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THE RIGHT TO REPAIR OF DAMAGES IN THE EVENT OF AFFECTION OF THE INDIVIDUAL FREEDOM OF THE PERSON DURING THE CRIMINAL PROCEEDINGS

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Abstract

Starting from the need to respect, in any judicial procedure, the right to liberty and security of the person, in order to guarantee public safety and ensure a high level of social capital, this study addresses the issue of reparation for damage to the individual's liberty during the criminal proceedings. The paper presents the special procedure for reparation of material damage or non-pecuniary damage in case of illegal deprivation of liberty in the regulation of the current Romanian Code of Criminal Procedure, with the interpretations given by the High Court of Cassation and Justice for ensuring a unitary judicial practice, as well as with the aspect of unconstitutionality ascertained by the Decision of the Constitutional Court of Romania no. 136/2021. In the context of the legislative interventions envisaged by the latest draft law on amending and supplementing the Code of Criminal Procedure, concrete regulatory proposals are made in the paper so that this special procedure guarantees the exercise of the right to reparation for all situations of unlawful or unjust deprivation of liberty in the course of criminal proceedings, according to the standard of protection established by the European Convention for the Protection of Human Rights and Fundamental Freedoms. The possibility of extending the scope of the special reparation procedure to the case of impairment of individual liberty by restrictive measures of liberty is also being considered.

Key words: *the right to liberty and security of person, criminal trial, illegal or unjust deprivation / restriction of liberty, damage repair, legislative changes.*

INTRODUCTION

The high level of **social capital**, in the sense of mutual trust of individuals in the context of their relationship in society, is obtained and maintained by guaranteeing

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public safety, including by respecting the fundamental rights of the person during legal proceedings, regardless of the nature of these proceedings (criminal, civil, administrative litigation, etc.) and the procedural quality of that person (suspect, defendant, injured party, civil party, plaintiff, defendant, etc.).

One of the fundamental rights that must be respected in a judicial procedure, to guarantee public safety, is the right to liberty and security of person.

Moreover, in the current Romanian Code of Criminal Procedure, a series of fundamental principles are enshrined (in art. 2 - art. 12), under the name of "principles of the application of the criminal procedural law", as rules that underlie the development of the entire criminal proceedings (*Lorincz, 2015, pp. 30-31*), including the principle of guaranteeing the right to liberty and security.

1. THE PRINCIPLE OF GUARANTEEING THE RIGHT TO FREEDOM AND SECURITY IN CRIMINAL PROCEEDINGS

The right to liberty and security is enshrined in art. 9 of the current Romanian Code of Criminal Procedure (CCP), by the following provisions:

"(1) During the criminal proceedings, the right to liberty and security of person shall be guaranteed.

(2) Any measure of deprivation or restriction of liberty shall be provided exceptionally and only in the cases and under the conditions provided by law.

(3) Everyone who has been arrested shall have the right to be informed as soon as possible and in a language which he understands to the reasons for his arrest, and shall have the right to appeal against the decision.

(4) Where it is found that a measure of deprivation or restriction of liberty has been unlawfully ordered, the competent judicial authorities shall be required to order the revocation of the measure and, where appropriate, the release of the detained or arrested person.

(5) Any person who has been unlawfully disposed of in the course of criminal proceedings shall be entitled to reparation for the damage suffered, under the conditions provided by law."

This recognition of the right to liberty and security, as a fundamental principle of the Romanian criminal process, represents a transposition in our criminal procedural legislation of some provisions from a series of international documents: European Convention for the Protection of Human Rights and Fundamental Freedoms ("*Everyone has the right to liberty and security of person*" – art. 5), International Covenant on Civil and Political Rights ("*Everyone has the right to liberty and security of person*" – art. 9), Charter of Fundamental Rights of the European Union ("*everyone has the right to liberty and security of person*" – art. 6).

Also, in the Romanian Constitution, in the chapter dedicated to fundamental rights and freedoms (Chapter II of Title II), the principle of

guaranteeing individual freedom is enshrined (art. 23 –"Individual freedom"), in the following wording:

"(1) Individual freedom and security of the person are inviolable.

(2) Searching, retaining or arresting a person is allowed only in the cases and with the procedure provided by law.

(3) Retention may not exceed 24 hours.

(4) Pre-trial detention is ordered by the judge and only during the criminal trial.

