

The Content of the Right to Repairs for Judicial Errors in Criminal Proceedings - Jurisprudential Influences (National and European)

Denisa BARBU¹

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

Abstract: This article aims to analyze the content of the right to redress for miscarriages of justice in criminal trials, under the influence of national and European jurisprudence. In this sense, we will formulate a comparative historical analysis, starting from the Code of Criminal Procedure Carol I, going through the provisions of the old Code of Criminal Procedure and finally stopping at the provisions of the current Code of Criminal Procedure. The purpose of this comparative-historical approach is to analyze the evolution of jurisprudence and internal doctrine under the impact of human rights theories. A considerable role in our analysis is represented by the jurisprudence of the ECtHR, which had a particular impact on the perception of the Romanian legislator regarding the content of the right to compensation for judicial errors that occur in criminal trials.

Keywords: *judicial errors; criminal process; right to compensation.*

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1. Introduction

The Criminal Procedure Code of Charles II from 1936 referred to the institution of repairing damages resulting from judicial errors in two distinct chapters, the first of which was called "Damages due to victims of judicial errors", and the second "Compensation of persons unjustly arrested". In the first chapter we refer to, the code in question aimed to grant compensation to those unjustly convicted, and in the second case the measure of illegal preventive arrest was considered.

Later, upon the adoption of the Old Code of Criminal Procedure, these provisions were combined in a single set of articles, under the title "Reparation of damage in the case of wrongful conviction or taking a preventive measure". As stated in the doctrine (Tulbure & Tatu, 2001, p. 554), the 1968 code extended the scope of cases that gave the right to compensation to all preventive measures, not only to those depriving of liberty, the criterion by which the extent of the damage caused was to be quantified, being that of the time interval between the date on which the measure was taken and the one on which a solution was given to stop criminal prosecution or acquittal. The unconstitutionality of the mentioned provisions, but also their inconsistency with the provisions of art. 3 of Protocol no. 7 of the European Convention on Human Rights led the Romanian legislator to amend, through Law no. 281/2003, the scope of this procedure, also changing the title of Chapter IV of Title IV of the Code of Criminal Procedure, as follows: "Reparation of material damage or moral damage in case of wrongful conviction or illegal deprivation or restriction of freedom".

According to art. 538 of the New Code of Criminal Procedure, "(1) The person who has been definitively convicted, regardless of whether the punishment applied or the custodial educational measure has been enforced or not, has the right to compensation by the state for the damage suffered in the event when, following the retrial of the case, after the annulment of the conviction for a new or recently discovered fact that proves that a judicial error occurred, a final acquittal was pronounced. (2) The provisions of para. (1) is also applied in the case of the reopening of the criminal trial regarding the convicted person tried in absentia, if after the retrial a final judgment of acquittal was pronounced".

A first aspect, which needs to be specified above all, refers to the express provision of the fact that the reparation will be made including through awarding moral damages, as well as through "the payment of a sum

of money or in the establishment of a life annuity or in the obligation, at the state's expense, that the illegally detained or arrested person be entrusted to a social and medical assistance institute" (art. 540 par. 2 of the New Code of Criminal Procedure). It is true that the Civil Code obliges the one who has caused damage to another to cover these damages in all aspects, therefore including the moral aspect (Damian et al., 2013; Sandu et al., 2017).

Until the entry into force of Law no. 281/2003, the granting of moral damages was based, from the point of view of the legal support, on the provisions of the Civil Code (SCJ, 1992, p. 96), the extension appearing somewhat forced, especially in the context of the reluctance shown in Romanian jurisprudence (HCCJ, 2004, 2005; SCJ, 2003a), which is still restrained in ordering the payment of sums of money in order to provide monetary satisfaction for a moral injury, so we consider the clarification made by the legislator in the Code of Criminal Procedure to be necessary, even more so because, many times, it is possible that these repercussions are even more serious than the material ones, or even that they exist when the material damages are non-existent.

Another major change brought by Law no. 281/2003 is to remove from the title of Chapter IV the notion of preventive measure, referring, in addition to conviction, to the deprivation or restriction of liberty, without other references to preventive measures, as had been done until then. The same solution was maintained by the New Criminal Procedure Code. Some authors considered that this is the moment from which it can be said that the Romanian legislator understood, thus, to enshrine the possibility of obtaining monetary reparations not only for the injuries caused by the disposition of an unjust conviction or illegal preventive arrest, but also for the hypothesis that these injuries are caused by taking other preventive, depriving or restrictive measures of freedom (Paraschiv & Damaschin, 2004, p. 638) (with the specification that any preventive measure has the effect of restricting freedom, in the various forms in which it manifests itself) .

