

# The Convict's Right to Hope. Difficulties Regarding the Prejudice Payment Conditions in the Matter of Conditional Release

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## Abstract

*The year 2014 was an important moment in changing the dynamics of criminal law institutions in our internal system, the legislator reinventing some of the rules of the criminal process.*

*Among many criminal law institutions, conditional release has received a new legislative approach, which has also led to a change in judicial practice in the matter.*

*Regulated as a way of individualizing the execution of a custodial sentence, this aspect of controversy over when the institution of conditional release becomes applicable, it is based on the state's criminal policy at a certain point in time.*

*The controversy we are referring to considers that the individualization of the execution of the sentence in the case of conditional release operates post-judicially during the execution of the punishment, and not at the time when the conviction is pronounced.*

*As stated in the doctrine<sup>1</sup>, the institution of conditional release is a vital criminal policy measure for the purpose of punishment. In this respect, it was mentioned<sup>2</sup> that conditional liberation should be regarded as an incentive for convicts who give evidence of correction, being intended to accelerate the process of reeducation and social reinsertion.*

**Keywords:** *hope, conditional release, criminal process, prejudice, social reintegration, civil obligations.*

## 1. The need to modify the institution of conditional liberation in domestic criminal law

Even from the Explanatory Memorandum of the Criminal Code in force it is shown that the institution of conditional liberation knows significant changes both in terms of granting conditions and the process of social reintegration of the condemned by the active and qualified involvement of the state, the essential role of probation counselors.

It is stated in the Explanatory Memorandum<sup>3</sup> that conditional release is not a right recognized by the sentenced person not to execute the penalty until the deadline,

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<sup>1</sup> Florin Streteanu, Daniel Nițu, *Criminal Law. General Part*, Vol. II, Ed. Universul Juridic, Bucharest, 2018, p. 576.

<sup>2</sup> *Ibidem*.

<sup>3</sup> [www.avocatnet.ro](http://www.avocatnet.ro), accessed on 23.05.2019.

but a legal instrument whereby the court finds that it is no longer necessary to continue the execution of the sentence under detention until full compliance with the length of the conviction as the convict, through his conduct throughout the period of execution, proves that he has made obvious progress towards social reintegration and thus convicts the court that he will no longer commit crimes, and his early release does not pose any danger to community.

Based on these considerations, the provisions of Article 100 The Criminal Code regulate the following conditions in relation to which the convict's conduct for the granting of conditional release is assessed:

a) the sentenced person has executed at least two-thirds of the sentence, in the case of imprisonment not exceeding 10 years, or at least three-quarters of the penalty, but not more than 20 years, in case of imprisonment for more than 10 years;

b) the sentenced person is in the execution of the penalty in a semi-open or open regime;

c) *the convict has fully complied with the civil obligations established by the conviction, unless he proves that he has had no possibility to fulfill them;*

d) the court is convinced that he has turned and that he will no longer commit other crimes.

In the Explanatory Memorandum of the Law on the Adaptation of the Law no. 286/2009 on the Criminal Code, as subsequently amended and supplemented, with the decisions of the Constitutional Court, Directive no. (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and the right to be present in the criminal proceedings, Directive 2014/42 / EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and the proceeds from crime in the European Union<sup>4</sup> shows that the need to amend the provisions on conditional release art. 100 The Criminal Code is given by the fact that a state's criminal policy can be changed and may be based on the principle, enshrined in all democratic states, that a person can be recovered and re-educated as a behavior towards society, and obliging it to a certain type of attitude by releasing them more quickly.

It is also shown that a change in criminal policy is necessary and we must be able to consider that a person can correct his behavior and without fully executing a custodial sentence. Persons committing offenses established by criminal law must actually have a chance of rehabilitation in society, and the lower penalties to be executed are sufficient to demonstrate to the judge that he understands the consequences of his deeds and that he is ready for the release. Moreover, the additional condition imposed, that the judge will order the measure only if he is convinced that the convict has turned and can integrate into society, is capable of regulating any inconvenience. The fraction of the punishment that has been executed or deemed to be executed creates only a condition for conditional release rather than a right, and the one who will have the necessary margin of appreciation will be the judge entrusted with the settlement of the case.

