

DIFFERENT FORMS OF COMPENSATION AVAILABLE FOR DAMAGES CAUSED TO THE VICTIMS OF HUMAN TRAFFICKING

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ABSTRACT: *Law no. 678/2001, establishes special provisions regarding the judicial proceedings, with respect to investigating crimes of human trafficking, in two phases: the prosecution and trial. The reason for establishing these special provisions has its foundation in the nature of the crime of human trafficking who has acquired a boundary character, against which conventional means and methods have become insufficient. The issue we address in our efforts refers to the situation of the victims of human trafficking and how to repair the moral and material damage suffered by the victims of this type of crime. The situation appears more complex as the victim may suffer physical and psychological trauma which cannot be medically treated. However, we are witnessing another phenomenon that brings in discussion the provisions of the Law no. 678/2001, which removes the criminal responsibility of the persons who were victims of the human trafficking. Thus, although in some cases it is obvious that it is about no victim, being in fact the case of prostitution or begging crimes, Romanian courts are reluctant to declare that status quo, which although obvious doesn't lead to punishing the mentioned crimes.*

KEYWORDS: *human trafficking, victim, moral damage, material damage, crime, traumas, appropriate compensation, remedies.*

JEL CLASSIFICATION: *K 13, K 14*

“Sexual violence against children is a crime against childhood. To stop it we need more than just words and promises. We need concrete actions to prevent, denounce and punish abuses, in order to help children to protect and to express themselves and also to give victims a chance to overcome their trauma. It is necessary, possible and urgent.”

(Maud de Boer Buquicchio¹)

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1. ABOUT HUMAN TRAFFICKING IN THE EUROPEAN UNION AND ROMANIAN LAW. LEGAL PROVISIONS AND CONCEPTUAL DELIMITATION

The legislation of the European Union treats the issue of human trafficking in the frame of the provisions combating organized crime. The mentioned issue is treated differently on the agenda of the European Parliament in 1986, when the first resolutions, regarding women in general and especially human trafficking, were adopted.

A decade later, European Commission published the first communication regarding trafficking in women for the purpose of sexual exploitation², which created the premise for the development of policies and legal instruments at European level regarding human trafficking.

The major legal instruments in the matter of human trafficking are as follows: Article 29 from the Treaty on the Functioning of the European Union (TUE) – “*the Union’s objective is to provide citizens with a high level of protection within an area of freedom, security and justice, by developing common actions between Member States, regarding police and judicial cooperation in criminal matters*”; *Council Framework Decision no. 2002/629/JAI* from 19th of July 2002 on combating trafficking in human beings³; *Council Directive no. 2004/81/CE* from the 29th of April 2004⁴ on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities; *Council Framework Decision no. 2004/68/JAI* from the 22nd of December 2003⁵ on combating the sexual exploitation of children and child pornography; European Convention on Human Rights. These provisions inter alia represent the European Union efforts and policy to eliminate the issue of trafficking of human being, situation that threatened to take a particular scale, due to the lack of efficient legislation regarding this criminal phenomenon.

Offences relating to trafficking in Romanian Law are punishable in accordance with the provisions of Law no. 678/2001⁶, which regulates the prevention and control of human trafficking, protection and assistance accorded to the victims of human trafficking, which constitutes a violation of individual rights and a damage to his dignity and integrity.

We also mention that by Law no. 508/2004⁷ on the establishment, organization and operation of the Public Ministry’s Directorate for Investigating Organized Crime and Terrorism (DIICOT) the legislator created a specialized body to combat organized crime and terrorism. According to article 12 of Law no. 508/2004 offenses under Law no. 678/2001 are in the competence of DIICOT, and if during the prosecution, the prosecutors of the prosecution offices state that the offense, which formed the subject of the case, is an offense within the jurisdiction of DIICOT, they must immediately submit the file to the competent prosecutor.

² Please see Commission Communication of 20 November 1996 to the Council and the European Parliament on Trafficking in Women for the Purpose of Sexual Exploitation, COM (96) 567 final, 20.11.1996, [On-line]: <http://europa.eu.int/eur/lex/en/index.htm>

³ Official Journal L 203, 01.08.2002, p. 1-4.

⁴ Official Journal L 261, 06.08.2004, p. 19-23.

⁵ Official Journal L 13, 20.01.2003, p. 1.

⁶ Official Gazette of Romania, Part I, no. 783 of 11.12.2001.

⁷ Official Gazette of Romania, Part I, no. 1089 of 23.11.2004.

