COMPENSATORY ACTION - A NEW LEGISLATIVE ACTION IMPOSED ON NATIONAL AUTHORITIES AS CONSEQUENCE OF RECENT CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract

Subsequent to pronouncement by the European Court of Human Rights of the semi-pilot judgement in case Iacov Stanciu v. Romania and the pilot judgement in case Rezmiveş and Others v. Romania - where the Court found structural problems concerning overcrowding of detention facilities and improper conditions of detention - national authorities were imposed to adopt an appropriate legal instrument in order to eradicate injuries of fundamental rights guaranteed by the Convention.

The mechanism established by Law no. 169/2017 amending legislation on execution of punishments and detention measures aimed at achieving a double goal. On the one hand, it pursued to grant compensation to convicted persons executing punishments consisting in deprivation of liberty in improper conditions; on the other hand, it was destined to contribute to relieving places of detention.

The purpose of this study is to analyze the degree to which the recently adopted legislation is suitable to fully attain the assumed end.

The objectives of the study are to make an analysis of the relevant legal provisions and their impact on prison system and execution of punishment and at the same time of relevant case-law, in order to determine if the present form of the law leads to differentiations in treatment towards those to whom it addresses, incompatible to fundamental law.

Keywords: *Compensatory action. Law no. 169/2017. Compensations granted to convicted persons. National solutions to overcrowding of detention facilities.*

1. Introduction

Per Article 3 of European Convention for the Protection of Human Rights and Fundamental Freedoms[1]: „No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

In Romanian national legislation, the importance of this right attributed to any person, regardless of his or her social position, age, education, religion, ethnicity or sex is underlined by its stipulation in the fundamental law[2].

Subsequently, constitutional provisions have been reiterated in legislation, where there has been stated as a principle that "any person who is under criminal investigation or trial must be treated with respect for human dignity"[3] and „it is forbidden to subject any person in execution of punishment or other measures depriving of liberty to torture, inhuman or degrading treatment or other ill-treatment[4]."

Despite the above-mentioned procedural gurantees, by judgemnent pronounced in case Bragadireanu vs. Romania on 06.12.2007[5], the European Court of Human Rights[6] stated for the first time that there has been a breach of Article 3 of the Convention caused by national conditions of detention.

The Court appreciated that penitenciary overcrowding, obligation to share beds with other persons, damaged mattresses and inappropriate sanitary facilities fall in the area of inhuman and degrading treatment of the convicted person during execution of punishment.

During the next 5 years, the Court pronounced other almost 100 judgements, stating that Romania was in breach of Article 3 of the Convention[7], situation caused by, e.g.[8]: overcrowding, insufficient or inadequate alimentation, limited number of bathrooms,

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[1] European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 04.11.1950, ratified by Romania through Law no. 30/18.05.1994, published in the Official Gazette of Romania no. 135/31.05.1994.

[2] According to Article 22 Para 2 of Romanian Constitution: „no one shall be subjected to torture or toany punishment or inhuman or degrading treatment".

[3] Article 11 Para 1 of Romanian Criminal Procedure Code.

[4] Article 5 Para 1 of Law no. 254/2013 on the execution of punishment and detention measures ordered by judicial authorities during the criminal trial, published in the Official Gazette of Romania no. 514/14.08.2013.

[5] ECtHR, Decision adopted on 06.12.2007, Application no. 22088/04, *case Bragadireanu vs. Romania*.

[6] Hereinafter „the Court".

[7] According to ECtHR, decision adopted on 25.04.2017, Applications no. 61467/12, 39516/13, 48231/13 and 68191/13, *case Rezmiveş and Others vs. Romani*a, Para 106, during 2007 – 2012 there have been 93 judgements stating breaches of Article 3 of the Convention by Romania.

[8] ECtHR, decision adopted on 1301.205, Application no. 41040/11, *case Micu vs. Romania*; ECtHR, decision adopted on 18.10.2011, Application no. 38746/03, *case Păvălache vs. Romania*; ECtHR, decision adopted on 6.09.2014, Application no. 51012/11, case *Valerian Dragomir vs. Romania*.

limited access to showers, lack of hygiene, lack of natural light, insufficient ventilation, passive smoking.

The large number of convictions against Romania and lack of adequate response from national authorities lead the Court to state that overcrowding and improper detention conditions represent in fact structural problems of penitentiary system.

This state of facts was acknowledged in the semi-pilot judgement pronounced in case Iacov Stanciu vs. Romania[9] on 24.07.2012. The Court noted that Romanian authorities have taken some general measures to remedy structural problems in prisons, but nevertheless asked domestic authorities to adopt additional new measures designed to ensure compliance with Article 3 of the Covention, without indicating though a deadline ultimatum. At the same time, asked Romania to adopt a national legal instrument in order to allow effective reparation of damages suffered by persons detained in unsuitable conditions.

Requests made were unsuccessful and therefore, after more than four years from the moment the Court had identified the problems, violations of the same kind were found in more than 150 judgments pronounced against Romania, based on overcrowding and inadequate material conditions in prisons[10].

