

SUMMARY

doctoral research project entitled

RESTRICTION OF CERTAIN RIGHTS OR FREEDOMS IN THE CRIMINAL TRIAL

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The doctoral research project entitled "Restriction of certain rights or freedoms in the criminal trial" had as its starting point the assertion in both internal and international law the need of protecting fundamental rights and freedoms representing the values system of contemporary democracies. In order to build a complete and complex perspective through which public authorities protect human rights, it is necessary to know the current state of development of the legal means of protection, as reflected in national and European law and the trends of the evolution of law and national and international practice.

The object of the research paper is the restriction of certain rights or freedoms starting from a systemic analysis of the conditions in which the restriction is made and continuing with a practical research of human rights and public freedoms whose exercise may be restricted in order to ensure the evolution of the criminal trial.

From a legal perspective, it is a characteristic for these rights and freedoms the fact that they are found in each branch of law, situation especially highlighted in the constitutionalization process through which the branches of law are undergoing.

The provisions of art. 53 of the Romanian Constitution establish the restriction of certain rights or freedoms, the restrictive conditions in which this restriction may be imposed, with the aim of maintaining the balance between individual rights and general interests of the society.

These conditions must be analyzed in a successive order as the non-fulfilment of one condition results in the unconstitutionality of the measure and therefore it is no longer necessary to analyze the following conditions.

What's missing in our constitutional jurisprudence in this area is the systemic character of the analysis of fulfilment the conditions limiting certain rights or freedoms.

This fact was an argument of our scientific research devoted to the theoretical, legislative and judicial practice aimed at restricting certain rights or freedoms.

The main purpose of the research topic was to study theoretical and practical conditions of the restriction of certain rights and freedoms and respect these conditions in the case of human rights and public liberties that may be affected during criminal trial.

The paper is structured around two axes of research. **The first axis** concerns the analysis of institutions, mechanisms and legal regulations that ensure the preservation of human rights and public liberties in the criminal trial. The existence of a constitutional jurisdiction and implicitly of a constitutional contentious of human rights and public liberties is likely to protect these rights and freedoms in relation to the authority of criminal state by reference to the provisions of art. 53 of the Romanian Constitution. **The second axis** of research focuses to identify from a systemic and comparative analysis the possible failures that can arise in the activity of enactment and applying regulations meant to ensure real legal protection of the exercise of fundamental rights and freedoms in the criminal trial, and whether the Romanian constitutional system can provide through constitutional jurisdiction the guarantee of the exercise of human rights and public liberties, against whom the rights and freedoms must be guaranteed and especially who should protect these rights and freedoms.

Part I of the doctoral research paper is devoted to the systemic analysis of the conditions in which the restriction of certain rights or freedoms is made under article 53 of the Romanian Constitution, but it was first necessary to determine the field of implementation of the restriction, more precisely the rights and freedoms whose exercise may be limited considering that article 53 speaks of the restriction of *certain rights and freedoms*, article 3, paragraph 1 enforces as a supreme value citizen's rights and freedoms

and article 152 establishing the limits of reviewing the Constitution refers to the fundamental rights and freedoms of citizens that can not be suppressed by the review procedure.

The concept of human rights refers to the inherent rights to the human being. Positive law is the real law applicable in a state at a certain time. This law includes the natural rights that are applicable with the same title as the law required by the state. Human rights differ from civil liberties from the perspective of the source of their protection. Public freedoms have as a source of their legal protection a constitutional text and human rights may have as a source of their formal protection a general principle of law.

Although the text of art. 53 of the Constitution does not state explicitly, through a consistent jurisprudence the Constitutional Court has defined its scope, stating that it only concerns the *fundamental rights* and not any individual rights, whether arising out of normative documents or consensual acts. The Declaration of Rights and Freedoms as a supreme value in article 1 of the Constitution provides the opportunity to enlarge the domain of fundamental rights and freedoms, the person may invoke the violation of the supreme value even if the real right is not expressed in the Constitution by a constitutional provision on the fundamental rights or freedoms. Therefore, the limits of the restrictions are imposed for all rights and freedoms, the state is obliged to ensure as a the supreme value every right and every freedom even if they are or not formally constitutionalized. In this context it is important highlighting the link between fundamental rights, subjective rights and the supreme values.

