PREVENTIVE MEASURES - EXCEPTION TO THE PRINCIPLE OF THE RIGHT TO LIBERTY AND SECURITY

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Abstract

Considering the specific obligations arising from the exercise of criminal action and civil action in criminal proceedings and taking into account the need to ensure a better conduct of activities that are undertaken in solving criminal cases, it sometimes appears necessary, taking certain procedural measures.

Procedural measures were defined [1] as institutions available for criminal procedural law and criminal judicial bodies consisting of privations or certain constraints, real or personal, of the conditions and circumstances under which the criminal proceedings are being realized. By the function pursued by the legislature, these measures work as a legal means of prevention or suppression of circumstances or situations likely to jeopardize the effectiveness of the criminal proceedings through the obstacles, difficulties and confusion which they can produce [2].

Procedural measures arise as opportunities, but not being specific to any criminal case, judicial bodies take measures according to the specific circumstances of each criminal case. From this derives the adjacent character of the criminal procedural measures to the main job [3].

Keywords: *procedural measures, legislator, coercion, suspect, fundamental values.*

1. Introduction

1.1. General considerations on procedural preventive measures

Procedural measures are also provisional and may be revoked when the circumstances which compelled their decision disappear.

Preventive measures are criminal procedural law institutions, with a nature of coercion, and the suspect or defendant is prevented from carrying out certain activities that would have a negative impact on criminal proceedings or on achieving its aim [4].

The new Romanian Criminal Procedure Code, adopted by the Law no. 135/2010 regarding the Code of Criminal Procedure, as amended and supplemented by Law no. 255/2013 for the implementation of Law no. 135/2010 on the Criminal Procedure Code and amending and supplementing certain acts which contain criminal procedure, is rethinking largely the system of preventive measures applicable to individuals, according to the principles derived from relevant international regulations on human rights and accumulations resulting from the jurisprudence of the European Court of Human Rights and the national courts one [5].

Stressing the functionality of preventive measures, the law (art. 202, para. 1) shows that those are taken if necessary, in order to ensure the proper conduct of criminal proceedings, of preventing absconding the suspect or the defendant from prosecution / trial or the prevention in committing another offense.

Given the fact that a persons liberty is one of the fundamental human values, between the legislative changes that have occurred since December 22, 1989, there were enrolled also the ones regarding the system and the regime of preventive measures. In this regard, the previous Code of Criminal Procedure was amended successively, in the field of preventive measures by [6] laws and the Constitution. Also, legal provisions on preventive measures were the subject of numerous decisions of the Constitutional Court. Not lastly, the legal regulations of the preventive measures have led to instances of inconsistent application of the criminal procedure law, causing the delivery, by the High Court of Cassation and Justice of numerous decisions in solving appeals on points of law promoted in this matter.

Given the fact that by the imposition of preventive measures, it is caused a prejudice to individual freedom, national and European legislation instituted a series of legal safeguards to prevent abuse and arbitrariness in taking and keeping them. Therefore, whenever the question of taking, maintaining, extending or confirming a preventive measure is being posed, beyond the provisions of the Criminal Procedure Code, account must be taken on other provisions applicable, in particular the provisions of the Romanian Constitution (Article . 23) and the European Convention on human rights and fundamental freedoms (particularly art. 5 on the right to liberty and security, as interpreted by the European Court of human rights), the Constitutional Court decisions, decisions of the High the Court of Cassation and Justice in solving appeals on points of law [7]. With a principle value, art. 9 (2) NCPC

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states, as mentioned above, the exceptional character that preventive measures must have in criminal proceedings based on the rule established in para. (1) EC.

Incidentally, in full accordance with the values expressed by the European Convention, whenever the Criminal Procedure Code provides for measures during the criminal trial that restrict the exercise of fundamental rights, the legislature has provided that the restriction of these rights is permissible only by law and if it is necessary in a democratic society.

Introducing in the criminal procedure law, in 1990, the provisional release on bail and provisional release under judicial control available to judicial authorities were set as tools for a better individualization of the measure of preventive arrest and at the same time, there was a balance between the prevention custodial and non-custodial preventive measures.

Through the provisions of the Code of Criminal Procedure it has been achieved a conversion of provisional release preventive measures and the interdiction to leave the country or locality in the contents of a single preventive measures, judicial control, provided in two ways, proper judicial review and judicial control on bail.

Being a legislative novelty, in our legislation was introduced the preventive measure of house arrest, measure of restraint by which the defendant is deprived of freedom of movement outside his home.

