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Unjust Deprivation of Liberty During the Criminal Process: The Romanian National Standard Compared to the European Standard for the Protection of Individual Freedom in Judicial Proceedings

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Abstract: The provisions of international documents that guarantee the fundamental right to freedom and security are transposed into Romanian legislation both in the Constitution and in the Code of Criminal Procedure. In this context, the present study aims to analyze the national standard of protection of individual freedom in judicial proceedings compared to the standard established by the Convention for the Protection of Human Rights and Fundamental Freedoms. Through documentation, interpretation, and scientific analysis as the main research methods, this paper emphasizes the possibility of establishing, through domestic legislation, a level of protection higher than that imposed by the conventional standard. From this perspective, by regulating a right to repair the damage suffered in the situation of unjust deprivation of liberty as a result of ordering a preventive measure, the national standard of protection established by the Romanian Code of Criminal Procedure is higher than the European standard. This study concludes with a proposal to expand the current procedural framework configured by the provisions of the Romanian Code of Criminal Procedure (with the amendments made in 2023) regarding the special procedure for repairing the damage suffered as a result of the illegal or unjust deprivation of liberty during the criminal process.

Keywords: the fundamental right to liberty and security; criminal judicial proceedings; the European standard for the protection of individual freedom; The Romanian Criminal Procedure Code; legislative changes



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1. Introduction

The protection of individual freedom, in the sense of the guarantee by state authorities of the fundamental right to freedom and security of any person, is enshrined in a series of documents, both at the international level (the Universal Declaration of Human Rights¹, which stipulates in art. 3 that “every human being has the right to life, liberty and security of person”; the International Covenant on Civil and Political Rights², art. 9, which provides that “Everyone has the right to liberty and security of person. No one may be arrested or detained arbitrarily. No one may be deprived of his liberty except for legal reasons and in accordance with the procedure laid down by law...”) as well as on a European level (The Charter of Fundamental Rights of the European Union³, according to which “every person has the right to freedom and security”—art. 6; The Convention for the Protection of

¹ Universal Declaration of Human Rights of 10 December 1948.

² International Covenant on Civil and Political Rights of 16 December 1966.

³ The Charter of Fundamental Rights of the European Union, published in the Official Journal of the EU no. C 202 of 7 June 2016.

Human Rights and Fundamental Freedoms⁴, which, in art. 5, details over the course of five paragraphs the content of the right to freedom and security stated in the first paragraph: “Every person has the right to freedom and security...”).

The internal legislation of Romania guarantees individual freedom in judicial proceedings both by provisions of the Fundamental Law of the Romanian State (Constitution⁵) and by procedural–criminal rules included in the Code of Criminal Procedure⁶.

Deprivation of liberty, as an exception to the principle of guaranteeing the person’s right to freedom and safety, was defined in the doctrine as a measure ordered by the state authorities by which a person is held against his will in a specific space and for a specified period of time being prevented from leaving that space by coercion or threat of coercion by the use of force (Trechsel 2006). In order for this deprivation of liberty imposed by the authorities not to become an instrument of oppression, it must be justified and be ordered in compliance with the procedural rules specific to a fair trial; the power of the state compulsory to detain individuals for the protection of the community must observe due process (McSherry 2019).

In this context, the present work, structured in five sections, addresses the issue of deprivation of liberty during the criminal process from the perspective of the level of protection of individual freedom established by the provisions of the Romanian Constitution and the current Romanian Criminal Procedure Code (with the most recent amendments in the matter) by referring to the minimum standard of protection established by the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The research methods used for the elaboration of this study were documentation, observation, interpretation, and scientific analysis, including comparisons of some normative provisions and some aspects of judicial practice (jurisprudence of the European Court of Human Rights, jurisprudence of the Constitutional Court of Romania, jurisprudence of the High Court of Cassation and Justice of Romania).

Thus, in the second section (following these introductory considerations), we present the provisions of the Charter of Fundamental Rights of the European Union and the Convention for the Protection of Human Rights and Fundamental Freedoms, which establish a minimum standard of protection of the right to freedom and personal safety, a standard that must be respected by all European states that recognize and apply these normative acts.

In the third section, we analyze the provisions of the internal legislation (Constitution of Romania, Romanian Code of Criminal Procedure) by which individual freedom is guaranteed within criminal judicial procedures, highlighting the most recent legislative changes brought to the current Code of Criminal Procedure in 2023 in the matter of deprivation of liberty through procedural measures provisionally ordered during the criminal trial.

The fourth section is dedicated to some aspects of the judicial practice of national courts (both from the jurisprudence of the High Court of Cassation and Justice and from the jurisprudence of the Constitutional Court of Romania) in connection with the establishment of the national standard regarding the guarantee of the right to freedom of the person during the Romanian criminal process, which is relative to the minimum standard of protection imposed by the European Convention.

