

The Effects of the Romanian Constitutional Court Decisions in the Extradition Proceedings between Romania and the United States of America

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ABSTRACT: The Romanian Constitution states in Article 147 that: “(1) The provisions of laws and ordinances in force, as well as those of regulations, found to be unconstitutional, shall cease to have legal effect 45 days after the publication of the decision of the Constitutional Court if, within this period, the Parliament or the Government, as the case may be, do not bring the unconstitutional provisions into line with the provisions of the Constitution. During this period, the provisions found to be unconstitutional shall be automatically suspended.” It follows that, in principle, the effects of these decisions are for the future, and within the period expressly provided for by the constitutional rule (45 days), the legislator is obliged to amend the legal provisions (provisions) declared unconstitutional, but also that during this period these provisions are suspended by law, i.e., they can no longer be applied. The phrase “for the future” also means that the decisions of the Constitutional Court apply to pending and final cases, as well as to any other future situations. The Constitutional Court itself, in its Decision no. 454/4 July 2018, has specified in recital 63 the effects of its decisions: “... unconstitutionality is a sanction of constitutional law that applies immediately to pending situations.” If an exception of unconstitutionality concerns a provision of the Framework Law on international judicial cooperation, namely Law No 302 of 2004 (republished in 2022), it is in the field of international judicial cooperation, a procedure governed by the Extradition Treaty between Romania and the United States of America, signed in Bucharest on September 10, 2007, and by the Framework Law, as a special law governing all international judicial cooperation in criminal matters, which is supplemented by the provisions of the Code of Criminal Procedure.

KEYWORDS: international judicial cooperation, extradition, exception of unconstitutionality, obligation to respect decisions of the Constitutional Court, duration of arrest in extradition proceedings, respect for the rights of the extraditable person, judicial practice

1. Introduction

First of all, it should be noted that the institution of extradition, as a procedure which is specific to the field of international judicial cooperation, is not intended to prejudice the merits of the criminal proceedings brought against the extraditable person by the requesting State, nor an assessment of the judgment of conviction where extradition is requested for the purpose of enforcing a sentence which has been definitively imposed, nor does it constitute an anticipation of a sentence, as this measure is ordered following the commencement of criminal proceedings against the extraditable person and not as a result of the removal of the presumption of innocence. If the extraditable person has been definitively convicted, the presumption of innocence has been removed, but even in this case, there are procedural safeguards, which we will examine below.

Obviously, any person subject to the law has the right to invoke a plea of unconstitutionality in the course of the procedure if he or she considers that the legal provisions applicable in the case in question are contrary to the fundamental law of the State, including in the extradition procedure, and there have been many such cases.

What is relevant for the present scientific approach is the situation in which this exception of unconstitutionality concerns the Framework Law on International Judicial Cooperation and/or the provisions of the Extradition Treaty between Romania and the United States of America, signed in Bucharest on September 10, 2007, published in the Official Gazette of Romania, Part I, no. 387 of May 21, 2008.

Consequently, where the exception of unconstitutionality has been upheld, the courts are obliged to apply that decision and comply with the Court's order. The judgments delivered by the Constitutional Court are binding on the institutions concerned, which are under an obligation to put an end to the infringement found and to remedy the consequences of that infringement, in the sense of taking measures in its legal order, such as legislative amendments, to put an end to that infringement and to remedy all the effects of that infringement.

2. Use of the term ‘offender’ in the Extradition Treaty between Romania and the United States of America; application of the Treaty to offences committed before its entry into force

