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# The Evolution of the Regulations regarding the Right to Compensation for Judicial Errors in Criminal Trials - Based on the Influence of International Conventions, National and ECHR Jurisprudence

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**Abstract**: *The legal institution regulated by art. 505-507 of the Criminal Procedure Code represents the last step of the complex of procedural guarantees subsumed by the notion of purpose of the criminal trial. The entire regulation in criminal procedural matters has in mind this axis, of finding out the truth, in the event that the mentioned finality would not be achieved by resorting to the procedural remedy of the ordinary and extraordinary appeals, so that, in the end, the court decision, once definitive, is considered the expression of the truth (res judicato pro veritate habetur). It was noticed, however, that the elimination of errors by means of the above-mentioned procedure does not always lead to the removal of all the consequences of an unjust act of justice, due to the consequences they generate, specifically, for on the person who was previously subjected to judgment. As a result, the legal provisions regarding the reparation of damage in case of false conviction or ilegal arrest are emerging as a complementary institution to the criminal process, necessary for the execution of justice and the restoration of the legal order.*

**Keywords:** *judicial errors; compensation for judicial errors; illegal deprivation of liberty; illegal conviction.*

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## Introduction

Although by criminal judicial errors we mean the wrong establishment of the facts during the criminal trial, resulting in the final conviction or wrongful arrest of an innocent person or the false exoneration of a person accused of committing a crime (Antoniu, 1989, p. 99), in this paper we propose to analyze exclusively the first situation presented in the definition above. In addition, it should be mentioned that the notion of judicial error is based on mistakes determined by the low degree of professional training or the limited experience of those who apply the law (Huidu, 2019), not by situations when there may be some mistrust in the way that the persons involved in solving the cases fulfill their duties, when the presumption of impartiality and objectivity that concerns them is called into question (Chișu, 2004, p. 152). For the latter situations, the legislator provided for adequate procedural remedies, such as the procedural institutions of incompatibility, abstention and recusal (Apetrei 1999; Boroi et al., 2002; Chișu, 2004, p. 151).

In the hypothesis of the occurrence of judicial errors, once their existence has been recognized in the ways provided for in the Code of Criminal Procedure, their legal consequences will cease for the future, but *ex tunc* the damage has already been caused, therefore, the issue of reparations arises for the respective person. As observed in the specialized literature (Chișu, 2004, p. 152), compensation appears as a right of the one affected by a judicial error and as an obligation of society (Apostu, 2018).

## 1. The legal nature of the institution of repairing material damage or moral damages caused by judicial errors

The state's liability for judicial errors falls, in its essence, between the forms of tortious civil liability, being similar, in legal nature, to the liability of the employer for the deed of the employee. From this point of view, the issue arises of establishing the conditions under which the state will be liable for damages caused by illegal convictions or preventive measures.

First of all, it should be mentioned that, being a subdivision of tortious civil liability, it is necessary for this form of liability to verify the fulfillment of the four conditions required by civil legislation in the matter: the existence of a damage, an illegal act, the commission of the act with guilt and the causal link between the damage and the illegal action. With reference to the damage, in order for it to exist, it must be certain, personal, direct and must result from the infringement of a right or a legitimate interest (Stătescu

& Bârsan, 2002, p. 154) (in our case it is the right to freedom and to a fair trial). As regards the requirement of committing an illegal act, this condition is required by the very title of Chapter VI of Title IV of the Code of Criminal Procedure, which requires that the restriction of liberty was imposed illegally or the sentence was ordered unjustly. In the matter of guilt, the specialized literature (Petre, 2005, p. 99) appreciates that this must be seen in relation to the duty of the state to ensure all the conditions so that judicial errors are not committed and to show care in the election and appointment of magistrates. Therefore, the liability will belong to the state, as justified by the objective liability theory (Stătescu & Bârsan, 2002, pp. 212-213), which is based on the idea of activity risk or the obligation to guarantee for one's activity.

