DETENTION CONDITIONS IN ROMANIAN PENITENTIARIES. COMPENSATORY APPEAL AND RECOVERY OF DAMAGE SUFFERED BY CONVICTED PERSONS DUE TO NON-COMPLIANCE WITH MINIMUM DETENTION CONDITIONS

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Abstract

Considering the debates in the public space regarding the detention conditions in the Romanian penitentiaries, in the present study I set out to analyze the way in which the detention conditions in the Romanian penitentiaries are ensured.

Thus, I will present the regulation in the national legislation of the minimum standards that must be observed, with emphasis on overcrowding of places of detention, but also compensation in case of accommodation in inappropriate conditions, with reference to the compensatory appeal, as regulated by Law 169 / 2017.

At the same time will be analyzed the ways in which the moral and material damage suffered by the convicted persons can be repaired, following the non-observance of the minimum conditions of detention, including the jurisprudence of the European Court of Human Rights, considering that the number of requests exceeded the figure of 3000 at the time of drafting of Law no. 169/2017.

Keywords: *detention conditions, convicted persons, compensatory appeal, Law no. 169/2017*.

1. Introduction

Given the acute lack of space in the detention rooms of Romanian penitentiaries, compliance with the minimum standards for the execution of custodial sentences must be analyzed in particular by Romanian courts, when analyzing the complaints or requests of the convicted persons.

I also presented the way in which it is possible for the national courts to repair the moral and material damage suffered by the convicted persons and I showed the problems generated by the application of Law 169/2017, regarding the commission of other offenses by parolees following the application of the provisions of the compensatory appeal as well as legislative changes following these issues.

2. Regulation in the national legislation of the minimum standards that must be observed, with emphasis on the overcrowding of places of detention

With regard to the execution of custodial sentences, given the acute lack of space in the detention rooms of Romanian penitentiaries, compliance with the minimum standards must be examined in particular by the judge supervising deprivation of liberty and by the Romanian courts, at the time of analyzing the complaints or requests of the convicted persons.

At the same time, according to the provisions of art. 1 para. 1 of the Annex of the Order of the Minister of Justice no. 433/2010 (in force until 2017), the spaces intended for the accommodation of persons deprived of liberty must respect human dignity and meet the minimum sanitary and hygiene standards, taking into account the climatic conditions and, in particular, the living space, air volume, lighting, heating and ventilation sources. Regarding the living area, the art. 3 letter b of the same normative act stipulates that in the accommodation rooms from the existing penitentiaries at least 4 square meters must be provided for each person deprived of liberty, employed in the closed regime or of maximum security.

Also, the Romanian courts, invested with solving some complaints or requests from the convicted persons, have the obligation to establish if the detention conditions can be considered degrading, including from the perspective of art. 3 of the European Convention on Human Rights.

Article 3 of the Convention enshrines one of the most important values of democratic societies, categorically prohibiting torture or inhuman or degrading treatment and punishment. In order to be incidental, the applied treatments must meet a minimum severity threshold, and in this context, the state has two types of obligations: a negative and general one not to subject a person under its jurisdiction to treatments contrary to art. 3 and a substantially positive obligation to take preventive measures to ensure the bodily and moral integrity of persons deprived of their liberty, such as the provision of minimum conditions of detention and adequate medical treatment.

Thus, in the Kalashnikov v. Russia case, the detention room was permanently overcrowded. Each person had at his disposal only 0.9 - 1.9 m2, two or three people had to share the same bed, so they could lie down only one at a time. The detention room was lit

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during the day and night. The 18-24 people deprived of their liberty were constantly making noise, smoking was allowed, there was no ventilation system, and the detainee was allowed to spend only two hours a day outside the detention room. At the same time, the sanitary endowment was deficient, there was no disinfection, and in the four years of detention in this condition, a substantial worsening of his health was found.

In view of these aspects, the Court considered that this was a degrading treatment within the meaning of Article 3 (ECHR, 15 October 2002, Kalashnikov./Russia, no. 47095/99, paragraphs 92 to 103).

At the same time, the Court ruled in the case of Iacov Stanciu against Romania, application no. 35972/05, paragraph 166, that custodial measures applied to the person may sometimes involve an inevitable element of suffering or humiliation but, nevertheless, the suffering and humiliation involved must not exceed that inevitable element of suffering or humiliation related to a certain form of legitimate treatment or punishment.

