

Remedy Action for Judicial Errors Committed in Criminal Proceedings in the Light of the Provisions of the European Convention of Human Rights and the Practice of the European Court of Human Rights

Denisa BARBU¹

¹ Associate Professor PhD, Valahia University of Targoviste, Department of Public Administration, Romania, denisa.barbu77@yahoo.com

Abstract: In its desire to integrate into the European Union and to close chapter 24 of accession, entitled "Internal Affairs and Justice", Romania adopted a series of regulations in criminal matters aimed at ensuring the alignment of our legislation with that of the countries of the European Community. However, our country remained unable to openly recognize its gaps and mistakes in this field, as well as to take measures in the sense shown. Thus, the New Code of Criminal Procedure remained, further, very restrictive, not fully clarifying the hypothesis of persons sent to court in a state of freedom and who were unjustly convicted. This article deals with the issue of reparation for miscarriages of justice in criminal trials, as it has evolved in the light of the provisions of the European Convention on Human Rights and the practice of the European Court of Human Rights.

Keywords: *judicial errors; action to repair the damage; criminal process.*

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1. Introduction. The deadline for introducing the action and the date from which it begins to run

Art. 541 para. 2 of the new Code of Criminal Procedure stipulates that the action for reparation of damages caused by judicial errors can be brought within 6 months from the date of finalization, as the case may be, of court decisions or prosecutor's orders. The current form of the legal texts, established by the New Code of Criminal Procedure, is the version reached after several amendments.

Prior to the New Code, Law no. 281/2003 established that the term was 1 year and began to run from the date the acquittal decision became final or from the date the prosecutor's order was issued. The term in the Old Criminal Procedure Code, prior to its repeal, was 18 months, and it was a limitation period for the right to action, considered to be reasonable for ensuring optimal conditions for the injured party to realize their right, the 1 year being considered too short (Drăguț, 2005, p. 237). The duration of the term of 1 year was modified as a result of the problems raised in court practice by the persons prejudiced by means of some judicial errors, who considered the provisions of the former 505 para. 2 of the Old Code of Criminal Procedure to be unconstitutional, because it limited the term for filing the action.

Regarding the exception of unconstitutionality of the provisions of art. 505 para. 2 of the Old Code of Criminal Procedure, it was opined that these provisions do not contravene the provisions of the Constitution, since any right claimed by an interested person, including the right established by this text, can only be acquired if the person in question respects the deadlines provided by law.

Neither the constitutional norms, nor those of the international treaties to which Romania is a party, provide for the non-prescription of the right of persons prejudiced by the measure of conviction or illegal detention to start an action to repair the damage, nor any time limit in which this right can be exercised. The Constitution, through the expression "according to the law", leaves it to the legislator's option to establish the procedural conditions under which the right to reparations can be exercised (CC, 1999, 2001). However, the current regulation reduces the deadline for bringing the action to one third of that provided for in the previous regulation.

As in the previous regulation, however, currently it is required that the illegality of the measure has been established by the prosecutor's order or court decision, the simple disposition of acquittal, termination of criminal

prosecution or trial or removal from criminal prosecution without reaching the conclusion that the measure was illegal, as could be interpreted due to the previous deficient drafting.

This change occurred as a result of the need to align the provisions of the Romanian legislation in criminal procedural matters with the jurisprudence of the European Court of Human Rights, in order to facilitate the access of Romanian litigants to the proceedings of the international court. Thus, we signal yet another legislative amendment dictated by the positive obligations that Romania assumed as a result of the ratification of the European Convention on Human Rights. We recall, in this sense, the case of *Julian Rosengren v. Romania* (ECHR, 2008), a case that demonstrates the necessity of introducing this legal text among the provisions of the Romanian Code of Criminal Procedure.

J. Rosengren was a person with dual citizenship, Romanian and Swedish, who in 1993 was remanded in custody as a result of being sent to court for a series of acts that represented tax fraud. The preventive measure was extended several times, without exceeding the maximum period provided by the law, but when the maximum legal term for which it could be ordered was approaching, it was replaced by the obligation not to leave the locality. On several occasions, the defendant requested the revocation of the measure of preventive arrest, as well as the obligation not to leave the country, on the grounds that the reasons that determined them no longer existed. All these requests were rejected by the court, without, however, being properly motivated.