From our point of view, these arguments brought by the doctrine are much belated, considering the discussions held in the specialized literature even before this moment. Along with other authors (Apostu, 2016; Apostu et al., 2017; Huidu, 2018, 2019), we are of the opinion that the term "freedom" used in the text of the law should not be understood exclusively as physical freedom, not to refer exclusively to the execution of a custodial measure - be it a conviction or a preventive measure -, because the text of art. 539 operates with the notion of "unlawful deprivation of liberty". It is about two notions, which are used alternatively: on the one hand, there is talk of illegal deprivation of liberty, in the sense of conviction, according to

art. 538 of the New Criminal Procedure Code, and on the other hand, the notion of "illegal deprivation of liberty" is used according to art. 539 of the New Code of Criminal Procedure, and in this case we consider that the aspect can be interpreted in the sense that it refers to any form of freedom (pretrial detention, house arrest).

Starting from this, we believe that we are not too avant-garde if we campaign for the aspects in question to be viewed extensively, in the sense of giving the possibility - even now - to ask for the reparation of unjustly caused damages not only through convictions or preventive measures, but also through other measures of a criminal nature, such as safety or educational measures and to expand the scope of cases for which such damages can be granted to any given solution or measure taken in a criminal case, of a nature that can be generating damages or moral suffering, as long as it was taken in violation of the legal provisions.

2. The right to claim damages

Any person who is in any of the cases provided for by art. 538-539 of the New Criminal Procedure Code has the right to claim compensation. Prior to the New Code of Criminal Procedure, by Law no. 281/2003, by art. 504 para. 3, ordered that "the person who, in the course of the criminal investigation or trial, intentionally or through serious fault, prevented or tried to prevent the discovery of the truth" does not have the right to compensation. Such limitation of procedural rights represented a legislative development in our country, in the context in which the Code of Criminal Procedure Charles II provided, in art. 513 para. 4 points 2 and 3 - in the case of wrongful conviction - that the requests of persons who, through fraud or gross negligence, caused judicial errors or had two other convictions of the same nature cannot did not have the right to compensation, as well as in art. 657 para. 2 - in the case of pre-trial detention - that the person who has suffered correctional or criminal convictions, as well as the person who during the criminal investigation or trial prevented or tried to prevent the judicial bodies to find out the truth, did not have the right to be awarded damages. Among these cases, the Old Code of Criminal Procedure maintained only the last hypothesis, the one regarding the intent or serious fault, which were, practically, included in the notion of "prevention", and the one representing previous convictions representing a violation of free access to justice, under the conditions in that each criminal case must be considered in its individuality, and the state of recidivism cannot be an excuse for the state not to assume the judicial errors to which its citizens fall victim.

The new Criminal Procedure Code provides, by 538 par. 3, that the person who "through false statements or in any other way, determined the conviction, except in cases where they were forced to do so", is not entitled to compensation. This regulation is timely, for two reasons. On the one hand, it is not the best solution to try to enumerate all cases of judicial errors, only the generic statement according to which the state is responsible for them being sufficient, excepting only the situation when they occurred for reasons attributable to the injured person. Otherwise, certain limits could inevitably have been generated, which would be unconstitutional, therefore the Romanian legislator applied the regulatory system used when drafting Protocol no. 7 of the European Convention on Human Rights (Tulbure, 2001). On the other hand, when, for certain personal reasons - for example, the desire to defend a close relative or a friend - the defendant takes upon himself a criminal act or provides false information or refuses to provide such indications, although he had a obvious alibi, and thereby proves a lack of procedural loyalty, his attitude cannot be the basis for granting compensation (Dongoroz, 1976) (*nemo auditur propriam turpitudinem allegans*). But the passive attitude of the defendant, who, being inactive, does not try to prove his innocence, was not considered an attempt to hinder the discovery of the truth, because such behavior is allowed under the right to defense (which includes the right to remain silent) (Dongoroz, 1976, p. 397).

It is worth noting that by Law no. 281/2003 this exception was initially eliminated, although the provisions of the international conventions and pacts (Florea, 2017; Florea et al., 2019; Terec-Vlad & Trifu, 2014) mentioned above provide for the same case of limitation. Currently, according to the provisions of art. 20 para. 2 of the revised Romanian Constitution, art. 3 of Protocol no. 7 of the European Convention on Human Rights becomes inapplicable in relation to internal regulations, which obviously contain more favorable provisions. However, we do not see what would be the point of the motivation for repealing the former paragraph 3 of art. 504 of the Old Code of Criminal Procedure and we consider the previous solution better argued, all the more so since the current context arises the possibility of asserting abusive and opportunistic attitudes in that, for some people, obtaining these compensations could become an end in itself. This kind of behavior would also represent an obstacle for the criminal investigation bodies, in their activity of discovering the truth.

