Critics of some provisions concerning preventive measures

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Abstract: Taking into account the new socio-juridical realities, effect of the fight against corruption, an exhaustive analysis of the dispositions relating to preventive measures may be imposed, more than ever, considering the implications of these institutions with a constraint character of the individual freedom and safety of person. The imperative need to ensure and respect the fundamental rights and freedoms of humans guaranteed by the fundamental European Convention on human rights [1] and the Constitution[2], repeatedly underlined by the doctrine [3], in particular protecting the person against a possible arbitrariness of the judicial authorities, were decisive in the development of this work. The criticism that we bring are circumscribed to the coding ways (lawmaking) of some institutions and provisions contained in Title V. Preventive measures and other procedural measures, Chapter I Preventive measures, Sections 1-8 of the General Part of the new code of criminal procedure (abbreviated as CPC), with direct reference to the legislative technique, normative inadequacies, unclear/insufficient provisions, etc. On the other hand the proposals for improving the poor laws are presented and argued, in order to eliminate in the future the possibility of different interpretation and application of the institutions concerned. Without claiming to exhaust the critical aspects relating to the provisions in question, the present work aims to be a reflection on the errors and flaws contained in the Code of criminal procedure, with strict reference to preventive measures, expressing the opinion that our legislature will be concerned in the future with fixing them (and not only), so as to ensure the proper and reliable understanding and interpretation of the rules in question.

Keywords: detention; judicial control; reformulation; modification; legislative lacuna.

Introduction

Established in order to ensure the proper conduct of the criminal trial, to prevent the evasion of the suspect/defendant from criminal investigation or trial, or to prevent the commission of another offence, the preventive measures can be arranged with regard to the suspect or accused person or legal person [4].

Setting any of the precautionary measures can only be made in accordance with the general and special, cumulative and imperatives conditions, which constitutes at the same time the procedural guarantees edited in order to protect the fundamental right of inviolability of the person, in particular the right to be able to move freely and to have the desired conduct.

This paper is structured in two sections: the first contains a brief presentation of the decisions of the Constitutional Court - issued after certain articles concerning the institutions addressed, namely the appeals of law admitted for the purposes of the uniform interpretation and application of provisions have been declared unconstitutional, while the latter contains criticism of some regulations in force which, in our opinion, are inexplicit, blurry, unpredictable or unequivocal – imposing their modification and/or completion, as well as the proposals de lege ferenda.

1. Decisions of the Constitutional Court and the appeals in the interest of the law

From the date of entry into force of the new Code of criminal procedure (CPC) - February, 01, 2014 - certain dispositions have required to be verified by both the Constitutional Court [5] - as a result of some unconstitutionality exceptions raised - as well as by the High Court of Cassation and Justice [6] - result of applications for uniform interpretation and application of some rules laid down by appeals in the interest of the law.

Of the 7 decisions handed down by the Constitutional Court, 3 were specifically provisions on preventive measures (only one being admitted), and in respect of the six appeals in the interest of the law
(allowed in full), 2 had as object establishing the ways for the application of certain provisions contained in the chapter on preventive measures.

Thus, by Decision no. 712 of December, 04, 2014, the Constitutional Court upheld the exception of unconstitutionality of the provisions of art. 211-217 CPC, risen in a cause involving the resolution of a request for the replacement of judicial control measure, because the criminal procedural provisions did not regulate a term for which the preventive measure may be ordered.

In motivating the decision [7], after a brief analysis of the non-custodial preventive measures of the obligation to not leave the locality and the obligation to not leave the country (as they were regulated in the old code of criminal procedure), the contentious constitutional court held that the obligations afferent to the two former preventative measures can be found in the current CPC as obligations which may be imposed on the accused in the case of judicial control of judicial control on bail, with the mention that some of the old obligations were taken over with a similar content, and, in addition, additional obligations have been introduced.

