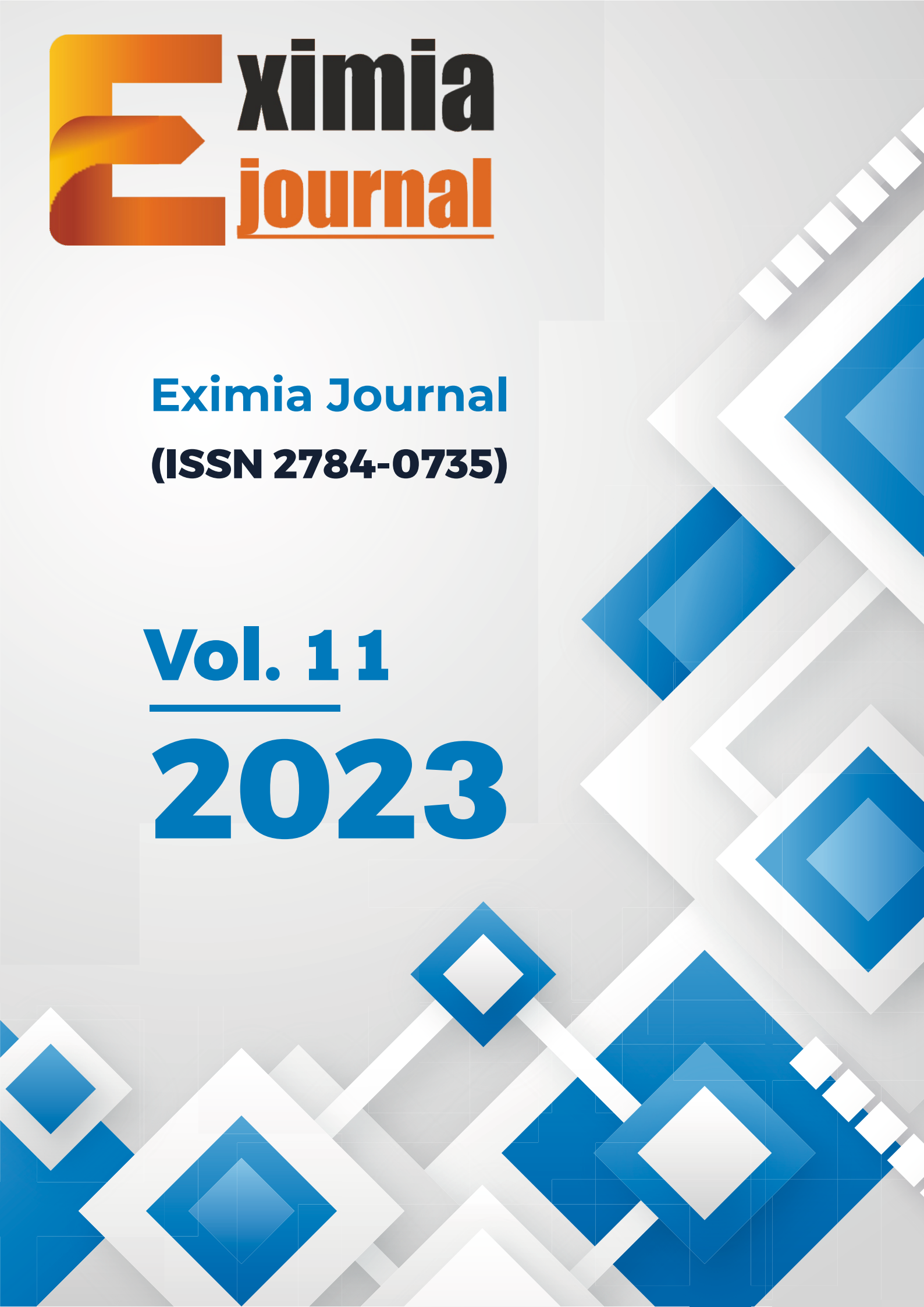




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House arrest

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Abstract. The right to physical freedom is one of the most obvious rights and freedoms, being the subject of the Constitution, as a fundamental law, as well as of numerous treaties, conventions and other such acts to which our country is a party. Man, by nature, is individual. This character of man has made him over time to fight continuously with the tendency to freedom. We can affirm that the feeling of freedom was born and ascended with man, therefore for the human being it has been and will remain as natural and legitimate as existence itself. However, the association of man in a social grouping, in the sense of the state, compels him to observe the norms to which the state is subject. Living in society, man must accept, in order to achieve the general interest, the "common social good", the limitation of his forms of manifestation to the dimensions of the reasonable. This can be done, which is preferable, through self-control, but this is an uncertain, variable, random path. More certain is the intervention of an external factor, constituted in society by the coercive force with which public power is endowed. It is a path that has the advantage of permanence, proportionality, the possibility of being controlled. Institutionalized coercion is not only an exclusive dimension of public power, but it is also its essential dimension. Of course, as a method of governing state power, persuasion takes precedence, coercion having a subsidiary role, but it is ubiquitous. Any state-organized society has a coercive force, varying only the forms of realization of coercion, its intensity, and the relations between coercion and persuasion. The measure of house arrest can be considered easier compared to other preventive measures of criminal proceedings, which, by definition, represent the deprivation of liberty of a person during criminal proceedings in order to ensure its proper conduct.

Keywords. preventive measures, arrest, code, defendant

1. General aspects of preventive measures

1.1. General connotations and classification of preventive measures

Among the defining dimensions of the Romanian state is its attribute of being a "rule of law", an attribute that has the significance of subordination of the state to legal norms. The question that arises is whether, and to what extent, the subordination of the state to law affects human freedom, because state power and freedom seem impossible to reconcile insofar as no one can be free and constrained at the same time.

Everyone, at liberty or detained, has the right to protection, i.e. the right not to be deprived of liberty, except in compliance with the requirements of art. 5 ECHR.

Unable to be detached from physical freedom, the right to security means that no person may be subjected to arbitrary interference by public authorities with his right to liberty, with the result that the notion of security overlaps with that of legality.

The entire text of Art. Article 5 of the Convention revolves around a single purpose, namely the protection of the freedom and security of the person against arbitrary arrest and detention.

It has been shown in doctrine that between the deprivation of liberty and the restriction of freedom of movement there is only a difference in intensity, not in nature or essence.

According to Article 53 of the Romanian Constitution, "the exercise of certain rights or freedoms may be restricted only by law and only if necessary". Also, "the measure must be proportionate to the situation giving rise to it, be applied in a non-discriminatory manner and without prejudice to the right or freedom", as specified in art. 53 para. 2 of the Romanian Constitution.

Regarding procedural measures, these are means of deprivation or coercion that the law makes available to judicial bodies and through which the normal conduct of criminal proceedings is ensured. Thus, whenever the state of liberty of the accused or accused would hinder or cause possible deficiencies to criminal investigation or criminal proceedings, judicial bodies have the possibility to limit this freedom so that their activity provided by law on establishing the truth is carried out in the most optimal conditions.

Procedural measures have the character of activities adjacent to the main activities and therefore these measures appear possible, their application is possible and are not characteristic of any criminal case, the judicial bodies ordering these measures to be taken in relation to the conditions or concrete circumstances of each case.¹

Preventive measures are those measures ordered by judicial bodies to ensure the proper conduct of the trial and the participation of suspects or defendants in criminal proceedings. Preventive measures are also ordered against persons who commit criminal offences and, where it is desirable that such persons do not influence witnesses or injured persons, experts or other participants in the criminal proceedings.

Several criteria for classifying procedural measures have been proposed in the literature², as follows:

- the existence of a legal criterion, regulated by the Code of Criminal Procedure, determines the following classification:
 - preventive measures, materialized in those procedural measures regarding the restriction of the freedom of the person, under the law (detention; judicial control; judicial control on bail; house arrest; preventive arrest);
 - other procedural measures, such as: protection and safety measures, restitution of things and restoration of the situation prior to committing the crime.
- The social value³ to which the procedural measures are directed determines the following classification in:
 - personal procedural measures concerning certain persons (detention, arrest, detention; judicial control; judicial control on bail; house arrest; preventive arrest, etc.);
 - real procedural measures, concerning the assets of certain persons (attachment, mortgage inscription);

¹ Anamaria Trancă, Preventive measures. Legal practice, Hamangiu Publishing House, Bucharest, 2017

² Rebegea Dumitru, Preventive measures in criminal proceedings, Bibliotheca Publishing House, Targoviste, 2015

³ Ion Neagu, Micea Damaschin, Treatise on criminal procedure. Special part, Second Edition, Universul Juridic, Bucharest, 2018

- The particular purpose pursued by taking procedural measures determines the classification into:
- procedural measures of coercion (arrest, seizure);
 - Procedural protection measures.

Such a classification was necessary given that the topic I proposed to analyze is part of these procedural measures, according to the Code of Criminal Procedure. Keeping in mind the previous classification, I will analyze the category of preventive measures, category that forms the object of the paper.

Preventive measures belong to the category of procedural measures, with a coercive character, by which the accused or accused person is prevented from undertaking certain activities that would have a negative impact on the purpose of the criminal proceedings or on the achievement of its conduct.⁴

Code of Criminal Procedure (Art. 202 para. (4)) of Romania regulates five preventive measures,:

- Retention;
- Judicial review;
- Judicial review on bail;
- house arrest;
- Pre-trial detention.

This paper aims, through this subchapter, to approach preventive measures from a theoretical perspective and I will analyze below the conditions for ordering such preventive measures, the actions that can be formulated against these measures, the possibilities of revocation or termination of such measures in certain situations, but also the real content of these measures.

Preventive measures are coercive measures that can be taken by judicial bodies to ensure the proper conduct of criminal proceedings, to prevent the suspect or accused person from absconding from prosecution or trial, or to prevent new crimes from being committed.

