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CONSIDERATIONS ON THE EFFECT OF THE PILOT DECISION OF THE EUROPEAN COURT OF HUMAN RIGHTS CONCERNING THE DETENTION CONDITIONS IN ROMANIA

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Abstract

Romania had been struggling for many years with the issue of overcrowding of places of detention, which has attracted numerous convictions in front of the European Court of Human Rights since 2007 (Case of Bragadireanu v. Romania), reaching a semi-pilot decision in 2012 (the Case of Iacov Stanciu v. Romania). Although the Court has recently acknowledged some progress made by the Romanian authorities to improve the conditions of detention, it found that the measures were ineffective, the factual situation was not changed, the resulting aspect and the large number of repetitive complaints in court, in which the plaintiffs invoke the precariousness of the detention conditions in our country, which leads to violation of art. 3 of the European Convention of Human Rights, on "the right not to be subjected to torture and other inhuman or degrading treatment or punishment" Thus, the Court has reached a pilot decision in the Case of Rezmiveş and Others v. Romania, the Romanian authorities adopted the Law no. 169/2017.

The present study aims to present the issue with which Romania has been confronted in the matter of conditions of detention in the last 10 years, as they result from the convictions passed by the European Court of Human Rights. Also, as a pilot decision on this matter has been issued against our country, the study also highlights the conditions, procedure and effects that such a decision produced for the state in which it is ordered.

In the last part, the study presents the measures taken by the Romanian authorities as a result of the pilot decision making an analysis of the legal provision adopted by the Law no. 169/2017, as regards the reduction of the period of detention, the depopulation as well as the granting of compensation to the persons detained in violation of art. 3 of the European Convention on Human Rights.

Keywords: *pilot decision, detention conditions, inhuman or degrading punishment, conditional release*

1. Considerations on the regulation of inhuman and degrading treatment and punishment

According to art. 22 par. 2 of the Constitution of Romania, no one can be subjected to torture or to any kind of inhuman or degrading punishment or treatment, human dignity being a supreme value guaranteed by the rule of law.

The constitutional provision is reiterated in art. 4 of Law no. 254/2013 on the execution of punishments and deprivation of liberty according to which „punishments and detention measures are executed under condition ensuring the respect of human dignity", while art. 5 of the same law provided that „it is forbidden to subject any person who executes a punishment of deprivation of liberty for bad, torture or inhuman or degrading treatment"

The regulation of this fundamental principle is also found in international documents. Article 5 of the Universal Declaration of Human Rights provides that „no one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment", while art. 3 of the European Convention on Human Rights stipulated that „no one shall be subjected to torture or to inhuman or degrading treatment or punishment".

In its jurisprudence, the European Court of Human Rights held that art. 3 of the European Convention on Human Rights enshrined one of the fundamental social values of a democratic society, the right not to be subjected to torture, inhuman and degrading treatment being an absolute right (benefiting from protection for any person irrespective of his behavior o the offense committed) and intangible, and it is not allowed any limitation even when it can endanger national sovereignty, which distinguished it from most of the rights protected by the Convention.

The European states that have ratified the Convention have assumed the negative obligation not to subject persons under their jurisdiction to treatments contrary to art. 3 and the positive obligations to take measures to avoid the risk of being subject their citizens to bad treatments in order to protect the physical integrity of persons deprived of their liberty, to ensure adequate conditions of detention and the procedural obligation to carry out an official, thorough and effective investigation, respecting the principle of contradictory for the purpose of identifying and punishing those responsible for the application of bad treatment[1].

At international level it was adopted a special convention, the *Convention against torture and other cruel, inhuman or degrading treatment or punishment*[2], which defined the notion of torture and establishes for the contracting States a series of positive and negative obligations, both at the level of prevention and repression.

At European level it was adopted *the European Convention on the prevention of torture and inhuman or degrading treatment or punishment*[3], which established an

[1] Ovidiu Predescu, Mihail Udroiu, *European Convention on Human Rights and Romanian procedural Criminal Law*, Ed. C.H. Beck, Bucharest, 2007, p. 54.