During 2012, an extraditable person raised an exception of unconstitutionality concerning the use of the phrase “treaty for the extradition of criminals” in the introductory part of Law no. 111/2008 ratifying the above-mentioned bilateral treaty. It was found in the decision of the Constitutional Court that the author of the exception claimed that the phrase “treaty for the extradition of criminals” in its preamble violates the constitutional provisions of Article 23 para. (11) on the presumption of innocence and Article 11 para. (3) according to which, “If a treaty to which Romania is to become a party contains provisions contrary to the Constitution, it may be ratified only after the Constitution has been revised”. In this regard, the author of the exception argued that the provisions of the law at issue “are contrary to the presumption of innocence enjoyed by any person involved in criminal proceedings, as long as that person has not been convicted by a final judgment. Given that the purpose of the treaty is the extradition of offenders, a category which, under the terms of the treaty, also includes those who are prosecuted, such a qualification is a real denial of the principle enshrined in Article 23(2) of the EC Treaty. (11) of the Constitution. He also argued that the provisions of Article 22 of the Extradition Treaty between Romania and the United States of America were contrary to the constitutional provisions of Article 11(11) of the Constitution. (2), according to which “Treaties ratified by the Parliament, according to law, are part of domestic law”, Art. 15 para. (2) on the principle of non-retroactivity of the law, Article 19 on extradition and Article 78 on the entry into force of the law, since the extradition treaty also applies to offences committed before its entry into force.”

The Constitutional Court found that “the use in the preamble to the Treaty of the term ‘offender’ does not have the meaning of rebutting the presumption of innocence enshrined in Article 23(2) of the Treaty. (11) of the Constitution, but serves to circumscribe the subject matter of the treaty, expressing the concern of the two signatory States to combat the phenomenon of crime, which has experienced a particular intensification at international level, especially a certain offensive of organized crime. Extradition is an act of inter-State judicial assistance in criminal matters aimed at transferring a person prosecuted or convicted of a criminal offence from the sphere of judicial sovereignty of one State to the sphere of another State.”

It was also found that the application of the provisions of the Treaty to offences committed before its entry into force does not amount to a rebuttal of the presumption of innocence and does not contravene the principle of non-retroactivity of the law laid down in Article 15(1) of the Treaty. (2) of the Constitution, on the ground that “it applies to extradition proceedings in respect of which extradition requests were submitted to the courts of the requested State after the date of its entry into force. However, the procedural rules are of immediate application and the time of the commission of the offence is irrelevant”.

3. The concept of “provisional arrest for a purpose to extradition”. Sui-generis concept?

3.1. Presentation of the facts and procedure in the extradition requested by the United States of America

We would like to point out that the same case has been the subject of another study by the authors, but from the point of view of the interference and effects of the decisions handed down by the European Court of Human Rights, since the extraditable persons have decided to use all the legal means at their disposal. According to Article 39 of the Rules of Procedure of the Court, the applicants should not be removed from the territory of Romania, i.e. not be extradited, as a provisional measure. In essence, the Department of Justice requested by “verbally note during 2021 the extradition of three persons, one a Romanian citizen and the other two persons having different foreign citizenship, for trial in the United States of America for the following facts:

Count 1: Conspiracy to commit racketeering in violation of Title 18, United States Code, Section 1962(d), which carries a maximum penalty of life imprisonment;

Count 2: Conspiracy to import and export cocaine and to manufacture and distribute cocaine with the intent, and knowing, and having reason to believe that such cocaine will be imported into the United States, in violation of the provisions of Title 18, United States Code, Sections 960(b)(1)(B) and 963, which provide for a maximum penalty of life imprisonment; and

Count 3: Conspiracy to commit money laundering in violation of the provisions of Title 18, United States Code, Sections 1956(a)(2)(A) and 1956(h), which provide for a maximum penalty of 20 years imprisonment.

The indictment issued by the U.S. Marshals Service revealed that the individuals requested and others known and unknown to the Grand Jury were members and associates of the H.A. Club. Motorcycle Club or “HAMC” a transnational outlaw motorcycle gang whose members and associates engage in criminal activity, including drug trafficking, money laundering, illegal arms trafficking, and acts of violence, including murder. During the same period, members of the organization operated throughout the United States, including in the Eastern District of State X as well as in other countries,” following a detailed description of their alleged crimes.

The Bucharest Court of Appeal, Criminal Division I, decided in separate criminal judgments to grant the extradition request made by the United States Department of Justice and ordered the extradition and surrender to the requesting judicial authorities of the three persons. The criminal judgments of the Bucharest Court of Appeal became final with the dismissal by the High Court of Cassation and Justice of the appeals lodged by the extraditable persons as unfounded.

