CERTAIN ISSUES ON THE DETENTION OF AN INDIVIDUAL

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Abstract

The dynamics of the law is natural in the existence and evolution of the state legal system. The law has to be actual, always actual, if not in a perfect harmony, at least in an efficient harmony with the social status of a country. The constitution, by being itself a law, more precisely a fundamental law, has to comply with the existences of the system dynamics. But not in any way. In order to fulfill its regulating and especially, civilizing role, constitutional revisions have to meet certain substantiations of content and legislative technique, but also certain demands of constitutionalism. One of these demands is that the revision (amendment, supplementation, etc.) of a constitutional text is not a step backwards as regards democracy and rule of law. The efficiency of constitutional revisions is questionable if they restrict or remove classic rules and principles such as: freedom respect, property respect, free access to justice, earned rights, presumption of innocence.

Keywords: *constitution, constitutionalism, constitution primacy, revision, fundamental rights and freedoms, guarantees*

1. Introduction

1. The re-discussion of theoretical and practical issues on the detention of an individual, as a preventive measure, is relevant because we find ourselves in a period where one of the important matters which are in the attention of public authorities and public opinion is the revision of the Constitution.

There is no doubt that proposals for improvement of Title II of the Constitution, called Fundamental rights, freedoms and duties are also targeted by the efforts on the Constitution revision.

In what concerns the place of the regulations on the detention of an individual, in Title II, we recall some of the literature findings[1], namely:

a) Art. 23 of the Constitution regulates individual freedom and security. There are two categories in close connection expressing distinct legal realities. Individual freedom is human freedom to move freely, to think and speak freely. If the individual violates the laws of the state, the state repression is entitled to act. Notwithstanding, the action of the state against the individual is conditioned by certain rules which protect the individual and stop arbitrary actions of public authorities. These rules are provided by art. 23 and concern the detention of an individual, the

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[1] See Andrei Muraru Protecția libertății individuale a persoanei prin mijloace de drept penal (The protection of individual freedom of a person by criminal law means) PhD thesis, 2009, Manuscript. The paperwork shall be hereinafter referred to as the Thesis; Ioan Muraru, Elena Simina Tănăsescu (coordinators), Constitution of Romania, Comment on articles, CH Beck Publishing House, Bucharest 2008, pag.217; Ioan Muraru, Elena Simina Tănăsescu, Drept constituțional și instituții politice, Edition 15, Vol. I, CH Beck Publishing House, Bucharest, 2016, pg. 165.

arrest of an individual, the presumption of innocence, certain rules on criminal trial. All these are in fact guarantees in favor of the freedom of individual and form the category of individual security.

b) The security of individual in the constitutional context is traditionally considered as being part of the guarantees of the fundamental rights. And art. 152 para. (2) of the Constitution provides that „ no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof". Therefore, we will note that certain provisions of the constitution revision drafts which try to amend current rules on the detention of an individual have to be removed.

c) The detention of an individual, as a theoretical and practical matter, concerns both criminal science and constitutional law due to the fact it is a dimension of human rights and human rights are by excellence a subject of study for constitutional law, and of course, a subject of study for other disciplines. This explains why detailed explanations are found both in criminal science and in constitutional law books. No doubt, constitutional explanations must largely prevail due to the fact that, in the legal pyramid, the Constitution ranks the supreme position.

2. Concepts, correlations, doctrine

Therefore, it is shown that detention is a preventive measure, including deprivation of freedom, which can be ordered by the prosecutor or by the criminal investigation body[2].

Furthermore, the detention as a preventive criminal procedural measure is explained, being a measure whereby the person suspected of having committed an offense provided and punished by the law, is deprived of freedom by the competent authorities, on a strictly limited term[3].

The explanation of the detention is performed with details in the criminal procedure books.

Therefore Grigore Theodoru, under title the concept of procedural measures and their importance[4] establishes, among others, the following: public authorities may use coercive means in order for the normal performance of the criminal trial and for the fulfillment of its scope; the constraint may consist in the deprivation of freedom of these individuals, in the restriction of their freedom or of other rights and freedoms; these measures prevent absconding prosecution and trial, as well as execution of prison sentence; although individual freedom is established by the Constitution, art. 53 of the Constitution allows, in order to protect national safety, public order, criminal investigation performance, the restriction of its exercise, subject to proportionality and to the guarantee on the existence of the right or freedom; procedural coercive measures can only be taken during criminal trial; by representing a deprivation or restriction of the rights guaranteed by the Constitution, criminal procedural measures have an exceptional nature; the law has to establish their maximum term, to provide the

[2] Crişu, Constituţia României, op. cit. p. 217.
[3] Ioan Muraru, Elena Simina Tănăsescu, Drept constituţional şi instituţii politice, op. cit. p 166-167.
[4] Grigore Theodoru, Tratat de drept procesual penal, Hamangiu Publishing House, 2007, p. 425 and the following.

possibility of withdrawing them and to regulate the cases when they cease de jure; in case of flagrant offenses, the detention measure adoption is mandatory. The same author[5] classifies criminal procedural measures in personal and actual, and the first category includes: deprivation of freedom (detention, arrest), the obligation of not leaving the locality or country, to undergo a medical treatment.