In order to apply a thorough approach regarding the issue analyzed, it is necessary to clarify some concepts which are representative in combating such crimes.

According to Article 12 and 13 of Law no. 678/2001 human trafficking refers to actions such as: the recruitment, transportation, transfer, accommodation and housing of a person, by threats, violence or other forms of constraint, kidnapping, fraud or deceit, misuse of power, or taking advantage of the impossibility of such person to defend himself or to express his will, or by offering, giving, accepting or receiving money or other benefits in order to obtain the consent of the person having authority on other person, for the purposes of exploitation of that person.

Exploitation of an individual shall mean:

- The forced work or provision of services or in violation of the legal rules on the working conditions, remuneration, health and security;
- Slavery or other similar procedures of deprivation of liberty or servitude;
- forced practice of prostitution, pornographic representations or other forms of sexual exploitation;
- Removal of organs;
- Other similar activities, whereby the rights and fundamental freedoms of the individual are violated.

Also, according to the Law are punishable a series of acts which constitute offenses related to human trafficking, as follows:

- determining or allowing, consciously, either directly or by an agent, the entry or residence on the territory of the country of a person who is not a Romanian citizen, subject to human trafficking for the purpose of this law:

a) By using against this person fraudulent means, violence, threats or any other form of constraint; or

b) By abusing of the special condition of such person, owing to its illegal status or to the precarious nature of the entry into or residence in the country, or owing to pregnancy or infirmity or mental or physical deficiency, shall be an offence and shall be sanctioned with the punishment provided for the offence of human trafficking.

- exposing, selling or spreading, renting, distributing, manufacturing or producing in any other way, transmitting, offering, supplying or holding in order of spreading objects, films, pictures, slides, emblems or other visual supports that represent sexual positions or acts of a pornographic nature, presenting or involving minors under the age of 18, shall be the offence of infantile pornography.

- also will be sanctioned the import or delivery of objects, films, pictures, slides, emblems or other visual supports that represent sexual positions or acts of a pornographic nature presenting or involving minors under the age of 18, to a transport or distribution agent, in order to being sold or distributed.

The law expressly exempts from criminal responsibility the person subject to human trafficking who committed, as a result of being exploited, the offence of prostitution or of begging.

Also, the person who committed one of the offences provided by this law, and during the criminal prosecution denounces and facilitates the identification and calling to account

the criminal liability of other persons, who committed offences provided by this law, shall benefit by the reduction to half of the limits of the punishment provided by the law.

A problem which occurs during the trial regards the legal assistance of the defendant, whereas fixed punishment for offences related to human trafficking are more than 5 years in prison.

According to article 44 of Law no. 678/2001 the victims of these offences are entitled to legal assistance, required in order to exercise their rights in criminal proceedings provided by law in all phases of criminal proceedings and to support their claims and civil claims against persons who committed offences under this law and if they are implied.

Writing the text of the law reveals a contradiction, by using two contradictory formulas: “entitled” and “mandatory”⁸, which generated controversies in legal practice.

Some courts have left to the victim the opportunity to seek qualified legal assistance, while others have designated an ex officio defender.

In our opinion it is necessary to appoint an ex officio defender for the victim, since the legislator intention was to provide effective means for the victim in order to defend its legal rights and interests.

It is worth mentioning that the Supreme Court ruled that the breach of the provisions of Article 44 of Law no. 678/2001 draws the sanction of relative nullity, so it can be invoked only by the victim who has not received legal assistance in criminal proceedings and for this reason suffered an injury.⁹

2. THE VICTIMS OF HUMAN TRAFFICKING

The victims of human trafficking¹⁰ can be both persons who have been subject to violence, threats or have been misled by those who deal with human trafficking and also persons who are aware of the true intentions of traffickers and agreed with this situation in the context of economic or mental vulnerability that characterized them at the time.

2.1. Children – victims of human trafficking

The means by which children are victims of human trafficking are as follows: recruitment, transportation, transfer, housing or keeping children in order to be forced to steal, beg, to make subjects of illegal adoption or even more dramatic, to be used for an organ transplant. If they are able to return to their community of origin, they are often rejected by family. The mental traumas which have gone through, makes them vulnerable to problems faced in daily life.

⁸ Article 44 of Law no. 678/2001 states as follows: The persons referred to in Article 43 are entitled to legal assistance required in order to exercise their rights in criminal proceedings, provided by law, at all stages of criminal proceedings and to support their claims and civil claims against persons who committed crimes under this law in which they are involved.

