REASONING FOR ORDERING THE CUSTODY ON REMAND IN THE LIGHT OF ECHR JURISPRUDENCE

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Abstract: *Article 5 of the European Convention on Human Rights guarantees the right to liberty, which requires among other things that, when ordering the custody on remand of a person, all the conditions stipulated by the national legislation must be met. The decisions ruling the taking, maintenance, extension of this measure must include specific reasons for imposing such a measure, and the reasoning should not be abstract nor general, but related to the actual case. The article analyzes some aspects which could be taken from the ECHR decisions relating to the reasons for which the custody on remand may be ordered.*

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"*Arrest is simply holding a citizen until declared guilty and this holding, causing suffering by nature, should last as little as possible and should be the least severe.*" (Cesare Beccaria)

"*People are born free and remain free and equal in rights*" was proclaimed in 1789 during the French Revolution, by the adoption of the "Declaration of Human Rights and the citizen". *The right to liberty* thus stated has its historical origin in some provisions found in "Magna Charta Libertatum"[1] in the 13th century in England, provisions reaffirmed by the Act of 1679 on "Habeas Corpus", "the Declaration of Independence of the United States" of 14 July 1776, and last but not least, it is one of the fundamental rights guaranteed by the European Convention of Human Rights in Article 5.

The importance of Article 5 of the European Convention on Human Rights which guarantees the physical freedom of the individual and especially its right to not be arrested

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[1] The Document contained in a rudimentary form the interdiction of arbitrary arrest and the principle of equality which led in time to the notion of "rule of law".

or detained improperly became evident when forwarding the first cases to the Strasbourg organs. Thus, almost one third of the first 10,000 claims came from individuals deprived of their liberty. The numerous convictions of the signatory states of the Convention by the European Court of Human Rights for non-compliance with the Article 5 regarding the legality of the measure of preventive arrest, showed that the right to liberty is still an unattainable ideal.

The doctrine[2] showed that the provisions of the European Convention may lead to some general ideas regarding preventive measures, namely that imprisonment can be imposed only by a magistrate, it should be done only according to the legal forms and under the law procedure of each state, to be limited in time, to have a duration as short as possible, to be replaced in certain circumstances with other procedural measures, to ensure the smooth running of the criminal case without maintaining the custody, to be subjected to challenge by the convicted. According to ECHR case law, any deprivation of liberty must meet the essential purpose of Article 5 of the Convention, namely the protection of the individual against arbitrary state authorities[3].

The Romanian law guarantees the right to liberty by the strict legislative provisions, but their enforcement is often superficial. Often the preventive measures, especially the custody on remand is ordered very easily by the magistrate, called to respond to a proposal summarily reasoned by the prosecutor. And if the custody on remand proposal is criticized in terms of motivation, the ruling of the court taking this measure is even less justified.

The theory, however, is clear, the limited circumstances in which the measure of preventive arrest may be ordered are provided. The Romanian Criminal Procedure Code provides that taking the measure of arrest may be ordered only if there is evidence or indications that the person committed an offense, if the penalty for the offense is more than four years, and if there is one of the cases referred to in Article 148 Criminal Procedure Code.

The condition referring to the existence of evidence or solid grounds is a transposition into the domestic law related to the provisions of Article 5 para.1 letter c of the Convention, according to which the deprivation of liberty may be ruled "when there is reasonable suspicion of having committed a crime". The Court reasoned in numerous decisions[4] that the grounds for suspicion that the person has committed a crime should be analyzed objectively based on "data". Thus, the judicial organs are required to hold and allege a credible and consistent explanation for the layout of this measure. The data that form the basis of preventive measures must lead to the suspicion or the presumption that the accused or the defendant has committed a crime[5].

