutions. The fourth chapter showed that the Romanian Government has responded to the Court's suggestions, as most of them are found in the draft law. These are: establishing a "simplified and effective procedure", a unified single body of law, placing time limits for each administrative step, placing a cap on compensation and paying it in installments over an extended period of time in order "to strike a fair balance between the interests of the former owners and the general interest of the community", and no more processing of cases in random order. It was the pilot judgment procedure started in *Atanasiu* that triggered the reform in the national system. The pilot judgment was well received by the Romanian national authorities, who showed willingness to find a solution to the systemic or structural problems. As the case study reveals, there have been many consultations between Strasbourg and the national authorities, which have proved helpful for the latter. However, the slowness of the national authorities has made it so that a draft law was presented only three months before the Court's deadline. And after receiving an extension of the deadline, the problem has gone again into "oblivion". The national authorities do not seem really eager to find a proper solution, as the worst that could happen is that *Atanasiu* together with other cases will keep remaining on the agenda of the Committee of Ministers. The threat of exclusion from the Council of Europe is an idle one as it is a political decision in the Committee. The States in the Committee have many too many economical interests and so too much to lose in Romania to see it facing exclusion.

[241] Opinion of the former Prime-minister Mihai-Răzvan Ungureanu, available in Romanian at www.gov.ro/participarea-primul-ministru-mihai-razvan-ungureanu-la-emisiunea-sub-semnul-intrebarii-la-b1-tv-partea-a-doua__l1a116792.html, 25 May 2012.

Though the draft law respects most the Court's wishes, it is inefficient as it does not even comply with the basic law of the country. This, in my opinion, says that the national authorities were so willing to satisfy the wishes of Strasbourg and to escape the pressure coming from there that they left the interests of the people affected aside. In fact, this has caused another stall in the reform, as at the moment there seems that the authorities are reconsidering the previous way of dealing with the issue of restitution. As the talks with the civil society have reached a deadlock, the authorities give signals to change their mind, as the President of Romania had declared on May 24 that Romania will continue to apply the principle of *restitutio in integrum*[242], the same principle being advocated by the current Prime-minister[243].

The civil society has rejected the project, terming it as "unconstitutional". The former owners that haven't yet received compensation argued that they would not accept to be discriminated with respect to the former owners that have already received full compensation. They asked for nothing less than full compensation. While they understand that paying the compensation with money from the budget of the Romanian State would be an unbearable effort for the State, their, as also Mr. Lepa's, suggestion is for compensation to be paid from the State patrimony, especially shares to energy companies that now belong in a large part to the State, but also agricultural lands.

The case study reveals that the pilot judgment procedure is effective as a powerful incentive. However, this effectiveness is double-edged. Indeed, starting the pilot judgment procedure against Romania has put pressure on the national authorities to work for addressing the systemic problems. Romania did in the draft law do what the Court requested and collaborated with Strasbourg, this showing in my opinion that the State is willing to receive guidance from Strasbourg. But while the Romanian Government did its best to satisfy the wishes of the Court, the applicants have not been satisfied with the solution proposed by the Government. And it is the applicants that have to be satisfied in the first place as they duly have a right to property. Indeed, there must be a fair balance between the general interest of the community and the interests of the former owners, but

[242] Opinion of the President of Romania, available in Romanian at www.evz.ro/detalii/stiri/traian-basescu-despre-retocedarea-proprietatilor-restitutio-in-integrum-un-principiu-costisito.html, 5 June 2012.
[243] Opinion of the Prime-Minister of Romania, available in Romanian at www.evz.ro/detalii/stiri/solutia-lui-ponta-la-restituirea-proprietatilor-980338.html, 7 June 2012.

this would not have been achieved by a law that is both unconstitutional and unsatisfying. And it is the European Court of Human Rights that made suggestions for such provisions that go against the basic law of the country. In my opinion this shows how limited the knowledge of the Strasbourg Court is with respect to the national legislation and practice of the country. The pressure coming from Strasbourg through the pilot judgment procedure was benefic, but it should have been doubled by internal pressure. As Mr. Lepa said in an interview, “the ECtHR has become a sort of general registry because Romania does not respect property rights”. This is to say that the Court in Strasbourg is the strongest pressure mechanism that the former owners have on the power in Bucharest. They lacked a local way of putting pressure on the Government to solve their issue. If they would’ve had such a way, it is my opinion that they would not have “troubled” the ECtHR.