At the same time, the role of the state in correcting and reintegrating into society the people who have been convicted, and not to remove them and keep them in prisons for as long as possible, so that they become irrecoverable for society.

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<sup>4</sup> Available online at [www.cdep.ro](http://www.cdep.ro), accessed on 23.05.2019, a draft law currently in the constitutional review stage by the Constitutional Court (referral dated 02.05.2019). The draft was adopted by both the Senate and the Chamber of Deputies on 17.04.2019 and 24.04.2019 respectively.

In this regard, the numerous convictions ordered by the European Court of Human Rights against Romania for overcrowding in prisons are taken into account, especially since it has already pronounced the *pilot decision Rezmiveş and others v. Romania* of 25.04.2017<sup>5</sup>, which obliged the Romanian state to provide a clear timetable for general measures to address overcrowding in prisons and to improve prison conditions.

In our analysis, we also need to take into consideration the Recommendation rec (2003) 22 of the Committee of Ministers to Member States on conditional release<sup>6</sup> that conditional release presents one of the most effective ways to prevent relapse and promote placement, planned reintegration, assisting and supervising the detainee in the community.

As a general principle, the recommendation establishes that conditional release is aimed at helping detainees to move from prison life to law-enforced life in the community through post-release and surveillance conditions that promote and contribute to public safety and community crime.

## 2. The convict's right to hope

By the judgment of the European Court of Human Rights in *Matiošaitis and others v. Lithuania*, judgment of 23.05.2017<sup>7</sup>, the Court referred to life imprisonment sentences that do not offer prospects of release, finding that the provisions of Article 3 of the Convention.

In fact, the six applicants whose applications had been declared admissible had all executed sentences for life imprisonment. In their applications before the European Court, they complained under Article 3 of the Convention that their sentences could not be reduced.

The applicants submitted that serving a life sentence without a real hope for release was further aggravated by the segregation imposed under Lithuanian law as well as by inhuman conditions of detention in Lukiškės Prison. Life prisoners' segregation had also been noted and criticized by the CPT in its reports on Lithuania.

Consequently, with no de facto opportunity to have the penological grounds for their continued detention assessed, the applicants were in practice deprived of any prospect of release and their continued detention was therefore in breach of Article 3 of the Convention.

In law, having regard to the provisions of Article 3 of the Convention, the issue before the Court had been whether the penalties imposed on the applicants could be classified as irreducible, or whether there was a prospect of release.

In order to ensure an adequate assessment of the changes and progress towards the rehabilitation made by a prisoner sentenced to life imprisonment, the review of such a punishment would entail either giving reasons to the executive or exercising judicial control, so that even the appearance of arbitrariness would be avoided. Lithuanian presidential pardon did not allow detainees, de facto, to know if they were

<sup>5</sup> [www.echr.coe.int](http://www.echr.coe.int), accessed on 27.05.2019.

<sup>6</sup> Available online at [www.rm.coe.int](http://www.rm.coe.int), accessed on 23.05.2019, adopted by the Committee of Ministers on 24 September 2003 at the 853rd meeting of the Prime Ministers.

<sup>7</sup> [www.hudoc.echr.coe.int](http://www.hudoc.echr.coe.int), accessed on 23.05.2019.

intended for release and on the basis of which conditions there was no judicial control. Accordingly, the applicants' life imprisonment sentences could not be regarded as reducible for the purposes of Article 3 of the Convention.

The Court therefore found, in these circumstances, that there had been a violation of Article 3 of the Convention.

