CONSIDERATIONS AND OPINIONS REGARDING THE PREVENTIVE MEASURE OF THE DETENTION PROVIDED IN THE CRIMINAL PROCEDURE CODE AND THE ADMINISTRATIVE MEASURE CONCERNING THE ESCORTING OF PERSONS TO THE POLICE HEADQUARTERS

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Rezumat: *Detenția, ca măsură preventivă, poate fi luată în baza unei ordonanțe, cu respectarea demnității umane, a drepturilor și libertăților cetățenilor, a liberei dezvoltări a personalității umane și a justiției, care sunt valori supreme și garantate. Măsura reținerii nu poate fi dispusă pe simple suspiciuni sau presupuneri, întrucât necesită probe sau indicii solide că o persoană a săvârșit o infracțiune.*

Cuvinte cheie: *detenție, escortare, libertate, măsură preventive*

Abstract: *Detention, as a preventive measure, can be taken on the basis of an ordinance, with respect to human dignity, the rights and freedoms of citizens, the free development of the human personality and justice, which are supreme and guaranteed values. The detention measure cannot be ordered on simple suspicions or assumptions, as it requires strong evidence or clues that a person has committed a crime.*

Key words: *detention, escorting, freedom, preventive measure*

On the one hand, one of the freedoms recognised and guaranteed by the fundamental law is the individual freedom and safety. According to Article 23, paragraph (1) of the Romanian constitution, individual freedom and safety of the person are inviolable (paragraph 1). Searching, detaining or arresting a person is allowed only in the cases and by the procedure provided by law (paragraph 2). On the other hand, the custodial sentence can only be of criminal nature (paragraph 13) [12].

The mentioned article (article 23) has a normative, complex and relatively thoroughly regulated character compared to the level of generality usual to the fundamental laws. It should be noted that in its first paragraph, article 23 of the Constitution uses two concepts, namely that of "individual freedom" and that of "safety of the person". It can be noted that the two concepts are not one and the same and, more exactly, do not form a single legal institution, although they are and must be used and explained together.

Therefore, according to the content of article 23 of the Constitution, individual freedom concerns the physical freedom of the person, his/her right to conduct and to exercise freedom of movement and behaviour, the inability to be held in slavery or any other servitude, retained, arrested or detained except in the cases and according to the forms expressly provided by in the Constitution and the law.

From the analysis of the texts of the fundamental law it results, unequivocally, that individual freedom is the constitutional expression of the human natural state, the person being born free. Public authorities or any other persons have an obligation to respect and protect human freedom. Therefore, the violation of the rule of law by individuals entitles public authorities to repressive interventions,

[12] Paragraph 13 of Article 23 was introduced by Article I, point 1 of Law no.429/2003.

which imply, if necessary, in relation to the gravity of the violations, even some measures that directly affect human freedom, such as, for example, searches, house arrests, detention or even arrest.

The repressive activity of the public authorities, the restoration of the rule of law, is and must be conditioned and carefully delimited, so that individual freedom is respected and no person who is innocent is a victim of abusive or possibly determined by political factors actions. Thus comes the notion of safety of the person which expresses the set of guarantees that protect the person in situations where public authorities, in application of the Constitution and laws, take certain measures concerning individual freedom, guarantees that ensure that these measures are not illegal. This guarantee system allows the repression of antisocial or illegal acts, but at the same time. it provides the necessary legal protection for the innocent.

However, the notion of individual freedom has a much larger scope than the safety of the person. The safety of the person can also be seen as a guarantee of individual freedom regarding the legality of the measures that may be ordered by the public authorities, in the cases and under the conditions provided by law[13].

The procedure provided by law means the procedural rules for which mandatory compliance is required. At the same time, the legal norm obliges the legislature to specify, respectively to establish expressly and explicitly both the cases and procedures. In any of the cases, the legislator, in establishing the cases and procedures, will have to take into account that according to article 1, paragraph (3) of the Constitution, "human dignity, the rights and freedoms of citizens, the free development of the human personality and justice are supreme and guaranteed values".