In other words, it is necessary to differentiate between the liability of the state for judicial errors - as a special form of liability - and the liability of the empoyer for the deed of the employee - with which the former is similar. It should be stated that the state and the magistrate are not jointly liable, as it happens in civil law, the victim being able to sue the state exclusively, not having the right of option, in the sense of choosing to go sue directly against the judge/prosecutor. In addition, the state cannot even call the magistrate as a guarantee – we must not confuse this aspect with that of the regressive action for gross negligence -, as the state is liable regardless of the form of guilt with which the magistrate acts, because the desire is to grant protection equally for the victim (to recover the damage from the most solvent party, and the state is always considered to be solvent), as well as for the judge/prosecutor (who cannot answer directly to the injured party in any situation, unlike civil law, where solidarity is provided as an additional protection measure exclusively in favor of the victim) (Petre, 2005, p. 99).

## 2. Concordance of the texts of the Criminal Procedure Code with the provisions of the Romanian Constitution and international conventions and pacts to which Romania is a party

The legal institution of state liability for judicial errors caused in criminal trials was enunciated for the first time, in terms of the conditions and rules on the basis of which liability can be engaged, in the European Convention on Human Rights ( Council of Europe, 1950 ). Art. 5 of the Convention provides, in the text of para. 4, that any person deprived of his freedom by arrest or detention has the right to file an appeal before a court - according to the concept of *appeal,* the European Court of Human Rights understands any form of protest that corresponds to an appeal provided by

the procedural legislation of a member state to the Convention -, for it to rule in a short term on the legality of their detention and order their release if the detention is illegal (Predescu, 1996, p. 182 ). It follows that, in para. 5, it is expressly stated that any person who is the victim of an arrest or detention under conditions contrary to art. 5 of the Convention, which in par. 1-3 list the conditions referred to in par. 5, has the right to indemnification (Predescu, 1996, p. 182 ). In addition, art. 3 of the Additional Protocol no. 7 of the Convention establishes: "when a final criminal conviction is subsequently annulled or when pardon is granted, because a new or recently discovered fact proves that a miscarriage of justice has occurred, the person who suffered a punishment because of this conviction is compensated according to the law or practice in force in the respective state, except when it is proven that the failure to discover the unknown fact in a timely manner is attributable to them in whole or in part" (Predescu, 1996, p. 211; Romanian Parliament, 1994 ).

Later, the "International Covenant on Civil and Political Rights" ( General Assembly of the United Nations, 1966; Council of State, 1974 ), in art. 16 point 6, takes up these provisions, under the following wording: "when a definitive criminal conviction is later canceled or pardon is granted, because a new or newly discovered fact proves that a judicial error occurred, the person who suffered a punishment as a result of this conviction shall receive an indemnity in accordance with the law, except in the case when it is proved that the failure to timely discover the unknown fact is imputable to them, in whole or in part" (Council of State, 1974).

Until the adoption of the 1991 Constitution, no fundamental law of Romania expressly provided for the right to compensation for judicial errors (that is, before the amendment and republication of the Constitution in 2003), establishing, by art. 48 para. 3 that "the state is patrimonially liable, according to the law, for damages caused by judicial errors committed in criminal trials" (Dianu, 1997, p. 53). However, it was only in 1994, with the ratification of the European Convention on Human Rights by Romania, that it was possible to state that the right of Romanian citizens to compensation for judicial errors received all the inalienable guarantees for its full exercise.

