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The compensatory appeal in the face of political populism

Skargi o odszkodowanie w obliczu populizmu politycznego

Abstract: The Romanian prison system faces several systemic problems such as overcrowding, inadequate conditions of detention, a shortage of staff, especially medical and holding unit guards, and the high frequency of deaths. In many cases, prisoners have complained about infringement of their rights to the European Court of Human Rights, which has repeatedly ordered the Romanian State to pay them compensation. Compensation was significant, and the amounts paid by the Romanian state in the period 2013–2017 total around 5 million euros. Given that the implementation of substantial reforms to help improve detention conditions kept being postponed, in 2017 the ECHR issued a pilot decision (*Rezmiveş et al. vs. Romania*) suspending prosecution of approximately 8,000 outstanding cases concerning detention conditions, calling on the state to take measures to reduce overcrowding and improve detention conditions. In this respect, a period of six months was granted, during which the Romanian government was to present a plan for the implementation of measures aimed at achieving these objectives. In the short term, the Ministry of Justice and the National Administration of Penitentiaries introduced a compensatory measure which consisted of reducing the total sentence by 6 days for each 30 days executed under improper conditions, the aim being to speed up the process of releasing of prisoners and, therefore, to reduce overcrowding. The law by which the compensatory measure was introduced became the subject of heated debates in Romanian society, with print and online media campaigns being triggered, where this measure was presented as one that "keeps offenders out of prison", often highlighting cases of former prisoners who had benefited from the provisions of this law and then reoffended. Nevertheless, the non-existent post-detention support given to former prisoners by the Romanian State needs to be taken into consideration. The reaction of the political class was to repeal the normative act, without any alternative measures being implemented. The article aims to carry out an analysis of the realism of these measures, of the context

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that caused these measures to be taken, and of the debates that existed in society and among the political class, underlining the specific elements of penal populism. The impact of these measures on the prison system will also be analysed.

Keywords: prisons overcrowding, compensatory remedy, European Court of Human Rights, pilot decision

Abstrakt: Rumuński system więziennictwa boryka się z wieloma problemami takimi jak: przeludnienie, nieodpowiednie warunki detencji, brak personelu zwłaszcza medycznego oraz strażników więziennych, a także wysoka liczba zgonów. Więźniowie wielokrotnie skarżyli się na naruszanie ich praw do Europejskiego Trybunału Praw Człowieka, który często nakazywał Rumunii wypłatę im odszkodowania. Kwota wypłaconego odszkodowania była znaczna – w latach 2013–2017 wyniosła łącznie około 5 milionów euro. Biorąc pod uwagę, że wdrożenie istotnych reform mających poprawić warunki pobytu więźniów, było dotychczas przez państwo rumuńskie odkładane, w 2017 roku ETPCz wydał pilotażową decyzję (*Rezmiveș i in. przeciwko Rumunii*), zawieszając orzekanie w około 8000 niezakończonych sprawach przed nim zawisłych dotyczących warunków pobytu w izolacji. Rząd rumuński otrzymał sześć miesięcy na przedstawienie planu wdrożenia środków pozwalających na osiągnięcie tego celu. W krótkim czasie Ministerstwo Sprawiedliwości i Krajowa Administracja Więziennictwa wprowadziły środek kompensacyjny polegający na skróceniu łącznej kary o 6 dni za każde 30 dni wykonane w niewłaściwych warunkach, w celu przyspieszenia procesu zwalniania skazanych z izolacji więziennej, a tym samym zmniejszenia przeludnienia. Ustawa, na mocy której wprowadzono ten środek kompensacyjny, stała się przedmiotem gorących debat w społeczeństwie rumuńskim, a także kampanii prowadzonych w mediach (prasie i intrenecie), w których środek kompensacyjny był przedstawiany jako „utrzymujący przestępców z dala od więzienia", a przy tym często eksponowano przypadki byłych więźniów, którzy skorzystali z przepisów tej ustawy, a następnie ponownie popełnili przestępstwo. Niemniej jednak należy podkreślić, że zwalnianym więźniom państwo rumuńskie nie udziela żadnego wsparcia. W konsekwencji toczących się debat i prowadzonych kampanii, politycy uchylili przepisy dotyczące środka kompensacyjnego, nie proponując jednak w zamian żadnych środków alternatywnych. Artykuł ma na celu dokonanie analizy wprowadzonych środków, kontekstu, w jakim zostały one wprowadzone oraz debat, jakie toczyły się w społeczeństwie i wśród polityków, podkreślając specyficzne elementy populizmu penalnego. Przeanalizowany zostanie również wpływ wprowadzonych środków na system więziennictwa.

Słowa kluczowe: przeludnienie w więzieniach, środek kompensacyjny, Europejski Trybunał Praw Człowieka, decyzja pilotażowa

Introduction

In June 2020, the COVID-19 pandemic was pushed into the background for a few days, with the Romanian media shifting their attention to Ion Turnagiu, who had set fire to a 17-year-old girl. We know relatively little about his life. Born in 1975, he was abandoned by his mother at the age of 11, and raised by his maternal grandparents. His childhood and adolescence are periods marked by vagrancy, theft to ensure subsistence, and gambling. In 1993, shortly after his 18th birthday, he managed to get hired by a family in order to help them with household chores.

Finding out that there was a large amount of money stored in a closet, he tried to steal it, but the theft was witnessed by a member of that family, a pregnant woman. Killing with an axe, he took the money and fled to Bucharest. Here he took shelter with an elderly family, whom he also killed, taking money and jewellery from their home. After a transient relationship with a ballerina, in whose company he will spend the stolen money, he attempted suicide. Leaving Bucharest, he took shelter in a train station and met a former childhood friend. Believing the latter had money on him, he got him drunk and stabbed him to death.

He was ultimately apprehended and sentenced to life for five crimes. Under the Criminal Code, a person sentenced to life imprisonment may be released on parole after the execution of 20 years of detention, if they are persistent in their work, disciplined and give good evidence of rectification, considering their criminal history (art. 551 para. 1 Criminal Code 1968).

