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A General Overview on the Ethics of Pre-trial Detention

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Abstract: The measure of pre-trial detention is one of the five preventive measures regulated by the legislator in Title V of the general part of the new Criminal Procedure Code, adopted by Law no. 135/2010 and implemented on February 1st, 2014, along with detention, judicial control, judicial control on bail and house arrest. Preventive measures are institutions of criminal procedural law, and have a coercive character, aimed at the deprivation or the restriction of individual liberty, whereby the suspect or defendant is prevented from undertaking certain activities that would adversely affect the proper conduct of criminal proceedings or achieving the purpose of the criminal trial. Regarding the cases of pre-trial detention and the conditions that must be met in order to take the measure of pre-trial detention, it must be said that they result from the corroborated examination of the provisions of art. 202 para. 1 and 3, and art. 223 of the Criminal Procedure Code. Article 202 of the Criminal Procedure Code regulates the general conditions for taking preventive measures, in general, and the provisions of art. 223 of the Criminal Procedure Code regulates the specific conditions for taking the measure of pre-trial detention.

Keywords: *pre-trial detention, conditions, defendant, freedom.*

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1. Introduction

The conditions and cases of pre-trial detention have been regulated by the legislator for specific purposes, namely: to ensure the proper conduct of the criminal proceedings, to prevent the elusion of the trial by the suspect or the defendant and to prevent new criminal transgressions (art. 202 para 1 of the Criminal Procedure Code). Considering the purpose of regulating pre-trial detention in the criminal procedure legislation, certain ethical aspects regarding this measure can be brought into discussion. The moment in which the pre-trial detention is decided is not so much related to the punishment that will be applied to the perpetrator, so it is not related, on the time axis, to elements that will become relevant in the future, but is related to elements that have already happened in the past, which, in an instrumentalist manner, justify taking a measure with a pronounced retributive character, although the person subjected to this measure still benefits from the power of the presumption of innocence. Starting from this ethical dilemma, we will analyze the institution of pre-trial detention starting from the main axes on which this measure is built due to the criminal policies it reflects, analyzing a series of general aspects that focus on a broader discussion on the ethics of pre-trial detention in contemporary society.

Preventive measures are not inherent in any ongoing criminal trial, but have an exceptional character, and the judicial bodies assess the need to make use of them according to the concrete circumstances of each case. Article 9 para. 2 of the Criminal Procedure Code stipulates that "any measure of deprivation or restriction of liberty shall be ordered exceptionally and only in the cases and under the conditions provided by law". Of the five preventive measures, three are deprivation of liberty - detention, house arrest and pre-trial detention, and two are deprivation of liberty under judicial control and judicial control on bail All these measures are applicable only to natural persons, though specific preventive measures may be taken against legal persons, as regulated by the provisions of article 493 of the Criminal Procedure Code.

Most preventive measures (with the exception of detention) can be taken only against the defendant, namely the person against whom the criminal proceeding has been initiated. Article 82 of the Criminal Procedure Code provides that "the person against whom the criminal action has been initiated becomes a party to the criminal proceedings and is named a defendant". Detention may also be ordered against the suspect, a person in

respect of whom, from the existing data and evidence of the case, there is a reasonable suspicion that he committed an act indictable under the criminal law (art. 77 of the Criminal Procedure Code).

The measure of pre-trial detention may be ordered by the judge of rights and liberties, by the preliminary chamber judge or by the court before whom the case is pending, during the criminal trial, and consists in the deprivation of liberty of the defendant accused of committing a crime (Ivan & Ivan, 2014).

The measure of pre-trial detention is the harshest of all the preventive measures, because it not only restricts, but completely abolishes the freedom of the person who is a subject to this measure and consists in detaining the person against whom this measure is taken in specific places designed for persons deprived of liberty during criminal proceedings.

Regarding the cases of pre-trial detention and the conditions that must be met in order to take the measure of pre-trial detention, these result from the corroborated examination of the provisions of art. 202 para. 1 and 3, and art. 223 of the Criminal Procedure Code. Article 202 of the Criminal Procedure Code regulates the general conditions for taking preventive measures, in general, and the provisions of art. 223 of the Criminal Procedure Code regulates the specific conditions for taking the measure of pre-trial detention.