Later, the criminal trial was terminated on the grounds that the statute of limitations had expired. As a result, the defendant filed several complaints to the Prosecutor's Office attached to the High Court of Cassation and Justice, a number of ministries, as well as to the president of the state, through which he requested to be compensated for the illegal deprivation of liberty to which he had been subjected, complaints which were not answered. His request to the European Court of Human Rights included, among other things, the request referring to this aspect. This request was rejected by the Court as inadmissible, without judging the trial of the merits, because the applicant let a period of more than 6 months pass from the completion of the procedures in national law to the introduction of the action before the European court, contrary to the provisions of the procedural rules of the Court.

What is interesting, however, is another aspect, namely the requirement expressed by the Court (ECHR, 1990) according to which, in order for the plaintiff to be recognized as entitled to compensation, it is

necessary to first establish the illegal nature of the deprivation or restriction of liberty by a competent court according to domestic law, or even by the Court (in the present case, since the request was rejected as time-barred, the European court could not even examine the legality or illegality of the measure taken against Mr. Rosengren).

In 2006, the supreme court came up with a new interpretation regarding the limitation period provided by art. 505 para. 2 of the Old Code of Criminal Procedure, an interpretation that we believe is also of interest in the current regulation, through art. 541 para. 2 of the New Criminal Procedure Code (HCCJ, 2006). The premised situation was that the plaintiff's appeal was rejected on the grounds that the right to action invoked by him was extinguished by the fulfillment of the limitation period provided by art. 505 para. (2) C. proc. pen., which, being regulated by an imperative rule consistent with the European Convention on Human Rights, could not be waived, the court being obliged to ascertain this situation *ex officio*. Against this decision, the plaintiff filed an appeal citing its illegality, deduced from the legal nature of the term provided for by art. 505 para. (2) of the Criminal Procedure Court which, being recommended and contrary to the European Convention on Human Rights, obliges the courts to admit the action. The appeal was considered founded.

The norms of the Convention and correlatively, the ECHR jurisprudence, having constitutional and supra-legislative force, are directly applicable in the Romanian legal system. As such, the Romanian state authorities, including the courts, are obliged to observe that, according to the principle of subsidiarity, the rules of the Convention and, correlatively, the European litigation, enshrine the concrete and effective protection of human rights, without imposing any limits. As, in the case of judicial errors that can lead to unjust arrests, the exercise of the right to reparations (art. 5 point 5 of the Convention and art. 3 of Protocol no. 7) is non-discriminatory, at least if there is no objective and reasonable justification, by taking into account the provisions of art. 14 of the Convention.

Analogously, the prescription of the right to action in the matter of reparations may have a different legal regime in the national system, but only if, in the sense shown, the difference in treatment also has an objective and reasonable justification. Or, in this case, the plaintiff invoked as a reason for appeal precisely the absence of objective and reasonable justification of the one-year limitation period. Since the court of appeal failed to examine, in the sense shown, the ground of appeal relating to the application of the Convention's rules in the case, it is required, in order to ensure the double degree of jurisdiction, that the supreme court decides to admit the appeal

and quash the appealed decision with reference to the same court for a new trial.

2. The action to repair judicial errors is exempt from the judicial tax duty - additional benefit granted to victims of judicial errors

By derogatory provision from the rules of the civil process, art. 541 para. 4 of the current Code of Criminal Procedure establishes that the action to repair damages caused by judicial errors is exempt from the judicial tax duty. This puts an end to a controversy that appeared in the literature, but especially in legal practice, regarding the possibility or impossibility of charging such taxes when introducing the mentioned action. For reasons of morality and equity - based on the idea that the one who has been wronged by the state would be exaggerated to be asked, also by the state, to pay some taxes in order to realize their right - in some decisions of the case (Susman, 1998, p. 73) it was argued that, being the return of a forced execution in criminal law, the action having such an object is exempt from the tax duty, according to art. 15 final paragraph from the Criminal Procedure Code.

On the other hand, the Supreme Court ruled, in some civil appeals, that the action is a patrimonial action, assessable in money and is not exempt from the payment of tax duties, so it is subject to these taxes in proportion to the value of the claims made. The opposite point of view is also supported in the practice of the European Court of Human Rights, that, resolving a case against Romania in 1999, ruled precisely in this sense. It is the case of *I. Dalban v. Romania* (ECHR, 1999). Ionel Dalban, a journalist, published a series of articles through which he criticized the administrative policy of some factory managers.

