

SHORT CONSIDERATIONS ON THE RIGHT TO COMPENSATION IN CASE OF MISCARRIAGE OF JUSTICE OR UNLAWFUL IMPRISONMENT – A STEP BEFORE THE ECHR PROCEEDINGS

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Abstract

Pursuant to the provisions of Article 538 et seq. of the Romanian Code of Criminal Procedure, individuals who consider themselves to be victims of manifest miscarriages of justice or in cases of unlawful deprivation of liberty may bring an action against the Romanian State through the Ministry of Public Finance for damages for the unlawful deprivation of liberty they have suffered. This study will attempt to analyse the conditions of admissibility of such claims, arising from unlawful deprivation of liberty, and to present elements of material and non-material damage that could be covered by the court. But even if such actions were to be admitted and the court were to grant the claims referred to by the persons entitled, could the non-material damage be fully compensated, given that several fundamental human rights have clearly been infringed? The issue is also approached from the perspective of the rich case-law of the European Court of Human Rights on this matter, which we consider relevant to the present topic.

Keywords: *action, compensation, damages, reparation, the Romanian State.*

1. Introductory considerations

Fundamental human rights must be respected, and when they are not voluntarily respected, their violation must be redressed. Among the individual human rights recognized to every human being the right to liberty and security of the person, enshrined in **Article 5** of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “*the Convention*”) is part of the human rights hard core¹.

The provisions of **Article 5** of the Convention are extremely important for a democratic society, as it regulates the protection of any person against arbitrary or abusive detention or arrest. The term *liberty* does not was chosen by chance, it refers to the very physical freedom of individuals. No person may not be deprived of his/her liberty in an arbitrary manner, but only in well founded cases, provided for and executed according to the law, which are the protection of public order. Even in the case of a permitted deprivation of liberty by law, the person concerned must be assured that

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¹ Please see Corneliu Birsan, *European Convention on Human Rights: Commentary per Articles*, C.H. Beck Publishing House, Bucharest, 2010, Laura-Cristiana Spătaru-Negură, *International Protection on Human Rights. Course Notes*, Hamangiu Publishing House, Bucharest, 2019, p. 138 and following, Fuerea Augustin, *Introduction to international human rights law: lecture notes*, Era Publishing House, Bucharest, 2000.

certain safeguards are respected. This right is inalienable and no one can waive it.

But what happens when the state violates this fundamental right in judicial proceedings, through manifest miscarriages of justice or unlawful deprivation of liberty?

Under the provisions of **Articles 538 and 539** of Law No 135/2010 (hereinafter "*the Code of Criminal Procedure*"), individuals who consider themselves victims of manifest miscarriages of justice or unlawful deprivation of liberty (hereinafter "*the persons entitled*") may bring an action against the Romanian State, through the Ministry of Public Finance², for compensation for damage caused by miscarriages of justice or unlawful deprivation of liberty.

The purpose of this study is to set out certain considerations relevant to actions seeking compensation for damages for unlawful deprivation of liberty suffered.

With regard to territorial, material and general jurisdiction, the court in whose district the person entitled to damages is domiciled, bringing a civil action against the state, which is summoned by the Ministry of Public Finance, has jurisdiction to rule on the action, pursuant to **Article 541 para. (3)** of the Romanian Code of Criminal Procedure.

By the judgment on the merits of the case, the court could be empowered by the persons entitled to order the Romanian State to pay:

i. a sum of money to cover the **material damage** caused by the criminal case, consisting, for example, of lawyer's fees, legal expenses, amount of weekly packages, parental donations for the subsistence of the entitled person's family, and for the lost benefit, as appropriate;

ii. a sum of money to cover the **non-material damage** caused by the unlawful detention of the person entitled and the inhuman and degrading conditions of detention to which he/she was subjected during the period of his/her imprisonment and/or placed under house arrest, under judicial supervision;

iii. **interest** on the amount claimed from the date of the claim until full payment of the amount due;

iv. the person entitled costs incurred in the proceedings in accordance with **Article 453** of the Romanian Code of Civil Procedure.

2. General considerations on the admissibility of such claims

Given that the persons entitled were the victims of an obvious miscarriage of justice in the criminal cases, they are entitled to compensation for damages for the harm suffered, pursuant to **Article 539 et seq.** of the Romanian Code of Criminal Procedure.

Pursuant to the provisions of **Article 539** of the Romanian Code of Criminal Procedure:

"(1) A person who, in the course of criminal proceedings, has been unlawfully deprived of liberty shall also be entitled to compensation for damages.

(2) The unlawful deprivation of liberty must be established, as the case may be, by an order of the public prosecutor, by a final decision of the judge of rights and freedoms or of the preliminary chamber judge, and by a final decision or final judgment of the court hearing the case."

Involvement of these persons entitled in criminal proceedings for alleged

² With regard to the passive legal standing of the defendant Romanian State through the Ministry of Public Finance, the provisions of Article 541 para. (3) of the Code of Criminal Procedure recognizes *expressis verbis* the passive legal capacity.

particularly serious offences [i.e. the offence of setting-up an organised criminal group, provided for by **Article 367 para. (1)** of the Romanian Criminal Code, the offence of abuse of office in a continuous form, provided for in **Article 297 para. (1)** of the Romanian Criminal Code], offences which they did not commit, certainly damaged the persons entitled honour, moral credit, social position and professional prestige.