To facilitate effective enforcement of its judgments, the Court adopted ruling pilot procedure which, among other things, clearly highlightend the existence of structural problems underlying the violations and, in addition, indicated to the respondent State measures necessary for remediation[11].

Considering assessments on general measures taken by Romanian authorities and reports of the European Committee for the Prevention of Torture and inhuman punishment (CPT), in conjunction with recognition by the Ombudsman of penitentiary system problems, on April 25, 2017, ECtHR pronounced the pilot judgement in case Rezmiveş and Others vs. Romania. This time, the Court specifically asked Romania to provide within six months, in cooperation with the Committee of Ministers of Council of Europe, an action plan meant to find a solution to prison overcrowding and inadequate conditions of detention.

National authorities have complied and took a first step, so that on July 14, 2017 it was promulgated Law no. 169/2017 which amended and supplemented Law no. 254/2013 on the execution of sentences and detention measures[12].

The main provision of this law was introduction of compensatory measures for inadequate conditions of accommodation of convicted persons.

However, is the adopted domestic remedy able to resolve the structural deficiencies identified in the prison system and lead to the eradication of injuries to fundamental rights guaranteed by the Convention? Is it an effective legal instrument for compensation of persons accommodated in inadequate conditions and relieves places of detention? Does this compensatory action lead to different treatments and consequences for persons who are in the same legal situation, incompatible with Romanian Constitution?

To answer these questions, it is necessary to analyze provisions of Law no. 169/2017 and their impact on prison system and implicitly on punishment execution.

Also, analysis of national case-law is a useful tool to verify whether national legal instrument meet the assumed objectives.

The importance of analysis in the present article is given at the same time by the need to verify compliance of national authorities with requirements of the pilot judgment and also resides in the absolute novelty of problems discussed.

In our opinion, the study presents from a scientific perspective part of national authorities efforts to comply with obligations under the pilot judgment in case Rezmiveş and Others against Romania[13] and, equally, examines the impact on convicts of compensatory mechanism adopted by Law no. 169/2017.

2. Content

According to Explanatory memorandum of Law no. 169/2017[14], the legislator had a double goal: to grant compensation to convicted persons executing punishments in severe overcrowding conditions, and at the same time contribute to relieving places of detention.

The remedy legal instrument by which national authorities have considered compliance with the Court is represented by a compensatory mechanism designed to eliminate violations of Article 3 of the Convention and has been implemented by Law no. 169/2017.

The most important measures adopted by Law no. 169/2017 were:

I. modification of Article no. 40 Para 5 b of Law no. 254/2013 which aimed to a slight relaxation of conditions under which it is possible to change the regime of execution of punishments depriving

[9] ECtHR, decision adopted on 24.07202, Application no. 35972/05, *case Iacov Stanciu vs. Romania*.

[10] R.Paşoi, D.Mihai, *Pilot Judgement in case Rezmiveş and Others vs. Romnia concerning detention conditions*, available online at https://juridice.ro, last accession 06.03.2018, at 08,01.

[11] According to Resolution Res(2004)3 of the Council of Ministers of the Council of Europe, adoped on 12.05.2004.

[12] Published in the Official Gazette of Romania no. 514/14.08.2013.

[13] Under this ECtHR decision, domestic authorities have assumed a whole complex of measures, among which compensatory action respresents only a part.

[14] Available online at http://www.cdep.ro.

of liberty to a regime immediately below as level of difficulty;

II. modification of the content of the right of convicted persons to phone calls by ensuring their freedom to make public mobile communications from prison, in confidentiality conditions, without visual surveillance;
III. granting to the convict the right to renounce to his/her due remuneration for work done in exchange for days additioned to punishment already executed, taking into account the work done;
IV. change of period of punishment considered executed based on work done, so that the convicted person may obtain a more consistent reduction of the period of detention.

In the context of Law no. 169/2017, the most important legislative measure was by far prescription in Article 551 of a compensatory measure for accomodation of convicts in improper condition.

According to the text of the law mentioned before, in calculating the punishment effectively executed, one must take into account execution in inadequate conditions as a compensatory measure (irrespective of regime of execution of punishment). In this case, for each period of 30 days executed under inadequate conditions (even non-consecutive days), other additional 6 days of punishment are considered executed. This benefit cannot be revoked, regardless of circumstances occurred during execution of punishment.

The legislator tried to define the notion of "improper conditions" as accommodation of one person in any detention center in Romania that presented flaws in fulfilling conditions imposed by European standards.

Of course, this definition is at least unfortunate and, at first glance, seems to restrict its scope only to persons in detention centers, defined by Article 115 of the Romanian Criminal Code[15] and Article 136 of Law no. 254/2013, as institutions specialized in social recovery, where only educational custodial measures applied to minors are to be executed.

By means of teleological interpretation, we appreciate however that this was not the scope of the national legislator.

We argue this opinion by reference mainly to the history presented in the introduction of this analysis, the general context of adoption of Law no. 169/2017, the correlation of changes enacted by this law, the objective pursued for adoption, and not least the Explanatory memorandum of the law.

We consider that the notion of „detention centers" should cover an area extended to any detention place in Romania.