As a result of these publications, Mr. Dalban was sued for libel. Convicted in the first instance, the decisions were also upheld in appeals. I. Dalban complained about the wrong application of the criminal procedural law by the courts, a fact that determined his unfair conviction, basing his claims on the fact that the national courts did not take into account the evidence administered in the defense, respectively the official documents that served as the source of his articles. The prosecutor's office notified the Supreme Court of Justice with an appeal for annulment, with the reasoning that the constitutive elements of the crime of slander were not met.

The supreme court acquitted the convict, appreciating that he had acted in good faith. The request before the European Court is filed by the wife of I. Dalban, because at the time of the start of the procedure before the European Court, he was deceased. The petitioner was dissatisfied with

the Romanian procedural system, in the sense that, in order for civil responsibility to be engaged, the way opened by the Civil Code provided for the existence of fault. Ms. Dalban stated, without being contradicted by the Government representatives, that a substantial tax duty had to be paid. Regarding the guarantees of success of such an action, as they are given by the Code of Criminal Procedure, it would not be reasonable to ask Ms. Dalban to initiate a new procedure with a least uncertain outcome.

3. Persons who have procedural capacity

According to the Criminal Procedure Code of Charles II (in art. 513 para. 2), the right to file a claim for compensation for judicial errors committed in criminal trials belonged to the injured party, as it could be initiated, but also continued, if they died, by their spouse, parents, brothers, sisters or descendants. In the 1968 Code, the range of persons who have active procedural status in such cases is expanded to include all those who are supported by the victim of the judicial error (art. 506 paragraph 1). Thus, the primary holder of the action can only be the one directly involved in the illegally settled case, but secondary holders can also be other persons than the spouse or close relatives. It can be observed that, although it is a civil action, the right reverts, after the death of the holder, only to those who were supported by them, not to their heirs in general (Nistoreanu et al., 1999, p. 321).

The same provision is provided by art. 541 para. 1 of the current Code of Criminal Procedure: "the action to repair the damage can be initiated by the entitled person, according to art. 538 and 539, and after their death it can be continued or started by the persons who were in their care at the time of their death". Starting from this, two issues must be discussed. First of all, the right to action does not belong to the heirs, as successors of the personality of the deceased, because this is not a matter of succession, of depriving them of a series of patrimonial rights.

The damages suffered as a result of a judicial error are of a personal nature, by means of compensations the aim is to provide satisfaction to those who, directly and effectively, suffered as a result of the illegal measure taken by the authorities. Secondly, and precisely for this reason, it is specified in the current Criminal Procedure Code, unlike the one from 1936, that the persons supported by the direct holder of the right, not the spouse, siblings or descendants, can start or continue the action. Thus, we can interpret that those who are in the maintenance of the victim of a judicial error may or may not be related to them (the category of these persons is

wider than that specified by the Civil Code), may benefit from maintenance based on contractual or de facto relationships (with character of perpetuity and periodicity).

In order to be granted their legal rights, the dependents will, however, have to prove before the court the state of facts - the execution of the actual services to them - which gives them active procedural status. Even in this case, the existence of the damage is proven by reference to the person directly entitled to the repair of the damage, because the damage suffered by it was spread over those who are in their care (Crișu, 2004, p. 160).

The problem of determining the persons who can have active procedural status in the event of the death of the primary owner of the action through the lens of the requirement of the Code of Criminal Procedure, that have benefited from care from the direct victim of the judicial error. The justification of the interest thus seems quite unequivocal and completely determined. However, it seems that the perspective of the Romanian authorities is somewhat different from the interpretation of the text we mentioned above, to which we refer, so that the intervention of the European Court of Human Rights was necessary in order to establish a series of broader criteria based on which to determine the existence or non-existence of a procedural interest in such cases.

Thus, in the case of *Dalban v. Romania* (ECHR, 1999), the representatives of the Government requested the removal of the case from the list, with the reasoning that the plaintiff's widow would not invoke a personal interest for the continuation of the procedure, but would refer to the interest of her deceased husband, in that she asks for compensation not for the privations she would have suffered, but arguing that they are due to give the possibility to the magazine where I. Dalban worked to resume its activity, as well as for reasons related to the restoration of its good reputation.

The Court found that Mr. Dalban's widow has a legitimate interest in finding that there has been a violation of the right to freedom of expression due to his conviction. The European court agrees, with regard to the lack of interest regarding the end of the claim regarding patrimonial damages, but it establishes a particularly important precedent in the application of the provisions of the Convention, stating that the invocation of the moral suffering the wife faced is a sufficient justification as a result of the husband's unjust conviction.