By the provisions of the Code of Criminal Procedure of Charles II, the right to compensation was granted for the judicial errors committed during the proceedings in front of the Romanian courts and to foreign

citizens who had been unjustly detained preventively, but if the condition was met that the Romanian citizens enjoyed a similar regulation in the respective person's state (art. 662 C. proc. pen. of 1936). The Criminal Procedure Code in force today no longer includes a similar regulation, which would be welcome, especially in the current context, when the tendency of Romanian legislation is - and must be - to open towards internationalization / Europeanization.

3. Enriching the scope of cases providing the right to compensation, under the influence of the practice of the European Court of Human Rights

The Code of Criminal Procedure from 1936 provided for a series of cases in which compensation could be requested for judicial errors: the situation when the convicted person is recognized as innocent by a review decision (art. 513 paragraph 1), the person had been pre-arrested and acquitted or removed from criminal prosecution because the act does not exist or was not committed by the accused (art. 657 par. 1), as well as the one who was detained only for 24 hours, for investigations, acquitted before issuing an arrest warrant (art. 658 paragraph 4). The Criminal Procedure Code from 1968, in its initial form, maintained the same cases of state liability, without, however, including express provisions regarding detention. By Law no. 32/1990, the legislator renounces to individualize, among the preventive measures, exclusively the arrest as a cause that confers the possibility of obtaining damages, the text referring to any preventive measure, but by maintaining the condition that the acquittal has been pronounced. By Law no. 281/2003, the legislator expressly provides, in the title of the chapter, the possibility of ordering the payment of moral damages, and in the content of art. 504 of the Old Code of Criminal Procedure, a substantial change is made.

Thus, after what is stated in para. 1, that an action for damages can be brought for an illegal conviction, para. 2 no longer speaks of any preventive measure, but of the situation when the person was "deprived of liberty or whose liberty was illegally restricted". In addition, by para. 4, three new situations in which compensation can be granted were added, namely when the person was deprived of liberty after the statute of limitations had run out (without making any difference as to whether it is the statute of limitations of criminal liability or that of the execution of the sentence), amnesty or decriminalization of the act. In these last cases, the right to reparation arises if the preventive measure has ceased by stopping criminal

prosecution or by acquittal, respectively by the termination of criminal prosecution or the criminal process (Drăguț, 2005, p. 233).

Until the date of the amendment of art. 504 of the Old Code of Criminal Procedure and after the ratification, by Romania, of the European Convention for the Protection of Human Rights, the requests submitted to the courts on grounds other than those shown by art. 504 were based on the provisions of the Convention, as a more favorable regulation, which had priority over the national legislation, the interested parties acquiring in this way the compensations to which they were entitled. Thus, a legislative error is fixed (HCCJ, 2005; SCJ, 2003b, 2003c), which impermissibly restricted the scope of the application of art. 504 of the Old Code of Criminal Procedure, and the emergence of paradoxical situations is avoided, when a person received pecuniary satisfaction for an acquittal ordered after an illegal conviction, but for a crime concurrent with the previous one, he could not claim compensation, although the judicial error concerned both situations (SCJ, 1991, p. 109), or in the cases, so frequent after 1990, when acquittals in political trials were pronounced based on the former art. 10 lit. d of the Old Code of Criminal Procedure (the deed lacks one of the constitutive elements of the crime) and the removal of the asset confiscation measure was ordered, but no compensation could be granted (Susman, 1998, p. 71).

Prior to the changes brought by Law no. 281/2003, there were serious objections to the content of para. 1 of art. 504 of the Old Code of Criminal Procedure, on which the Constitutional Court also ruled (CC, 1998). The discussions were generated by the fact that the provisions of art. 504 of the Old Code of Criminal Procedure contravened the provisions of the Constitution, because they restricted to two situations of granting compensation to the victims of judicial errors, namely when the convicted person did not commit the imputed crime or the crime does not exist. But the Constitution, in accordance with the regulations of art. 3 of Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, establishes the patrimonial liability of the state for damages caused by any judicial error committed in criminal trials.

The constitutionality of the text was argued in that the fundamental law transfers to the criminal procedure law the right to regulate and determine cases of judicial errors. It was also argued that the initial drafting of that regulation from the old Code of Criminal Procedure took into account the non-existence of the deed, not the other situations in which the deed does not fall under the scope of the criminal law, but may attract a liability of a different nature. Some authors considered that, in criminal matters, judicial errors exist only in the situations provided for by law,

although theoretically one can speak of judicial errors in many other situations as well (for example, the court wrongly recognized the state of recidivism), but the legislator stopped only on those that justify, to a greater extent, the granting of civil compensations (Petre, 2005, p. 101).