To conclude on aspects with an introductory character, we emphasize that preventive measures have their basis in the needs created by the highest interests of attaining the criminal proceedings [8], and their regulation in all codes of criminal procedure is another argument on the necessity of such institutions, even if between the fundamental principles of the criminal trial, the presumption of innocence is also a part.

According to art. 202 paragraph (4) the preventive measures that can be placed on the suspect or the accused (as an individual) are: detention, judicial, judicial bail, house arrest and preventive detention.

If there are special reasons justifying a reasonable suspicion that a legal person committed an offense under the criminal law, and only to ensure the smooth conduct of criminal proceedings, there may be ordered the following preventive measures, according to art. 493 par. (1):

a) the prohibition of initiating, or, where appropriate, the suspension of the procedure of dissolution or liquidation of the legal entity;

b) the prohibition of initiating or, where appropriate, the suspension of the merger, the division or capital reduction of the legal entity, began before or during prosecution;

c) the prohibition of patrimony operations likely to involve reduction of the assets or the insolvency of legal entities;

d) the prohibition on concluding certain legal documents, set out by the judiciary;

e) the prohibition on activities likely to those during which the offense was committed.

2. Content

Given that by taking preventive measures the fundamental right of inviolability of the person [9] is being prejudiced, the legislature has established solid procedural safeguards which require strict observance of laws that allow such procedural measures.

Procedural safeguards mentioned above consist precisely in many conditions to be fulfilled cumulatively in order to have a preventive measure. Choosing the preventive measure to be taken is done in the light of its purpose, seriousness, the manner and circumstances of committing the offense and the person against whom it is taken.

In order to take preventive measures, there must be realized cumulatively a number of general conditions, analyzed below.

I. To be evidences or indications which point to the reasonable suspicion that a person has committed a crime.

We consider as superfluous establishing this first condition for taking a preventive measure, because preventive measures, species of the procedural measures, involv necessarily the existence of a legal framework or the phase of the proceedings, which can not exist without evidence or indications of which results that an offense has been committed [10]. Also, being personal procedural measures, the decision on taking certain preventive measures implies the existence of the suspect quality (only for assumption of apprehension) or defendant (for the other preventive measures).

In these circumstances, when it is determined the opportunity of taking any one of the preventive measures in the law, in the case file there is necessary an evidence on which was ordered the prosecution against a specific person or the initiation of criminal proceedings, procedural acts that have in common the premise of a reasonable suspicion that the person committed the offense.

II. Preventive measures are necessary in order to ensure the proper conduct of criminal proceedings, preventing the suspect or the defendant from absconding prosecution or trial or to prevent commission of another offense.

By regulating this requirement, the legislature established the driving force in making any preventive measures, namely to ensure the proper conduct of criminal proceedings. It is estimated that this objective is ensured by preventing the

absconding of the suspect or defendant from carrying out judicial activities. Additionally, by taking preventive measures, it cand be aimed the general prevention, by preventing new crimes.

III. The preventive measure must be proportionate to the gravity of the accusation against that person on whom is taken and necessary for achieving the goal through its arrangement.

In connection with this condition, some work [11], estimated that between preventive measures and the system of criminal sanctions is needed a certan consistency, because, in this view, the state of freedom in criminal proceedings should correspond, to a certain extent, to the one existing after the criminal sanction and beig given the seriousness of the accusation on the person against whom criminal repression begins during prosecution or trial of the case.

In this respect, it is considered that a criminal sanction would be inappropriate as a non-custodial completion of a trial in which the defendant was found in custody. Such a situation would be likely to highlight a certain disparity between hardness or the harshness ritual in criminal trial and the penalty imposed as a result of its conduct.

IV. There has to be no cause preventing the exercise of criminal action or movement.

V. The suspect or defendant must be heard in the presence of the chosen or appointed ex officio lawyer.

From all the rules of criminal procedure results that these five general conditions must be met for any of the preventive measures taken by the law. Beside the general conditions set out above, in order to take certain preventive measures (eg, detention, judicial review, etc.) are required also some specific conditions.

In order to ensure personal freedom, our legislation provides that preventive measures are taken, usually by the judge of rights and freedoms, the judge of preliminary chamber or court (depending on the phase in which the criminal proceedings are) and prosecutor, the only measure that the criminal investigation authorities can take is retaining for less than 24 hours.