With regard to persons deprived of their liberty, the Court has already emphasized in previous cases that a prisoner does not lose, by the mere fact of his imprisonment, the defense of his rights guaranteed by the Convention. On the contrary, the detained persons have a vulnerable position, and the authorities have the obligation to defend them, and pursuant to art. 3, the state must ensure that a person is detained in conditions compatible with respect for his or her human dignity, that the manner and method of execution of the measure does not subject him to stress or difficulties that exceed the inevitable level of suffering in detention and given the practical needs of detention, health and well-being are adequately ensured.

The Court emphasized the exemplary judgments in Torreggiani and Others v. Italy (Applications Nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10), final to 27/05/2013, as a result of which pecuniary and moral compensations had been granted to the detainees forced to stay in a 3m² cell or in an insufficiently lit and ventilated space, without access to hot water.

Relevant is the fact that before the European Court for the Defense of Human Rights were registered 4 requests directed against Romania, through which four nationals of this state, the plaintiffs Daniel Arpad Rezmiveș, Laviniu Moșmonea, Marius Mavroian, Iosif Gazsi notified the Court on September 14, 2012, June 6, 2013, July 24, 2013 and October 15, 2013, pursuant to art. 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The object of the requests was, among others, the violation of the provisions of art. 3 of the Convention, on the conditions of detention in various penitentiary units or detention and pre-trial detention centers of the police in various localities, in which the petitioners also complained about cell overcrowding, inadequate sanitation and poor hygiene, poor food quality , the validity of the materials received, as well as the presence of rats and insects in the cells).

In its pilot judgment of 25 April 2017, the Court requested the Romanian State, within six months from the date of final judgment, to provide, in cooperation with the Committee of Ministers of the Council of Europe, an exact timetable for the implementation of appropriate general measures. capable of resolving the problem of overcrowding and inadequate conditions of detention, in accordance with the principles of the Convention as set out in the pilot judgment. The Court also decided to postpone similar cases that had not yet been communicated to the Romanian Government until the adoption of the necessary measures at national level. The Court considered that, although the measures taken by the authorities up to that date could contribute to the improvement of living and sanitary conditions in Romanian prisons, coherent and long-term efforts, such as the adoption of additional measures, should be made to achieve compliance with the Articles 3 and 46 of the Convention.

The Court also considered that, in order to comply with the obligations arising from its previous judgments in similar cases, an appropriate and effective system of internal remedies must be established.

The Court noted at the time of the judgment that the applicants" situation could not be dissociated from the general problem which is caused by a structural dysfunction characteristic of the Romanian penitentiary system, which has affected and may continue to affect many people in the future. Despite internal, administrative and budgetary measures taken, the systemic nature of the problem identified in 2012 persists and the situation is therefore a practice incompatible with the Convention.

According to the decision, the measures expected from Romania were structured on two levels: measures of an administrative nature, which would reduce overcrowding and improve material conditions of detention and measures of a legislative nature to ensure an effective remedy for the injury suffered, of the nature of the preventive appeal and of the specific compensatory appeal.

The Court cited by way of example a number of additional measures that could be considered by the Government in order to address the problem of detention conditions such as improving the probation system and simplifying the procedure for access to parole.

3. Compensatory appeal, as regulated by Law 169/2017 and secondary legislation

In 2017, compared to the signals received from the ECHR and reiterated by its president, Guido Ramondi, who recommended Romania and Hungary to adjust their logistics and criminal policy in order to stop the precarious conditions in penitentiaries, was adopted

the Law no. 169/2017 for amending and supplementing Law no. 254/2013 on the execution of sentences and custodial measures ordered by the judiciary during criminal proceedings, which provided a compensatory mechanism for persons deprived of liberty accommodated in inappropriate conditions of detention, by reducing the sentence, as a general measure to relieve penitentiaries.

According to art. 55/1 of this normative act, when calculating the sentence actually executed, regardless of the regime of execution of the sentence, as a compensatory measure, the execution of the sentence in inappropriate conditions is taken into account, in which case, for each period of 30 days executed in inappropriate conditions, even if they are not consecutive, are considered executed, in addition, 6 days of the sentence applied.

