COMPENSATION FOR INDIVIDUAL PREJUDICE IN EUROPEAN LITIGATION OF HUMAN RIGHTS

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Abstract
This paper aims at presenting some problems regarding individual prejudice, by invoking the European Convention on Human Rights. Starting from the fact that the Convention lies in the approach of positive law in the sense of creating a legal regime of rights and freedoms by establishing a system of protection through legal proceedings, of the individual, acting as a guarantor, jurisprudence exercise transferred the interest for repairing damages caused by the violation of rights that require satisfaction of some compensation measures in the form of damages. So, repairing methods are achieved by equitable satisfaction.

Keywords:
satisfaction, law, moral damages, democratic governance, human rights.

JEL Classification: K41.

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I. INTRODUCTION

Mainly compensation for individual damage methods by granting of just satisfaction, consist of measures intended to repair the whole or partial damage by equivalent, where cannot be made repairs in nature.

European court practice focuses on two situations: one classical - which provided historical equitable satisfaction in the form of monetary compensation or by the finding of violation of the right, and a recent one- evolutionary, which discussed measures aimed to restore the applicant to pre-violation situation.

In this we are agree with Ms. Corina Popescu opinion, who believes that equitable satisfaction in Art. 41 sense from Convention, is due to the fact of how to repair the damage caused by the detected violation when *restitutio in integrum* is not possible, either because of the provisions of domestic law, or towards the very nature of the violation.

The approach is justified much more by art. 46 of the Convention\(^3\), which refers to the return of injury in nature, meaning to restore to pre-rights violation position, of the applicant.

Therefore prejudice compensation by equitable satisfaction can be made by moral path, when the rights violations is observed, or by material path, as monetary compensation.

Both situations are registered under the standard of compensatory damages.

I.2. MATERIAL PREJUDICE - PECUNIARY COMPENSATION AND LOSS OF EARNINGS

The provisions of art. 50 (now 41) of the Convention emphasizes that the concept of balanced satisfaction mean only pecuniary compensation. The concept could not be modified neither by the European Court nor by the Committee of Ministers, because they don’t have the necessary competence to impose the condemned state to a certain action in response to observing violation of individual rights\(^4\).

In this context is emphasized declaratory nature of the judgment of the European Court, regarding observation of the existence of individual rights violation, so confirming the part of the decision device, which oblige the respondent State to pay a sum of money. Seen from another perspective the


judgment of the European Court has a providing character, as in the situation described is invoked an executable obligation, therefore the result.

Pecuniary allowance includes material or moral damage suffered by the applicant, plus coverage of legal expenses and moral damages.

I.2.1 COMPENSATION FOR MATERIAL DAMAGE

According to the request for granting equitable satisfaction, the applicant must be restored, to the extent possible, in the situation that he would have been if there would been no violation, which would include compensation for the incurred loss and compensation for the loss or lack of earnings on which the applicant must expect in the future.

This principle corresponds to a general thesis which includes two elements, namely: the obligation of repair, induced by the common law rule, in case of prejudice and the existence of the concept of lost profit reparation.

Although the effective compensation for the damage is based on the principle of fairness of satisfaction, but in the common law rule one of the essential and necessary condition is the certainty of that damage.

According to the Annex to Regulation Court's, regarding the request for just satisfaction, the applicant with his made request, may obtain compensation for the loss incurred and compensation for the loss or lack of earnings which he was expected in the future. Although sometimes this future gain demonstrates an uncertainty in most cases, the Court accepts its repair.

Actual pecuniary prejudice consists of patrimonial loss, suffered by the applicant, as a result of found violations. Unlike the loss of earnings, actual damage can usually be easily proven, demand cause will fall under Art. 41 of the Convention.

It should be noted that the Court jurisprudence, retained the principle according to which "the basis of compensation for pecuniary damage can only be the situation that would have existed without the observation of violation". Therefore the notion of economic loss is considered by the Court as the output value from applicants’ patrimony, those violations that generates such losses are those that refers to goods such as ownership, as it is guaranteed by art. 1 of Protocol No. 1 of the Convention.

Also can be alleged violations of other rights than the ownership right, in the case when the violation of other rights and freedoms, leads to applicants' patrimonial material losses.

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In cases involving violation of property rights, jurisprudence is evolutionary. So by judgments given in *Papamichalopoulos and c Greece*\(^7\) cases, the solution given by the Court requires that the Greek State has to refund disputed lands to the applicant within six months, and in the absence of such refunds, to pay full compensation for pecuniary damages. Disposed solution will represent a model which will then be applied to the Brumărescu c Romania\(^8\) case.

