

**THE CRIMINAL SAFEGUARD OF VULNERABLE PERSONS.  
THE NEW CONCEPTION  
OF THE ROMANIAN CRIMINAL LEGISLATOR**

**Rodica PANAINTE\***

**Abstract**

*This article represents an analysis of a new incrimination in the Romanian criminal law, namely that of the offense of **patrimonial exploitation of a vulnerable person**, stated in the provisions of Article 247 of the new Romanian Criminal Code. The brief history of criminalization shows however that this is not an *ex novo* incrimination, as the Romanian criminal legislation stated the incrimination of similar acts in the criminal codes of the period prior to the Communist regime, by most often taking over texts from foreign, European criminal legislations.*

*We have argued in this article that the current regulation was done under the inspiration of foreign regulations, and on this occasion we have made a European comparative law approach, showing the manner and form in which some of the European legislations incriminate the acts of patrimonial exploitation of a person, and that these incriminations generally aim to protect the vulnerable persons against patrimonial exploitation.*

*We have also analyzed the sense in which the Romanian criminal legislator has used the phrases **patrimonial exploitation of a person** as well as that of **person in a state of obvious vulnerability**, as clarifying the meaning of these phrases helps to delimit the scope of incidence and application of the new legal text.*

---

\* Rodica Panainte, PhD., is a Lecturer at the Faculty of Law within “Mihail Kogalniceanu” University of Iași, Romania, and a Postdoctoral Researcher at the Faculty of Law within “Alexandru Ioan Cuza” University of Iași.

**This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resources Development 2007-2013.**

RODICA PANAINTE

*Finally, we have shown the need and importance of this new incrimination, given the current social and economic context in Romania, which required the safeguarding of the categories of vulnerable persons against this form of exploitation, but we have expressed our reservations about the manner and extent to which criminal law will be able to manifest its preventive role in the case of these new offenses.*

**Keywords: criminal law, new Criminal Code, patrimonial exploitation, vulnerable person, criminal safeguard.**

## **I. Introductory considerations on the act of *patrimonial exploitation of a vulnerable person*. Concept and short history of criminalization**

The new Romanian Criminal Code contains a number of new incriminations, reflecting, as shown in previous studies, a new conception of the Romanian criminal legislator of the social values that can and must be protected by the criminal law.

Such an incrimination is the new offense in Art. 247 of the special part of the Criminal Code, a text with the marginal title “Patrimonial exploitation of a vulnerable person” within Chapter III which includes *crimes against patrimony by disregarding trust*.

Compared to the regulations of the Criminal Code previously in force – the Criminal Code of 1969 - this is a new incrimination as, previously, no similar crime was expressly consecrated, nor was expressly mentioned the term of *vulnerable person* or any other similar term.

However, the offense *de lege lata* incriminated in Art. 247 of the new Criminal Code cannot be considered an *incriminatio ex novo*, because the Romanian criminal law had a similar regulation in the provisions of the Criminal Code of 1865, which in Art. 322 provides that “Anyone who will speculate in the needs, weaknesses and passions of a minor, to get the minor to subscribe (sign) to his/her loss, liabilities, receipts or any written documents of arrangement (agreement) for borrowing money or goods or commercial documents, or any other written documents by which the minor will be in debt, regardless of the form in which this agreement was made, shall be punished with imprisonment and fine”.

This text was a takeover of Art. 406 of the French Criminal Code, and as it can be noticed, it only took into account the minor’s exploitation. But this text served as a model, together with the provisions of the Italian Criminal Code, for the Criminal Code of 1937 which extended the scope of the text regarding the committed acts, in some cases, also to other persons than minors<sup>1</sup>.

The text was later taken over by the provisions in the “Carol II” Criminal Code, which consecrated in Art. 542 the crime of “exploitation of weaknesses or flaws” and provided that “Anyone who, in order to obtain a material benefit, abusing the needs, passions, vices or inexperience of a minor or the mental infirmity or inferiority of a person, and makes that person commit an act that

---

<sup>1</sup> Duvac, C., “Material exploitation of the vulnerable person in the new Criminal Code”, *Criminal Law Review*, no.1/2012.

would produce for him/her or other person a harmful legal effect, commits the crime of exploitation of weaknesses or flaws”.