Conclusion

The pilot judgment procedure is a novel way by which the European Court of Human Rights looks into a case, going past the facts of the proper case and into the systemic problems that caused that and other cases. It is a way by which the Court observes and orders measures to be taken by the States that do not have effective protection systems at national level, as the great number of repetitive cases prove such a situation. It was a necessary measure because of the increasing number of cases that threaten to "suffocate" the Court. Also, beside this aim of increasing the efficiency of dealing with applications, the pilot-judgment procedure is a way by which the constitutional function of the ECtHR is accentuated, as the Court reviews and asks for amendments to be made to domestic legislation, administrative acts and judicial rulings.
The pilot-judgment procedure increases the cooperation between States and the Council of Europe institutions. This is done especially through the Department for the Execution of Judgments, but also by State visits made by officials from the Court. The Committee of Ministers itself gives special regard to solving systemic problems[244]. Also, the States seem keen to collaborate with Strasbourg in finding solutions to systemic problems, even if only in a delayed and Strasbourg-oriented way. This is so especially as there is no case until now in which a country member of the Council of Europe had not accomplished a pilot judgment.[245]

However, the pilot-judgment procedure still faces a series of challenges. First of all, there has been expressed doubts over the legal basis of the obligation upon a respondent State to execute the pilot judgments of the Court. This is because the pilot-judgment procedure was not included in Protocol 14, that was reforming the Convention, rather being based on Resolution Res(2004)3 of the Committee of Ministers. Thus, not being included in the reforming Protocol, it might be argued that the obligation comprised in Article 46(1) of the ECHR, former Article 53, for States to abide the

[244] Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, Rule 4(1): "The Committee of Ministers shall give priority to supervision of the execution of judgments in which the Court has identified what it considers a systemic problem in accordance with Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem."
[245] http://www.digi24.ro/stire/CEDO-acorda-Romania-un-noua-amanare-in-problema-retrocedarilor_22335, 12 June 2012.

judgment of the Court does not address obligations regarding applicants who are not parties in the case. I do not share this opinion. The case study in the present paper and the experience with other pilot judgments show that States do not question the obligations brought by a pilot judgment and are willing to adopt the general measures requested by the Court. The fact that the Committee of Ministers, an organism composed of State representatives, has issued a resolution requesting the ECtHR to identify systemic problems and assist States in solving them can only reinforce the idea that States feel bound to respect the Court's decision in a pilot judgment, if only based on what is soft law. It has been often argued by the Court that the Convention is "a living instrument that which must be interpreted in the light of present-day conditions".[246] The pilot-judgment was a necessary way of adapting the Convention system to the challenges that appeared after the former communist States became members of the Council of Europe. This is especially true when it comes to the "survival" of the Convention system. Thus, the pilot-judgment procedure is only a way of keeping the Convention system alive. The view that the obligation in Article 46 stands also for pilot judgments is supported by the Brighton Declaration, which provides that

> "[e]ach State Party has undertaken to abide by the final judgments of the Court in any case to which they are a party. Through its supervision, the Committee of Ministers ensures that proper effect is given to the judgments of the Court, including the implementation of general measures to resolve wider systemic issues."[247]