[2] *Convention against torture and other cruel, inhuman or degradinf treatment or punishment* which was adopted at New York and signed by Resolution no. 39/46 from December 10, 1984, published in Romanian Official Journal no. 112/October 10, 1990.

[3] *European Convention on the prevention of torture and inhuman or derading treatment or punishmen* which was adopted at Strasbourg on November 26, 1987, ratified by Romanian by Law no. 80/1994, published in the Romanian Official Journal no. 285 from October 7, 1994

extrajudicial mechanism designed to prevent the application of such treatment to persons deprived of their liberty, by establishing a mechanism based on cooperation between competent national authorities. At the same time, the European Convention provided the establishment and functioning of the European Committee for the prevention of torture and inhuman or degrading treatment or punishment, which is responsible, inter alia, for the organization of visits to places where persons are deprived of their liberty by a public authority (the state parties being required to authorize the visit).

According to the European Convention for the prevention of torture and inhuman or degrading treatment or punishment, the term „torture" means any act by which intentional pain or suffering is caused to a person, whether physical or psychological, especially in order to obtaining from that person or from a third person, any information or confession, to punish him for an act committed by him or a third person, or suspected of having committed, intimidating or pressuring him or intimidating or put pressure on a third person, or for any other reason based on a form of discrimination whatever it may be, when such pain or such suffering is enforced by an agent of the public authority or by any other person acting with official title or at the instigation or with the express or tacit consent of such person.

However, the Convention does not define the concepts of inhuman or degrading treatment. Such a definition is found in the United Nations Convention on torture and cruel, inhuman or degrading treatment, which in art. 16 provides that inhuman or degrading treatment shall be other acts of torture where such act are committed by an official of the public authority or by any other person acting of his own behalf or at his instigation or with his express consent

Some authors define that inhuman treatment as the one that deliberately causes mental or physical suffering of a particular intensity, while degrading treatment is the one by which the individual is humiliated to himself or others, or which causes him to act against his will or conscience. However, suffering or humiliation must exceed the inevitable minimum determined by a particular form of legitimate treatment or punishment[4].

Our legislation defines the notions of torture and inhuman or degrading treatment within the special part of the Criminal Code, where it criminalizes, in art. 281 and 282, undergoing bad treatments and torture.

At the same time, the Romanian legislator established a progressive system of criminal constraint by regulating the three types of punishments: detention, imprisonment and fine, and for the personalization of the punishment to be applied, the means of individualization set out in art. 74 of the Criminal Code, but also by specific alternative forms, which substitute deprivation of liberty with a system of enforcement through measures and obligations. That way, through the

[4] Ovidiu Predescu, Mihail Udroiu, *op.cit.,* p. 55.

state's human rights policy, the progressive regulation of criminal law sanctions was pursued, so that under any circumstances the person in need of coercion would not be subjected to torture, inhuman or degrading treatment, bad treatment, discrimination, all sanctions and measures finalizing with the re-socialization and recovery of offenders.[5]

2. The conditions of detention in Romania in the light of the provisions of art. 3 of the European Convention on Human Rights

Although the European Convention on Human Rights does not contain any specific provisions on persons executing a deprived of liberty punishment, the European Court of Human Rights has established that the State must ensure that such a person is compatible with respect for human dignity, so that the execution of the punishment does not cause him a level of suffering exceeding the level inherent in detention.

Although any punishment includes, by its very nature, components that could be classified as humiliating, in order to be classified as inhuman and degrading it is necessary to state that an individual is treated by the public authorities in such way as to prejudice the values defended by art. 3 of the Convention: the dignity and physical integrity of the person. Assessing the extent of suffering is a relative issue that depends on the circumstances of the case and, in particular, on the nature of the punishment, the context in which it was applied and the mode of enforcement. Advertising in which the execution of the punishment is carried out may also constitute an element of degrading character, but it is not decisive, since it is sufficient for the person to be defeated to take place in his own eyes, not necessarily by reference to third parties.[6]

Romania has been convicted in many cases for violating the provisions of art. 3 of the European Convention on Human Rights, as regards the conditions of detention.

