COMPENSATION FOR UNJUSTIFIED CONVICTION AND UNJUSTIFIED ARREST IN COMPARATIVE LAW

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***Abstract**: Even "Ulpian" said, "It is better to leave a guilty person unpunished than to condemn the innocent one."*

However, once a society has to accept the risk of unjustified and unwarranted initiation of the punishment of citizens, so the actual offenders not remain unpunished. For this reason, the damages compensation has been entered into our legislation and the legislation of many foreign countries, so and in all cases of unjust conviction and unjustified detention the society would provide compensation - material compensation, rehabilitation to legal security of individuals as members of society and the stability of the legal elements.[1]

***Keywords**: Compensation, unjust conviction, unjustified detention, international human rights*

1. INTRODUCTION

Guaranteeing and the right to compensation in case of unjustified detention or illegal sentence is closely connected with the protection of constitutionality: it is a symbolic check of the readiness of democratically-minded countries to bear the consequences of illegal and improper activities of its agencies and to protect the rights of its citizens in case of improper resorting to criminal law repression. This demand, fueled by the activities of the Council of Europe and the European Court of Human Rights, is more prominent in the national legislation. However, the tradition affects the organizational, legal and technical mechanisms to achieve the right to compensation in cases of arbitrary arrest or conviction shaped in different ways. Hence, the manner of exercising this right will depend primarily on whether the state recognizes the responsibility for the failures that led to violations of the rights of persons arbitrarily detained or convicted, or is reduced to the responsibility of state authorities or officials who acted illegally in this case. In addition, there are differences in process and ways that can be used to implement this right.

[1]Dr Gordana Zrilić, Magistarski rad, 1981. godina „Naknada štete za neopravdanu osudu i neopravdano lišenje slobode i rehabilitovanje“.

2. HISTORICAL DEVELOPMENT OF RESPONSIBILITY FOR DAMAGE COMPENSATION FOR UNJUST CONVICTION AND ARBITRARY DEPRIVATION OF LIBERTY

The first clues about the state's responsibility for damage caused to third parties caused person in its service we could find in the feudal order of the feudal lords of responsibility for damage caused to its employees in performing the duties of the feudal government, or in the interactions. Later, with the transfer of these functions to the feudal state, it passes the responsibility for the damage they cause to third parties its employees based on the understanding that the state is always responsible for any damage and that its employees are acting in the name of the state. This responsibility is maintained to this day with some modification, depending on the development activities of the state as an instrument of the will of the ruling class expressed through appropriate regulations.

With the development of productive forces and the expanding activities of the state, first legal opinion that the state is still responsible for the harmful actions of their employees by third parties is gradually abandoned. Primarily because there was great number of this type of damage, typical of early capitalism, they represent a kind of an unnecessary burden to the state.

In this respect, the debates on the nature of responsibility and accountability of the state were numerous. There is a perception that for the damages should be responsible the employees themselves, not the state. With further scientific, technical, economic and cultural progress, this responsibility has evolved, mainly in the direction of extension of state obligations.

Even our legislation that regulate the responsibility of the state i.e. society for the damage caused to third parties by its organs or persons in the service went through several phases from the Code of Criminal Procedure of the Court of the Kingdom of Yugoslavia, then (1946-1953, 1953-1963, 1963-1974 and 1974-1977), until today.

Already in the Code of Criminal Procedure of the Court of the Kingdom of Yugoslavia since 1929, we find the provision found in Article 466, which establishes that if a person has been unjustly convicted in a criminal proceeding for a criminal offense has the right to demand compensation from the state for the property damage suffered by the unjustified condemnation. Following is considered unjustified convictions: 1) When against the person who is legally convicted, later based new criminal proceedings dismissed, and 2) in all cases where a person is convicted by final judgment later acquitted of charges or it is rejected, unless dismissed due to lack of proposals or withdrawal of the plaintiff or for lack of jurisdiction.

Request for damages is no possible, if convicted by its false admission or intentionally caused its condemnation nor then, if against the first instance judgment, which sentenced him did not use the legal remedy, or against the judgment pronounced in his absence, from the final event of negligence in case he wasn't asking for the restitution.

The above statutory provisions indicate that this law had some positive and negative legal presumptions so the claim for damages was justified. The first positive presumption is that a person has been convicted with a definitive court judgment (which is already in force), and after that there is no more legal remedy against that decision.

Another positive assumption is that the verdict was unjust, so that the court allowed the error regarding the guilt of the sentenced person. The third assumption is positive, it is legally a person convicted by final judgment later acquitted or the rejected, or the re-prosecution whose reopening was allowed in favor of the accused person, is legally terminated.