The conclusions section, emphasizing the importance of ensuring, including in the criminal procedural aspect, the level of protection established by art. 5 paragraph 5 of the European Convention, reiterates⁷, under the conditions of taking into account the legislative interventions carried out on the Romanian Criminal Procedure Code in 2023, the

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, signed in 1950.

⁵ The Constitution of Romania, adopted in 1991, republished in the Official Gazette of Romania no. 767 of 31 October 2003.

⁶ The Romanian Criminal Procedure Code, adopted in 2010 (Law no. 135/2010 on the Criminal Procedure Code, published in the Official Gazette of Romania no. 486 of 15 July 2010, with subsequent amendments and additions).

⁷ See, in this sense, the concrete proposal of *de lege ferenda* from the work of Anca-Lelia Lorincz, “The right to repair of damages in the event of affection of the individual freedom of the person during the criminal

proposal to expand the procedural framework for the application of the special procedure to repair the damage suffered as a result of illegal or unjust deprivation of liberty.

2. The European Standard on Guaranteeing the Right to Liberty and Security

The general principle of freedom is spread in the branches of law either in the form of general liberties or in the form of individual liberties.

Human freedom appears under three aspects: freedom from nature, freedom from society, and freedom from the self, which is the basic condition of liability (Popa 1998). The recognition of human rights in laws and the regulation of the individual's legal status as having subjective rights as well as the establishment of their place in society represent a significant step in the evolution of democracy reflected in the legal activity.

The doctrine (Muraru and Tănăsescu 2008) states that this internal relationship between fundamental rights and the basic moral values of an egalitarian universalism in terms of coercive law is a crucial aspect of their meaning in a democratic society.

The concern for the protection and promotion of individual liberties and fundamental rights in general, although with a long history, finds its most important reference in the English constitutional acts Magna Carta Libertatum (1215) and the Habeas Corpus Act (1679). The Treaty of Lisbon came into force on 1 December 2009, incorporating the European Union's Charter of Fundamental Rights, giving these rights a new significance at a critical juncture when some member states attempt to impose their own vision on democratic values and standards in Europe. This came after the French Constitution on the Rights of Man and Citizen (1789), the Universal Declaration of Human Rights (1948), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

The Charter establishes the principle of the right to liberty and security in article 6, stating in paragraph 2 in the same article that "Everyone has the right to liberty and security".

Human society has evolved, and the complicated and challenging nature of relationships that arise within states or internationally, whether regionally or globally, dictates the need for new legal frameworks that are closely related to political and economic ones. In addition to safeguarding human rights and liberties, these frameworks must also prevent governments from enslaving their citizens—sometimes overtly and sometimes under believable, justifiable, or absurd pretenses.

In this framework, the theory of reflexive rights and state self-restraint recognized the need to limit the power of the state and provided a clearer definition of the state for the purpose of enforcing and achieving fundamental rights. According to De Lapradelle (1912), fundamental rights derive from the self-control of the state, which act as real barriers to the institutional powers of the state, thereby guaranteeing the inherent freedom of movement of individuals within a certain limit.

The interest in signing international human rights instruments is not only tied to the need to promote and guarantee human rights and freedoms but frequently comes because of them.

The neglect or serious violation of these rights and freedoms has created contradictions that threaten the status of the free man and the ideals of peace, stability, and security that have persisted in the philosophical–religious and social culture of most nations.

In this view (Deleanu 1998), subjective law refers to the legal concept defined by the person's place in society, as well as the relationship between the individual and the state.

Within contemporary society, we encounter, on the one hand, the complexity of interpersonal connections, as well as the relationship that exists between the individual and society, and, on the other hand, the relationship with the ever-changing internal and external dynamics. Moreover, people no longer demand the simple regulation of freedom, but also participation in freedom. They require the implementation of effective legal

measures (Popa 1998), which implies as many constitutional guarantees as possible for rights and freedoms, especially for personal freedoms.

It is useful to consider the axiological dimension, which involves going through the three stages of the theory genesis of the value of human rights, fundamental rights, and freedoms, especially personal freedom: extracting social realities, synthesizing them, and identifying them, which defines important values and it makes these values positive, transforming them into legal norms (Pavel 2009).

Article 52 of the Charter refers to “The scope and interpretation of rights and principles—(3) To the extent that this Charter contains rights that correspond to rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, their meaning and scope are the same as those provided by the mentioned convention. This provision does not prevent Union law from conferring wider protection”.

