PREVENTIVE DETENTION
- THE REAL DANGER WHICH SETTING THE DEFENDANT FREE IS FOR PUBLIC ORDER–

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Abstract*: As a rule, preventive detention is a severe measure brought upon those who are suspected of committing serious offenses. Therefore, taking in consideration the criminal procedure law and the protection of fundamental human rights, it is of utmost importance that this type of imprisonment is not allowed the possibility to be used in an excessive and abusive way, but in definite situations, with clearly defined limits and constant guarantee of human rights.*

Keywords*: preventive detention, offense, criminal procedure law, protection of fundamental human rights, The European Court of Human Rights.*

The European Court of Human Rights established that the lack of freedom of a person is such a severe measurement, that it can operate only in those circumstances when other measures, less severe, don't have enough power to defend public or private interest, which could be, in opposition, the state of detention.[1]

Article 5 of the European Convention on Human Rights Protection and Fundamental Freedoms[2], called "The Right to Freedom and Safety", says that every person has the right to freedom[3].

[1]Witold Litwa v. Poland cause;

[2]Signed in Rome, on the 4th of November 1950, ratified by Romania through Law 30/18.05.1994, published in M. Of. Part I, no. 135/31.05.1994;

[3]Art. 5 of the convention: "1. Everyone has the right to liberty and security of person.
No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
(a) the lawful detention of a person after conviction by a competent court;
(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed and offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Starting from the text above, it is easy to understand that the judicial procedure has to guarantee that anyone is not and will not be deprived of liberty arbitrarily.

More than this, in the case of preventive detention, the doctrine reminds us that we are in the presence of a derogation from the principle that one cannot be deprived of one's freedom.

So it is rational that when it is talked about preventive detention, to have in mind clear arguments that will not harm personal and individual freedom, which are inviolable[4].

The criminal procedure code indicates, according to article 148, the directives for establishing the state of detention[5].

To this we must add the criteria that can fundament taking the exceptional action of preventive detention as they appear in the Convention:

- *the risk that the defendant might escape* (Stogmuller c. Austrian cause, November 10, 1969 Decision);

- *the risk that the defendant, once set free might obstruct justice* (Wemhoff c. German cause, June 27, 1969, Decision);

- *the risk that the defendant might commit new crimes* (Matzentter c. Austrian cause, November 10, 1969 Decision);

- *the risk that the defendant might provoke public disorder* (Letellier c. French cause, June 26, 1991 Decision).

The amendment that we bring to these substantiation criteria is a very rational one: when one has in mind one of these aspects it is absolutely necessary that the judicial organs do not make a generic reference to these, but they motivate beyond any doubt the possibility of their fulfillment. Only in this way we can talk about real guarantees on behalf of the authorities.

According to article 148, letter f, the arresting of the defendant is ordered also when "*the defendant committed a crime for which the law provides life imprisonment or a punishment with prison for more than four years and where there is evidence that freeing the defendant represents a real social menace to public order* ".

More than this, according to article 136 paragraph 8 C pr. Pen., "*the choice of the action that will be taken will be made according to its purpose, the degree of social menace of the crime, of the health, age, criminal record and other circumstances concerning the person against whom the action is taken.*"

Lately, the Romanian authorities, reporting mainly to the ECHR have established, that in these cases, to be able to talk about the existence of a public menace, it is relevant to have in mind supplementary aspects:

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2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4.Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation;

[4]Engel v. Holland cause; Gusinskii v. Russia cause;

[5]Together with art. 143;

- *the state of uncertainty that could be generated by setting the defendant free;*

- *the triggered public reaction*, reported to the gravity of the facts;

- *the characteristics and personal circumstances of the defendant* (for example, the criminal record of the defendant[6]).

According to every set aspect, we can say that it will be without justification and without reason that the decision of preventive detention doesn't take under consideration these aspects for establishing the public menace that could be generated by the releasing of the defendant. From this comes the idea that public menace cannot be ever assumed. It is mandatory to be proven[7].