⁹ Please also see the Decision no. 5847 from the 9th of November 2004 of the High Court of Cassation and Justice from Bucharest, Criminal Section, unpublished.

¹⁰ See for an analysis of the categories of persons who may be victims of human trafficking the volume edited by the Magistrates Association and the Association of Social Alternatives from Iasi with the title: Human Trafficking; the Defender, the Victim and the Offense, p. 74-81.

Subsequently, some children who were subject of human trafficking, when become adults, return to the places where they come from, in order to recruit other people. The United Nations provides statistics, which includes estimates at a global level and which reveals the fact that millions of children are trafficked for labour exploitation¹¹. In the same time the reports of non-governmental organisations indicate¹² that there are thousands of minors under the age of 13 who are trafficked from and within Eastern Europe for forced labour, begging and theft.

A recent report of the International labour office (ILO) – Global Report on child labour states as follows: the global number of child labourers had declined from 222 million to 215 million, or 3 per cent, over the period 2004 to 2008, representing a ‘*slowing down of the global pace of reduction*’. The report also expressed concern that the global economic crisis could further “*brake*” progress toward the goal of eliminating the worst forms of child labour by 2016. The new ILO global report, entitled *Accelerating action against child labour*, presents detailed estimates. Progress was greatest among children aged 5-14, where the number of child labourers fell by 10 per cent. Child labour among girls decreased by 15 per cent. However, it increased among boys (by 8 million or 7 per cent). What’s more, child labour among young people aged 15 to 17 increased by 20 per cent, from 52 million to 62 million¹³.

An important step in fighting against sexual exploitation of minors has been the entry into force of on the 1st of July 2010 of Convention adopted by the Council of Europe on protection of children against sexual exploitation and sexual abuse. The Convention was regarded¹⁴ as the first international instrument to attack all forms of sexual violence, whose victims are children, including abuse within the family. Along sexual abuse, prostitution and forced participation of children in pornographic videos, the Convention also deals with the issue of grooming and sexual tourism.

2.2. Women – victims of human trafficking

Women become victims of human trafficking being misled by various job offers posted on the Internet, ads from mass-media or matrimonial agencies. Victims are recruited through ads which „guarantee” a career as a hotel worker, as baby sitter, waitress etc. Once the persons reach the destination, they are deprived of acts and become victims of human trafficking.

¹¹ International Labor Office, *Accelerating action against child labour. Global Report* under the follow-up to the ILO-Declaration on Fundamental Principles and Rights at Work, Geneva, 2010, [On-line]: http://www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/documents/publication/wcms_126752.pdf

¹² Such an NGO is the Regional Clearing Point on Counter Trafficking.

¹³ See for more details <http://www.ilo.org/ipec/+ILO-IPEC&cd=1&hl=ro&ct=clnk&gl=ro>. Please see also European Union, *EU Report on Human Rights 2008*, Office for the Official Publications of the European Union, Luxembourg, 2008, p. 35-36.

¹⁴ Please see also the press-release of the Information Bureau of the European Commission in Bucharest on <http://www.coe.ro/stire.php?id=915>. It also should be mentioned the position of the Council of Europe to launch on 29 November in Rome an awareness campaign to eliminate sexual violence against children. One of the main objectives will be to draw the attention of the general public to the level of sexual abuses in circles such as family, school or extracurricular activities. The campaign will also be an opportunity to remove the silence that surrounds sexual abuse and improve children’s education and training professionals to prevent, as far as possible, all forms of sexual violence.

Human trafficking is also realized by means of another crime, involving illegally crossing the borders, when subjects are women from poor countries, who cannot get legally visa for the destination country.

In this context, the situation is more favourable for those who exploit them because the nature of the situation enables them to freely dispose of the victims on the territory of a state, where they arrived illegal, in which country they are not registered and does not exist. Thus, victims are transported by guides from one state to another, arriving in the destination country illegal.

2.3. Men – victims of human trafficking

A particular case is where men can fall victims to human trafficking and are subject to exploitation in forced labour in industry¹⁵, forced to begging, smuggling and organ trafficking.

Another problem is the sexual exploitation of men by gay communities of the destination country. The problem of homosexuality and pedophilia arises in the context of some psychological tendencies, when predisposed young men come to have a relationship with another man, thus achieving mental connection between love and homoerotic sex. Subsequently, they may become victims of sexual exploitation of other men in the context of human trafficking met in form of sexual exploitation.