The conclusion is that in cases where there is violation of property rights, the Court has ordered the State obligation to restitution of the property in nature, pursuant to art. 46 paragraph 1 of the Convention, and otherwise, when the respondent State demonstrates with evidences that is unable, he must pay compensation in accordance with art. 41 of the Convention.

So it can be noted that material prejudice reparation under art. 46 paragraph 1 of the Convention, by measures that come to restore the applicant to the pre-violation situation, excludes from the application art. 41 of the Convention which refers to the granting of just satisfaction.

More, in addition to material compensation, the Convention and its Protocols takes into account the loss of earnings, which is the lack of a gain in assets of the applicant, which would have been obtained without the violation of rights or freedoms. Loss of earnings, compared to the actual damage, is characterized by uncertainty, because it consists of a temporary element situated after the time of the violation, which include the term hazard.

In this sense, we discussed the given judgment in *Editions Plon c France*\(^9\) case, although was observed the violation of art. 10 of the Convention by prohibiting dissemination of a book, the Court rejected the applicant's request to grant an indemnity for loss of earnings, consisting of profit obtained from the sale of the book, assuming that profit would have been random.

The problem of lost profit is the subject of discussion, especially in cases concerned with the violation of property rights, because it assumes that besides the obligation to return the goods or to pay the compensation, equal to the value of the property, the applicant is prejudiced by the lack of property usage.\(^10\)

Therefore the conclusion that emerges is that loss of earnings is the subject of repair. In this sense, the Court has several options available, either accepts the evidences and the quantum proposed by the applicant or has an expertise, or states in equity according to the circumstances of the case, or rejects the application as unfounded.

Consequently, the respondent State at the option of the Court, if it accepts the request on loss of earnings is obliged to pay pecuniary indemnity which covers the lost profit.

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\(^8\) C.E.D.O. Brumărescu c România art.41, Case from 23 ianuarie 2001.


\(^10\) A se vedea în acest sens C.E.D.O. Loizdou c Turcia, art. 50, Case from 28 july 1998.
In this sense, specialized literature motivates the situation presented above by the fact that the Court should give with title of satisfaction not only a pecuniary indemnity designed to repair the actual damage, but also pecuniary indemnity intended to compensate the loss of earnings, which may consist of effective earning loss when the claimant proves that they could have achieved a certain gain, which didn’t get because of the found violation, either in unrealized benefice inherent to the needed period for compensation of actual prejudice.¹¹

**I.3. COMPENSATION FOR MORAL DAMAGE**

Damage is composed not only of patrimonial goods but also of personal rights, so the Court defined the moral prejudice as "a state of anxiety, disapprovals and uncertainty resulting from the violation, and other non-material damages".¹²

From this definition we consider that it quite difficult to elucidate how to pay moral damages or how can be such injury repaired financially.

For demonstrative reasons of moral damage, Court decides on the application of art. 41 form Convention, based on equity, pooling values of material prejudice with the moral ones, thus giving a total sum of money representing the entire suffered loss.

Although the Annex to the Rules of Court, indirectly specifies that when it comes to moral damages, there must be taken in consideration the physical or mental distress, which establishes by violation of rights, jurisprudence derogates from the basic rule, giving in subsidiary of the application the admission of the moral prejudice.

The Court considers that in principle any violation causes harm to the moral of the applicant, which may consist of feelings of distress and anxiety, helplessness and frustration, injustice or in adversity effects to applicant’s image.

Therefore even if the complainant argues in the subsidiary that there is a moral damage, it will be dealt with unanimously along with the monetary prejudice.

**I.4. CONCLUSIONS**

The jurisprudence of the European Court regarding the application of art. 41 of the Convention does not encompass all situations which lead to a lack of transparency, by showing that it is unpredictable, random and incorrect.

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¹¹ Popescu Corin Ruxandra, op. cit. p. 234.
Applying different solutions on similar facts, which refer to the same prejudice repair, demonstrates the inconsistency of the European Court solutions.

If on finding the existence or absence of the alleged violation, the Court’s jurisprudence is unitary, regarding just equitable satisfaction, the solution is unpredictable, especially on the amount of monetary compensation. This ascertainment would be a real reason for the applicant to not be asked for moral and material injury recovery.

The conclusion that emerges is that the current practice, which aims reparation by ascertainment of violation itself, is contrary to the letter and spirit of art. 41, requiring the removal of it, just by granting satisfaction in other forms, even only moral, not necessarily monetary.

In the context when European Court requires a large number of complaints, the applicant is less interested in theoretical legal issues, being interested in terms and quantum of reparation claimed. In this context the Court must evolve according to the spirit of the Convention and of the Protocols which completes it.

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