We also come up with an evocative example in this regard, namely the case of Marian Romanescu v. Romania, judged by the ECHR in 1995 (European Court of Human Rights, 1995). The applicant, a former member of the Security, was arrested, starting on December 22nd, 1989, twice, for a period totaling 40 days. As a result of this, the person suffered a form of depression, which led the employing unit to order his retirement due to illness. The plaintiff contested the retirement decision and, as a result, he

was admitted to the Military Hospital in Bucharest, where he was subjected to particularly strong medical treatment. In the same period, a civilian psychiatric commission established that M. Romanescu did not suffer from any mental imbalance. However, the military forensic commission diagnosed him with paranoid schizophrenia. In 1990, the person filed a complaint with the military prosecutor's office, demanding the criminal liability of those whom he considered guilty of the trauma he had suffered. As a result of this fact, criminal proceedings were initiated against the commander of the unit to which the plaintiff belonged, a criminal prosecution which subsequently ceased, based on art. 10 letter f of the the into force Code of Criminal Procedure (Romanian Parliament, 2014).

On two occasions (1993 and 1994) a commission of the Mina Minovici Institute, through the psychiatric re-examination of the plaintiff, established that he was mentally healthy. Starting with 1993, M. Romanescu's right to pension was revoked, because he refused to submit to a new psychiatric examination, before a military commission, which he considered lacking in impartiality. In December 1993, the applicant filed an action at the Bucharest Court of Appeals against the Romanian Intelligence Service and the Ministry of Defense, requesting compensation for the measures taken against him, the annulment of the retirement decision, as well as the connection of the case with the one opened by the Military Prosecutor's Office on the occasion of his first complaint.

The Court observed the fact that Romania ratified the European Convention of Human Rights on June 20th, 1994, therefore its provisions would only apply to facts that occurred after its entry into force, according to Romanian law. In the present case, the Court thus declared itself not competent *ratione temporis* to judge regarding the facts that happened before the ratification of the Convention by Romania, as it appears from art. 27 para. 2 of the Convention. Nevertheless, the Court considered that it can assert its competence based on art. 6 para. 1, which establishes the right to a fair trial, considering that it is possible to issue a decision on whether the proceedings before the Romanian courts regarding the material damages requested by the plaintiff have - or not - a reasonable duration in time, but this too only with regard to the duration that has elapsed since the date of ratification of the Convention by Romania. That period of time (10 months), however, being considered reasonable by the Court, it declared the plaintiff's request as inadmissible, therefore rejecting it. The conclusion was that until June 20th, 1994 Romanians did not benefit from protection of the international court with regarding their rights.

In art. 52 para. 3 of the republished Romanian Constitution (Chamber of Deputies, 2003; Romanian Parliament, 2003a), the text of this article was modified as follows: "The State is patrimonially liable for damages caused by judicial errors. The liability of the state is established under the terms of the law and does not remove the liability of magistrates who exercised their function in bad faith or with gross negligence" (Chamber of Deputies, 2003; Romanian Parliament, 2003a).

The amendment of the fundamental law under this aspect requires a series of clarifications. First of all, it appears obvious that, in the new form, the responsibility of the state for judicial errors committed *exclusively* in criminal trials was no longer expressly provided for, no distinction being made in this regard. As it was also observed in the doctrine, the problem of involving this form of responsibility in other types of trials than criminal ones was rather little addressed, on the grounds that the regulation of such an institution regarding other types of cases would be, on the one hand, unjustified, and on the other hand, it would also be difficult, because it is difficult to determine who establishes and according to what criteria it can be established that a judicial error was committed, with the exception of those in criminal matters. In these situations, it can be determined much more clearly if there is a judicial error, and a clearer distinction can be made between truth and error (the act was committed or not, by a certain perpetrator or by another etc.), unlike other branches of law, in which the judge resorts, most of the time, to an interpretation of the legal norms, which have a predominantly dispositive character, and of the legislator's will, according to equity and the judge's own conscience.

In addition, in criminal cases, more than in other fields, judicial errors have a much greater impact on the people involved, reaching some of the most important values, such as individual freedom, the inviolability of the domicile, freedom of movement and, in some legal systems, even the right to life (Petre, 2005, p. 97). We believe that the opinion expressed above is, indeed, thoroughly argued, but, although due to the lack of contrary examples, it appears to be completely justified, and a *de plano exclusion* of the possibility of incurring the state's liability for judicial errors in other types of cases is not the most beneficial solution, because it would violate both the right of any citizen to free access to justice, and it could also lead to unfair situations. On the other hand, however, we point out the lack of regulations in the matter of procedural provisions from other branches of law, through which to give substance to the constitutional text, which, in their absence, appears as a purely doctrinal approach.