The measures ordered against such persons entitled have harmed the values that define human personality, values that relate to the physical existence of a person, to health and bodily integrity, to honour, dignity, professional prestige and other similar values. The seriousness of the effects produced is accentuated by the age of the persons at the time - for example, young people at the beginning of their careers, with well-defined professional and social prospects.

In case of certain persons entitled, even after their release from pre-trial detention centres, due to the media coverage of the unreal facts, which were presented in the national press, online and on national TV broadcasts, in which the respective persons were **portrayed as criminals**, they may end up being stigmatised in society and feel this trauma, even though it is obvious that miscarriages of justice were committed against them, because in the end **they were acquitted by the courts**.

Thus, the **principle of the financial liability** of the Romanian State for damage caused by errors committed in criminal proceedings is enshrined in **Article 52 para. (3)** of the Romanian Constitution and in accordance with the practice of the Romanian Constitutional Court, as well as with the provisions of **Article 3 of Protocol No. 7** to the Convention.

The **right to compensation** arises when it is premised on a miscarriage of justice, which leads to the conclusion that

compensation for damages can be claimed in all cases where the state authorities committed abuses of law or manifested gross negligence. Even if the arrest or detention was qualified as lawful under national law, it could still be contrary to **Article 5** of the Convention.

Individual liberty is a fundamental human right guaranteed by **Article 23** of the Romanian Constitution and by **Article 5** of the Convention.

The European Court of Human Rights has consistently held that in cases of violation of **Article 5 para. 1** of the Convention concerning unlawful deprivation of liberty, apart for the claims for material damage, claims for moral damages for the period of unlawful detention are also justified.

The measure of pre-trial detention of those persons entitled most probably caused them moral suffering, that it materialised in acute states of stress and depression which required a great deal of strength and willpower to overcome.

Thus, in the light of **Article 5** of the Convention, the constitutional principle that **the state is financially liable for damage caused** by miscarriages of justice in criminal proceedings and must allow reparation for the damage caused both by wrongful conviction and as a result of unlawful deprivation of liberty during criminal proceedings, is embodied.

Judicial practice has defined **the conditions which must be met for the award of damages in an action for damages and miscarriages of justice** based on **Article 539** of the Romanian Code of Criminal Procedure, as follows:

A. existence of an unlawful deprivation of liberty;

B. the unlawful deprivation of liberty must be established, as the case may be, by order of the public prosecutor, by a final decision of the judge of rights and freedoms

or of the preliminary chamber judge, and by a final decision or final judgment of the court hearing the case;

C. the existence of damage suffered by the applicant, which is presumed;

D. the lodging of the claim within 6 (six) months from the date of the final judgment of the court.

We will detail further these conditions.

A. Existence of an unlawful deprivation of liberty

In the case of preventive measures in a criminal case, the existence of such preventive measures becomes unjust as a result of the decision to dismiss the criminal charge on the merits - for example, acquittal under **Article 396 paras. (1) and (5)** of the Romanian Code of Criminal Procedure in relation to **Article 16 para. (1) letter (b) first thesis** of the Romanian Code of Criminal Procedure.

As the Constitutional Court pointed out in the Decision No 136/2021 on the objection of unconstitutionality of **Article 539** of the Romanian Code of Criminal Procedure:

“37. Preventive custodial measures taken in the course of criminal proceedings represent a severe/major restriction of a person's individual liberty. Even if the constitutional text allows the limitation of individual liberty for the purpose of the proper conduct of the criminal proceedings, it does not mean that, regardless of the outcome of the criminal proceedings, the infringement of this liberty should not be redressed. In other words, the outcome of the judicial process must be regarded as an essential criterion for compensating for the injustice suffered by the person concerned. (...) Therefore, if it is proved, by a final order of dismissal/judgment, that the criminal charge against the person is unfounded,

the severe limitations on his individual liberty must be compensated. (...)

38. If the State owes compensation for a preventive measure depriving a person of his liberty taken unlawfully, irrespective of the outcome of the criminal proceedings, precisely because it has infringed its own legal system, so too does the deprivation of liberty of a person against whom the State, on examining the merits of the charge, fails to rebut the presumption of innocence give rise to a necessary right to compensation. Being deprived of liberty on the basis of the charge brought, a finding that the charge is unfounded/ inconsistent with reality has the effect of establishing that the deprivation of liberty measures taken against the person concerned in the course of the criminal proceedings are unjust. (...) The failure to comply with legal procedures in the taking of a preventive measure involving deprivation of liberty or the unfoundedness of the criminal charge which led to the taking of the preventive measure involving deprivation of liberty are grounds which equally justify a right to compensation for the impairment of individual liberty, even if the grounds are different [unlawfulness of the measure or unfoundedness of the charge]. The fact that the deprivation of liberty is found to be unjust and unfair only at the end of the criminal proceedings does not mean that it was not unjust and unfair at the very time it was ordered and that, therefore, the person subject to the measure was not wronged.

(...)

