SAFEGUARDING THE RIGHT TO LIBERTY AND SECURITY IN THE EUROPEAN CONTEXT

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Abstract: *The present paper focuses on presenting the legal guarantees which accompany the lawful arrest or detention, especially as they are configured in Article 5 of the European Convention of Human Rights and the related case law of the European Court of Human Rights. The right to liberty and security of person, acknowledged in all the major international instruments, is a key component of the European culture of protecting the human rights, which has also been minutely incorporated into the Romanian legislation. Although the right to liberty and security is considered inviolable in all democracies, there can be justified exceptions in which the exercise of this right is limited; it is not only required for them to be lawful, but also any derogation must strictly conform to the provisions laid down by the law so as to avoid any arbitrary act from the part of the authorities.*

Keywords: *right to liberty and security, lawful arrest, criminal proceedings, European Convention of Human Rights, European Court of Human Rights.*

1. INTRODUCTION

Throughout the past decades, the imperative of safeguarding the fundamental rights and freedoms has gradually led towards the consolidation of several efficient instruments at international level, which promote 'a common law of the trial' [6], here included the criminal matters.

In this respect, in order to create a European pattern of criminal proceedings, both universal and regional sources of law manifested significant relevance.

As far as the former category is concerned, the *Universal Declaration of Human Rights*, adopted by the United Nations General Assembly on the 10th of December 1948, is essential as it is of great moral force [2]; based on it, the *International Covenant on Civil and Political Rights* was adopted in 1966 and it came into force in 1976.

The main regional sources for the European area are the following ones: the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (the *European Convention on Human Rights* in short), signed in Rome on the 4th of November 1950 within the Council of Europe (ratified by Romania in Law no. 30/1994), together with the Additional Protocols amending it, as well as the European Union law on human rights, notably the *EU Charter of Fundamental Rights*, which was proclaimed in 2000 and has become binding since December 2009, when the *Lisbon Treaty* came into effect.

The 1991 *Constitution* of Romania, revised by Law no. 429/2003, has also acknowledged the value of the aforementioned instruments. Thus, according to Article 20 par. 1 and 2 of the Romanian fundamental law, 'constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the *Universal Declaration of Human Rights*, with the covenants and other treaties Romania is a party to. Where any inconsistencies exist between the covenants and treaties on fundamental human rights Romania is a party to, and internal laws, the international regulations shall take precedence unless the Constitution or national laws comprise more favourable provisions'.

Concerning the legal force of the *European Convention on Human Rights* and the related case law developed by the European Court of Human Rights in the Romanian internal legal order, pertaining to the aforementioned constitutional provisions, they benefit from a constitutional and over-legislative force; also, they have direct applicability, being integrated into the constitutional block of the domestic system [2].

2. LEGAL ESTABLISHMENT OF THE RIGHT TO LIBERTY AND SECURITY

Individual freedom is considered inviolable in all democratic regimes, its guarantees being established by law. In the criminal process, an important consequence of the individual freedom is embodied in the rule which states that the process is to take place with the defendant enjoying his/her freedom, which is the natural state of every person. However, it is equally true that the legislation of all countries has admitted exceptions regarding the deprivation or restriction of liberty aiming at the evolution of the criminal process in appropriate conditions [11].

The Universal Declaration of Human Rights states, in Article 9, that 'no one shall be subjected to arbitrary arrest, detention or exile'. The right to liberty and security of person is also established, in a more detailed manner, in Article 9 of the *International Covenant on Civil and Political Rights*.

Within the *European Convention on Human Rights*, Article 5 deals with the right to liberty and security, as well as the limitations that can affect it. This article has been attributed, within the framework of the doctrine [4], to the so-called 'strong nucleus' of the Convention, together with Article 6 (the right to a fair trial), Article 8 (right to respect for private and family life), and Article 10 (freedom of expression). It follows that upholding the right to liberty and security is absolutely necessary in a democratic society.

Finally, Article 6 of the *EU Charter of Fundamental Rights* proclaims that 'everyone has the right to liberty and security of person'. As observed in the Council's *Explanations* [14] relating to the Charter, the rights comprised therein are the rights guaranteed by Article 5 of the *European Convention on Human Rights* and, in accordance with Article 52 par. 3 of the *Charter*, they have the same meaning and scope. Thus, the limitations which may be imposed cannot exceed those permitted by the *Convention*. At the same time, this provision shall not prevent EU law from providing more extensive protection.

It must be underlined that any limitation brought to the exercise of the fundamental rights and freedoms must meet four essential conditions, namely: to be provided for in the specific national legislation, which must be not only accessible to everyone, but also predictable; to pursue a legitimate purpose, such as the protection of the territorial integrity of the state, public safety, preventing the commission of certain crimes, defending the public order or the rights of others; to be necessary in a democratic society; and, lastly, to be proportional with the pursued legitimate purpose [2].