(5) During the criminal investigation, the pre-trial detention may be ordered for a maximum of 30 days and may be extended by a maximum of 30 days, without the total duration exceeding a reasonable term, and not more than 180 days.

(6) In the trial phase, the court is obliged, in accordance with the law, to periodically verify, and not more than 60 days, the legality and validity of pre-trial detention and to order, immediately, the release of the defendant, if the grounds that led to pre-trial detention have ceased or if the court finds that there are no new grounds for maintaining the deprivation of liberty.

(7) The court's decisions regarding the measure of pre-trial detention are subject to the remedies provided by law.

(8) The retained or arrested person shall be informed immediately, in the language he understands, of the reasons for his retention or arrest, and of the charge, as soon as possible; the accusation is made known only in the presence of a lawyer, chosen 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 pre-trial detention has the right to request his or her provisional release, under judicial control or on bail.

(11) Pending the final judgment of the conviction, the person is found not guilty.

(12) No punishment may be established or applied except under the law conditions and according to the law.

(13) The custodial sentence can only be of a criminal nature."

It is observed that the current procedural-criminal regulation of the principle of guaranteeing the right to liberty and security (art. 9 CCP) is based on both the constitutional text and the international provisions that refer to two distinct notions: individual liberty and security person (*Lorincz, 2015, p. 44*). On the one hand, "individual liberty" means the physical freedom of the person, his right to move freely, to be retained, arrested or detained only in the cases and in the forms expressly provided for in the Constitution and laws (*Muraru, 1993, p. 248*). On the other hand, the term "safety of the person" refers to all the safeguards that protect the person in situations where the public authorities,

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precisely in application of the Constitution and the laws, take certain measures concerning individual freedom, guarantees that ensure that these measures are not illegal (*Muraru, 1993, p. 249*).

From this perspective, analyzing the way in which it is regulated, in art. 9 of the current Romanian Code of Criminal Procedure, the principle of guaranteeing the right to liberty and security, it is found that, after the general statement in para. (1), of the right of every person to liberty and security of person in criminal proceedings, the following is a list of a series of safeguards (*Ghigheci, 2014, pp. 152-153*):

- in para. (2) provides that any measure of deprivation or restriction of liberty shall be provided exceptionally and only in the cases and under the conditions provided by law; as stated in the doctrine (*Ghigheci, 2014, p. 149*) in connection with this first guarantee, in the regulation of the Romanian Code of Criminal Procedure, related to the constitutional and conventional text, the right to liberty and security seems to have a wider scope, because in para. (2) in art. 9 CCP refers to "any measure depriving or restricting liberty", while both the Romanian Constitution (art. 23) and the European Convention (art. 5) restrict the scope of application of this principle only to retention and pre-trial detention, as preventive measures of deprivation of liberty.

- in para. (3) the right of every arrested person to be informed as soon as possible and in a language which he understands of the reasons for his arrest shall be provided, as well as his right to lodge an appeal against the order of the measure;

- in para. (4) the competent judicial bodies shall be required to order the revocation of the measure and, where appropriate, the release of the retained or arrested person where it is found that a measure of deprivation or restriction of liberty has been unlawfully ordered;

- in para. (5) stipulates that any person who has been illegally disposed of, during the criminal proceedings, a measure of deprivation of liberty has the right to compensation for the damage suffered, under the conditions provided by law. It is noted that, in connection with this guarantee (right to compensation), the text refers only to the person against whom a custodial measure has been ordered, unlike the previous regulation [art. 5 para. (4) CCP 1968] which gave the person deprived of his liberty during the criminal proceedings or who had been restricted, illegally or unjustly, the right to seek redress under the conditions provided by law (that is, under the conditions of art. 504-507 CCP from 1968, which established the procedure applicable in case of deprivation or restriction of liberty illegally).

The current regulation [both art. 9 para. (5), as well as art. 539 para. (1) CCP] guarantees the right to reparation of the damage only to the person who, during the criminal trial, was illegally deprived of liberty. Therefore, by the current law (*lege lata*), the procedural guarantees of respect for the right to liberty

and security during criminal proceedings, from the perspective of the recognition of the right to compensation in case of deprivation of liberty, are more limited than in the previous regulation.