As mentioned earlier, the Romanian Code of Criminal Procedure regulates five preventive measures: detention, judicial control, judicial control on bail, house arrest and preventive arrest.

Of these, three are preventive measures involving deprivation of liberty (detention, house arrest, pre-trial detention) and two are preventive measures with restrictive rights (judicial control and judicial control on bail).

As for the purpose of preventive measures, they apply mainly to natural persons, but where it is possible to incur criminal liability of legal persons, the Code of Criminal Procedure regulates measures that can also be taken against the latter.⁵

Thus, about the purpose and general conditions of application of preventive measures, it can be stated that, according to art. 202 para. (1) of the Code of Criminal Procedure: "preventive measures may be ordered if there is evidence or serious indications from which a reasonable suspicion arises that a person has committed a criminal offence and if they are

⁴ Carmen-Silvia Paraschiv, Maria-Georgiana Teodorescu, Alin Sorin Nicolescu, Criminal procedural law. General part. Lecture notes. 3rd edition, Hamangiu Publishing House, 2021

⁵ Nicolae Volonciu, Andreea Simona Uzlău, Daniel Atasei, Cătălin Mihai Chiriță, Teodor-Viorel Gheorghe, Cristinel Ghigheci, Teodor Manea, Raluca Moroșanu, Georgiana Anghel-Tudor, Victor Văduva, Corina Voicu, Code of Criminal Procedure commented. 3rd edition, revised and added, Hamangiu Publishing House, Bucharest, 2017

necessary to ensure the proper conduct of criminal proceedings, to prevent the suspect or accused person from absconding from prosecution or trial or to prevent the commission of another offence”.

Therefore, the purpose of preventive measures is, in fact, the danger that must be prevented compulsorily, the judicial bodies having the obligation to choose the most appropriate and necessary measure for this purpose to be carried out.

In order for judicial bodies to order a preventive measure against the suspect or accused, a number of conditions must be met, namely:⁶

- there is evidence or serious indications that a person has committed a criminal offence. In relation to this condition, the following points are noted:
 - preventive measures may be ordered against both suspect (detention) and defendant (any preventive measure);
 - The evidence on which preventive measures are taken against a person need not be as strong as the evidence on which a conviction would be based, in the latter case it is imperative that the evidence adduced in the case leads the court to a conviction beyond a reasonable doubt that the act was committed by the defendant with the guilt prescribed by law and that there is no reason to remove criminal liability;
 - The need for evidence to take preventive measures is justified because fulfilling this condition avoids arbitrariness by judicial bodies in ordering those measures;
- The measure chosen shall be proportionate to the seriousness of the accusation. With regard to this condition, the following clarifications are necessary:
 - The criteria for assessing the seriousness of an act are not provided for by criminal procedure law. However, it is clear that that gravity must be assessed objectively, both as a whole and, above all, in concrete terms. The seriousness of the act can be assessed by reference to the means used by the suspect or defendant, the result produced by committing the crime, but also aspects related to the person of the suspect or defendant, with particular reference to his crime.

Preventive measures must be necessary. In this context, the need to take, extend or maintain a preventive measure against a person, it should be noted that this cannot and should not be inferred from the mere declaration by the judicial body of these purposes.

The need to order a preventive measure must arise from the concrete assumption of the judicial body that the offender may commit another, in which case the risk must be prevented. Whenever a preventive measure is ordered, prolonged or maintained, it is necessary for the judicial body to ascertain whether or not there are grounds preventing the initiation or exercise of criminal proceedings.

In the following, I will analyse the specific aspects of each preventive measure.

Detention is a preventive measure involving deprivation of liberty which is ordered for a maximum period of 24 hours. The time required to send the suspect or accused person to the headquarters of the judicial body cannot be included during the detention period.⁷

The preventive measure of detention is the only preventive measure that can be ordered only during the criminal investigation, which can also be ordered by the criminal investigation

⁶ Anamaria Trancă, Preventive measures. Legal practice, Hamangiu Publishing House, Bucharest, 2017

⁷ Ivan Anane, Elements of criminal procedural law, Pro Universitaria Publishing House, Bucharest, 2015

body and is the only preventive measure that can be ordered on the suspect. Detention should not be confused with bringing and presenting the offender before judicial bodies or with the establishment of an arrest warrant.

Detention may be ordered against a person if there is evidence that he or she has committed an act prescribed by criminal law, when the measure is necessary and proportionate to the seriousness of the act and when there is no situation precluding the indictment or prosecution.

According to art. 10 of the Code of Criminal Procedure, criminal proceedings cannot be initiated, and when they have already been initiated, they cannot proceed if:

- The act does not exist;
- the act is not provided for by criminal law;
- the act does not present the degree of social danger of a crime⁸;
- the act was not committed by the accused or the defendant;
- the act lacks one of the constituent elements of the crime;
- there are any of the causes that remove the criminal character of the act;
- there is no prior complaint of the aggrieved person, authorization or notification of the competent body or other condition provided by law, necessary for initiating criminal proceedings (in this situation, criminal proceedings may be initiated later under legal conditions);
- amnesty, prescription or death of the perpetrator or, as the case may be, deletion of the legal person when it has the status of perpetrator;
- the prior complaint has been withdrawn or the parties have reconciled or a mediation agreement has been concluded under the law, in the case of crimes for which the withdrawal of the complaint or the reconciliation of the parties removes criminal liability.
- It was ordered to replace criminal liability;
- there is a cause for non-punishment provided for by law;
- there is authority of *res judicata*. The hindrance takes effect even if the act finally adjudicated would be given a different legal classification.

It is important to note that detention may also be ordered against a person when there are reasonable indications that that person has committed an act prescribed by criminal law. Criminal procedural law does not provide a definition of the notion of reasonable indications, but in order to edify ourselves we can appeal to the jurisprudence of the European Court of Human Rights.

Thus, by the existence of reasonable indications we mean "The existence of data, information leading an objective and impartial observer to the conclusion that the investigated person could have committed the crime with which he is accused" (*Gusinskiy v. Russia*, *Tuncer and Durmus v. Turkey*, *Jecius v. Lithuania*).

As indicated above, detention can only be ordered against the suspect or defendant.

Thus, in order to order that preventive measure to be taken against a person, it is necessary not only to prosecute, but also to continue criminal proceedings against the suspect for whom it is to be ordered. If the judicial body decides to detain a person, it is obliged to hear him.

The obligation to hear a person does not imply coercion of the person concerned to make a statement, since any person against whom an accusation is brought may prevail over the right

⁸ Buzescu Gheorghe, *Particularities of contravention law*, Sitech Publishing House, Craiova 2017

to remain silent, enshrined in the law on criminal procedure Romanian art. 83 of the Code of Criminal Procedure. The judicial bodies are obliged to proceed with the hearing of the person before ordering a preventive measure against the person.⁹

The procedural document ordering detention is called an order. The measure is enforceable from the moment the order is issued. It should be noted that the order ordering the custody of a person must be reasoned. Unlike other preventive measures involving deprivation of liberty, in case of detention, the law does not require the judicial body to issue a warrant for the execution of the preventive measure.

The measure of detention shall be communicated in writing to the detained person by serving a copy of the order ordering the taking into custody.

Against the order ordering the detention of the suspect or defendant, he/she may file a complaint, the appeal being resolved by the prosecutor supervising the criminal investigation, and if the criminal investigation is carried out by the prosecutor, the body called upon to resolve the complaint submitted by the suspect or defendant is the hierarchically superior prosecutor.

Judicial review is a restrictive preventive measure of rights that may be ordered, depending on the procedural stage, by the public prosecutor, the judge of rights and freedoms, the judge of the preliminary chamber or by the court.

It should be noted that "in the criminal investigation phase, it is the prosecutor who orders the measure of judicial control against the defendant but, by exception, the judge of rights and freedoms also has this possibility when rejecting the prosecutor's proposal. imposing a more severe preventive measure, reasonably considering that the measure of judicial review is necessary but also appropriate for criminal proceedings to proceed in normal conditions"¹⁰.

In order to order the preventive measure of judicial review against the defendant, the following conditions must be met:

- the existence of evidence from which a reasonable suspicion is inferred that a person has committed a criminal offence;
- There are no cases of removal of the initiation of criminal proceedings;
- the measure of judicial review must be necessary and sufficient for the purpose pursued by carrying it out.

Judicial review may be ordered against a person on the basis of a public prosecutor's order or by resolution of the judge of rights and freedoms, the judge of the preliminary chamber or the court. The order or, as the case may be, the resolution shall be reasoned and served on the defendant against whom the measure of judicial review has been ordered. The defendant may appeal against the prosecution order issued by the prosecutor, the decision of the judge of rights and freedoms, the preliminary chamber judge or the trial court.

During the judicial review, the defendant must comply with the following obligations:

- appear before the prosecuting body, the judge of the preliminary chamber or the court whenever called upon;
- immediately inform the judicial bodies which ordered the measure or with which the case is pending of any change of domicile;
- to appear before the law enforcement body designated to supervise them by the judicial bodies that ordered the measure, according to the supervision program drawn up by the law enforcement body or whenever they are called.

⁹ Florin Străteanu, Daniel Nițu, Criminal law general part. University Course, Vol. I, Universul Juridic, 2014

¹⁰ Mircea Damaschin, Criminal procedural law General part, Universul Juridic, Bucharest 2013

Also, according to art. According to Article 215 of the Code of Criminal Procedure, the judicial bodies which ordered the measure may require the defendant, during the judicial review, to comply with one or more of the following obligations:

- not exceed a certain territorial limit, fixed by the judicial body, except with its prior consent;
- not to go to specific places determined by the judicial body or to travel only to places determined by it;
- carry an electronic surveillance system at all times;
- not to return to the family home, not to approach the injured person or his/her family members, other participants in the crime, witnesses or experts or other persons specifically designated by the judicial body and not to communicate with them directly or indirectly, in any way;
- not to exercise the profession, profession or activity in the exercise of which he committed the act;
- communicate regularly relevant information about its means of subsistence;
- undergo control, care or medical treatment, in particular for the purpose of detoxification;
- not to participate in sports or cultural events or other public gatherings;
- not to drive vehicles specifically determined by the judicial body;
- not to possess, use or bear arms;
- not to issue cheques.