3. CONCRETE MODALITIES TO REPAIR DAMAGES CAUSED TO THE VICTIMS OF HUMAN TRAFFICKING

The victims of human trafficking, i.e. trafficked persons, have the right to compensation as well they should receive special treatment, consisting in medical aid and legal assistance, in order to help them to overcome the negative effects of their exploitation.

Compensations must be seen and analyzed as remedies which have to be imposed by special procedures. Thus, there is necessary the adoption of special criminal, penal and administrative regulations, which offers various possibilities for addressing the situation of victims on a case by case basis, depending on the nature of damages – material or mental – arising from the offense.

The issue of financial compensation accorded to victims of certain categories of crimes has been addressed in the legislation of the European Union, which has made necessary the adoption of the Law no. 211/2004 regarding some measures ensuring the protection of victims¹⁶.

The above mentioned law transposes into the national law the Council Directive no. 2004/80/CE from the 29th of April 2006 on compensations accorded to the victims¹⁷, the Commission Decision no. 2006/337/CE from the 19th of April 2006 establishing standard forms of applications and decisions pursuant to Council Directive no. 2004/80/CE from the 29th of April 2004 on compensations accorded to the victims¹⁸.

¹⁵ According to the statistics of the International Migration Office from Bucharest.

¹⁶ Official Gazette of Romania, Part I, no. 505 of 4.06.2004.

¹⁷ Official Journal L 261, 06. 08. 2004, pp. 19-23.

¹⁸ Official Journal L 125, 12. 05. 2006.

In its initial form, Law no. 221/2004 included a procedure which provided the granting of financial compensation only for the victims of other types of crimes, excluding the offenses related to human trafficking¹⁹. Subsequently, the Government Emergency Ordinance no. 113 from the 17th of October 2007 amending and completing the Law no. 211/2004²⁰, have extended the effects of the law also to the victims of human trafficking. Another novelty was the regulation of the different modalities of financial compensation in cases when the crime is committed in a Member State of the European Union, other than the state in which the victim of crime resides legally. The novelty was brought by amending the Chapter 5 of the Government Emergency Ordinance no. 113/2007, entitled „Request for financial compensation in cross-border situations”.

The Ministry of Justice is the Assistance Authority responsible for the legal assistance of the Romanian citizens, foreign citizens who has their legal residence in Romania and stateless persons who are victims of intentional crimes committed in another Member State of the European Union. The requests for financial compensations will be sent to this authority by the state on which territory the crime was committed. The application must be accompanied by the necessary documents (evidence) and the Ministry of Justice will send the request for financial compensation within 5 working days from the reception of the application submitted by the deciding authority of the state on whose territory the crime was committed. The decision-making authority in matters regarding the requests for compensation for crimes committed in Romania is the Commission for financial compensations awarded to the victims, which is functioning at the Bucharest Tribunal and is formed by at least three judges. The above mentioned commission receives the requests for financial compensation directly from the applicant or from the Assistance Authority of the state on whose territory the applicant resides. The problem which occurs related to the files which contain the solution of the applications for financial compensation or the solution concerning the granting of an advance of the financial compensation for the victims of the crime, regards the legal nature of the judgements issued by the mentioned commission. The jurisprudence of the courts appears inconsistent, taking into consideration the fact that some courts adopted civil judgements²¹, when others penal judgements²².

In our opinion, the rulings of the Commission for financial compensations awarded to the victims must be civil judgements²³. In this respect, it was shown that only a criminal

¹⁹ The mentioned issue was noted also in the doctrine. Please see for more details the work edited by the Magistrates Association from Iasi and the Social Alternatives Association, op. cit., p. 86.

²⁰ Official Gazette of Romania, Part I, no. 729 of 26.10.2007. The Ordinance was approved by the Law no. 45/2008, Official Gazette of Romania, Part I, no. 228 from 25.03.2008.

²¹ See for more details the Decision of the Arad Tribunal, Civil Decision no. 12– Commission for financial compensations awarded to the victims – from 07.11.2005 (unpublished).

²² See for more details the Decision of the Timis Tribunal, Penal Decision no.5 – Commission for financial compensations awarded to the victims – from 02.11.2005 and Decision no. 6 – Commission for financial compensations awarded to the victims – from 05.12.2005 (unpublished).