The notion of “security” in this context refers to reasonable interference by public authority with the individual’s right to personal liberty. The provisions in article 5 of the European Convention on Human Rights, entitled “The right to liberty and security”, as well as the decisions of the European Court of Human Rights regarding article 6 of the Charter and article 5 of the Convention, all refer to the freedom of the natural person with the primordial aim that no one is unjustly deprived of this freedom (Bârsan 2005). The European Court of Human Rights (ECtHR) has emphasized time and again that the Vienna Convention on the Law of Treaties’ rules should serve as the “starting point” for its interpretation of the ECHR. These rules instruct the ECtHR to take into account (1) the ordinary meaning to be given to ECHR treaty terms; (2) the context provided by the Convention, including its preamble, which confirms that the ECHR was adopted to ensure the protection of certain rights in the UDHR6; (3) the object and purpose of the ECHR as an instrument for the protection of certain human rights for individual human beings; (4) the Contracting Parties’ subsequent practice; and (5) any pertinent rules of international law. Through its case law, the ECtHR has also developed what it refers to as “additional means of interpretation”, including the concepts of autonomous interpretation, evolutive interpretation, and the margin of appreciation doctrine. According to autonomous interpretation, the ECtHR will define terms like “tribunal” and “witness” under the Convention rather than the national legislation of the state parties. Understanding that the Convention is a “living instrument” that needs to be construed in the context of the times is reflected in the court’s evolutive interpretation. In interpreting the Convention, state parties are given certain latitude by the margin of appreciation doctrine (Wheatley 2024). The rights set out in article 6 of the Charter correspond to the rights guaranteed in article 5 of the Convention and have, in accordance with article 52 paragraph 3 of the Charter, the same meaning and the same scope. Therefore, the restrictions to which they may legally be subjected cannot exceed those permitted by article 5 of the Convention.

- “1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
 3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

Thus, due to the constitutional guarantee of the right to freedom and security, as well as the state's ratification of international human rights treaties, state institutions fulfill their negative obligation not to violate this right under the terms and conditions provided for in the Constitution, laws, and international agreements. However, the state has the positive duty to ensure respect for personal freedom and the security of the person and not to allow restrictions on this right created by other natural persons in the relations between natural and legal entities. Public authorities must intervene to prevent or discourage, as well as prohibit and sanction, such behavior on the part of individuals in order to fulfill the state's commitment to guarantee their freedom and security. As a matter of law, such an act constitutes a crime from a legal point of view, and a person convicted of a crime is deprived of his liberty.

Similarly, the European Court ruled in the case of *Riera Blume and others v. Spain*⁸ that the state breached its obligation to safeguard an individual's liberty and personal security, even though the state authorities responsible for restricting that liberty later agreed to a prison sentence at the plaintiffs' families' request. In this context, the most representative case of the European Court of Human Rights that distinguishes between deprivation of liberty and simple restrictions on freedom of movement is *Guzzardi v. Italy*⁹ ruled on the mandatory residence of a person on a remote island with an area of 2.5 km with his family and with the freedom to move around the area but with limited social contacts when a sentence of 16 months of imprisonment at home was being considered a violation of the provisions of art. 5 of the Convention.

Compared to the UK, the European Court has shown that the difference between imprisonment and restriction of liberty is one of degree and intensity rather than nature or substance¹⁰. Thus, the court held that the applicant was deprived of his liberty under the condition that the medical staff had full control over him and his actions, and he could not leave the hospital, even if he was not locked in a room. The medical staff had complete control over the freedom of this frail and incapacitated person based solely on their own assessment. In conclusion, the admission of a person to a psychiatric institution constitutes

⁸ ECtHR Judgment in *the Case of Riera Blume and others versus Spain*, pronounced on 14 October 1999. Available online at www.echr.coe.int (accessed on 26 June 2024).

⁹ ECtHR Judgment on request no. 7367/76 in *the Case of Guzzardi versus Italy*, pronounced on 6 November 1980. Available online at www.echr.coe.int (accessed on 26 June 2024).

¹⁰ ECtHR Judgment in *the Ibrahim Case and others versus United Kingdom*, pronounced on 13 September 2016. Available online at www.echr.coe.int (accessed on 28 June 2024).

a prison sentence under the specified conditions and can only be carried out under those conditions and procedural rules that protect the person's right to liberty and security.

The European Court of Human Rights ruled that placing people in separate hotel rooms where they stay for three days without being allowed to leave under the supervision of certain people who stay permanently in each room with the windows of the rooms hermetically sealed with boards is a deprivation of freedom¹¹.

On the other hand, in the intergovernmental proceedings between Turkey and Cyprus, the question was raised whether the Turkish state violated the right to freedom and security of the Greek Cypriots living in enclaves in the northern part of the island. The Turkish forces forbade these people to walk at night. The court¹² found that this kind of circumstance is not protected by article 5 of the Convention and would be analyzed under article 8 of the European Convention, which addresses the invasion of an individual's privacy in situations where there has never been actual custody. In a different ruling, the European Court decided that someone residing in a territorial enclave enclosed by another state's borders should not be prevented from entering that state¹³.