By analyzing the concept and the categories of preventive measures, Grigore Theodoru[6] shows that: according to art. 136 (Code of Criminal Procedural of 1968) para. (1), preventive measures are coercive instruments provided by the law which can be taken by criminal prosecution bodies, judges and courts of law, in order to ensure the good performance of the criminal trial or to prevent the absconding of the defendant from criminal prosecution, trial, or from the execution of sentence; this is why they are called preventive measures and exist in all law systems; the establishment of measures with different individual freedom restriction is recommended in the adoption of preventive measures; the law has to establish the legal guarantees required in order to prevent any abuse in taking and maintaining preventive measures; such guarantees are provided by art. 23 of the Constitution, in art. 5 of the Code of Criminal Procedure (1968), etc.

In what concerns the procedural nature of preventive measures, Grigore Theodoru concludes that: deprivation of freedom as preventive measure has a procedural nature; it is taken only within criminal trial; preventive detention is optional; deprivation of freedom is an exception to freedom rule[7].

Ion Neagu și Mircea Damaschin analyze the detention in the large context of procedural measures[8], in section on preventive measures. By analyzing critically the opinions already expressed in the doctrine, Ion Neagu and Mircea Damaschin formulate a more concise definition according to which preventive measures are coercion institutions which can be ordered by criminal judicial bodies, for the good performance of criminal trial and the fulfillment of the scope of the actions carried out in the criminal trial[9]. The author believes that procedural measures: have a nature adjacent to the main activity; have a temporary nature; have coercive purpose although not all measures entail the existence of coercion (protection measures or safety measures of medical nature); in special situations they have protective and not coercive purpose.

In what concerns the classification[10] of procedural measures, Ion Neagu notes the existence of the following: personal or actual procedural measures (on the basis of values); measures which concern the person of the suspect or defendant (detention, arrest) and measures which can be taken on other individuals (sequestration, protection of minors) – on the basis of the individual; measures which can be taken only in the criminal prosecution stage (detention); measures which can be taken only in the judgment stage (removal from the court room); measures which can be taken in both situations (arrest, sequestration) – on the basis of the stage of the criminal trial; coercive measures (arresting, sequestration) and protection measures (notification to the protection authority) – on the basis of the

[5] Theodoru, op. cit. p. 427.
[6] Theodoru, op. cit. p. 428-429.
[7] Theodoru, op. cit. p. 429-430.
[8] Ion Neagu, Mircea Damaschin, Tratat de procedură penală, Partea generală, Edition II, Universul Juridic Publishing House, 2015, pg. 592 and the following.
[9] Neagu, Damaschin, op. cit. p. 595.
[10] Neagu, Damaschin, op. cit. p. 594.

scope. By analyzing the preventive measures, Ion Neagu and Mircea Damaschin note that their legal regulations led to cases of non-unitary application of the criminal procedural law, causing the High Court of Cassation and Justice to make certain decisions in the settlement of second appeals in the interest of the law promoted in this field[11]. The detention is deemed a preventive measure, together with the arrest.

Due to the fact preventive measures entail individual freedom, they can be ordered if the following general conditions are met at the same time:

- there are substantiated evidence or indications which lead to the reasonable suspicion that an individual committed a crime;
- preventive measures are required for the good performance of the criminal trial, for the prevention of suspect's or defendant's absconding from criminal prosecution or judgment or for the prevention of another offense;
- there is no ground to prevent the initiation or pursuing of the criminal action;
- the preventive measure should be proportionate with the gravity of the accusation brought to the person this measure is taken against and should be required for the fulfillment of the scope pursued by ordering this measure;
- the suspect or defendant must be heard in the presence of a lawyer of their own choosing or appointed ex officio.

According to all the criminal procedural rules, these general conditions must be fulfilled for any of the preventive measures provided by the law[12].