2. SPESPECIAL PROCEDURE FOR REPAIR OF MATERIAL DAMAGE OR MORAL DAMAGE IN THE EVENT OF ILLEGAL PRIVACY

- Provisions regarding the right to compensation in case of judicial errors or wrongful deprivation of liberty have existed, in our procedural-criminal legislation, since 1936. Thus, in the Code of Criminal Procedure Carol II (adopted in 1936) we find provisions regarding "damages due to victims of judicial errors" (art. 513 - art. 514) contained in Chapter II (*Review and damages due to victims of judicial errors*) from Title III (*Extraordinary ways of attack*) of Book IV (*Ways of attack*).

Also, in Chapter III (art. 657 - art. 662) of Title II (*Various measures of public interest*) of Book VI (*Special procedures and measures of public interest*) there were provisions on "compensation of persons unjustly detained in prevention". We note, however, that these provisions, even if some of them were placed alongside the special procedures (in Book VI), did not constitute a separate special procedure.

- Subsequently, the Code of Criminal Procedure of 1968 (in its original form, which entered into force in 1969) was to regulate "reparation of damage in the event of wrongful conviction or arrest", as a special procedure, in the sense of a set of derogatory rules. and complementary to the usual procedure (art. 504 - art. 507, constituting Chapter IV of Title IV - *Special procedures* of the Special Part of the Code). Throughout the period of applicability of this code (from January 1, 1969 to February 1, 2014), the regulation of this special procedure has undergone several legislative changes (in 1990, 2003, 2006, 2010). For example, following the legislative intervention operated by Law no. 32/1990, the scope of application of this procedure was extended, changing the name from "Reparation of damage in case of wrongful conviction or arrest" to "Reparation of damage in case of conviction or taking of an unjustified preventive measure". Moreover, by Law no. 281/2003, the name of this procedure was again changed to "Reparation of material damage or non-pecuniary damage in case of wrongful conviction or unlawful deprivation or restriction of liberty", thus extending the scope and to the non-pecuniary damage suffered, as well as to the case of unlawful deprivation or restriction of liberty, including through measures other than preventive measures (such as the safety measure of medical hospitalization) (*Lorincz, 2011, p. 554*).

- In the current Code of Criminal Procedure (*Law no. 135/2010, entered into force on February 1, 2014*), in Chapter VI (art. 538 - art. 542) of Title IV (*Special procedures*) of the Special Part is regulated the procedure for reparation of damage material or moral damage in case of judicial error or in case of illegal deprivation of liberty or in other cases.

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A first observation regarding the name of this procedure, according to the provisions in force at the moment, is that the reference to "reparation of material damage or non-pecuniary damage" is maintained, but unlike the provisions of the previous code, the regulation of the procedure is limited to the case of deprivation of liberty, with no reference to the restriction of liberty. In this respect, we find that the current procedural-criminal provisions regarding this special procedure respect the level of protection established by art. 5 paragraph 5 of the European Convention ("any person who is the victim of an arrest or detention" under conditions contrary to the provisions guaranteeing the right to liberty and security shall have the right to reparation), level of protection limited to custodial measures.

As indicated above, in the Code of Criminal Procedure adopted in 1968 (as amended in 2003) the special procedure for reparation of damage also applies in case of unlawful restriction of liberty.

A second observation, in connection with the name of the procedure in the current code, is that the phrase "or in other cases" has been added, although, from the analysis of the content of the provisions of art. 538 and art. 539 it appears that there are currently only two cases giving rise to the right to reparation: the case of judicial error and the case of unlawful deprivation of liberty. Therefore, although criticizable from the perspective of the requirements of legislative technique regarding the rigor of wording, it seems that the legislator intended to leave open the way for regulation, through the possibility of introducing other cases that entitle to compensation for pecuniary damage or non-pecuniary damage.

Regarding the case of illegal deprivation of liberty, from the analysis of the content of art. 539 CCP it appears that the person who, during the criminal trial, was illegally deprived of liberty has the right to reparation of the damage, requiring that the illegal deprivation of liberty be established, as the case may be (reported to the phase in which the criminal trial is and to the judicial body that finds this illegality), by:

- prosecutor's ordinance; for example, by the prosecutor's ordinance revoking the retention measure [when new circumstances arise which result in the illegality of the measure - art. 242 para. (1) CCP, or when, in resolving the complaint against the retention ordinance, the chief prosecutor or the hierarchically superior prosecutor finds that the legal provisions governing the conditions for taking this measure have been violated - art. 209 para. (15) CCP] or by the closing case ordinance, when the defendant is in the execution of a custodial measure and the prosecutor finds that, prior to the taking of the respective measure, any of the cases provided in art. 16 CCP, a case that determines the illegality of this measure (for example, the ordinance by which the prosecutor orders the case to be closed against the defendant in pre-trial detention, on the grounds that the statute of limitations preceded the order of pre-trial detention);