As regards judicial review on bail, this preventive measure has the same content as the measure of judicial review, the major difference between these measures being that in the case of judicial control on bail the defendant is required to pay a sum as security for participation. of the defendant in the criminal proceedings and the fact that he will not commit further crimes.

House arrest is the preventive measure involving deprivation of liberty consisting in the obligation imposed on the defendant not to leave for a determined period of time the building in which he lives without the permission of the judicial body that ordered the measure or where the case is pending and to submit to the restrictions imposed by it. House arrest may be ordered against the defendant only by the judge of rights and freedoms, the judge of the preliminary chamber or by the court.¹¹

It should be noted that the measure of house arrest cannot be ordered against a person who has committed a crime against a family member or who has previously committed the crime of escape.

Also, according to art. According to Article 223 of the Code of Criminal Procedure, house arrest may be taken only if the following conditions are met::

- the defendant has fled or gone into hiding in order to evade prosecution or trial, or has made preparations of any kind for such acts;
- the defendant attempts to influence another participant in the crime, a witness or expert, or to destroy, alter, conceal or steal material evidence or cause another person to engage in such conduct;
- the defendant exerts pressure on the injured party or tries to make a fraudulent agreement with him;

¹¹ Anamaria Trancă, Preventive measures. Legal practice, Hamangiu Publishing House, Bucharest, 2017

- there is reasonable suspicion that, after criminal proceedings have been instituted against him, the defendant has intentionally committed a new offence or is preparing to commit a new offence.

Pre-trial detention is a preventive measure involving deprivation of liberty of the defendant for a certain period of time and placing him in specially designated places (police stations, correctional institutions).

The measure of preventive detention is the toughest of these measures, which is why it is exceptional.

This measure of preventive detention may be taken, extended or maintained only by a judge of rights and freedoms.¹² As regards the conditions for ordering preventive arrest, it should be noted that they are identical to those that must be met for ordering house arrest.

In view of all of the above, it can be noted that the subject matter of preventive measures is very well regulated, with the Code of Criminal Procedure containing express provisions for taking, prolonging, maintaining, revoking or terminating the law of such measures.

As regards the measure of preventive detention, its character as an exceptional measure must be respected and it is not sufficient for that character to be stated only theoretically.

Even with a quick reading of the judicial practice in the field, it can be noted that the measure of preventive arrest has become a very easy measure ordered by judicial bodies, under the conditions provided by art. Article 223 of the Code of Criminal Procedure is sometimes treated abstractly and superficially.

Defendants who commit criminal offences should most often be subject to judicial review, except for those defendants who commit acts of violence and who pose a serious danger to public order.¹³

It was precisely in order to stop such persons from committing new offences that judicial control on bail was regulated; The bail amount is primarily aimed at preventing the new crime and ensuring the participation of defendants in the criminal process.

1.2. Preventive measures in criminal proceedings

These measures are subject to general conditions and special conditions, the latter making it possible to distinguish one from another.

Preventive measures are the means of coercion provided by law that judicial bodies can take in order to ensure the proper conduct of criminal proceedings or to prevent the accused or accused from evading criminal prosecution, trial or execution of punishment.¹⁴

These measures are subject to general conditions and special conditions, the latter making it possible to distinguish one from another. Preventive measures are the means of coercion provided by law that judicial bodies can take in order to ensure the proper conduct of criminal proceedings or to prevent the accused or accused from evading criminal prosecution, trial or execution of punishment.

Our Code of Criminal Procedure has adopted the system of regulating preventive measures with a different degree of constraint on the freedom of the person or other rights or freedoms, so that judicial bodies have the possibility to choose the preventive measure appropriate to the purpose for which it is taken.

At the same time, the law provided guarantees for persons against whom a preventive

¹² Ivan Anane, *Elements of criminal procedural law*, Pro Universitaria Publishing House, Bucharest, 2015

¹³ Mircea Damaschin, *Criminal procedural law General part*, Universul Juridic, Bucharest 2013

¹⁴ Mircea Damaschin, *Criminal procedural law General part*, Universul Juridic, Bucharest 2013

measure is taken, meaning that it can only be taken in compliance with the conditions expressly provided by law by certain judicial bodies, after a special procedure and for certain terms.

During criminal proceedings, the accused or accused person may try to conceal the commission of the crime, prevent proof of guilt, evade prosecution and trial in order to delay his criminal liability. Also, the finally convicted defendant may try to evade serving the sentence in various ways, which makes it difficult to achieve the purpose of the criminal proceedings.

In order to avoid compromising the purpose of criminal proceedings, through maneuvers of the accused or defendant, such as those shown above, all modern legislation makes these preventive measures available to the judicial authorities.

According to art. 1 of the Code of Criminal Procedure, "the rules of criminal procedure regulate the conduct of criminal proceedings and other judicial proceedings in connection with a criminal case. The rules of criminal procedure aim to ensure the efficient exercise of the powers of the judicial bodies by guaranteeing the rights of the parties and of the other participants in the criminal process so as to comply with the provisions of the Constitution, of the constituent treaties of the European Union, of the other regulations of the European Union in the field of criminal procedure, as well as of the pacts and treaties on fundamental human rights to which Romania is a party."

Art. Art. 23 of the Romanian Constitution expressly states that "individual freedom and security of person are inviolable. The search, detention or arrest of a person shall be permitted only in the cases and with the procedure prescribed by law." Detailed regulations in this regard contain the Code of Criminal Procedure, as amended so far.

Of course, in some cases, the aim of prevention can be achieved with minimal interference with the individual freedom of the accused or accused. As it happens for: restraint; judicial review; judicial review on bail; house arrest.¹⁵

Other times, more severe preventive measures are required, such as: pre-trial detention.

Having regard to the varying conditions under which such measures are required, they are subject to a varying degree of constraint on freedom or other rights and freedoms so that the judicial authority may choose, in relation to each specific case, the preventive measure capable of ensuring the aim pursued by the least constraint.

The literature stresses that, given the nature of human value harmed by these measures, the legislator must also put in place the necessary legal safeguards to prevent any abuse in taking and maintaining preventive measures. Deprivation of liberty, according to legal doctrine, must be considered as an exceptional preventive measure, to be resorted to only after all other legal possibilities that can be ordered against the accused or accused person have been exhausted.

The system of guarantees for the correct application of preventive measures shall be based, above all, on the provisions of Art. Article 23 of the Romanian Constitution, which gives these guarantees a constitutional character, making it impossible to remove or restrict them by an organic or ordinary law.

Other guarantees result from Art. Article 9 of the Code of Criminal Procedure, which states that: "during criminal proceedings, the right of everyone to liberty and security is guaranteed. Any measure involving deprivation or restriction of liberty shall be ordered exceptionally and only in the cases and under the conditions provided by law. Every arrested person shall have the right to be informed as soon as possible and in a language which he

¹⁵ Nicolae Volonciu, Andreea Simona Uzlău, Daniel Atasiei, Cătălin Mihai Chiriță, Teodor-Viorel Gheorghe, Cristinel Ghigheci, Teodor Manea, Raluca Moroșanu, Georgiana Anghel-Tudor, Victor Văduva, Corina Voicu, *op.cit.*

understands of the reasons for his arrest and shall have the right to appeal against the order of the measure. Where it is found that a measure involving deprivation or restriction of liberty has been ordered unlawfully, the competent judicial bodies shall order the revocation of the measure and, where appropriate, the release of the person detained or arrested. Any person unlawfully ordered in the course of criminal proceedings a measure involving deprivation of liberty shall be entitled to compensation for the damage suffered, under the conditions provided for by law."

Our internal regulations, as supplemented and amended, have been brought into line with some standards set in this field by various international documents. Among these, the European Convention on Human Rights is of particular relevance, which is the basis for regulating preventive measures in European criminal procedure legislation.

The following provisions of the Convention are relevant to the issue at hand, namely::

- Deprivation of liberty can, in principle, only be ordered by a magistrate;
- Deprivation of liberty is to ensure that the offender is brought before the competent body in order to bring him to criminal responsibility;
- Deprivation of liberty must be carried out only in lawful forms and in accordance with the procedure laid down in the laws of each State;
- Deprivation of liberty should be limited in time, so that until the final resolution of criminal cases, preventive measures are as short as possible;
- Deprivation of liberty may be replaced, under certain legal conditions, by other procedural measures guaranteeing the proper conduct of the criminal case without maintaining the state of arrest, the defendant may be released (under conditions of judicial control, on bail);
- the deprivation of liberty can be challenged by the arrested person before the judge, those interested having at hand the possibility of using legal remedies.

(i) 2. House arrest as a preventive measure during criminal prosecution

2.1. Definition, disposition and purpose of house arrest

House arrest may be ordered during the criminal investigation phase by the judge of rights and freedoms, in the preliminary chamber phase by the preliminary chamber judge¹⁶, and during the trial by the court.

Since house arrest is a preventive measure of liberty, it can only be taken by the judge. The measure of house arrest is taken by conclusion.