44. Therefore, in view of the State's obligation to value justice, the violation of the inviolability of individual liberty in the present case constitutes a miscarriage of justice within the meaning of the first sentence of Article 52 para. (3) of the Constitution, but not from the point of view of the judge's assessment of the case, which

was based on the evidence in the case, but from the point of view of the outcome of the trial. Thus, it is inadmissible for an acquitted person to continue to bear the stigma of the deprivation of liberty to which he has been subjected, without being given the necessary material and moral reparation. (...)

45. Accordingly, the Court finds that, in the light of Articles 1 para. (3) and 23 para. (1) of the Constitution, **the deprivation of liberty ordered in the course of criminal proceedings resolved by application of Article 16 para. (1) letters (a)-(d) of the Code of Criminal Procedure causes harm to the person subject to that measure**, which entails the applicability of the first sentence of Article 52 para. (3) of the Constitution. Therefore, the Court holds that there is no congruence between the above-mentioned constitutional texts and the restrictive view of the Code of Criminal Procedure, which links the right to compensation associated with the unlawful deprivation of liberty to the violation of a legal rule in taking/extending/maintaining the preventive measure. Since a legal text cannot restrict the scope of application of constitutional provisions and cannot take precedence over a rule of constitutional rank, an acquittal/termination decision given in a criminal trial for the above reasons must be given **the same remedial purpose** since it demonstrates a violation of the same constitutional value - the inviolability of the individual's liberty - as in the case of failure to comply with the legal rules concerning the taking/extension/maintenance of the preventive measure depriving the person of

liberty. **It is true that the situation under consideration is not a case of unlawful deprivation of liberty, but, given that both hypotheses are designed to protect the same constitutional values [justice, individual liberty, legality], it means that the person whose inviolability of individual liberty has been violated must be recognised and enjoy the same protection.** The Court therefore finds that the situation under consideration constitutes a case of unjust deprivation of liberty, in which case the individual's right to compensation cannot be extinguished. Therefore, **the juxtaposition of the two aforementioned hypotheses in the content of Article 539 of the Code of Criminal Procedure reflects the full and correct dimension of the provisions of Article 52 para. (3), first thesis, of the Constitution, their legal treatment in terms of the type and extent of compensation, as well as the action for compensation for damage, being thus identical.**"³(our underlining).

The acquittal of such persons on the merits and/or (upholding it) on the effective remedies thus leads us to state that **the custodial measures ordered in these cases appear to be unjust measures by reference to the acquittal** ordered against the persons entitled, respectively to the recitals of the Constitutional Court Decision No 136/2021.

B. The unlawful deprivation of liberty must be established, as the case may be, by order of the public prosecutor, by a final decision of the judge of rights and freedoms or of the preliminary

³ Decision of the Constitutional Court of Romania No 136 of 3 March 2021, published in the Official Gazette No 494/12.05.2021. By this decision, the Court **admitted the exception of unconstitutionality** raised by Cristian Marius Niță in Case no. 5090/63/2017 of the Dolj Court - Civil Section I **and finds that the legislative solution contained in Article 539 of the Code of Criminal Procedure which excludes the right to compensation for damages in case of deprivation of liberty ordered during the criminal proceedings resolved by closure** (in Romanian "*clasare*"), **according to Article 16 paragraph (1) letter a)-d) of the Code of Criminal Procedure, or acquittal is unconstitutional.**

chamber judge, and by a final decision or final judgment of the court hearing the case

In the case of such persons entitled, the acquittal, pronounced under the provisions of **Article 16 para. (1) para. (1) letters (a)-(d)** of the Romanian Code of Criminal Procedure, is sufficient to establish, in civil proceedings, the **unlawful nature of the measure of deprivation of liberty** ordered during the criminal proceedings, in the light of the considerations of the Constitutional Court Decision No 136/2021.

We consider it useful, relevant and conclusive to point out that the entitled person's right to compensation is not conditional on the basis of acquittal - **Article 16 para. (1) letters a-d)** of the Code of Criminal Procedure:

- a) the fact does not exist;
- b) the fact is not provided for by the criminal law or was not committed with the guilt provided for by the law;
- c) there is no evidence that a person committed the crime;
- d) there is a justifying or non-culpability cause - precisely because, otherwise, the presumption of innocence of the person provided for by **Article 23 para. (11)** of the Constitution.

It is a matter of principle that a final judgment of acquittal has the force of *res judicata* and results in the **preservation of the presumption of innocence**. To distinguish between the grounds for acquittal in order to determine whether or not the person concerned is entitled to compensation would be to maintain a shadow of doubt as to the presumption of innocence. It is unique and has the same effect irrespective of the basis of acquittal.

Neither before nor after acquittal can different degrees of comparability of innocence be created.

Following a final acquittal, **it is no longer permissible to express suspicions as to the innocence of the accused person**.

Thus, the European Court of Human Rights considers that once an acquittal has become final - even an acquittal which gives the accused the benefit of the doubt under **Article 6 para. (2)** of the Convention - the expression of any suspicion of guilt, including those expressed in the grounds for acquittal, is incompatible with the presumption of innocence⁴.