- final conclusion (in the sense of a decision) of the judge of rights and freedoms or of the judge of the preliminary chamber; for example, by concluding the revocation or finding of the cessation of the preventive measure, when the judge of rights and freedoms (during the criminal investigation) or the judge of the preliminary chamber (in the preliminary chamber procedure) revokes the measure of pre-trial detention or the measure of house arrest or finds that the measure has been legally terminated, at the same time considering that the measure has been taken, extended or maintained in breach of the legal provisions;

- final conclusion or final decision of the court invested with the trial of the case; for example, by the final conclusion or the final decision of the court of revocation of the preventive measure or of finding the legal termination of the measure, if the maximum duration provided by law has been exceeded, in which case the measure becomes illegal from the expiration of the term established by law (*Moroşanu, 2014, pp. 1291-1292*) or by the final decision of the court (acquittal, termination of criminal proceedings, conviction, waiver of the sentence or postponement of the sentence) by which the illegal nature of the measure of deprivation of liberty ordered during that criminal trial is retained.

Therefore, in order to invoke the right to compensation by the person whose individual liberty was unlawfully affected during the criminal proceedings, it is necessary for the prosecutor to find (by ordinance) that the custodial measure was taken illegally or the judge of rights and freedoms, the judge of the preliminary chamber or the court invested with the trial of the case to establish (by final conclusion or final decision) that the measure of deprivation of liberty was taken, extended or maintained at a certain time in violation of legal provisions (*Moroşanu, 2014, p. 1292*).

Since in the practice of the courts different interpretations have been given to the provisions of art. 539 para. (2) CCP, there is no unitary point of view regarding the application of these provisions, in the sense of establishing the illegal character of deprivation of liberty during the criminal process, which gives the right to compensation, the High Court of Cassation and Justice (by Decision no. 15/2017) admitted the recourse in the interest of the law formulated by the Board of the Timișoara Court of Appeal and thus decided:

”In the interpretation and application of the provisions of art. 539 para. (2) of the Code of Criminal Procedure, the illegal nature of preventive measures of deprivation of liberty must be explicitly established by the jurisdictional acts provided for therein.

The acquittal judgment, by itself, cannot constitute a ground for establishing the illegality of the custodial measure”.

Therefore, the establishment of the illegal character of the deprivation of liberty during the criminal process, deprivation of liberty that gives the right to compensation, cannot be implicit, this illegal character cannot be deduced from the

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final acquittal decision (*see in the same sense, Lorincz, 2016, pp. 32-39, work published prior to the decision of the supreme court*).

Also, for the unitary interpretation and application of the provisions of art. 539 para. (2) CCP, the supreme court ruled by a prior decision (Decision no. 11/2019), at the notification of the Alba Iulia Court of Appeal, Criminal Section, on the settlement in principle of the question of law if "in the situation in which the court that pronounced the final acquittal decision did not rule on the legal or illegal character of deprivation of liberty during the criminal trial of the acquitted defendant, this character can be established by way of contestation at execution based on the provisions of art. 598 para. (1) lit. d or art. 598 para. (1) lit. c thesis I CCP", establishing as follows: "*In the application of art. 539 para. (2) of the Code of Criminal Procedure, the legal or illegal character of deprivation of liberty during the criminal proceedings of the defendant acquitted by final decision cannot be established by way of an enforcement appeal based on the provisions of art. 598 para. (1) lit. d or art. 598 para. (1) lit. c thesis I of the Code of Criminal Procedure*".

In order to pronounce this preliminary decision, the Panel for resolving legal issues in criminal matters from the High Court of Cassation and Justice noted that the phrase "the court vested with the trial of the case" from the content of art. 539 para. (2) CCP refers only to the criminal court vested with the trial of the case in the first instance or in an appeal, or the enforcement court becomes competent in a judicial procedure to resolve situations correlative to the execution of the judgment, therefore of some incidents that occurred after the finality of the judgment by which the merits were resolved.

The case of contestation at execution provided in art. 598 para. (1) lit. c thesis I CCP it refers to the emergence of any ambiguity regarding the judgment that is being executed, therefore to the "necessity of clarifying a provision contained in that judgment", and not to its completion.