In a different approach, but in connection with the discussion above - the elimination of the phrase "in criminal trials" -, the domestic jurisprudence addressed the issue of the illegality of the institution of contraventional prison, on the occasion of the trial of a case by the Craiova Court of Appeal (Drăguţ, 2005 ), as a result of the legal basis of the state's liability in the event that the deprivation of liberty was the consequence of the execution of such a mandate. The analysis of this problem starts, naturally, from the binding force of the jurisdiction of the European Court of Human Rights in the application of art. 5 para. 1 of the Convention, on which occasion the international court qualifies any contravention as a misdemeanor and establishes that deprivation of liberty in the form of imprisonment can be an exclusively criminal punishment, noting the paradox that would be created by assimilating contraventional imprisonment with the deprivation of liberty as a criminal sanction, which would constitute a violation of the fundamental right to freedom and security, with the consequence of material and moral compensation for the damage caused.

In conclusion, the contravention imprisonment executed in the penitentiary constitutesd a deprivation of liberty contrary to art. 5 para. 1 of the Convention, and the essential legal issue concerned the direct application of art. 5 of the Convention in the national legal order, in close connection with the texts of the Constitution. The right to compensation of the victim of an arrest or detention in conditions contrary to the provisions of art. 5 para. 1 of the Convention refers to any kind of illegal deprivation of liberty that directly results in moral (Terec-Vlad et al., 2015 ) or material damage, as well as due to the fact that, in 1994, Romania ratified the Convention, thus making the Convention, according to art. 11 paragraph 2 of the Constitution, part of the national law, which has priority over the national internal regulations. Therefore, the revision law of the constitution introduced, in art. 23, a point 13, according to which: "the custodial sanction can only be of a criminal nature". The new constitutional text is consistent with that of the Convention and constitutes an unequivocal basis for the objective responsibility of the state for judicial errors committed in such cases (Drăguţ, 2005, pp. 234-235).

## 3. The evolution of the institution of state liability for judicial errors in Romanian legislation under the impact of ECHR jurisprudence

Regarding the consecration of the state's liability for judicial errors in criminal trials in the criminal procedural legislation, we note that, despite the lack of adequate constitutional provisions and without the provisions of

international conventions or pacts to which our country is a party, this right was provided for, the first time, in the Code of Criminal Procedure of Carol the II, of 1936 , in Book IV, Title III, Chapter II, Section II entitled "Damages due to victims of judicial errors", comprising art. 513 - 514, as well as in Book VI, Title II, Chapter III entitled "Compensation of persons unjustly detained", including art. 657 – 662 (Romanian Parliament, 1936).

The Criminal Procedure Code of 1968 regulated this right in Chapter IV of Title IV of its special part, entitled "Reparation of material damage or moral damage in case of wrongful conviction or unlawful deprivation or restriction of liberty", including art. 504 – 507. These four articles - but, in particular, art. 504, which determines which are the cases that give the right to reparation - have been modified, since the adoption of the code, by Law no. 29 of November 12th, 1968 (General Assembly, 1968a), successively, through: Law no. 32 of November 16th, 1990 for the amendment and completion of some provisions of the Criminal Procedure Code (Romanian Parliament, 1990), Law no. 104 of September 22nd, 1992 for the amendment and completion of the Criminal Code, the Code of Criminal Procedure and other laws (Romanian Parliament, 1992), as well as for the repeal of Law no. 59/1968 (General Assembly, 1968b) and Decree no. 218/1977 (Council of State, 1977) and by Law no. 281 of June 24th, 2003 regarding the amendment and completion of the Criminal Procedure Code and some special laws (Romanian Parliament, 2003a). All these changes, as well as the evolution of the institution analyzed in this paper, due to the successive laws that intervened on the original text of the code, will be analyzed by us in the following section.