The general conditions for taking preventive measures, and therefore also the measure of pre-trial detention, are as follows: the existence of solid evidence or indications that indicate a reasonable suspicion that a person has committed a crime; the proportionality of the chosen measure by comparison to the gravity of the accusation brought against the defendant; the need for the preventive measure to achieve the purpose pursued by its disposition; initiating criminal proceedings against the person suspected of having committed an offense and the lack of any cause that might prevent the initiation or exercise of criminal proceedings. Art. 202 of the Criminal Procedure Code provides that: "(1) Preventive measures may be ordered if there is solid evidence or indicators to form a reasonable suspicion that a person has committed a crime and if they are necessary in order to ensure the proper conduct of the criminal proceedings, to prevent the suspect or the defendant from eluding criminal prosecution or the criminal trial, or to prevent the perpetration of another crime. (2) No preventive measure may be ordered, upheld, prolonged or maintained if there is a cause preventing the initiation of criminal proceedings or prosecution. (3) Any preventive measure must be proportionate to the seriousness of the accusation brought

against the person subjected to it and must be necessary for the achievement of the purpose pursued by its disposition".

Regarding the specific conditions for taking the measure of pre-trial detention, as shown in the juridical doctrine (Udroiu, 2016, p. 402), there are hypotheses (including cases and conditions) for taking the measure of pre-trial detention that are autonomous from the condition that the perpetrator poses a danger to public order, as there are also hypotheses for taking the measure of pre-trial detention that do consider the danger that the defendant poses to public order, hypotheses that are apparent in all the phases of criminal proceedings, during which the measure may be ordered, namely during criminal investigation, preliminary chamber procedure, criminal trial on the merits or during the phase of appeal.

In the first category, the one comprised of hypotheses that are independent of the existence of any danger to public order posed by the offence itself, in order to take the measure of pre-trial detention is necessary, in addition to the common condition that there is a reasonable suspicion that the defendant committed a crime (Barac, 2015) - regardless of punishment provided for this crime -, at least one of the cases expressly provided by law in art. 223 para. 1 letters a to d of the Criminal Procedure Code needs to be met, namely: "a) the defendant fled or hid, in order to evade prosecution or trial, or made preparations of any kind for such acts ; b) the defendant tries to influence another participant in the trial to commit a crime, or a witness or an expert to destroy, alter, hide or steal material evidence or to influence another person to engage in such behavior; c) the defendant exerts pressure on the injured party or tries to reach a fraudulent agreement with them; d) there is a reasonable suspicion that, after initiating the criminal proceeding against them, the defendant intentionally committed a new crime or is preparing to commit a new crime "(art. 223 para. 1 letters a to d of the Criminal Procedure Code).

There is also a second category of hypotheses starting from which pre-trial detention can be ordered, depending on the danger to public order that the defendant would pose if such a measure would not be taken. Unlike the first category of hypotheses, in this case it is necessary that evidence exists to indicate that the defendant has committed a crime, and not any crime, but one of those expressly mentioned by the law (art. 223 para, 2 thesis I of the Criminal Procedure Code): "an intentional crime against the life of a person; a crime that caused personal injury or death to a person; a crime against national security provided by the Criminal Code and other special laws; an offense of trafficking in drugs, carrying out illegal operations with precursors or other products likely to have psychoactive effects; an

offense of disregarding the regime of arms, munitions, nuclear materials and explosives; trafficking and exploitation of vulnerable persons; acts of terrorism; money laundering; counterfeiting of coins, stamps or other valuables; blackmail; rape; illegal deprivation of liberty; tax evasion; outrage; judicial outrage; a crime of corruption; a crime committed through computer systems or electronic means of communication; another crime for which the law provides the punishment of imprisonment for 5 years or more "(art. 223 para. 2 thesis I of the Criminal Procedure Code).

As indicated above, the existence of a reasonable suspicion that one of the above offenses has been committed is not in itself sufficient to order the measure of pre-trial detention, but, on the basis of an assessment of the gravity of the crime, the manner and circumstances in which it was committed, the entourage and the social environment of the defendant, their criminal record and other circumstances regarding their person, it is found that their deprivation of liberty is necessary to remove the state of danger that they pose to public order (Gentimir, 2014) - art. 223 para. 2 thesis II of the Criminal Procedure Code. As such, these conditions must be cumulatively met.