The operative part of an acquittal decision must be respected by any authority which directly or indirectly concerns the criminal liability of the person concerned. The presumption of innocence means that, where there has been a criminal charge and criminal proceedings have resulted in an acquittal, the person who has been the subject of the criminal proceedings is innocent before the law and must be treated in a manner consistent with that state of innocence. In this respect, therefore, the presumption of innocence will subsist after the conclusion of the criminal proceedings to ensure that, in respect of any charge which has not been proved, the innocence of the person concerned is respected⁵.

It follows from an examination of all these legal rules that **the responsibility for damage caused by judicial errors**, in relation to the person entitled, **is always and without exception, directly and without exception, incumbent on the state**, which is obliged to make reparation for any damage suffered by a person who is arrested

⁴ Please see, for instance, the Judgment of 21 March 2000, in the case *Asan Rushiti v. Austria*, para. 31; please also see the Judgment of 25 August 1993, rendered in the case *Sekanina v. Austria*, para. 30.

⁵ Please see, for instance, the Judgment of 12 July 2013, rendered in the case *Allen v. Unit Kingdom*, para. 103.

or detained in violation of the legal provisions in question.

Thus, if it is established by a final judgment that the criminal charge against the person entitled is unfounded, it follows that the severe restrictions on that person's liberty must be compensated, since it is clear that he/she has suffered damage.

C. The existence of damage suffered by the person entitled, which is presumed

According to Article 539 of the Romanian Code of Criminal Procedure, a person who has been unlawfully deprived of liberty in the course of criminal proceedings is entitled to compensation for the damage suffered.

This text does not establish the categories of damage that can be compensated for unlawful deprivation of liberty, so the **general principle of full compensation for damage**, established by **Article 1349 para. (2)** and **Article 1357 para. (1)** of the Romanian Code of Civil Procedure, includes both material and moral damages.

The honest citizen is not obliged to bear the moral and material consequences of the **malfunctioning of a criminal activity**, i.e. the enforcement and distribution of justice in a democratic society. The state, as a responsible person, is liable for the damaging consequences of the conduct of specific judicial activities, but not for an act committed by another person, but as the guarantor of the legality and independence of the judicial process.

Liability will be incurred independently of any fault, on an objective basis.

The **justification** for this is the objective guarantee against the risk of judgments being handed down or measures being taken which, although not unlawful, do not meet the requirements of **Article 6** of

the Convention and are likely to cause harm to individuals.

With regard to the nature and extent of the damage, please take into account the duration of the deprivation of liberty, the consequences for the person or his/her family, and the case-law of the High Court of Cassation and Justice, which in the Civil Decision No 457/27.01. 2012 established that:

“The moral damage caused by the unlawful arrest (resulting from the acquittal decision) does not have to be proven, since this measure violates one of the most important attributes of human personality, the right to freedom, as an inalienable right of the human being and as a primary value in a democratic society, and the amount awarded by the court by way of compensation for the non-material damage suffered must be compensation for the damage done to his honour, health and reputation by the initiation of the criminal proceedings in which the restrictive measures were ordered and, ultimately, the acquittal of the person.”⁶

In this case, the arguments considered by the Supreme Court are applicable and the non-material damage caused by the unlawful custodial measures is **indisputable**.

With regard to the amount of compensation, under **Article 540 para. (2)** of the Romanian Code of Criminal Procedure:

“In determining the amount of compensation, account shall be taken of the duration of the deprivation of liberty or restriction of liberty incurred and the consequences for the person or the family of the person deprived of liberty or of the person in the situation referred to in Article 538.”

Moreover, according to **Article 540 paras. (3) and (4)** of the Romanian Code of

⁶ The text of this decision is available at <https://legeaz.net/spete-civil-iccj-2012/decizia-457-2012>.

Criminal Procedure, in choosing the type of compensation and its extent, the entitled person's situation in repairing the damage and the nature of the damage caused shall be taken into account, and if the victim was employed before the deprivation of liberty or imprisonment as a result of the execution of a custodial sentence or educational measures, the time during which he/she was deprived of liberty shall also be calculated, in relation to the length of service established by law.

Specifically, in assessing the amount of compensation, account may be taken of the following personal and family circumstances of the persons entitled, which are likely to increase the seriousness of the consequences, as follows:

- i. the respectability of the person entitled (e.g. at the time of his/her detention and remand in custody, the person entitled was of a young age and enjoyed a good reputation);
- ii. whether the entitled person's health had deteriorated and he/she was left with trauma from the detention centres;
- iii. the respectability enjoyed by his/her family (e.g. parents, spouse) and the extent to which his/her health was impaired;
- iv. whether, at the time of pre-trial detention, he/she had minor children and whether there were any problems with their care and upbringing;
- v. problems relating to promotion at work.

a) Material damage

With regard to the material damage, we specify that this is the harmful consequence that has economic value, being

able to be evaluated pecuniary, being primarily the consequence of the violation of the rights and economic interests of the person entitled.

Thus, it is necessary to quantify the amounts paid by the entitled person or his/her family by way of legal fees for the compulsory defence, legal costs, the estimated value of weekly food parcels, fruit and drinks, personal hygiene items received in the detention centres, any donations received by his/her family for subsistence (taking into account the absence of the person's income during the period of pre-trial detention and possibly even the suspension of employment or service), and the benefit not received (e.g. the confidentiality bonus for clearance of national classified information⁷, state secrets - "top secret" in the amount of 12% of basic salary).