By analyzing the detention, Ion Neagu and Mircea Damaschin[13] believe: this is the easiest of the measures involving freedom deprivation; as a preventive measure differs from three similar concepts, namely: criminals capturing under art. 310^2 and art. 61 para. (2); the individual detention by the police either for identity checking or for the fulfillment of an warrant for arrest under art. 266 para. (1); the prohibition to leave the courtroom until the end of the judicial investigation (in this respect, art. 381 para. (9) provides that heard witness shall remain in the room at the disposal of the court until the completion of the judicial investigation carried out in the respective session)

The conditions which must be fulfilled at the same time in order for this measure to be adopted are, according to art. 209 para. 1, in connection to art. 202, the following:

- there are substantiated evidence or indications which lead to the reasonable suspicion that an individual committed a crime;
- preventive measures are required for the good performance of the criminal trial, for the prevention of suspect's or defendant's absconding from criminal prosecution or judgment or for the prevention of another offense;
- there is no ground to prevent the initiation or pursuing of the criminal action;
- the preventive measure should be proportionate with the gravity of the accusation brought to the person this measure is taken against and should be required for the fulfillment of the scope pursued by ordering this measure;
- the suspect or defendant must be heard in the presence of a lawyer of their own choosing or appointed ex officio.

The detention can be ordered both by the criminal investigation body and by the prosecutor. If the detention was ordered by the criminal investigation body, this is bound to notify immediately and by any means the prosecutor on the preventive measure adoption.

[11] Neagu, Damaschin, op. cit. p. 595.
[12] Neagu, Damaschin, op. cit. p, 597-599.
[13] Neagu, Damaschin op. cit. p. 619-623.

As a transposition of the fundamental principle of the right of defense in this field, the judicial body which adopted the measure is bound to notify the suspect or defendant, before the hearing, that he is entitled to be assisted by a lawyer of his own choosing or appointed ex officio and that he is entitled to make no statements, except the provision of information on his identity, by making him aware of the fact that what he says may be used against him. According to the provisions of art. 209 para. (2), the detained person shall be promptly informed in a language which he understands, on the crime he is suspected for and the reasons of the detention.

The detention measure can take no more than 24 hours. According to previous regulation, the term throughout which the person was deprived of freedom following the administrative measure of being taken to the police department, provided by art. 31 para. 1 letter b of Law no. 218/2002 on the organization and functioning of the Romanian Police was deducted from the aforementioned term.

According to current regulation, art. 209 para. (3), the term required for taking the suspect or defendant to the office of the judicial body is not included in the term of the detention.

According to art. 209 para. (10) the detention measure shall be ordered by ordinance, which shall include the grounds of the measure, day and time when the detention begins, as well as day and time when the detention ends.

Throughout the term of the detention, the criminal prosecution body can conclude that the conditions for preventive detention are concluded, case in which the prosecutor shall notify the judge of rights and freedoms in order to take the preventive detention measure in what concerns the detained suspect, at least 6 hours before the expiry of the retention term.

3. Constitutional regulations

In what concerns the detention of an individual, the Constitution, in art. 23, establishes the following:

- it shall be permitted only in the cases and under the procedure provided by law;
- it shall not exceed 24 hours;
- any person detained shall be promptly informed, in a language he understands, on the grounds for his detention;
- the release of a detained person shall be mandatory if the reasons for such steps have ceased to exist, as well as under other circumstances stipulated by the law.

The rule of art. 24 of the Constitution according to which all throughout the trial, the parties shall have the right to be assisted by a lawyer of their own choosing or appointed ex officio shall be added.

The constitutional text is clear and definite. No detention can last more than 24 hours. Upon the expiry thereof, the authority which ordered the detention has two options: the release; the obtaining of a preventive detention warrant.

It is important to note that the constitutional provision establishes the maximum term of the detention, but this does not mean that the person must be retained the respective number of hours, regardless of the situation. The authority which ordered the detention shall be entitled to maintain this status only for the time required to clarify the circumstances leading to it.

Therefore, the detention can last one hour, seven hours, etc. The legal liability of the authority for an unjustified term of the detention is out of question.

This is the reason why we will note the legal details in the field.

Legal regulations

We can add here several rules provided by the Code of criminal procedure, namely:

the conditions which have to be fulfilled for the ordering of this measure are provided by art. 143 para. 1 and 2; the detention can be ordered both by the criminal prosecution body and by the prosecutor; it is required to notify the defendant that he is entitled to hire a lawyer and not to make any statement, by drawing his attention on the fact that what he declares can be used against him; the grounds of the detention are made available; the detention measure is ordered by ordinance, which has to provide the day and hour the detention began, and the release ordinance has to provide the day and hour the detention ceased; preventive detention measure can be taken throughout the detention term, under the terms of the law; the deputy or senator cannot be retained without the consent of the Chamber he is part of, after hearing him; in case of flagrant offense, they can be retained and the Ministry of Justice shall notify immediately the President of the Chamber on the detention; if the Chamber thus notified finds that there are no grounds for detention, it shall order the annulment of this measure (Ion Neagu criticizes this regulation in op. cit. p. 466).

