

THE REFLECTION OF PROCEDURAL GUILT IN THE CRIMINAL PROCEDURE PROVISIONS. LIABILITY FOR UNJUST CONDEMNATION OR FOR TAKING PREVENTIVE MEASURES UNLAWFULLY

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Abstract

In the criminal proceedings of some law states the wrongful sentencing of individuals is very rare, having a comprehensive system of procedural safeguards which prevent such a situation. The purpose of the criminal proceedings is to punish only the culprits, the Criminal Procedure code frontispiece being stated the idea that no innocent person should be held criminally liable. By achieving this aspect of purpose is ensured observance of legality and the rule of law. All the basic rules and the whole organization of the criminal trial are polarized around this major goal of justice. Also the professional qualification level of those summoned to administer criminal justice in the modern state to minimize the risk of judicial miscarriages. The deep humanism of our law requires though the regulation of those procedural arrangements, through which in the event of an act of injustice, the wrongly convicted is able to obtain prompt repairs that society owes them. A very important aspect related to the evolution over time of the regulation of this institution, is that in its doctrine of integration in the European Union, Romania has adopted a series of laws and regulations designed to ensure our legislation's alignment with the relevant legislation of the countries from the European community and to ensure the compliance with the European Convention on Human Rights. This process is still ongoing, therefore the establishment and the subsequent modification of the special procedure concerning the remedies for the material or moral damage in the event of unjust sentence or unlawful deprivation of liberty was based on the desire to avoid the conviction situation of the Romanian state by the international courts for failure to comply with the Art. 5 paragraph 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms that 'any individual who is the victim of arrest or detention in conditions contrary to the provisions of this article shall have the right for remedy'.

Keywords: *unjust conviction, deprivation or restriction of liberty, unlawful, material damage, miscarriage of justice*

Introduction

Through the complex of procedural safeguards accompanying the performance of criminal justice in our country it is ensured the achievement of the criminal process objective, which, inter alia, consists of not punishing innocent individuals. Through the compliance with this aspect of the purpose of criminal proceedings it is ensured the observance of legality and the rule of law. The way in which it is disciplined the criminal procedure and the level of professional qualification of those who are called to perform criminal justice generally exclude the risk of miscarriages of justice.

The person who has been unlawfully or unjustifiably subjected to restrictive measures involving deprivation of liberty has the right to seek material or moral remedies under the Constitution Article 52 line (3) and the Criminal Procedure Code Art. 504- 507.

The legal criticized provisions are part of Chapter IV " Remedies for the damage to property or moral damages in the case wrongful conviction or unlawful deprivation or restriction of liberty" of Title IV "Special procedures" of the Criminal Procedure Code and determine who has the capacity to benefit from compensation, namely the individual who has been finally convicted after the retrial was reached a final judgment of acquittal, as well as the person who, during the trial, was deprived of liberty or who has been unlawfully restricted.

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The European Court itself, when granting moral compensations, it does not operate with predetermined evaluation criteria, **but in equity judgments**. The provisions of Art. 505 of the Criminal Procedure Code established the criteria by which it determines the compensation for damages but does not establish the criteria to quantify them.

Liability for unjust conviction or for taking unlawful preventive measures - Special procedure Art. 504 -507 Code of Criminal Procedure

Established as a fundamental principle, the inviolability of an individual consists of the right of every person to be free to act, the achievement of these attributes can be made only in the cases and under the conditions provided by law.¹

The current Constitution of Romania, revised in October 2003 has devoted in Article 23, individual liberty, indicating that the “Individual liberty and security of an individual are inviolable. Searching, detaining or arresting a person are allowed only in the cases and under the procedure provided by law”

However, in our view, the constitutional provisions included in Article 23 are partly too detailed and are practically substituted to provisions which, in this matter must find their place in the Criminal Procedure Code.