Of the negative assumptions the law states: First, if the indictment is dismissed for incompetence or because of the fact that proposal or a private lawsuit, were not filed within the statutory period or within the statutory deadline, or were withdrawn. Second, if the convicted person intentionally caused his conviction by false admission in any other way, and then if he did not use the legal remedy against the judgment of first instance court, which condemned him, or the sentence has been announced in his absence, if from negligence he didn't ask for restitution, where is permitted by law.[2]

From these negative legal presumptions arising that cannot be allowed compensation for damages, if the convict person worked consciously, i.e. if deliberately caused his false confession about his conviction or judgment against the first instance, did not use the legal remedy, regardless the motive that led the prisoner: is it wanted to be sentenced to serve sentences for serious material opportunity to thus obtain food and a roof over his head, or to remove his responsibility for some other serious criminal offense, or of altruism took the guilt of another person close to him on himself. Regardless of the nature of motives, objectively, he worked against the interests of justice because it created confusion in the court and caused an injustice, and therefore has no legal or moral grounds to seek compensation.

The article 41 on the FNRJ Constitution from 1946, which contains a provision that "citizens have the legal conditions, the right to require state officials and damages that may be made illegal and improper discharge of service", further develops institution of compensation. Such stylization is also, among other things, represented the reason for the discussion of the legal nature of state responsibility. Interpreting it, one felt that the basis was sufficient to conclude on the primary responsibility of the state, and that the legislation is left only to standardize the modalities of that responsibility. Even more, as this principle was expressed in the law on service in the Yugoslav People's Army of 1946, according to which "the damage caused by military personnel to anyone by illegal and improper discharge of service, the state will be responsible." The state has the right to charge the perpetrator of the damage (Article 10).According to another view, which mainly relied on the provisions of the Law on Civil Servants and the Law on Organization of People's Courts, from 1946, it was thought that the constitutional text does not provide a sufficient basis to conclude the primary responsibility of the state, contrary to the provisions of the laws enacted under Article 41 Constitution of FNRJ that articulate a primary responsibility of the employee or the judge, and that exception exist in respect of military personnel, which resulted from the Article 40 of Civil Service Act, where for the damage was prescribed personal responsibility, while the state had a position covered by the guarantor in case of the complaint.

Only exceptionally and in justified cases, the state was able to assume the obligation to pay compensation and according to the prescribed procedure. Similar solution exist in Article 78 of Law on Organization of People's Courts, in which the "judge and jurors are financially responsible for damage caused by the discharge of duty they do with illegal and improper actions." In this provision, the possibility of filing lawsuits against the state was not provided. These were not the only dilemmas, because the discussion of primary and subsidiary state responsibility encouraged discussion of the known views on various subjective and objective state liabilities to third parties caused by its organs or persons.[3]

With civilians there was kind of subsidiary state responsibility, and with the military personnel system the primary responsibility on how it was established many discussions that

[2]Dr Mihailo Čubinski, Naučni i praktični komentar Zakonika o sudskom krivičnom postupku Kraljevine Jugoslavije, Izdavačka knjižarnica, Beograd, 1933. god. Strana 776

[3] Dr I. Krbek: Upravno pravo FNRJ, Beograd, 1955. godina, strana 191.

have a theoretical character, because in practice, the courts in specific disputes had to apply the provisions of special laws and could not bind the state to compensate for the damage because if there were no conditions under the provisions of special laws.
From this, it follows that in the provisions of special laws damaged ones were put in different and in an unequal position, and to the point from which it can be concluded there were two regimes of the state responsibility.
In the war and post-war period can be said this was unregulated substances and uneven practice in terms of passive legitimacy of the state where the lawsuit should be directed against it. In the first place because some of its functions were performed by particular institutions, organizations and public character of state-owned enterprises with the capacity or without legal personality, which is referred to determine their specific regulations or in their absence, based on budgetary regulations.[4]
Damaged were encountered with a similar and greater difficulties, when the lawsuit damages were exercised by employees, according to the principle of their primary responsibilities. Those were difficult cases regarding the possibilities of establishing that an employee caused damage, whether in his actions or failure, which was irregular and illegal, had evidence to blame that needs to be proved. Thus, damaged exercised his right with considerable difficulty and during a long litigation. Some of these difficulties are partially removed and largely overcome by passing general Act on People's Committees from 1952, and the Act on Public Defender's Office from 1952 and the Constitutional Law on the basic social and political orders of FPRY and federal authorities from 1953. These laws in a way chose which socially and political community in which cases is responsible for the damage, and can say, that practically the explicit recognition of the legal personality of socio-political communities arose then. In addition to the above legislation, the greatest service to jurisprudence rendered the general opinion of the Supreme Court of Yugoslavia from 23/01/1956, regarding the fact in which cases the action for damages is filed against the Federation, People's Republic, district or municipality, which has largely contributed to the establishment of specific order in lawsuits for damages against the socio-political communities.
On that basis in 1953 followed a number of special laws (Code of Criminal Procedure, Law on Military Courts, the Law on Commercial Courts), and in 1957 the Law on Public Servants. The relevant provisions of these laws clearly dictated the primary responsibility of state and did not envisage the possibility of action against the officers, except in Article 122 Law on Public Servants and the statutory procedure.
Accordingly, the period of the liberation of the country up to the Constitution of the SFRJ in 1963, could be regarded as a period in which the basic settings on the responsibility of social-political communities and their personality process were determined, with a more open and contested theoretical and practical issues.
Constitution of the SFRJ in 1963 in Article 69 significantly expanded the responsibility of the socio-political communities, and thus the rights of claimants. According to this constitutional provision, "everyone is entitled to compensation for damage inflicted on him during the performance of services or other activities of state bodies or organizations performing activities of public interest, fancied their illegal or improper actions of a person or body with this service or activity." This practically meant that the socio-political