3.2. Arguments and procedure before the Constitutional Court

In this case before the Constitutional Court, which is totally atypical and unprecedented in the history of extradition cases between Romania and the United States of America, as well as between Romania and any other third country or member state of the Council of Europe, an exception of unconstitutionality of Article 52 para. (3) and Article 57 para. (5) and (6) of Law 302/2004 on international judicial cooperation in criminal matters. The authors of the exception of unconstitutionality argued that: “the notion of “provisional arrest for extradition purposes” is not defined by the provisions of the Framework Law or those of the Code of Criminal Procedure, as there is no provision for any duration for which this measure may be ordered, being a sui generis notion... according to the case-law of the European Court of Human Rights, it is essential that the conditions for deprivation of liberty be clearly defined under national law and that the law itself be foreseeable in its application in order to meet the criterion of legality laid down by the Convention for the Protection of Human Rights and Fundamental Freedoms. The elements to be taken into account when assessing the “quality of the law” include, in particular, the existence of clear legal provisions on the ordering of detention, the maintenance of that measure and the determination of its duration, and the existence of an effective remedy by which the applicant can

challenge the lawfulness and duration of detention. It points out that no deprivation of liberty must be arbitrary and must also respect the principle of proportionality. In conclusion, the absence of a definition or criteria for determining the content of the measure of ‘provisional arrest for the purpose of extradition’, its legal regime, and the absence of concrete criteria for the revocation, replacement or de jure termination of the measure are the equivalent of a lack of foreseeability of the law, with the consequence of a breach of the guarantees of individual liberty laid down in Article 23 of the Constitution.”

With regard to the claim that the concept of ‘provisional arrest for the purpose of extradition’ is not defined by the provisions of the Framework Law or those of the Code of Criminal Procedure, the Constitutional Court held that: “a legal provision must be precise, unequivocal, establish clearly defined, predictable and accessible rules, the application of which does not allow arbitrariness or abuse. The legal rule must regulate in a unitary, uniform manner, and lay down minimum requirements applicable to all its addressees”.

Considering the lack of a definition of the concept of “provisional arrest for the purpose of extradition”, both in the Framework Law and in the Code of Criminal Procedure, in the context of the review of constitutional compliance, the Court stated in the recitals to the decision under consideration that the concept in question has a “meaning specific to the subject-matter under consideration, which indicates the Legislature’s intention to attribute to it, in the context of the regulation of the extradition procedure, the meaning resulting from the common meaning of the concepts of which it is composed” .

The Court did not accept the allegation of the authors of the exception of unconstitutionality that this concept is a sui-generis notion, because, “according to the Explanatory Dictionary of the Romanian Language, the word “arrest” means “detention under legal custody of a person”; the word ‘provisional’ means ‘which lasts or is intended to last for a limited time, after which it is to be replaced; temporary, ephemeral, transitory’; the prepositional phrase in view of’ means ‘for the purpose of’; the word ‘extradite’ means ‘to hand over someone who has been prosecuted or convicted to another State, upon request, under the conditions laid down in international conventions’. In this context, the Court recalled that, both under the Constitution and the case-law of the Constitutional Court and under the Convention for the Protection of Human Rights and Fundamental Freedoms and the jurisprudence of the European Court of Human Rights, the arrest of a person for the purpose of extradition constitutes a deprivation of liberty. At the same time, the provisions of Article 18 of the Framework Law regulate the persons subject to extradition and Article 19 of the same normative act regulates the persons exempted from extradition. Thus, the Court held that “the generally accepted meaning of the term ‘provisional arrest for extradition’ is “temporary deprivation of liberty of a person who is the subject of extradition proceedings”.