Guaranteeing personal freedom as a fundamental principle acquired a new regulation and the Criminal Procedure Code in force in 1990, regulation which anticipated the constitutional provision.² In Articles 4 and 5 it is stipulated the possibility of the person against who was applied an unlawful or unfair preventive measure, to request remedies for the suffered damages.

Observing the rules with ranking principles of the Constitution and the Criminal Procedure Code, it follows that, according to the regulations of our country, deprivation of liberty or restriction of personal freedom in any other form is possible in right enforcement practice, but only following a judicial activity of criminal nature. The restriction of personal freedom may occur either as a preventive measure taken during the criminal trial, or as a custodial sentence placed at the end of the criminal case resolution by final judgment of the court.

If the restriction of freedom following the application of criminal sanctions as freedom depriving penalties is not evident outside the known outstanding issues in substantive law, regarding the restriction of freedom by taking preventive procedural measures were formulated numerous criticism.

Arguably no other institution of criminal procedural law has been challenged so strongly, especially in some doctrines as deprivation of liberty preventive measures.

The guarantees of freedom of the individual in criminal proceedings can be found in the regulations in which preventive measures may be stipulated, the competent authorities to require taking the preventive measures, the duration of preventive measures and checking the legality preventive measures.³ Guaranteeing personal freedom is the fundamental principle stipulated in the Constitution, the European Convention and the Criminal Procedure Code according to which during the criminal proceedings no person may be detained, arrested or deprived in other way of freedom nor subjected to any form of restriction of freedom than that in the cases and under the conditions provided by law. Through the right to liberty it is understood the right to physical liberty of the person (the classic meaning of individual freedom *liberte d'aller et de venire*), which consists in the ability to move, to travel freely. An individual is deprived of liberty by ordering the detention, administrative management at the police station, preventive arrest, provisional arrest in the view of

¹ I. Neagu, *Tratat de procedură penală. Partea generală*, p. 90.

² The Law No. 32 was adopted in November 1990, one year before the Constitution.

³ This convention was adopted in New York on 10 December 1980. România acceded to the Convention by the Law No. 19 of 10 October 1990, published in Official Gazette no. 112 of October 10, 1990.

redemption or issuing an European arrest warrant, of security measure disposition of the internment, as well as in the case of the main penalty execution imprisonment or life imprisonment or the educational measure of admission into a rehabilitation center or a medical educational institute. There will be a restriction of freedom of movement of persons by forming the obligation not to leave the city or country.

If the person deprived of his liberty by preventive arrest or hospital admission, or one whose liberty has been restricted by imposing the obligation not to leave the city or country considers that the measure is illegal is entitled to make a complaint before an independent and impartial court body in which to challenge the legality of the measure to which it is subject. The final judgments taken by the court in this matter can not be rated as force of *res judicata*, a new request for revocation or replacement of deprivation of liberty measure can be made at any time. The person under preventive custody may request throughout the trial a provisional release under judicial control or on bail. The person who has been unlawfully or unjustifiably subjected to restrictive measures involving deprivation of liberty has the right to seek compensation for material or moral suffered damage.

Both the Romanian Constitution, Article 52 paragraph 3 and Criminal Procedure Code, Articles 504-507 provide the possibility to initiate a civil action for damages against the Romanian state in the case of deprivation or restriction of liberty unlawfully or unfairly convicted. The compensation for the prejudice may be required in all cases in which the state authorities commit abuses of law or manifest negligence, because Article 52 of the Constitution points out exercising this right by those interested regardless the nature of the followed procedure, without reference to conducting a criminal trial.

In case the remedies for the damage were awarded according to Article 506 and if the Romanian state was condemned by an international court of law, the recourse against those who, in bad faith or serious negligence, caused the damage generating situation is mandatory. The state may recourse against the official subjects (judges or prosecutors) whose responsibility will be held in relation to their procedural guilt.