The protection and defense of individual freedom is also regulated at European level. Thus, in Title I (rights and freedoms) of the European Convention on Human Rights, in article 5 (the right to freedom and safety) provides that[14] “every person has the right to freedom and safety”, but stating that these rights may sometimes be revoked.

In this sense, from the provisions of art. 5 paragraph (1) of the above mentioned Convesion, it follows that "no one shall be deprived of his/her freedom", except in the following cases and in accordance with the law:

a. if the person is lawfully detained on the basis of a conviction pronounced by a competent court;

b. if the person has been the subject of an arrest or a lawful detention for failure to comply with a judgment rendered in accordance with the law, by a court, or in order to secure an obligation under the law;

c. if the person has been arrested or detained for the purpose of bringing his/her case before the competent judicial authority, where there are reasonable grounds for believing that he/she has committed an offense or when there are reasonable reasons for believing in the need to prevent him/her from committing an offense or to flee after committing it;

d. in the case of the lawful detention of a minor, determined for his or her education under supervision or lawful detention for the purpose of bringing him or her before the competent authority;

e. in the case of the lawful detention of a person liable to transmit a contagious disease, of an insane person, an alcoholic, an unconscious person or a vagabond;

f. in the case of the lawful arrest or detention of a person to prevent him or her from entering the territory illegally or against whom an expulsion or extradition procedure is pending.

[13] Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tănăsescu - The Romanian Constitution, revised. Comments and explanations. All Beck Publishing house, 2004, pp 40-41.

[14] The Romanian Constitution. European Convention on Human Rights. Charter of Fundamental Rights of the European Union, 12th edition. Roseti International Publishing House, Bucharest 2020, p. 78

According to paragraph (2) - every person arrested shall be informed as soon as possible and in a language he/she understands, of the reasons for the arrest and of any charges against him. On the other hand, according to paragraph (3) - any person arrested or detained under the conditions provided for in paragraph 1 letter c) of this article must be immediately brought before a judge or other magistrate empowered by law to exercise judicial powers and has the right to be tried within a reasonable term or released during the proceedings. Release may be subordinate to a guarantee that the person concerned will be present at the hearing.

At the same time, any person deprived of his or her freedom by arrest or detention shall also have the right to appeal to a court of law in order to rule on the lawfulness of their detention and to release him or her if the detention is unlawful (paragraph 4). Finally, according to paragraph (5) - if the person is the victim of an arrest or detention in contradictory conditions as per the provisions of this Article, he/she is entitled to reparation.

On the other hand, it should be added that according to article 7 paragraph (1) of the mentioned Convention, no one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a penal offense, under national or international law, at the time it was committed. At the same time, no heavier penalty can be imposed than the one that was applicable at the time the criminal offense was committed. As a result of the foregoing, the restriction of certain rights or freedoms may be ordered only if necessary. The measure must be proportionate to the situation which gave rise to it and be applied in a non-discriminatory manner and without prejudice to the existence of a right or freedom.

Therefore, we emphasize unequivocally that a first condition that must be met in order for a restriction on the exercise of the right to take place is that the restriction be provided for by law. In this sense, and also in connection with individual freedom, the provisions of texts of various normative acts can be cited - such as the Code of Criminal Procedure or those regulated by Law no. 218 on the organization and functioning of the Romanian Police, published in the Official Gazette no. 170 of March 2, 2002.

Thus, according to article 209 paragraph (1) of The Code of Criminal Procedure, the criminal investigation body or the prosecutor may order the detention if the conditions provided in art. 202 are met.

In article no. 202, paragraph (1), The Code of Criminal Procedure states that "preventive measures (including detention) may be ordered if there is strong evidence or clues that there is a reasonable suspicion that a person has committed a crime and if the measures are necessary to ensure the proper conduct of the proceedings of the criminal trial, of the prevention of the abduction of the suspect or of the defendant from the criminal investigation or from the trial, or of the prevention of committing another crime ”.