The court further decided that bringing someone to a police station for interrogation does not automatically equate to detention. In another case¹⁴, the European Court ruled that a person's personal liberty was violated when a person's release was delayed by 45 min compared to the mandatory 12 h period set by the domestic law.

The particular circumstances of the individual in question must be considered in order to assess whether or not their rights to liberty and security have been infringed; the extent of these rights may differ based on the circumstances.

In the case of *Engel et al. v. The Netherlands*¹⁵, the European court held that military service itself is not a deprivation of liberty due to the normal conditions of military life or the performance of the normal duties of a soldier in a special building during his free time. On the other hand, the use of harsh custodial measures, including holding soldiers in cells, deprives them of their liberty because, by its nature and effect, it deviates from the normal conditions of military service. Consequently, even while soldiers and civilians are not subject to the same limits on the enjoyment of their right to liberty and security under article 5 of the European Convention, these restrictions differ based on the individual's legal position.

From this point of view, the disciplinary measures applied to people in detention cannot deprive them of their freedom because these people are not in a state of freedom; even if the right to freedom and security is recognized for all people, it is universal (*Bogdan and Selegean 2005*).

3. The Current Procedural–Criminal Legislation in Romania Regarding the Guarantee of Individual Freedom in Judicial Proceedings—Recent Changes

At the national level (internally), the guarantee of individual freedom is stipulated in the Constitution of Romania in a chapter dedicated to fundamental rights and freedoms and in the content of art. 23 ("Individual freedom")¹⁶, the constitutional text states, in

¹¹ See footnote 8.

¹² ECtHR Judgment in *the Case of Cyprus versus Turkey*, pronounced on 12 May 2014. Available online at www.echr.coe.int (accessed on 26 June 2024); The decision of the ECtHR concerned *Catan et al. versus Moldova and Russia*, pronounced on 19 October 2012. Available online at www.echr.coe.int (accessed on 26 June 2024).

¹³ See footnote 9.

¹⁴ ECtHR Judgment in *the Case of Khoroshenko versus Russia* pronounced on 30 June 2015. Available online at www.echr.coe.int (accessed on 26 June 2024).

¹⁵ ECtHR Judgment in *the Case of Engel et al. versus the Netherlands*, pronounced on 8 June 1976. Available online at www.echr.coe.int (accessed on 26 June 2024).

¹⁶ "(1) Individual freedom and security of the person are inviolable.
(2) The search, retention or arrest of a person is allowed only in the cases and with the procedure provided by law.
(3) Retention cannot exceed 24 h.
(4) Preventive arrest is ordered by the judge and only during the criminal trial.
(5) During the criminal investigation, preventive arrest can be ordered for a maximum of 30 days and can be

para. (1), the inviolability of individual freedom and the safety of the person and continues (throughout the following 12 paragraphs) with the framework regulation of the possibility of legal limitation of these freedoms by search, retention, preventive arrest, or applying a custodial sanction that can only be of a criminal nature.

Pursuant to the constitutional provisions, the current Romanian Code of Criminal Procedure (CCP) includes the guarantee of the right to freedom and safety (art. 9)¹⁷, which is among the fundamental principles of the application of criminal procedural law; thus

“(1) During the criminal process, the right of any person to freedom and safety is guaranteed.

[...]

(5) Any person against whom a custodial measure was ordered illegally or unjustly, during the criminal process, has the right to compensation for the damage suffered, under the conditions provided by law.”

It is noted that in terms of the regulatory modality contained in art. 9 of the CCP, after enunciating, at the level of principle, the guarantee of any person’s right to freedom and safety during the criminal process follows the enumeration of a series of guarantees that give consistency to this right (Ghigheci 2014). The last of these guarantees (the one that refers to the right to reparation of damage) was substantially increased by the legislative intervention of 2023, which consisted of the completion of para. (5) of art. 9 of the CCP¹⁸ with the phrase “*or unjust*”, thus ensuring the right to reparation for the person against whom a custodial procedural measure was ordered unfairly, i.e., unjustly¹⁹.

Moreover, by the decision of the Constitutional Court No. 136/2021²⁰, the Romanian court of constitutional control declared unconstitutional the legislative solution contained in

extended by a maximum of 30 days, without the total duration exceeding a reasonable term, and no more than 180 days.

(6) During the trial phase, the court is obliged, under the terms of the law, to check periodically, and not more than 60 days, the legality and validity of the preventive arrest and order, immediately, the release of the defendant, if the grounds that have determined the pre-trial detention have ceased or if the court finds that there are no new grounds justifying the maintenance of the deprivation of liberty.