In order to be able to take the preventive measure of house arrest, the following conditions must be met:¹⁷

- criminal proceedings have been initiated;
- there is evidence from which there is reasonable suspicion that the defendant has committed a criminal offence and one of the following situations exists:
 - the defendant has fled or gone into hiding in order to evade prosecution or trial, or has made preparations of any kind for such acts;
 - the defendant attempts to influence another participant in the crime, a witness or expert, or to destroy, alter, conceal or steal material evidence or cause another person to engage in such conduct;
 - the defendant exerts pressure on the injured person or tries to make a fraudulent agreement with him;

¹⁶ Andrei Zarafiu, Preventive arrest, C. H. Beck Publishing House, Bucharest, 2010

¹⁷ Andrei Zarafiu, Preventive arrest, C. H. Beck Publishing House, Bucharest, 2010

- there is reasonable suspicion that, after criminal proceedings have been instituted against him, the defendant has intentionally committed a new offence or is preparing to commit a new offence.¹⁸
 - (irrespective of the cases referred to above) the evidence shows reasonable suspicion that he/she has committed an intentional crime against life, an offence causing bodily injury or death to a person, an offence against national security provided for by the Criminal Code and other, special laws, a crime of drug trafficking, arms trafficking, trafficking in human beings, acts of terrorism, money laundering, counterfeiting of coins or other values, blackmail, rape, deprivation of liberty, tax evasion, outrage, judicial outrage, a corruption offense, an offense committed by electronic means of communication or another offense for which the law provides for imprisonment of 5 years or more, and, On the basis of an assessment of the seriousness of the offence, the manner and circumstances in which it was committed, the entourage and the environment from which it comes, the criminal record and other circumstances relating to his person, it is established that his deprivation of liberty is necessary to remove a state of danger to public order.¹⁹
- the measure of house arrest is necessary and sufficient for the proper conduct of criminal proceedings, to prevent the defendant from evading prosecution or trial or to prevent the commission of another offence;
 - the measure of house arrest must be proportionate to the seriousness of the accusation brought against the defendant;
 - there is no cause preventing the initiation or exercise of criminal proceedings referred to in art. 16 para. (1) Code of Criminal Procedure;
 - the defendant has not been convicted definitively of the crime of escape or there is no reasonable suspicion that he or she has committed a crime against a family member;
 - hearing prior to taking the measure of house arrest of the defendant in the presence of defence counsel chosen or appointed ex officio.

The measure of house arrest consists in the obligation imposed on the defendant, for a determined 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 pending and to submit to restrictions established by it.

According to art. 221 para. (2), during house arrest, the defendant shall have the following obligations:

- appear in front of the prosecuting officer, the judge of rights and freedoms, the judge of the preliminary chamber or the court whenever called upon;
- not to communicate with the injured person or his/her family members, with other participants in the crime, with witnesses or experts, as well as with other persons established by the judicial body.

The judge of rights and freedoms, the judge of the preliminary chamber or the court may order that during house arrest the defendant must wear an electronic surveillance system at all times.²⁰

¹⁸ Anane Ivan, Investigation of criminal investigation bodies, Pro Universitaria Publishing House, Bucharest, 2014

¹⁹ Anamaria Trancă, Preventive measures. Legal practice, Hamangiu Publishing House, Bucharest, 2017

²⁰ Mihai Udriou, Criminal procedure. General part. The New Code of Criminal Procedure, C. H. Beck Publishing House, Bucharest, 2014

Regarding the conclusion ordering the measure of house arrest, it expressly stipulates the obligations that the defendant must comply with and draws his attention to the fact that, in case of bad faith violation of the measure or obligations incumbent upon him, the measure of house arrest may be replaced by the measure of preventive arrest.²¹

The person against whom the measure of house arrest was ordered shall be communicated, under signature, in writing, including the rights provided for in art. Art. 83 of the Code of Criminal Procedure (rights of the defendant), the right of access to emergency medical care, the right to challenge the measure and the right to request the revocation or replacement of this measure with another preventive measure, and if the person is unable or refuses to sign, a report will be concluded.

During the measure, the defendant may leave the building where he lives to appear before the judicial bodies, at their request.²²

At the written and reasoned request of the defendant, the judge of rights and freedoms, the judge of the preliminary chamber or the court, by way of conclusion, may allow him to leave the building for presentation at work, education or vocational training courses or other similar activities or for the purchase of essential means of subsistence, as well as in other duly justified situations, for a determined period of time, if this is necessary for the realization of legitimate rights or interests of the defendant.

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, for the period of time strictly necessary, immediately informing the institution, body or authority designated with his supervision and the judicial body that took the measure of house arrest or before which the case is pending.²³

The copy of the conclusion of the judge of rights and freedoms, of the preliminary chamber judge or of the court by which the measure of house arrest was taken shall be communicated immediately to the defendant and to the institution, body or authority designated with his supervision, to the police body in whose district he lives, to the Community public service for the registration of persons and to border authorities.

The institution, body or authority designated by the judicial body which ordered house arrest shall regularly check the defendant's compliance with the measure and obligations and, if it finds violations thereof, it shall immediately refer the matter to the public prosecutor during criminal proceedings, to the judge of the preliminary chamber in the preliminary chamber proceedings or to the court during the trial.

If the defendant violates in bad faith the measure of house arrest or the obligations incumbent on him, or there is reasonable suspicion that he has intentionally committed a new offence for which criminal proceedings have been ordered against him/her, the judge of rights and freedoms, the judge of the preliminary chamber or the court, at the reasoned request of the prosecutor or ex officio, may order the replacement of house arrest by preventive arrest, as provided by law.

Suitable. Art. 399 para. (9) of the Code of Criminal Procedure, the duration of house arrest shall be deducted by the punishment imposed by equating one day of preventive house arrest with one day of punishment.

²¹ Mihai Udroi, Criminal procedure. General part. The New Code of Criminal Procedure, C. H. Beck Publishing House, Bucharest, 2014

²² Anamaria Trancă, Preventive measures. Legal practice, Hamangiu Publishing House, Bucharest, 2017

²³ Ion Neagu, Mircea Damaschin, Treatise on criminal procedure. General part, Universul Juridic, Bucharest, 2014

2.2 Pre-trial detention in other countries

House arrest in general. Even in other countries, it represents detention ordered by the court in one's own home.

Sentencing is viewed as an important alternative to standard incarceration at different stages of the criminal justice process. It is used by criminal justice systems around the world and often involves very diverse requirements.²⁴ There are several forms of house arrest, depending on the severity of the court order requirements.

This measure generally refers to restricting an offender to his home during certain hours, usually in the evenings. Under conditions of home detention, the defendant is confined to the house for most hours, with exceptions declared for school, work, religious services, medical treatment, or for the purchase of medicines or food purchases.

These exceptions are generally specified in advance and strictly enforced. Finally, home confinement, perhaps the most serious form of house arrest, generally refers to cases where the offender is required to remain at home at all times, with rare exceptions, such as medical treatment or court-ordered correctional therapy, such as antidrug therapy, abuse counselling.

The latter two forms of house arrest are often enforced by electronic surveillance via a device placed on the defendant's ankle, thus allowing very close monitoring of his presence or absence from home. Each of these forms of house arrest can be imposed at almost any stage of the criminal justice system and is used for various purposes.

House arrest can be useful as a form of pre-trial detention for defendants who appear to be unsuitable candidates for release on their own responsibility or who are unable to post bail.

The main objectives of pre-trial house arrest are to ensure that the defendant appears at trial, to ensure public safety, to reduce prison overcrowding and to reserve prison space for the most dangerous or untrustworthy defendants.

A major advantage of using house arrest at this stage is that people who have not yet been found guilty are not subject to incarceration with other, possibly more serious, offenders. Alternatively, house arrest can be described as a form of punishment, but less depriving than imprisonment.

Because of this premise, house arrest should only be used for offenders who would not normally be released on bail or in cases where very high bail is set but reduced subject to house arrest.

House arrest at this stage is particularly useful for minors, who are typically detained for long periods of time before going on trial for minor crimes only to be released after trial and conviction.

An important aspect of house arrest is deciding who should be eligible. Generally, violent offenders are not considered eligible for house arrest and it is inappropriate to use house arrest for offenders such as drug traffickers convicted of selling drugs outside their home.²⁵

With the exception of ordinary traffic offenders and persons convicted of drink-driving, extended histories generally exclude the use of house arrest, at least during the sentencing phase.

Other factors that are often considered are employability, history of substance abuse, and unstable housing arrangements. The health of the offender could also be taken into account.

²⁴ Buzescu Gheorghe, Internal and international police cooperation, Sitech Publishing House, Craiova, 2020

²⁵ Mihai Udrioiu, Criminal procedure. General part. The New Code of Criminal Procedure, C. H. Beck Publishing House, Bucharest, 2014

House arrest is sometimes used for people with terminal illnesses who pose minimal risks to the community and wish to die with dignity in their homes or with their families. House arrest is not a good option, however, if there are known criminals living in or around the house, or if the victim lives in the house. The effective use of house arrest requires careful checking and monitoring.

To illustrate the measure of arrest in other countries, in the following, I will briefly present this topic for the American and English legal systems. In the U.S. legal system, house arrest is defined as solitary confinement at the offender's home or other location specified as an alternative to imprisonment.

The expression is used interchangeably with others, including home detention, home detention and electronic monitoring.

It is usually seen only as an appropriate sentence for first-time nonviolent crimes. Pre-trial house arrest may also be issued to help isolate offenders before official sentencing and sentencing at trial.

Despite the name, home confinement does not mean that the individual cannot leave his home at all. Instead, they have a strict restriction and can only go within a certain radius of their home to carry out specific pre-approved activities in agreed locations.

For example, house arrest laws allow criminals to go to jobs and education, doctors' appointments and meet with their probation officer. This allows the offender to serve the sentence and live a restricted life as punishment for his crime, while retaining his place in society.²⁶

In order for a house arrest sentence to be issued, the criminal prosecutor usually issues a recommendation to the judge.

The courts will then determine whether or not this is an appropriate sentence. Generally, a house arrest sentence will only be given to first-time crimes considered low-risk. In addition, as offenders remain an integral part of society, this punishment will only be applied to non-violent crimes that pose minimal risk to the community.