Therefore, the detention measure cannot be ordered on simple suspicions or assumptions that there are reasons for the detention, the normative text expressly requiring the existence of “solid evidence or indications”, clearly stating who can take this measure, also normalizing the quality of the person against whom it is ordered (suspect or defendant). It is to be taken into consideration that all legal systems and all state legislation that are subject to deprivation of freedom as a short-term personal procedural measure of coercion, detention (or any similar institution, regardless of name) are an operative measure arising from the need for the immediate immobilization of the perpetrator by the judiciary - mainly the police, regardless of time and special conditions or prior hierarchically superior approval.

With few exceptions, the police are the first to come to the crime scene or detect operatively and identify the perpetrator - obviously at the disposal of these bodies must be put an equally operative

measure to detain the alleged perpetrator. According to article 209 of the Code of Criminal Procedure, the person is immediately informed, in the language he/she understands, of the crime of which he/she is suspected and the reasons for their detention, paragraph (2).

Detention may be ordered for a maximum of 24 hours as per paragraph (3), the same provisions existing in the Romanian Constitution, which by article 23 paragraph (3) stipulates that "detention may not exceed 24 hours". The detention time does not include the time strictly necessary to drive the suspect or defendant to the seat of the judicial body according to the law. According to article 209 paragraph (5) Code of Criminal Procedure, the measure of detention may be taken only after the hearing of the suspect or defendant in the presence of the lawyer chosen or appointed ex officio.

Prior to the hearing, the criminal investigation body or the prosecutor is obliged to inform the suspect or defendant that he/she has the right to be assisted by a lawyer of his own or appointed ex officio and the right not to make any statement, except for information regarding his/her identity, making it clear that what they declare can be used against them.

It should also be emphasized that the suspect or defendant has the right to personally inform his/her lawyer or to request that the criminal investigation body or the prosecutor inform them. The manner of making the acknowledgment shall be recorded in a report. The chosen lawyer has the obligation to appear at the seat of the judicial body no later than two hours after the notification.

According to article 209, paragrpah (10) Code of Criminal Procedure - the detention is ordered by the criminal investigation body or the prosecutor by an ordinance which will include the reasons that determined the taking of the measure, the day and time when the detention begins and the day and time when it ends. A copy of the ordinance is to be provided to the suspect or defendant, as per paragraph (10). If the detention has been ordered by the criminal investigation body, such as, for example, by the judicial police, they are required to inform the prosecutor of the taking of the preventive measure immediately and by any means.

An appeal may be lodged against the order of the criminal investigation body by which the detainee or defendant has been detained. The prosecutor shall immediately rule by order. If it is established that the legal provisions governing the conditions for taking the detention measure have been violated, the prosecutor shall order its revocation and the immediate release of the detainee.

On the other hand, against the order of the prosecutor by which the detention measure was taken, the suspect or defendant may file a complaint before the expiration of its term, to the chief prosecutor of the prosecutor's office or, as the case may be, to the higher hierarchical prosecutor as the legal provisions governing the conditions for taking the detention measure have been violated – the chief prosecutor or the hierarchically superior prosecutor orders its revocation and the immediate release of the defendant.

At the same time, according to article 31 of the Law on the organization and functioning of the Romanian Police, the police officer, in carrying out his duties under the law, is invested, among others, to take the administrative measure (police measure), respectively to drive the person to the police headquarters in accordance with legal provisions.

In this sense, according to art. 36 of the law, the police officer is entitled to drive a person to the police headquarters when:

a. under the conditions of art. 34 para. (3), its identity could not be established, or there are plausible reasons to suspect that the declared identity is not real or the documents presented are not truthful;

b. because of the behaviour, the place, the moment, the circumstances or the goods found on the person, who creates plausible reasons to suspect that he/she is preparing or has committed a criminal act;

c. by their actions they endanger the life, health or bodily integrity of themselves or another person, or public order;

d. taking legal action on the spot could create a danger for them or for public order.