2. Examining the legal classification of crimes by the judge of rights and freedoms on the occasion of solving the proposal for pre-trial detention. Limitations and effects of such an examination

Unforeseen by law in the procedure of solving the proposal of pre-trial detention and approached only in isolated cases by the older or newer doctrine, the problem of examination and implicitly of the possibility of censoring the legal classification of the crime, on the occasion of solving the proposal of pre-trial detention, naturally made controversies appear in judicial practice. However, after examining the identified solutions, a majority opinion can be outlined, in the sense that, when resolving the proposal for pre-trial detention, it is necessary to examine this classification.

Before expressing a point of view on the analyzed problem, we will make a brief presentation of the opinions expressed and of the solutions pronounced in the jurisprudence.

Thus, according to an opinion expressed by the legal doctrine (Jderu, 2017), it was stated that: "regarding the legal classification of the facts imputed to the defendant, we find that, although in judicial practice there are solutions stating that the judge of rights and freedoms cannot censure the legal classification established by the indictment ordinances, because his competence is limited to verifying whether there is evidence establishing a

reasonable suspicion that the defendant has committed offenses which are among those expressly provided by the law or for which the sentence is of 5 years of imprisonment or more, in our opinion, the judge of rights and freedoms is obliged to verify, in the event that the provisions of art. 223 para. 2 of the Criminal Procedure Code are invoked as the legal basis for the proposal of pre-trial detention, whether the condition regarding the special maximum of the imprisonment penalty provided by the legislator for the crime whose commission is imputed to the defendant is fulfilled. Consequently, although obviously in the criminal investigation phase the prosecutor is the only one abilitated to establish the legal classification of the crimes imputed to the defendant, his position in this regard may be subject to analysis by the judge of rights and freedoms, especially if the factual situation as it is retained by the criminal investigation body is appropriated by the judge himself, thus, in this case such a step would not be a reappraisal of the body of evidence administered in that case" (Jderu, 2017, pp. 1052-1053).

Also in the recent judicial doctrine, an opinion was expressed somewhat similar to the one mentioned above, in the sense that the judge of rights and freedoms will not order the change of the legal classification retained in the prosecutor's proposal for pre-trial detention and will not ascertain the incidence of any of the cases provided by art. 16 of the Criminal Procedure Code, however, having the possibility to verify whether the legal classification, as it results from the administered evidence, allows the taking of the measure, respectively if the conditions of any of the cases that prevent the initiation of criminal proceedings are met, without pronouncing a solution regarding the prosecution, in the case of actually ordering the measure.

Few jurisprudence solutions have been pronounced and different opinions have been expressed on this issue. Thus, in a decision issued on the proposal to order the measure of pre-trial detention, it was argued that, at the time of solving the proposal for pre-trial detention, the judge of rights and freedoms cannot censor the legal classification established by the order to initiate criminal proceedings, and he is limited to verifying whether there is enough evidence to raise a reasonable suspicion that the defendant has committed crimes which are among those expressly provided by law or for which the law provides a sentence of 5 years of imprisonment or more. It should be pointed out that in this case the defense criticized the legal classification before the judge, regarding the form of the crime, whether it was a fact consumed or only attempted, but this is an irrelevant, aspect when speaking about the limits of punishment. In a similar ruling (Bucharest Court