3. KEEPING THE DEPRIVATION OF LIBERTY WITHIN THE LAW

The right to liberty and security of person is an inalienable right, which cannot be waived and which concerns every person, whether at liberty or in detention. The main objective of these provisions is to protect the individual against the arbitrariness of State authorities [2]. The Court has constantly held that the terms 'liberty' and 'security' are to be read as a whole. While the *liberty of person* refers to 'freedom from arrest and detention', the *security of person* means 'the protection against arbitrary interference with this liberty' [13]. The lawfulness regarding the privation of liberty implies two aspects.

On the one hand, the cases in which the derogation from the principle mentioned at the beginning of Article 5 of the *European Convention on Human Rights*, stating that 'everyone has the right to liberty and security of person', are expressly and restrictedly provided for in par. 1 letters a)-f) of Article 5. Hence, this enumeration represents in itself a guarantee for maintaining the legality of the detention. As the text of the *Convention*

shows, 'no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law (…)'. The list is exhaustive and encompasses situations which are only susceptible of a restrictive and strict interpretation [2, 6].

The six hypotheses representing exceptions to the prohibition of deprivation of liberty are the following ones: a) the lawful detention of a person after conviction by a competent court; b) the lawful arrest or detention 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 on reasonable suspicion of having committed an 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 preventing the spreading of infectious diseases, of persons of un-sound mind, alcoholics, drug addicts or vagrants; lastly, f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

On the other hand, the deprivation of liberty must be carried out, as stated in par. 1 of Article 5, only 'in accordance with a procedure prescribed by law' ('selon les voies légales'). For such a measure to be consonant with the *Convention*, it must fulfill a double prerequisite: the observance of the domestic law which, in its turn, must be in complete accord with the *Convention* [3].

For this reason, as far as the criminal process is concerned, the guarantees set out by the *Convention* have been consolidated in both the Romanian Constitution (Article 23) and the Criminal Procedure Code (Article 5, Articles 504-507, etc.) so as to ensure the means of safeguarding the rights and freedoms of the participants in the criminal case, especially those of the defendant [6].

4. SAFEGUARDING THE RIGHT TO LIBERTY AND SECURITY IN THE CRIMINAL PROCESS

As it can be noticed from the previous sections, there are 'three situations in which deprivation of liberty may be justified as part of the criminal process: the apprehension of someone suspected of involvement in committing an offence (para. *c*); the imprisonment of someone as a penalty for having committed an offence (para. *a*); and the detention of someone pursuant to a request for his or her extradition to another country (para. *f)*' [5].

There are three hypotheses of detention on remand, mentioned in Article 5 par. 1 letter c), namely the commission of an offence, the prevention of committing an offence or the flight after committing the offence. Detention on remand is a complex institution taking into consideration its implications, which are of both a social and a personal nature. After the conviction by a court of first instance, detention on remand turns into detention after conviction [13].

In the case of convicted offenders, the conviction must be ruled by a 'competent court'. Decisions adopted by the police, by a public prosecutor, a military commander or by an administrative body do not meet the requirements. The term 'conviction' implies both the finding of guilt and the imposition of a penalty [13].

In the situation of extradition, the Court often distinguished between the lawfulness of the detention and the lawfulness of the extradition [5].

As it stems from the case law of the European Court (in ECHR, *De Jong, Baljet, and Van Den Brink v. The Netherlands*, 22 May 1984; ECHR, *Engel and others v. The Netherlands*, 8 June 1976), with reference to the criminal process for the purpose of the *Convention*, discrete military criminal offences and proceedings are also included [5].

5. THE RIGHT TO BE INFORMED

According to Article 5 par. 2, 'everyone who is arrested shall be informed promptly, in

a language which he understands, of the reasons for his arrest and of any charge against him'.

Generally, only the communication of the grounds for the arrest is necessary, but, in some exceptional cases, when the measure taken is not obvious, it is also required to inform the arrested person regarding the arrest itself [3].

Furthermore, in *Van Der Leer v. The Netherlands* (22 January 1990, par. 27), the Court draws attention to the fact that the terms 'arrested' and 'charge' are to be interpreted autonomously, extending 'beyond the realm of criminal-law measures' and consequently applying to all types of deprivation of liberty.

By virtue of this provision, 'any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with Article 5 § 4. Whilst this information must be conveyed "promptly", it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features' (ECHR, case of *Saadi v. The United Kingdom*, 11 July 2006, par. 51).

6. DETENTION ON REMAND

Article 5 par. 3 of the *Convention* provides for the following: '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 authorised 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'.

It must be mentioned that this text refers explicitly only to the provisions of par. 1 letter c) of Article 5, thus it is inapplicable for the detention in the case of extradition [2, 3].

In the case law of the Court, four fundamental reasons have been developed which are considered acceptable for the detention on remand of an accused suspected of having committed a crime, mentioned in *Calmanovici v. Romania* (1 July 2008, par. 93) [9]: the danger that the accused might escape; the risk that, once released, the accused can tamper with the course of justice; the risk of committing new crimes or, finally, presenting danger for the public order.