The police officer has the obligation to report to his / her hierarchically superior about escorting the person to the police headquarters as soon as possible from the moment of arrival at the headquarters (art. 36 para. 2). The person is taken to the nearest police unit where his / her identification, verification of the factual situation and, as the case may be, taking legal measures can be performed (paragraph 3).

Also, according to the provisions of the provisions in force (art. 36 para. 4), the verification of the factual situation and, as the case may be, the taking of legal measures against the person taken to the police headquarters shall be carried out immediately. Bu then, the police officer has the obligation to allow the person to leave the police headquarters after completing the activities according to par. (4), or of the legal measures that are required (paragraph 5).

At the same time, it is forbidden to introduce the person at the police headquarters in a detention and pre-trial detention centre (art. 36 para. 6). If during the verifications on the person taken to the police headquarters, the existence of some indications regarding the commission of a crime is found, it will be proceeded according to the norms of criminal procedure.

It should also be emphasized that the provisions of par. (5) and (6) shall not apply if detention or pre-trial detention has been ordered. According to art. 38 para. (1) of the Law on the organization and functioning of the Romanian Police, the person taken to the police headquarters has, among others, a series of rights, such as:

- to be informed of the reasons for being escorted to the police station (letter 1);
- to be informed about his rights (letter b);
- to file an appeal against the order of the measure, according to article 39 (letter c), etc.

But then, according to par. (2), the police officer is obliged to inform the person, according to par. (1) letter (a), before taking the measure of escorting to the police headquarters, and according to par. (1) letter (b), as soon as possible from the moment of arrival at the headquarters.

The situation of the person in question is to be clarified at the police headquarters, and for this purpose various activities are carried out, such as: verbal and written relations from people who know the person; information provided by various authorities; information from electronic databases; photography and processing of fingerprints, of particular cues and signs, a photograph, sketch or description of the person is made public if there is a reasonable belief that these measures will help establish the person's identity.

As a legal measure, both the preventive detention measure provided by the Code of Criminal Procedure and the measure of escorting to the police headquarters concern, in our opinion, even the person's state of freedom or the right to free movement, one of these measures being allowed by the legal norms in force. In this respect, any of the mentioned measures bring into question, in antithesis, on the one hand the observance of the presumption of innocence, and on the other hand, the sacrifice or restriction of individual freedom to maintain the rule of law and defend the general interests of society.

As it can be seen with relative ease, we are faced with two measures, namely one provided by the Code of Criminal Procedure, and another by the Law on the organization and functioning of the Romanian Police. At a literary glance of the two texts, one could conclude that there is a certain similarity between them, in a broader sense, it refers to some restrictions, some even regarding the freedom of the person. Indeed, there are some similarities between them, in the sense that both can be taken by the police. However, the two institutions, significantly, one being a preventive measure and the other, a police measure.

First of all, the detention, as a preventive measure, can be taken only by the criminal investigation bodies or by the prosecutor, as per the conditions provided in art. 202 Code of Criminal Procedure, respectively if there is solid evidence or indication that a person is suspected of having committed a crime, and if they are necessary in order to ensure the proper conduct of the criminal process, to prevent the suspect or the defendant from evading criminal prosecution or the trial, or of the prevention of the commission of another crime.

Detention, as a preventive measure, can be taken on the basis of an ordinance, the person in question being introduced in places of detention according to the legal norms in force. Next, the criminal investigation body or the prosecutor gathers the necessary evidence regarding the existence of the crime in order to ascertain whether it is necessary to order the prosecution or not.