It is also pointed out that the former non-custodial preventive measures could be ordered for a maximum period of 30 days, with the possibility of extension for another 30 days, during criminal prosecution the maximum period (cumulated) cannot exceed one year, or, exceptionally, two years, while the current non-custodial preventive measures have not embraced a time limit or a maximum duration for which they may be ordered.

Analyzing, from a constitutional point of view, the nature and specificity of the preventive measures, the Court found that they constitute interferences with the fundamental right of individual freedom, provided for in article 23 of the Constitution (the case of preventive measures involving deprivation of liberty - detention, house arrest and preventive arrest) or other fundamental freedoms or rights, governed by article 25, article 26, article 39, article 41 and article 45 of the Constitution (the situations of judicial control and judicial control on bail - classified as the only non-custodial preventive measures).

Stressing, from a constitutional point of view and by reference to the provisions of article 211-215 of the CPC, the conditions that must be met for the restriction of the exercise of certain rights or freedoms [8] - subsequent of the two types of judicial control - the court found that the regulation in question does not ensure a just balance between the public and individual interest, in violation of the principle of proportionality, in that the legislature hasn't covered a determined/limited period in time for which either of two non-custodial preventive measures may be ordered. In other words, the temporary unlimited time restriction of the fundamental rights and freedoms targeted by the content of any preventive measures affects the constitutional principle of proportionality, by affecting the normative content of the targeted fundamental rights.

For these reasons, and noting that the arguments of unconstitutionality referring to article 211-215 of the CPC are applicable to articles 216-217 CPC, the Court accepted and declared unconstitutional the provisions of articles 211-217 CPC. As a result of this, through the Government Emergency Ordinance no. 82/10.12.2014 [9] articles 207, article 208 and article 216 CPC have been amended and respectively supplemented by a new article - article 215\(^1\) CPC settling the possibility of ordering the judicial control for a period not exceeding 60 days, which may be extended for a maximum of 60 days. The total duration may not exceed:

- in the course of prosecution -1 year (if the penalty prescribed by law for the offence committed is a fine or imprisonment for a maximum of 5 years) or 2 years (in the case of offences punishable by life imprisonment or imprisonment of more than 5 years);
- in the course of the judgment at first instance - a reasonable term, but not more than 5 years from the date of submission to court;

From the interpretation of article 343 with article 215\(^1\) paragraph 7, it follows that the duration of the preliminary judicial control is of maximum 60 days.

Through the same legislation mentioned it was regulated the regular verification ex officio (but not later than 60 days) of the legality and solidity of the preventive measures of the judicial control or judicial control on bail, by the judge of the preliminary room and Court.

In respect of the two appeals in the interest of the law allowed for the purposes of the interpretation and application of the criminal procedural provisions incidental to the preventive measures, without detailing
the pros and cons, we recall the decision no. 4 of September, 29, 2014 [10] with direct reference to the article 203 paragraph 5 and article 425 paragraph 1 CPC.

Thus the penal competent to judge the appeal found that in the course of the criminal prosecution and during preliminary proceedings, the appeal against the conclusion of the judge of rights and freedoms or, where appropriate, of the preliminary room judge regarding preventive measures shall be handled in the council chamber, through a reasoned conclusion that it pronounced in the Council Chamber and not in open court, through decision.

Also a particularly important decision - in our opinion - concerning the examination of an appeal in the interest of the law relating to the provisions of art. 215, paragraph 8 of the CPC, is no. 4 of January, 19, 2015 [11].

The problem of law subjected to debate had to determine whether, during the criminal investigation, the power to dispose of new obligations for the defendant or the replacement or termination of the initial dispositions belongs either to the judge of rights and freedoms which adopted the measure, either to the prosecutor who conducts or supervises the criminal prosecution - even if the preventive measure has been taken by the judge of rights and freedoms.

Bearing in mind that in section 2 we will cast a critical point of view in relation to the thing established, we emphasize that the Supreme Court ruled that in the course of criminal investigation the imposition of new obligations for the culprit, replacement or termination of those originally ordered (even by the judge of freedoms and entitlements) rests with the prosecutor who conducts or supervises the prosecution.