For the purposes of this normative act, accommodation in any of the following situations is considered the execution of the punishment in inappropriate conditions:

a) accommodation in an area less than or equal to 4 sqm / detainee, which is calculated, excluding the area of toilets and food storage spaces, by dividing the total area of detention rooms by the number of persons accommodated in the respective rooms, regardless of the endowment of the space in question;

b) lack of access to outdoor activities;

c) lack of access to natural light or sufficient air or availability of ventilation;

d) lack of adequate room temperature;

e) lack of the possibility to use the toilet in private and to observe the basic sanitary norms, as well as the hygiene requirements;

f) the existence of infiltrations, dampness and mold in the walls of the detention rooms.

The provisions also apply accordingly to the calculation of the sentence actually served as a preventive measure or punishment in detention and pre-trial detention centers in inappropriate conditions.

In order to apply the compensation established by law for the execution of the sentence in inappropriate conditions, was adopted the Order of the Minister of Justice no. 2773 / C / 2017 for the approval of the Centralized Situation of the buildings that are unsuitable from the point of view of the detention conditions, published in the Official Gazette no. 822 of October 18, 2017, which establishes the categories of buildings, identified by the inventory number, which were classified as unsuitable in terms of detention conditions, taking into account the criteria established by Law no. 169/2017, but also by the landmarks established by this normative act which does not impose a centralization of the rooms that ensure inadequate detention conditions, but the elaboration of a centralized situation of the buildings intended for the accommodation of persons deprived of liberty. Their situation is updated annually or whenever changes occur that could generate a reclassification of accommodation.

It should be noted that the notion of "compensatory appeal" does not exist as such in the legislation, and both in Law no. 254/2013, as well as in Law no. 169/2017, which amended it, there are the terms "compensation" and "compensatory measure". The advantage of the convict who benefits from the "compensatory measure", introduced by this normative act (which applies retroactively, starting with July 24, 2012), is that he can appear faster than usual before the court, which can order conditional release. Also, for some convicts, the application of the compensatory measure meant that the entire sentence applied was considered executed, so that they were released on time, immediately, without the need to request parole.

4. The reparation by the national courts of the moral and material damage suffered by the convicted persons

Countless times, the persons deprived of their liberty addressed the national courts in order to obtain compensation for the execution of sentences in inappropriate places.

Regarding the observance of the rights of convicted persons, the courts found the incidence of the provisions of art. 1349 paragraph (1) of the Civil Code, according to which any person has the duty to respect the rules of conduct imposed by law or local custom and not to infringe, through his actions or inactions, the rights or legitimate interests of other persons, and according to art. 1357 paragraph (1) of the Civil Code, the one who causes damage to another through an illicit deed, committed with guilt, is obliged to repair it.

These provisions establish the conditions of tortious civil liability for one"s own deed, respectively to have an illicit deed, this to be committed with guilt, to produce a damage, and to have a causal link between the illicit deed and the occurrence of the damage.

The courts found that art. Article 3 of the European Convention on Human Rights enshrines one of the most important values of democratic societies, categorically prohibiting torture or inhuman or degrading treatment or punishment. In order to be incident the art. 3 of ECHR, the treatments applied must meet a minimum severity threshold. In this context, the state has two types of obligations: a negative, general one, not to subject a person under its jurisdiction to treatments contrary to art. 3 and a substantially positive obligation to take preventive measures to ensure the bodily and moral integrity of persons deprived of their liberty, such as the provision of minimum conditions of detention and adequate medical treatment.

Although deprivation of liberty applied to the person may sometimes involve an inevitable element of suffering or humiliation, the suffering and humiliation involved must not exceed that inevitable element of suffering or humiliation related to some form of legitimate treatment or punishment.

According to art. 1357 paragraph 2 of the Romanian Civil Code, the national courts have established that the perpetrator is liable for the slightest fault, and regarding the occurrence of the damage, that the damage is fully repaired, unless otherwise provided by law, and as a rule, regarding the granting compensation for moral damage suffered by non-compliance with the minimum conditions of detention, the national court was guided by the recommendations made by the European Court of Human Rights at the end of the judgment in Ivanov Stanciu v. Romania (see civil judgment no.2287 / 16.03.2018 of the Court Sector 5 Bucharest, remained final by civil decision No. 3505 / A / 23.10.2018 of the Bucharest Tribunal, in file No. 6216/302/2016).