In Lithuanian criminal law, detainees could be released from the condition of the detainee's condition at the terminal stage, or they could be amnestied or punishable. None of these measures provided the true perspective of liberation. Under Lithuanian law, only detainees serving limited sentences, not those sentenced to life imprisonment, were eligible for release. In its turn, as the Court has consistently held, switching the sentence to life imprisonment due to the prisoner's terminal condition could not be considered a "prospect of release." Similarly, the amnesty under Lithuanian law could not be considered as a measure that would give prisoners sentenced to life imprisonment the prospect of mitigating their punishment or release. The Court held that, moreover, as acts of general rather than private application, amnesties did not seem to take into account the aspect of the rehabilitation of each detainee.

As the Court has held in previous cases, reviewing a life sentence should allow the authorities to address any changes in the prisoner's life and any progress towards rehabilitation.

Also, although Article 3 of the new Criminal Code allowed convictions for life imprisonment to be reclassified and commuted to a limited term, this was the only possibility and all eligible applicants had requested this on the basis of that provision, but without success.

With respect to presidential pardon, detainees sentenced to life imprisonment were eligible to meet their pardon demands within a substantially shorter time than the 25-year maximum that the Court has said is acceptable in *Vinter's* and *others* and *Murray*, the procedure was transparent and accessible and implied the existence of a set of criteria that allowed the President, based on an opinion from the pardon commission, to determine whether the continued detention of a life sentenced had been penalized.

However, presidential pardon could not be considered as *de facto* reducing convictions for life imprisonment. First, neither the pardon commission nor the President was obliged to give reasons for the refusal of a petition for pardon. Secondly, the President's pardons of pardon were not subject to judicial control and could not be directly challenged by detainees. Thirdly, the work of the pardon commission was not transparent, and its recommendations were not legally binding for the President. In conclusion, the presidential pledges of pardon in Lithuania were the present equivalent of the royal prerogative of forgiveness based on the principle of humanity rather than the existence of a mechanism with adequate procedural safeguards to control the detainees' situation so that the review of their sentences to life imprisonment did not lead to their rehabilitation.

In any case, the example presented highlights a need for criminal policy at European level in criminal matters, that of Member States' guarantee that those sentenced to imprisonment (even for life) may enjoy a possibility in the future of liberation before the full length of the penalty.

We have in mind, in this context, *a genuine right to hope of the condemned*, without which he no longer presents the premises of a real desire for redeployment.

The Court reiterates that the mere fact that a prisoner has already served a long term of imprisonment does not weaken the State's positive obligation to protect the public, and that no Article 3 issue could arise if a life prisoner continues to pose a danger to society. This is particularly so for those convicted of murder or other serious offences against the person (see *Vinter and Others*, § 108; also see *Murray*, § 111, both cited above). However, it equally considers that even those who commit the most abhorrent and egregious of acts, nevertheless retain their essential humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and to do that would be degrading.

It is precisely the possibility of premature release that can cause the condemned to reconsider its values and conduct throughout the period of detention, thus being able to reward and reintegrate into society more quickly.

In order to achieve an effective social reintegration, conditional release can be preceded by a temporary release, which is intended to help the detainee to become aware of the rules to which he will have to obey when he or she will leave the detention permanently.

Thus, including in Romania, detainees can get permissions to leave the penitentiary management where they execute the punishment, as a reward, following a positive conduct during the period of imprisonment.

Similarly, England introduced the temporary release, ROTL (Release on Temporary license), in its domestic legislation, in the form of a temporary leave to leave the prison. The institution becomes applicable in exceptional circumstances, for example when a close relative is seriously ill, or to help the convict reintegrate more easily into society, thus preparing for further release.

In this respect, English law regulates the possibility of releasing the following forms of premises<sup>8</sup> to prisoners with positive behavior: Permit for special events. This is a permit for a few hours and is granted for:

- visiting close relatives on the verge of death
- traveling to the funeral of close members
- marriage or religious services
- medical treatment – during admission or treatment
- traveling to court or interrogation.

Permit for days of reintegration. This permit is granted for:

- participation in community-based projects or other out-of-prison events in preparation for release
- keeping in touch with the family
- training or education to gain working skills. Extended permit for days of reintegration.