of Appeal, 2009) it was established that "the claim regarding the wrong legal classification of the crime committed by the defendant is also unfounded, even if the aspect was relevant aspect, in the appellant's opinion, for establishing the existence of the requirements provided by art. 143 of the Criminal Procedure Code, noting that this claim is clearly erroneous and disregards the competence of the judicial bodies, as such competence was provided to them by law in relation to the phases of the criminal trial. Thus, it should be mentioned that, during the criminal investigation, the prosecutor is the only one entitled to conduct the criminal investigation and to prosecute the person suspected of committing a crime, to order the initiation of criminal proceedings and to provisionally establish the legal classification of the facts for which the criminal investigations are carried out" (Bucharest Court of Appeal, 2009). In the same sense, of not censoring the legal classification of the crime during the procedure of ruling on the proposal for pre-trial detention, our supreme court also ruled in a case decision (High Court of Cassation and Justice, 2013), arguing that in that case there were strong indications that plausibly justified the suspicion that the defendants were involved in illegal activities, which could constitute offenses punishable by law with imprisonment of more than 4 years (the decision was ruled under the auspicies of the 1968 Criminal Procedure Code), stating that the classification of the crimes as made by the prosecutor's office was not procedurally objectionable before the court of recourse at that particular procedural stage (we mention that the legal recourse was the procedural remedy in the matter of preventive measures before February 1st, 2014).

On the contrary, as opposed to the above mentioned solutions and opinions, in the jurisprudence it was also decided that the judge of rights and freedoms must examine the legal classification of the crimes for which the criminal proceeding was initiated against the defendant. Thus, in one case (Bucharest Tribunal, 2016), the judge of rights and freedoms rejected the proposal to take the measure of pre-trial detention, holding that the legal classification of crimes against the defendant is wrong, and the crime punishable by law with imprisonment of 5 years or more is absorbed in the crime punishable by imprisonment of less than 5 years, so the proposal does not meet the legal conditions necessary to order pre-trial detention. In the reasoning of the decision, the judge of rights and freedoms showed that he is obliged to verify this classification when the basis for taking the measure of pre-trial detention relates to the amount of the prison sentence. During the remedy procedure of the opposition, the judge of the superior court maintained the pronounced solution, also stating, with reference to the issue

in question, that "although during the criminal investigation the legal classification of the facts is is within the competence of the prosecutor, however, when a pre-trial detention proposal depends on the sentence limits of the crime that is the subject of the proposal, it becomes mandatory for the judge of rights and freedoms to examine the correctness of the legal classification, because the sentence limits are the very condition of the legality of the requested preventive measure, otherwise not being part of the crimes provided in art. 223 para. 2 of the Criminal Procedure Code" (Bucharest Court of Appeal, 2016). In the same sense, stating the need to establish the legal classification of the deed when resolving the proposal for pre-trial detention, is another similar solution in which it was established that "the examination of the correctness of the legal classification attributed to the deed cannot be done without examining the body of evidence (Maramureș Tribunal, 2016).

In our opinion, the judge of rights and freedoms is obliged to examine the legal classification of the deed for which the proposal for pre-trial detention was formulated. There are several arguments in support of this view.

Thus, there are legal provisions that refer to the classification of the deed (at this stage) even if they concern the content of the arrest warrant, a warrant which, finally, is a procedural act that transposes into execution the decision of the judge regarding the preventive measure as a whole. Thus, according to the provisions of art. 230 para. 3 letter f of the Criminal Procedure Code. the arrest warrant must include, among other data, "the indication of the deed of which the defendant is accused, indicating the date and place of its commission, the legal classification, the crime and the punishment provided by the law". The arrest warrant is issued by the judge of rights and freedoms, so that for this procedural act the responsibility for its legality and correctness rests with the judge and not with the prosecutor who made his own classification. Therefore, if the judge has the obligation to insert the classification of the deed for which he ordered the arrest in the arrest warrant, he also has the correlative obligation to verify its classification, even provisionally, with the occasion of issuing a decision on the arrest proposal, based on the evidence administered by the prosecutor up to that procedural moment, evidence that, as rightly supported in the legal doctrine, but also in practice, cannot be removed, but only appreciated (High Court of Cassation and Justice, 2015; Tocan, 2017), as the ruling on the pre-trial detention proposal is a provisional assessment, pertaining only to forming the judge's conviction of whether there is that reasonable suspicion regarding the defendant, that would enable the judge to make a

decision, without influencing the presumption of innocence or the ruling that will be made at the end of the criminal trial.