As a result of amendments brought by Law 281/2003 the content Article 504-507 was fortified in order to increase the guarantees offered by the fundamental principles governing the criminal procedure, namely bringing the proceedings will take into account not only material damages, but also the moral damage, mental trauma caused by unjust conviction or unlawful deprivation or restriction of liberty. This extension of the special procedure object is the effect of the amendments to the criminal procedure law under which the compensation of moral damages caused by criminal offences was expressly stipulated.⁴ The necessity of compensation for the moral damage can be observed in specialized literature⁵ prior to Law no. 281/2003.

Conditions provided by Art. 504 -506 of Criminal Procedure Code to formulate the compensation action by the injured person by the committing a miscarriage of justice: In criminal matters, the cases of miscarriage of justice, respectively the cases in which the injured party is entitled to compensation for damages caused by miscarriage of justice in criminal trials are set by Article 504 of the Criminal Procedure Code: the person who received a final sentence is entitled to compensation for the suffered damage by the state, if following the retrial it was reached to a final judgment of acquittal. Is entitled for compensation the person who, during the criminal trial, he was deprived of liberty or he has been unlawfully restricted from freedom.

1. For the first case, of **unjust conviction**, the initiation of the compensation court implies the fact that certain conditions have to be met:

a) *the existence of a final judgment of conviction*. It cannot constitute grounds for exercising such action a criminal judgment of conviction which is not final. Judgment in question must be force

⁴ I.Neagu *Tratat de procedură penală. Partea specială*. p.631.

⁵ G.Antoniou, E.Dobrescu, T.Dianu, Gh. Stroe, T.Avrigeanu, *Reforma legislației penale*, Ed. Academiei Române, București, 2003, p. 280.

of *res judicata* and establish the existence of the offense, its commission with guilt by a natural or legal person to order its conviction either to imprisonment, or fine or penalty for individuals or the fine for legal entities. It is irrelevant whether the imprisonment penalty was ordered execution in detention or ordered with the suspension on parole or supervised suspension of penalty or its execution at the workplace. It is irrelevant whether the imprisonment was put into effect or not. *Promoting and accepting of extraordinary appeals after which it is ordered the originally convicted defendant's discharge.* The final conviction may be canceled by means of annulment appeal, be revision, or in case of rejudging the missing persons. The final conviction does not necessarily imply enforcing the judgment. Therefore, it can serve as a basis for the exercise of redress, both final conviction not followed by execution and especially unjust condemnation followed by execution. The differences between these two situations, however, have implications in determining the extent of the damage, not admissibility of the application of the remedies.⁶

The restriction of initiation of the special remedies procedure was mentioned in the specialized literature.⁷ The same solution was definitive also for Constitutional Court⁸, which stated that limiting the possibility of obtaining remedies for miscarriages of justice is inconsistent with the Romanian Constitution.

Through the declarative interpretation of the provisions of Article 504 paragraph 1 it is reached to the exclusion of the liability of patrimonial state for non-convicting solutions provided according to Article 10 letters f)- j), the judicial error will be withheld only in case of final convictions, provided that in that case the criminal proceedings were unfounded. The compensation right arises only after the cancellation or dissolution of the final conviction, the courts of law pronounce following a retrial a final acquittal decision based on any of the cases specified in Article 10 paragraph 1 lines a) to e).

2. The second case- Remedies for the damage in the case of unlawful deprivation or restriction of liberty.

Unlawful deprivation or restriction of liberty should be determined, as appropriate, by order of the prosecutor to revoke the deprivation or restriction of liberty measure, by ordinance of discontinuing the criminal prosecution or termination of the criminal prosecution for the cause provided for in Article 10. Paragraph 1 letter. j) or by court decision to revoke the deprivation or restriction of liberty measure by a final acquittal decision or by final decision of cessation of criminal procedures for the case provided in Article 10 paragraph 1 letter j). It is necessary that the preventive measure in question or the security measure of provisional admission to have been ordered with the violation of the laws under either the Criminal Procedure Code or the European Convention. And in a situation where deprivation of liberty was legal, but **unjustified**, the state may occur liable, as per E.C.H.R., since only the unjustified nature of the measure itself can be determined by the acquittal judgment or the cessation of criminal procedure.