At the same time, it was pursued that the level of compensations granted for the moral damage by the national courts in case of finding the violation of art. 3 must be reasonable, taking into account the fair reparations granted by the Court in similar cases and the right not to be subjected to inhuman or degrading treatment is so important in the human rights defense system, that the authority or court dealing with it must present convincing and serious reasons for justifying the decision to award less compensation or not to award any compensation for moral damage.

5. The problems generated by the application of Law 169/2017 and the legislative amendments that led to the repeal of the law

Although it temporarily solved the problem of overcrowding in places of detention, following the introduction in Romanian law of the "compensatory appeal", one of the visible effects of the law, which created a growing concern among public opinion was the massive increase in the number of those released on time by reducing the duration of the sentence that had to be actually executed: from an average of about 900 people / year, in the period 2014-2016, it reached an average of about 1800 people / year, in the period 2017-2018.

Both the release on time, much faster following the adoption of the law of "compensatory appeal", and the conditional release of some convicts who did not correct their behaviour and can not be reintegrated, stimulated by the fact that there are not enough places of detention, it only encouraged the criminal phenomenon.

As a result, new crimes were committed, some of them very serious, it led to new victims of the new crimes and, eventually, the return to prison of some of the released prisoners without them being able to reintegrate to society.

In the case of such offenses, such as in particular, those against life, against bodily integrity or health, offenses of trafficking and exploitation of vulnerable persons or against sexual freedom and integrity, the Criminal Code may provide for certain legislative measures such as an increase in the number of penalties that must be effectively executed in the case of serious crimes, or the amendment of the Criminal Code in the sense that for serious crimes the conviction can be ordered without the possibility of conditional release.

Thus, during 19.10.2017-21.06.2019, a number of 18,849 persons were released from the units subordinated to the National Administration of Penitentiaries, by granting the compensatory benefits provided by Law no. 169/2017.

Of these18,849 persons, 840 persons were convicted for the crime of murder, 73 were convicted for the crime of aggravated murder, 81 persons were convicted for the crime of hitting and causing death, and 355 were convicted for the crime of hitting or other violence.

According to the data provided by the Romanian Ministry of Justice in a response to an interpellation formulated by the deputy Florin Roman, according to the latter"s statement dated 2.11. 2019 revealed that from 19.10.2017 to 18.09.2019 there were 21,049 releases, as a result of the application of the provisions of Law no. 169/2017. Of these, 634 were convicted of rape and 1,670 for aggravated robbery, and in the mentioned period, out of the total releases, 1,877 re-incarcerations were registered. Of these, 47 were rape, 226 robbery and 36 murder.

In this context, it should be emphasized that parole is only a vocation and not a right of the convicted person, and the court invested with a request for parole may or may not order the release of a convict, not being obliged to release automatically anyone who requests release conditioned. Moreover, the Criminal Code provides, in art. 99-100, that parole can be ordered only if "the court is convinced that the convicted person has straightened up and can reintegrate into society."

In relation to the consequences of the law, through the legislative proposal registered at the Chamber of Deputies under no. Pl-x no. 281/2019, it was proposed to repeal Law no. 169/2017 for amending and supplementing Law no. 254/2013 on the execution of sentences and custodial measures ordered by the judicial bodies during the criminal process, amending and supplementing Law no. 286/2009 on the Criminal Code, amending Law no. 254/2013. The explanatory memorandum showed that the criminal phenomenon in Romania, unfortunately, is out of control. The social reactions caused by the peculiarities of this phenomenon are particularly intense, especially in the last period of time, the public opinion being particularly concerned about recidivism and crimes committed by acts of violence, and recidivism is at alarming levels in Romania, whether we are talking about the actual recidivism, or the common recidivism, i.e. the criminal record. If the actual recidivism occurs among convicts in the proportion of about 40%, probably the highest rate in the EU, the criminal record - improper recidivism - reaches levels exceeding 60%. These are data that prove that the main purpose of the

punishment, namely that of social reintegration and avoidance of recidivism by criminally convicted persons is not achieved in Romania.