The national legislator analyzed, synthesized and classified, according to standardization landmarks, the aspects considered by the European Court of Human Rights as "inappropriate conditions" in its conviction judgements. According to the actual form in force of Article 55^1 Para 3, accomodation in any of the following situations is considered execution of punishment in inadequate conditions:

a) accommodation in a space less than or equal to 4 m/convict, calculated by excluding surface of toilets and food storage facilities, by dividing the total area of detention rooms to the number of people accomodated, regardless of equipping the concerned space;
b) lack of access to outdoor activities;
c) lack of access to natural light or sufficient ventilation or ventilation availability;
d) lack of adequate temperature of the room;
e) lack of possibility to use the toilet in private and respect of basic rules of health and hygiene requirements;
f) existence of infiltration, dampness and mold in detention room walls.

These provisions are also to be applied correspondingly to calculate the punishment effectively executed as preventive measure/ punishment in detention centers and also pre-trial arrest in improper conditions[16].

To this respect, there is no reason leading to establishment of different legal situations for different categories of persons in state custody.

It is not considered execution of punishment under inadequate conditions the day or period when the person was:

a) admitted to infirmaries within places of detention, hospitals of the sanitary network of National Penitentiary Administration, Ministry of Internal Affairs or public health network;
b) in transit.

However, the person who was already compensated for improper detention conditions by final decisions of national courts or the European Court of Human Rights (for the same period for which compensation was granted and the person was subsequently transferred or moved to spaces with improper detention conditions), cannot benefit of compensatory action. Therefore, the person in this situation cannot obtain a reduction of punishment, according to Article 55^1 Para 6 of Law no. 254/2017.

Adoption of compensatory action automatically raised a controversy over the date to be considered as starting point to calculate the additional days under this mechanism.

According to Para 8, the date to be considered is July 24, 2012, when the judgment in the semi-pilot case Iacov Stanciu vs. Romania was rendered.

Nonetheless, is it possible that a law passed in 2017 should produce legal effects since 2012, considering the fact that, in general, the law applies only for the future?

[15] Romanian Criminal Code, adopted by Law no. 286/2009, published in the Official Gazette of Romania no. 510/24.072009.
[16] Per Article 55^1 Para 4 of Law no. 254/2013.

The answer is positive and based on Article 15 Para 2 of Constitution, under which the law applies only for the future, *but for more favourable criminal law* (and this is the juridical nature of compensatory action). Setting the date of July 24, 2012 as a starting point to calculate days additionally executed appears however randomly chosen and is susceptible to criticism, since neither the Explanatory memorandum to Law no. 169/2017, nor the latter clarifies the reasons for this choice.

In addition, Court decisions stating violations of Article 3 of the Convention have been delivered starting from December 6, 2007[17], and until July 24, 2012 Romania had already been convicted in 93 other similar judgments.

As a result, there is no reason why compensatory action should not also be applied before pronouncement of the judgment in the semi-pilot case Iacov Stanciu vs. Romania, with consequence of eliminating any difference in treatment of convicted persons who have executed punishments in the same inadequate conditions *before* and *after* date of July 24, 2012[18].

In order to implement the compensatory measure, in each penitentiary there was established a Commission for evaluation of prison conditions[19], whose role is to make an inventory of buildings destinated for accommodation existing at unity level, and an analysis so as to determine which of them fall under incidence of Article 55^1 Para 3 concerning improper detention conditions.

In terms of the criteria stated in Article 55^1 Para 3a) of Law no. 254/2013, the Commission will carry out the analysis taking into account the average monthly index of overcrowding associated with each analyzed building.

In terms of the criteria stated in art. 55^1 Para 3b) and f) of Law no. 254/2013, the Commission will analyze considering the existence of judgments pronounced by national or international courts, which have found defficiencies in the outdoor/indoor space of analyzed buildings.

In terms of the criteria stated in Article 55^1 Para 3c) of Law no. 254/2013, the Commission will carry out the analysis according to national standards.

In terms of the criteria stated in Article 55^1 Para 3d) of Law no. 254/2013 for the period July 24, 2012 to entry into force of the law, the Commission will analyze considering the heat delivery program for cold season. For the period after the entry into force of the law, ensurance of proper temperature will be determined by the daily measurements inside the building.

In terms of the criteria stated in Article 55^1 Para e) of Law no. 254/2013, the Commission will analyze in relation to existence of a sanitary space equipped with door and locking system, compliance to national health standards, as well as those requiring respect of rights attached to individual and collective hygiene for persons deprived of liberty.

The centralized situation of buildings inadequate in terms of conditions of detention was approved[20] by Order of Minister of Justice no. 2773/17.102017[21], and its simple reading demonstrates that no place of detention run by the National Prison Administration meets European standards of accommodation[22].

Under the principle of equal treatment of persons in the same legal situation, the legislator established by Article VI of Law no. 169/2017 that provisions of the mentioned law are to be applied to convicts temporarily placed in detention centers at request of judicial authorities and also to persons deprived of liberty who executed under Article 55^1 Para 2 of Law no. 254/2013 punishments and/or measures depriving of liberty, when these persons were subject to a measure depriving of liberty.