It is granted for purposes similar to the re-entry permit, but it also offers the opportunity to spend more time at the place where the convict will live after the release. Permission to stay in touch with children. This permit is issued for detainees who are the only parent or supporter of a child under 16 years of age. This permit can be taken every 2 months.

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<sup>8</sup> For an ample presentation, see [www.prisonreformtrust.org.uk](http://www.prisonreformtrust.org.uk), accessed on 01.06.2019.

We note that including these institutions, applied before conditional release, are likely to urge the condemned to adopt constant positive behavior, and he can reasonably hope that he will be released before the total amount of the established sentence is reached.

### 3. Damage payment conditions – jurisprudence difficulties

A current issue of conditional release, which may blur the right to hope for conditional release, takes into account the obligation imposed on the convicted to pay the damage established by the offense.

How severe is this obligation? How far does the state's desire to protect the material interests of the person injured by the offense extend to the vocation to release the convict?

The jurisprudence is controversial regarding the fulfillment of the condition provided by Article 100 lit. c Criminal Code, regarding the coverage of the prejudice, before the conditional release, by the convicted person.

This is also due to the fact that the jurisprudential reality highlights fairly frequent situations in which convicted persons do not have the concrete possibility of covering the damages, often very significant as extent.

An excessive duty imposed on the convicted person would, indeed, *can affect the right to hope*, which the European Court of Human Rights is referring, thus restricting the willingness of the sentenced person to reschedule. Even if the above-mentioned decision was made following an analysis of the lifetime situation, the existence of a high amount of damage to the defendant may have consequences for possible future release. Access to this institution, which, undoubtedly, remains a vocation of the convict, must be possible with the help of normal care, natural in the context of an ordinary detainee.

Consequently, the eventual establishment of excessive obligations in relation to the situation of a detainee could eradicate the content of conditional release, the convict not expecting to be able to release himself in the future.

Relevant in this respect is the criminal decision no. 265 / CONT of 18.03.2019 of the Timiș Tribunal, delivered in file no. 3469/325/2019<sup>9</sup>, which allowed the convict P.A. against criminal sentence no. 473 from 12.02.2019 of the Timișoara Court.

The first court held that the documents in the file show that the Arad Court of Appeal, No. 360/2015, ordered the defendant to pay moral damages to civil parties in the amount of 4.000 euros, damages which had not been paid by them. According to the committee's conclusions, the convicted proved the impossibility of paying the moral damages and during the execution of the punishment he carried out productive activities that did not generate income. However, in relation to the act for which the petitioner was convicted, the court notes that the failure to pay even the partial damage to which he was ordered proves an appropriate failure of the offense.

In this respect, the first instance has held that convicted persons, who are also obliged to pay damages to injured persons, must show active conduct during detention, in the sense of trying to perform paid activities, if possible, precisely in order to restore the socially violated and materially.

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<sup>9</sup> Unpublished.

However, the impossibility of paying any money on behalf of the injured persons, the deed being of high gravity, by invoking only the unfolding of unpaid activities, cannot be received by the court, the convicted person having the obligation to try to find a legal solution for payment of the damage to which it was bound.

Thus, the Court of First Instance held that precisely the aspect of reparation was introduced in 2014 as an additional condition in the matter of conditional release, convicted persons including the payment of moral or material damages by sentencing sentences were also obliged to engage in activities that would bring them licit incomes during the period of detention to be able to fulfill this obligation.

Moreover, the first instance found that the convicted person paid legal expenses in the amount of 1463 lei, thus proving an available money, which is not related to the damages established for the injured persons, which is why he considers that the payment of the part of it to civil parties.

In view of these issues, the court first found that the convicted person did not meet all the conditions laid down by the law in order to be released conditionally.

In view of these considerations, the first instance rejected the request made by the Timisoara Penitentiary in respect of the convict P.A.

The Timiș Tribunal amended the ruling given that, as regards the condition of full payment of the civil damages established by the conviction, indeed, the plaintiff did not pay these damages, but it is necessary to check whether the challenging claimant had the opportunity to meet them.

