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Preventive Arrest of Minors: Regulation, ECHR Jurisprudence and Applicability in Romanian Criminal Law

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Abstract: The special situation of children and minors, including those who commit crimes, requires not only distinct legal provisions but also the consistent pursuit of the best interests of the child when they come into contact with the criminal justice system. In this regard, the legal provisions of the Romanian criminal procedure law contain provisions which, although not detailed and requiring corroboration with other provisions, enshrine and guarantee that the preventive detention of minors is exceptional and may only be ordered when no less severe preventive measure is not appropriate in the case in question. Romanian case law has repeatedly emphasized this aspect, both in relation to preventive detention and the application of educational measures involving deprivation of liberty as criminal penalties. This study emphasizes the importance of applying these principles consistently in practice to ensure that the rights of minors are protected within the criminal justice system.

Keywords: Preventive Detention, Minor, Exception, Best Interests of the Child

Introduction

The Romanian Criminal Procedure Law, which underwent extensive changes in 2014 with the entry into force of the new codes (criminal and criminal procedure), was based on the principles established by the case law of the European Court of Human Rights, which expressly regulates the principle of proportionality of preventive measures to the seriousness of the charge and the principle of the necessity of such a measure to achieve the legislative purpose pursued by its imposition. With regard to preventive detention, the text expressly provides for its exceptional nature and, at the same time, its subsidiary nature in relation to other preventive measures that do not involve deprivation of liberty, being the last resort (Franguloiu, 2021, pp. 7-17). It is important to note that there is a wide range of preventive measures designed to ensure their purpose, namely the proper conduct of criminal proceedings, such as judicial supervision and judicial supervision on bail, as distinct preventive measures (adopted on the French model). However, it should be noted that bail not only guarantees the defendant's participation in the criminal proceedings, but also covers the damage caused and the payment of the fine. Through the extensive reform process mentioned above, the cases in which a person may be remanded in custody in the form of general cases have been rethought (Article 202 of the Criminal Procedure Code) – the risk of absconding, influencing the criminal investigation, and committing new crimes, as well as a special case (Article 223(2)), where there is a concrete danger to public order in the case of serious crimes. This danger shall be assessed on the basis of legal criteria which, according to the German model, must be current, meaning that this aspect must be proven at the time when the judge of rights and freedoms must decide on the deprivation of liberty. Another preventive measure introduced in the criminal law reform process, inspired by the Italian model, is house arrest, as a concrete and effective possibility for individualizing the preventive measure, through Articles 218-222 of the Criminal Procedure Code. Following the Italian model and in order to respect the preventive nature of the arrest measure, the maximum time limits for which this measure may be ordered during the trial phase are also regulated.

With regard to minors, there is the possibility of depriving them of their liberty through general measures, but only if the principle of proportionality between the legitimate aim pursued by the measure and the impact that such a measure would have on their personality and development is respected (Franguloiu, 2004).

Specific aspects of the measure of preventive detention of minors provided by the practice of the European Court of Human Rights

We begin this analysis with the provision contained in Article 5 of the European Convention on Human Rights and Fundamental Freedoms (which is part of domestic law): "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty except on such grounds and in accordance with such legal rules as the law of each State, being a free and democratic society, recognizes as necessary for the protection of the life of other persons, of the liberty of his liberty, of the free exercise of his religion, of respect for his honour and of his rights to property, or of limited criminal law." As a preliminary point, it should be emphasized that an important element constituting a guarantee against arbitrariness is the "quality" of legal rules, in other words, the need for the national law authorizing deprivation of liberty to be accessible and predictable. Alongside accessibility, predictability is the second component of the principle of legal certainty, a fundamental guarantee against arbitrariness.

In this regard, the European Court of Human Rights (ECtHR) has held that a law that is capable of covering an indefinite number of actions because of its generic wording is lacking in predictability. This approach of the European Court was highlighted in the case of *Gusinskiy v. Russian Federation* (ECtHR, judgment of 19 May, 2004). In the same vein, in *Baranowski v. Poland* (28 March 2000), the Court held that the absence of a precise provision specifying the conditions under which it is possible to extend detention is contrary to Article 5 of the Convention. Similarly, in *Jecius v. Lithuania* (31 July 2000), the Court ruled that the deprivation of liberty of a person for an indefinite period, without prior authorization by a judge and without specifying the conditions under which such a measure may be imposed, is contrary to the principle of legal certainty. In *Varbanov v. Bulgaria* (5 October 2000), the detention of the applicant by the prosecutor on the basis of internal directives of the public prosecutor's office cannot be considered "law" as they are not published and have no legal force in which the applicant's detention took place on the basis of a law allowing the arrest of a person in "exceptional circumstances", without defining in any way the content of this concept.