He was released on parole on 10 May 2019, after a number of applications for conditional release were rejected, the court reasoned that during the execution of his sentence the convict had consistently participated in the educational programmes carried out in the penitentiary, had been involved in the pursuit of lucrative activities, and had been rewarded on numerous occasions. The application for conditional release had previously been rejected by the first instance court, with the explanation that although the execution of the sentence had begun on 27.11.1993, the convicted person had not been concerned with standing out consistently until 2014. Thus, the court considered that the rewards awarded up to this point do not prove a true rectification of the convict, but are a simulacrum for obtaining parole more quickly.

Ion Turnagiu's release went unnoticed in the press, though the Romanian press usually reports when people convicted of similar crimes are released. After his release, he settled in Drobeta Turnu Severin (a town in south-western Romania), where he would go on to commit his final crime. Information about the period he spent following release is lacking Nor is the information he posted on his Facebook profile (created in November 2019) likely to shed more light, given he limited himself to posting photos of friends, family members, and various motivational quotes. Also, his relationship with the injured party is a rather unclear one. Shortly after the attack, the press presented her as his partner, but then went on mention that the two had met online shortly before the attack. A week before she was set on fire, she had filed a complaint with the police, accusing Ion Turnagiu of raping her, but since the forensic report had not been drawn up, no preventive measures were ordered against him. On 11 June 2020, the day before the attack, Turnagiu posted a 30-second video on Facebook thanking everyone who was there for him, ending his post with "I love you all! Be healthy! Goodbye!". It is worth noting that the state that accompanied that post was "feeling defeated" and in the text related to it, Turangiu wrote in capital letters "GOOD-BYE, MY DARLINGS, THANK YOU ALL FOR BEING THERE FOR ME!!".

On 12 June, he carried out the arson, was apprehended, and his pre-trial detention was soon ordered. We do not have information from the criminal investigation, so the motivation for his action is unclear. Placed in custody, Turnagiu committed suicide on 30 June 2020, choosing to hang himself. In addition to the accounts of Ion Turnagiu's criminal past, the media triggered the usual identification of "service suspects" in these cases, starting with the prison release commission that had proposed his parole, and then the court that granted it; the police bodies who have not taken any action when the victim lodged a criminal complaint concerning rape, and the probation services which, under certain conditions, have the task of supervising persons on conditional release. This incident was another occasion for the re-issue of Law No. 169/2017 (meanwhile repealed after this incident) which aimed to reduce the phenomenon of overcrowding in Romanian prisons by establishing a mechanism of compensatory appeal.

Social media and publishing forums became places where the public expressed their hatred of Turnagiu's gesture, with (habitual) appeals for the reintroduction of the death penalty or other acts of torture. Neither the magistrates, nor the police, nor the politicians escaped the public's opprobrium. The latter reacted almost immediately, promoting a bill in parliament on 16 June which severely limited the possibility of conditional release of prisoners convicted of crimes deemed to have an increased degree of social danger. The bill was in fact a form of manifestation of political populism in criminal matters, which was later declared unconstitutional. Moreover, it was a reaction generated by the political class's desire to present itself to voters as concerned with ensuring the "safety of citizens", especially since parliamentary elections were expected to be held in the autumn of 2020, depending on the pandemic situation. This was also the final stage of debates that had begun in 2015, on the problems facing the prison system, which often fell under the same populism.

1. Prison overcrowding face to face with penal populism

Prison overcrowding is one of the biggest challenges for correctional systems. Thus, the Council of Europe, which annually monitors the evolution of the prison population in the Member States, through the SPACE I report (Aebi, Tiago 2021), pointed out that the overcrowding of prisons was a problem in several jurisdictions. For example, for 100 holding places, Belgium reported 121 prisoners for 2020, France 115 prisoners, Italy 120 prisoners, Cyprus 115 prisoners and Hungary 115 prisoners. Turkey, a country that is not a member of the European Union, had 127 prisoners. As far as Romania is concerned, it had 113 prisoners for 100 holding places. If we report globally, overcrowding is a problem affecting 118 countries

and territories that reported a higher occupancy rate of 100%, while in 11 of them occupancy exceeded 250% (Global Prison 2021).

The causes of this phenomenon are multiple and not necessarily related to an increase in criminality. Most of the time, high rates of incarceration are predominantly linked to repressive criminal policies that states adopt, with a focus on the imposition of custodial sanctions (Hough, Allen, Solomon 2008).

It is a phenomenon which, in turn, is a manifestation of political and penal populism, with governments unwilling to be perceived by public opinion as lenient on crime (Roberts et al. 2002). As such, it becomes a vicious circle, and the more determined politicians are to be perceived as fighting crime, the greater the pressure they put on the prison system, expressed by high rates of incarceration.

In addition, overcrowding of prisons is explained by insufficient development of community measures and sanctions, the existence of provisions which makes conditional release difficult, inadequacy of the resources of the prison system in relation to the dynamics of the criminal phenomenon, the existence of bureaucratic procedures that make it difficult to transfer prisoners, etc. In these circumstances, prison systems are often unable to comply with the recommendation of a single inmate per cell, in cases recommended by the Council of Europe or the United Nations or those serving life sentences, long-term, or in the case of persons remanded in custody.

The overcrowding of prisons makes them into toxic environments for both detainees and staff (Farrington, Nuttall 1980; Pitts, Griffin III, Johnson 2014; Bernd, Loftus-Farren, Mitra 2017; MacDonald 2018).

As regards prisoners, the negative effects of overcrowding translate into high rates of suicide or self-harm, aggression between prisoners, impairment of physical or mental health, insufficient involvement in recreational activities or educational rehabilitation programs, limitation of the right to visits, etc. For their part, staff in prison units face high levels of occupational stress because of the risks they face or the need to manage a significant number of incidents. In these circumstances, overcrowding is likely to undermine the task that prison systems have undertaken, that is, to contribute to the rehabilitation of prisoners and to reduce their risk of recidivism. One should also take into consideration that in some cases, to limit the effects of overcrowding, spaces assigned for rehabilitation or educational programmes are converted into detention facilities.