(7) The decisions of the court regarding the measure of preventive arrest are subject to the appeals provided by law.

(8) The retained or arrested person is immediately informed, in the language he understands, of the reasons for the retention or arrest, and the charge, in the shortest possible time; the accusation is made known only in the presence of a lawyer, elected or appointed ex officio. (9) The release of the retained or arrested person is mandatory, if the reasons for these measures have disappeared, as well as in other situations provided by law.

(10) The person under preventive arrest has the right to ask for his provisional release, under judicial control or on bail.

(11) Until the conviction is final, the person is considered innocent.

(12) No punishment can be established or applied except under the terms and under the law.

(13) The custodial sanction can only be of a criminal nature.”

¹⁷ “(1) During the criminal process, the right of any person to freedom and safety is guaranteed.

(2) Any privative or restrictive measure of freedom is ordered exceptionally and only in the cases and under the conditions provided by law.

(3) Any arrested person has the right to be informed as soon as possible and in a language which he understands about the reasons for his arrest and has the right to file an appeal against the disposition of the measure.

(4) When it is established that a measure depriving or restricting freedom was ordered illegally, the competent judicial bodies have the obligation to order the revocation of the measure and, as the case may be, the release of the retained or arrested person.

(5) Any person against whom a custodial measure was ordered illegally or unjustly, during the criminal process, has the right to compensation for the damage suffered, under the conditions provided by law.”

¹⁸ By Law no. 201/2023 for the amendment and completion of Law no. 135/2010 regarding the Criminal Procedure Code, as well as for the modification of other normative acts, published in the Official Gazette of Romania no. 618 of 6 July 2023.

¹⁹ “Illegal deprivation of liberty” means the ordering of a custodial measure in violation of the conditions and cases provided by law for taking such a measure. “Unjust deprivation of liberty” means the ordering of a custodial measure in the situation where the accusation in criminal matters is not founded (although, based on the existing evidence at the time the measure was ordered, the conditions and cases provided by law for taking that measure were respected).

²⁰ Decision of the Constitutional Court of Romania no. 136/2021, published in the Official Gazette of Romania no. 494 of 12 May 2021.

art. 539 of the CCP (prior to the amendment brought by Law No. 201/2023), which excluded the right to reparation of the damage suffered in the case of unjustly ordered deprivation of liberty during the criminal process. The author of the exception of unconstitutionality resolved by this decision invoked the fact that the regulation in art. 539 of the CCP of the right to reparation is “much too restrictive”, as it conditions this right only on the criterion of the illegality of the custodial measure.

Analyzing the exception, the Constitutional Court examined the legal issue related to the deprivation of liberty through a legally ordered procedural measure but which became unjust as a result of the case closing (when it was found that the criminal action was ungrounded) or of an acquittal pronounced in the case in which that measure was ordered. In justifying its decision, the constitutional control court held that the examined situation represents a case of unfair/unjust deprivation of liberty, which gives rise to a right to reparation of the damage suffered by the person subject to the respective procedural measure as a consequence of the provisions of the Constitution²¹.

Therefore, the addition, by Law No. 201/2023, of the content of para. (5) from art. 9 of the CCP was a consequence of the implementation of the Constitutional Court Decision No. 136/2021.

Also, for the implementation of the decision of the Constitutional Court No. 136/2021, by the same Law No. 201/2023, the Romanian legislator modified both the marginal name and the content of art. 539 of the CCP, thus regulating the special procedure for repairing material damage or moral damage in the case of unjust deprivation of liberty.

“Article 539

The right to reparation of damage in case of illegal or unjust deprivation of liberty

- (1) The person against whom, in the course of the criminal process, a preventive measure depriving of liberty was ordered, also has the right to reparation of the damage, if:
 - (a) the measure was found to be illegal;
 - (b) for the offense that justified the taking of the measure, it was ordered pursuant to art. 16 para. (1) lit. a)–d) the case closing or acquittal, unless the solution was ordered as a result of the decriminalization of the committed act.
- (2) The situations provided for in para. (1) are proven by the prosecutor’s order revoking the measure of retention or case closing, by the final decision of the judge of rights and liberties, the judge of the preliminary chamber or the court revoking the preventive measure depriving of liberty or by which it was found its termination by virtue of the law or, as the case may be, by the final judgment of acquittal.
- (3) In the situation provided for in para. (1) lit. b), the person is not entitled to demand compensation from the state for the damage suffered if, through false statements or in any other way, he caused the preventive measure of deprivation of liberty to be taken, except in cases where he was forced to do so.”

We note, however, that the new content of art. 539 of the CCP, even if it is more detailed compared to the previous regulation²², expressly limits the possibility of exercising the

²¹ Art. 1 para. (3), art. 23 para. (1) and art. 52 para. (3) thesis I of the Romanian Constitution.