We consider that all this material damage would be due because, if the Romanian judicial authorities had carried out their duties in a fair and lawful manner, **without abusing the legal provisions**⁸, the persons entitled would not have been put in the position of having to bear these expenses.

b) Moral damage

With regard to moral damage, the settled case-law of the High Court of Cassation and Justice has established that the monetary compensation awarded for reparation of moral damage must reflect a value concordance between the amount or/and the seriousness of the consequences whose reparation it is intended to contribute

⁷ On classified information, please see Valentina Bărbăţeanu, Andrei Muraru, *Right to a fair trial in the context of classified information. A survey in the light of CCR's case-law*, published in the proceedings of the Challenges of the Knowledge Society (CKS), "Nicolae Titulescu" Publishing House, 2022, pp. 210-219.

⁸ Please see Ştefan Elena Emilia, *Legality and morality in the activity of public authorities*, in the Public Law Journal no 4/2017, Universul Juridic Publishing House, Bucharest.

to. In determining the amount of non-material damages, regard must be had to the principle of full reparation of the damage caused by the wrongful act.

The issue of **determining compensation for non-material damage** is not limited to the economic quantification of non-patrimonial rights and values such as dignity, honour or the mental suffering suffered by the person entitled. It involves a complex assessment and evaluation of the aspects in which the harm caused is externalised and can thus be subject to the discretion of the courts.

Therefore, even if **moral values cannot be assessed in money**, the harm caused to them takes concrete forms and the court is thus able to assess their intensity and seriousness and to determine whether a sum of money and in what amount is appropriate to compensate for the non-material damage caused, assessing in fairness, in order to provide the victim with some satisfaction or relief for the suffering suffered.

According to the provisions of **Article 540 para. (2)** of the Code of Criminal Procedure - *Nature and extent of reparation*:

“(1) In determining the extent of reparation, account shall be taken of the duration of the unlawful deprivation of liberty and the consequences for the person, the family of the person deprived of liberty or the person in the situation referred to in Article 538.

(2) Reparation shall consist in the payment of a sum of money or the constitution of an annuity or the obligation that, at the expense of the State, the unlawfully detained or arrested person be placed in the care of a social and medical institution.

(3) In choosing the type of compensation and the extent thereof, account shall be taken of the situation of the person entitled to compensation and the nature of the damage caused.”.

In such cases, there is no doubt that the arrest of a person for a period of time has caused moral damage both to that person and to his or her family, with the implicit damage to those attributes of the person that influence social relations - honour, reputation - and those that are in the emotional sphere of human life - relations with friends and relatives, damage that finds its most typical expression in the moral pain experienced by the victim.

The consequences of pre-trial detention have had an impact on the professional sphere, as these people are unable to carry out their professional activities due to their **reduced capacity for social relations**.

The whole family also feel the **negative impact of the arrest**, as the violation of the right to liberty made it impossible for them to see the spouse, children and parents, and they were unable to provide them with the necessities of life due to the lack of income.

In addition, in our experience, there are such people who have tried to keep their minors from finding out about the deprivation of liberty situation, not agreeing to come to detention and remand centres throughout the period of remand, with the minors subsequently finding out and **suffering a strong emotional shock**, being haunted by the idea that one of their parents has been arrested for a serious criminal offence.

Thus, clearly, they suffered on a family level, **being torn away from the family**, unable to enjoy their family for a long period of time, and the minor children being deprived of the upbringing and education they could have provided as parents.

Neither the persons entitled nor their families have found it easy to bear the negligence of the Romanian judicial authorities for acts they did not commit, as the unlawful deprivation or restriction of

liberty measures have marked their existence as people in all aspects of their lives, feeling humiliated and unjust, and the inhuman conditions in pre-trial detention **have accentuated the nightmare** they have experienced.

The consequences of unlawful arrest have also most often had **consequences for the health of these people**, which has deteriorated greatly due to the inhuman conditions in detention and remand centres and the emotional stress, including the prospect of repeated postponement of the court's decision.

The moral damage caused to such persons cannot be overlooked in view of the long duration of criminal proceedings.

i. Criteria taken into account in determining the existence of non-material damage

According to its case-law⁹, the Romanian High Court of Cassation and Justice has ruled that, in **determining the existence of non-material damage**, the character and importance of the non-patrimonial values to which the damage was caused, the personal situation of the person entitled, taking into account criteria such as his or her social environment, education, level of culture, standard of morality, psychology must be taken into account.

Since the damage is to values which have no economic content and the protection of rights relating to the protection of private life, within the scope of Article 8 of the European Convention on Human Rights, but also values protected by the Constitution and national laws, the existence of the damage is subject to the condition of a reasonable assessment, on a proper and fair basis, of the real and actual damage caused to the victim.

As regards proof of non-material damage, **proof of the unlawful act is sufficient, the damage and the causal link being presumed**, and the courts will infer the existence of non-material damage from the mere existence of the unlawful act capable of causing such damage and the circumstances in which it was committed. The solution will be determined by the subjective, internal nature of the non-material damage, direct proof of which is practically impossible.

ii. The conditions of pre-trial detention under which the suffering of such persons entitled can be assessed

Depending on the place where such entitled persons have been remanded in custody and detained, their **suffering can be very easily presumed**, some such places being known for their miserable conditions (e.g. in Bucharest the Centre for Detention and Remand in Custody of the Central Prison, the Centre for Detention and Preventive Arrest No 5, Rahova Penitentiary).