Moreover, the COVID-19 pandemic was an additional challenge for the states, which started to identify short-term solutions to limit the phenomenon of overcrowding. At first the solutions identified were initially to limit the number of transfers between prisons, to limit the interaction between staff and prisoners, but also to limit the number of visits, solutions which, as I have already shown, are more likely to contribute aggravating problems. On reflection, authorities have focused on identifying more sustainable measures, such as delaying the execution of sentences or more widely applying alternative measures and sanctions (Dutheil, Bouillon-Minois, Clinchamps 2020; Nowotny et al. 2020; Simpson, Butler 2020).

Generally, it is for the states to identify solutions to the problem of prison overcrowding. Globally, there are several minimum standards developed under the aegis of the United Nations (Mandela Rules), which are aimed at regulating the treatment of prisoners and at drawing up guidelines for the states for the treatment of persons deprived of their liberty. However, these standards have only the value of recommendations, and there are no mechanisms in place to penalise states that violate these recommendations.

At a European level, the Council of Europe, through a number of institutions such as the Committee for the Prevention of Torture and the European Court of Human Rights, has established a series of procedures whereby Member States can be penalised for violating the rights of prisoners, their rights being subsumed to those guaranteed under the European Convention on Human Rights.

In the specific case of the problem of prison overcrowding, the Court consistently ruled that holding detainees in improper spaces violated the rights provided for in Article 3 concerning the prohibition of torture or degrading treatment, Article 5 on the right to freedom and security, and Article 8 on the right to respect for private and family life. In this respect, the Court's case-law is a relevant one, which obliges (under the provisions of Article 41 of the Convention) the Member States to pay compensation to prisoners whose rights had been infringed.

In the cases of structural problems for some States, which constantly arise in the case-law of the Court, the pilot judgment procedure was established with the role of enabling States to take action to address the causes which led to the problems. First applied in 2004 in the case of *Broniowski vs. Poland*, through this procedure the Court may decide to suspend the resolution of similar human rights infringement cases, giving a state the opportunity to identify remedies to these problems.

In the specific case of the problem of prison overcrowding, pilot decisions were handed down against Bulgaria (*Neshkov and Others vs. Bulgaria* 2015), Hungary (*Varga and Others vs. Hungary* 2015), Italy (*Torreggiani and Others vs. Italy* 2013), Poland (*Orchowski vs. Poland* 2009; *Norbert Sikorski vs. Poland* 2009), Romania (*Rezmiveș et al. vs. Romania* 2017), Russia (*Ananyev and Others vs. Russia* 2012) and Ukraine (*Sukachov vs. Ukraine* 2020).

As regards the way in which the Member States have related to these decisions, we will give a brief overview of the measures taken by them in the application of the pilot decisions, as well as the dynamics of the prison population in the period following the imposition of those decisions.

Poland (targeted by two pilot decisions in 2009) introduced a series of reforms aimed at introducing electronic monitoring by replacing the execution of a prison sentence with electronic monitoring under certain conditions, adopting a new penal code (2015) which provided for the possibility of applying the conditional suspension of the execution of the prison sentence on a wider scale, and a comprehensive process of modernisation of the prison system, with a focus on increasing the opportunities offered to prisoners in the field of education, professional qualification, treatment programmes and infrastructure modernisation (including the

construction of new holding spaces) etc. Poland's progress was highlighted during the 2017 visits of the Committee for the Prevention of Torture (Report to the Polish Government 2018). The data provided by the SPACE I report also confirm Poland's resolution to the problem of prison overcrowding. In 2010 the density of prison population reported for 100 places was 99.4, in 2020 it had fallen to 88.2.

As regards the situation of Russia, against which a pilot decision was given in 2012, it is quite difficult to capture the existence of any genuine progress for improving the conditions of detention. Firstly, in analysis concerning Russia, we must consider the socio-political peculiarities of that state. Described as an autocratic rather than democratic state (Roberts et al. 2002; Treisman 2018), Russia's relations with the Council of Europe are marked by unilateralism, especially after 2017, when the Russian Constitutional Court decided that only those ECHR decisions that did not contravene Russia's constitution were to be respected by Russia. No concrete steps have been identified within the Russian prison system regarding action to improve detention conditions (i.e strategies to enhance prison conditions or to reduce the number of prisoners). As has already been noted (Dikaeva 2020), the criminal system in Russia is further characterised by a repressive criminal policy, lack of transparency and insufficient application of community sanctions. Given that 523,928 prisoners were incarcerated within the Russian prison system on 1 January 2020, it is clear that genuine reform aimed at improving detention conditions would be a complex process, and under current conditions in Russia is unlikely to be carried out.

In the pilot decision delivered in 2013 against Italy in the case of *Torreggiani et al. vs. Italy*, the ECHR applicants complained about the conditions of detention and, in particular, overcrowding, and previously the Court had dealt with "several hundred of such requests" concerning the conditions of detention in several Italian prisons, so that it considered that overcrowding was a systemic problem.

In this case, too, the Court granted Italy a grace period in which it proposed a series of measures to resolve the problems, while suspending the resolution of other similar requests. The solutions identified by the Italian Government consisted, inter alia, of reducing the period of execution of the sentence for persons still incarcerated (1 day for every 10 days spent under conditions contrary to the provisions of Article 3 of the Convention) or offering material compensation of 8 Euro/day for prisoners who were in pre-trial detention or who had in the meantime been released. The Court considered that those solutions provided reasonable compensation for the damage suffered by the prisoners, although in practice a number of problems related to the mechanisms for the effective award of compensation were raised. On the one hand, the proceedings were quite complicated, which was likely to discourage prisoners from seeking compensation for damage, and on the other hand, the judges were quite reluctant to grant financial compensation (Graziani 2018). However, the problem of overcrowding remains an acute one for the Italian prison system, with a new upward trend in the prison population as of 2016, so that in 2020 Italy reported 120 prisoners for 100 places.

In these circumstances, in their report on the 2019 visit (Report to the Italian Government 2020), the Committee on the Prevention of Torture recommended that the Italian authorities take the necessary measures to reduce the number of prisoners, both by including alternative measures for pre-trial detention and by speeding up the process of release of prisoners.