One can easily understand the reasons why this crime was not found in the Criminal Code of 1969: the law could not stipulate in its regulations situations and traits of human beings which the hypocrisy of Communist doctrine did not accept: the new man, the desired prototype of the Communist society, had no weaknesses or flaws.

Moreover, the proposals for the re-incrimination of this offense after 1990, during the elaboration and discussion of the draft of the new Criminal Code of 2004, were received with reservations and reluctance by the Romanian doctrine, arguing that such situations of exploitation of vulnerable persons do not occur so frequently in our society, and their criminalization or stipulation in the criminal law would be an excess of law, and that it would be more appropriate to consider and incriminate them as a specific form of fraud<sup>2</sup>.

However, the legislators of the new Criminal Code took into account the high frequency of such crimes and also had the power to recognize that in the Romanian society – given the disorder in the hierarchy of values – the vulnerable persons are also exposed to patrimonial exploitation, both because of a jungle-type mentality where there is no social solidarity, and in the absence of any special protection measures and policies.

Consequently, it was stronger the opinion of those who believed that this kind of acts - exploiting vulnerable persons - are committed frequently enough in our society and that they have produced the most serious consequences – patrimonial and moral – for the persons who fell victim, so that such a deed be considered a crime and the victims of these acts benefit from the more effective and rapid protection of criminal law.

In the definition given by Art. 247 of the new Criminal Code, the patrimonial exploitation of a vulnerable person is the act of a creditor who, while lending money or goods, taking advantage of the state of obvious vulnerability of the debtor, due to age, health, infirmity or dependency relationship in which the debtor is with the creditor, makes him/her constitute or transmit, for him/herself or another a real right or claim of a manifestly disproportionate value to that of the benefit.

The crime also has an aggravated form when the perpetrator him/herself brings the victim in a state of obvious vulnerability by causing a poisoning with

---

<sup>2</sup> *Ibidem*.

alcohol or psychoactive substances, in order to induce him/her to consent to the creation or delivery of a real right or claim or give up a right, if there was damage.

## **II. Elements of comparative law regarding the act of patrimonial exploitation of a vulnerable person**

The criminalization in the text of the new Criminal Code was inspired by similar regulations in the Swiss Criminal Code and the Portuguese Criminal Code<sup>3</sup>.

The analysis of these texts will help us better understand the ways in which these crimes can be committed as well as the criminal legislator's view of the acts that fall into the category of patrimonial exploitation of vulnerable persons.

Thus, in Art. 157 the Swiss Criminal Code incriminates the offense called *profiteering*, which is defined as *the deed of any person who, for his own or another's financial gain or the promise of such gain, exploits the position of need, the dependence, the weakness of mind or character, the inexperience, or the foolishness of another person to obtain a payment or service which is clearly disproportionate to the consideration given in return, or who acquires a debt originating from an act of profiteering and sells or enforces the same.*

The act is considered to be more serious if the perpetrator acts for commercial purposes, as commercial activities, which have continuous character, usually bring more significant profits than sporadic civil operations.

In the Portuguese Criminal Code, the similar act is called "*usury*" and it happens when a person with intent to obtain a material benefit for him/herself or for another person, exploits the suffering, mental illness, incapacity, incompetence, inexperience or weakness of character, or the relationship of dependency of the debtor, in order to make him/her commit to offer or promise, in any form, for him/herself or on behalf of another person, regardless of material advantage, depending on the circumstances of the case, clearly disproportionate to the consideration given in return.

In the view of the Portuguese legislator the deed is aggravated when the perpetrator makes usury a way of life, or when he/she hides the illegal material benefit in a disguised (forged) letter of application or contract, or when he/she consciously causes by means of usury, the patrimonial ruin of the victim.

Criminal law does not talk about the moral damage caused to the victim, and about its repair, so we appreciate that, although not punished by criminal law, the perpetrator could be held to cover civil liability for the moral damage caused to

---

<sup>3</sup> *Ibidem.*

the person who, when being vulnerable, was even temporarily in the position to be exploited by the perpetrator.