The detention of a person inevitably causes psychological suffering, but the state authorities must ensure conditions consistent with respecting human dignity and the personal space in the prisons is the central focus of the detention conditions analysis.

From the analysis of the ECHR case law, it follows that most convictions concern the overcrowding of prisons in our country which causes a detainee to have an area below the minimum permitted by international regulations and recommendations of the European Committee for the prevention of torture and inhuman or degrading treatments or punishments.

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[5] Ioan Chiş in Ilie Pascu, Vasile Dobrinoiu Traian Dima, Mihai Adrian Hotcă, Costică Păun, Ioan Chiş, Mirela Gorunescu, Maxim Dobrinoiu, *The New Criminal Code commented, Vol. I. The genral part,* IIIrd edition, Ed. Universul juridic, Bucharest, 2015, p. 398.

[6] Flaviu Ciopec, *Judicial individualization of punishment. Regulation. Doctrine. Jurisprudence*, Ed. C.H. Beck, Bucharest, 2011, p. 159-160.

In its jurisprudence, the Court founds violations of art. 3 of the Convention regarding the conditions of detention that have existed over the years in Romanian prisons, especially overcrowding, inappropriate hygiene and lack of adequate medical care (see among other cases, *Bragadireanu v. Romania,* December 2017*; Petrea v. Romania,* no. 4792/03, April 29, 2008*; Gagiu v. Romania,* no. 63258/00, February 24, 2009*; Brânduşe v. Romania,* no. 6586/03, April 7, 2009; *Măciucă v. Romania,* no. 25673/03, August 26, 2009; *Artimenco v. Romania,* no. 12535/04, June 30 2009*; Marian Stoicescu v. Romania,* no 12934/02, July 16, 200; *Eugen Gabriel Radu v. Romania,* no. 3036/04, October 13, 2009*; VD v. Romania,* no. 7078/02, February 16, 2010*; Dimakos v. Romania,* no. 10675/03, July 6, 2010; *Coman v. Romania,* no. 34619/04, October 26, 201; *Dobri v. Romania,* no. 25153/04, December 14, 201; *Cucolaş v. Romania* no. 17044/03, October 26, 2010*; Micu v. Romania,* no. 29883/06, February 8, 2011*; Fane Ciobanu v. Romania,* no. 27240/03, October 11, 2011*;* and *Onaca v. Romania,* no. 22661/06, March 13, 2012)

In all cases in which it was ordered Romania's conviction for the conditions of detention, the European Court of Human Rights held that, although there was no intention of humiliating or degrading the plaintiffs, the absence of such an objection can not exclude the finding of an infringement of art. 3 of the European Convention on Human Rights, so that the Court considered that the conditions of detention, which the plaintiffs had to endure for several years, subjected them to attempts at an intensity that exceeded the inevitable level of suffering inherent in detention, degrading treatment, thus breaching the provisions of art. 3 of the Convention. At the same time, the Court recalled that art. 3 requires states to ensure that any prisoner is detained under conditions compatible with respect for human dignity and that, taking into consideration prison conditions, the health and well-being of the person are duly secured[7].

3. The conditions and purpose of the ruling of the European Court of Human Rights on a pilot decision

Where a number of cases are pending before the European Court of Human Rights, in which the same violation of rights by the respondent state is called in essence, the so-called "repetitive claims", the Court may decide to resolve one or several of them with priority in the pilot decision procedure.

The process of the pilot decision was designed as a way of identifying the problems that arose from a malfunctioning in a State Party as a result of repetitive demands directed against it and imposing on that state the resolution of the problems in dispute.

In this procedure, the Court rules on the existence or non-existence of a breach of the Convention in an application or another and, on the other hand, identifies

[7] Case of Eugen Gabriel Radu v. Romania, judgment from October 13, 2009, in Radu Chiriţă (coord.), *op.cit.,* p. 175.

the systemic issue and provides the government of the State with clear indications of the necessary repair to take in order to fix the problem. Thereafter, the State concerned, under the supervision of the Committee of Ministers of the Council of Europe, will choose the way in which it will fulfill its obligations, according to art. 46 of the Convention, which provides for the binding effect and enforcement of judgments given by the Court.