It should also be noted that the authors of the objection of unconstitutionality have formulated criticisms which have taken into account the rules of legislative technique, as well as those relating to the criminal policy of the State, to the effect that the extradition procedure should be regulated by the Code of Criminal Procedure, which is neither possible nor appropriate, given the specificity and essence of international judicial cooperation, as is shown by the taxonomy of rules governing this specific field. The concept of sui generis was originally a particular term used in Roman law to describe a legal situation whose singularity made it impossible to classify it in an existing category, necessitating the creation of specific texts. However, extradition and the concepts associated with it, including provisional arrest on an emergency basis or for the purpose of extradition, are not sui-generis concepts, but have long been regulated in all legal systems, and are not a singular institution that could not be placed in an existing category.

Moreover, it is not a preventive measure that should be included in the category of those provided for by the Code of Criminal Procedure, in the chapter on preventive measures, because the legislator has taken into account their different legal nature, being preventive measures that can be taken in the course of the execution of requests for international judicial cooperation, which are issued and executed on the basis of international, bi or multilateral treaties, conventions,

whether universal or regional (for example, the United Nations Convention against Transnational Organized Crime, Palermo 2000 or the United Nations Convention against Corruption, Mérida 2003, the 1957 European Convention on Extradition of Paris) or which are of an inter-State nature (for example, the 2007 Treaty between Romania and the United States of America on Extradition, applicable in the present case), the provisions of which are supplemented, in accordance with the role of the supplementary rules, in the special law on international judicial cooperation in criminal matters.

The reasoning of the Romanian Legislator, similar to that of the Legislator of other States (Member States or third countries), was to avoid situations in which the execution of such requests would become impossible due to differences in the legal systems of the States. At the same time, given that this procedure does not deal with the offence which is the subject of the criminal proceedings, but with a request for international judicial cooperation, which has the special nature of the procedure provided for in Title II of the Framework Law, the Legislator has sought to ensure that the procedure is expedited and that a final judgment is obtained quickly, so that the judicial control of the decision can be exercised, in accordance with the positive obligations established by the European Convention on Human Rights and Fundamental Freedoms. Thus, the constitutional review found that the wording used complies with the standards of quality of the law required by Article 1(1)(b) of the Constitution. (5) of the Constitution, the meaning of which can be determined by the addressees of the legal rule under criticism.

4. Ending of provisional arrest with a view to extradition. Revocation or replacement of provisional arrest in extradition proceedings

4.1. Legal nature of provisional arrest for the purpose to extradition

Another criticism of unconstitutionality concerned the lack of safeguards against arbitrariness in relation to the measure of provisional arrest for extradition and the impossibility of applying less intrusive measures than detention.

In that light, the Constitutional Court held that deprivation of liberty in extradition proceedings subsequent to the decision granting the request for cooperation whereby extradition was granted and the person was ordered to be surrendered to the requesting State, in the light of the European Convention on Human Rights and Fundamental Freedoms, does not require such detention to be reasonably necessary, but “will only be justified if the expulsion or extradition proceedings are ongoing”. To the extent that “such proceedings are not conducted with special diligence, the detention ceases to be justified under this rule”.

Consequently, the Court also noted that when the extradition decision is handed down, the court will automatically order either continued provisional arrest for the purpose of extradition or arrest for surrender, the purpose of the measure in both cases being to enforce the decision handed down by surrendering the extradited person to the requesting State.

Regarding the duration of deprivation of liberty at this stage of the extradition procedure, the Court observed that “although the legislator has not expressly provided for a maximum duration, it can be determined by adding together the periods laid down by the Legislator in the provisions of Articles 52, 53 and 56 of Law No 302/2004. At the same time, given that the purpose of deprivation of liberty at this stage of the extradition procedure is to enforce the judgment by surrendering the extradited person to the requesting State, the Court observes that the conditions laid down in Article 5(1) (f) of the Convention are satisfied, in order for detention not to be classified as arbitrary and considers that the Legislature’s choice not to lay down an obligation for periodic review of the custodial pre-trial detention measure and the possibility of replacing that measure with another measure is justified.”

4.2. Occurrence of a case of force majeure making it impossible to surrender/take back the extradited person

The hypothesis in question, governed by the provisions of Article 57 para. (5) and (6) of the Framework Law, criticized in the constitutionality objection, is an integral part of the body of legislation governing that stage of the procedure which intervenes following the occurrence of a case of force majeure which makes it impossible to hand over/take back the extradited person, a situation which determines the maintaining of the measure of provisional detention for an indefinite period.