We note, in addition, the subsequent modification of the text of art. $408^1$ of the Criminal Procedure Code, introduced by art. I point 3 of Law no. 576/2004 for the amendment and completion of the Criminal Procedure Code (Romanian Parliament, 2004) , by art. I point 199 of Law no. 356/2006 for the amendment and completion of the Criminal Procedure Code, as well as for the amendment of other laws (Romanian Parliament, 2006). Prior to the amendment, para. 12 thesis I of art. $408^1$ had the following content: "the court - this is the Romanian court of review in the case of the judgments of the European Court of Human Rights - will not be able to oblige the state to pay compensations that were granted by the European Court of Human Rights and collected by the victim because of the violation of a right provided for by the European Convention for the Protection of Human Rights and Fundamental Freedoms".

The motivation for inserting this legislative provision was given by the fact that the Romanian courts neither could nor should issue a decision

over and above that of the European Court, which was sufficient, which did not have to be subjected to an additional recognition procedure, nor could it be modified, due to the fact that Romania had recognized the special jurisdiction of the Court from the date of ratification of the Convention, therefore its decisions would have a direct effect in our country, without any other formalities. The text is was longer justified under the conditions of the amendment of paragraph 1 of art. 408[1] by Law no. 356/2006 (Romanian Parliament, 2006). If in the initial form, the legislator was content to order that the final judgments pronounced according to national law and in respect of which a decision was also given by the European Court can be subject to revision, now it comes with a specification that establishes a series of conditions regarding that review. Therefore, this will not be able to be requested at any time, but only if the serious consequences of the violation of the right provided for in the Convention continue to occur in the absence of a review of the decision given by the Romanian courts and can only be remedied in this way.

The rewriting in this form of the article we are referring to has, as its starting point, the fact that the same considerations expressed by us above, regarding the effect produced in Romania by the judgments of the European Court, are also applicable with regard to the prejudicial judgment as a whole. This loses its effect by the very existence of a conviction at the Court, but in the hypothesis that it is observed, for various reasons, continues to produce effects even after the issuance of that decision, therefore it appears to be appropriate to review the internal decision. Starting from here, maintaining para. 12 in its initial form appeared as an abusive restriction of the right to compensation because, since the effects of the illegal decision continued to occur, then the situation generating damages did not cease. It is natural that, based on these considerations, the Romanian courts should be allowed to grant compensation even though the issue has already been decided by the European Court, but obviously only for the period of time following the completion of the proceedings before the Court.

Currently, the right to reparations for judicial errors is provided in Chapter VI, art. 538-542 of the Criminal Procedure Code, adopted through Law no. 486/2010, entered into force on February 1st, 2014, providing for the fact that: "The person who has been definitively convicted, regardless of whether the punishment or the educational measure applied involving the deprivation of liberty has been enforced or not, has the right to compensation by the state for the damage suffered if, following the retrial of the case, after the annulment of the decision of conviction for a new or

recently discovered fact that proves that a miscarriage of justice has occurred, a final judgment of acquittal has been pronounced".

## 4. Conclusions

The institution of state liability for judicial errors (in criminal trials and not only in criminal trials) experienced a gradual evolution starting with the Criminal Procedure Code of 1936, until the Criminal Procedure Code that entered into force in 2014. Initially the evolution was slow, especially in terms of the scope of the state's liability (it started from liability for unfounded convictions in criminal trials and became a liability for judicial errors in all types of litigation). However, under the impact of the ECHR jurisprudence and the effect that the judgments of the Strasbourg Court had not only in Romanian law, but also in the legal consciousness of the Romanian society, today Romania has a legislation adapted to optimally serve the idea of respect for the right to defense and access to justice.

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