Hungary's reporting on the implementation of the pilot decision handed down in 2015 presents a number of peculiarities specific to a populist approach. A compensatory system was initially developed through a series of amendments to the Code of Punishment. The compensatory scheme introduced concerned, in essence, a grant compensating for the period spent by a prisoner under conditions of overcrowding, which was underpinned by financial compensation amounting to approximately 3.9–5.2 Euro/day of holding. It was a smaller amount compared to that which had been offered by the ECHR in previous cases regarding the conditions of detention (approximately EUR 9.7). The proposed compensation system was also subject to criticism (Communication 2017) concerning the excessive bureaucratic procedures which had to be carried out by prisoners in order to obtain compensation and which, in most cases, had a deterrent effect. The proposals that were formulated were aimed, among other goals, at rethinking the sanctioning system in order to reduce the influx of prisoners, but also at allocating material and human resources capable of managing compensation claims under appropriate conditions.

In 2020, amid political developments in Hungary which were characterised by an appeal to authoritarianism from the government led by Viktor Orban, and the state of emergency invoked as a result of the COVID-19 pandemic, the granting of compensation was suspended. Clearly, the pandemic was a pretext for the Budapest government, as the Orban government's intention to suspend payment of compensation had been announced as early as January (Guest Post 2020). This referred to the fact that, in reality, the compensation scheme was in fact the business of some "smart lawyers", while at the same time minimising the seriousness of the problem of inhumane conditions of detention. In these circumstances according to the SPACE 1 report, in 2015 Hungary had a ratio of 129.4 prisoners / 100 holding places, while in 2020 the density was 113.2 prisoners / 100 holding places.

As regards Ukraine, given that the pilot decision was handed down in 2020, we consider that carrying out an analysis of the situation would be a premature step. The above-mentioned examples of how pilot decisions are implemented give us the opportunity to draw a number of conclusions. Firstly, the identification of compensatory measures is a challenge for governments that need to identify practical ways of implementing pilot decisions. Although the Court makes a number of recommendations in the pilot decisions on the measures that states are to implement, their responsibility to identify the best solutions appropriate to the local context is underlined.

The challenge stems from the fact that compensatory measures are often to be applied in a context where populist discourse by the political class prevails,

regarding the need to reduce crime and to implement "tough measures" against those who break the law. In these circumstances, discussions on improving the conditions of detention and eliminating prison overcrowding can have a "boomerang effect" so that the application of pilot decisions constitutes a genuine test on issues such as the reality of the commitments made by governments with regard to respect for human rights or the existence of the rule of law.

2. Compensation appeal in Romania – between the realities of the prison system and penal populism

On 25 April 2017 the European Court of Human Rights handed down a pilot decision against Romania in the case of *Rezimveş et al. vs. Romania*. The Court found that the problem of inadequate conditions in the Romanian detention facilities was systemic, with the steps taken up to that point by the Romanian State with a view to improving them proving to be ineffective.

Thus, the first decision of the Court against Romania was to be given in the case of *Bragadireanu vs. Romania*, in order to subsequently issue 93 judgments, between 2007 and 2012, against the Romanian State for violations of Article 3 of the Convention. These judgments concerned issues such as overcrowding in detention facilities or poor conditions in pre-trial detention centres or prisons, characterised, inter alia, by lack of hygiene, insufficient ventilation and natural light, problems with sanitary facilities, the presence of rats, reduced hours of outdoor activities, improper transport conditions for prisoners, etc.

In view of this influx of applications concerning the situation in the Romanian prison system, the Court addressed for the first time Article 46 of the European Convention on Human Rights, in the case of *Iacov Stanciu vs. Romania*, taking the view at the time that there was no need to resort to the pilot procedure. In that sentence, the Court found that the issue concerning this case was already specific to the Romanian prison system, noting that it was necessary to establish an appropriate remedial system, namely the award of damages in accordance with the Court's current practice. Furthermore, the Judges of the Court mentioned that the subsequent legislation to be drawn up in Romania should reflect the existence of a presumption that, during the execution of the sentence, the prisoners had suffered moral damage.

In other words, convicted persons were entitled to receive reparations from the Romanian State, without the need to prove the existence of injury. The Court also pointed out that the Romanian Government had an important role to play in regulating the situation in detention facilities. The Judges of the Court made this statement by virtue of the fact that, for a long time, the only institution that was seen to be responsible for the conditions existing in the detention facilities was the

National Administration of Penitentiaries. Given that it was under the Ministry of Justice and the funds at its disposal came largely from the state budget, it was obvious that the Romanian Government had, after all, a responsibility with regard to the situation in detention facilities.

With regard to the amount of compensation, the Court determined that it should not be unreasonable, establishing as a reporting criteria the fair remedies granted by the Court in similar cases. Looking at the Court's case-law in the cases concerning Romania, we will note that these sums generally were of the order of thousands of Euros. Moreover, the provision of significantly lower compensation or even failure to provide any was required to be well-reasoned.

The precariousness of the conditions in holding premises in Romania has not been highlighted only in the case-law of the ECHR. As Romania ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, it accepted that premises of persons deprived of their liberty should be subject to inspection by the Committee for the Prevention of Torture (CPT).

The reports drawn up during the inspections highlighted the inadequate conditions in the detention facilities under the supervision of the General Inspectorate of Police or the National Administration of Penitentiaries. For example, in the report drawn up during the 2018 visit (Report to the Romanian Government 2019), the members of the Committee highlighted the existence of progress and the intentions of the Romanian authorities to renovate existing facilities or build new ones, but stressed the persistence of old problems such as poor material conditions, inadequate medical care, lack of adequate ventilation, the absence of fruits and vegetables from the diet of prisoners, etc. This information was also provided by other bodies, for example the Association for the Defence of Human Rights – the Helsinki Committee, which has also made a number of visits to detention facilities over the years, and later by the Ombudsman.