If, as stated above individual rights are the reflection of fundamental rights, the unconstitutionality of a norm being attracted by the violation of a fundamental right, the establishment of citizens' rights as a supreme value tends to overturn the procedure, it is sufficient that an individual right is infringed by regulation outside the imposed perspective of article 53 for the norm to become unconstitutional. Subjective right is attached to a supreme value without being directly attached to a fundamental right.

The examination of the conditions of restriction of rights or freedoms must be performed in a successive order as the non-fulfilment of one condition results in the unconstitutionality of the measure and therefore it is no longer necessary to analyze the following conditions. The principle of legality of criminal offences and penalties represents the application in criminal matters of the rule with the more general character concerning the predictability of law in a democratic society. According to it no deed can be considered an offence if it is not stipulated by the law and no punishment can be imposed if it is not stipulated by the law. This is why criminal norms must be restrictively interpreted being repressive regulations likely to harm the individual freedoms and their wording should be as accurate as possible and the terms used well defined.

The existence of *faulty wording of the criminal provisions applicable to some persons accused affects the constitutional guarantees on the right to a fair trial*. Thus, it is noticeable that this right is a complex one, which has several components and in which it is included *lato sensu* and the right to an effective defence. All these varied and uneven circumstantiations only deprive the firm attitude of the state that seeks to counter crime, and impede the achievement of justice, which, according to art. 21 and art. 124 para. (2) of the Constitution, must be made for all individuals in a fair trial and in a unique way, impartial and equal. The principle of legality requires the existence of national rules sufficiently accessible, precise and foreseeable in their application, as evident from the constant jurisprudence of the European Court of Human Rights.

In assessing the necessity of the restriction of certain rights or freedoms of a democratic society, we must first consider whether the restriction is necessary to avoid anarchy, but not if it does not transform the power of the majority in an absolute power. The restrictions must be psychologically accepted by the majority of the individuals, dominant at the level of collective consciousness as a necessary measure to save society from anarchy and chaos. However, if it would create the reverse reaction of denial the necessity of liberty limits then is contrary to democracy. In fact democracy means that the will expressed in the state's legal system is identical with the will of the subjects.

In constitutional law, the principle of proportionality is applicable especially in the field of protection fundamental human rights and freedoms while in criminal law, this

principle is a criterion to substantiate the validity of the measures ordered by the judicial authorities both in the domain of individualization penalties and in the case of appropriateness of the preventive measure decided on the facts and the purpose of criminal trial. Proportionality requires first an analysis of the appropriateness of the measure of restraint's object in its reasons, then adequacy of means used on the purpose of restrictive law and then adapting the real result of restrictive law on the purpose chased by the legislator through that law, and on the reasons for his choice. This analysis of compliance or violation of the principle of proportionality requires a dual control of *necessity and appropriateness*.

After an initial period during which the Constitutional Court stated that any restriction of a right should cease as soon as the cause which justified it ceased, introducing a temporal criterion for the analysis of proportionality, then chose to leave as much margin to the legislator, reaching to validate reasons of legislative opportunity for the restriction of certain rights.

Part II of the paper is dedicated to the restriction of certain rights or freedoms in criminal trial.

Individual freedom is part of the fundamental rights as stated, not randomly in the second article of Chapter II of the Romanian Constitution, which regulates fundamental rights because as shown in this paper, is the foundation of other fundamental rights protected by the constitutional provision.

The right to liberty and security, however, is not an absolute right, which originates from the content of article 23 of the Constitution, the restriction of this right is possible in compliance with article 53 of the Constitution. The guarantees given to individual liberty constitute a system and allowed the repression of public force but also safeguards the legal protection necessary for the exercise of this freedom, report expressing the principle of proportionality.