By issuing a pilot decision, the Court seeks to help European States that have ratified the Convention to solve their structural or systemic problems at national level, to provide those involved – plaintiffs or possible future plaintiffs in pending cases – the possibility of faster national repairs, as well as to reduce its own volume of activity, by reducing the number of similar, generally complex, thorough examination requests, and consuming many resources at the Court level.

As a result of a pilot decision, the Court may suspend – for a certain period of time – the settlement of repetitive requests which are subject of the procedure decided by that decision, provided that the government of the State Party takes promptly the necessary internal measures to comply with the decision. However, the Court may resume the examination of suspended requests when the interest of the administration of justice so requires.

Regarding detention conditions, the European Court of Justice has also ruled pilot decision, as far as Russia and Italy are concerned.

On January 10, 2012, the Court ruled in Ananyev and Others v, Russia, requesting the Russian state to establish, in cooperation with the Committee of Ministers, within 6 month of the final date of the judgment, a binding schedule for the establishment of the preventive and compensatory measures applicable to the alleged violations of art. 3, arresting the existence of a malfunctioning of the prisons system regarding inadequate detention conditions (acute lake of personal space in the accommodation, shortage of sleeping places, limited access to light and clean air, lack of privacy during the use of sanitary facilities). The Court found the violation of art. 3 and 13 (right to an effective remedy) in over 80 requests since 2002 and that over 250 similar claims were pending before it.

In Case Torreggiani and Others v. Italy, by judgment of 8 January 2013, the Court found the structural and systemic nature of the problem of overcrowding of detention facilities, which was also confirmed by the existence of hundred of demands requiring verification of the detention conditions in more Italian prisons with the provision of art. 3 of the Convention. The Court has ordered The Italian government to institute, within one year from the date of the final judgment, an effective internal remedy or a combination of such remedies capable of providing adequate and sufficient reparations, in accordance with the principles stated in the Convention, in order to fix the overcrowding of detention facilities, where needed.

If in the first case, the Court, having regard to the fundamental nature of the right not to be subjected to inhuman or degrading treatment, decided not to suspend the examination of similar claims pending before it, the latter decided to

suspend the examination of applications were to exclude the overcrowding of detention facilities in Italy within one year, until national measures were adopted by the national authorities.

4. The pilot decision pronounced by the European Court of Human Rights on the conditions of detention in Romanian prisons (the Case of Rezmives and Others v. Romania, April 25, 2017)

On April 25, 2017, the European Court of Human Rights issued a pilot decision against Romania in Rezmives and Others, obliging our country to submit a timetable with general measures to remedy the systematic violation of the European Convention on Human Rights, in terms of detention conditions in Romanian prisons.

In the motivation of the decision, the Court stated that it considered it necessary to combine four cases, based on four complaints having the same object, namely overcrowding (lack of vital space) and detention conditions in prisons in our country (insufficient toilets and showers, lack of ventilation and insufficient natural light, poor quality food, etc.) Aiud, Gherla, Oradea, Timisoara, Craiova, Targu Jiu, Iasi, Rahova and Baia Mare police arrest were targeted.

In order to pronounce this decision, the Court referred to the Romanian legislation on the execution of depriving of liberty punishments, the recommendations made by the Ombudsman, the statistical data on the evolution of the number of detainees and the documents of the Council of Europe and the Committee for the prevention of torture, inhuman and degrading treatment.

Of all these documents, inter alia, the Court has endorsed the recommendations that: the deprivation of liberty should be regarded as an extreme measure, the State should focus on non-deprivation of liberty measures in order to reduce to the minimum the duration of provisional detention, with priority being given to alternatives to detention (home arrest and supervision), the creation of conditions for support and help for those released from detention in communities.