4 Certain references to the Constitution revision draft which was discussed by the Constitutional Court of Romania and then in the doctrine[14] are also of great interest.

Art. 23 of the Constitution regulates individual freedom, thus establishing in para. (1) that individual freedom and security of a person are inviolable.

Paragraph (3) of this article establishes that „Detention shall not exceed 24 hours"

The President of Romania, in the exercise of the right provided by art. 150 (1) of the Constitution, upon the proposal of the Government, initiated the revision of the Constitution[15], and in this context the revision of art. 23 para. (3). Therefore, the legislative proposal established that paragraph (3) shall read as follows: "Detention shall not exceed 48 hours." Therefore, the extension of the term of the detention from 24 hours to 48 hours was proposed.

Under art. 146 letter a) final thesis of the Constitution, the Constitutional Court pronounced on the revision initiative in favor of the legislative proposal, namely: the new wording of the constitutional text, by regulating the maximum term of detention, cannot be construed as resulting in the suppression of the guarantees of a fundamental right under art. 152 para. (2) of the Constitution; the proposed amendment responds to the obligation of the state to ensure a fair balance between the interest of defending fundamental rights of the individual and the interest of defending the rule of law, by taking into account the issues raised in practice by the current detention term, in what concerns the activity of the criminal prosecution bodies; the detention of a maximum term of 48 hours is justified for the effectiveness and efficiency of the measure.

The view of the Constitutional Court can not be deemed as resulting from a thorough examination of the doctrine, legislation and case law in the field. We will try to motivate this statement.

We hereby recall that personal freedom represented the subject of thorough analyses in the drafting of art. 23 of the Constitution (1990-1991), as well as in the

[14] The information and documentation for this issue are taken over from Ioan Muraru, Examinare critică a unor aspecte rezultate dintr-o decizie a CCR. Curierul Judiciar, no. 11/2011, pg. 590-593.

[15] We will use the text of the Constitution revision proposal as it is provided in Decision no. 799 of the Constitutional Court.

Constituent Assembly[16]. This should be recalled because the historical method was and remains one of the main methods of interpretation of legal regulations.

In the Theses of the Constitution Draft submitted to the Constituent Assembly (Thesis 2) the Drafting Committee proposed the following wording:

"The right to personal security and freedom is guaranteed.

Prosecution, detention or arrest of an individual shall be permitted only in cases expressly provided by the law and in strict compliance with the legal procedure established for this purpose.

Detention shall not exceed 24 hours."[17]

The Constitution Draft submitted to the Constituent Assembly established the following:

"(1) Individual freedom and security of a person are inviolable.

(3) Detention shall not exceed 24 hours."

The debates held on the content of individual freedom and safety of a person explain history and motivate solutions. We believe that the maintenance of the view of the Drafting Committee submitted by one of its reporters presents undoubtedly an historical interest, meaning that: "It may be that in 2-3 years, when we improve justice apparatus, prosecution apparatus, therefore, everything that works in the judicial systems, these terms are exaggerated. We may ask the judges to pronounce a ruling in less than two months, for example. This may happen when we have everything required for a good functioning of justice. Therefore – this observation must be considered from now on– we do not have to brake, by means of the Constitution, the possibility that the legislation responds as best as possible to the requirements for the protection of life and freedom of person. This is why we, the committee, we dare to ask you to keep the text proposed by us"[18]. Therefore, basically, these discussions explained the constitutional provisions and opened perspectives for public freedoms.

Conclusions

I always considered that the provisions of art. 23 are earned rights, a victory of reason against abuses and dictatorship, a victory against the police state. The aforementioned legislative proposal has to be regarded as a step forward or as a step backwards?

A potential convincing answer to this question entails the elucidation of two issues:

1) Which is the legal nature of reason; 2) If the provisions of art. 152 para. (2) of the Constitution are applicable in this case[19].