However, Romania's conviction in the case of *Iacov Stanciu vs. Romania* did not bring about significant changes, which was also the reason for the pilot decision in the case of *Rezimveș et al. vs. Romania*. When providing reasons for its decision, the Court noted that the measures taken by the Romanian Government did not have a visible result, namely, the improvement of the conditions of detention and the avoidance of overcrowding, noting, for example, that at the level of October 2015 the occupancy of Romanian prisons was 150, 68%. In those circumstances, within the pilot decision, the Court also made a number of recommendations to the Romanian State on the measures it could envisage, namely a reform at the level of the Criminal Code to allow the application of non-custodial sanctions on a larger scale, the strengthening of the probation system and, in particular, reviewing the conditional release procedure.

Moreover, the court noted that the solution to the problems of the Romanian prison system did not necessarily consist of the construction of new penitentiary units, but also of the renovation of existing prison facilities. Additionally, the

solution identified in the case of *Jacob Stanciu vs. Romania*, namely the granting of compensation by the supervisory judge of deprivation of liberty and by the courts, was reiterated.

Important from the perspective of our approach is the fact that the decision refers to the existence of a legislative initiative of November 2016 aimed at drafting a law project aimed at establishing a compensatory measure that allowed convicted persons in conditions of chronic overcrowding to have their sentence reduced by 3 days for each 30-day period executed in an inadequate space (compensatory appeal procedure).

Thus, the Court decided that, within six months of the final retention of the judgment, the Romanian State had to draw up a clear timetable for the implementation of general measures to solve the problems of overcrowding and poor conditions in the places of detention. It also postponed the examination of all similar claims against Romania. Although at the time of the drafting of this article it is four years after the pilot decision was issued, the progress of the Romanian State in achieving the objectives set by the Court has been minimal. As we shall point out, the main reason for the failure was that the strategies to be implemented in applying the decision were diverted from finality under the spectre of specific manifestations of, though not only, penal populism.

Initially, we consider that a number of clarifications are required concerning the political context which governed the debates to which we will refer in this article. In December 2016 parliamentary elections were held in Romania, and were won by the Social Democratic Party, led at the time by Liviu Dragnea. In 2016 he had been sentenced to a two-year prison sentence with a conditional suspension of the execution of the sentence, for committing electoral fraud during a referendum in 2012. He was also tried in a criminal case, the object of which was a series of fictitious employments which he had carried out during his time as the President of the Teleorman County Council, the persons employed in a social assistance directorate under the authority of the Council carrying out their work within the local branch of the Social Democratic Party. These employments had been carried out by Liviu Dragnea during his time in the conditional period, so that if his guilt was established, the suspension of the execution of the sentence would be revoked and he would serve a custodial sentence.

Moreover, Liviu Dragnea was not the only dignitary of the Social Democratic Party who had problems with the criminal law, so the electoral victory of this party aroused a number of concerns among both the political class and civil society. Taking advantage of their relatively comfortable parliamentary majority, a number of amendments to the criminal law were made in order to avoid criminal liability for these dignitaries. It should also be noted that they were not the only persons interested in amending the criminal law. In the context of the intensive fight against corruption carried out in previous years by the National Anti-Corruption Directorate, a number of employers or persons with key roles in media trusts (especially in the area of television and the written press) were under investiga-

tion and some of them had been convicted. In these circumstances, in the period 2015–2016 the conditions of detention in Romanian prisons suddenly became a subject of concern for these trusts. Reports were presented, debates were held in which the precarious conditions of detention in Romanian prisons were presented, the problem of overcrowding was highlighted and also the need to adopt a law on amnesty and pardon was launched in the public space. As expected, debates about the desirability of amnesty and pardon created unrest among detainees, so that in several prisons a series of riots took place during the summer of 2016. The riots were also based on a distorted media account of the statements of the Minister of Justice at the time, Raluca Pruna, who had referred in an interview to the fact that she was considering launching a debate on the desirability of a pardon law as a possible solution to the problem of overcrowding, stressing, however, that it was not necessarily a solution to the problem, recalling in the interview the example of Turkey whose prisons had returned to their original level of occupation only 11 months after the adoption of such a law (Ministrul Justitiei 2016).

What was expressed as an intention was later reported by the media as a certainty. It also pointed out that Romania must take a number of concrete steps towards avoiding overcrowding as it risked receiving a pilot decision from the ECHR, with Romania obliged to pay compensation of around 80 million Euros/ year. It was also pointed out in that interview that although the ECHR decision in the case of *Jacob Stanciu vs. Romania* should have motivated the authorities to take action, this had not happened with the main responsibility lying with Parliament. The debates were to continue in the autumn and winter of 2016, with the aforementioned media trusts increasing the pressure on policy makers.

A draft law on amnesty and pardon also appeared in the public space, which was submitted to the Ministry of Justice by "a group of NGOs". The full text of the project was published in full by a single website, the title of the article in which it was presented being suggestive to describe the tension that characterized the moment: "Genocide in prisons – Here is the amnesty project submitted to the Ministry of Justice by a group of NGOs" (Genocidul 2016).

Shortly after the installation of the government resulting from the November 2016 elections, the new government resumed the topic of amnesty and pardon in January 2017. A meeting between the Minister of Justice Florin Iordache and the head of the National Prison Administration took place on 9 January 2017, with the director of this institution declaring at the end of the meeting that "any exit would help", including amnesty and pardon. However, this position was to be challenged, including by prison unions, who stressed that this solution would only lead to a temporary resolution of the problem of overcrowding. Soon the Minister of Justice undertook a series of visits to prisons, reiterating that for 28,000 prisoners, the minimum detention conditions were not being met.

Also in January 2017 a bill on pardoning punishments was underway. Its foundation note reproduces the themes that had already been promoted in the public space, namely overcrowding, the inadequacy of the detention facilities and their

age, the fact that the Romanian State was previously obliged to pay compensation by the ECHR for the conditions of detention, the imperative to respect human dignity, the passivity of the authorities after the decision of *Iacov Stanciu vs. Romania* had previously been pronounced, the imminence of a pilot decision from the ECHR (Notă de Fundamentare n.d.), etc.

Although acts of corruption were formally exempted from the pardon, the public perception was that there was, in reality, a different goal than the one announced by the originators. In this respect, when the bill was discussed on newspaper forums, many comments referred to the fact that, in reality, the bill was nothing more than an attempt to solve the criminal problems of some politicians.