The finality of the guarantees offered by constitutional texts is to create a balance between the need for preventive measures affecting the security of the person, with the purpose of a good development of criminal prosecution, of the protection of the society's

members towards the person accused of committing a crime, and everyone's right to defend themselves against unjustified arrest or detention, unlawful, in order to regain their freedom.

We believe that constitutional provisions could be harmonized in a future constitutional revision, in terms of **limiting preventive detention during trial** at a reasonable term, established expressly, that eliminates current provisions of the Criminal Procedure Code which refers to half of the special maximum of the punishment stipulated for the offence made. In this way would be eliminated the difference of legal treatment of the defendant who was not prosecuted and may be taken into custody preventively during prosecution within 180 days and the other case when the defendant was sent to court. Given the need to synchronize Romanian criminal procedural legislation with the European legislation and the tradition of assuming the regulations of judicial institutions that have shown viability, we consider, in the context of the planned revision of the Romanian Constitution in the sense of substantiating the change of art. 23 para. 3 by increasing the **retention period up to 48 hours**.

Another proposal that resulted from the analysis of the restricting conditions of individual liberty in criminal trial, concerns **the regulation of prohibiting the deployment of trials having as a purpose the preventive arrest or the extension of this measure** during the night, except when the process has began during the day and was subsequently extended.

From a legislative perspective in Romania considerable progresses have been made in terms of defence of human rights and especially the right of defence but the remaining question concerns the attitudes of the authorities of criminal prosecution, who out of the desire to find in time people who commit acts of criminal nature, violate sometimes the rights stipulated by article 6 para. 3 of the Convention but also constitutional norms. In support of this statement rely the comparative analyzes we conducted between the provisions of criminal procedures nowadays and the provisions of the new Code of Criminal Procedure, expected to come into force on the 1st of February 2014. I considered that nowadays the restriction of the exercise of the rights of defence in the faze of preliminary acts and the interdiction imposed to the accused person and the

defendant chosen of having access to criminal prosecution file infringes the right of defence guaranteed by article 24 of the Constitution as these restrictions are not covered by the Criminal Procedure Code, which renders redundant to examine the other conditions stipulated in article 53 of the basic law.

Express regulation in the Romanian Constitution that the arrest warrant and residence searches are available only during the trial, after the criminal prosecution, by the magistrate **judge** independent in its relations with the executive constitute at the present time *institutional guarantees* as these concern the skills of judicial authorities with responsibilities in the inviolability of the residence.

The regulation of the procedure through which residence searches are ordered and carried out in the articles 100-111 of the Criminal Procedure Code currently in force, are **procedural guarantees**, which determine the validity of the trial and procedural documents with respecting certain conditions while **substantial guarantees** concern background conditions to be fulfilled.

The role and importance of the judiciary in a democratic society are essential but in the same time the judiciary must show transparency in relation to society and the media in particular.

As we demonstrated we are for the transparency of the judiciary system, for one of the roles of the media is to convey information and express opinions on the work of justice but transparency can not be total.

This is because freedom of expression conflicts and can be detrimental to individual freedom in terms of respecting the benefit of the doubt during criminal trial.

Those who have first of all to ensure the benefit of the doubt in public statements and media messages about the causes investigated are judiciary authorities themselves, whose claims must be reserved, and not generate public guilt of the investigated persons.

No doubt that the provisions of the new Criminal Procedure Code on preventive measures, requirement, ordering and realizing residence searches, issuing of the warrant, respecting the right to defence contain new provisions that constitute substantial

procedural guarantees in terms of respecting fundamental rights and freedoms. The manner in which these procedural rules shall be interpreted and applied in practice, will be a touchstone for all the actors involved in the judicial activity so that the very manner of application can not constitute a limitation on the exercise of rights or freedoms.