In the case a finding of an unjust conviction or unlawful or unjustified deprivation or restriction of liberty, the injured person is entitled to claim compensation for material or moral prejudice from the Romanian state, represented by the Ministry of Public Finance by means of a civil action in tort.⁹

⁶ I. Neagu *Tratat de procedură penală. Partea specială.* p.633.

⁷ Theodoru V.p.624.

⁸ Constitutional Court, Decision no. 45 of March 10, 1998 (Official Gazette no. 182 of 18 May 1998)

⁹ The provisions 998-999 of the Civil Code on liability in tort shall not constitute grounds for engaging the state liability for miscarriages of justice. The legal regulation that establishes in what does the judicial errors consist of, for which the state can be held liable is Article 504 of Criminal Procedure Code compared to Article 52 paragraph 3 of the Romanian Constitution, which states that the State bears patrimonial liability for damages caused by miscarriages of justice. The liability of the state is a direct one, but only limited to the damages caused by judicial errors in criminal proceedings. Also the provisions of Article 504 paragraph 1 of Criminal Procedure Code does not constitute an application of Article 998-999 of Civil Code, such an interpretation could lead to the idea that the state, THROUGH the

In the event that, in criminal proceedings have occurred moral or material damage was caused by judicial errors, the patrimonial state will be held liable. It is about a tort liability law of the state which is legally based on Articles 998-999 of the Civil Code and also on the regulations of Articles 504-507 of the Criminal Procedure Code which provide remedies for the material or moral damages in the case wrongful conviction or unlawful deprivation or restriction of liberty.

The provisions of Articles 998-999 of the Civil Code refers to the obligation to repair of a damage caused by an unlawful act, without distinguishing whether it is a material or a moral injury. Although the law did not expressly provide, it was considered that if the legislature has used the concept of damage he wanted to protect all the rights of one individual who was harmed by committing an illegal act and has provided without distinguishing the nature of the prejudice, that any damage should be compensated, he made implicit reference to both physical damage as well as to moral damages. In order to avoid these discussions, the draft of the new Civil Code expressly states the provisions of Article 1095 paragraph 1 that the compensation obligation and the liability in tort is committed for all to material, injury or moral damage brought to a person's negligence.

In determining the extent of repairs it is taken into account the length of deprivation of freedom or restriction of liberty suffered and the consequences on the individual or family of the one deprived of his liberty or whose liberty has been restricted. The repair is the payment of a an amount of money or, taking into account the conditions of the entitled to compensation and the nature of the suffered damage, the establishment of a lifelong pension or the obligation that, on the state's expense, the one deprived of liberty or whose liberty was restricted to be assigned a social and medical assistance institute. To the persons entitled to compensation who, before deprivation of liberty were employed, are being calculated on seniority as established by law, and while they were imprisoned. The compensation is supported by the Ministry of State Finance.

It is noticed that from the title name of Chapter IV relating to deprivation or "unlawful restriction of liberty" and the content of Article 504 paragraph 3 according to which only preventive measures are taken into account as reasons for limiting the exercise of the right to freedom, there are obvious discrepancies.¹⁰ We emphasize that the process of amending and supplementing the criminal procedure law, in general, and the analyzed special procedure, was particularly carried out having regard to the European Convention on Human Rights, which is established in Article 5 paragraph 5, that the individuals held prisoners against the law are entitled to compensation.

We consider that the present form of Article 504 paragraph 3 does not meet the requirements of the European Convention on Human Rights. Consequently, when developing a new Code of Criminal Procedure, *de lege ferenda*, either text in question will be completed to cover all situations in which the trial will operate an unlawful deprivation or restriction of liberty or will waive the rule in question. In the latter case, the jurisprudence solution for compensation is expected to be based on those procedural acts which have as their purpose finding the occurrence of the miscarriages of justice.