In addition to this condition, any proposal of the prosecutor of taking the preventive arrest measure and any court decision ordering the taking, extension, maintenance of custody on remand must be based on the reasons set out in Article 148 Criminal Procedure Code. But it is not enough to show that the case is incident, but the incidence of

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[2] See Nicolae Volonciu, *Tratat de procedură penală*, general part, vol. I, Paideia Publishing House, 1993, p. 406.
[3] ECHR, case Chahal v. United Kingdom, Decision of 15 November 1996.
[4] ECHR, case Brogan and others v. United Kingdom, Decision of 29 November 1988, Kurt v. Turkey, Decision of 25 May 1998.
[5] See Anastastasiu Crisu, Drept procesual penal, Hamangiu Publishing House, 2011, p. 296.

the respective case must be proved. Thus, the justification of these decisions is required, not just a general, abstract reasoning, but a reasoning related to the actual case.

Theoretically, the Romanian legal system offered more guarantees regarding custody on remand. Thus, the terms where the extension or maintenance of preventive detention is questioned are short, allowing permanent control of the court on the opportunity to set the preventive measure. Also, defendants may submit an unlimited number of requests for revocation, replacement, termination of the preventive measure throughout the criminal trial. But that is why, especially in maintaining the custody status, the reasoning becomes a stereotype because it is almost impossible for the same court to reason a greater number of such decisions, although the situation within the case did not meet great changes so that each time it would present new arguments. The judgment can be appealed (some of them) and as such, even if some arguments wouldn't be taken into consideration by the first instance, these arguments could be exposed in the appeal.

On the other hand, as regarding the explanation of the judgment on preventive measures, the courts are obliged to use the general formula to avoid prejudgment, by a very thorough analysis of evidence. That's why the reasoning is often stereotyped and abstract, because it is very hard to find a middle way between the two dangers – the deficient reasoning and prejudgment regarding guilt.

But from the stereotyped reasoning up to the deficiency of reasoning or lack thereof, is just one step. Thus, a court is likely to take preventive measures or to extend them in order to reason the state of actual danger (Article 148, letter f, Criminal Procedure Code). But is it sufficient that after a period of time, when, no doubt, the danger decreases in intensity, to use the same reasoning? Couldn't we say in this case that the reasoning is missing?

If we analyze the prosecutors' proposals to order the custody on remand, we see that in most cases the custody on remand is based on the provisions of Article 148 letter f Criminal Procedure Code – "the defendant has committed a crime for which the law prescribes life imprisonment or imprisonment for more than 4 years and there is evidence that its freedom would be an actual danger to public order".

Threat to public order could be defined as "*the fear that, once discharged, the defendant would commit criminal acts, or would trigger strong reactions among the public order due to the act committed by him and his state of freedom*"[6].

To be noted that, in order to avoid possible abuses, the text expressly refers to the existence of an "*actual danger*", which means that it must be actual, real and definite, to be evidenced by facts, data and evidence showing unmistakable danger to public order; only a general reference to this notion or its gravity is not sufficient to justify custody on remand. Some find it strange the "claim" of the legislator that the file should contain evidence that the discharge of the defendant threatens the public order. Such a requirement, they say, would lead to the conclusion that in no circumstance the custody on remand could be ordered on these grounds, because there is no such evidence. This argument, however, cannot be accepted, as long as there are decisions of the domestic courts that could properly justify the ordering or maintenance of custody on remand, without being unable to indicate such proof.

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[6] Cristian Rotaru, Considerations underlying the reasons for ordering custody on remand. The amendments made by the Law no. 356/2006 regarding the grounds on which the custody on remand is ruled. The analysis of the Article 148 letter f Criminal Procedure Code, the Review *Curierul Judiciar*, no. 11/2006 p. 54.

The Bucharest Tribunal, Criminal Section I, in the Rule no. 2776/3 of 18 January 2006 correctly noted that the general reasoning given by the Public Prosecutor's Office in its written proceeding that "the danger posed by discharging the defendants for the public order is actual and proven by the existing evidence in the case file", without showing which are those evidences questioned, cannot establish a "relevant" and "sufficient" reasoning, thereby the conclusion of threat to the public order cannot be drawn only on the severity of the crime (corruption) expressed in extended penalty limits provided by the law.

Judges should reason in a more detailed manner in what lies the danger to public order that could result from the release of the defendant. Such reasoning, however, cannot refer exclusively to the gravity of the crime. Thus, not all cases in which offense of robbery is committed requires custody on remand (eg. if the defendant, the primary offender, pulls off a necklace from the victim's neck).