²² Prior to the legislative change made in 2023, art. 539 CCP it had the marginal title “The right to reparation of damage in case of illegal deprivation of liberty” and the following content:

“(1) The person who, in the course of the criminal process, was illegally deprived of liberty also has the right to reparation of the damage.

(2) Illegal deprivation of liberty must be established, as the case may be, by order of the prosecutor, by the final decision of the judge of rights and liberties or the judge of the preliminary chamber, as well as by the final decision or final judgment of the court charged with judging the case.”

right to reparation of damage only in the case of deprivation of liberty through preventive measures (i.e., retention, preventive arrest, house arrest).

We emphasize the fact that, as it appears in the content of art. 5 paragraph 5 of the European Convention, “any person who is the victim of an arrest or *detention* in conditions contrary to the provisions of this article” has the right to compensation for damages; therefore, both arrest, as a preventive measure, and any other form of detention (such as involuntary medical internment as a temporary safety measure) that contravenes the conventional provisions gives rise to a right to reparation, as has been ruled in the jurisprudence of the European Court of Human Rights (for example, Case N. against Romania²³).

It is true that in the direct application of art. 5 paragraph 5 of the European Convention and art. 52 para. (3) thesis I of the Romanian Constitution²⁴, the Romanian courts can admit the civil action for reparation and in the case of deprivation of liberty through the safety measure of medical internment taken during a criminal process. We believe, however, that a new amendment to art. 539 of the CCP is justified in order to extend the current restrictive framework of the application of the damage repair procedure to the deprivation of liberty through measures other than preventive ones, thus ensuring, through the domestic procedural–criminal legislation, the standard of protection established by the European Convention. In fact, the regulation from the previous Criminal Procedure Code (from 1968)²⁵ allowed (following the legislative amendment operated by Law No. 281/2003) the application of the special procedure of repairing the damage also in the case of deprivation of liberty through the safety measure of medical internment (Lorincz 2022).

In this context, we also mention the recent amendment brought to the Romanian Code of Criminal Procedure by Law No. 214/2023²⁶ regarding the provisions of art. 248 of the code that regulates the procedure for applying and lifting the measure of temporary medical internment as a procedural safety measure of a medical nature.

The Romanian legislator operated this amendment to implement the decision of the Constitutional Court No. 357/2022²⁷ by which the constitutional review court found the unconstitutionality of those provisions contained in art. 248 of the CCP, which allowed the measure of temporary medical internment during the criminal investigation and the preliminary chamber procedure in the event that the suspect or defendant suffered from a mental illness to be ordered without the prior performance of a medico-legal psychiatric examination.

It should be emphasized that in the considerations of this decision (paragraph 43), the Constitutional Court addressed the issue of the safety measure of temporary medical internment by referring to the jurisprudence of the European Court of Human Rights, noting that the court in Strasbourg applies the provisions of art. 5 of the European Convention in the case of deprivation of liberty ordered by taking this measure. This is an additional argument that can be brought to the proposal to extend the procedural framework of the application of the special procedure of repairing the damage and to the case of deprivation of liberty through measures other than preventive ones.

²³ ECtHR Judgment on request no. 59152/08 in the Case N. against Romania, pronounced on 28 November 2017. Available online at <http://ier.gov.ro/wp-content/uploads/cedo/N.-%C3%AEmpotriva-Rom%C3%A2niei.pdf> (accessed on 25 March 2024).

²⁴ According to art. 52 para. (3) thesis I of the Constitution, “the state is patrimonial liable for damages caused by judicial errors”.

²⁵ The Romanian Code of Criminal Procedure adopted in 1968, republished in the Official Gazette of Romania no. 78 of 30 April 1997.

²⁶ Law no. 214/2023 for the amendment and completion of Law no. 286/2009 regarding the Criminal Code, of Law no. 135/2010 regarding the Code of Criminal Procedure, as well as for the amendment of Law no. 318/2015 for the establishment, organization and operation of the National Agency for the Administration of Unavailable Assets and for the modification and completion of some normative acts, published in the Official Gazette of Romania no. 634 of 11 July 2023.

²⁷ Decision of the Constitutional Court of Romania no. 357/2022, published in the Official Gazette of Romania no. 1061 of 2 November 2022.

4. Aspects of Judicial Practice Regarding the Establishment of the National Standard Regarding the Guarantee of the Right to Freedom of the Person During the Romanian Criminal Process

In a case recently resolved by the Romanian High Court of Cassation and Justice²⁸, the court interpreted and applied the provisions of the Code of Criminal Procedure by referring to the national standard of protection of the right to freedom and security established by domestic legislation relative to the minimum standard of protection imposed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (art. 5 paragraph 5).