Following the same principle, compensatory action applies correspondingly to minors executing educational measures in detention centers, educational centers or prisons, and also to minors convicted under the former Romanian Criminal Code of 1968[23] and at the moment of entry into force of the present law are executing educational measures in detention centers.

The legislator opted for an administrative procedure of calculating the benefit of compensatory action, stating in Article V that the Office of registration and work organisation within each unit will open a registration file for each person deprived of liberty, where there are to be noted buildings of accommodation during execution of punishment and calculation of days to be deducted from executed punishment following to improper detention conditions.

Although at first glance compensatory action appears to meet the requirements of drafting legal acts[24], in reality the situation is far from achieving this goal.

In this contex, a number of questions regarding legal situations appeared, that the legislator most likely had ignored or not forseen. We will subsequently

[17] ECtHR, Decision adopted on 06.12.2007, Application no. 22088/04, *case Bragadireanu vs. Romania*, already mentioned.

[18] M.A. Hotca, Un bun început pentru respectarea hotărârii-pilot în cauza Rezmiveș și alții împotriva României – adoptarea Legii nr. 169/2017 privind modificarea și completarea Legii nr. 254/2013, available online at https://juridice.ro, last accession on 06.03.2018, at 08,00.

[19] Per Article II of Law no. 169/2017, the Commission consists of: deputy economic administrative director or equivalent, as chairman; deputy director for safety and regime or equivalent; head of penitentiary regime service or equivalent; heads of department of the buildings evaluated; chief medical and responsible for safety of work, as secretary.

[20] Per Article IV Para 7 of Law no. 169/2017.

[21] Published in the Official Gazette of Romania no. 822/18.10. 2017.

[22] Save for a few accomodation spaces.

[23] Law no. 15/1968 on Romanian Criminal Code, published in the Official Gazette of Romania no. 79-79bis/ 21.061968.

[24] Clarity, simplicity and predictability, according to Common Guidelines of the European Parliament, the Council and the Commission for those participating in drafting EU legislation.

identify, indicate and analyze some of them, in an attempt to find some answers according to the undertaken scope of the research:

1. Which is the legal nature (regime) of days considered additionally executed in compensation for accomodation in inadequate conditions?

Lack of answer lead to diverging views, which is the reason why in some cases it was found that days granted in compensation for accommodation in unsuitable conditions should be reduced, e.g., from total fraction of release on parole, while in other cases it was considered that days should be deducted from punishment itself, thus changing fractions of release on parole and date of expiry of punishment.

In our opinion, by adopting this remedy instrument prescribed by Law no. 169/2017, the legislator pursued compensation by reducing the period of execution of punishment in prison, and not the punishment covered by res judicata principle. As a result, days granted in compensation for accommodation in unsuitable conditions cannot lead to changes concerning the punishment established by the court, and the fractions prescribed for release on parole are to be calculated according to the punishment established by the final decision of conviction.

2. Changing the date when the punishment is considered entirely executed following to application of compensatory action represents a modification of punishment established by the final judgement which may be done only by the court by means of challenge to enforcement governed by Article 598 Para 1 of Romanian Criminal Procedure Code, or is it possible by mere administrative procedure performed by the administration of the detention?

We are of the opinion that changing the date when the punishment is considered entirely executed does not amount to change of punishment itself, and in the first case jurisdiction belongs to Office administration of persons deprived of liberty. According to Article 20 of Order of Minister of Justice no. 432/2010/05.02.2010[25] approving Instructions regarding the nominal and statistical number of persons deprived of liberty in custody of units subordinated to National Administration of Penitentiaries, after having received the convict in prison, the employee shall, inter alia, establish the date when the person concerned is to be released following entire execution of punishment and calculates, according to duration of punishment established by the court, the date when the fractions prescribed for release on parole expire.

One can therefore easily see that, by means of an administrative procedure, there are calculated the date when execution of punishment starts, the date when it expires and different fractions of punishment.

For the same reasons, the Office will also calculate (as required by Article V Para 3 of Law no. 169/2017), days additioned to punishment following inappropriate conditions of detention, and afterwards will accordingly modify the date of expiry for punishment execution and the fractions for release on parole.

It is only if the administration of prison refuses to calculate days additioned or they are wrongly quantified, that the convicted person may appeal to the court by way of challenge against enforcement.

This was also the opinion expressed in criminal sentence no. 54/12.01.2018[26] by Judecătoria Sectorului 5 Bucureşti, which dismissed as unfounded the challenge against enforcement filed by convict T.A.F., concerning miscalculation of days additioned in application of compensatory mechanism.

The court found that awarding compensation days ist o be done administratively by the prison unit where the convicted person is imprisoned. The challenge to enforcement was denied as unfounded, as long as the administration of the detention place had calculated for the convict a number of 156 compensatory days for accommodation in inadequate conditions during 27.10.2015-08.01.2018.

3. Release of convicts at the expiry of duration of punishment depriving of liberty is to be done administratively, or following referral by the administration of the detention to the court, in order to promote a challenge to enforcement under Article 598 of Romanian Criminal Procedure Code?

This question arose in the context of lack of specific regulation of release procedure before the end of punishment, the period of which had been changed following the application of compensatory measure under art. 55^1 Para 1 of Law no. 254/2017.