Examples include criminals convicted of fraud or embezzlement. On the other hand, house arrest will never be offered for serious crimes such as rape or murder.

During the sentencing, a house arrest agreement will be established. Each state in the U.S. has its own rules about the use of house arrest.

Therefore, restrictions will vary from state to state. In addition, the details of the crime can have an impact on house arrest rules, giving more freedom to low-risk offenders. However, in most cases, house arrest rules are standard, including the following:

- Probation officer: each offender must be assigned a probation officer whose job it is to monitor the offender and check that he complies with the terms of the sentence. As part of compliance testing, the defendant must attend regular meetings with the probation officer. The officer can also make surprise visits to ensure that all rules are followed;
- During home detention, the offender must refrain from drinking alcohol and drugs. The probation officer has the right to check the offender's home for prohibited substances and report to the courts if drugs or alcohol are found at the property. The defendant must also participate in random drug tests when requested to do so;
- During house arrest, the offender is usually asked to wear an electronic tag or bracelet containing a GPS device and continuously monitoring their location. This monitoring device must be worn at all times;

²⁶ <https://lawrina.com/blog/what-is-house-arrest/>

- In addition to the above, the sentence of house arrest often includes community service as part of the punishment for the crime. Once the terms are agreed, any violation could result in jail time for the offender.

In the English legal system, house arrest is widely used, but after bail has been paid.

In Great Britain, "the legislation provides that this measure of house arrest (conditioned by imposing fixed time intervals and wearing an electronic monitoring bracelet, but which is min. 9 hours), is deducted half of the duration to be executed, according to art. 253 of the Criminal Justice Act 2003".²⁷

There are also the same conditions as in the other systems, such as monitoring the defendant and checking the terms of the sentence, wearing an electronic bracelet, as well as complying with certain obligations.

2.3. Leaving house arrest

During criminal investigation, house arrest may be ordered for a maximum of 30 days.

House arrest may be extended, during criminal investigation, only if necessary, if the grounds for taking the measure are maintained or new grounds have arisen, each extension not exceeding 30 days.

In the above case, the extension of house arrest may be ordered by the judge of rights and freedoms of the court competent to hear the case at first instance or of the corresponding court in its grade in whose district the place where the crime was found to have been committed or the seat of the public prosecutor's office to which the prosecutor conducting or supervising the prosecution belongs.

The judge of rights and freedoms is asked to extend the measure by the prosecutor, by reasoned proposal, accompanied by the case file, at least 5 days before the expiry of its duration.

The judge of rights and freedoms, seized, sets a deadline for solving the prosecutor's proposal in the council chamber before the expiry of the duration of house arrest and orders the summoning of the defendant.

The participation of the prosecutor is mandatory, the judge of rights and freedoms admits or rejects the prosecutor's proposal by reasoned conclusion.

The case file is returned to the criminal investigation body within 24 hours from the expiry of the deadline for filing the appeal.

The maximum duration of house arrest during criminal investigation is 180 days, after which the defendant may leave the house arrest by right.

The duration of deprivation of liberty ordered by the measure of house arrest shall not be taken into account for the calculation of the maximum duration of preventive detention of the defendant during criminal investigation.

In case of intentional abandonment of house arrest by the defendants, this is considered escape.

The crime of escape, provided by art. Article 285 of the Criminal Code provides for a simple form, consisting in escape from the legal state of detention or detention, the law also retaining an aggravated form.

Thus, the unjustified failure of the convicted person to appear at the place of detention upon expiry of the period during which he was legally at liberty or the leaving without authorization by the convicted person of the workplace outside the place of detention is

²⁷ <https://www.avocatimuresansilaghi.ro/blog/arestul-la-domiciliu-fractionat-pe-intervale-orare/>

considered escape and unjustified failure to present the convicted person at the place of detention.

With the introduction into the Romanian criminal procedure system through the new Code of Criminal Procedure of the preventive measure of domiciliary arrest, a legitimate question arose regarding its ability to constitute the premise state of the crime of escape.

As mentioned in the previous chapters, according to art. According to Article 218 of the Code of Criminal Procedure, "house arrest shall be ordered by the judge of rights and freedoms, by the preliminary chamber judge or by the court, if the conditions are met (...)"

The assessment of compliance with the conditions laid down shall be made taking into account the degree of danger of the offence²⁸, the purpose of the measure, health, age, family situation and other circumstances relating to the person against whom the measure is taken. The measure may not be ordered in respect of a defendant against whom there is reasonable suspicion that he has committed a crime against a family member and in respect of a defendant who has previously been definitively convicted of the crime of escape.

The rationale for the latter prohibition seems to be one of criminal policy, the predisposition of the person to evade the legal restrictions, so that it can be assumed that the measure taken would not have any preventive effect on him, being there being a risk of breach of the obligations imposed. However, the norm seems to have some discriminatory valences based on old positivist theories of criminal predisposition. However, it was rightly held that the prohibition did not apply to rehabilitated persons.²⁹

Although assimilated by the legislature, both in the Code of Procedure and in special laws, to the preventive measure involving deprivation of liberty, most of the doctrine nevertheless considers it closer to non-custodial measures as a particular form of judicial review in which only freedom of movement is restricted to the defendant and not physical freedom. In support of the character of a deprivatory measure, certain arguments of a normative nature may stand.

Thus, according to art. 399 para. Art. 9 of the Code of Criminal Procedure, "The duration of the house arrest measure shall be deducted from the duration applied by equating one day of preventive house arrest with one day of the sentence". Even the identity of the conditions for taking the measure with those of taking pre-trial detention could be an argument for its character as a deprivatory measure, thus being exceptional.

The execution of the house arrest measure is regulated by Law nr. 254 of 19 July 2013 on the execution of custodial sentences and measures ordered by judicial bodies during criminal proceedings, and not by the Law on non-custodial measures.

The question of its order by a judge, but not by the prosecutor, also supports the exceptional nature which brings it closer to the deprivation measure.

At the same time, art. Article 222 of the Code of Criminal Procedure provides that the maximum duration of house arrest during criminal investigation is 180 days and the duration of house arrest is not taken into account for calculating the maximum duration of preventive arrest of the defendant during criminal investigation.

Therefore, if the measure of domiciliary arrest was taken against him, after 180 days, the measure of preventive arrest could also be taken for that period, the first measure not being

²⁸ Buzescu Gheorghe, Drept polițienesc - curs universitar, Editura Sitech, Craiova, 2019

²⁹ Ion Neagu, Ion Neagu, Mircea Damaschin, Treatise on criminal procedure. General part, Universul Juridic, Bucharest, 2014

deducted from the other. If we were to recognise the purely depriving nature of the measure, it should not be possible to cumulate domiciliary arrest with preventive detention.

By reference to art. 126 of Law nr. 254/2013 which claims that "through the building where house arrest is executed, provided for in art. 221 para. (1) of the Code of Criminal Procedure, means the defendant's dwelling, room, outbuilding or fenced place pertaining to them."

Thus, the building can be from a studio or a dorm room in the case of some defendants, to the generous house and yard in the case of others. It is obvious that, if the building includes house and land, freedom of movement is not restricted to construction, extending to the yard, garden or park, essential being that they belong to the former, to be an extension of the residential building.

The person under house arrest is not under permanent guard, like the one in the special places of detention. According to art. 125 of Law nr. 254/2013, the fulfillment of measures is supervised by the police, and not the person, as one might erroneously interpret. The only means of surveillance with a domiciliary intrusion character is provided by art. 129 para. Art. 3 of the special law, "The supervisory body shall order unannounced visits, periodically or upon notification, at any time of the day, to the defendant's home or to the places established by the conclusion of the judge of rights and freedoms, the preliminary chamber judge or the court, in order to verify compliance with the measure and obligations by the supervised person. The carrying out of unannounced visits by the supervisory body shall be notified immediately to the judge of rights and freedoms, to the preliminary chamber judge or to the court, as the case may be".

In order to ensure the operability of these visits, art. 221 para. (10) of the Code of Criminal Procedure allows that, during the visit, the police body may enter the building where the measure is carried out, without the consent of the defendant or of the persons living with him.

From the interpretation of the legal provisions, the defendant under house arrest could leave it in three situations: to present himself at the summons of the judicial bodies, based on a prior approval following a well-reasoned request (travel to work, school courses, purchase of means of subsistence would be justified), as well as in urgent cases, without prior approval (to protect health, of life or property), with the obligation to inform the supervisory body.

If the supervisory body finds that the measure and obligations imposed on the defendant have not been complied with in bad faith, it shall draw up a reasoned notification and submit it to the prosecutor during the criminal investigation, to the preliminary chamber judge in the preliminary chamber procedure or to the court during the trial. Based on this notification, to which may be added the existence of reasonable suspicion that the defendant has intentionally committed a new crime for which criminal proceedings have been ordered against him, the judge of rights and freedoms, the preliminary chamber judge or the court, at the reasoned request of the prosecutor or ex officio, may order the replacement of house arrest with preventive arrest, under the conditions provided by law. The replacement will be made on the basis of art. 242 para. 3 of the Code of Criminal Procedure.

The replacement of domiciliary arrest with the more severe measure is not an obligation for the court, but a possibility, even if the conditions provided by art. 223 of the Code of Criminal Procedure. This is because the ultimate criterion is that of the expediency and necessity of taking the extreme measure, by reference to the criteria provided by art. 202, art. 218 para. 2 and Art. 223 para. 2 final sentence, there cannot be a case in which, without this analysis, the measure of arrest is mandatory.