Another guarantee against arbitrariness is that the measure taken must be necessary and proportionate to the circumstances of the case. In the case law of the ECtHR, necessity has been assessed as a criterion justifying measures depriving or restricting liberty if they are appropriate, reasonable, absolutely necessary, and strictly required by the circumstances of the situation (Micu, 1998, p. 162). In this context, the Court's judgment in the case of *Witold Litwa v. Poland* (ECtHR, judgment of 4 April 2000) in which the Court held that the detention of a person is such a serious measure that it can only be justified if other, less severe measures have proved ineffective in protecting the interest pursued.

The second condition imposed on States for a measure depriving a person of liberty to be compatible with the object and purpose of the Convention is that it must be included in at least one of the cases provided for in Article 5(1). This last condition is, in fact, a direct consequence of the fundamental rule that no one may be arbitrarily deprived of their liberty. Therefore, any violation, limitation, or alteration of this right is based on a reason other than those listed exhaustively in Article 5(1) will be considered unlawful (*Jecius v. Lithuania,* ECtHR, judgment of 31 July 2000; *Bojilov v. Bulgaria,* judgment of 22 December 2004; *Ciulla v. Italy,* judgment of 22 February 1989).

The exhaustive list of exceptions to the right to liberty and security provided for in the provisions of the Convention includes the following cases: detention following conviction

(Article 5(1)(a)); arrest or detention for non-compliance with a legal obligation or a court order (Article 5(1)(b)); preventive detention and arrest where there are reasonable grounds to suspect that an offense has been committed (Article 5(1)(c)); detention of minors in certain special situations (Article 5(1)(d)); detention of sick or disabled persons (Article 5(1)(e)); and detention of aliens (Article 5(1)(f)).

Since detention is a significant restriction of a person's right to liberty, preventive detention cannot be imposed arbitrarily, but depends on the fulfillment of several conditions that have been rigorously established in both national and international regulations.

Legal doctrine has emphasized (Mateuț, 2007, p. 182; Theodoru, 2008, p. 444) that this measure raises complex legal, psychological, and social issues, as it may generate a genuine presumption of guilt on the part of the individual that is not always compatible with the fundamental principle of the presumption of innocence (Bitanga, Franguloiu & Hermosilla, 2018, p. 87), but above all it may incite the judge to impose a sentence at least equal to the duration of the preventive detention.

Given the subsidiary and exceptional nature of preventive detention, we agree with the doctrine that as long as a person is presumed innocent until a final conviction is handed down, they may only suffer the consequences of their actions in very exceptional circumstances. Thus, we consider that the preventive detention of a person (and in particular of a minor) cannot be ordered solely on the basis of the fact that there are suspicions that they have committed an offense, as it is absolutely necessary that additional conditions be met in this regard. Although in most interpretations formulated in doctrine (Renucci, 2009, p. 329), Article 5(1)(c) contains three distinct cases of deprivation of liberty, we do not agree with the view that the existence of reasonable grounds for suspecting that an offense has been committed is, in fact, a general condition, prior to any other grounds that would justify this preventive measure.

Furthermore, the Court considers that the unacknowledged detention of an individual constitutes a total denial of the fundamental guarantees enshrined in Article 5 of the Convention and a particularly serious violation of that provision (*El-Masri v. the Former Yugoslav Republic of Macedonia* (MC), para. 233). The failure to record information such as the date and time of arrest, the place of detention, the name of the detainee and the reasons for detention, and the identity of the person who carried out the detention may be regarded as incompatible, inter alia, with the very purpose of Article 5 of the Convention (*Kurt v. Turkey*, § 125), as well as with the requirement of lawfulness of detention within the meaning of the Convention (*Angelova v. Bulgaria*, § 154).

With particular reference to minors, under European standards and Resolution CM (72) of the Committee of Ministers of the Council of Europe (*X. v. Switzerland*, Commission Decision of 14 December 1979), the term "minor" applies to persons under the age of 18 (*Koniarska v. the United Kingdom*). Moreover, Article 5(1)(d) is not the only provision authorizing the detention of minors. This text actually contains a specific, but not exclusive, case allowing the detention of minors, namely where it is for: a) the purposes of education under supervision; b) for the purpose of bringing him before the competent authority (*Mubilanzila Mayeka and Kaniki Mitunga v. Belgium,* para. 100).

