

THE LEGAL NATURE OF ADMINISTRATIVE DETENTION

Adrian ALDEA ¹

Abstract: *Administrative or constabulary detention is the first measure involving deprivation of liberty that the police officers applies in extenso when initiating criminal investigations. Following the amendment of the jurisprudence of the European Court of Human Rights a more rigorous regulation of the circumstances and situations in which such a measure becomes effective is required.*

Key-words: *detention, criminal investigation, deprivation of liberty, constitutionality.*

1. Introduction

Deprivation of liberty as an administrative measure of taking into police custody is stipulated by art. 31 paragraph (1) letter b) from Law no 218/2002 regarding the organisation and operation of the Romanian Police.

In order to perform his duties, according the police officer is vested with public authority, having in this respect a series of cardinal rights and obligations.

With regard to the judicial domain of private liberty, according to article 31, paragraph (1) letter b) from Law no 218/2002 - *"While performing his duties, according to the law, the police officer is invested with the power of public authority and has the following leading rights and attributions : [...]*

b) to accompany to the police station those individuals, who through their actions endanger the life of other human beings, public order or other social values

as well as those individuals that are suspected to have committed offences, whose identity could not be established by law; in case of not complying with the police officer's orders, he may use force; the probation of such situations and individuals and taking legal measures, where appropriate, must be performed within 24 hours " - the police officer has the right to take into police custody the individuals who, through their actions, endanger the life of other human beings, imperil the public order or other social values, as well as those suspect of breaking the law, whose identity could not be established according to the law; in case of non-compliance with his dispositions, the police officer is entitled to use force.

The text legally qualifies the nature of this measure which implies a form of deprivation of liberty, including it in the judicial category of administrative measures.

¹ Law Faculty, *Transilvania* University of Braşov.

As a any form of liberty deprivation, the legislator establishes a maximum time limit and pointing out that checking the situation of these individuals and taking possible legal consequential measures is achieved within 24 hours.

Regarding the time limit of this administrative measure, it is necessary to underline the legal relationship that exists between this kind of deprivation of liberty measure and the one resulting from preventive detention. The problem we approach here is to find out if the two measures (the one stipulated by Code of Criminal Procedure and the one referred to in Law no 218/2002) are distinct, separate or show similitude to the extent of considering them equal.

Thus, we are presented with two measures – one stipulated by the Code of Criminal Procedure and the other drawn by Law no 218/2002. It is true that there are some similarities between them, meaning that both measures can be taken by the police officers and, on the other hand, they cannot have a duration of more than 24 hours. At the same time, the two procedures involved differ, one being a preventive measure and the other one being a constabulary measure.

First, detention as a preventive measure can be taken only by the criminal investigation officer or by the prosecutor, towards the offender, by virtue of a regulation, if there is solid evidence that he committed an offence stipulated by the criminal law, empowered through an ordinance, the person in question being taken into detention according to legal provisions regarding the places of detention.

Thereafter, the criminal investigation officer from the judicial police will collect the evidence needed for preventive detention, and submit a substantiated report to the prosecutor, within the time frame (10 hours) provisioned by article

144 paragraph 3 from Criminal procedure Code.

Regarding the stipulations of Law 218/2008? the measure is an administrative one (therefore not a preventive measure), and consists in accompanying the individual from the place where he/she was detained to the police station, in view of taking legal action, measure which can be taken by any police officer when circumstances require. The measure of taking into police custody to check their identity has, by law, an administrative character and it is ordered outside the procedural framework, while the detention measure has the legal character of a prevention measure, as ordered only within the procedural context, after the initiation of prosecution and benefitting from the constitutional European warranty system established for individuals deprived of liberty.

Taking somebody into police custody in order to take legal measures applies only to the individuals who, through their actions, endanger the public order, the life of human beings or other social values, as well as to suspected individuals whose identity could not be established according to law. Following this the situation of the person is to be clarified within 24 hours at the police station by carrying on different activities such as investigations, obtaining verbal or written information from acquaintances, data collection from various state institutions etc.

Unlike the detention (preventive measure), in case of taking into police custody the individuals in question would not be placed in detention (arrest rooms), but in rooms especially designed, where a minute or a report will be written out (therefore not based on an ordinance of detention).

If within 24 hours the individual is incriminated of committing an offence and the cumulative prerequisites as per art. 143

Criminal Procedure Code are met, the measure of arrest could be further taken for the rest of the available time considering that art. 144 from the Criminal Procedure Code stipulates the deduction from detention period of the time when the individual was deprived of liberty due to the administrative measure of taking into police custody as regulated by art. 31 paragraph 1 letter b from law no 218/2002.

It turns out that in some circumstances and conditions, the constabulary measure of taking into police custody is followed by the second measure of preventive detention as mentioned in the Criminal Procedure Code.

Considering all the above, it follows that the two measures, the preventive one and the constabulary one, are peculiar, distinct from each other [4] and could not be confused even though there are some similarities between them.