The conditions in these centres are renown to violate the mandatory minimum standards for accommodation conditions for persons deprived of their liberty, as laid down in the Order of the Minister of Justice No 433/2010. In accordance with **Article 1** of this Order:

“(1) Premises intended for the accommodation of persons deprived of their liberty must respect human dignity and meet minimum health and hygiene standards, taking into account climatic conditions and, in particular, the living space, air volume, lighting, heating and ventilation sources.

(2) The accommodation rooms and other rooms for persons deprived of their

⁹ Please see, by way of example, Decision No 153 of 27 January 2016 delivered on appeal by the First Civil Section of the High Court of Cassation and Justice on an action for damages.

liberty must have natural lighting, the necessary facilities for artificial lighting and be equipped with sanitary and heating facilities.

(3) Accommodation rooms in existing prisons must provide:

(a) at least 4 square metres (sqm) for each person deprived of liberty in the closed or maximum security regime;

(b) at least 6 cubic metres of air for each person deprived of liberty in the semi-open or open regime.

(4) Minors, juveniles, persons remanded in custody and persons for whom the enforcement regime has not been determined shall be subject to the provisions of paragraph (3) letter (a) shall apply.”

Thus, in these centres, the persons entitled claim to have experienced problems due to **overcrowding** (e.g. although there is a limited number of beds in the cells, at any given time there can be many more people in the room, even posing the problem of receiving other detainees in the bed), the **lack of good sanitary conditions** (unhealthy conditions of the sanitary facilities, including lack of privacy due to the lack of doors to the sanitary facilities in the holding rooms, showers that were not separated from each other, lack of hot water - possibly rationed, unhealthy refrigerators, the presence of mould, prolonged exposure to cigarette smoke due to the fact that the detainees were forced to share a room with smokers) **and heating** (lack of heat in winter), **the presence of pests** (rats, bedbugs, cockroaches), as well as **the lack**

of daily walks or socio-cultural programmes, which amount to **degrading and inhuman treatment per se**.

As for the so-called “right to air”, initially considered insignificant, but later becoming the only daily concern during the period of detention, it materialized in the possibility, when weather conditions permitted, of access to a room of maximum 4 square meters, with concrete walls at least 3 meters high and a thick net on top, where prisoners were allowed to walk in the “air yard”, but not more than one hour a day.

Furthermore, although the applicable legislation provided for the **separation of smoking and non-smoking prisoners in separate rooms**, in fact this did not exist, with non-smokers being placed in a position to breathe in near-permanent foul air tainted with cigarette smoke.

The conditions in these Romanian centres have been intensely debated, notorious and undeniable, as noted by:

i. the representatives of the People's Advocate¹⁰;

ii. the representatives of the Chamber of Deputies¹¹;

iii. the representatives of APADOR-CH¹²;

iv. the consistent case-law of the European Court of Human Rights, in particular the judgment delivered in the pilot procedure in the case of *Rezmiveş and others v. Romania*¹³. Moreover, the European Court of Human Rights has found and analysed the degrading material conditions in the Romanian penitentiaries on

¹⁰ Please see, for instance, <https://avp.ro/wp-content/uploads/2021/12/Raport-privind-vizita-desfasurata-la-CRAP-nr.-9-Bucuresti.pdf>, <https://avp.ro/wp-content/uploads/2021/10/raport-crap-nr-5.pdf>, https://avp.ro/wp-content/uploads/2021/02/raport-penitenciar-rahova_2020.pdf.

¹¹ Please see, for instance, <https://www.cdep.ro/presa/Raport.pdf>.

¹² Please see, for instance, <https://apador.org/raport-asupra-vizitei-in-penitenciarul-jilava/>, <https://apador.org/en/raport-privind-vizita-in-centrul-de-retinere-si-arestare-preventiva-nr-1-din-bucuresti/>.

¹³ The full text of the judgment is available at <https://hudoc.echr.coe.int/eng/?i=001-176305>. Please also see Marta-Claudia Cliza, Mirela Gorunescu, Laura-Cristiana Spătaru-Negură, *The Pilot Case of Rezmiveş and the Most Awaited Reform of the Romanian Penitentiary System*, in *Journal of Legal and Administrative Studies*, no. 2 (17) of 2017, pp. 27-45, <https://www.ceeol.com/search/article-detail?id=610275>;

many occasions [e.g. the Rahova Penitentiary in several of its judgments, among which we mention by way of example the judgment in the case of *Apostu v. Romania*¹⁴ of 3 February 2015 (application no. 22765/12), para. 83; judgment in *Iacov Stanciu v. Romania*¹⁵ of 24 July 2012 (no. 35972/05), paras. 171-179; judgment in *Flămânzeanu v. Romania*¹⁶ of 12 April 2011 (no. 56664/08), paras. 89-100; judgment in *Pavalache v. Romania*¹⁷ of 18 January 2011 (application no. 38746/03), paras. 87-101].