Secondly, the pilot-judgment procedure has been criticized because of the vagueness of the operative part of the judgments. As also in *Atanasiu*, in a pilot judgment the Court describes the violations as originating in "a malfunctioning of domestic legislation and practice caused by the failure to set up an effective mechanism to secure the rights of a group of individuals in line with Convention standards". The Court orders in a general way for legal and administrative practices to be amended and sometimes recommends specifically some possible solutions. This is indeed a drawback for pilot-judgments. It is hard for a State to know what it actually has to do in order to satisfy the wishes of the Court. However, this issue is tackled through the extensive cooperation that

[246] ECtHR, *Hirsi Jamaa and Others v. Italy*, App.no.27765/09, 23 February 2012, para.175.
[247] The Brighton Declaration of the High Level Conference on the Future of the European Court of Human Rights, para.26, available at www.coe.int/en/20120419-brighton-declaration, 3 June 2012.

is developed between the State and Strasbourg. As shown in the case study, visits from Court's officials and the aid from the Department for the Execution of Judgments work in this extent. Article 46(3) allows for the Court to issue an interpretation of its judgment, but this can be done only at the request of at least two thirds of the representatives in the Committee of Ministers and only if "the execution of a final judgment is hindered by a problem of interpretation of the judgment". In my opinion it would be welcomed if it would be possible for States themselves to ask the Court to rule with respect to the interpretation of a judgment and if the Court would be more precise in its judgments, as the case study shows that there is willingness from the States to receive more guiding from the Court.

In a pilot judgment the Court applies a "carrot and stick" method. It usually places a deadline in the pilot judgment for the State, which is without doubt beneficial as in the case of Romania it was as the deadline was getting closer that things started being put into action. Until this deadline the State has to find a solution to its systemic problem and it will be rewarded with the striking of the list of a series of cases and with a better reputation. However, if the State does not find a solution until the deadline, what will happen is that, in the case that the State doesn't ask for an extension, the cases that have been adjourned will be re-opened and the case in which the pilot-judgment procedure has been used will continue to be on the agenda of each meeting of the Committee of Ministers. This, in my opinion, is not a powerful enough incentive for the States to solve their systemic problems. I believe that States are more receptive to economic issues. A bad reputation of a country with regard to human rights has a bad reputation in economic terms. I believe that a more accentuated strategy of "naming and shaming" will be more effective in ensuring quicker compliance from States.

The Court does not provide a reasoning for which it has chosen a case to be considered under the pilot-judgment procedure. While it seems that this has to do with practical and political, as well as legal factors, more clarity would be needed in this extent.[248] This is particularly important for the applicants as, for example, in *Atanasiu and Others* the applicants were awarded compensation for the damages suffered, while the applicants in other 266 cases might've felt discriminated for not knowing at least the

[248] See note 64.

reasons why their case was not selected to be treated under the pilot-judgment procedure. A clear procedure would be needed in this extent.[249] This is especially so as, for example, the applicants whose cases have been adjourned by the Court in *Atanasiu* will now have to wait another 9 months because the Court has extended the deadline awarded to Romania.

More clarity would also be needed with respect to the delimitation of the roles the Court and the Committee of Ministers play in the pilot judgment procedure. From the case study it can be seen that both institutions assume roles in aiding the State in implementing the judgment. However, it is not clear if and how the two institutions collaborate in this matter. This fact has been observed in the Brighton Declaration, where it has been encouraged for "the States Parties, the Committee of Ministers and the Court to work together to find ways to resolve the large number of applications arising from systemic issues identified by the Court".[250]

To resume, the pilot judgment procedure is an effective way of dealing with systemic violations. This is so as it is a powerful incentive for States to find solutions for these violations. However, there is still a lot of place for improvement in order to better achieve its aim. It is in my opinion that the answer to systemic violations lies in the pilot judgment procedure, but this needs qualitative improvements.

[249] The Brighton Declaration in para.20(d) cals for such a procedure by inviting "the Committee of Ministers to consider the advisability and modalities of a procedure by which the Court could register and determine a small number of representative applications from a group of applications that allege the same violation against the same respondent State Party, such determination being applicable to the whole group".
[250] The Brighton Declaration, para.20(c).

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