In relation to the fulfillment of the constituent elements of the crime of escape in case of leaving domiciliary arrest without right, the doctrine is not unanimous. Thus, an author shows that the defendant under house arrest cannot be a direct active subject of the crime of escape.³⁰

Other authors consider that the person against whom the measure of deprivation of liberty was actually taken in accordance with the legal provisions or the person against whom the measure of house arrest or preventive arrest was taken is in a state of detention.

In the latter opinions it is stated that, within the meaning of Art. 285 of the Criminal Code, the detention or detention of a person is lawful from the moment when the detention order, arrest warrant or warrant for execution of sentence has been issued by the judicial body competent to take such a measure.

According to art. 2 para. 3 of Law nr. 254/2013, "House arrest shall be executed only on the basis of the conclusion ordered by the judge of rights and freedoms, by the preliminary chamber judge or, as the case may be, by the court, according to the provisions of the Code of Criminal Procedure."

Thus, the court will not issue a house arrest warrant. The difference is one of nuance, but essential. The arrest warrant is an order, which emphasizes the deprivation character of the measure, naturally followed by handcuffing and placement in the detention center. The absence of an order strongly mitigates the deprivation of domiciliary arrest. That is why it is considered that we are not in a state of detention or detention within the meaning of art. 285 of the Criminal Code.³¹

Returning to what was stated in the beginning of the analysis, "there are de lege two situations which, although they do not represent an escape from the guard, are assimilated to escape, both concerning the convicted persons. The first situation would exist in the case of the convicted person who is on leave provided for by the Law on Execution of Sentences and who does not appear after the expiry of the period at the penitentiary. The second situation concerns convicted persons who are under open regime of execution and who perform unguarded work outside prisons".³²

Even if they depart from the classical definition of escape, the two situations will be interpreted strictly, it being obvious that if the legislature had considered other situations, it would have listed them. Therefore, the state of domiciliary arrest cannot be circumscribed either to the standard form or to the two assimilated forms.

In support of the latter view is Art. 385 of the Italian Criminal Code, which provides that 'the foregoing provisions (relating to escape) shall also apply if the accused is under arrest at his own home or in another special place for that purpose. The criminal legislature, when it wishes to criminalise a particular conduct, expressly provides for it, which cannot be inferred by analogy'.

Accepting the criminalisation of leaving house arrest without right as an escape offence would also touch on the issue of incurring a double penalty for the same offence. Thus, for a single activity, the person would have to bear the rigors of replacing the preventive measure with the harsher measure, but would also be tried and eventually convicted for a crime with the same constituent elements, in real competition with the initial deed (for which he was arrested).

In the light of ECHR case-law, in relation to art. 4 of Protocol No 4. 7 (ne bis in idem principle), the escape of a person from pre-trial detention does not give rise to any penalty in

³⁰ Ion Neagu, Mircea Damaschin, *Treatise on criminal procedure. General part*, Universul Juridic, Bucharest, 2014

³¹ Ion Neagu, Mircea Damaschin, *Treatise on criminal procedure. General part*, Universul Juridic, Bucharest, 2014

³² <https://www.avocatimuresansilaghi.ro/blog/arestul-la-domiciliu-fractionat-pe-intervale-orare/>

the first act other than return to custody after capture. Of course, the facts will be retained in the actual contest. The escape of the convict entails disciplinary consequences. But escape from house arrest entails, in addition to the special treatment of the plurality, a specific sanction – the replacement of the measure by detention for an act that meets the elements of another concurrent crime.

Thus, analysing the pros and cons of the deprivation of liberty character of domiciliary arrest, by reference to the constituent elements of the crime of escape, the latter cannot have as an active subject a person who is not detained, preventively arrested or definitively sentenced.

At the same time, if the defendant violates in bad faith the measure or obligations incumbent on him, from a legal point of view, the only option is to replace the measure of house arrest with the measure of preventive arrest.

2.4. Procedural steps of house arrest

At the prosecution stage, the judge of rights and freedoms of the court competent to hear the case at first instance or of the corresponding court in its grade within whose jurisdiction the place where the crime was found to have been committed or the seat of the public prosecutor's office to which the prosecutor conducting or supervising the prosecution belongs, may order, at the reasoned proposal of the prosecutor, house arrest of the defendant.

The prosecutor submits to the judge of rights and freedoms the proposal to take the measure of house arrest together with the case file.

The judge of rights and freedoms, seized, sets a deadline for settlement in the council chamber within 24 hours from the registration of the proposal and orders the summons of the defendant.

The defendant's failure to appear does not prevent the judge of rights and freedoms from deciding on the proposal put forward by the prosecutor.

The judge of rights and freedoms hears the defendant when he or she is present.

Legal assistance of the defendant and participation of the public prosecutor are mandatory.

The judge of rights and freedoms accepts or rejects the prosecutor's proposal by reasoned conclusion.

The case file is returned to the criminal investigation body within 24 hours from the expiry of the deadline for filing the appeal.

The judge of rights and freedoms who rejects the proposal for preventive detention of the defendant may order, by the same conclusion, the taking of one of the other preventive measures provided for in art. 202 para. (4) letters b) and c) of the Code of Criminal Procedure (judicial control or judicial contrum on bail), if the conditions provided by law are met.

The measure of house arrest may be taken by the judge of rights and freedoms if he rejects the proposal for preventive arrest, if he considers that the conditions set out in art. 218 of the Code of Criminal Procedure.³³

At the criminal investigation stage, against the conclusion by which the judge of rights and freedoms takes the measure of house arrest, the defendant may file an appeal.

The procedure for dealing with the appeal shall be that provided for in Art. 204 of the Code of Criminal Procedure. At the preliminary chamber stage, the judge of the preliminary chamber before whom the case is pending may, by conclusion, order the defendant to be placed under house arrest at the reasoned request of the public prosecutor or of his own motion.

³³Anamaria Trancă, Preventive measures. Legal practice, Hamangiu Publishing House, Bucharest, 2017

The preliminary chamber judge seized orders that the defendant be summoned. The hearing of the defendant present at the appointed time is mandatory.

Legal assistance of the defendant and participation of the public prosecutor are mandatory.

The failure of the defendant to appear does not prevent the preliminary chamber judge from deciding on the proposal submitted by the prosecutor by indictment (in general) or from deciding on the taking of the measure of house arrest following the ex officio notification.

The preliminary chamber judge accepts or rejects the prosecutor's proposal by reasoned conclusion. If he rejects the prosecutor's proposal, the preliminary chamber judge may take the measure of judicial review or judicial review on bail against the defendant.

At the preliminary chamber stage, against the conclusion by which the preliminary chamber judge takes the measure of house arrest, the defendant has the right to file an appeal, according to the provisions of Art. 205 of the Code of Criminal Procedure.

At the trial stage, the court follows the same procedure as at the preliminary chamber stage.

At the trial stage, the conclusion of the court ordering the preventive measure of house arrest may be appealed, with appeal, under the conditions of art. 206 of the Code of Criminal Procedure.

1) 3. Peculiarities of preventive arrest and house arrest

3.1. Fundamental rights and freedoms of individuals in criminal proceedings

The institution of human rights has been determined over time by the complex crystallization process, currently being also a very complex institution, related to both domestic and international legal norms.³⁴

In order to understand how international protection of human rights works, we need to understand how the concept of man understood as a "person", holder of fundamental rights, emerged and how it evolved. Thus, in the following I will focus my attention on the emergence and development of the notion of "person" in the context of a modern world.

In our times it is natural to regard the person as worthy of his fundamental rights, but we must not forget that the notion of a person, understood as a human being - owner of rights and obligations, is the result of a long period of time full of events and obstacles.

If we trace history, we can see that the idea of innate rights, belonging to the person, appears in the seventeenth century. However, in codes and statutes, the first rights to assert themselves were economic rights, then civil rights, then political rights; and, finally, human rights.

Given the existence of the notion of 'person subject to law' (soggetto di diritto), it was also necessary to emerge the concept of 'person endowed with rights' (personae) in order to organise legal relations.

In the nineteenth century, the concept of "person" as a right holder began to timidly emerge, and thus burst into continental legal culture, being also considered essential, a model system of democratic law inspired by the founding values of any civil society.

Terminology has much to say about history and the concepts that are reflected in the creation of legal norms and the theoretical elaboration of legal categories, but the legal system of a country also provides useful clues for understanding the spirit of its history. Therefore, the legal concept of the person must also be placed in its historical context.

³⁴Nicolae Purdă, Nicoleta Diaconu, Legal Protection of Human Rights, Unversul Juridic, Bucharest, 2007

The essence of the person is his human dignity, that characteristic feature that must be recognized in every individual, regardless of his role in society.

Domat's ideas can be considered a prototype of the model of legal reasoning about the conception of the person.

It divides the status of the person (complex of qualities of a human being) into natural and civil. Natural status refers to a person's gender, date of birth and age. Civil status, on the other hand, is determined by "arbitrary laws" and springs either from concepts of status created by Roman legal tradition (liberty, citizenship and family) or from local laws. He considered that in France persons were divided into nobles and inferiors, clergy, citizens and plebeians, free or in servitude, the latter not being a condition of a person, but a condition related to his house or the nature of his property.³⁵

Although remarkable, Jean Domat's conception, in the eyes of today's legal commentators, is not without flaws.

Several shortcomings are perceived in his conception of natural law. The first is the confusion of the laws of nature with civil law, the second is the separation of natural law from civil law, and the third is the hypostasis of social status. In particular, birth out of wedlock accompanied by the acquisition of 'villain' status, limiting inheritance rights, should not be considered a condition arising from nature. It is obvious that the natural act of birth confers no distinction as regards the inherent rights of the person, except equality.

According to Jean Domat, the legal construction of the person seems to be an accumulation of categories, prejudices and social conditioning, which codify objective inequalities. It does not distinguish what is called natural from that superimposed on nature.