The New Criminal Procedure Code establishes that the cases that give the right to compensation are:

- "after the annulment of the conviction for a new or recently discovered fact that proves that a judicial error has occurred, a definitive acquittal was pronounced" (art. 538 par. 1 final sentence);
- "in the case of the reopening of the criminal trial regarding the convicted person tried in absentia, if after the retrial a final judgment of acquittal was pronounced" (art. 538 paragraph 2);
- "illegal deprivation of liberty must be established, as the case may be, by order of the prosecutor, by the final decision of the judge of rights and liberties or the judge of the preliminary chamber, as well as by the final decision or the final decision of the court charged with the judging of the case" (art. 539 par. 2).

Both the Romanian Constitution and the provisions of the international pacts and treaties regarding fundamental human rights, which inspired the Romanian constituent legislator, such as those in art. 14 point 6 of the International Covenant on Civil and Political Rights, adopted by the UN General Assembly on December 16, 1966, or those from art. 3 of Protocol no. 7 additional to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Council of Europe on November 22, 1984, all provide that the patrimonial liability of the state for damages caused by judicial errors committed in criminal trials takes place according to the law or custom in force in the respective state. The national law, to which the mentioned provisions refer, regulates not only the limits, but also the conditions of the state's patrimonial liability, as well as the cases in which the state is exempted from liability.

On the other hand, the Court admitted, however, the exception of unconstitutionality, on the basis that the phrase "according to the law" in the Constitution refers to the extent of the state's patrimonial liability and in no way to the removal of the state's liability in the event of some cases that constitute judicial errors. The provisions of the revised Constitution eliminate the phrase "according to the law" and expressly refer to the extent of the state's responsibility, so currently any form of controversy has been annihilated. The circumstance "according to the law" does not concern the legislator's possibility to limit the liability of the state only to some judicial errors, but the establishment of the methods and conditions in which the

engagement of this liability is to be made for the payment of the due compensations. The constitutional solution is in accordance with the regulations provided in art. 3 of Protocol no. 7 to the Convention for the Defense of Human Rights and Fundamental Freedoms. If until the adoption of the revised Constitution, the responsibility of the state for damages caused by judicial errors committed in criminal trials was only a legal principle, i.e. regulated exclusively by law, through the current form of the revised Constitution, it becomes a constitutional principle, thus regulating the very competence of the legislator in determining the conditions of application. The conclusion is the same in the interpretation of the provisions of art. 3 of the above-mentioned protocol, which, according to the provisions of art. 20 para. 2 of the Constitution, is applicable in case of conflict with existing internal regulations.

In the specialized literature it was also shown, in support of this solution, that in some cases it is easy for the court to determine whether the committed act is a crime, but, in most cases, the evidence is quite complicated and it becomes difficult to determine the constitutive elements of the crime or that there is no cause that removes the criminal character of the act. The convicted person, however, suffered an unjust conviction and should not bear the consequences due to the difficulties encountered by the judicial bodies in finding out the truth (Tulbure & Tatu, 2001, p. 554). For these reasons, some authors campaigned for all the wrongfully convicted people, even those who were decriminalized, to benefit from reparations - even if the latter cases cannot be imputed to the criminal process in itself -, because the respective acts are no longer considered crimes (Theodoru, 1998, p. 662). Therefore, the changes undertaken by the New Code of Criminal Procedure are in accordance with both the constitutional provisions and the jurisprudence of the European Court of Human Rights.

Based on these decisions of the Constitutional Court, the solution according to which, the crime being flagrant, preventive arrest was mandatory and the defendant, although later acquitted, has no right to compensation, is unfounded and exceeds the legal provisions. Such an argument contradicts, in spirit and letter, the provisions of the New Code of Criminal Procedure, which do not distinguish between the crimes for which the acquittal was ordered.

4. Conclusions

From a different perspective, the recognition of the illegality of the preventive measure can intervene during the entire course of the criminal

process, both in the criminal investigation phase and in the judicial phase. If the preventive measure has ceased by revocation, the problem arises of knowing what are the reasons that can constitute the basis for the criminal action. In the doctrine, it was considered that the right to repair the damage arises only if the preventive measure is revoked because it was taken in violation of the legal provisions (Drăguț, 2005, p. 233). This interpretation is in accordance with the regulation contained in art. 5 par. 5 of the European Convention on Human Rights.

In this context, two cases from the jurisprudence of the European Court of Human Rights, are evocative, namely *Lukanov v. Bulgaria* (ECHR, 1997) - in which the Court, examining the situation of the arrest of the former communist leader, found that his deprivation of liberty did not constitute legal detention, ordered on the basis of the existence of credible grounds to suspect that he has committed a crime - and *Chahal v. the United Kingdom* (ECHR, 1996) - on which occasion the Court, examining the legality of the detention procedure, ruled that this notion does not only refer to the obligation of the authorities to comply with the essential rules of procedure of the national legislation, but it must, like any deprivation of liberty, be in accordance with the purpose of art. 5 of the Convention.

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