In these circumstances will be eligible for compensation the claims under Articles 504-507 in case the temporary release of the arrested defendant was rejected clearly unjustified.¹¹ Or for the case the revocation request of the prepreventive arrears was rejected, even though from the file results the disappearance grounds which led to taking the measure, which means that the continuation of legal proceedings involves the state of freedom of the one accused or convicted. In all cases,

Ministry of Public Finance, is limited and unconditional, situation in which legal rules governing the state liability in other areas are no longer justified since the principles of Article 998-999 of the Civil Code are generally applicable (High Court of Cassation and Justice, Civil and Intellectual Property Section, DECISION No. 422/2006, www.legalis.ro).

¹⁰ I. Neagu *Tratat de procedură penală. Partea specială*. p.634.

¹¹ E.C.H.R., Decision of 27 August 1992 in the case Tomassi against France.

demonstrating the illegality committed leads to retention of the existence of a deprivation of physical liberty in an arbitrary fashion.¹²

The same legal system is to be applied against the assumption that the defendant it was ordered illegally a temporary security measure. Thus, if the measure of safety to hospital care in the absence of data showing that the defendant is mentally ill or drug addict and is in a dangerous condition to society, it can be initiated the remedy procedure, justified by its the restrictive nature of freedom of the procedural measures.¹³

It is entitled to remedies for the suffered damage also the individual who was deprived of liberty after inverting the prescriptio, amnesty or decriminalization act.

The action of remedy can be initiated by the person who has been deprived of liberty or whose liberty has been restricted and after his death, may be continued or started by people who were dependant.

The proceedings may be brought within an established framework of 18 months calculated from the date of the final, where necessary, by court decisions (The court of law unlawfully may order the deprivation or the restriction of liberty in what concerns the defendant in preventive arrest, the obligation not to leave town, the obligation not to leave the country, the unlawful rejection of the request for provisional release, medical admission.) or of the ordinance the prosecutor to revoke the preventive measures (the detention, obligation not to leave town and obligation not to leave the country) on the one hand, or the ordinance not to proceed to judgment (by ordering the removal of a criminal investigation or the termination of the criminal prosecution)

It is an action whose resolution is a matter court in whose district the entitled person is exempted from judicial tax.

Compensation is allowed for both actual damage (*damnum emergens*) and for the loss of earnings (*lucrum cessans*). The injured person can not sue along with the state the magistrate or magistrates who issued the judicial decisions through which the unjust conviction or the unlawful deprivation or restriction of liberty was ordered.

According to the practice of the European Court of Human Rights when a person's fundamental rights have been violated by any measures that have been proved to be unfounded, the person is entitled to full compensation for the damage caused, of both material damage and moral damages. Unlike damage claims for material prejudice, to which damage must be certain both in terms of existence and the extent, at the action or moral damages the certainty may be only about the existence of the damage, not the extent of it. **The amount of moral damage is assessed in terms of general criteria at the discretion of the judge.** This is fully justified by the fact that moral damages can not be determined by strict abstract rigors, since it varies from person to person, depending on the specific circumstances of each case. With regard to the moral damage, the literature and legal practice have pointed out that the court should not be limited to a determination of its existence as such, it is obliged to identify the elements that would determine the seriousness of the damage¹⁴ The Former Supreme Court of Justice – The Civil Section decided that moral damage consisting in the honor or the reputation of a person or other psychiatric sufferings, justifies the granting of such compensation which shall be determined by general appreciation, but taking into account the criteria resulting from the specific case before the court of law.

¹² I. Neagu *Tratat de procedură penală. Partea specială*. p.635.