Or rather, it attributes to one who is called "natural" a selective function, apparently performed according to the canons of preconceived social beliefs. Domat takes the notion of statute from Roman law, notes the absence of a definition and that its origin and causes are not clarified. Status is not regarded by him as a legal instrument, a social selector, a support of society, but rather as a fact of nature, imposed by the natural order and therefore coming from the Creator who imposed this order on the world.

To summarize, it can be stated that the cornerstones of the construction of the concept of person (Roman law, medieval law, natural law and pre-Napoleonic civil law) are the result of ancient hypostases or operations such as anachronisms to which the commentator returns to justify primates, immunities and privileges.

Tradition is used to justify the present and to argue the necessity of its continuity with the past. In other words, to engage in operations whose ideological orientation is not clarified.

The fact that in some national legal traditions the concept of person is codified does not necessarily mean that the rights of individuals are protected, nor does it demonstrate the superiority of those national traditions that contain rules and treaties over the person over those that have none, but it demonstrates the awareness of the importance of protecting fundamental human rights. Thus, the results of applying such rules and treaties matter.

Regarding the emergence of the Universal Declaration of Human Rights, it was rather a reference model for what followed in terms of the protection of human rights at European level in an international context, as it can be said that it is not a complete act, lacking some gaps.

The act preceding the Universal Declaration of Human Rights was the European Convention on Human Rights, which raised the question of the direct applicability of its rules,

³⁵Jean Domat, *Le leggi civili nel loro ordine naturale*, Tipografia di Pietro Bizzoni Publishing House, Pavia

being linked to the recognition of fundamental human rights in the context of the European Community.

As regards the Constitutions that followed the Second World War, in particular the Italian Constitution of 1948 and the German Basic Law of 1949, it can be said that they brought to the fore the transition from the notion of an individual perceived as an abstract subject to a person whose rights are recognized as such, the person coming to be understood not in the abstract, but as a real person with biological and social needs.

The Charter of Fundamental Rights of the European Union is considered to be the act with the greatest impact on the European Community. Thus, it has best defined the concept of protection of fundamental human rights and has set the best direction for the Member States of the European Union in terms of national law-making on this issue.

"The Charter was drafted by a new and original body created by the European Council. The body – called the Convention – consisted of: representatives of heads of state or government, one representative of the President of the European Commission, 16 members of the European Parliament and 30 members of national parliaments. In addition, there were 4 observers: 2 representatives of the Court of Justice and 2 representatives of the Council of Europe, one of whom from the European Court of Human Rights. The originality of the new body was given by its mixed composition: representatives of European and national institutions, as well as representatives of executive and parliamentary structures"³⁶

When it first appeared, the Charter of Fundamental Rights of the European Union, adopted by the European Council at the Nice Summit on 7 December 2000, was considered, at least from the statements made by its supporters in Nice in December 2000, as a text whose value and content was purely political.

In reality, the process of institutional innovation has taken a different course. In the first months of examining and interpreting the Charter, both judges of the European Court of Justice and some national judges treated it as a document with legal effect. The phenomenon of the "current constitution" materialized at Community level.

The Charter therefore began to function as a list of values, as an image of general principles or as an action programme for the European Union, as if it had effective legal effect. This function was strengthened with the entry into force of the Constitution for Europe.³⁷

This type of reasoning, which uses formal arguments but contains implicit political rulings, is second nature to the learned Italian or German legal writer. In modern constitutional experience, however, there is no shortage of situations very different from this model. In France, the venerable declaration of human rights stemming from the Revolution is considered by most people to be a political document, and the French Constitution is a legally relevant document that is intended only to delineate the institutional structure of the state.

In the United Kingdom, a text written as the Bill of Rights has been introduced, i.e. the Human Rights Act 1998, in which the European Convention on Human Rights, signed in Strasbourg in 1950, is reproduced with a certain mutilation.

The constitutional structure is based on the democratic tradition of the country, but is of an ordinary nature, not entrusted to a written text. In the experience of all other countries,

³⁶Nicolae Purdă, Nicoleta Diaconu, *Protecția juridică a drepturilor omului*, Editura Universul Juridic, București, 2007

³⁷Doina Balahur, *Course support, European Protection of Human Rights*, "Alexandru Ioan Cuza" University, Iasi, Centre for European Studies, 2006

including Romania, (written) constitutions consist of both indications of fundamental rights and provisions defining the structure of the state.

The European Charter is closer to the Italian and German models.

The preliminary draft submitted by Giscard d'Estaing set out in Article 2 a list of the values of the European Union, including respect for human dignity, equality and solidarity, fundamental rights.

These are the cornerstones of democracy, the rule of law and tolerance. In reality, Article 2, as worded, is sufficient to guarantee all citizens respect for fundamental rights, but the incorporation of the Charter into the Constitution has the merit of listing all the rights of the person now recognized as belonging to individuals,

The Charter strengthens the individual dimension of the person, treating him as a single entity claiming rights from the authorities, and also emphasises his social dimension.

The European Charter maintains its focus on the social dimension of the rights of the individual and his or her social groupings.

Mention of the principle of solidarity, present in the Charter, which enhances the social role of the person and protects the collective interest. In any event, the text cannot be understood as a list of purely individual values closed to any social requirement, human dignity necessarily being a relational value, as well as tolerance and fundamental rights (which include the right to freedom of association) and, of course, democracy, which, if understood in a modern sense, cannot have a purely individual dimension.

A value must be relational and communal in nature. A value is rooted in the conscience and life of a people only if it is shared and respected, not just because it is printed on paper.

The expression "fundamental rights" or "fundamental human rights" indicates claims or freedoms recognized in international texts, in texts of national constitutions, in judicial practice, in supranational practice. Similarly, the term legal relationship between individuals is used generically, as a freely expressed obligation or promise or as a contract giving rise to civil liability.

Given the written texts most frequently used in comparisons, such as the Constitutions of Western countries and their Civil Codes, in addition to special laws, international conventions and treaties, no explicit legislative formula is found that specifically links "fundamental rights" and "legal relations between individuals".

The Charter to some extent amplifies and updates the rights of the person. For example, it provides for the right to respect for private life (Article 7).

The Charter also adds to this right another right, relating to the protection of personal data (Article 8). Raising this right to the level of rights guaranteed by the Constitution is a further step towards a modern status of the rights of the person.

In the same way, the Charter, recognizing the right to found a family (Article 9), treats the family as a natural grouping based on marriage and recognizes the importance of a real family, as one of the social groupings in which the personality of the individual develops.

The Charter not only includes among the fundamental rights of the person the right to form a family which is not founded on marriage, but is open to the recognition of same-sex families. Also, with regard to the principles of equality and non-discrimination (Articles 20-26), the Charter extends the rights of the person, incorporating into the list of rights the prohibition of discrimination based on colour, genetic features, birth, disability or sexual orientation.

In addition, there are provisions on environmental protection (Article 37) and consumer protection (Article 38).

This process, which departs from the neutral concept of the individual person as beneficiary of rights (*soggetto di diritti*) towards the conception of the individual as a person who deserves protection in himself, is not considered complete by many critics.

As far as the fundamental rights and freedoms of individuals in criminal proceedings are concerned, they merely spring from and continue the Universal Declaration of Human Rights and the Charter of Fundamental Rights of the European Union.

Thus, among the rights that we can notice during the criminal process, which have also become principles in the criminal process, the most important are:

- Presumption of innocence;
- guaranteeing the freedom of the person;
- respect for human dignity;
- guaranteeing the rights of defence;
- equality of persons in criminal proceedings;
- Right to a fair trial.

Also, Article 83 of the Code of Criminal Procedure provides for the following rights of the defendant in criminal proceedings, derived from those listed above:

- the right not to make any statement during criminal proceedings, being warned that if he refuses to make statements he will not suffer any adverse consequences, and if he makes statements they may be used as evidence against him;
- the right to be informed about the act for which he is being investigated and its legal classification;
- the right to consult the file, according to the law;
- the right to have a lawyer of his/her choice and, if he/she does not appoint one, in cases of compulsory assistance, the right to have a legal aid lawyer assigned to him/her;
- the right to propose the taking of evidence as specified by law, to raise exceptions and to draw conclusions;
- the right to make any other requests related to the settlement of the criminal and civil side of the case;
- the right to have an interpreter free of charge when he or she does not understand, express himself or herself well or cannot communicate in Romanian;
- the right to have recourse to a mediator, where permitted by law;
- the right to be informed of his/her rights;

Thus, in the following, I will make a brief presentation of this right.

The presumption of innocence gained its autonomy, as a rule of law, only in the eighteenth century, first being proclaimed in the legislation of the United States of America and then in the Declaration of the Rights of Man and of the Citizen of 1789. Later, feeling the need to enshrine this presumption through documents of an international character, it was inscribed in Article 11 of the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948, while recommending that States' national laws incorporate into their provisions rules on the presumption of innocence.

The inclusion of this presumption in the great laws of most states of the world is a victory against the conceptions according to which there are born criminals, who have a pathological predisposition to commit crimes and for whom the presumption of innocence could not operate. The presumption of innocence is enshrined as a fundamental principle in the laws of some states, and in our legislation it was inscribed until 2003 in Title III of the Code of Criminal Procedure (Evidence and means of evidence), in art. 66. According to this article, the accused or accused person is not obliged to prove his innocence.

Given that, by its functionality and significance, the presumption of innocence radiated throughout the criminal proceedings, its importance exceeding the field of evidence, it was necessary to reassess and consecrate it as a basic rule in the entire criminal process.

Being a rebuttable presumption, the presumption of innocence can be rebutted by proving guilt in the course of probation; In the light of Art. 4 of the Code of Criminal Procedure. "Everyone shall be presumed innocent until proven guilty by a final criminal judgment. After taking all the evidence, any doubt in the formation of the conviction of the judicial bodies shall be interpreted in favour of the suspect or defendant".