2. Critics of the measures in force and proposals de lege ferenda

Analyzing the provisions of Title V, Chapter I, CPC, in the enumerated order, we can find certain inaccuracies since the table of contents of section 1.

Thus, paragraph 1 of the article 202, which refers to the general conditions applicable to the disposition of any of the preventive measures, contains an inadequate semantics, by legislating the expression "If there is reasonable evidence or indications from which reasonable suspicion results". The new CPC does not define, except for the term evidence [12] any of the previous terms, which is why in order to determine the meaning of each we must use of explanatory dictionary of the Romanian language [13]. From this point of view:

- "clue" = force, circumstance, situation which regarded in connection with other facts, circumstances, situations can serve as evidence;
- "thoroughly" = key, decisive, essential;
- "suspicion" = hunch;
- "reasonable" = acceptable, usual, which is maintained in the normal limits;

By interpreting as a whole the phrase we notice there is no connection of meaning between the first part represented by "solid evidence or clues" and the last "reasonable suspicion", aspect which could lead to subjective interpretations in the juridical practice, unwanted considering the importance of the necessary conditions for restraining /limiting the fundamental rights and freedoms.

For this reason, de lege ferenda proposed to amend art. 202, paragraph 1 CPC, in the sense of keeping only the regulations concerning “solid evidence or clues” and not the “result of reasonable suspicion”, which in principle can have a profoundly subjective sense.

Another observation implies, this time, the legislative technique used, contrary from our point of view, to the need for encoding the institutions in a normal, logic and chronological order, respectively the correlation between studying and understanding of the text with the actual carrying out of the procedures in the field of preventive measures. Under this aspect the regulation of the appeal ways (art. 204-206 CPC) and of the dispositions relating to the verification of their legality (article 207-208) before the provisions concerning concrete preventive measures (art. 209-240) constitutes a mistake of legislative technique.

De lege ferenda the provisions relating to the appeal and the specific verifications should be coded according to articles related to the proper preventive measures.
The legal framework concerning detention and explicitly the term of not more than 24 hours, has constituted and still constitutes the subject of intense debate in the national media, as well as at the level of the Superior Council of the Magistracy or some structures of the subordination of the Public Prosecutor's Office of the High Court of Cassation and Justice (e.g. the National Anticorruption Directorate).

About the dispositions of article 209, paragraph 3 CPC, we note that limiting the period for which this measure may be ordered to not later than 24 hours has as foundation the provisions of article 23, paragraph 3 of the Romanian Constitution. De lege ferenda we consider that the dispositions with a strictly criminal procedural nature should be removed from the fundamental law, among which it is the one concerning the maximum time limit that must be respected in case of detention, and implicitly legislating that period only in the Code of criminal procedure.

Concerning the limit of 24 hours by reference to the situations of jurisprudence, comparing the legislation from other member countries of the European Union we notice that this corresponds with that of 15 Member States, with the difference that the period can be extended up to 48 hours (e.g. Portugal), or up to 96 hours (e.g. Italy, France, United Kingdom) or even up to 7 days (Ireland). In countries such as Estonia and Hungary the maximum period stipulated is 72 hours.

Of course, in many of these countries, the procedure is different from that of Romania. For example in France, the gendarmerie may dispose detention for up to 24 hours, the extension of this period up to a maximum of 48 hours being the exclusive attribute of the Prosecutor and over this last period (up to 96 hours) can be disposed only by judge of freedoms and detention - but only if any crimes related to terrorism, drug trafficking, organized crime, murder committed by two or more persons, etc. were committed.

De lege ferenda, regarding detention, we propose preserving the general term of 24 hours and the inclusion of the possibility of an extension to a maximum of 48 hours, applicable only in the case of serious offences (from the category of those whose maximum penalty is of 5 years or greater), taking into account the personal circumstances of the author, of the ways in which the act was committed and its effects.