When the law entred into force, some courts appreciated that release of convicted persons benefiting of compensatory mechanism is not to be done administratively, but by court decision based on Article 598 of the Criminal Procedure Code regarding challenge to enforcement.

I.e., based on Article 598 para 1d of Romanian Criminal Code, Judecătoria Sectorului 5 Bucureşti decided to admit the challenge to enforcement filed by the judge delegate in charge of enforcement (criminal sentence no. 2616/19.09.2017[27]). By calculating the benefit of additional days consequant to accommodation in unsuitable conditions, the court found that the convict T. A. had executed the punishment and ordered release.

For identical reasoning, the courts accepted challenges to enforcenment filed by other convicted persons[28].

[25] Published in the Official Gazette of Romania no. 157/11.03.2010.
[26] Final by criminal decision no. 206/23.02.2018 pronounced by Bucharest Tribunal – Ist Criminal Section, unpublished.
[27] Final by non-contestation, unpublished.
[28] Criminal sentences no. 2617/19.09.2017, no. 2618/19.09.2017, no. 2619/19.09.2017, pronounced by Judecătoria Sectorului 5 Bucureşti, final by non-contestation, unpublished.

We appreciate, however, that the answer to our question results from corroborating Article 53 of Law no. 254/2013 and Article 20 of Order of Minister of Justice no. 432/2010/05.02.2010 (previously referred to).

Per Article 53 Para 1 of Law no. 254/2013, director of the prison has jurisdiction to order release at "the expiry of imprisonment, the date of the final judgment ordering the release on parole, as well as any other date decided by competent judicial bodies in cases provided by law (...)". Thus, administration of detention place releases the convicted person at the expiry of period of imprisonment, by administrative procedure, without any need of referral to court.

At the same time, the expiry date of punishment is calculated by Registration Bureau organized in each place of detention, considering additional days as result of execution of punishment under inadequate conditions of detention. Benefit of additional days under compensatory mechanism leads to a new situation in national law, which requires regular updating of the date of expiry of punishment depending on conditions of detention.

Basically, when the convicted person is imprisoned, the responsible employee calculates the starting and respectively the expiry date of punishment according to the final judgment, but the latter will be modified over time through administrative proceedings, as for every 30 days of accommodation in unsuitable conditions 6 days will be considered as effectively executed.

Summarizing, release at expiry of period of punishments depriving of liberty will be done administratively, under the procedure governed by Article 53 of Law no. 254/2013.

This conclusion is also supported by case-law. For example, criminal sentence no. 88/16.01.2018 issued by Judecătoria Sectorului 5 București[29] rejected as inadmissible the challenge to enforcement filed by the convict N.D., arguing that grant of compensation days according to Law no. 169/2017 is to be done administratively by the prison unit where the convicted person is imprisoned, and not by way of challenge to enforcement.

Only in case that these days should not be granted, the convicted person may submit an application to the court under the principle of access to justice. In case under discussion, the court found that Rahova Penitenciary calculated for the applicant N.D. a number of 132 compensation days for the period 17.09.2014-21.12.2017 during which the convict had been detained in improper conditions, and therefore the appication was inadmissible.

4. After entry into force of Law no. 169/2017, situation of all persons deprived of liberty benefiting of compensatory action must be analyzed by Commissions for release on parole organised in penitenciaries, according to Article VII of the law?

Response can only be negative.

Per Article 97 of Law. no. 254/2013, release on parole is granted at the request of the convicted person or at the proposal of the Commission for conditional release. The report for release on parole, along with supporting documents and, where appropriate, recommendations of probation officer made under Article 97 Para 7 are submitted to the court of first instance which has territorial jurisdiction over the prison[30].

There are situations where, by applying compensatory action, the convicted person gets vocation to release on parole by fulfilling fractions of punishment stipulated in Article 99 and Article 100 of Romanian Criminal Code. In this case, the Commission for release on parole shall analyze and notify to the court. Similarly, the Commission will also proceed in the same manner if the application for release on parole was rejected (before entry into force of compensatory action) for non-accomplishment of legal fractions of punishment.

The Commission will inform the court even though the deadline for request renewal is not fulfilled, as Law no. 169/2017 has the character of a more favorable criminal law.

On the other hand, if before entry into force of Law no. 169/2017 the court rejected the application for release on parole on the grounds that the convict did not reform and cannot reintegrate in society, and established a deadline for renewal of application for a date situated after entry into force of compensatory action, the Commission will not have to notify the court before accomplishment of the deadline established by a judgment entered into res judicata area. If it does however, we consider that the application should be rejected as inadmissible.

Recent case-law confirms this conclusion. Thus, criminal sentence no. 3032/17.11.2017 pronounced by Judecătoria Sectorului 5 București[31] admitted the proposal for release on parole for convict M.G.A. Although court of first instance held that release on parole was possible before the date established by a final decision (pronounced prior to entry into force of Law no. 169/2017) when the proposal could be renewed, the higher court decided on the contrary.