Thus, the supreme court was entrusted with judging a recourse declared against the decision of the court of appeal by which the defendant—the Romanian State was obliged to pay a sum of money in the form of moral damages, and the payment of unpaid salary rights during the period of preventive arrest was ordered against the defendant who was later acquitted in the criminal case in which that custodial measure was taken.

In this case, through a request registered at the Bucharest Court, 5th civil section, on 29 November 2017, plaintiff A. sued the Romanian State through the Ministry of Public Finance and requested that the defendant be ordered to pay material damages (consisting of the counter value of unpaid net salary rights for the duration of 56 calendar months, corresponding to the mandate of the president of the Financial Supervisory Authority as well as the court costs caused by the conduct of the criminal trial in which he was the defendant and which ended with the acquittal) and moral damages (consisting of the moral reparation for the deprivation of liberty ordered during the criminal trial completed by his acquittal).

On 28 December 2018, the Bucharest Court rejected, as unfounded, the civil action brought by the respective request for summons.

By a decision issued on 5 July 2021, the Bucharest Court of Appeal, the 3rd civil section, for cases with minors and family admitted, in part, the appeal declared by applicant A. against the civil sentence of the first instance (Bucharest Court), obliging the Romanian State to pay the plaintiff an amount representing the equivalent of the net salary rights related only to the period in which he was subject to the measure of preventive arrest as well as an amount lower than that requested by the plaintiff as moral damages.

The solution pronounced by the Bucharest Court of Appeal was contested by declaring recourse by plaintiff A., the defendant of the Romanian State (through the Ministry of Public Finance), and the Prosecutor's Office attached to the High Court of Cassation and Justice—National Anticorruption Directorate. On the one hand, applicant A. claimed that he did not obtain full compensation for the damage suffered; on the other hand, the defendants invoked the lack of material and moral damage and contested the way the appeal court interpreted the provisions of art. 539 of the CCP by applying the decision of the Constitutional Court No. 136/2021 regarding the qualification of the illegal act.

Judging the recourse, the High Court of Cassation and Justice held that the court of appeal correctly applied the provisions of art. 539 of the CCP by taking into account the decision of the Constitutional Court No. 136/2021, finding that the defendant was unjustly deprived of his liberty, a situation that falls within the regulatory scope of the procedural provisions on compensation for damage.

However, the Romanian State (through the Ministry of Public Finances) claimed that in this case, under the provisions of art. 5 of the European Convention, which guarantees the right to liberty and stipulates the conditions under which deprivation of liberty is considered a permitted interference by state authorities, the supreme court assessed that, according to the jurisprudence of the Constitutional Court of Romania, “the national law, as interpreted by the Constitutional Court, grants a higher standard of protection than that of the convention in the matter of guarantees for deprivation of liberty”.

²⁸ Decision of the High Court of Cassation and Justice of Romania no. 1096/2023, pronounced by the first civil section on 8 June 2023. Available online at [https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery\[0\].Key=id&customQuery\[0\].Value=208917#highlight=#](https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery[0].Key=id&customQuery[0].Value=208917#highlight=#) (accessed on 31 March 2024).

Taking into account the considerations of the Constitutional Court Decision No. 136/2021 (paragraphs 31 and 47), the panel from the High Court of Cassation and Justice that judged the recourse in question held that art. 5 paragraph 5 of the European Convention “imposes a minimum standard of protection” and that, although the recognition of the right to reparation for the damage suffered for unjust deprivation of liberty during a criminal trial is not a requirement of the Convention for the Protection of Human Rights and Fundamental Freedoms, the state is entitled, through domestic legislation, to establish a higher standard protection of individual freedom by regulating the right to reparation in cases other than those expressly resulting from the content of the conventional provisions.

Also, in relation to the claims of the appellant, plaintiff A., the Supreme Court considered that the Court of Appeal correctly held that the compensation of the damage can be ordered only within the limits of the existence of a causal link between the damage suffered and the deprivation of liberty to which the defendant has been subjected to unjustifiably. Therefore, the court considered that, through the special procedure regulated in the Code of Criminal Procedure, compensation can only be granted for the period of deprivation of liberty and not for the entire period of non-exercising the mandate of the president of the Financial Supervision Authority.

With regard to the existence, in this case, of moral damage likely to be covered through the special procedure regulated in the Code of Criminal Procedure, the High Court of Cassation and Justice found that the appeal court correctly indicated the criteria for assessing damages to be moral (the negative consequences suffered by the applicant and his family, the intensity with which these consequences were perceived, the importance of moral values damaged) and related to the concrete circumstances of the case (duration of preventive arrest—6 months, the quality of the applicant at the time of ordering the custodial measure, the temporary compromise of his public image, the damage to his health during the unjust deprivation of liberty, etc.).