¹³ M. Damaschin, *Condamnare sau dispunere a unei măsuri preventive pe nedrept. Despăgubiri*, în R.D.P., nr 3, 2004, p. 79.

¹⁴ Ghe. Vintilă and Constantin Furtună – *Daunele morale – Stadiu de doctrină și jurisprudență* – Ed. Allbeck, București 2002, pag. 116-131).

The legislature has provided that the entitled persons, who before the deprivation of liberty were employed, they are being calculated, aside from the seniority established by law also the time in which they were imprisoned as remedies for the damage.¹⁵

The existence of moral damage should not be proven (unlike the material damage), but it is justified as a matter of discretion, taking into account non-property rights or interests affected, such as the right to liberty, bodily integrity, health, honor, reputation and so on, respectively the physical and mental suffering caused by the violations of these fundamental values of the human person - protected now by the Constitution and the E.C.H.R.. A quantification of moral damages or a "measuring" of the sufferings cannot be achieved by technical, accurate evidence, being a purely subjective matter, which must be concretely analyzed by taking into account the total of the circumstances related to the actual conviction (nature, duration, method of execution), as well as the adverse effects which it has produced both to family and professionally (ECHR, November 6, 1980, Guzzardi against Italy).

The European Court itself, when granting moral damages, does not operate with predetermined evaluation criteria, but **in equity judgment**. The provisions Article 505 of the Criminal Procedure Code establish the criteria by which it is determined the compensation for the suffered damage but do not establish the criteria to quantify them.

The need to maintain the public order, including the protection of any accused is a reason that may justify the extension of imprisonment. However, it can not be considered relevant and sufficient unless it is supported by facts showing that the prisoner release would actually affect public order. Moreover, **the detention is not legitimate unless public order is indeed under threat**.¹⁶

In its jurisprudence, the Court set forth four fundamental reasons acceptable to the preventive arrest of a person suspected of having committed a crime: the danger that the defendant would escape (*Stögmüller vs Austria*, November 10 1969, series A no. 9,); the risk that, once released, to prevent the administration of justice (*Wemhoff vs Germany* June 27 1968, 14), to commit new crimes (*Matzenetter vs Austria*, November 10, 1969) or to disturb public order (*Letellier vs France* and *Hendriks vs Netherlands* [Dec.], no. 43701/04, July 5, 2007). Moreover it decided that courts of law ruling with regard to the possibility of keeping the defendant in preventing arrest must consider all the specific relevant factors, which are able to confirm the necessity existence of this measure (*Mansur vs Turciei*, 8 iunie 1995,).

According to paragraph (5), Article 96 of Law no. 303, no person is entitled to compensation who, throughout the trial, **contributed in any way** in committing a legal error by the judge or the prosecutor.

In the concept of the legislature, only the absolutely innocent person (who has not committed any unlawful act that would attract criminal and extra-criminal liability is entitled to compensation from the state - Opinion separated at the Constitutional Court, Decision no. 45 of 10 March 1998 on the plea of unconstitutionality of the provisions of Article 504 paragraph 1 of the Criminal Procedure Code, published in the Official Gazette of Romania, Part I, no. 182 of 18 May 1998). According to the ECHR jurisprudence, the specific danger to public order it is understood as a "collective response to the offense" which, by its resonance affects the natural social balance, creates a state of indignation and disapproval, of fear and social insecurity, stimulates the fear that justice does not act strongly enough against criminal manifestations of pronounced social danger and may encourage others to commit similar acts. The Strasbourg Court has principally stated that, in time, the national authorities have the positive obligation to indicate specific elements to justify the arrest, respectively in each case the public interest.

¹⁵ Decision no. 1888/1991 – published in Rev.Law no. 7/1992, pag. 85).

¹⁶ *Letellier vs France*, June 26, 1991, 51, series A, no. 207).