Considering on basis of circumstances presented that the legal situation of the convicted had not been modified by entry into force of compensatory mechanism and the period during which the application could be renewed (as established by previous court ruling) still produced legal effects by virtue of res judicata principle, the court of judicial review rejected the proposal for conditional release as inadmissible.

5. When application for release on parole was rejected, the period established by the court after

[29] Final by criminal decision no. 167/15.02.2018 pronounced by Bucharest Tribunal – Ist Criminal Section, unpublished.
[30] According to Article 205 of Regulation implementing Law no. 254/2013, published in the Official Gazette of Romania no. 271/11.04.2016.
[31] Final by criminal decision no. 205/23.02.2018 pronounced by Bucharest Tribunal – Ist Criminal Section, unpublished.

which the application can be renewed modifies, as consequence of additional days considered executed as compensation under inadequate conditions of accommodation?

This hypothesis must be considered from two perspectives. The first one concerns the situation when release on parole was denied *prior* to entry into force of the law, by analogy with assessments made in paragraph 4 and specific distinctions as shown there. The second one concerns the case when release on parole was rejected *after* entry into force of compensatory action, situation where there is no reason to modify the period established by the court, covered by res judicata principle, along with the final decision.

In all cases, period of renewal established by the court when rejecting the application/proposal for release on parole cannot be longer than 1 year[32] and must be indicated separately in all cases when the solution is based on non-compliance of requirements prescribed by law, including the situation where the remainder to be executed until accomplishment of legal faction is less than or equal to 1 year. If the application/proposal for release on parole is denied for non-compliance of the fraction prescribed by law, and the remainder to be executed until reaching this fraction is longer than one year, the court will not establish a concrete date, but will generically set that the application/proposal shall be renewed after expiry of fraction[33] (which is to be calculated considering also the benefit of compensatory action).

6. In case of persons deprived of liberty sentenced to life imprisonment, days considered additionally executed following to improper conditions are/are not taken into account when calculating the required fraction for release on parole?

In accordance with Article 99 Para 1 of Romanian Criminal Code, release on parole for life imprisonment can be accepted if the convict has effectively served 20 years in prison.

We appreciate the days considered additionally executed as result of inadequate accommodation conditions represent days actually executed from the punishment, as unequivocally results by gramatical interpretation of Article 55^1 alin. 1^{34}.

Moreover, assessment to the contrary could lead to criticism aimed at the very constitutionality of the legal text, as long as it leads to differential treatment in respect of persons in the same legal situation, disregarding the principle of equality before law.

Constitutional Court frequently examines in its case-law respect of constitutional requirements enshrined in Article 16 Para 1 of the Constitution, which states that: „All citizens are equal before the law and public authorities, without any privilege or discrimination."

In older decisions, Constitutional Court held that the principle of equality requires establishment of equal treatment of situations which, depending on the purpose, are not different[35]. Also, according to recent jurisprudence of the same court, situations concerning certain categories of people should differ in essence so as to justify the difference of treatment, and this difference of treatment must be based on objective and reasonable criteria[36]. In essence, ignoring the principle of equal rights has the effect of unconstitutionality of the norm establishing a privilege or discrimination. To this respect, Constitutional Court stated that, according to its case-law, discrimination is based on the notion of exclusion from a right/benefit[37], and the specific constitutional remedy where unconstitutional discrimination appears is granting/offering access to the benefit of the right[38].

7. Compensatory action also influences the regime of punishment execution?

The response cannot be but positive, considering that per Article 40 Para 2 of Law no. 254/2013, change of regime of depriving of liberty punishment execution may be granted after serving legal fraction of inprisonment punishment (compensatory measure will be included in this fraction). Therefore, Commission for individualisation and change of regime of execution of punishments depriving of liberty will analyze accomplishment of conditions for regime change for all convicts who, by benefit of additional days, get vocation to a milder regime.

8. When the detained person is in custody under several enforcement warrants in execution/succesively executed, which is the starting point for calculation of days considered additionally executed, following accomodation in inadequate conditions?

In general terms and by applying a systematic interpretation, we can see from the entire economy of Law no. 169/2017 that compensatory measure concerning additional days granted for inadequate conditions of detention concerns only the punishment in execution, and not also punishments already executed based on previous convictions. This framework remains valid even if the current enforcement warrant is executed at the final point of execution of a previous enforcement warrant.

In our opinion, additional days considered executed following to improper detention conditions can be calculated as a compensatory measure only for punishments in execution at the moment of entry into force of Law no. 169/2017. In consequence, if the

[32] According to Article 587 Para 2 of Romanian Criminal Procedure Code, the term begins on the date the judgment becomes final.

[33] To this respect, see decision no. 8/20.03.2006 pronounced by High Court of Cassation and Justice (by a specific procedure prescribed by Romanian law, called „review for uniform interpretation of law"), published in the Official Gazette of Romania no. 475/01.06.2006.

[34] Which states that: „when calculating the punishment effectively executed it is to be considered (…) as compensatory measure (…)".

[35] Constitutional Court of Romania, decision no. 1/08.02.1994, published in the Official Gazette of Romania no. 69/16.03.1994, penultimate Para.

[36] Constitutional Court of Romania, decision no. 366/25.06.2014, published in the Official Gazette of Romania no. 644/02.09.2014, Para 55.