Comments such as "the substrate of pardon is not prison overcrowding, as it is circulated, but precisely a masked amnesty. It is inadmissible to wipe away such crimes" were common, as were mentions of the names of politicians who stood to benefit from the provisions of this bill.

Furthermore, the view that the draft Ordinance was actually a pretext for circumventing criminal liability, and was not based on a desire to actually resolve the problems of the prison system, also lies in the fact that the pardon would also apply to convictions for the payment of criminal fines, to suspended prison sentences, and even to those who would be convicted in the future where their files were pending at the time of January 18 2017. Furthermore, other beneficiaries of the pardon included those who were sentenced to imprisonment up to 5 years, who were repeat offenders and who committed offences other than those expressly listed in the draft project. In these circumstances, the beneficiaries also included those convicted of abuse of office, crimes related to corruption, or serious forms of tax evasion. The draft also granted a pardon with half the penalty imposed on those over the age of 60, pregnant women and dependent children up to 5 years of age, with only one condition, namely that they not be repeat offenders – so it would not matter if they had been convicted of serious crimes.

Almost simultaneously, a draft law (Traicu 2017) was under public debate, which, under the façade of aligning some provisions of the Penal Code with a series of decisions of the Constitutional Court, was aimed at decriminalising serious crimes. This regulatory act provided, inter alia, for the decriminalisation of the abuse of office if the damage was less than 200,000 lei (approximately 50,000 Euros) and if it exceeded that amount, it could only be investigated if the victim had made a prior complaint. It also eliminated the offence of negligence in service, as well as the offence of conflict of interest if a benefit was due, which completely changed the purpose of the criminalization of that offence.

Given the repercussions these bills would have had on the criminal justice system, civil society mobilised, and Bucharest became the scene of massive protests, with their scale and the international reaction causing the government to take a step back. However, the effect of these attempts were long-lasting, affecting public confidence in good faith governance when the need for reforms of the criminal justice system were discussed.

Thus, the period 2017–2019 was marked by a series of attempts by the government coalition to amend criminal legislation and the laws of judicial organization, often with accusations about the press or civil society stating that, in reality, their goal was to undermine anti-corruption efforts and facilitate the avoidance of criminal liability of politicians. In these circumstances, this state of affairs was also reflected in reforms concerning the prison system, the problems which it faced being current.

In April 2017, ECHR issued its pilot decision in the case of *Rezmiveș et al. vs. Romania*, with the Bucharest authorities this time being in a position to identify short-term solutions to the problems related to the holding conditions, but the memory of the events of January 2017 dramatically limited the available options.

Generally, the Romanian press often reported in objective terms on the provisions of the framework decision, avoiding references to the previous failed efforts to promote a number of other changes under the pretext of solving problems in prisons. The exception was, of course, the press trusts, which as mentioned previously, had a direct interest in promoting rapid change. In their case, the decision was used as an opportunity to highlight once again the disastrous conditions in prisons, further advocating for the swift adoption of measures, and in particular promoting the idea of adopting a pardon law.

Although as previously mentioned, the ECHR had given the Bucharest authorities a six-month period in which to come up with a plan for measures to eliminate overcrowding, the decision was seen by the government as an opportunity to speed up the process of prisoner releases. Decision-makers, including Liviu Dragnea, began to refer to fines of the order of 80 million euros that Romania would pay to the ECHR if it did not solve the problem of overcrowding. This was clearly misinformation, designed to justify the haste with which measures were later implemented. The Court did not have the power to impose fines, the amounts being seen at most as compensation for prisoners who had served their sentence under improper conditions, in the event that the Romanian State opted for that method of compensation.

In those circumstances, the first (and in fact the only) measure adopted by the Romanian authorities in the application of the pilot decision aimed at speeding up the process of release of prisoners. As mentioned in the explanatory memorandum accompanying the draft law (Expunere n.d.), reducing the duration of sentencing was a solution which, beyond Italy, had also been implemented by other European states in similar situations (e.g. Hungary). This was likely to provide a number of short-term results, given that the expansion of holding spaces through the construction of new prisons was not a solution in line with the Court's vision, nor could it be achieved on a schedule in line with the urgency required by the provisions of the decision.

In these circumstances, Law no. 169/2017 was adopted, which for the execution of the sentence under improper conditions provided as a compensatory measure a reduction in sentence of 6 days for each 30-day period served under improper

conditions. The law was published on 18.07.2017 in the Official Monitor, not even three months after the ECHR delivered the pilot decision, although as I previously mentioned, it had granted the Romanian authorities a period of six months to submit a plan of measures.

For "executing a sentence under improper conditions", the law defined as criteria accommodation in a space of less than 4m2/inmate, lack of access to activities in open space, lack of access to natural light or sufficient air, failure to maintain adequate temperature in the rooms, existence of leaks, grease and mould in the walls of the detention rooms, and the lack of the possibility to use the toilet in private and to comply with basic sanitary rules. It should be noted that although the bill initially provided an additional 3 days considered to have been executed for a period of 30 days, in the context of the debates occasioned by the adoption of the law, this amount was later increased to 6.

In practice, all prisoners benefited from the conditions of the law, regardless of the penitentiary where they were serving the sentence, the law specifically exempting from the calculation of the compensatory period those times in which prisoners were in transit or admitted to the infirmaries at places of detention, in hospitals within the health network of the National Administration of Penitentiaries, the Ministry of Internal Affairs or the public health network. Prisoners were also exempted and had been compensated for improper conditions of detention, by final decisions of the national courts or the European Court of Human Rights, for the period for which compensation was awarded and transferred or moved to a detention area with inadequate conditions. The law began be applied for the period executed starting with 24 July 2012, the date on which the ECHR's decision was handed down in the case of *Iacov Stanciu vs. Romania*.