The national court of law must to verify whether it is not possible to resort to other measures with the aim ensure the smooth running of the trial.¹⁷

The recourse action. According to Article 507 if the remedies for the damage have been paid to the wrongfully convicted person and whom was unlawfully relieved or restricted from freedom, as well as in a situation where the Romanian state was condemned by an international court, the recourse action against the person who in bad faith or serious negligence caused tortious situation is mandatory. In both cases, the recourse actions may be directed only against a judge or prosecutor, guilty of the crime of unjust repression¹⁸, misconduct in office, unlawful arrest¹⁹ and abusive research or the settlement of a criminal case in violation of the international human rights instruments ratified by Romania (violated following which the Romanian state would issue a conviction).

The civil liability of the judge or the prosecutor in relation to the provisions of Article 507 Criminal Procedure Code, for miscarriages of justice committed during criminal proceedings.

The conditions stipulated in Articles 504-506 of Criminal Procedure Code for the action formulation of compensations by the injured person by committing judicial error.:

1 The state bears patrimony liability for damages caused by miscarriages of justice.

2 In criminal matters, the cases of miscarriage of justice, or where the injured party is entitled to compensation for the damage caused by judicial errors in criminal trials are set by Article 504 of the Criminal Procedure Code: the person who was finally convicted is entitled to compensation for the damage suffered by the State, if after retrial it has been reached to a final judgment of acquittal. It is entitled to compensation also the person who, during the criminal trial, he was deprived of liberty or has been unlawfully restricted of freedom.

3 The existence of a decision of the judicial body that establishes the existence of judicial error:

a) In case of incorrect conviction a final acquittal judgment is necessary rendered following the retrial; given the previous criminal procedural provisions, the restriction of initiating special remedies was mentioned.

b) In the case of unlawful deprivation or restriction of liberty:

1 the prosecutor may observe the error by revocation ordinance of the restrictive measure or deprivation of liberty, discontinuing the criminal prosecution or terminating the criminal prosecution for the cause provided for in Article 10 paragraph 1 letter j (force of *res judicata*) of the Criminal Procedure Code.

2 the court of law may find the error by dismissing decision of a restrictive measure involving deprivation of liberty, by a final acquittal decision or final cessation decision of the criminal procedure of the case provided for in Article 10 paragraph 1 letter j) of the Criminal Procedure Code.

3 To compensate for the the damage, the injured party may take action only against the State, represented by the Ministry of Public Finance.

4 The limitation period of the right of action against the person who takes action against the state is of 18 months from the date of the final decision, if necessary, of the court decisions or the prosecutor ordinances, according to Article 506 Paragraph 2 of the Criminal Procedure Code.

5 The action is exempt from stamp duty.

¹⁷I.C.C.J., Decision no. 1345 of April 8, 2010.

¹⁸The unjust repression consists in the act of activating the criminal proceedings, or ordering the arrest, of prosecuting or convicting a person knowing that he is innocent Article 268 of Criminal Code.

¹⁹The offense of unlawful arrest and abusive research is provided in Article 266 of Criminal Code, which states inter alia that illegal arrest or detention shall be punished with imprisonment from 6 months to 3 years.

According to Article 96, paragraph 5 of Law 303/2004 regarding the statute of judges and prosecutors, republished²⁰, is not entitled to compensation in the process the person who, during the trial, contributed in any way to the unlawful deprivation or restriction of liberty.²¹

The conditions stipulated by Article 507 of Criminal Procedure Code for the recourse action made by the state against the judge and the prosecutor.

1 Only the state can make recourse action against the judge or prosecutor to recover the compensation paid to the injured party by committing the legal error.

2 Compensating the damage was granted by the State pursuant to a final judgment. This aspect excludes the possibility that during the trial, the state to which legal action was taken to call as a warranty the judge or the prosecutor who issued the solution that led to judicial error. Because the state can make a recourse action, the judgment should be pronounced against him is irrevocable and also to be executed.