According to Art. 203 par. (1), the detention measure may be taken against the suspect or defendant by the criminal investigation body or by the prosecutor, only during prosecution. The procedural act during wich the decision of ordering the detention is the decree. Regarding the enforcement of detention, the prosecuting authority will draft a letter to the administration of the prison where the suspect or defendant will be executing [12] the preventive measure.

Judicial review and judicial control on bail may be ordered against the defendant by the prosecutor or judge of rights and freedoms during the phase of criminal prosecution, by the judge of preliminary chamber, during the procedure of preliminary chamber, and by the court during the trial. The procedural act when the prosecutor takes the decision on measures as judicial review or judicial control on bail is the decree. This preventive measure it is ordered by the judge of rights and freedoms, preliminary chamber judge or by the court when reasoned.

In order to implement preventive measures, the judicial authority shall notify, through a letter prepared under art. 82 of Law no. 253/2013 on the execution of penalties, educational measures and other non-custodial measures ordered by the court in criminal proceedings, the institutions able to monitor compliance with the obligations imposed on the defendant.

Preventive measures of house arrest and detention shall be ordered against the defendant by the judge of rights and freedoms during the phase of criminal prosecution, the judge of preliminary chamber, the procedure preliminary chamber, and the court during judgment. The procedural act ordering these preventive measures is a motivated decision. Regarding the execution of preventive arrest the competent judicial body will issue an arrest warrant.

Regarding the content of the act which disposes a preventive measure, the current regulation does not contain express provisions showing common elements that must be included in the procedural act.

The rightfull cease of preventive measures is a legal obstacle in maintaining them. So, whenever the law provides that the preventive measure ceases, the court is obliged to order its dissolution.

In art. 137 of the Criminal Procedure Code were previously laid down general provisions regarding the act of taking preventive measure. Thus, in the act ordering any of the four preventive measures were indicated: act that was the subject of the accusation or indictment, the legal text where the punishment provided for the offense was mentioned. Assuming detention and arrest, the act taking these measures should indicate the additional case provided for in art. 148 and the concrete bases of which arose its existence. In the case of the obligation not to leave the city or country, the document that such action had to show concrete reasons that have determined the measure, without referring to any of the cases provided for in art. 148.

Cases where preventive measures rightfully cease are provided for in art. 241, ranked in cases of general cease, applicable to all preventive measures, and specific cases only regarding arrest and house arrest.

General cases of legal preventive measures cessation.

First, preventive measures cease on deadlines provided by law or determined by judicial bodies.

Arguably, it can be said that the deadlines provided by law in cases where preventive measures were placed on the maximum length of time limits provided by law are expired; for example, the preventive arrest of the defendant ceases as it had been taken for 30 days and that period expired. Thus, the period of the arrest of the defendant is not more than 30 days and after such period, during prosecution, if it wishes to maintain this measure, the judge of rights and freedoms has a constitutional and criminal obligation to decide to extend the arrest.

When the judicial body has set a preventive measure for a period longer than the maximum period provided by law and this deadline set by the judicial body has elapsed, it can be said that the measure of prevention has rightfully ceased as it was the deadline set by the judicial body.

Preventive measures shall be stopped automatically or under the circumstances when it was given a solution for the suspect or defendant to be exonerated from criminal liability. In this respect, art. 241 paragraph (1), lit. b) indicates that preventive measures shall automatically be stopped in cases where the prosecutor has a solution not to indict or the court gives a solution to pay, giving up criminal proceedings, waiving penalty, postponing the penalty or suspension of sentence under supervision, although not final.

Also, according to art. 241, paragraph (1), lit. c) preventive measures cease the date of the final judgment, when the defendant was convicted. Lastly, preventive measures cease in other cases specifically provided by law. By this expression are considered to be covered art. 399, para. (3) according to which preventive detention measures cease while court issues:

a) An imprisonment not more than the duration of detention and arrest;

b) A prison sentence, suspending the execution under supervision;

c) A fine penalty, which accompanies imprisonment;

d) An educational measure.

3. Conclusions

It is also thought as being still relevant the jurisprudence of the Supreme Court in solving the appeal on points of law, prior to the current Code of Criminal Procedure, which established that in case of the court's failure to check, during the trial, of the legality and validity regarding the preventive arrest of the accused before the end of the period provided by law, draws the rightfull cease of preventive arrest and an immediate release of the arrested defendant. Although the decision relies only on stopping the preventive measures, it is considered that the failure to check the legality and merits of any preventive measure by the judge for preliminary chamber or the court leads to the cessation of the preventive measure.