With regard to this hypothesis, the Constitutional Court held that “the rule is that if the extradited person is not picked up on the date set, he or she may be released on expiry of a period of 15 days, calculated from that date, which may be extended by a maximum of 15 days. Thus, the measure of arrest for surrender shall automatically cease if the extradited person is not taken back by the competent authorities of the requesting State within 30 days of the date initially agreed for surrender. The Court observes that this conclusion follows from a combination of the provisions of Article 43(7) and Article 57(5) of the Framework Law. In this case, the court orders the immediate release of the extradited person and informs the Ministry of Justice and the International Police Cooperation Centre of the General Inspectorate of the Romanian Police.”

Consequently, the Constitutional Court found that “the legislature has provided for the *de jure* cessation of the measure of deprivation of liberty taken in respect of the extradited person, with the consequence that the person is released on the expiry of a period of not more than 30 days calculated from the date fixed for surrender between the requested State and the requesting State. In other words, at this stage the extradited person may only be held in custody for a maximum of 30 days.”

As regards the notion of “force majeure”, the Constitutional Court ruled that “it is not defined by Law No 302/2004, as there is no regulation of this kind either in the Code of Criminal Procedure or in the Criminal Code. Instead, the Court notes that, according to Article 1.351 para. (2) of the Civil Code, “force majeure is any external, unforeseeable, absolutely invincible and unavoidable event”. At the same time, other acts of law provide, in the context of the subject-matter which governs it, that force majeure means an unforeseeable, unavoidable and insurmountable event which makes it temporarily or definitively impossible to fulfil/perform, in whole or in part, certain obligations/operations. [...] Also, in order to determine the scope of the notion of “force majeure” in a given matter, the legislator has linked the existence of these cases to strictly determined events. For example, according to Article 2(j) of Government Emergency Ordinance no. 21/2004 on the National Emergency Management System, are indicated as types of risk “cases of force majeure caused by fires, earthquakes, floods, accidents, explosions, damage, landslides or collapses, mass illness, collapse of buildings, installations or developments, grounding or sinking of ships, falling objects from the atmosphere or the cosmos, tornadoes, avalanches, failure of public utilities and other natural disasters, major disasters or large-scale public events caused or contributed to by specific risk factors; strikes cannot be considered as a type of risk under the terms of this Emergency Ordinance”. [...] In the literature, with reference to the Civil Code regulation, it has been stated that force majeure is an external natural phenomenon of an extraordinary, unforeseeable and unremovable nature, which objectively and without fault prevents a person from acting as he would have wished in order to prevent damage. The characteristics of force majeure events must be: external to the injurer, unforeseeable, absolutely invincible and unavoidable. [...] As regards the extradition procedure, the Court considers that a case of force majeure is an event which is beyond the control of the authorities of the requesting or requested State, which cannot be foreseen by them and the occurrence of which cannot be avoided or overcome, so that its effects cannot be limited, even if the authorities concerned have done their utmost. At the same time, the Court holds that there must be a causal link between the occurrence/production of the effects of force majeure and the impossibility of surrendering/taking back the extradited person on the date agreed between the requested State and the requesting