These inhumane conditions clearly have a serious impact on the people's health, as they are detained in unsanitary conditions, on the edge of survival, images that remain deeply imprinted on their retinas and in their souls, often having nightmares and reliving those moments.

iii. Reasonability of moral damages

The Romanian High Court of Cassation and Justice¹⁸ has ruled that moral damages, in order to preserve their character of “just satisfaction”, must be awarded in an amount that does not divert them from the aim and purpose laid down by law, so as **not to become an unfair material benefit**, without causal justification in the damage suffered and its consequences.

Thus, in order to ensure fair compensation for the suffering which injured third parties have suffered or may have to suffer, **the compensation awarded must be reasonably proportionate to the damage suffered.**

iv. Establishment of non-material damage

The High Court of Cassation and Justice¹⁹ has ruled that non-material damage represents harmful consequences of a non-economic nature resulting from infringements and violations of non-patrimonial personal rights and is determined by assessment, following **the application of criteria relating to the negative consequences suffered** by those concerned, **in physical, psychological and emotional terms**, the importance of the values damaged, the extent to which they have been damaged, the intensity with which the consequences of the damage were perceived.

In quantifying compensation for non-material damage, fairness is a fundamental criterion established by doctrine and case law.

From this point of view, the determination of such compensation undoubtedly involves a degree of approximation, but the court must strike a certain balance between the non-material damage suffered and the compensation awarded, in such a way as to allow the injured party to enjoy certain advantages which mitigate the non-material suffering, without, however, leading to unjust enrichment.

It has been unanimously held by both national and European courts that **any compensation for non-material damage could only have the role of mitigating psychological damage and not of covering it in its entirety.** However subjective the

¹⁴ The full text of the judgment is available at <https://hudoc.echr.coe.int/eng?i=001-150781>.

¹⁵ The full text of the judgment is available at <https://hudoc.echr.coe.int/eng?i=001-123577>.

¹⁶ The full text of the judgment is available at <https://hudoc.echr.coe.int/eng?i=001-104498>.

¹⁷ The full text of the judgment is available at <https://hudoc.echr.coe.int/eng?i=001-123797>.

¹⁸ Please see, for instance, Decison no. 320 of 1 February 2018, given by First Section of the Higher Court of Cassation and Justice.

¹⁹ Please see, for instance, the Decision 2 dated 17 January 2017 given in recourse by the Second Civil Section of the Higher Court of Cassation and Justice.

nature of moral damage may be by its very nature, only a **balanced assessment** could compensate for the difficulty of quantifying it, and the practice of the courts in this area offers a more concrete application of the criteria found in **Article 540** of the Romanian Code of Criminal Procedure for determining the type and extent of compensation.

On the other hand, the practice of the European Court of Justice recognises that States (including the national legislator) have a margin of appreciation in relation to certain limitations, without prejudice to the rights of the person claiming a certain conduct on the part of the State.

It follows from the combination of the two aforementioned legal texts that one of the requirements laid down by the law and to be taken into account by the court in order to determine the extent of reparation is proof of the consequences for the person or the family of the person deprived of liberty or whose liberty has been restricted as a result of the deprivation of liberty.

At the same time, it is imperative to take into account **the degree of violation of the right asserted, while respecting both the principle of proportionality²⁰ and the principle of equity²¹.**

For that reason, the court seized of the matter of compensation for non-pecuniary damage must fix an amount necessary not so much to restore the injured person to a situation similar to that which he had previously enjoyed as to provide him with moral satisfaction capable of replacing the

value of the damage of which he was deprived.

With regard to the case-law of the European Court of Human Rights, we would point out that the Court has ruled that **excessive formalism with regard to the burden of proving the non-material damage caused by unlawful detention cannot be compatible with the right to compensation covered by Article 5** of the Convention²².

Assessment of the non-material damage suffered by each person entitled

The attitude of these persons entitled towards family members after release usually changes a lot, as they isolate themselves and refuse to communicate with close people and friends, because they feel ashamed and stigmatised.

The accusations made have a negative effect on the community in which they live, and the community's attitude reflects on them, which is why they feel isolated and blamed within their community.

The public opprobrium to which they have been subjected for years during the criminal trial, the status of "convict" they still feel it even after the whole nightmare ends with the acquittal of the person concerned.

An interesting situation can be found in practice, namely when, in the context of the reintegration of the person entitled into work, the boss of this person is one of the prosecution's witnesses in the case, and it is

²⁰ Regarding the principle of proportionality, please see Marta-Claudia Cliza, Constantin-Claudiu Ulariu, *Administrative Law. General Part*, C.H. Beck Publishing House, Bucharest, 2023, pp. 115-118.

²¹ On matters regarding the general principles of law, the principle of equality and the responsibility principle, please see Elena Anghel, *General principles of law*, in Lex ET Scientia International Journal, XXIII no. 2/2016, pp. 120-130, available at http://lexetscientia.univnt.ro/download/580_LESIJ_XXIII_2_2016_art.011.pdf, Cornelia Beatrice Gabriela Ene-Dinu, *History of the Romanian state and law*, Universul Juridic Publishing House, Bucharest, 2020, p. 288 and following, and Elena Anghel, *The responsibility principle*, published in the proceedings of the Challenges of the Knowledge Society (CKS), "Nicolae Titulescu" Publishing House, 2015, pp. 364-370.