[37] Constitutional Court of Romania, decision no. 62/21.10.1993, published in the Official Gazette of Romania no. 49/25.02.1994.

[38] Constitutional Court of Romania, decision no. 681/13.11.2014, published in the Official Gazette of Romania no. 889/08.11.2014, Para 24.

convicted person has served sentence of imprisonment starting from July 24, 2012 and was released from prison at the end of punishment, before entry into force of Law no. 169/2017[39], this person cannot benefit of compensatory action.

Similarly, execution of successive enforcement warrants canot result in entitlement to benefit of compensation but for the period executed in unsuitable conditions under the active warrant, as the punishment established by previous warrant had already been executed.

In arguing this opinion, it is to be noted that the legislator prescribed a single method of compensation, namely deduction of days from the punishment in execution, and not from punishments already executed. In the latter situation, the convicted person who has served sentence in inadequate conditions may appeal to civil courts by means of tort actions brought against the state for compensation.

For example, civil sentence no. 6538/26.09.2016 pronounced by Judecătoria Sectorului 5 Bucureşti[40] partly accepted the application filed by applicant P.I. and ordered that the defendants Bucharest Rahova Penitentiary and the National Prison Administration should jointly pay to the applicant the amount of 10,000 lei as moral damages.

The court considered that the applicant was incarcerated for 211 days and did not benefit from a minimum of 4 square meters space, contrary to Article 1 Para 3a of the Minimum rules on accommodation of detainees, adopted by Order of Minister of Justice no. 433/2010, and this situation caused psychological distress to the detained person.

Although some courts have held that simple statement of improper accommodation conditions was in itself sufficient just satisfaction for non-pecuniary damage inflicted on the convicted person, these solutions were modified by higher courts.

Thus, civil decision no. 3281/12.09.2016 issued by Bucharest Tribunal – Vth Civil Section admitted the appeal lodged by the applicant S.F. against civil sentence no. 521/01.21.2016 pronounced by Judecătoria Sector 4 Bucureşti and the defendants Jilava Penitentiary, National Administration of Penitentiaries and Romanian State (represented by Ministry of Finance) were obliged to pay to the applicant the amount of 1,500 euros moral damages.

We appreciate that for such cases a much better solution would have been prescription by Law no. 169/2017 of a compensatory pecuniary benefit (alternating the compensatory action consisting in additional days), and every convicted person who has already executed punishment should receive a sum calculated for each day served in the place of detention in inadequate conditions.

Analyse of case-law of the courts results in the idea that additional compensatory days following inappropriate detention conditions concern only punishment in execution.

For example, the challenge to enforcement filed by convict N.D., detained in Bucharest-Rahova Penitenciary, was denied as unfounded by criminal sentence no. 306/08.02.2018 pronounced by Judecătoria Sectorului 5 Bucureşti[41].

The court found that N.C. is in execution of a punishment of 5 years and 197 days, following merger of a 4 years punishment (applied as consequence of a post conviction criminal offence) with the rest to be executed from a previous punishment of 5 years and 197 days (which had a total amount of 18 years of imprisonment). As grounds for this solution, the court stated that the benefit of Law no. 169/2017 must be reported to the resulting punishment in execution at the present moment, without considering the period already executed from the first 18 years punishment. This period is situated between the date when execution of the 18 years punishment began and the date when a new criminal offence took place, and at the same time is not part of the resulting punishment.

9. When a convict is released following to benefit granted according to compensatory action and afterwards returnes to prison in execution of another punishment which was merged with the punishment previously executed, this person can benefit from a new compensation for the period already executed ?

We are of the opinion that, in this case, the convicted person cannot benefit of a new compensation covering the same period for which the benefit was already granted, although by merging concurrent punishments a single warrant is to be executed. The background of this solution is that no one can get double compensation for the same reason.

10. In case of persons deprived of liberty who committed a criminal offence in prison during execution of punishment, which date should be considered as starting point in calculating additional days following to accomodation in improper conditions?

According to the line of reasoning already presented, additional days are to be calculated from the date of commencement of the new punishment applied as result of the new criminal offence committed in prison, calculated on the basis of the new enforcement warrant.

11. In addition to issues above-mentioned, arising in the context of lack of regulation by Law no. 169/2017, legal practitioners pondered on the question whether, contrary to public statements of national officials, the benefit of compensatory action should also be applied to convicts who had been released from the prison prior to entry into force of law and were situated within the term through which the convict is supervised.

[39] July 21, 2017.
[40] Final by civil decision no. 2837/15.09.2017 pronounced by Bucharest Tribunal – IVth Civil Section, unpublished.
[41] Final by criminal decision no. 238/05.03.2018 pronounced by Bucharest Tribunal – Ist Criminal Section, unpublished.

It was considered that art. 55^1 of Law no. 254/2017 was also incident in this situation and the convict can obtain a reduced punishment (and hence reducement of the term through which the convict is supervised) by means of challenge to enforcement based on Article 598 Para 1d of Romanian Criminal Procedure Code.

E.g., Bucharest Tribunal – Ist Criminal Section[42] accepted the challenge to enforcement filed by convict P.A.