On the other hand, the case of contestation to execution provided in art. 598 para. (1) lit. d CCP it refers to the invocation of a cause of extinction or reduction of the punishment, appeared after the finality of the enforced decision, or "the aspects regarding the legality of the preventive measures cannot be circumscribed to this reason for appeal".

The supreme court also held that, in the case of final acquittal judgments, as in the case of termination of criminal proceedings, the enforcement appeal can only concern the enforceable provisions contained in the operative part (such as the enforcement of safety measures or the provision of immediate release following the revocation of the preventive measure). Even in the case of a final conviction, the analysis of the illegal nature of deprivation of liberty could be the subject of an enforcement contestation [pursuant to art. 598 para. (1) lit. c thesis II CCP - when an impediment to enforcement arises] only if the circumstance in question

(unlawful deprivation of liberty) arose after the judgment became final (for example, the convict against whom the execution of the sentence was suspended was kept in pre-trial detention).

Consequently, the High Court of Cassation and Justice considered that the executing court cannot rule, by way of an enforcement contestation, on the legality of the custodial measures ordered during the criminal proceedings prior to the finality of the court decision.

3. THE THE EFFECT OF THE DECISION OF THE CONSTITUTIONAL COURT OF ROMANIA NO. 136/2021

In addition to the judgment made by the High Court of Cassation and Justice to ensure a unitary judicial practice, materialized in the two decisions mentioned above (*Decision no. 15/2017 pronounced on the recourse in the interest of the law and Decision no. 11/2019 pronounced on the referral in order to take a preliminary decision for resolving a matter of law*), the provisions of art. 539 CCP were subjected, on several occasions, to a constitutionality control, the most recent materializing in the Decision of the Constitutional Court no. 136/2021.

The exception of unconstitutionality solved by this decision was motivated by its author by invoking the fact that the regulation of the right to compensation in the light of art. 539 CCP it is "far too restrictive", conditioning this right only by the criterion of illegality of deprivation of liberty, without taking into account the criterion of the unfairness of the measure of deprivation of liberty taken during the criminal trial, related to the solution of closing or acquittal ordered in that case.

In other words, analyzing this exception (unlike the previous exceptions, all rejected), the constitutional court examined the issue of law aimed at deprivation of liberty through a preventive measure ordered in compliance with the conditions provided by law, but which becomes "unfair" as a result of the closing case solution [based on art. 16 para. (1) lit. a-d CCP] or acquittal by rejecting on the merits the accusation in criminal matters made against the person deprived of liberty by that procedural measure.

In motivating this decision, the Constitutional Court showed that the analyzed situation does not represent a case of illegal deprivation of liberty within the meaning of art. 539 CCP, but a case of unjust deprivation of liberty, which must lead to the recognition of the right to compensation, as a consequence of the provisions of art. 1 para. (3) ("Romania is the rule of law ..., in which ... the rights and freedoms of citizens ... are guaranteed"), art. 23 para. (1) ("Individual freedom and security of the person are inviolable") and art. 52 para. (3) thesis I ("The State is patrimonial liable for damages caused by judicial errors") of the Constitution.

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Making the distinction between the illegal character of deprivation of liberty [which must be explicitly established by the jurisdictional acts provided in art. 539 para. (2) CCP] and the unfair character of the deprivation of liberty, the Court considered that in the case of deprivation of liberty ordered in the criminal case solved by closing, according to art. 16 para. (1) lit. a-d CCP (that is, when it is found that the criminal action is unfounded), or acquittal, "the exercise of the right to reparation before the civil court will be based on the closing case ordinance or on the acquittal decision".

In conclusion, admitting the exception of unconstitutionality, the court of constitutional control found that "*the legislative solution contained in art. 539 of the Code of Criminal Procedure which excludes the right to reparation of the damage in case of deprivation of liberty ordered during the criminal proceedings resolved by closing case, according to art. 16 para. (1) lit. a-d of the Code of Criminal Procedure, or acquittal is unconstitutional*".

It should also be noted that this decision of the Constitutional Court was not adopted unanimously by votes, and there is a separate opinion that the exception of unconstitutionality should have been rejected as unfounded, because the constitutional court cannot assume the role of positive legislator by adding new cases of judicial error to those provided by law, in other words it cannot replace the legislator by creating, repealing or amending legal norms.