With the law adopted shortly after the events of January 2017, and with the ruling party being involved in a wide-ranging process of revising regulatory frameworks, particularly the one aimed at fighting corruption, the issue of compensatory appeal was massively politicized. Thus, both the opposition, civic activists and part of the mass media used the law to protest, once again, about the ruling coalition's determination to fight the rule of law, to undermine the justice system at the cost of endangering the safety of the community. Shortly after the law was passed, Romania was shaken by a series of murders committed in Caracal, where two teenage girls were kidnapped, raped, killed, and then their bodies cremated. Beyond the seriousness of the crime, the scandal was amplified by the delayed reaction of the police forces, who, although alerted by one of the victims through the 112 emergency system, had failed to act promptly.

Shortly after, the President of Romania, who was in open conflict with the governing coalition, convened the Country's Superior Defence Council at the end of a meeting, giving a press statement in which he also mentioned that "changes to the laws of justice [...] the compensatory appeal, all this has created serious vulnerabilities to national security, with some of the most dramatic effects for people's

safety" (National Security 2019). This took place even though the compensatory appeal procedure had not yet taken effect.

Thus, the problem of prison overcrowding was seen as a secondary motivation, with the compensatory appeal being presented as a way of more quickly releasing those who were sentenced to custodial sentences as a result of the commission of corruption offences, creating a privileged situation for the President of the Social Democratic Party, Liviu Dragnea (although he had not yet been definitively convicted in the second criminal case). All this at the cost of endangering the safety of citizens, as dangerous criminals would be released as well, with a repeated refrain throughout the discourse that rapists, criminals, robbers and drug traffickers would also be released. Or as mentioned in a blog "a maroon haunts Romania – the prisoners released by the Social Democratic Party and Tudorel Toader (Minister of Justice) commit crimes after crimes, with thousands of victims" (Justiția 2018). Under those circumstances, the media began keeping a record of persons released as a result the law, each time pointing out the fact that when they reoffended, they were at large on the basis of the compensatory appeal.

Headlines such as "More than 500 convicts released on compensatory appeal have committed new violent crimes" (Date 2019), "Criminals, thieves, rapists escaped from prison" (Mihai 2020), "The beneficiaries of the compensatory appeal: 5,000 criminals and robbers and 1,000 rapists" (Sirbu 2019) were common in the media between 2017–2019.

In turn, social media had plenty of memes portraying, for example, the Minister of Justice dressed in blood-stained butcher's clothes, or underworld leaders thanking the President of the Social Democratic Party for passing the law. Additionally, prison conditions were compared with those in hospitals or student dormitories ("Why do prison conditions have to be aligned with European standards and those in hospitals do not?"). A number of civic groups started signature-gathering initiatives with a view to repealing the compensatory appeal under the heading "Safety of citizens at risk!".

Moreover, the opposition leaders relied intensively on the theme of compensatory appeal in political debates. "You haven't built a single one of those eight regional hospitals for which Romanians had hopes and voted you for in 2016. You promised 2,500 nurseries and kindergartens and there are barely 45. Instead, you managed to free more than 22,000 criminals, many of them rapists and violent people, who have since reoffended and caused the dramas that terrify Romania today" (Dan Barna 2019) was to claim in a political statement Dan Barna, the leader of an opposition party at the time, the Save Romania Union.

In turn, Ludovic Orban, the leader of the opposition, declared that:

> the first thing we should hear from Viorica Dancilă (prime minister) is that she will urgently stop the release from prison of dangerous offenders and criminals. What she had to do was very simple: repeal the law on compensatory appeal, the one that has released and continues to release

> criminals who commit the most violent acts and who are reoffending, as we have already seen in the many cases which were made public. (Ludovic Orban 2019)

In May 2019, the president of the Social Democratic Party, Liviu Dragnea, was sentenced to three and a half years in prison. His disappearance from the leadership of the party and the results obtained by the opposition parties in the European Parliament elections in the spring of that year led to a series of reconfigurations of the political scene in Romania. Thus, in October 2019, following a no-confidence motion, the Social Democratic government was ousted, with power being taken over by a coalition made up of parties that had been in opposition.

The repeal of Law no. 169/2017 was a priority for the new government, and took place in December 2019 following the adoption of Law no. 240/2019. As far as the authors are concerned, we appreciate that Romania's experience applying the appeal has been a failure, with several factors contributing to this. The most important factor that contributed to the failure of the initiative was the lack of public trust in part of the political class, the media, and in the good faith of those who promoted the introduction of this remedial measure. As already mentioned, although the reform was based on a real problem, namely the pilot decision of the ECHR, it came at a time when decision-makers were perceived to be more concerned with changing the criminal justice system in order to undermine the fight against corruption. In these circumstances, it was relatively easy to bring up in debates the fact that the law of compensatory appeal, far from seeking to resolve problems with regard to conditions of detention, was instead a means by which persons convicted of committing corruption offences could be released more quickly from the execution of custodial sentences. Or, as it has been repeatedly pointed out (Ruuskanen et al. 2009), public confidence has a determined role in the successful implementation of certain criminal policies, all the more so since their transformation into "targets" of penal populism is a relatively easy step.

The second factor identified was the speed with which the law was promoted. Although the Romanian Government had a period of six months to propose a series of reforms to bring the situation into line with the requirements of the ECHR, the law on compensatory appeal was promoted as a matter of urgency (only three months after the Court adopted the decision in the case of *Rezmiveș et al. vs. Romania*). Basically, although it was a decision with important consequences, it was taken without any real debate beforehand.

A number of action plans had been adopted over time at the level of the Ministry of Justice – for example, timetables for measures aimed at improving the conditions of detention were created, but they were rather technical in nature. In our approach we could not identify any concrete evidence that they had been the subject of debates with even minimal resonance among professionals or public opinion. In these circumstances, the introduction of the theme "the release of dangerous offenders from prisons" could easily be achieved. Moreover, the initia-

tors of the law have failed to communicate an important message, namely that the law of compensatory appeal merely created the opportunity for a person to be proposed for parole, and does not automatically lead to their release from prison. A mechanism governed by the Criminal Code and Law no. 254/2013 establishes that conditional release is proposed by a prison committee, a proposal which can then be approved or rejected by the court.