3 The limitation period of the right of action for the state to make recourse action is of 1 year.

4 The person against whom the state is taking action, including the judge or the prosecutor, to have acted in bad faith or serious negligence. The Article 507 of the Criminal Procedure Code refers to any person who in bad faith or negligence caused a damage generating situation, which includes judges and prosecutors. The bad faith and serious negligence must be demonstrated during the recourse action brought by the state against the judge or the prosecutor.

By analyzing the conditions which have to be met in order to initiate the recourse action by the state against the judge or prosecutor result in two important **procedural safeguards**, namely:

1 **The direct inadmissibility of the action** filed by the injured person by committing the judicial error against the judge or the prosecutor. According to Article 504 of the Criminal Procedure Code and Article 96 paragraph 6 of Law 303/2004, an the compensation claim may be made only against the State, represented by the Ministry of Public Finance.

2 **The inadmissibility of the action under warranty** filed by the state, as owner of recourse action against the judge and prosecutor during the trial of the action for damages brought by the injured party by committing a legal error. Thus, according to the provisions of Article 507 of Criminal Procedure Code and Article 96 paragraph 7 of Law 303/2004, the state recourse may be made only after the delivery of a final judgment, and the damage was covered, so only after the decision was executed.

Conclusions

In summary, for the civil liability of judges and prosecutors (THE PROCEDURAL GUILT OF THE OFFICIAL SUBJECTS) for damages caused by judicial errors made in criminal proceedings shall be instituted, under the law, as appropriate, the provisions of Article 96 of Law 303/2004 or Article 504'-06 of Criminal Procedure Code, and secondly the recourse action (compensation) of the State against the judge or the prosecutor which it is subsequent action for damages, brought by the party. The Romanian legislator intended to regulate through a special procedure provided in Article 12. of G. D. No. 94/1999 the recourse of the Romanian state against the guilty persons led to its conviction at ECHR to pay certain amounts of money. The recourse may be exercised for any amount imposed on the state by the sentence of the ECHR, that not only provides sufficient amounts order any damage suffered as a result of human rights violations (moral and material damage) but also for expenses incurred by the injured party in the internal procedures and in the European court, in order to remedy the interference, the same as for the default interest rates established by the Strasbourg court decision in case of delayed execution. Considering that the text is states about "civil liability" that the exercise must be fulfilled regression of conditions a breach

²⁰ Official Gazette no. 826 of 13 September 2005, with subsequent amendments.

²¹ M.Udroiu, *Procedură penală*.

of the Convention, there is a final conviction pecuniary Romanian state, the causal link between the act and the injury, the existence of guilt and payment of the amounts to which the state was required. In terms of guilt presence, because the rule does not distinguish, it can take the form of guilt and blame. According to Article 12 line 3 of G.D. No 94/1999 the "civil liability" of judges is determined under conditions which will be governed by the law of judicial organization. These conditions have never been regulated by Law no. 92/1992 of Law no. 303/2004, and in the absence of proper regulation in the law of judicial organization reference made remains enigmatic.²²

In conclusion it is intended to amend and complete the Law no. 303/2004 regarding the the statute of judges and prosecutors, and amending and supplementing the Code of Criminal Procedure, is structured on the following regulatory principles:

- ensuring the effective possibility for the person who has suffered damage to claim compensation

- determining the cases that are right to remedies for the damage.

- strengthening the state's role as guarantor of compensation for the damage suffered by individuals.

- ensuring the independence of of judges and prosecutors in discharging their functions

- determining the cases in which the recourse action can be made as well as determining its basis.

- the conceptual delimitation of the notion of "bad faith" and "serious negligence".

- the conclusion of civil liability insurance for judges and prosecutors.

The social impact that a new law project will have is that it will lead to an improved perception of the judicial system by increasing confidence in achieving work of justice and at the same time will increase the accountability of judges and prosecutors in discharging their function.

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²² Revista Forumul Judecătorilor nr. 3/2010 p.33.