What evaluation criteria should be used to assess whether the release of the defendant threatens the public order or not?

The High Court of Cassation and Justice of Romania, showed in a recent case[7] that the criteria could be: *the actual gravity of the crime committed*, which should not be confused with the social danger of the crime committed, which is revealed in the penalty provided by law[8], *personal circumstances of the defendant* (criminal history, the defendant's attitude towards the its crime and its consequences, the position held by the perpetrator, in this case the Court of Appeal judge), the nature and manner of committing the crime. These elements combined contribute to judges' opinion, who will assess if the defendant threatens the public order or not.

Some judges, however, felt at the time of ordering the custody on remand that in some cases, the *particular seriousness of the crime committed* may be *sufficient* to outline the assessment that the defendant threatens the public order (for example, when the defendant has committed crimes of extreme violence). Using as the main criterion in custody on remand the *severity of the crime* has the effect of ensuring the "predictability", meaning that it would create expectations among the public that for a deed of a specific gravity to be ordered a preventive measure of the same gravity, regardless of personal circumstances of the defendant (or accused).

If there is analyzed only the gravity of the deed committed when ordering the preventive measure under Article 148 letter f, considering the seriousness of the offense committed, I believe that the challenge should be rejected, although the defendant's incriminating crimes are serious in cases where from the start of the offense committed until the formulation demand a long time passed in which the defendant was free and was not a threat to the public order. The judicial practice and ECHR practice stressed that actual danger to public order has an existence related to time. Threat to social order does not amplify with time, but on the contrary it rather fades and gets to a point when it does not meet the requirements of law to justify the maintenance in custody of a person, or ordering such measure, in case the person has been free[9].

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[7] High Court of Cassation and Justice, criminal section, Decision no. 1973/2012.
[8] ECHR case Lettelier v. France, Decision of 26 June 1991.
[9] Case JIGA v. Romania, Decision of 16 March 2010.

However, we must admit that some crimes can cause a particular reaction of the public, certain crimes can cause a disorder in the society, designed to justify a preventive detention. But in this case the judge who will order the custody on remand must not only consider the seriousness of the offense, but also the particular reaction of the public opinion.

Criminal offenses, even if these crimes have a high gravity, reflected in the nature and limits of punishment, are not, by themselves, grounds for continuance of the defendant's arrest. The seriousness of the offense is not the only factor to be taken into consideration to determine whether the non-custodial interrogation presents a danger to public order, as Article 136 last paragraph C, Criminal Procedure Code specifies that one must also take into account the purpose of the measure to be taken, the health, age, criminal record and other circumstances regarding the person in question[10].

ECHR has shown in many cases[11] that the threat to public order necessary for the arrest of a person may be taken into account according to Article 5 of the Convention in exceptional circumstances and cannot be considered relevant and sufficient only if it is based on facts which indicate that the defendant's freedom would actually disturb the public order. It was found that the national authorities had not presented actual facts in relation to the risks in the event of discharge of the persons concerned, had not examined individually each case and had not taken into account the possibility of alternative measures to detention.

Custody on remand, having an exceptional feature – the state of freedom being the normal state – must not extend beyond reasonable limits, regardless of whether or not it will decrease the penalty[12].

Therefore, more attention should be paid by the prosecutor with regards to its reasoning for the custody on remand thus avoiding to request the court to order the custody on remand when the purpose can be achieved by a lighter preventive measure. The Courts, however, apprised with a proposal of custody on remand should consider all the alleged arguments, if they are proven, not just asserted and in case the proposal is reasoned in general, not specifically, to reject the request. Only thus a guarantee of the right to liberty could be provided, protected by the Constitution and the ECHR Convention.

[10] See „Custody on remand. The need to fulfill, cumulatively the requirements of the national legislation, of the EU regulations and of the ECHR jurisprudence", *Săptămâna Juridică*, 5th year, no. 29, p. 23

[11] ECHR, case Calmanovici v. Romania, Decision of 1 July 2008.

[12] ECHR, case Wemhoff v. Germany, Decision of 27 June 1968.