²³ We are sharing the opinion expressed by I. Retca, *Natura juridică a hotărârilor pronunțate de comisia pentru acordarea de compensații financiare victimelor infracțiunilor*, Dreptul Journal no. 9/2007, p. 222-223. the author states as follows: „The simple fact that financial compensations are awarded to the victims of crimes of whose offenders are subject to criminal liability does not justify the adoption of a criminal decision. Applications based on the provisions of Chapter 5 of Law no. 211/2004 has the special characteristics of civil complaints. The victims of some categories of crimes acts under a right recognized by the law and whose protection a complaint before the courts is compulsory. These are personal and main, not secondary complaints under the civil procedural law”.

court has jurisdiction to order the attachment of the civil complaint to the criminal one, either by constituting a party which have suffered damages of a civil nature, or by introducing ex officio a civil complaint to the courts (in accordance with the provisions of Article 7, par.1 of the Criminal Procedure Code). In these situations the criminal court is asked to settle both the criminal and the civil complaint, when solving the civil complaint is strong related to the criminal complaint, as results from the provisions of Article 346 of the Criminal Procedure Code.

We mention that for the free psychological counselling of victims of human trafficking specialized bodies have been created within the probation services that works near the courts. Psychological counselling to the victims of human trafficking is guaranteed by law, in cases when the crime was committed in Romania or outside the Romanian territory, if the victim is a Romanian citizen or a foreign citizen who is legal resident in Romania.

However, there is a problem which must be resolved, the necessity of objective evaluation of the victim, i.e. the verification of the fact that we are or not in the presence of a victim of human trafficking. Our experience in cases concerning human trafficking reveals the fact that there are some situations when we are not in the presence of „victims” in the meaning of Law no. 678/2001, but only in the presence of some offenses of prostitution, cases where the pimps were not judged for the offense of proxenetism, but for crimes related to human trafficking. Thus, even within the same panel of judges, appeared the same „victims” in two or more files. Sometimes, the courts omitted to observe that there was any „victim”, being only in the presence of an offense of prostitution - fact recognized by the so called “victim” for the amusement of the public – and despite of these facts, the decision regarded crimes concerns, in the end, the same human trafficking crime, because the court took into consideration only the testimony of the “victim”, which was given during the prosecution. The situation has to be analyzed in the light of the provisions of Law no. 678/2001, which exempts from criminal liability the victims of human trafficking. In these circumstances, women prostitutes – also known as prostitutes by the police – declares themselves as “victims” of a crime related to human trafficking. In other words, they chose between the two statuses “victim” of human trafficking and offender of prostitution offense.

Finally, related to a large study²⁴ conducted in the doctrine, we have to mention the following:

The National Inspectorate for Personal Records ensures the identification of the victims and communicates to the consulate or diplomatic mission via the Directorate for Consular Relations – immediately or within 5 working days from the receiving of the request – the approval for issuing the travel documents necessary for returning into the country, where the person in case does not have a passport or other identity document.

The Ministry of Labour and Social Solidarity, the Ministry of Industry and Resources and the Ministry of Finance examines the possibility of taking measures in order to stimulate economic agents who employs persons who are exposed to a high risk of being

²⁴ Please see E. A. Mihuț, D. Moca, Metodica cercetării traficului de persoane, “Dreptul” Journal no. 4/2001, p. 174-181.

trafficked and also victims of trafficking who have graduated training courses in a particular domain²⁵.

The General Directorate for Social Assistance and Child Protection from the child's residence ensures the reception, the legal representation and the escort of the child, and takes special protection measures, if necessary. The mentioned authority also monitors the evolution of the situation of the children who were repatriated for a period of six months after the moment of return.

The working staff of the Assistance and Protection Centres and also the employees of the Ministry of Administration and Internal Affairs ensure the protection of privacy and the confidentiality of the identities of the victims of human trafficking received in the mentioned centers.

4. CONCLUSIONS

As we have mentioned above, the main difficulty regarding these cases is related, once again, to the characteristics of the human trafficking offenses: a high degree of secrecy in terms of mode of operation; the network of traffickers are closed structures operating in the underworld, protected against the legal system and being experts in avoiding their discovery and arrest²⁶.

The problems which occur in the context of granting appropriate compensations for the victims must be addressed taking into the consideration the specific nature of the human trafficking crimes. The competent authorities will conduct a thorough assessment of the damage suffered by the trafficked person, who will receive appropriate compensation consisting in material, medical and legal support, depending on the specific nature of the analysed case.

²⁵ Please see the Article 15 of the Regulation for the implementation of the provisions of Law no. 678/2001.

²⁶ Please also see I. Lazăr, A. Mocan, Sancțiunea nepublicității ședinței de judecată, o problemă care necesită un recurs în interesul legii, „Dreptul” Journal no. 1/2007, p. 192.