Regarding the institution provided by the Law on the organization and functioning of the Romanian Police, it should be noted that this (escorting a person to the police station) is a police measure (preventive measure), and consists in accompanying the person from the moment he/she has been stopped, until the moment of arrival at the police station in order to take legal measures – measure that can be taken by any police officer when the situation requires. Escorting to the police headquarters in order to take legal measures refers to the situations expressly provided by the legal provisions that were previously analysed.

According to art. 36 para. (4) of the Law on the organization and functioning of the Romanian Police, the verification of the present situation and, as the case may be, the taking of legal measures against the person taken to the police headquarters shall be carried out immediately. At the same time, the police officer has the obligation to allow the person to leave the police headquarters immediately after the completion of the activities according to par. (4) or of the required legal measures (paragraph 5), prohibiting the introduction of the person in the police headquarters in a pre-trial detention centre.

Therefore, unlike detention (preventive measure), in the case of the police measure of escorting to the police headquarters, the person concerned will be placed in a specially arranged room (office), on which occasion a report (not an ordinance) will be drawn up, where it is recorded the reasons for escorting the person to the police headquarters, the measures taken on this occasion, the manner of exercising the rights provided in art. 38 as a result of the communication, the result of the body, luggage and vehicle inspection, if means of coercion were used, the presence of visible traces of violence when legitimizing and going to the police headquarters and completing the verification of the person's situation and taking legal action (Article 40, paragraph (1).

According to par. (2), the statement provided in par. (1) shall be registered in the records of the police unit and shall be signed by the police officer and the person concerned or by the legal representative. A copy of the statement shall be handed over to the person concerned or to the legal representative, the refusal to sign or receive being recorded in the document.

On the one hand, as per the provisions of the law (art. 36 para. (4), it is concluded that the verification of the factual situation and, as the case may be, the taking of legal measures against the person taken to the police headquarters should be carried out immediately. Also, according to para. (5), the police officer has the obligation to allow the person to leave the police headquarters after the completion of the activities according to paragraph (4) or the required legal measures. The measure of preventive detention can be taken only after the start of the criminal trial, respectively after the start of the criminal investigation.

On the other hand, the police measure (administrative measure) can be taken only within the legal provisions regulated by the law on the organization and functioning of the Romanian Police, provided that this measure is carried out immediately, allowing the person to leave the police headquarters,

without mentioning a limited duration of these verifications, compared to the preventive detention measure where the duration may not exceed 24 hours.

In relation to those analysed, regarding the measure of detention as a preventive measure and the police measure of escorting to the police headquarters of some persons, we conclude that the two measures are distinct, separate, one different from another, and should not be mistaken, even if there are certain similarities. Given the legal text (art. 36 para. (4) and (5), the question arises, what would be the deadline within which these checks can be completed in the case of the police measure, as there is no definite duration in which to carry out those activities (escorting to the police station and allowing the person to leave that place), in the legal order, the phrase "immediately" is used, which can give rise to various controversies or even some abuses.

Therefore, we believe that it is imposed the introduction in the lex ferenda of a new paragraph, respectively article 36, paragraph 4, in the sense that "if the mentioned activities cannot be carried out immediately for objective and solid reasons, they can be continued without exceeding 24 hours".

We express our opinion in the sense that during the detention measure, the time in which the person was deprived of liberty as a result of the administrative measure of escorting to the police headquarters provided by art. 31 of the law no. 218/2002, even if in practice more special situations may arise, such as the driving of a suspect in manhunt from one end of the country, where they were tracked to the other end of the country where the prosecution takes place (being many hours). However, it should be borne in mind as far as possible that by collecting, verifying and capitalizing on data and information, police officers should in no way infringe on the fundamental rights and freedoms of citizens, their privacy, honour or reputation.

If the checks required by the police officers at the police station cannot be carried out within a maximum of 24 hours, another custodial measure may be used, such as a pre-trial detention measure, of course in compliance with all legal conditions.

References:

1. Article I, point 1 of Law no.429/2003.
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