The first sentence of Article 5(1)(d) authorizes the authorities to place a minor in detention on the basis of a judicial or administrative decision to ensure that he or she attends an educational institution. In the context of the detention of minors, the term “education under supervision” cannot and should not be systematically equated with the concept of classroom instruction. Education under supervision is a concept that encompasses many aspects of the exercise by the competent authority of parental rights for the benefit and protection of the minor concerned (*P. and S. v. Poland*, para. 147; *Ichin and Others v. Ukraine*, para. 39; *D.G. v. Ireland*, para. 80).

On the other hand, the case referred to in point (d) does not preclude the use of a temporary measure of entrusting the minor to the care of the authorities as a preliminary step to placing him in a supervised educational establishment, without that measure referring to the nature of that establishment. It is also necessary, in this case, that detention be quickly followed by the effective application of such a system in a specialized environment (open or closed) with sufficient resources to achieve its purpose. Where a State has opted for a system of supervised education involving deprivation of liberty, it is required to provide appropriate infrastructure, adapted to the security and educational requirements of that system, in order to comply with the requirements of Article 5(1)(d). (*Case of A. and Others v. Bulgaria*, para. 69; *D.G. v. Ireland,* para. 79). It should not be overlooked that the European Court of Justice considerably restricts the concept of "detention center for minors", in the sense that such a center cannot be considered a center for "education under supervision" if no educational activities are offered there (*Ichin and Others v. Ukraine*, para. 39).

It should also be noted that there is another restriction on the concept of drawing up a psychiatric report for the purpose of taking a decision on the mental health of a minor. In this regard, the Court considered that the detention of a minor accused of an offence while a psychiatric report was being prepared for the purpose of taking a decision on the mental health of the person concerned fell within the scope of Article 5(1)(d), constituting detention of a minor with a view to bringing him before a competent authority *(X v. Switzerland*, Commission decision of 14 December 1979).

The concept of "friendly" justice for minors

The Committee of Ministers of the Council of Europe adopted the *"guidelines for child-friendly justice",* demonstrating in the preamble the need for their adoption (Franguloiu, Moroșanu & Klein, 2012, pp. 24-27). It was thus emphasized that: "The aim of the Council of Europe is to achieve greater unity between member states, in particular through the adoption of common rules in areas of legislation", and the need to ensure the effective implementation of existing universal and European standards on the protection and promotion of children's rights was underlined.

In accordance with the guarantees provided by the European Convention on Human Rights and Fundamental Freedoms and the case law of the European Court, the right of every person to have access to justice and to a fair trial in all its components (including, in particular, the right to be informed, the right to be heard, the right to legal defense, and the right to be represented). This is necessary in a democratic society and applies equally to children, taking into account, however, their ability to form their own opinions. It also follows from the preamble that the guidelines are based on *relevant case law* of the Court, *decisions, reports* or *other documents* of other institutions or bodies of the Council of Europe, including *recommendations* of the European Committee for the Prevention of Torture or Inhuman or Degrading Treatment or Punishment, *statements, opinions* of the Council of Europe Commissioner for Human Rights, as well as various *recommendations* of the Parliamentary Assembly of the Council of Europe.

Consideration was also given to the need to ensure the effective implementation of existing binding standards relating to the rights of children, without preventing member states from introducing or applying higher standards or more favorable measures, in accordance with the Beijing Rules (Franguloiu & Alexandru, 2003a).

The preamble also emphasized that the progress made by Member States in implementing child-friendly justice should be taken into account and noted, however, the obstacles that kids face in the justice system, like the (non-existent, partial, or conditional) right to access justice, the diversity and complexity of procedures, and possible discrimination for various reasons. Equally, it was pointed out that account should be taken of the need to prevent possible secondary victimization of children by the judicial system in proceedings

involving or affecting them, as well as of the views and opinions of children in Council of Europe member states who have been consulted.

It should not be overlooked that all professionals working with or in contact with children in the justice system must receive appropriate support and training as well as practical guidance to ensure and implement children's rights, in particular when assessing the best interests of children in all types of proceedings in which they participate or which affect them, as the main principle to be taken into account when a child (minor) appears before a judge (Franguloiu & b, 2003).

Legislative reforms in the field of child rights protection in contact with the justice system in recent years have brought about welcome changes in this area. Legislation is more compatible with international standards, the length of sentences for children has been reduced, the number of children removed from the criminal justice system as early as possible is increasing, probation services have been established and are working effectively, prosecutors have been appointed to examine cases involving minors, the number of children deprived of their liberty has decreased, and efforts have been made to educate children in pre-trial detention.

