

LIABILITY IN CASES OF "UNREGULATED JUDICIAL ERRORS"

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ABSTRACT: *The Criminal Procedure Code expressly regulates the situations deemed to display a judicial error, opening the way to the person who suffered from it, to proceed against the State for compensation. But what happens in cases where a person, facing criminal charges, has suffered moral and material damage, but does not fit in the situations expressly provided by the law? Will it be possible for that person to appeal to the common procedure from the civil law? The article presents some cases of such "unregulated judicial errors" and the national courts case law in such situations, concurrently proposing possible solutions so that the access to justice would not be restricted.*

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The Code of Criminal Procedure regulates expressly and in a limitative manner those situations in which a judicial error may be deemed to have occurred in a criminal proceeding. Only those regulated situations open the way for the person who suffered from a judicial error to initiate action against the State to repair the damage.

Thus, the Code of Criminal Procedure regulates two situations: that of a final conviction as well as that of an unlawful privation of liberty.

According to art. 538 of the Code of Criminal Procedure, the person who has been finally convicted, regardless of whether the applied punishment or the educational measure involving deprivation of liberty has been enforced or not, is entitled to compensation by the State for the damage suffered if, following the retrial after cancelling or abolishing the conviction for a new or recently discovered fact that proves that a legal error has occurred, a final decision on acquittal has been made. Paragraph 2 provides that this rule also applies to the reopening of the criminal proceedings in respect of the convicted person in absentia, if, after a retrial, a final acquittal has been given.

Next article, art. 539 provides for the right to remedy also of the person who was unlawfully deprived of liberty during the criminal proceedings. The same article also provides for jurisdiction to determine whether deprivation of liberty was unlawful. The unlawful deprivation of liberty must be established, as appropriate, by an order of the prosecutor, by the final decision of the judge of rights and freedoms or of the judge of a

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preliminary session, as well as by the final decision or the final sentence of the court vested to try this case (Chiriac, 2016).

But what happens in cases when a person under criminal investigation suffers material and moral damages, but does not fall into the situations expressly provided by the law?

Thus, for example, the situation in which a person is under criminal investigation for seven years for manslaughter in a road accident. In the 7 years he / she carries out expenses representing legal fees, monthly trips to the Prosecutor's Office and the court, missing days from work, and is obliged to bear the costs of the technical expertise performed at his / her request.

Or is the situation in which a renowned doctor is charged, taken to court for serious bodily harm or manslaughter, and thus his reputation is corrupted by these accusations? Even if he will be subsequently acquitted, during the investigation he suffered damage, consisting in creating an unfavourable image in front of patients.

Or the situation in which a levy is instituted within criminal trial proceedings, making unavailable the assets of the investigated person for a long period of time, which can lead to a considerable decrease in the value of the goods or the impossibility of continuing the activity of the company, with the irreversible consequence of shutting down the activity (in the case of the attachment of accounts), without the final solution being sentencing? Or the omission of the court to order by decision the lifting of the seizure, which leads to the unavailability of the goods in an unjustifiable way, until the legal situation is cleared out? (Moldovan, 2017)

Who and on what grounds will remedy the damage?

In analyzing this issue, we recall a case with a final decision given by the Romanian courts. The person investigated for manslaughter, although in the initial investigations the victim's fault would have been inferred due to the failure to grant priority, this person is finally acquitted (after a trial that lasted 7 years in the criminal investigation phase and the first instance trial), the decision of the court not being challenged by appeal by the prosecutor's office. It is undeniable that that period was characterized by the emotions and sufferings inevitably involved in a criminal trial (police presence, hearings, etc.) as well as feelings of injustice. It should not also be considered as being unimportant the embarrassment to justify to friends and acquaintances to whom he had to explain his legal situation, as well as the days he lost in the courts. In order to prove his innocence, the defendant spent several sums of money, representing the lawyer's fee, also during the trial at first instance he had to pay the fee for a car technical expertise. The judge in the first trial court did not accept the payment of the expertise from the state funds.

Under these circumstances, the question arises, what would have happened if the defendant did not have the money to pay for the value of the expertise? The answer is simple: he would have been unfairly convicted.

Who will be responsible for the costs incurred to him? As well as for the moral prejudice he suffered? It is obvious that the criminal prosecution bodies have not done enough diligence to solve this case in a professional manner, have not carefully analyzed the existing evidence, failed to administer relevant evidence in the criminal investigation phase (the expertise that could have clarified the state of affairs even in the criminal investigation phase) and more, did not apply the principle of the presumption of innocence. This principle would have clearly presupposed the charging of the person (the initiation of the criminal proceedings and the subsequent prosecution) only after there was

sufficient and conclusive evidence of his guilt. So the burden of proof was on the accuser. In no case should the burden of proof (in defence) be returned to the defendant.