We underline the fact that the procedural provisions that regulated/regulate the manner of exercising the right to reparation of damage in case of wrongful arrest/taking of a wrongful preventive measure/illegal deprivation of liberty have been subject to constitutionality control on several occasions, even prior to the entry into force of the current Criminal Procedure Code²⁹. The control of the constitutionality of these provisions was carried out by the Constitutional Court (Constitutional Court of Romania) by verifying their compliance with the provisions of the Constitution, following the invocation of some exceptions of unconstitutionality³⁰ in several cases pending before the courts. The jurisprudence of the Constitutional Court of Romania has been constant in resolving the exceptions raised³¹ in the sense of retaining the fact that “according to art. 5 paragraph 5 of the Convention, any person, victim of an arrest or detention in conditions contrary to the provisions of the same art. 5, has the right to reparations, paragraph 5 of art. 5 of the

²⁹ Decision of the Constitutional Court of Romania no. 417/2004, published in the Official Gazette of Romania no. 1044 of 11 November 2004; Decision of the Constitutional Court of Romania no. 221/2005, published in the Official Gazette of Romania no. 516 of 17 June 2005; Decision of the Constitutional Court of Romania no. 78/2008, published in the Official Gazette of Romania no. 152 of 28 February 2008; Decision of the Constitutional Court of Romania no. 48/2016, published in the Official Gazette of Romania no. 346 of 5 May 2016.

³⁰ The exceptions of unconstitutionality represent the legal means by which the parties in the process (or the prosecutor, or even the court *ex officio*) can invoke, before the courts, the non-compliance with the constitutional provisions of certain legal provisions applicable in the case. The competence to resolve these exceptions rests with the Constitutional Court, which is pronounced by binding decision for all courts. If the exception is admitted and the unconstitutionality of the criticized legal provisions is found, the decision of the Constitutional Court leads to the termination of the legal effects of the respective provisions (see art. 29–31 of Law no. 47/1992 regarding the organization and operation of the Constitutional Court, republished in the Official Gazette of Romania no. 807 of 3 December 2010).

³¹ All the exceptions of unconstitutionality which invoked the violation of free access to justice and the right to a fair trial (rights provided for in art. 21 of the Romanian Constitution), as well as art. 5 paragraph 5 of the European Convention, on the grounds that the provisions of the Romanian Criminal Procedure Code condition the granting of compensation on the existence of a procedural act (court decision) establishing the illegality of the custodial measure, were rejected.

Convention being immediately following the one that provides that any person deprived of his liberty by arrest or detention has the right to file an appeal before a court, so that it can rule in a short period of time on the legality of his detention and order his release if the detention is illegal”.

Moreover, in the considerations of Decision No. 48/2016 (paragraph 17), the Constitutional Court found that “the right to reparation of damage in case of illegal deprivation of liberty, provided for in art. 539 of the Code of Criminal Procedure constitutes a takeover, through the national criminal procedural rules, of the provisions of art. 5 paragraph 5 of the Convention” and that “the standard of protection provided by art. 5 paragraph 5 of the Convention is a minimum one, the Member States being entitled to offer, through internal legislation, an increased legal protection of individual freedom, by regulating the right to reparations and in other situations than those expressly resulting from the norm of art. 5 paragraph 5 of the Convention”.

5. Conclusions

The possibility of any Member State of the European Union to offer, through internal legislation, a level of protection higher than the conventional standard is enshrined in the text of those directives that contain the so-called non-regression clauses, according to which “nothing in the Directives must be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter of Fundamental Rights of the European Union, the Convention for the Protection of Human Rights and Fundamental Freedoms, or other relevant provisions of international law or the law of any Member State that provides a higher level of protection” (Mitsilegas 2019, pp. 153–54).

Therefore, we note that from the perspective of guaranteeing individual freedom in judicial proceedings by regulating the manner of exercising a right to reparation of damage suffered as a result of unjust deprivation of liberty, the national standard established by the provisions of the current Romanian Code of Criminal Procedure (with the amendments made in 2023) is higher than the minimum standard established by the European Convention.

On the other hand, even if there is the possibility of exercising the right to reparation of the damage and in the case of deprivation of liberty through the safety measure of involuntary medical internment, in the direct application of art. 5 paragraph 5 of the European Convention and on the basis of the constitutional provision, according to which “the state is patrimonial liable for damages caused by judicial errors”, we consider that in order to ensure also from a procedural aspect (of the regulation in the domestic procedural-criminal legislation) the conventional standard that refers to any measure of detention (i.e., deprivation of liberty), it is necessary to expand the current restrictive framework provided for in the Romanian Code of Criminal Procedure by regulating the procedure for reparation of damages for all cases of illegal or unjust deprivation of liberty during the criminal process.

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