Whereas, from the moment of publication in the Official Gazette (May 12, 2021), the Decision of the Constitutional Court no. 136/2021 has become mandatory, it has as effect the need to operate legislative interventions to bring the provisions of the Code of Criminal Procedure in line with the provisions of the Constitution.

4. LEGISLATIVE INTERVENTIONS PLANNED BY THE DRAFT LAW AMENDING AND COMPLETING THE CRIMINAL PROCEDURE CODE

As it appears from the Explanatory Memorandum of the most recent draft law for amending and supplementing Law no. 135/2010 on the Code of Criminal Procedure (*subject to public debate by the Ministry of Justice on 2 September 2021 and submitted to the Government for approval on 2 June 2022*), in order to reconcile the provisions or legislative solutions declared unconstitutional with the provisions of the Constitution, in order to compliance with the Decision of the Constitutional Court no. 136/2021, the following legislative interventions were proposed:

- modification of para. (5) in art. 9 CCP, in order to regulate, in principle, the right to reparation of the damage also in the case of the person who was unjustly deprived of liberty during the criminal trial;

- modification of art. 539 CCP, in order to regulate the procedure for reparation of the damage also in the case of the person unjustly deprived of liberty during the criminal trial;

- modification of art. 542 CCP (which has as object the regulation of the action in regress), in order to be correlated with the amendments brought to art. 539 CCP.

However, we note that, in addition to the changes expected in order to implement the Decision of the Constitutional Court no. 136/2021, other legislative interventions were proposed in connection with the provisions regarding the reparation of the damage.

► Thus, we find that the new content of art. 539 CCP (proposed by the draft law) expressly limits the possibility of exercising the right to reparation only to deprivation of liberty by preventive measures.

It is true that, strictly related to the current content of para. (2) in art. 539 of the Criminal Procedure Code, even today this special procedure cannot be used (accessed) by the person who invokes an illegal deprivation of liberty through the safety measure of medical hospitalization, as long as the illegal deprivation of liberty must be established only by the acts expressly provided for in this paragraph (namely: the prosecutor's ordinance, the final conclusion of the judge of rights and freedoms or the judge of the preliminary chamber, the final conclusion or the final decision of the court invested with the trial of the case).

According to the provisions of the General Part of the current Code of Criminal Procedure [art. 248 para. (8) and art. 248 para. (13)], regarding the taking of the safety measure of medical hospitalization, the judge (judge of rights and freedoms or judge of the preliminary chamber) or the court decides on the prosecutor's proposal by decision which can be challenged within 5 days from the pronouncement. The introduction of the contestation does not suspend the implementation of the safety measure.

This means that, if the contestation is admitted and the safety measure is found to be unlawful, the person against whom the measure was taken should be able to seek redress, the unlawful deprivation of liberty being established by the final judgment (namely the decision) by which the contestation was resolved.

Or, among the procedural acts listed exhaustively in para. (2) in art. 539 CCP, regarding the establishment of the illegal character of the deprivation of liberty, is mentioned only the final conclusion of the judge of rights and freedoms / judge of the preliminary chamber.

It should be emphasized that, according to art. 5 paragraph 5 of the European Convention, has the right to reparation "any person who is the victim of an arrest *or detention* under conditions contrary to the provisions of this article"; therefore, not only arrest, as a precautionary measure, but also any other form of illegal detention (such as temporary involuntary medical hospitalization, as a safety measure) entitles the victim to reparation, as established by the case law of

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the European Court of Human Rights (*Dragomir v. Romania, decision on application no. 59064/11, pronounced on June 3, 2014; N. v. Romania, decision on application no. 59152/08, pronounced on November 28, 2017*).

Even if the Romanian courts, in the direct application of art. 5 paragraph 5 of the European Convention, as well as of art. 52 para. (3) thesis I of the Constitution, may admit the action for reparations in case of illegal deprivation of liberty by safety measure, the level of protection established by the European Convention can be ensured by an amendment of the Code of Criminal Procedure, in order to extend the restrictive framework current application of the special damage repair procedure.