Under Article 598 Para 1d of Romanian Criminal Procedure Code related to Article 55^1 of Law no. 254/2013, the court found that a number of 205 days were additionally executed, as consequence of the period when P.A. was accommodated in inadequate conditions in detention centers or centers of detention and arrest. At the same time, the court found that the 5 years punishment applied to convict P.A. was entirely executed on 17.10.2017.

By teleological interpretation, the court appreciated that Law no. 169/2017 did not restrict its scope only to imprisoned persons in execution of punishments at entry into force of the law. Thus, the benefit of compensatory measure was also to benefit to convicts who had executed part of the punishment in inadequate conditions and had been released on parole prior to entry into force of the same law.

The court also held that, based on actual form of Law no. 169/2017, that there is no legal argument to establish a difference in treatment between the convict who is still in prison and the one who executed part of the punishment in inadequate spaces, but was released on parole and was still inside the term through which supervision was in course.

3. Conclusions

Precarious conditions of detention in Romanian prisons have resulted in several convictions at the European Court of Human Rights, starting with judgment pronounced in case Bragadireanu and ending with those in semi-pilot case Iacov Stanciu and pilot case Rezmiveș and Others, all cases vs. Romania.

Only in 2017 there were 378 conviction judgments, and the consequence was obligation of Romanian state to pay the amount of 2.296,451 euros. Forced to take concrete measures to address structural problems in prisons and ensure compliance with art. 3 of the Convention, national authorities adopted a compensatory legal instrument.

Law no. 169/2017 amended provisions of Law no. 254/2013 on execution of punishments and detention measures and at the same time introduced a new mechanism, in order to relieve places of detention and grant compensation to convicted persons executing punishments in conditions incompatible to Convention.

Juridical actions undertaken by national authorities cannot represent but a first step in fulfilling the conditionalities assumed, as lack of clarity of law and a comprehensive view on compensatory mechanism make this approach not to entirely meet the assumed purpose. Initially conceived as a rather simple procedure, compensatory action proved however in practice increasingly more difficult to apply in situations which do not match perfectly the standard pattern regulated by the legislator.

The study analyzed some of the problems arising after entry into force of the Law no. 169/2017 and tried to find practical answers based on systemic, teleological and literal interpretation of substantive and procedural provisions. Nevertheless, results achieved by means of interpretation cannot be validated as universal and courts will bring forward their own arguments, based on interpretation of the same provisions which in the present form appear to lack juridical consistency.

In this context, judgements pronounced by national courts will inherently generate non-unitary case-law and in consequence need of a new legislative intervention or pronouncement of interpretation judgments[43].

The current regulation of compensatory mechanism leads to different solutions for persons in similar legal situations and raises from this perspective problems of incompatibility with fundamental law, which will probably be considered by the Constitutional Court at the right time. In the same line of reasoning, application of benefits of the law only to persons executing punishments (and as a consequence exclusion of those who served full sentence or were released on probation) creates the appearance of a constitutional conflict, in absence of another compensatory mechanism available to these categories, such as, for example, pecuniary compensation[44].

From this perspective, we consider necessary the amendment of legislative provisions regulating compensatory action, aiming to cover also situations such as those analyzed in the present research.

Law gaps also make impossible the adoption (i.e., by provision of Director of National Administration of Penitentiaries), of specific regulations during execution of punishments in order to avoid application of different measures to persons in the same legal situation[45].

Despite the above-mentioned application difficulties, according to statistics made at national level, from entry into force of the law to January 29, 2018, units subordinated to the National Administration of Penitentiaries have ordered the release of 1,031 people due to compensatory benefits

[42] Final by non-contestation, unpublished.
[43] Procedure regulated by Article no. 475 of Romanian Criminal Procedure Code.
[44] Pecuniary compensatory mechanism is used by several states (e.g., Italy, Poland, Hungary) and appreciated by ECtHR as satistactory.
[45] Interpretation of law cannot be made by means of secondary legislation.

prescribed by Law no. 169/2017[46]. Likewise, courts have upheld other 3427 applications for release on probation, consequent to application of the same compensatory mechanism.

This means that, in less than four months, a total of 4458 people sentenced to imprisonment have left places of detention, situation which proves the efficacy of compensatory mechanism.

The present research has a very pronounced character of novelty, and its usefulness resides not only in a theoretical exposure of compensatory mechanism established by national authorities, but also in identifying, indicating and analyzing the main problems appeared in practical implementation of the adopted measures.

Results presented above may be a starting point both for future legislative changes in the field of execution of depriving of liberty punishments, and also for analysis and reflection of all those involved in enforcement of this compensatory legal instrument: administration personnel of detention places, theoreticians and practitioners (lawyers, prosecutors and judges).

Future research may concern verification of (unified) solution to the problems identified in this study, orientation of case-law and an analysis of non-unitary jurisprudence in the area of compensatory action, or identification of other compensatory mechanisms for persons who had already served full sentence at the moment Law no. 169/2017 entered into force.

Finally, we consider that, in a reasonable period of time, a new analysis on the impact of compensatory mechanism on the execution of depriving of liberty punishments should be useful.

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