The term 'promptly' does not have in view a minimum, but an undetermined period of time. The celerity is estimated by taking into consideration all the circumstances of the cause.

In the previously mentioned case of *De Jong, Baljet, and Van Den Brink v. The Netherlands*, 'the three applicants were referred for trial before the Military Court seven, eleven and six days respectively after their arrest'. The Court decided that 'in the particular circumstances, even taking due account of the exigencies of military life and military justice (…) the intervals in question cannot be regarded as consistent with the required promptness' (par. 51 and 52) [6].

Regarding the 'judge or other officer authorised by law to exercise judicial power', three cumulative conditions must be met: first, to be independent of the executive and of the parties; second, to have the legal obligation to hear the person brought before him/her; third, to be required to analyse all the circumstances, both in favour and against the detention, and in the absence of the reasons justifying it, hence the detention proves groundless or unlawful, to be able to decide the release of the person [6].

The guarantee consisting in the entitlement to trial within a reasonable time or to release pending trial must be interpreted in the following way: detention on remand cannot be maintained beyond its reasonable limits. This is extremely important as it is a well known fact that the liberty of person constitutes the rule, whereas the deprivation of freedom before conviction represents the exception, being a serious derogation from the principles of individual freedom and the presumption of innocence [2]. There is a genuine presumption in favour of freedom, as the Court noted in *Calmanovici v. Romania* (par. 90).

The evaluation of the 'reasonable time' of the detention on remand is marked by two

points in time, namely: the initial moment (*dies a quo*), when the person is arrested or detained, and the final moment (*dies ad quem*), when the person is either released or convicted [4].

The duration of the trial proceedings at this stage falls under the incidence of Article 6 of the Convention [2].

7. THE RIGHT TO JUDICIAL REVIEW CONCERNING THE LAWFULNESS OF THE DETENTION

The content of Article 5 par. 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' – has its origin in the institution called *habeas corpus* belonging to the Anglo-Saxon system. The *Habeas Corpus Act* was adopted by the English Parliament in 1679, aiming at preventing the abusive detention of persons [16].

The text quoted above does not imply an automatic control, but it rather institutes the obligation for the Contracting States to offer the opportunity for proceedings to be initiated by the detained person himself or herself [3].

This procedure, in which an appeal against a detention order is being examined, must have a judicial character and ensure guarantees appropriate to the kind of deprivation of liberty in question, such as the 'equality of arms' between the parties, the prosecutor and the detained person (ECHR, *Gorshkov v. Ukraine*, 8 November 2005, par. 40).

Also, as shown in cases such as *X. v. The United Kingdom* (5 November 1981, par. 53) or *Weeks v. The United Kingdom* (2 March 1987, par. 62), 'the word "court" is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country' and the members making up the 'court' must fulfill the requirements of independence as well as impartiality in the performance of their duties [6]. In the absence of all these guarantees, this right would be only theoretical and illusory [4].

As observed in *Hutchison Reid v. The United Kingdom* (20 February 2003), the proceedings have to comply with the right to a speedy judicial decision. In the same case, the Court notes that the burden of proof lies on the authorities, which are not allowed to place it on the applicant.

8. THE RIGHT TO COMPENSATION

The final paragraph of Article 5 provides that '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'.

As the Court ruled in cases such as *Tase v. Romania* (10 June 2008), this right has a subsidiary nature, whose premise is the violation of one of the preceding provisions, namely paragraphs 1 to 4, of the article under discussion, which has already been established by a national authority or by the European Court.

Moreover, the right must be certain. In the cited case, the Court 'concluded that the applicant had no effective remedy by which to challenge the lawfulness of his detention' (par. 46), which triggered the applicability of Article 5 par. 5.

The Court does not rule out the possibility of Contracting States to condition the award of compensation by the ability of the person concerned to show damage resulting from the breach. In the context of Article 5 par. 5, 'the status of "victim" may exist even where there is no damage, but there can be no question of "compensation" where there is no pecuniary or non-pecuniary damage to compensate', as the Court argued in the case of *Wassink v. The Netherlands* (27 September 1990, par. 38) [3].

9. CONCLUSIONS

The fundamental rights and freedoms lie at the very foundation of democracies around the world and must always be looked upon as a lighthouse in the midst of moral darkness.

Thus, the *European Convention of Human Rights* is attached to a certain philosophy and a certain commitment, which is common to all Contracting States.

Since the right to liberty and security is vital for any human being, it is essential that the legal principles and derogations be thoroughly studied and applied.

Future work should analyse the challenges of applying the guarantees proclaimed by the *Convention* in the case of serious crimes, such as those involving organised crime and terrorism [8].

Also, it should further consult the case law of the European Court of Human Rights in order to capture the dynamism of how the field of human rights evolves and also how the States relate to these aspects.

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