1.1 After a thorough examination of art. 23 of the Constitution, it can be noted that two legal categories are regulated, which are undoubtedly connected but not the same, namely individual freedom and security of person. If freedom concerns physical liberty of a person, his right of acting and moving freely, of not being held in slavery or in any other servitude, of not being detained or arrested, except in cases and according to the forms expressly provided by the Constitution and laws, the security of a person represents all the guarantees which protect the person in cases where public authorities, in the application

[16] See Romanian Constitution Genesis. 1991. Works of the Constituent Assembly. Autonomous Administration „Official Journal", 1998, especially p. 196-198; 211-256; 293-334; 341-434; 440-445. The work shall be hereinafter referred as **Genesis**.

[17] Genesis, p. 191.

[18] Ioan Muraru, in Genesis, p. 347.

[19] According to this article, para. (2) no revision can be performed if it results in the suppression of fundamental rights and freedoms of the citizens or of the guarantees thereof (subl. ns.).

of the Constitution and the laws, take certain measures which concern individual freedom, guarantees which make sure that these measures are not illegal. This system of guarantees allows the repression of antisocial acts, but, at the same time, provides innocents the required legal protection[20].

A first finding is required: the content of the security of a person includes all the rules in the field of art. 23 of the Constitution: detention, arrest, hearings, procedures, presumption of innocence, etc. Therefore, art. 152 para. (2) of the Constitution concerns the security of the person as a whole, any revision of components being prohibited.

By analyzing briefly the doctrine we find that a valuable work[21] shows, among others, the following: the right to freedom and security is an inalienable right, which no one can give up, which concerns all persons; the European Court of Human Rights often stated in its case law, among others, that the main scope of art. 5 is the protection of individual against arbitrary actions of state authorities; the circumstances under which a person can be legally deprived of freedom have to receive a narrow and rigorous interpretation, due to the fact they are exceptions on a fundamental guarantee of individual freedom; deprivation of freedom can have direct and adverse consequences on the exercise of other individual rights and freedoms; the detention of the persons to be prosecuted should not be a rule; the right to freedom and the right to security, taken together, represent a fundamental right that takes no alternative – there is the status of freedom or the status of deprivation of freedom, etc.

Another successful work shows that "the guarantee of the substance", the respect of the essential content or of the essence of fundamental rights and freedoms is a major idea of comparative constitutional law which is recorded in modern constitutions[22]. The thesis according to which the security of the person falls into the category of guarantees of individual freedom is generally recognized, in this respect, the scientific works of real value being interesting and showing among others, the following: "The concept of security does not mean that the state can never prejudice individual freedom, but it does mean that guarantees have to be granted in this field to the individual in order for these prejudices not to be illegal... . Protective principles mainly consist in the organization of a criminal procedure which ensures not only the repression of crimes and offenses, but also grants innocents certain guarantees[23]. "Together with the term of individual freedom, the constitutional text also uses the expression of security of person. The security of the person consists of all the guarantees provided by the law whereby the person is protected if the state takes measures of deprivation of freedom against the respective person"[24]; "the meaning of the concept of security of person expresses the guarantees which protect the person in case the state orders measures of deprivation of freedom"[25].

[20] Cf. Ioan Muraru, Elena Simina Tănăsescu, Drept constituțional și instituții politice, Edition 14. Vol. I, C.H.Beck Publishing House, 2011, p. 166

[21] Corneliu Bîrsan, Convenția europeană a drepturilor omului, Comentariu pe articole, vol. I, All Beck Publishing House, 2005, p. 277, 278, 279, 283.

[22] Louis Favoreu, Patrick Gaïa, Richard Ghevontian, Jean-Louis Mestre, Otto Pfersmann, André Roux, Guy Scoffoni, Droit Constitutionnel, 13e edition, Dalloz, Paris, 2010, p. 887.

[23] Claude-Albert Colliard, Libertés publiques, Dalloz, Paris, 1982, p. 234.

[24] Ștefan Deaconu, Drept constituțional, C.H.Beck Publishing House, Bucharest, 2011, p.237.

[25] Anastasiu Crișu, Comentariu, p. 213.

The Charter of Fundamental Rights of the European Union must also be taken into account, by providing in art. 6 the following: "any person has the right to freedom and security". The security of a person is therefore considered a fundamental right[26].

Given all these brief remarks, we can conclude the following: the security of a person which is often considered a fundamental right represents a guarantee of the fundamental rights in the Romanian Constitution system; all components of the security of person, as provided by art. 23 of the Constitution, form a single and indivisible block, therefore, the revision of a component is not allowed due to the fact it affects the whole block; the legislative revision proposal comes into conflict with art. 152 para. (2) and therefore it cannot be performed.

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[26] For the explanation of the text, see Guy Braibant, La Charte des droits fondamentaux des l'Union Européenne, Edition du Seuil, 2001, p.107-109.