Another argument relates to the need of establishing the legal jurisdiction to resolve such a pre-trial detention proposal by the judge of rights and freedoms. According to art. 224 para. 2 of the Criminal Procedure Code, "the proposal, together with the case file, is presented to the judge of rights and freedoms affiliated with the court that would have the jurisdiction to rule the case on the merits or with the corresponding court in whose constituency the place of detention is situated, the place where the crime was committed or the headquarters of the prosecutor's office who drafted the proposal is situated". Considering that the jurisdiction related to subject matter of the court depends on the legal classification of the deed, for the correct determination of this jurisdiction, the judge of rights and freedoms has the duty to verify this classification.

Thirdly and perhaps most importantly, the correct establishment of the legal classification of the deed is a condition for the very legality of pre-trial detention, when the arrest proposal is based on the provisions of art. 223 para. 2 of the Criminal Procedure Code, irrespective if we are talking about the specific crimes indicated in the text of the law and which make the arrest admissible, or about the maximum punishment for the crime that is the subject of the proposal, a maximum that cannot be determined in the absence of a correct legal classification.

It is, of course, the attribute of the prosecutor, in the stage of the criminal investigation, to establish the legal classification of the deed, a classification that he has the possibility to change until the end of the criminal investigation and that he will mention in the indictment act. However, this jurisdiction of the prosecutor, in the phase of criminal prosecution, does not exclude the judge's own examination, when he is asked to take decisions during the phase of criminal prosecution. In our opinion, this examination does not allow the judge of rights and freedoms to change the legal classification, this possibility being provided only during the trial on the merits and during the appeal, but only to ascertain if it is a correct classification and if that classification makes the arrest proposal admissible or not.

The question arises as to what the solutions available to the judge of rights and freedoms are in the situation when he finds that the legal classification of the deed has not been properly established by the prosecutor. In our opinion, two hypotheses can be distinguished. In case the judge of rights and freedoms finds that the deed that is the object of the proposal has a legal classification that no longer places it in the sphere of the

crimes provided by art. 223 para. 2 of the Criminal Procedure Code. and if in that particular case none of the hypothesis provided by art. 223 para. 1 of the Criminal Procedure Code are applicable, the arrest proposal must be rejected. If, on the other hand, the judge of rights and freedoms finds that the deed that is the object of the proposal does not have a correct legal classification, but has another classification that places it in the sphere of the crimes provided by art. 223 para. 2 of the Criminal Procedure Code, or, although it is not included in the scope of these crimes, the judge finds the existence of one of the cases provided by art. 223 para. 1 of the Criminal Procedure Code (if both grounds of arrest have been invoked simultaneously), the arrest proposal is admissible and the judge will admit or reject it, according to his own conviction, after examining the evidence proposed by the prosecutor's office and after hearing the defendant.

Finally, the question arises, in this last hypothesis, which will be the legal framework that will be mentioned in the arrest warrant, the one established in the proposal or the one that the judge considers to be correct. In practice (District 5 Court of Bucharest, 2017), in a case solution, a solution by which the arrest proposal was admitted, but it was considered that the legal classification of the deeds was not correct, it was established that the judge cannot indicate in the arrest warrant a legal classification that he does not consider correct, and must insert the classification that he considers to be correct.

De lege ferenda, we consider that this procedural aspect aimed at the most intrusive preventive measure (and not only pertaining to this measure, because the reason is the same also for house arrest) must be expressly regulated by the legislator, by inserting clear provisions regarding the limits and effects of the examination that the judge of rights and freedoms makes on the classification of the deeds.

3. Conclusions

As a preventive measure, however, pre-trial detention has a strong punitive effect, even before a court ruling overturns the presumption of innocence. Therefore, the need for this measure must be assessed in the light of its ethics, from this perspective. The social danger of the crime and of the perpetrator, as a specific condition for taking this measure, must be linked to a series of hypotheses, starting from which the judge can begin to assess the need to take this measure, some hypotheses dependent on the person of the perpetrator and others independent of this, hypotheses that are rather related to a series of abstractions that the law makes regarding the

concept of social danger. Due to these aspects, which are embodied in the legal doctrine in two distinct theoretical positions on the ethics of ordering the measure of pre-trial detention, the examination of the legal classification of the crime by the judge of rights and freedoms when ruling on the pre-trial detention proposal is particularly important, as shown above, and can mean the difference between merely applying the law and actually doing justice.

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