[4] Act on representation of the state and public organizations in the property relations courts proceedings and administrative bodies ("Official Gazette of SFRJ", No.88/46) was provided that trait of parties in the proceeding have FNRJ, the people's republics, autonomous regions, People's Committees, People's Assemblies, state enterprises, government agencies and public organizations, but other regulations established who has a feature of legal entity.

community might be liable for acts and omission of persons or authorities that do not violate any rule of conduct prescribed in the performing of duty, i.e. for errors and omissions of various natures, if they can be characterized as illegal or improper operation.
With such constitutional provision, to injured party was much easier to exercise their rights.
Following enactment of the Constitution from 1974, there are no significant changes when one considers that the provisions of Article 69 of SFRJ Constitution and Article 199 of Constitution from 1974 were identical. In this connection, one might say that the oppositions that were generated in this period are the result of discrepancies of corresponding provisions of special laws with the constitution. A further conclusion to be reached would be that the legal theory and jurisprudence pleading for consistent application of the Constitution because the Constitution of 1974 expands the rights of the injured persons.

3. DIFFERENCES IN THE REGULATION OF RIGHTS TO COMPENSATION IN NATIONAL LEGISLATIONS

The right to compensation for unjustified detention and unjustified conviction is regulated differently in comparable jurisdictions. Depending on how the principled approach to the issue of state responsibility for damage, it is possible to give ex gratia compensation as a form of government assistance to unjustifiably accused, who had suffered an accident without his fault, or is entitled to compensation as provided subjective right of the injured that in some jurisdictions sometimes is realized under slightly different and more restrictive conditions than the general legal regime.[5]
In jurisdictions where the state traditionally enjoyed immunity from liability for damages, the right to compensation for unjustified arrest or unjustified conviction is based on the primary responsibilities of civil servants who cause damage to their illegal actions. The fee for the case of arbitrary detention and unjustified conviction can be obtained from the state or the state (ex gratia, as separate compensation from the special funds) or the general legal regime by bringing a legal action against a civil servant who caused harm with its actions. This system is peculiar to Anglo-American jurisdictions. In contrast, in the continental legal system, the right to compensation for unjustified detention and unjustified conviction is regulated as a subjective civil rights of the injured party, which, on the other hand, corresponding the state's obligation to pay damages. This right stems from the constitutional provisions and can sometimes be concretized by criminal procedure norms, which prescribe the conditions and scope of recognition of different modes of general civil law.
When considering how legislatures approach the determining unjustified conviction and groundless apprehension, groups in the legislation which defines what is considered to be unjustified conviction or groundless apprehension differs, and so the role of the court is reduced to examine whether the legal conditions for an award of compensation are fulfilled or not (as is the case in the legislature of Serbia and the states from the former Yugoslavia, Hungary, etc.).[6]
The second group consists of legislations that let the court to decide in each case to determine whether it is an unjustifiable conviction or not. The article 626 of the paragraph 1 of Code on Criminal Procedure of France said, "The decision based on which stems the innocence of convicted, may be, upon hits request, award a compensation for damage

[5] Vasiljević, sistem krivičnog procesnog prava SFRJ, Beograd, 1981. godina, str. 748
[6] Z. Petrović, "Naknada štete za neopravdanu osudu i neosnovano lišenje slobode, Pravo – teorija i praksa, 2001. godina, br. 4. str. 4-5

caused due to the unfounded sentence": The compensation is, therefore, given to convicted by a court before which the procedure was repeated and it is not possible to ask for compensation out of this procedure. Interestingly, for the procedure for awarding benefits the Court of Cassation is authorized against whose decision the appeal is not allowed.