On this line, as it was judiciously established in a case decision, the courts must respect the presumption of innocence when they analyze the possibility of preventive detention, not being able to anticipate, by taking such an action, to give a liberty depriving punishment[8].

We state that, in the case of demanding in court warrants for preventive detention, the Court is obliged to withhold from the judge abstract arguments referring to the public menace. On the contrary, the Court must show solid, concrete and unequivocal reasons (different reasons, often opposed for similar actions)[9]. We state this because, as many times practice proved us, the Public Ministry only showed to the judge so-called arguments for preventive detention, generic reasons, abstract or simple theoretical proof, without indicating the concrete aspects for which releasing the defendant will represent a public menace.

In ECHR jurisprudence it is constantly stated that any preventive detention must be highly motivated by the judicial organs, in order to protect the legal guarantees of the defendant[10].

Another important aspect about the social menace to which the releasing of the defendant can be harmful is its actuality. Beyond any doubt, the social menace must be actual.

The actuality of the social menace, in the finality of the notion, imposes immediate freedom deprivation. The fact that at some point the actions (in a wide sense) of the defendant presented a social menace, but the judicial organs haven't imposed freedom deprivation cannot represent a reason for a subsequent solicitation for preventive detention, as long as, logically, there isn't the essential element that we were talking about – actuality. For example, for as long as at some point, the judicial organs have considered that the constriction of freedom of movement, by obliging the defendant to remain in the country is sufficient for protecting general interest, these cannot subsequently solicit to the judge to take actions that deprive the defendant of freedom. It is vital for this proposal to

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[6]Article 136 paragraph 8;

[7]Tomasi v. France cause;

[8]Patsouria v. Georgia cause, Letellier v. France, in Disclosure no 386/R/16.09.2010, file no 43238/3/2010, of the Court of Appeal Bucharest and "Preventive detention. Appreciation of social menace for public order " – Laura Codruta Kovesi, Dana Titian, Daniela Frasie, ED. Hamangiu, 2009;

[9]We hereby remind, as an example, the penal Decision no 235/A/1997, pronounced by the Second Penal Section of the Court of Appeal Bucharest, in which it is shown that "*in our right, the defendant must not prove the innocence; the judicial organs are those, according to article 66 cpp, obliged to give evidence of being guilty* ";

[10]Calmanovici v. Romania cause, request no 42250/2002; Musuc v. Moldavia, no. 42440/2006;

have sustainability, that the defendant's behavior to have changed, so we can talk about the actuality of the social menace.

And so, when the judicial organs decide upon preventive detention it is mandatory to have reasonable and sufficient reasons and also as the jurisprudence and doctrine show, the prediction on the subsequent behavior of the defendant obeys some objective analysis landmarks, otherwise the presumption of innocence will be undertaken.

As a consequence, without a concrete public menace, preventive detention is not imposed, and so the judge must orientate towards alternative measures of freedom limitation, the simple gravity of the facts not being sufficient to justify taking the action of preventive detention[11].

It shall not be interpreted that we sustain that judges, confronted with persons that committed severe crimes, should not consider preventive detention for them. On the contrary, we appreciate that the gravity of the facts represents one of the most important criteria in such an appeal[12], but it cannot be the only criterion, just like the judicial reality often proved it to us. We consider that the judicial organs, in justifying such an exceptional action, in their immediate, firm attitude being invested, *lato sensu*, with re-establishing of the law and order, they must prove cecity in analyzing social menace, and that only when it is certain that it will be produced by the releasing of the defendant, they can decide on preventive detention[13].

And so, on the establishment of social menace there cannot be taken into consideration, exclusively, the high number of previous crimes of the defendant, saying again that the judges must take a clear line between generic social menace[14] (determined by the law keeper in the moment of incriminating the fact, taking into consideration the social values that are harmed, and also the gravity of the harm being made) and the concrete social menace (determined on by analyzing every act on its own)[15].

The social menace for public order must never be mistaken with menace as an essential tray of the crime. But some underlining must be done. Even if we do not make equal the two notions, this does not mean that in analyzing the social menace for public order the gravity of the crime will not be taken into consideration. Just as it was shown in different cases, the existence of the social menace can result from the social menace of crime of which the defendant is being guilty.