In the light of the judicial practice in the field, it becomes obvious the importance of the presumption of innocence in the entire activity of the criminal process and the need to improve the procedural institutions in which the existence of evidence of guilt is evoked, so that the regulation subscribes to this fundamental principle.

The guarantee of the freedom of the person is enshrined as a fundamental principle, the inviolability of the person consists in the right of every person to be and to be able to behave freely, the attainment of these attributes can be done only in the cases and under the conditions provided by law.³⁸

The current Constitution of Romania, revised in October 2003, enshrined in art. 23, individual freedom, stating: "Individual liberty and security of the person are inviolable. The search, detention or arrest of a person shall be permitted only in the cases and with the procedure provided for by law. Detention may not exceed 24 hours. Pre-trial detention shall be ordered by a judge and only during criminal proceedings."

During criminal investigation, preventive arrest may be ordered for a maximum of 30 days and may be extended by a maximum of 30 days, without the total duration exceeding a reasonable term, and not more than 180 days. During the trial phase, the court is obliged, according to the law, to verify periodically, and no later than within 60 days, the legality and grounds of preventive arrest and to order immediately the release of the defendant, if the grounds that determined the preventive arrest have ceased or if the court finds that there are no new grounds justifying the maintenance of the deprivation of liberty. Court decisions on preventive detention are subject to appeals provided for by law.

The person detained or arrested shall be informed forthwith, in a language which he understands, of the reasons for his detention or arrest, and of the accusation as soon as possible; The accusation shall be notified only in the presence of a lawyer, chosen or appointed *ex officio*.

As far as respect for human dignity is concerned, the new socio-political conditions created in Romania after December 1989 have allowed the alignment of our criminal legislation and criminal procedure with the vast majority of world legislations, which comply with the principles proclaimed in the Charter of the United Nations, which recognizes the equal and inalienable rights of all members of the human family, which is the foundation of freedom, of justice and peace in the world. In this respect, Romania has acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.³⁹

Romania's accession to the above-mentioned Convention had resonances in terms of criminal legislation and criminal procedure. Consequently, by Law nr. 20/1990, was introduced in the Criminal Code (art. 267 the crime of torture as an offense against the administration of

³⁸ Ioan Muraru, *Constitutional Law and Political Institutions*, Actami Publishing House, Bucharest, 1990

³⁹ Done at New York, 10 December 1980. Romania acceded to the Convention through Law nr. 19 of 10 October 1990, published in M. Of. No. 112 of 10 October 1990.

justice, and by Law no. 32/1990 was introduced in the Code of Criminal Procedure, in art. 51, the principle of respect for human dignity, with the following content:

"Everyone who is under criminal investigation or trial must be treated with respect for human dignity. Subjecting it to torture or cruel, inhuman treatment or degradation is punishable by law."

The current Constitution enshrined this principle in the "Fundamental Rights and Freedoms", stating, in art. Article 22(2): "No one shall be subjected to torture or to any kind of inhuman or degrading treatment or punishment." This fundamental principle establishes the legal framework for the treatment to be applied to the person of the accused or accused person throughout the criminal proceedings.

Naturally, in the economy of criminal procedure regulation, there must be rules that transpose into criminal procedure the basic rule we are analyzing. From this point of view, we find that some of the provisions, among those that discipline the conduct of criminal proceedings, come directly to support the principle we are analyzing, while others, indirectly, also lead to the application of the same principle.

The guarantee of the right of defense, enshrined since Roman law, which included the rule that no one could be tried, not even the slave, without being defended, the right of defense is considered as a requirement and guarantee, necessary to achieve a balance between the interests of the person and those of society.

In the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, the right of defence was included among the fundamental human rights.

Art.14(3)(d) of the International Covenant on Civil and Political Rights refers to the person's right to defend himself or herself or to have the assistance of counsel.

Art. 6 of the Convention, guaranteeing the right of the person to have access to fair justice, states, inter alia, that the person to whom an offence is charged must have "the time and facilities necessary for the preparation of his defence".

Recognizing as legitimate such a consecration of the right of defense, the Constitution of our country, adopted in 1991 and revised in 2003, enshrines in art. 24, the right of defence among citizens' fundamental rights.

The Code of Criminal Procedure, being the basic law that disciplines the conduct of criminal proceedings, includes, among the basic rules of this social activity, the guarantee of the right of defense. In this regard, it is stated: "The right of defence is guaranteed to the accused, the accused and the other parties throughout the criminal proceedings. During criminal proceedings, judicial bodies are obliged to assure the parties of the full exercise of procedural rights under the conditions provided by law and to administer the evidence necessary for the defence. The judicial bodies have the obligation to inform, immediately and before hearing the accused or defendant about the act for which he is being investigated, its legal classification and to ensure the possibility of preparing and exercising the defense. Every party has the right to be assisted by defence counsel throughout the criminal proceedings. The judicial bodies are obliged to inform the accused or accused person, before the first statement is taken, of the right to be assisted by defence counsel, recording this in the hearing report. Under the conditions and in cases provided for by law, judicial bodies are obliged to take measures to ensure legal assistance for the accused or accused person, if he/she does not have a chosen defence counsel".

The equality of persons in criminal proceedings, in a broad sense, includes, in its content, the right of Romanian citizens, regardless of nationality, race, sex or religion, to exercise, under conditions of full equality, all the rights provided for in the Constitution and laws, to participate equally in political, economic, legal, social and cultural life.

The Romanian Constitution expressly enshrines the principle of equal rights in art. 16 points 1 and 2 and, implicitly, in Art. 21. Thus, in Art. Article 16 point 1 states that: "Citizens are equal before the law and public authorities, without privileges and without discrimination", and in art. Article 16 point 2 states that: "No one is above the law".

In Art.21 of the Constitution mentions free access to justice as a fundamental right of the person, stating that: "Any person may go to court to defend his/her rights, freedoms and legitimate interests"; The same constitutional provision further states that no law may restrict the exercise of this right.

According to Prof. Ion Deleanu, the text represents a specific application of the principle enunciated by art. Article 4 of the Constitution, namely, equality between citizens and gives particular expression to the solemn statement of Art. 1 of the Universal Declaration: "All human beings are born free and equal in dignity and rights"

The same author further points out that: "Equality is a fundamental value in the human family..." and that: 'The principle of equality presupposes equal legal treatment in equal situations'. Nuanced, the Constitutional Court ruled that: "(...) Equal rights do not mean an equal measure for different situations." "In other words, equal legal treatment must correspond to equal situations; In different situations, the legal treatment can only be different. This, if: there is objective and reasonable reasoning; This does not lead to a disproportion between the aim pursued by unequal legal treatment and the means employed. In fact, the Constitution itself admits positive discrimination. For example, art. 38 para. 2 also imposes special measures for the social protection of labour; Art. 45 para.1 expressly states that children and young people enjoy a special protection regime; Art. 46 also establishes special protection for disabled persons".⁴⁰

3.2. Aspects of preventive arrest and house arrest. Comparative law issues.

Pre-trial detention is never mandatory. This principle of pre-trial detention as a measure of last resort is introduced in the Code of Criminal Procedure, which specifies that any deprivation of liberty must be used as an exception, and according to the law.

Although not explicitly worded, it is suggested that judicial bodies must first consider alternatives to pre-trial detention. In order to protect the fundamental right to liberty and act on the basis of the presumption of innocence of the accused, judges must carefully weigh and prefer all available alternatives to pre-trial detention, considering to what extent non-deprivation of liberty measures could ensure the proper conduct of criminal proceedings to the same extent as pre-trial detention. Automatic approval of the most drastic preventive measure could negatively impact the person and their ability to prepare for the process. Judicial control, judicial control on bail and house arrest are the least restrictive alternative measures provided for by Romanian law.

House arrest is an alternative to pre-trial detention introduced by the 2014 reform of the Criminal Procedure Code. As mentioned in previous subchapters, this measure cannot be imposed on suspects who have previously been charged with escape. For them, judicial control can be considered, the ordering of pre-trial detention is never taken for granted.

On 7 May 2015, the Constitutional Court declared the provisions of Article 222 of the Code of Criminal Procedure unconstitutional because they failed to regulate the maximum period of time for which house arrest can be ordered. On June 30, 2015, by an emergency ordinance, this period was set at a maximum of 180 days during the criminal investigation, so

⁴⁰ Ioan Muraru, Constitutional Law and Political Institutions, Actami Publishing House, Bucharest, 1990

house arrest was again implemented. In the preliminary chamber proceedings and during the trial, the period of house arrest may not exceed half of the maximum penalty prescribed by law for the offence for which charges are made and may not exceed 5 years.

For 18 days (12-30 June 2015) house arrest was unconstitutional. In practice, this legislative vacuum revealed anomalies in the system of alternative measures to preventive arrest and, at the same time, highlighted public opinion on this issue, in an unfortunate case known in the press as "the rape of Vaslui"⁴¹.

Regarding the issue of the most used alternative measure, judges and prosecutors mention that in Romania, this is judicial control. 43.5% of the lawyers surveyed also agreed that judicial control is the most used alternative, while 38.9% also mentioned house arrest. Unfortunately, there is no data available on how frequently these alternatives are used.

In addition, with regard to house arrest, the legislature did not take into account the situation of people who have no family or friends and who cannot rely on anyone if they cannot leave their home (to buy food, for example).

Also, the legal framework within which house arrest operates, meaning that each day of house arrest is deducted from the final sentence, just like a day of preventive arrest, generates reluctance on the part of judges to order this measure. As house arrest is a more lenient measure than pre-trial detention, they believe that there should be different regimes to deduct from the final sentence. There is a need for a discussion on these different regimes, which would increase the willingness of judges to order house arrest (variants could be introduced such as: 2 days of house arrest equals one day of preventive arrest, etc.).

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