The third group consists of the legislation of Austria and Germany, where a decision on compensation make the court before which the proceedings were conducted on extraordinary legal remedy. In Austrian law, in the proceedings shall be first entitled right to compensation and in a separate process the amount of compensation. German law recognizes the right to pecuniary and non-material damages compensation to unjustly sentenced, relying on paragraphs 823 and 847 of the Civil Code.[7]

The fourth group includes those legal systems in which there are no specific rules on damages for unjust conviction and unjustified detention, so that right could be realized in a regular lawsuit. To this group belong the laws of Anglo-American legal system, in which the right to compensation for unjustified detention is based on the delicate responsibility for restricting freedom of movement.[8]

In the former socialist countries and developing countries has not been established the particular right to compensation for consequential damage. The right to non-pecuniary damage suffered by the name of the pain has never before been allowed in earlier legislation of socialist countries (except Yugoslavia), because the financial compensation for mental anguish suffered at odds with the prevailing morality. Political and social changes in these countries that followed the last decades, contributed to the fact that today this right is recognized (although it is uncertain to what extent is realized in practice). For example, in the former Soviet Union the right to damages for unjust conviction or groundless apprehension is determined only by the Decree on damages caused by unlawful actions of citizens and civil society organizations from 18/05/1980. After the collapse of the Soviet Union, in the Civil Code of the Russian Federation adopted in 1995, the article 1070 provides citizens the right to seek damages as a result of unlawful conviction, unlawful charges or subjected to criminal liability, illegal application of security measures, detention or any other measures of deprivation of liberty in criminal or administrative proceeding.[9] These changes generally allowed compensation for the pain suffered due to wrongful illegal actions taken by others. It is paid in cash or other material values, and the specific amount in each case is determined by court order. However, payment of such fees is not yet common in the jurisprudence. Even today, the right to compensation for any physical or mental pain under very restrictive conditions is guaranteed to directly injured persons according to Bulgarian, Hungarian, Czech, Slovak and Lithuanian law.

However, we can say that in recent years, an increasing number of countries accept the right to compensation, and even widely prescribed it as a constitutional right of citizens (constitutions of Liechtenstein, Turkey, Cyprus and so on).[10]

This brief preliminary comparative legal review should point out the complexity of issues, in which scope to allow the realization of the right to damages for improper or unjustified arrest and conviction, and how organizationally, legally and technically shape the mechanisms of realization of this right.

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[7] P. Klarić, Nematerijalna šteta u njemačkom građanskom pravu, Zbornik Pravnog fakulteta u Zagrebu, 1990. godina, br. 5-6, str. 767-768

[8] Falce imprisonment. O. Stanojević, Osnovni precedentnog prava (Common Law), Beograd, 1980. godina, str. 34.

[9] M. Grubač, Naknada štete zbog nezakonitih radnji pravosudnih organa u SSSR-u, Pravni život, 1984. godina, str. 477-484

[10] M. Grubač, Naknada štete zbog nezakonitih…, op.cit. str. 477

4. RESUME

Constitutional character of the right to liberty and security impose the necessity to compensate the damage to damaged person inflicted by arbitrary deprivation of freedom or unjust convicted compensation, even ex gratia if it does not allow the possibility for state to be responsible for such damage. Such systems of liability for damages are based solely on the plea, as the subjective basis of responsibility, are inherent in the countries of the Anglo-American area. Yet, even in these states, the tradition is changing, and statutory provisions, in addition to harmful persons, the state undertakes compensation, especially when it comes to violations of constitutionally guaranteed rights of citizens. Moreover, precisely in such cases shall be paid the punitive damages that need to serve as an example for others to practice unlawful violations of others' constitutional rights and to deter harmful person from such acts. In continental European legal system, unjustifiably convicted persons are entitled to damages based on the constitution, and it concretizing through the general provisions of civil law or the provisions of criminal procedure. It has a compensatory nature, but in recent decades more and more frequently observed is in practice it takes on a criminal charge character (especially the honor and reputation of the injured with the information published in the press).

The processes of democratization and reform of the legal system in order to establish the rule of law are inextricably linked with the need to protect the constitutionally guarantee rights and freedoms of citizens, as demonstrated by examples from the Russian legislation. Although it can be assumed that the situation in practice is not always satisfactory, however, cannot be neglected the fact that the entire European space, the increasing importance is given the protection of fundamental human rights and freedoms. This analysis of foreign laws clearly shows that the guaranteeing and the right to compensation in case of unjustified arrest or conviction of unlawful is inextricably linked with the protection of constitutionality: it is a symbolic test of readiness of democratically-minded states to bear the consequences of illegal and improper activities of its authorities and promote and protect the rights of its citizens in case of improper interference for the criminal repression.

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