Mandatory legal assistance for juvenile offenders

Mandatory legal assistance for juvenile defendants is an essential guarantee of the right to defense, which subsists throughout the criminal proceedings, including at the time of the request for preventive detention. Criminal procedure law has established the obligation to provide legal assistance, given that minors, due to their age, incomplete intellectual and moral development, and lack of experience, are insufficiently developed psychologically and physically and are unable to defend themselves adequately. If, at the time of referral to the court of first instance, the minor in conflict with criminal law has not reached the age of 18, the obligation to provide legal assistance remains, even if he or she has reached the age of majority during the proceedings.

This is a mandatory rule that is part of a particularly important procedural guarantee and is fully in line with international instruments on juvenile justice, aimed at ensuring that their physical presence at the trial enables them to defend their legitimate interests through effective participation in the proceedings and the full exercise of the procedural rights and guarantees conferred by law.

Conditions under which preventive measures may be ordered in respect of minors

Preventive detention and arrest may also be ordered in respect of a minor defendant, in exceptional cases, only if the effects of deprivation of liberty on the minor's personality and development are not disproportionate to the aim pursued by the measure. In terms of conditions, preventive measures may be taken in respect of minors under the same conditions as for adults:

- there is substantial evidence and indications giving rise to a reasonable suspicion that the minor has committed an offense
- the preventive measure is necessary to ensure the proper conduct of the criminal proceedings, to prevent the minor suspect or defendant from absconding from criminal proceedings or from trial, or to prevent the commission of another offense
- there is no cause preventing the initiation or exercise of criminal proceedings
- it must be proportionate to the seriousness of the charge against the minor and necessary to achieve the purpose pursued by imposing it
- when imposing house arrest, the degree of danger of the crime, the purpose of the measure, the health, age, family situation, and other circumstances of the minor in respect of whom the measure is taken, and may not be ordered in respect of a minor who is reasonably suspected of having committed an offense against a family member or who has previously been convicted of the offense of escape (with the proviso that in the case of a minor, he or she may not be the subject of the crime of escape unless the escape takes place from custody or

preventive detention, or if the minor is serving the measure in a penitentiary, and not from the execution of an educational measure, even if involving deprivation of liberty, in an educational or detention center, because in the latter situations the minor commits the offense of non-execution of criminal sanctions, provided for in Article 288 of the Criminal Code)

- preventive detention of minors may be taken in the cases provided for in Article 223 of the Criminal Procedure Code. Although it is noted that Article 243(3) of the Criminal Procedure Code provides that when determining the duration of preventive detention, the age of the defendant at the time when the preventive detention measure is ordered, extended, or maintained shall be taken into account, neither the text of this article nor any other text in the Criminal Procedure Code provides for different durations for adult defendants. Consequently, the same provisions apply as in the case of adults:

- detention may be ordered for 24 hours

- judicial supervision or bail may be provisionally ordered by the prosecutor for 5 days, by the judge of rights and freedoms for an indefinite period but with the obligation of periodic review every 60 days during the criminal investigation, by the preliminary chamber judge or by the court for an indefinite period

- house arrest may be imposed and extended by the judge for a period of 30 days during the criminal investigation, and by the preliminary chamber judge or the court for an indefinite period

- preventive detention may be ordered and extended for 30 days during the criminal investigation by the judge of rights and freedoms; during the preliminary chamber proceedings, it may be ordered by the preliminary chamber judge for a period of 30 days and then reviewed periodically no later than 30 days, and during the trial by the court also for a period of 30 days and reviewed periodically but no later than 60 days.

With regard to the choice of measure, even if preventive measures remain at the discretion of the court, it is clear that preventive detention must be exceptional, taken only in situations where the offense for which the minor is being investigated is particularly serious, or where the minor has previously committed serious offenses and, of course, there are the situations provided for in Article 223 of the Criminal Procedure Code.

Conclusions

Finally, we consider that the existing legislation is more than sufficient in the area of preventive detention of minors, which is entirely exceptional. Cases are decided by specialized judges (whether they are judges of rights and freedoms or judges deciding on the merits of the case) in accordance with the law on the organization of the judiciary. While we note that preventive detention is sometimes ordered too often or only taking into account the seriousness of the offense, it is nevertheless necessary to highlight and appreciate the steady progress made in this area, with cases of minors being subject to measures depriving them of their liberty becoming increasingly rare.

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