The acts of patrimonial exploitation of vulnerable persons are also provided in the legislation of other states. Thus the Norwegian criminal law also criminalizes this offense but as a form of fraud in contracts, which exists when a person, through a legal act, exploits the suffering, recklessness, lack of judgment, or dependence of any person in order to obtain or to stipulate a remuneration which, given the circumstances, is manifestly disproportionate to what is given instead, or which helps or facilitates them<sup>4</sup>.

In the Italian criminal law, the similar act is called *deception of incapable persons* and consists of the deed of any person who, in order to obtain for him/herself or for another a profit, abusing the needs, passions or inexperience of a minor, or abusing the state of infirmity or mental deficiencies of a person, even if he/she is not put under interdiction nor officially declared incapable, forces him/her to sign a document involving any damaging legal effect for him/her or for other, is punishable by imprisonment and a fine between 200 and 2000 euros.

The French Criminal Code also provides for this offense called *fraudulent abuse of the state of ignorance or weakness* and consists of the fraudulent abuse of the state of ignorance or weakness, either of a minor or of a person with a special vulnerability, due to age, illness, infirmity, physical or mental deficiencies, or a state of pregnancy, apparent or known to the offender, or a person in a state of mental or physical subjection, resulting from serious or repeated pressuring or special judgment-altering techniques, in order to determine the minor or major person to an act of abstention which seriously harm him/her<sup>5</sup>.

The French law holds as aggravated manner the act of a *de facto* or *de iure* administrator of a group that performs activities aimed at the creation, maintenance or exploitation of mental or physical dependence of persons who participate in these activities, in which case the penalty is imprisonment of up to five years and a fine of 750,000 euros.

An incrimination in simple terms of this act is also found in the Swedish Criminal Code, which provides, under the name of *usury*, the act of a person who, in order to conclude a contract or other legal transactions, takes advantage of the state of confusion, innocence or negligence of a person, or that person's

---

<sup>4</sup> Gherghe, V.R., "Material exploitation of the vulnerable person in the new Criminal Code", *Review of Law*, no. 1/2011.

<sup>5</sup> <http://codes.droit.org/cod/penal.pdf>

dependence degree, in order to get benefits disproportionately calculated to the benefits of the other person, or even without the other person obtaining any benefit<sup>6</sup>.

### **III. The content of the offence, the connection to other related incriminations**

It is noteworthy that in the European legislations there is sometimes distinction between the notions of *exploitation of a person*, *usury* and *profiteering*, but other times they have the same meaning.

In our criminal law, the terms are used distinctly and accurately. Thus, for example, in the new Romanian Criminal Code, the act of *usury* is distinctly incriminated from that of exploitation of vulnerable persons and it designates only the act of lending money with interest, as an occupation, by an unauthorized person.

So usury can be committed in relationship with any person, but when it is committed under Art. 247, that is taking advantage of the vulnerability of the person borrowing the money with interest, and if the profit obtained by the moneylender is disproportionately high compared to the benefits obtained by the borrower, the crime of usury will be retained in addition to that of exploitation of vulnerable persons.

Returning to the analyzed offense – the patrimonial exploitation of a vulnerable person, it is to be noted that the essence of this crime is represented by the actions of taking advantage, of profiteering and the patrimonial exploitation of a person *in a state of obvious vulnerability*.

Therefore, in determining the scope of incidence of this incriminating text, it is essential to know the sense in which the legislator has used the phrase *patrimonial exploitation* and that of *vulnerable person*.

Although used for the first time in the criminal law, the legislator of the new Criminal Code did not give an official interpretation of these phrases in Title X of the General Part of the Criminal Code "Meaning of some words or phrases in criminal law", but only showed, in Art. 182, the meaning of the phrase "*exploitation of a person*".

Regarding the notion of *patrimonial exploitation*, it seems to be explained in the very text of the incriminating article, which refers to the action of *making a person to constitute or transmit for him/herself or for another, a real right or claim*

---

<sup>6</sup> Duvac, C., *op. cit.*

*of manifestly disproportionate value to that of the benefit, when commissioning the loan of money or goods.*

So, in the conception of the Romanian criminal legislator, this act can only be committed in connection with or on the occasion of the signing of a loan agreement of money or goods, i.e. a contract of loan, of use or of consummation, within the meaning of civil law<sup>7</sup>.