Particular cases of preventive arrest and house arrest ceassing, according to art. 241 par. (1):

a) During the criminal investigation, on reaching the maximum duration of 180 days;

b) During the trial of the first instance, on reaching the maximum term provided by law;

c) During the appeal, if the measure has reached the term of the penalty imposed in the sentence. Regarding the cease of preventive arrest during the appeal, it is being noted the provisions of art. 399 par. (6) under which the defendant convicted by the first instance and found in preventive arrest is released as soon as the duration of detention and arrest are equal to the length of the sentence handed down, although the judgment is not final.

While ceassing preventive measures is a legal obstacle in maintaining them, the revocation of preventive measures is a procedural act which opportunity is estimated by the judicial organs. Given the provisions of art. 242 par. (1), the revocation of preventive measures appears as a procedural act for the judicial bodies to abolish preventive measures when the reasons that caused disappeared or new circumstances have arisen, resulting the illegality of this measure. In a slightly different wording it is observed that revocation of preventive measures is taken in the same procedural regime as in the earlier legislation.

The repeal of preventive measures can be made on request or ex officio. In case of repeal regarding the detention or preventive arrest, it will be ruled, simultaneously, the release of the suspect or defendant, if he is not arrested in another case.

For knowing permanently the opportunities in maintaing or repealing the measure, if the preventive measure was taken during prosecution by the prosecutor or the judge of rights and freedoms, the criminal investigation body is obliged to immediately inform, in writing, the prosecutor about any circumstance that could result in repealing the preventive measure. If it considers that the information justify the repeal of preventive measure, the prosecutor rules it or, where appropriate, refers the matter to the judge of rights and freedoms that took the action, within 24 hours after receiving the notice. The prosecutor must also notify ex officio the judge of rights and freedoms, when it finds himself the existence of any circumstances which justify repealing the preventive measure taken by it.

From provisions in art. 242 results that repealing the preventive measures is an act by which either the body that ordered the measure or other competent judicial body may go behind a decision, revoking it if the measure was taken illegally or if the grounds for adopting it have ceased. In this

respect, it is on record that the regulation seen as a principle, contained in Art. 9 paragraph. (4) wich states that when it appears that a measure deprivating or restricting liberty was imposed unlawfully, the cognizant judicial bodies are obliged to decide repealing the measure and, where appropriate, the release of the detained or arrested person.

Preventive measures, as procedural measures, are interlocutory and are being taken based on specific circumstances related to the criminal case and the person og the perpetrator.

It is possible that, during criminal proceedings, there could intervene items that require the replacement of the initially taken preventive measure with another preventive measure. In this regard, in the Code of Criminal Procedure was performed the distinction between replacing the preventive measure with a lighter or heavier one.

References:

- V. Dongoroz, S. Kahane, G. Antoniu, ș.a., Theoretical explenations of the romanian procedural penal code – The general part, vol. V, ed. a 2-a, Ed. Academiei, Ed. All Beck, București, 2003, p. 308;
- idem;
- I. Istrate, Personal freedom and its procedural penal guarantees, Ed. Scrisul Românesc, Craiova, 1984, p. 26;
- Grigore Theodoru, The romanian procedural penal code – The general part, Iași, 1974 vol. II;
- Radu Slăvoiu, Preventive measurea applying to persons in the regulations of the new Procedural penal code, Revista Dreptul, Nr. 12/2013, p. 78;
- Law no. 32/1990, Law no. 141/1991, Law no. 281/2003, G.U.O. nr. 109/2003, Law no. 356/2006, Law no. 202/2010, Law no. 28/2013;
- Nicolae Volonciu, Andreea Simona Uzlăi, The new procedural penal code commented, Ed. Hamangiu, București, 2014, p. 420;
- N. Iliescu, Human freedom according to the Procedural penal code, în S.C.J. Nr. 3/1971, p. 428;
- I. Muraru, Constitutional right and political institutions, Universitatea Ecologică București, Facultatea de Drept, București, 1990, pp. 251-255;
- Ion Neagu, Mircea Damaschin, Procedural penal treaty, the general part, in acoordance to the new procedural penal code, București, 2014, Universul Juridic, p 587;
- Ion Neagu, Mircea Damaschin, Procedural penal treaty, the general part, Ed. a III-a, Ed. Universul juridic, București, 2010, pp. 542-543;
- Ion Neagu, op. cit., p. 589.