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Adverse Legislative Aspects Regarding the Preventive Measure of House Arrest

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ABSTRACT: House arrest is the second preventive measure of deprivation of liberty, as noted in decision no 361/2015 of the RCC: "from the perspective of nature/substance, duration, effects, method of execution and intensity, both the measure of pre-trial detention and the preventive measure of house arrest concern a major interference in the person's right to individual liberty". We will analyze the preventive measure of house arrest from the perspective of guaranteeing the principle of legal certainty, but we will also argue the wrong classification of this measure in the category of custodial measures although, as regulated by the legislator, although it should be in the category of restrictive measures rights. Thus, the legislature did not take into account the essential element of a custodial measure, namely that of the manner in which it is enforced and its intensity. We will emphasize in this approach that the measure of house arrest does not meet the values of legal equivalence of a measure of deprivation of liberty in relation to the measure of pre-trial detention, but it approaches in terms of content, with a restrictive measure of rights, such as the institution of judicial review.

KEYWORDS: house arrest, pre-trial detention, execution, deprivation of liberty, restriction of rights, amendment of the law

House arrest from the perspective of the decision of the Constitutional Court of Romania, in terms of content and methods of execution

According to the jurisprudence of the Constitutional Court, the measure of house arrest is a measure of deprivation of liberty, assimilated to the measure of pre-trial detention. Also, the court of constitutional contentious held that the provisions of art. 23 of the Constitution must be interpreted in a broad sense (Decision no. 740 of November 3, 2015, published in the Official Gazette of Romania, Part I, no. 927 of December 15, 2015), which presupposes that all the guarantees imposed for taking the measure of pre-trial detention are also required with regard to house arrest. Consequently, in order to respect the individual freedom provided by the provisions of Article 23 of the Romanian Constitution and the right to equal protection by law provided by the provisions of Article. 16 of the Basic Law, the disposition and extension of the preventive measures by which a deprivation of liberty is brought must be subject to the same conditions. Thus, the taking of the measure of house arrest by the judge of the preliminary chamber or by the court against the defendant who was previously remanded in custody or house arrest in the same case is constitutional only if new grounds have intervened, which necessitate his deprivation of liberty (Official Gazette of Romania, no. 159 of March 3, 2017).

Like detention and pre-trial detention - as a pre-trial detention measure, house arrest was configured as a less severe measure than pre-trial detention. Thus, it considers that in the hypothesis targeted by the author of the exception, the provisions of art. 242 para. (2) of the Criminal Procedure Code, which allow the replacement of a preventive measure with another, easier, if the conditions for taking it are met and, following the assessment of the concrete circumstances of the case and the procedural conduct of the defendant, it is considered that the preventive measure lighter is sufficient to achieve the purpose provided in art. 202 para. (1) of the Criminal Procedure Code. Consequently, as long as the ground for replacing the pre-trial detention with another preventive measure depriving of easier liberty is found in the criminal procedural law, the violation of art. 23 para. (2) of the Constitution (Decision of the Constitutional Court of Romania, no. 22 of January 17, 2017, regarding the exception of unconstitutionality of the provisions of art. 220 para. (1) of the Criminal Procedure Code, published in the Official Gazette of Romania no. 159 of March 3, 2017).

The Romanian Parliament, through the initiative of two senators, proposed a project that represents the drawing up of the necessary legal framework in order to be able to implement the monitoring of convicted persons with electronic devices.

According to the draft, the court may order the execution of the prison sentence at home if the following conditions are met: the sentence applied, including in case of concurrence of crimes, is imprisonment for a maximum of 7 years; the offender has not previously been sentenced to imprisonment for more than 2 years, except in the cases provided in art. 42 for which the rehabilitation intervened or the rehabilitation term was fulfilled; the offender has agreed to perform unpaid work for the benefit of the community; In relation to the offender, the conduct of the offender, the efforts made by him to remove or reduce the consequences of the crime, as well as his possibilities of correction, the court considers that the execution of the prison sentence at home is sufficient and the convict will no longer commits other crimes, but it is necessary to supervise his conduct for a certain period.

The draft also refers to the term of supervision, which is equal to the duration of the sentence applied and is calculated from the date of finality of the conviction, during which the convict must comply with supervision measures and perform the obligation to perform work in for the benefit of the community, under the conditions established by the court (www.capital.ro).

According to the provisions of art. 221 of the Criminal Procedure Code, in the content of the measure of house arrest the legislator established obligations imposed on the defendant, for a certain period, not to leave the building where he lives, without the permission of the judicial body that ordered the measure or before which the case is and to subject to restrictions laid down by it.

Along with this general provision, also at art. 221 paragraphs (6) and (7) of the Criminal Procedure Code, we find exceptional provisions by which the defendant against whom this measure was ordered is offered the possibility to leave home, the latter actually representing the place of execution of the preventive measure.