► Also, without any connection with the Decision of the Constitutional Court no. 136/2021, through the draft law for amending and supplementing Law no. 135/2010 on the Code of Criminal Procedure, it is proposed to introduce provisions on the right to compensation for damage in case of illegal surveillance measures (art. 539¹ CCP), providing that this right to benefit any person which has been disposed of, confirmed, extended or, as the case may be, a technical surveillance measure has been illegally enforced; the illegality of the technical surveillance measure is to be determined, where appropriate, by:

- the reasoned conclusion (in the sense of a decision), which is not subject to any way of attack, by which the judge of the preliminary chamber admits the complaint against the measure (*way of attack which is also proposed to be regulated by the draft law amending the Code of Criminal Procedure, for implementing the Decision of the Constitutional Court no. 244/2017*);

- the final conclusion (in the sense of a decision) by which the judge of the preliminary chamber, in the cases in which the initiation of the criminal action was ordered, decides on the complaint against the closing case solution after verifying the legality of the administration of evidence and the conduct of the criminal investigation;

- the final conclusion (in the sense of a decision) by which the judge of the preliminary chamber decides, in the preliminary chamber procedure, on the requests and exceptions formulated or of the exceptions raised ex officio.

We note that the proposal to introduce these provisions is based on another decision of the Constitutional Court (*Decision no. 244/2017*), in which it was stated, based on an examination of the jurisprudence of the European Court of Human Rights, that the effectiveness of the way of attack against the technical surveillance measure is also analyzed according to the possibility of the petitioner to request “compensation for the interference suffered”.

CONCLUSIONS

In conclusion, welcoming the amendment of the current Code of Criminal Procedure in order to reconcile with the Basic Law the provisions or legislative

solutions declared unconstitutional, we consider that the subsequent legislative interventions should extend the procedural framework of the application of the special procedure for reparation and deprivation of liberty by measures other than preventive measures.

Moreover, as we have shown above, the regulation in the Code of Criminal Procedure of 1968 (following the amendment made by Law no. 281/2003) made it possible to use the special procedure for reparation of damage and in the case of deprivation of liberty by the safety measure of medical hospitalization.

In this sense, in the context of the legislative changes envisaged by the draft law initiated by the Ministry of Justice, we propose that in the new content of art. 539 CCP to use the phrase "custodial measure" (as in the current regulation) instead of "preventive custodial measure" (as in the mentioned project).

At the same time, for the same purpose of ensuring under criminal procedural aspect the level of protection established by art. 5 paragraph 5 of the European Convention, we propose that para. (2) in art. 539 CCP to be formulated as follows: "(2) The situations provided in para. (1) are proved by ordinance of the prosecutor, by final decision of the judge of rights and freedoms, of the judge of the preliminary chamber or of the court invested with the trial of the case or with the settlement of a way of attack in that case, or, as the case may be, by the final acquittal decision". Such a text of law would make it possible to use this special procedure, guaranteeing the exercise of the right to reparation for all situations of illegal or unjust deprivation of liberty.

On the other hand, given that the proposed amendment to the Code of Criminal Procedure shows that the initiator of the bill intends to establish a higher level of protection of fundamental rights than that enshrined in the Constitution and the European Convention for the Protection of Human Rights, by introducing provisions on the right to compensation for damage in the case of illegally ordered technical surveillance measures (thus, an additional protection of the right to privacy), the possibility of introducing provisions on the right to compensation in the event of unlawful or unjustified restriction of liberty during criminal proceedings (as additional protection of the right to liberty and security) may also be questioned.

An argument for questioning the possibility of extending the scope of application of the special procedure for reparation of damage and in the case of restrictive measures of freedom is the fact that, as noted by the Constitutional Court (in the recitals of Decision no. 48/2016), art. 5 paragraph 5 of the European Convention establishes a minimum standard of protection, "Member States being entitled to provide, through national law, increased legal protection for individual liberty, by regulating the right to reparation and in other situations than those expressly resulting from the rule of art. 5 paragraph 5 of the Convention".

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Moreover, as we have already shown, in the regulation of the Code of Criminal Procedure of 1968 (following the amendments operated by Law no. 281/2003), the special procedure for reparation of damage also applies in the case of restrictive measures of liberty.

Since the appreciation of the opportunity to reintroduce, such provisions belong to the legislator, this being an aspect of state criminal policy, we do not make a concrete proposal by law *ferenda* in this regard, but we specify that such legislative intervention would involve amending / supplementing both art. 539 CCP, as well as of para. (5) in art. 9 CCP [which would thus be correlated with para. (2) of the same article].

We note that the phrase "or in other cases" within the name of Chapter VI of Title IV of the Special Part of the Code of Criminal Procedure allows the introduction of such provisions, without any change in this name.

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