The Court also examined the European Penitentiary Rules drafted by the Committee of Ministers on May 11, 2006 and reminded that, since 2012 the Committee of Ministers, on the basis of the analysis of 93 files, appreciated that the situation in the Romanian police arrests in "very concentrated" that they do not correspond to "long-term detention". At that time, it was recommended that urgent measured be taken to ensure that arrests meet the requirements of art. 3 of the Convention and the arrests be transferred as quickly as possible to the prisons. The Court referred to its analysis and to the Reports of the Committee for the prevention of torture in 1992, 1997 and 2006, as well as to the observations made by the representatives of the Committee for the prevention of torture following the visits to prisons and preventive arrests in Romania, each time finding some problems related to lack of space, poor hygiene conditions and poor food quality.

In the second part of the decision, the Court analyzed the arguments of the parties – the plaintiffs and the Government of Romania – and concluded that "given the systemic nature and the increasing number of complaints concerning common problems, the conditions for a new pilot decision are met", after the one in 2012.

That way, the Court held that "the existence and extent of the structural problem in that file (the Case of Iacov Stanciu v. Romania, judgment of July 24, 2012) justified the recommendation of some general measures for improving the material conditions of the Romanian prisons combined with an adequate and effective pathway internal system, preventive and compensatory remedies, in order to ensure full compliance with art. 3 and 46 of the Convention".

In the above-mentioned case – which constituted a semi-pilot decision, the Court found a violation of art. 3 of the Convention on grounds of inadequate living and hygienic conditions, including medical care, in prisons where the plaintiff was accommodated.

The Court noted that Romania has taken some general measures, including legislative amendments, to address the structural problems related to overcrowding and its consequences – improper detention conditions, appreciating this progress, which eventually can help improve general conditions of living and hygiene in Romanian prisons. However, given the recurrence of the disputed issue, it considered that constant and long-term efforts should be pursued in order to achieve full compliance with art. 3 and 46 of the Convention.

The measures ordered by Romanian authorities, including the legislative amendments adopted, did not lead to a solution of the problem, so that the pilot decision was reached, the Court found that "there was a new violation of art. 3 of the Convention and consequently decided that the respondent State, in cooperation with the Committee of Ministers, within a period of six months from the final date of the judgment, would provide a precise timetable for the application of specific general measures capable of solving the issue of overcrowding and detention conditions, in accordance with the principles of the Convention" set out in the judgment. At the same time, the Court has decided to "postpone all similar complaints except those already communicated to Romania and to declare any unacceptable complaints in order to enable the domestic authorities to take necessary measures".

5. Measures taken by Romania as a result of the pronouncement of the pilot decision regarding the conditions of detention in Romanian prisons – Adoption of Law no. 169/2017

In order to comply with the provision of the European Court of Human Rights established by the judgment of April 25, 2017 in the Case of Rezmives and Others v. Romania, on July 14, 2017 the President of Romania promulgated the Law no.

169/2017[8] regarding the modification and completion of the Law no. 254/2013 on the execution of punishment and detention measures ordered by the judicial authorities during the criminal trial.

A first provision is the modification of art. 40 par. 5 lit. b) of Law no. 254/2013, regarding the conditions for the conditional release of convicts, the new text stipulating that release can be ordered when the convicted person: „b) has made the necessary efforts in the work done (the modified part -) or has been actively involved in the activities set out in the Individualized Evaluation and Educational and Therapeutic Planning", the previous form being that „he has worked or has been actively involved in the activities set out in the Individualized Evaluation and Educational and Therapeutic Planning" (point 1 of Law no. 169/2017).

From the comparative analysis of the two provision presented, it follows that the new legal condition is more favorable to the convicted person, who only has to prove his endeavors and not the result of it.

The most important provision of the new law is that introduced by art. 55^1 on the compensatory measure to be granted in case of convicted persons under appropriate conditions.

From the analysis the provision of art. 55^1 it is clear that, in calculating the punishment actually executed, it will be taken into consideration, as a compensatory measure, regardless of the execution regime in which the convicted person executes the penalty, the execution of the punishment under inappropriate conditions, for each period of 30 days executed in such conditions, even if the days are not consecutive, other 6 days of the applied punishment are considered to be executed.