State. [...] Once the surrender/return of the extradited person to the requesting State is impeded as a result of the occurrence of force majeure, that person shall remain deprived of liberty for an indefinite period of time. [...] The Court observes that, although the purpose of the deprivation of liberty remains the same in this case, namely the enforcement of the extradition decision, the application of the measure at this stage of the extradition procedure will be for an unlimited period of time and in the absence of a clear and predictable procedure. The mere existence of that purpose cannot, in itself, constitute sufficient grounds for maintaining indefinite deprivation of liberty. That is because, although it is sufficient for a deprivation of liberty to be ordered that an extradition procedure is in progress, other conditions must be satisfied in order for it not to be arbitrary. [...] The Constitutional Court has ruled that an interference with the right to individual liberty is not proportionate to the cause which gave rise to it, and does not strike a fair balance between the public interest and the individual interest, when it can be ordered for an unlimited period of time. The principle of proportionality, as governed by the specific case of Article 53 of the Constitution, requires that restrictions on the exercise of fundamental rights or freedoms must be exceptional, which necessarily implies that they must also be temporary. The Court found that the right of the judicial authorities to order certain preventive measures for unlimited periods of time, a right which entails a temporary unlimited restriction of the fundamental rights and freedoms covered by the content of that measure, is contrary to the standards of constitutionality. Such a restriction is unconstitutional, since the principle of proportionality affects the normative content of the fundamental rights concerned, and thus their substance, and is not limited to restricting the exercise of those rights.” [...]The Court finds that, at present, the law does not regulate a procedure applicable to the analysis of the measure of deprivation of liberty under which the extradited person is held, where the person could not be surrendered because of force majeure, thus leaving room for arbitrariness. The Court considers that the absence of clear and foreseeable rules on the deprivation of liberty of an extradited person, whose surrender on the date agreed between the requested State and the requesting State was not affected because of the occurrence of a case of force majeure, is a prerequisite for arbitrary/random interpretations and applications of the legal provisions, with the consequence that the very measure restricting the exercise of individual liberty is arbitrary.”

Accordingly, the Constitutional Court declared that the phrase “subject to the case provided for in para. (6)” contained in Art. 57 para. (5) of Law No 302/2004 on international judicial cooperation in criminal matters and the provisions of Art. 57 para. (6) of the same act are unconstitutional.

Following this decision, the Romanian legislator has decided to comply with this provision, given that the decisions handed down by the Constitutional Court are mandatory by law, as stated at the beginning of this study, and failure to comply with them by the courts, for example, is evidence of bad faith or serious negligence in the application of the law, which may lead to disciplinary liability of the judge.

Therefore, the new wording of Article 57(5) (6) of the Framework Law is: “(5) If the extradited person is not taken back on the date set, he or she may be released on the expiry of a period of 15 days, calculated from that date; this period may be extended by no more than 15 days.

(6) By way of exception to the provisions of paragraph (5), in case of force majeure preventing the surrender or reception of the extradited person, the Romanian authorities and those of the requesting State shall agree on a new surrender date, but the duration of the total provisional detention until the date of surrender may not exceed 180 days.”

Consequently, the text of the special law has become similar to the provision in the Code of Criminal Procedure on the maximum duration of the person’s detention during criminal proceedings.

Conclusions

Without intending to criticize the decision of the Constitutional Court, we limit ourselves to observing that, in our opinion, the text under criticism contained a clear, precise, foreseeable and predictable rule, in close accordance with the principles of legality and judicial security, bearing in mind that once the extradition decision has become final, surrender must take place as soon as possible, this is the essence of international judicial cooperation. In this process, the court does not rule on the guilt or innocence of the person involved, since the presumption of innocence is also respected in this procedure, but decides on a request for cooperation in accordance with the specific principles of the matter, namely that of loyal cooperation and mutual trust established by the Treaty. The period of arrest with a view to surrender may not be extended indefinitely, but it must be established that the measure of arrest is de jure ended if the extradited person is not taken over by the competent authorities of the requested State.

In addition, the rules of legislative technique for the drafting of legislation provides that the legislative solutions envisaged must be flexible and rigorous in order to combine the stability of regulation with the forward-looking requirements of social development. Moreover, there is nothing to prevent the person concerned from making applications to replace the provisional detention measure, relatively similar to the habeas corpus procedure, and the court from deciding on them. As we have pointed out, we do not intend to criticize the Constitutional Court's solution, however, it is essential to acknowledge, as legal practitioners and theorists, that in the specific field of international judicial cooperation, the assessment that the provisional arrest measure is arbitrary could be such as to weaken the credibility and legitimacy of the solution adopted in view of the specific requirements of international judicial cooperation which, in the context of the pandemic, has experienced shortcomings both in terms of communication and, above all, in terms of organising the transport and escort of extraditable persons.

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