Without detailing on the solution disposed by decision no. 4/2015 by the High Court of Cassation and Justice concerning the settlement of the appeal in the interest of the law (mentioned above), from reviewing its content, we notice that even the resolution panel has noticed the ineffective and elliptical nature of the provisions in question (existing previously their modification by Ordinance No. 82/2014), but what caught our attention was the right granted to the Prosecutor to modify the obligations imposed by the judge of rights and freedoms in connection with the disposition of the judicial control. In our opinion this regulation violates the principle of separation of judicial function regulated by article 3 CPC. Also, the rule can be appreciated as interference of the Prosecutor in the decisions taken by a judge; thus the right to appeal a measure on a hierarchical way - which represents a solid judicial guarantee - is less important.

Lege ferenda we appreciate the opportune and necessary modification of the normative framework, contrary to those laid down by article 215, paragraphs 3 CPC.

In addition, considering the previous provision, we appreciate as necessary that in the content of article 213, paragraph 1, thesis 1, to the phrase "against the prosecutor's ordinance through which the judicial control measure was taken" to be added "or through which it was modified one of the obligations imposed".

In the same institutions of judicial control, respectively in article 215, paragraph 3 CPC, we consider opportune that the text “in case of bad-faith breach of the obligations arising” to be modified to “in case of bad-faith breach of any of the obligations arising". This way, it would avoid future possible extensive interpretation, the possibility of replacing this measure with home arrest or preventive arrest can be invoked as soon as an obligation is breached, not all the obligations imposed.

Last but not least, we believe that content of article 234, paragraph 2 CPC must be modified and completed, in the sense of eliminating the exclusive right of the prosecutor regarding the prolongation of preventive arrest proposal, the latter imposing to operate "even ex officio by the judge of freedoms and rights" - which is identical to the regulations of article 238, paragraph 1 of the CPC.
Conclusions

In a true state of law [14], due to the repressive or specific coercion character, the provisions relating to the measures in question must be strictly defined and pursued, in order to be respected the individual freedom, implicitly to prevent arbitrary deprivation of liberty of a person by the authorities (the case of apprehension, home arrest and preventive arrest) or impairment of other fundamental rights and freedoms (the case of judicial control and judicial control on bail which do not have custodial effect but can affect the right to free movement, to intimate, home and private life, to economic freedom, the freedom of association, etc.) all representing constitutional guarantees.

In this respect, the clear, explicit and unequivocal regulation of general and special conditions, implicitly of the actual procedures relating to these measures represent a primordial importance.

NOTE: The presentation of this material is based on legislation, doctrine and practice until 02/22/2015.

References

[1] See art. 5 of the European Convention on human rights concerning the right to liberty and security and other rights related to the article 6 of the Charter of fundamental rights of the European Union;

[2] Article 23 of the Constitution regulates the individual freedom and security of person;


[4] The preventive measures applicable to natural persons are covered by article 202-244 of the Code of criminal procedure, and in the case of legal persons by article 493;


[7] Published in the Official Gazette No. 33 of January, 15, 2015;

[8] 7 cumulative conditions must be fulfilled, i.e. the domain that constitutes constitutionality control field that targets only fundamental rights and not the subjective rights of legal or conventional nature; the restriction of the exercise of the rights in question may be performed only by law; the restriction can operate only if it is imposed, and only if it is necessary in a democratic society; the restriction can only work in one of the limiting assumptions listed in art. 53 of the Constitution; the restriction must be proportional to the cause; the restriction to be non-discriminatory and do not affect the substance of the right;

[9] Published in the Official Gazette No. 911 in December 15, 2014;


[12] See article 97, paragraph 1 CPC;


state of law, based mainly on ethics, truth and justice, is one in which the main beneficiaries are all citizens of that state, in which all social groups see their expectations fulfilled, the rights and freedoms, the needs and interests, they see their vital needs met and also, see their future secured through institutional strength and effort wanting to efficiently serve its citizens’;