Thirdly, the law did not create a mechanism to ensure the community supervision of persons released on the basis of compensatory appeal, in particular those convicted of crimes with a high degree of social danger, nor had it provided for a number of facilities offered to such persons to benefit the process of social reintegration.

Basically, after being released, individuals were put in a position of identifying their own strategies for adapting to post-detention life. This happened in the context where the recidivism rate of former prisoners was already high, ranging from 46.3% to 38.4% between 2008 and 2018 (Raport Anual 2019). As has already been demonstrated (Durnescu, Istrate 2020), these figures are mainly explained by the fact that former prisoners do not make up a category for which the public services provide specialised interventions (shelter, finding a job, treating health problems, etc.). In practice, this undifferentiated treatment in relation to other citizens only exacerbates the problems they face after release. The stigma attached to ex-prisoners also creates difficulties in finding a job, with no framework to motivate potential employers to reintegrate them professionally. Thus, most of the time the only resources they can access during the reintegration process are their family or social support network.

In 2018, in the context of debates on the situation of the persons released from prison, a bill was drafted which provided for a number of facilities for former prisoners such as the provision of footwear, clothing, medicines, temporary accommodation in a centre for the homeless, meals granted at social canteens or a free food allowance, and tickets on urban and interurban public transport. These facilities were to be granted for a period of three months after the time of release. However, the draft was not adopted, and one of the reasons for reticence in promoting it was that there was a clear tendency public for opinion to be in opposition to such approaches.

Although the media generally presented the proposed law objectively, the comments posted by readers to these articles are relevant to the perception existing among the public ("In this country there are given alms to all kinds of social categories"; "It will only lead to the escalation of crime. So prison is at a discount, with compensation for days and money for difficult conditions and now, in addition, with all kinds of aids after release"; "I propose that those who vote for this, take one (former prisoner) at a time. Bonus!", "They only care for the good of the prisons!!!!"; "An honest citizen who comes from disadvantaged categories does not receive this state aid.", etc.).

There were also situations when the press, sometimes subtly, and sometimes directly, would place this approach in the realm of populism. For example, although the news was reported objectively, the legislative initiative was accompanied by photographs depicting members of the underworld or, alternatively, articles took on a polemic register from the outset.[1]

As for any mechanisms of supervision in the community for conditionally released persons, they are inadequate. Although the Penal Code, which has been in force since 1.02.2014, provides for the possibility of electronic surveillance of conditionally released persons, the system has not been implemented to date. This is despite the fact that, on several occasions, at the level of judicial bodies, electronic monitoring was perceived as effective in ensuring effective supervision of persons in conflict with criminal law (Oancea, Durnescu 2018). As regards interventions by probation services, they have a number of competences in relation to certain conditionally released persons, but the probation system currently faces a number of difficulties arising from the high volume of activity, the lack of material and human resources and the relatively limited opportunities in communities to provide adequate support to former prisoners. In these circumstances, the authorities lacked any argument with which they could have countered the emerging image of the persons released from prison: that they were not subject to any supervision and, in particular, that former prisoners had all been convicted of serious offences.

A fourth factor that caused the failure was the far too rapid pace of prisoner release. Linked to the lack of supervision and support after leaving the prison, and considering the number of persons released, obviously the number of those who would go on to reoffend would be significant. According to data from the National Administration of Penitentiaries, during the period of the law's enforcement, 22,917 prisoners were released (ANP 2019).

The objective of the law seemed to have been achieved, with a significant reduction in the prison population recorded during this period. On 31.12.2016 the number of prisoners was 27.455, and at 31.12.2018 it was 20.792, which means a reduction in occupancy of 24.26%.

The repeal of the law of compensatory appeal was not accompanied by the provision of other remedial measures. The Ministry of Justice drew up a new action plan for the period 2020–2025, in which the solutions identified were this time aimed at making investments to increase holding capacity and improve the hygienic-sanitary conditions in prisons, linked to an increase in the institutional capacity of the probation system.

[1] See in this respect the title of the article "For inmates – mum, for orphans – plague. Social reintegration – comparison between prisoners and orphans who have reached the age of majority" (Ghica 2018).

Conclusions

For a reform process to be successful, the one who initiates it must take into account a multitude of factors, such as setting clear objectives; ensuring consistent political support to underpin the approach; consultation with all those who have an interest in the process in question, who may facilitate it or, on the contrary, have the capacity to undermine it; the assessment of similar experiences or the adoption of multilateral approaches.

From this perspective, in retrospect, the approach initiated under Law no. 169/2017 was doomed to failure from the start. It was an initiative in an area where criminal populism could fully manifest itself. In all jurisdictions, actions such as amnesty, pardon or other similar means by which a significant number of prisoners are released in a short period of time, are likely to fuel the sensationalism of the media, but also to cause concern and uncertainty among the public. In these circumstances, these processes naturally require the development of strategies from which unilateralism, ambiguities or notions which create a perception of lack of control must be absent.

To achieve the short-term objective of reducing the prison population, the Bucharest authorities embarked on the process without taking into account that it would evidently lead to a series of negative reactions from part of the political class, the media, some professional organisations within the justice system and, consequently, in what we generically call public opinion.

The release of a large number of prisoners in a short period of time without adequate surveillance mechanisms and without mechanisms to facilitate social reintegration, inevitably led to high recidivism rates. Given these circumstances, the media was able to easily introduce the narrative of "criminals, robbers and rapists who walk freely on the streets" to the public space. Also, the credibility of the initiators was already compromised in part of the public opinion but, above all, with civic activists who would then view the action on compensatory appeal against a succession of legislative initiatives aimed at revising the regulatory framework on the fight against corruption. The fact that the law was aimed at solving a problem for which the ECHR had delivered a pilot decision against Romania would take a second place to the perception that, in reality, this law was another subterfuge whereby, at the cost of sacrificing public safety, the authorities sought to more quickly release those convicted of corruption from prison.

The law was repealed after two years, but it still continues to trigger reactions in the public space. "For this atrocity, no one is scandalized? The compensatory remedy was needed for this monster with so many rights!", was a journalist's comment on social media in June 2020 to a news story about Ion Turnagiu's recidivism.

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