Also, the social reaction consisting of concern and revolt could not be ignored, the citizens losing their confidence that the criminal policies, the way in which these policies are implemented regarding the punishment and the execution of the punishment in case of committing criminal acts, especially of acts committed with violence, are in line with the social security need of the citizen. The distrust - that the punishment and, in particular, the execution of the punishments would reach its general purpose of discouraging the commission of serious antisocial acts - is generated by the way in which the execution of the punishment is regulated today by Law no. 169/2017, through the amendments brought by this law of the "compensatory appeal" to the legislation regarding the execution of punishments from Law no. 254/2013 and the Criminal Code.

The amendments aimed at returning to the situation from 2016 regarding the reduction of the sentence which is considered as executed, so that in the Official Gazette no. 1028 / 20.12.2019, was published the Law no. 240/2019 regarding the abrogation of Law no. 169/2017, as well as for the amendment of Law no. 254/2013 on the execution of sentences and custodial measures ordered by the judicial bodies during the criminal proceedings.

By the new law, were repealed the articles II-VIII of Law no. 169/2017, which provided for the establishment of a Commission for the evaluation of detention conditions for the application of the provisions regarding compensation in case of accommodation in inappropriate conditions and the application of these provisions. It was also repealed the art. 551 of Law no. 254/2013 on the execution of sentences and custodial measures ordered by the judicial bodies during the criminal proceedings, which regulated the compensatory appeal.

At the same time, has been modified the method of calculating the sentence that is considered to be executed on the basis of the work performed or of school training and professional training, in order to grant conditional release. Thus, if a paid job is performed, 5 days are considered executed for 4 working days; in case of unpaid work, 4 days are considered executed for 3 days of work; if the work is performed during the night, it is considered 3 days executed for two nights of work.

6. Conclusions

Although the Action Plan of 25.01.2018 of the Government of Romania (see https://sgg.gov.ro/new/wp-content/uploads/2020 /11/ PLANUL-DE-ACTIUNE-.pdf) speaks of changes at the strategic level, of the improvement of the probation service, of the preparation, at the legislative level of an amendment of Law 254/2013, and by the document sent by the Romanian authorities on 23.04.2019 to the Committee of Ministers of the Council of Europe (page 5), containing information about this plan in the case of Bragadireanu and Rezmives and others v. Romania, accessible on the website www.rm.coe.int, requested the Council of Europe Development Bank to allocate an amount of 177 million euro for the creation of 5,110 additional places of detention in the period 2019-2023 it can be stated that the law on compensatory appeal has only partially solved the problem of agglomeration in places of detention.

Thus, on 19.01.2021, according to official figures (http://anp.gov.ro/blog/lnk/ statistici), the penitentiary system had a total capacity of 18,245 places and housed 21,854 detainees (a level of occupancy of about 120% and a rate of one detainee per 1,000 inhabitants, similar to France which has, however, completely different criminological premises), reason for which it can be concluded that the compensatory appeal decongested the penitentiaries to some extent, but after its repeal without the change in criminal policy, the overcrowding trend has resumed.

References

- The Criminal Code of Romania, adopted by Law no. 286/2009, published in the Official Gazette no. 510 of July 24, 2009, entered into force on 01.02.2014;
- Law no. 254/2013, regarding the execution of sentences and custodial measures ordered by the judicial bodies during the criminal process, published in the Official Gazette no. 514 of 14 August 2013;
- Law no. 179/2017, for the amendment and completion of Law no. 254/2013 on the execution of sentences and custodial measures ordered by the judicial bodies during the criminal process, published in the Official Gazette no. 571/ 18July 2017;
- Law no. 240/2019 on the abrogation of Law no. 169/2017 for the amendment and completion of Law no. 254/2013 on the execution of sentences and custodial measures ordered by the judicial bodies during the criminal proceedings, as well as for the amendment of Law no. 254/2013 on the execution of sentences and custodial measures ordered by the judicial bodies during the criminal proceedings published in the Official Gazette no. 1028/20 December 2019;
- Ioan Chiş, Execution of criminal sanctions, Universul Juridic Publishing House, Bucharest, 2015.