However, the situation that caused him material and moral damage does not fit into any of the two situations provided by the Criminal Procedure Code. Therefore, the person acquitted in the criminal proceeding subsequently filed an action at the Tg Mures Local Court against the Romanian State through the Ministry of Finance, requesting the award of the amounts of material and moral damages. On June 12, 2014, the Civil case decision 2874 partially allowed the action, in order to award the costs related to the expertise, and reject the other claims. It has been shown in the sentence that as regards the lawyer's fee the claim is inadmissible, due to the fact that in a criminal trial the defendant could have benefitted from an ex-officio lawyer. But doesn't the right to defence also imply the right to hire a lawyer?

Within the legal timeframe, the applicant appealed against this sentence, and also appealed to the Romanian State through the Ministry of Finance. By Decision no. 497 of 21 October 2014, the Mureş County Court upheld the appeal of the Romanian State, cancelled the decision of the Local Court and dismissed its claims in its entirety. In the reasoning of the two courts, it was argued on the one hand that the legal basis which provides for the award of damages in the event of judicial errors is not applicable, as he has not suffered a final conviction, and, regarding the State's tort liability, there was no fault of the state bodies in carrying out the research.

Analyzing the cause from the perspective of the European Convention on Human Rights, we believe that the following issues arise:

Firstly, the Convention guarantees at Art. 6 paragraph 3 letter c. the right of any person accused of a crime "to defend himself or to be assisted by an elected defender". Under Romanian law, the right to defence has the value of a constitutional principle, thus, Article 24 paragraph 1 of the Constitution guarantees the right of defence, and paragraph 2 of the same article guarantees the right to be assisted by a defender throughout the process. It is an essential component of the right to a fair trial, because a fair trial implies the possibility of arguing before the court, to present the case without being disadvantaged in relation to the other participants. The penalties for non-compliance with the right to defence are absolute nullity. In this respect the national courts have ruled when they have noticed the lack of a defence lawyer in the case at trial for a crime committed by the defendant, for which there is a sentence of more than 5 years, (Mrejeru & Mrejeru, 2008)¹ or for the situation when, although the defendant had an elected defender, the decision was given in a trial with an ex officio lawyer. (Mrejeru & Mrejeru, 2008)

Therefore, the rejection of material claims on the grounds that the applicant (the defendant in the criminal proceedings) could have been assisted by an ex officio lawyer is a violation of the right of defence, more exactly, of the right to benefit from the services of an elected lawyer.

On the other hand, Protocol No. 1 to the Convention guarantees the right to property protection. Any natural or legal person has the right to respect for his property. No one shall be deprived of his property except for a cause of public interest and under the

¹ Decision no. 7987 of 12 February 1998 of Piteşti Appeal Court in Theodor Mrejeru, Bogdan Mrejeru, *Principii fundamentale ale dreptului procesual penal. Respectarea demnităţii umane , garantarea dreptului la apărare în procesul penal*, Editura Universitară, Bucharest, 2008, pg. 144

conditions laid down by law and by the general principles of international law. Obliging a defendant to incur expert expenses to prove his innocence without the costs being returned is in fact a violation of the right to the protection of property.

Last but not least, Article 13 of the Convention guarantees the right to effective remedy - the existence in national law of a remedy allowing the person to rely on and demonstrate the failure to respect the rights and freedoms of the Convention. This Article requires, from the point of view of the European Court of Justice², that any person who, in a plausible manner, claims to be the victim of a violation of another right of the Convention, to have the right, according to the domestic law, to bring an action before a national authority in order to have his complaint solved and, in the event of its admission, to be awarded the appropriate remedy. This authority does not necessarily have to be a judicial institution, but the powers and guarantees of the institution concerned will be taken into account in order to analyze the effectiveness of the internal remedy. However, as long as the criminal procedural law limits the right to claim remedy for material and moral damages to only two situations, excluding any other situation, the issue of violation of Article 13 of the Convention may arise.

To conclude, we believe that it would be necessary to widen the scope of the applicability of the rules on judicial errors, including the possibility of claiming material, at least, if not moral damages, even in other situations that go beyond a final conviction or an unlawful arrest.

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² CEDO, Chamber, decision Leander c. Sweden ,26 March 1987, 9248/81