Therefore, as mentioned in the doctrine, this condition limits the activity of determining a person to constitute or transmit a real right or claim only to that happening during the lending of money or goods, for which the lender claims returning benefits (a disproportionate one, in his/her advantage)<sup>8</sup>.

Thus, for example, a person commits this offense when, knowing the victim's incapacity to pay the installments of a bank loan, offers him/her a loan to repay the credit, but as a simulated loan in the form of a purchase agreement of the building where the victim lives, at a much lower price compared to the market price, and the contract sets a subsequent term of transfer of property when the victim should repay the granted loan<sup>9</sup>.

The doctrine has rightly appreciated that this way of criminalization of this offense is inferior to that chosen by the legislator of the Criminal Code of 1937, that did not limit the scope of incidence of committing this act only at the conclusion of loan contracts, and that at present, *de lege ferenda*, it could be required to specify that this act can be made at the conclusion or performance of any legal act which could cause to the vulnerable person or to another, a harmful legal effect (harmful in the sense of injurious - in our opinion)<sup>10</sup>.

However, if the term *patrimonial exploitation* is defined in the very legal content of the offense, that of *person in a state of obvious vulnerability* is not defined at all, in the incriminating text being listed only the causes that could generate such a state, so it is for the doctrine and judicial practice to clarify the meanings of these concepts.

So far, the doctrine did not provide a definition of this phrase, so that its meaning can only be that provided by the literal interpretation offered by the explanatory dictionary of the Romanian language and the interpretations offered in the old criminal doctrine<sup>11</sup>.

---

<sup>7</sup> *Ibidem.*

<sup>8</sup> <http://codes.droit.org/cod/penal.pdf>

<sup>9</sup> Duvac, C., *op. cit.*

<sup>10</sup> *Ibidem.*

<sup>11</sup> <http://codes.droit.org/cod/penal.pdf>



The only opinion recently expressed in the doctrine concerns the term *obvious* used in this phrase, meaning that not every state of vulnerability of the debtor constitutes this state and attracts the incidence of this incrimination regulation, but one that which has a certain intensity, so that it is visible, detectable by everyone<sup>12</sup>.

#### **IV. Conclusions**

The criminalization of the new offenses in the new Romanian Criminal Code of 2009 is more than welcome: it was imperative because, despite the opinions that were opposed to this incrimination, the legislator of the new Criminal Code could not ignore the obvious reality. Almost daily, the media reports cases of older people or/with poor health or of persons in life situations of extreme hardship, who become the victims of those who have the possibility and do not hesitate to take advantage of the situation of vulnerability of the victims. Thus, in exchange for an apparent help which the perpetrators offer the victims, who have a clear and urgent need, they determine the victims to transfer to them, by means of various legal acts, assets or properties of a disproportionately large value compared to the amount of aid provided, counting on the victims being unable to repay the loans.

In our opinion, however, the role of criminal law for this offense will be, given the nature of the circumstances in which the offense is committed, less a preventive one and more a sanctioning one, but sanctions often come late, that is after the negative consequences - moral and material injuries to victims - have happened.

A real prevention of this offense would consist in creating conditions that would prevent reaching the state of vulnerability of those categories of persons at risk, as well as the existence of some possibilities and institutions to support and provide safeguard - economic, social or even legal – to persons vulnerable to patrimonial exploitation.

The true remedy, however, against patrimonial exploitation would be the increase of the level of conscience of the people, in order not to take advantage of the vulnerability of their peers in difficult situations of life. But it is somewhat premature and inappropriate to talk about this remedy, as it remains now only a goal of a society that lives in an outdated paradigm, based on control, domination,

---

<sup>12</sup> Gherghe, V.R., *op. cit.*

and exploitation of the vulnerable condition –from all points of view– of the human being.

### **REFERENCES**

Duvac, C., “Material exploitation of the vulnerable person in the new Criminal Code”, *Criminal Law Review*. no.1/2012.

Gherghe, V.R., “Material exploitation of the vulnerable person in the new Criminal Code”, *Review of Law*, no 1/2011.

Udroiu, M., *Criminal Law. General Part. New Criminal Code*, C.H. Beck Publishing House, București, 2014.

<http://codes.droit.org/cod/penal.pdf> .