The passive subject of the compensation action is the Romanian state, represented by the Ministry of Public Finance, as stipulated in art 541 para. 3 of the current Criminal Procedure Code. So, the person who has the

right to act will not be able to go directly against the prosecutors or the judges or the institution of which they are a part, whom they consider guilty of the injustice suffered, but will have to comply with the imperative provisions of the criminal procedural law (Tulbure & Tatu, 2001, p 556). The compensation will also be paid through the Ministry of Finance, which the state will bear, as provided by art. 505 para. 4 of the Criminal Procedure Code, in all cases.

4. The competent court to judge the dispute and the applicable procedural rules

The request for compensation for judicial errors is a request of a civil nature, although the object of this procedure is regulated in the Code of Criminal Procedure, as a consequence it will be settled according to the rules of civil procedure, which turns this litigation into one with a mixed legal nature (Tulbure & Tatu, 2001, p. 556). Starting from this, in judicial practice it was established that these disputes will be judged in the first instance by the civil sections of the courts, and not by the criminal sections (BCA, 2006).

The criminal judgment given on the judicial error has the authority of *res judicata* before the civil court. The proof and assessment of the damage suffered is done according to the rules of the Civil Procedure Code, and the decision will be subject to appeal, also according to the rules of the civil procedure. Regarding, however, the verification of the conditions regarding the merits of the action, compliance with the term of introduction, verification of the entitled person, the civil court will apply the provisions of the Code of Criminal Procedure.

The participation of the prosecutor is not mandatory, because in the civil process the relevant cases are determined expressly, and the present situation does not fall into any of them, not providing that the participation of the prosecutor is mandatory (Drăguț, 2005).

5. The retroactive action

The action to repair the damage in case of a judicial error has, in addition to the reparative character, also a preventive role. We are not facing a purely objective liability, but the state is responsible for its coercive organs, which applied the law wrongly, and when it is found that the law was applied in bad faith or through gross negligence, the state has retroactive action against the guilty person (Tulbure & Tatu, 2001). According to art. 542 para. 1 of the New Code of Criminal Procedure, "if compensation for the damage was granted according to art. 541, as well as if the Romanian state was

convicted by an international court for any of the cases provided for in art. 538 and 539, the retrogressive action for the recovery of the amount paid can be directed against the person who, with bad faith or gross negligence, caused the situation generating damages or against the institution to which it is insured for compensation in case of damages caused in the exercise the profession".

Therefore, not every mistake attracts the right to regressive action by the state, but only the one that was made in the conditions presented above, because mistakes can be made in both phases of the criminal process, only that some of them do not give rise to the right to compensation - therefore, not the state's right to action - because they can be removed through the procedural remedies established by law. Therefore, simple mistakes are not relevant under this aspect (Crișu, 2004).

As it was said in the specialized literature, for the use of the regressive action it is not necessary to have a conviction against the one who was guilty of provoking the situation that generated the damages, being sufficient to prove that the person called to answer contributed, in bad faith or due to gross negligence, when producing it (Dongoroz, 1976). Starting from this, it was concluded that the regressive action cannot be based on the facts of illegal arrest and abusive investigation, nor unjust repression, provided as crimes in the Criminal Code, because the expressions "judicial error" and "illegal deprivation of liberty" used by the Code of Criminal Procedure does not take into account the constitutive content of these crimes, because after the prosecution of those guilty, the victim can become a civil party in the criminal process and obtain the desired compensation directly from those guilty (Drăguț, 2005) .

There also is, however, the opposite opinion, according to which, considering that the situation generating damages, in the matter under discussion, is the conviction, deprivation or restriction of liberty in an illegal manner, the regressive action can only be directed against the prosecuting criminal body or the judge guilty of committing the crime of unjust repression, negligence in service or illegal arrest and abusive investigation (Nistoreanu et al., 1999).

6. Conclusions

It is, of course, possible that a miscarriage of justice is also caused by the fault of other participants in the process (witnesses, experts, interpreters). The specialized literature has not yet clearly defined the issue of whether the state will be obliged to answer for the errors caused in such

circumstances. As far as we are concerned, we appeal to the theory of the guarantee based on the risk of activity to motivate the opinion that the state should also be liable for the errors thus arising, on the basis of the fact that it receives the interests of the victim of an unjust accusation, but under less restrictive conditions, namely jointly and severally with the guilty witness, expert or interpreter and, in all cases, with the right of recourse against them after the compensation of the victim, regardless of the form of guilt with which the action was taken.

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