²² Please see the judgment rendered in the case of *Danev v. Bulgaria*, application no. 9411/05, paras. 34-35 or the short press release available at <https://hudoc.echr.coe.int/eng-press?i=003-3237041-3623296>.

obvious that this person's attitude towards the former 'convict' is not in line with the court's decision to acquit him, as it is obvious that such a person considers him guilty.

In practice, it has also been noted that even the spouses of such persons, under pressure from their colleagues, are forced to change their jobs, which also involves an emotional effort to adapt, despite being in a family crisis.

For all these reasons, the suffering of such entitled persons is inestimable and fair compensation for this non-material damage must be chosen by the court.

A compensation that is insignificant or disproportionate to the gravity of the violation does not comply with the provisions of **Article 5 para. 5** of the Convention, since **the right guaranteed by this rule would become theoretical and illusory**²³.

Under the provisions of **Article 540 para. (5)** of the Romanian Code of Criminal Procedure, the compensation granted by the court in such cases is borne by the Romanian State, through the Ministry of Public Finance.

D. The lodging of the claim within 6 (six) months from the date of the final judgment of the court

In order for such a claim to be admissible, the action must be brought **within six months of the date on which the judgment** of the court and the order or decision of the judicial authorities finding the miscarriage of justice or the unlawful deprivation of liberty became final.

3. Final considerations

For all the arguments of fact and law set out above, we consider that in such cases, the legal conditions set out in Article 539 of the Code of Criminal Procedure for the State to incur civil liability in tort are met, objective liability, independent of the fault of the judicial bodies involved in taking the preventive measure against the persons entitled.

Thus, *firstly*, such claims are admissible, being circumscribed to the legal hypothesis regulated by the provisions of **Article 539** of the Code of Criminal Procedure, in the light of the considerations of the Decision of the Romanian Constitutional Court no. 136/2021.

Secondly, please find that the only means of redress that the court can order is to grant the material and moral damages requested, since the unlawful nature of the deprivation of liberty measures was such as to restrict mental freedom, to cause real harm to physical existence, bodily integrity, health (due to health problems that have been triggered during this period, as a result of the severe stress to which the person entitled has been subjected), honesty, dignity and honour, but not least, the professional prestige of the person entitled.

In awarding the damages claimed and assessing the amount of damages, account must be taken of the negative consequences suffered by these persons, in family, physical and psychological terms, the age at which they suffered them, the public contempt and the other elements set out in this paper.

The deprivation of liberty measures have caused these persons great damage to their moral values and the harm done to them is immeasurable, and their family,

²³ *Vasilevskiy and Bogdanov v. Russian Federation*, § 22 and 26; *Cumber v. United Kingdom*, decision of the Commission; *Attard v. Malta* (dec.)

professional and social situation has been seriously affected.

The distorted image after many years of criminal proceedings can never be repaired.

Therefore, in order to repair the genuine emotional shock experienced by these persons on a personal, professional and family level, which has had **irreparable consequences on their family members²⁴ life and on their professional life**, starting from the factual situation (i.e. the way in which the criminal case was handled and the final decision handed down by the court), such claims must be admitted and the material and moral damage covered.

Obviously, in judicial proceedings, **evidence** must be given by documents and witnesses, as well as by any other evidence that may be necessary as a result of the debates. **Examples of such documents** include, for example, court judgments handed down in the criminal proceedings, arrest warrants, release papers, employment certificates, documents attesting to the medical condition of the persons entitled before and after conviction, invoices and receipts attesting to expenses incurred and claimed for material damage.

In addition, it is worth pointing out that, according to the provisions of **Article 541 para. (4)** of the Romanian Code of Criminal Procedure, such actions are **exempt from the payment of the judicial stamp duty**.

Moreover, it should be pointed out that, according to the provisions of **Article 541 para. (1)** of the Code of Criminal

Procedure, such actions for damages may be brought by the person entitled to damages, and after his death may be continued or brought by the persons who were dependent on him at the time of his death.

It is also important to point out that, according to the provisions of **Article 542** of the Code of Criminal Procedure, in the event that reparation for damage has been granted according to **Article 541** of the Code of Criminal Procedure, as well as in the event that the Romanian State has been convicted by an international court for any of the cases provided for in **Articles 538 and 539** mentioned above, the action for recovery of the amount paid may be directed against the person who, with bad faith or gross negligence, has caused the situation giving rise to damage or against the institution with which he is insured for compensation in case of damage caused in the exercise of the profession.

In such actions for damages, the Romanian State must prove, by means of a prosecutor's order or a final criminal judgment, that a state official has caused the miscarriage of justice or the unlawful deprivation of liberty **causing damage in bad faith or through serious professional negligence**.

We are curious in how many such cases the state will take recourse against the persons responsible with such actions for damages to recover the damage caused.

²⁴ For information on the concept of 'family members' at the European level, please see Roxana-Mariana Popescu, *Opinion of Advocate General Wathelet and Judgment of the Court of Justice of the European Union in Case C-673/16, concerning the concept of 'spouse' in European Union Law*, published in the proceedings of the Challenges of the Knowledge Society (CKS), "Nicolae Titulescu" Publishing House, 2019, pp. 705-710.

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