In this regard, the court held that, according to the documents in the file, the P.A. does not appear in the tax records with income nor owns property.

It is also noted that while the sentenced person worked during the detention, the lucrative activities consisted of unpaid servicing and productive services.

In view of these issues, the tribunal has appreciated that the P.A. was objectively unable to pay the civil damages established by the conviction judgment, by reference to the lack of valuable assets and any other income.

It was also noted that although conditional release can be ordered as a result of the impossibility to pay civil damages, it does not affect the right of the civil party to obtain compensation for the damage caused by the convict by committing the deed, under the law, the impossibility of payment being only found at the time of considering the request for conditional release, by reference to the material situation of the convicted person during detention.

Analyzing this judgment, we see a distinction between the impossibility to pay and the actual opportunity followed by non-payment.

As long as the convicted person has provided income-generating activities such as housekeeping or servicing at the place of detention and does not hold any other money or property, the imposition of the payment obligation arises as excessive.

Therefore, it is important to determine what is the reason for non-payment of the damage, including the legal provision in Article 100 lit. c The Criminal Code stipulating that in the case of proof of impossibility of payment, the condition is no longer to be fulfilled in the context of conditional release.

It has been pointed out in the doctrine<sup>10</sup> that the requirements imposed by the provisions of Article 100 lit. c Criminal Code imposing the obligation to pay the

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<sup>10</sup> Florin Streteanu, Daniel Nițu, *op. cit.*, p. 579.

damages established by the conviction decision are similar to those encountered in the case of the revocation of the postponement of the punishment and the suspension of the execution of the punishment under supervision.

In this respect, it has been appreciated<sup>11</sup> that the courts will have to be extremely demanding, the full non-fulfillment of the civil obligations leading to the existence of a presumption of bad faith of the convicted person, who has to prove the absence of any possibility.

By this approach of both legislative and jurisprudential approach, by vigorously enforcing the aforementioned provisions, there is an active concern in helping to respect the civil rights of injured persons by committing offenses.

Thus, once conditional release is granted, it is clear that all the comminatory means that exists on the condemned will disappear, the chances for civil obligations to be fulfilled are illusory.<sup>12</sup>

However, the obligation must not be excessive, impossible, and it is obvious that a person deprived of liberty has little chance of getting large amounts of money.

This is also the position of the Council of Europe expert, Mariavaleria del Tufo, a professor of criminal law, the University of Naples, who affirmed that suspension or conditional release in advance is subject to full reparation of the damage caused, creates unacceptable discrimination among offenders the rich and the poor. A mechanism should be found that would allow them to benefit from these measures and those who are unable to fully repair the damage caused by their economic situation.<sup>13</sup>

At the same time, in the analysis of the condition of payment of the prejudice, regardless of the fact that, according to civil law, the convict can no longer be compelled to pay civil damages<sup>14</sup>, the court must determine whether or not there are financial possibilities, and if there is no, the convict appears to be of bad faith, and the codes of liberation are not fulfilled.

Therefore, regardless of whether or not the sentenced person has a forced execution under civil law, the conditional analysis at the time of the conditional release request must be made distinctly.

## References

1. Streteanu, F., Nițu, D., *Criminal Law. General Part*, Vol. II, Ed. Universul Juridic, Bucharest, 2018, p. 576.
2. [www.avocatnet.ro](http://www.avocatnet.ro), accessed on 23.05.2019.
3. [www.cdep.ro](http://www.cdep.ro), accessed on 23.05.2019.
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6. [www.echr.coe.int](http://www.echr.coe.int), accessed on 27.05.2019

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<sup>11</sup> *Ibidem*.

<sup>12</sup> *Idem*, p. 580.

<sup>13</sup> Broad analysis at [www.nettsteder.regjeringen.no](http://www.nettsteder.regjeringen.no), accessed on 01.06.2019.

<sup>14</sup> For example, there was a prescription for the execution of civil obligations.