The action of arresting the defendant is the worst of the freedom depriving actions.[16]

In conclusion, we underline that the questions brought up by the concrete menace for public order that releasing the defendant might represent are very harsh, not few are the cases in which the judges, not analyzing concretely all these aspects, have disposed preventive detention. There are not clear criteria for which the law could bring up in this

[11]Decision no 534/31.08.2009 of the Court of Appeal Bacau;

[12]Closing no 386/R/16.09.2010, file no 43238/3/2010 of the Court of Appeal Bucuresti - Second Penal Section also for causes regarding minors and family;

[13]For this, the Closing from the 2nd of April, 2009 of the Courthouse from Sector I Bucharest, File no 8716/299/2009;

[14]To see article 18 penal code, which says "*fact that represents social menace in the way of the penal law is every action or inaction through which there is harm brought to one of the values shown in art 1 of the penal code and for which a punishment is necessary*";

[15]Penal decision no 78/04 September 2009 of the Court of Appeal Bacau;

[16]Ion Neagu, "*Trial penal law. General part. Treaty* " – Ed. Global Lex, Bucharest, 2006;

case, this is because approaching public menace is a subjective matter, different from one case to another, with specific traits, characteristic to each case in particular[17].

The Courthouse from Siliste considers that the exception of not being constitutional is unreasonable, because from the interpretation of the critiqued legal dispositions it does not result that the defendant is considered to have committed a crime, fact that can be established only by definite court order.

The Governors of the two chambers of Parliament, the Government and the People's Lawyer have not communicated their point of view regarding the exception of not being constitutional.

The Court, examining the closure, the report made by the reporting judge, the conclusions of the prosecutor, the legal criticized dispositions, reported to the Constitution, and also the Law no 47/1992, notes the following:

The object of the exception of not being constitutional is art 148, paragraph 1, letter f from the Code of Criminal Procedure, containing the following: "The action of preventive detention of the defendant can be taken if the conditions from art 143 are being met and if there are one of the following case: [...] f) the defendant had committed a crime for which the law provides life imprisonment or a punishment with prison for more than four years and where there is evidence that freeing the defendant represents a real social menace to public order" .

Constitutional dispositions called for sustaining the exception are those from art 23, paragraph 11, which call the presumption of innocence.

Examiningthe exception of not being constitutional just as it was formulated, the Court finds that from the interpretation of the legal dispositions criticized it does not result that to the defendant is charged with committing a crime, fact that can only be established through court order of conviction. Also, the using by the "law maker" of the term "crime" has a technical significance, this determines the act on which there is evidence that has been committed by the defendant, in a certain law text, which sees the act as being a crime and is punished with certain gravity. So being, opposite the believes of the author of the exception, the legal dispositions examined do not conflict with art 23 paragraph 11 of the Constitution, referring to the presumption of innocence.

In this way, the Court has pronounced, for example, in the Decision no 76 from February 8, 2005, published in the Official Monitor Of Romania, Part I, no 157 from February 22, 2005, in the Decision no 245 from March 9, 2006, published in the Official Monitor Of Romania, Part I, no 290 from March 30, 2006, and in the Decision no 1142 from December 4, 2007, published in the Official Monitor Of Romania, Part I, no 10 from January 7, 2008. Since there are no new elements able to determine the change of this jurisprudence, the solution and the arguments that helped these decisions stand in the case being.

For the above mentioned reasons, the Court decides to reject the exception of not being constitutional of the dispositions from art 148 paragraph 1, letter f of the Criminal Procedure Code, exception called by Nicolae Florin Maruntel in the File no 668/294/2009 of the Courthouse from Silistea – General Section.

[17]And so, interesting from the point of view of analysis is the exception of not being constitutional of the dispositions at 148 paragraph f c.pr.pen. in the File no 668/294/2009. In motivatingthe exception of not being constitutional it is sustained that, in essence, the criticized law text is not being constitutional, because it ''labels directly'' the defendant that he had committed a crime, which contravenes with the presumption of innocence.

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