Thus: "at the written and motivated request of the defendant, the judge of rights and freedoms, the judge of the preliminary chamber or the court, by conclusion, may allow him to leave the building for presentation at work, education or training or to other similar activities or for the procurement of essential means of subsistence, as well as in other duly justified situations, for a specified period of time, if this is necessary for the realization of certain rights or legitimate interests of the defendant" (paragraph 6) and "In urgent cases, for justified reasons, the defendant may leave the building without the permission of the judge of rights and freedoms, the judge of the preliminary chamber or the court, immediately informing the institution, body or authority designated with his supervision and the judicial body that took the action house arrest or where the case is pending" (paragraph 7).

From those mentioned by the legislator regarding the measure of house arrest, compared to the measure of pre-trial detention (also as a measure of deprivation of liberty) so, in the same category, we see many differences in terms of nature / substance, content and execution.

The measure of pre-trial detention requires its execution in a forced environment, cohabitation with several persons, activities required in relation to waking hours and sleep schedule, food, place/sleeping space, recreational activities or going out in the air free communication with family members or others. The defendant under the measure of pre-trial detention may not leave the building of the pre-trial detention or the penitentiary, as the case may be, in order to follow courses of education or professional qualification or presentation at a job, etc. However, in the execution of the measure of house arrest, all the aforementioned activities are carried out, in principle, at the free choice of the inmate, who can have the freedom of movement and socialization.

It should also be noted that the defendant subject to the measure of house arrest, if he owns a property with real estate and yard, can carry out recreational and sports activities without restrictions imposed by space and time (we refer to the space of the defendant's domicile).

A clear distinction must be made between an imposed environment, imposed activity or inactivity and an environment chosen with its corresponding counterparts.

We do not consider the equivalence of one to one regarding the deduction from the punishment provided in art. 399, paragraph (9) reported to art. 555 (align. 3) Criminal Procedure Code regarding the days spent under the measure of pre-trial detention with the days spent under the measure of house arrest because the conditions of execution are not only not equivalent, they are opposite. The chosen environment and the imposed environment are divergent notions from a legal point of view and not only. It is therefore not fair to consider a day spent under house arrest to be equivalent to a day spent under pre-trial detention in calculating the days to be deducted from the sentence to be served.

From the perspective of offering the possibility to leave the domicile for carrying out various activities of subsistence procurement or conducting courses of education or professional development, the defendant under house arrest is offered the opportunity to social life, to relate to the free social environment, prerogatives that the pre-trial detainee cannot enjoy. Even in judicial practice it has been found that by approving a person under house arrest, to go to work two days-an hour and a half, respectively three days-five hours and a half a week, lead to the lack of substance of the private measure because the defendant was in a very large proportion in his free time (C. A. Oradea, Criminal Section, Conclusion no 102/JDLC/2015 in file no 3562/111/2015).

From the perspective of sanctioning non-compliance with a custodial measure, the legislator legislates the passage of the place of detention in which the defendant is remanded in custody as a crime of escape and if the defendant under house arrest leaves without the required space will be considered disregarded/violated a preventive measure, the sanction being able to be the replacement of this measure with the measure of preventive arrest, therefore, the commission of any crime is not retained.

As regards the intensity of a custodial measure, it is available only if certain conditions imposed by the legislator are met (art. 202 Criminal Procedure Code).

The intensity of a measure of deprivation of liberty has as special legal valences the isolation of the defendant from the social environment because it represents a public danger or disregards the protection of legal protection by the state, or violates the rights and freedoms of his peers. Through the current regulation of the measure of house arrest, the defendant is granted an increased freedom of interaction with the social environment, thus bringing it very close to a preventive measure restricting rights and freedoms and not to the measure of pre-trial detention with which it is categorized in law current.

As we address some connoisseurs of legal sciences, we will not detail judicial control as a preventive measure restricting freedom but to legally substantiate this approach, we make this reference to the institution of judicial control to highlight that it is closer to legal nature but also content with the measure of house arrest.

We take into account the fact that, for both previously mentioned preventive measures, the judicial body imposes a series of measures that must be observed by the defendant, and their non-observance attracts the criminal requirement that will determine the judge of rights and freedoms or the judge of the preliminary chamber or court trial, only to replace the current measure with another more severe measure.

De Lege Ferenda Proposal

Without being in the situation of jurists who consider the decisions of the Constitutional Court as immutable, we consider that the inclusion of the measure of house arrest in the category of custodial measures is wrong and we propose that this measure be included in the category of restrictive measures or the creation of an intermediate category, between the two types of preventive measures, even with the name of intermediate restrictive measure of house arrest.

Conclusions

Based on their coercive nature, coercive measures have been designed as procedural measures made available to the judiciary, which they can order when necessary to ensure the proper conduct of the

criminal proceedings, involving a restriction or even a deprivation of human liberty, (one of the fundamental social values), measures governed by conditions the fulfilment of which represents guarantees established on the one hand in favour of the individual and on the other hand against arbitrary actions of the state having to take into account other applicable provisions, such as the European Convention Human Rights (in this case art. 5) but also the provisions of the national Constitution.

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