First of all, it is noted that the legislator's inaccuracy in the operation of certain terms, in paragraph 2 being mentioned that „it is considered inappropriate to accommodate a person in any Romanian detention center which has been deprived of the conditions imposed by the European standards". The term „detention center" is used, although, according to the Criminal Code, only the educational measure applied to the defendant who have committed offenses during their minority are executed in those centers and the major convicts execute their punishments in prisons. In order to encompass all places where punishments and measures – both educational and preventive – deprived of liberty can be enforced, we appreciate that the legislator should have used the notion of „detention center" or „place of detention".

This is because we consider that this measure will benefit not only the convicted persons, those against whom educational measures deprived of liberty were took, but also those who were detained and preventively arrested during the

[8] Law no. 167/2017 for amending and completing the Law no. 254/2013 regarding the execution of the punishment and detention measures ordered by the judicial authorities during the criminal trial, published in the Romanina Official Journal no. 571 from July 18, 2017.

settlement of the cases, being accommodated either in the centers of detention and preventive arrest of the General Inspectorate of the Romanian Police, or in the preventive prison centers in prisons, as art. 55[1] par. 4 provides that the provision of para. 3 shall also apply accordingly to the calculation of the punishment actually executed as a preventive measure/punishment in the detention center and preventive arrest in improper conditions.

The inappropriate conditions are mentioned in art. 55[1] par. 3 and is intended to accommodate any of the followings:

a) accommodation in a room smaller or equal to 4 square meters/detainee, calculated excluding the area of sanitary groups and food storage areas, by dividing the total area of the detention rooms by the number of persons accommodated in those chambers, irrespective of the provision of the space in question;

b) lack of access to outdoor activities;

c) lack of access to natural light or sufficient air or availability of ventilation;

d) lack of adequate room temperature;

e) lack of the possibility to use the private toilet and to respect the basic sanitary standards as well as the hygiene requirements;

f) existence of infiltrations, dampness and mold in the walls of detentions rooms.

It is not considered inappropriate accommodation by the law the day or period during which the person was: admitted to infirmity at places of detention, hospitals in the sanitary network of the National Prison Administration, the Ministry of Internal Affaires or the public health network, or was in transit.

Also, the provision on the compensatory measures do not apply if the person was compensated for inadequate detention conditions by final judgments of the national court or of the European Court of Human Rights for the period for which compensation was granted and was transferred or moved to another detention center with inadequate conditions.

Of particular importance is the provision in art. 55[1] par. 8 regarding the moment when the measure will be applied, taking into consideration the date when the punishment will be executed under inappropriate conditions, on July 24, 2012.

We note that the legislator chose as the debut date the date of the ruling of the European Court of Human Rights in the Case of Iacov Stanciu v. Romania. We appreciate, however, that in practice, there will be discriminatory situations, as regards the convicts of long-term punishment, whose execution started well before that date, when detention conditions were much more severe, and they will not benefit from compensatory days for that period.

For the persons in detention, the importance of the compensatory measure provided in art. 551 of Law no. 254/2013 emphasize the capitalization of the conditional release, the days earned in this way being cumulated with those

earned as a result of the work performed during the executed period, all of which are taken into consideration in the fractions of punishment provided by the Criminal Code in the matter of conditional release.

At this time (October 2017), the above provisions do not apply, as the Law also provides for certain procedural provision. According to art. IV of Law no. 169/2017, within 45 days from the entry into force of this Law, the Commission provided in art. II (Commission of the Assessment of Detention Conditions) will carry out an analysis of the buildings referred to in art. III (buildings intended for accommodation for persons deprived of their freedom at the unit level) in order to establish which of them are subject to art. 551 par. 3 of the Law no. 254/2013, on inadequate conditions of detention, so that, in order to establish at the level of each place of detention whether there are inadequate accommodation and whether a convict has been accommodated in them and for what period.