In spite of these differences of legal status, by law, from the maximum of 24 hours for which an individual can be detained as a preventive measure, the period for which the same person was deprived of liberty due to being taken into police custody for identification as administrative measure must be deducted.

In the reference literature [1] there exists a point of view according to which the juridical operation of deduction, as well as the entire regulation concerning the deprivation of liberty as an administrative measure has a downright unconstitutional character. Thereby, when Law no 218/2002 came into effect, under the 1991 Constitution, the deprivation of liberty did not know current limits, in the sense that it could interfere both following a criminal law activity, and also following a civil-administrative legal procedure (completed with the sanction of contraventional imprisonment).

After revising the fundamental law, in 2003, this possibility of affecting

individual liberty must be confined to a much narrower scope

Considering the constitutional guarantees meant to eliminate the arbitrary in the matter of liberty deprivations and in agreement with the international protection of liberty as a fundamental human right, affecting the private liberty in this way could not occur within the existing Romanian legal system, unless it is the result of liberty deprivation ruled during the criminal law suit (so only after the commencement of the law suit) or as a penalty of deprivation based on a criminal resolution of final conviction.

In relation with this constitutional prohibition, the measure of taking into police custody for identification, when it also implies deprivation, of liberty contradicts flagrantly the fundamental law, the measure being an administrative one and taken outside the criminal law suit. The unconstitutional character of the measure is not eliminated compared to the uttermost force of the fundamental law within the hierarchy of regulatory documents, not even when administrative deprivation of liberty deprivation is ordered during a law suit, respectively when establishing the identity is performed concerning an individual involved in a criminal activity or an individual against whom the measure of detention will be subsequently taken. Nevertheless, so far the unconstitutional character of the stipulations of art.31 paragraph 1 letter b from law 218/2002 has not been formally established through a mandatory decision of the Constitutional Court. In the opinion of the same author, as resumed within a recent study [6], the remaining into force of these regulations, therefore their application, could no longer be judicially established under art.154 paragraph 1 from the Constitution (which regulates the temporary law conflict), even though formally they continue to exist.

From this point of view, the constitutional regulation is extremely accurate, revealing that laws and other regulations (adopted prior to the revision of the Constitution) remain in force only to the extent to which they do not contradict the existing Constitution.

The same author [6], advocates that the disposition with general character, contained by article 31 paragraph 2 from Law 218/2002, according to which exercise of the rights given by this regulatory document (including the right of liberty deprivation by taking into police custody the officer is under the obligation to strictly comply with the fundamental human rights and liberties stipulated by the law and by the European Court of Human Rights is not capable to eliminate the flagrant unconstitutional character of this measure .

A different opinion [5], that we embrace, holds that the administrative measure of detention, under the existing regulations, is consistent both with the Constitution and with the decisions of the European Court of Human Rights. Thus through the law of Romanian Police , it has been provided that the measure taken by the police officer under stipulations of article 31 **is an administrative** one, and under the Decision no 132/2002, the Constitutional Court stated that these regulations are constitutional, without coming in contradiction with article 23 from the Constitution. The motivation was based on the fact that the constitutional regulations related to detention refer to all the cases in which competent public authorities are qualified by law to place under detention an individual for a period no longer than 24 hours. It was also laid out that, even if the administrative measure could be cumulated with the preventive measure of detention, the total time must not exceed 24 hours as the constitutional regulation does not stipulate such a circumstance .

In accordance with article 144 paragraph 1, as modified through Law no 281/2003, if the preventive measure of detention is successive to the administrative measure, the period of time for which the individual was deprived of liberty is reduced from the total period of detention as a preventive measure.

Detention, as an administrative measure stipulated by Law 218/2002, also complies with the regulations of article 5 paragraph 1 letter c from the Convention for the protection of human rights and fundamental liberties. The European Court of Human Rights constantly stated that the regulations of national laws regarding the detention of an individual outside a criminal law suit, with the intention to bring the individual before a court so as to clarify the situation of the person suspected to have committed an offence meet the provisions of article 5 paragraph 1 letter c.

The question is, if the administrative measure of detention can be repealed and which judicial body is in charge of solving it. We believe that the individual taken into custody and administratively „detained” can complain to the chief police officer who in turn may maintain or disprove the ordered measure.

If the situation of the administratively detained individual has been settled or the procedure of criminal prosecution against the same individual has been initiated, the administrative measure ceases because, according to article 31 paragraph 1 letter b from Law no 218/2002 stipulates, the purpose of this measure is accomplished either by establishing the identity of the individual suspected of having committed an offence, or by taking legal measures when there are at least solid clues that an offence has been committed. According to a second hypothesis, the criminal investigation body must order the detention of the defendant if the deprivation of liberty is required for the

proper conduct of the criminal process, deprivation of liberty being impossible based on an administrative measure.

In case the administrative measure continues after the commencement of the criminal prosecution, the defendant may file a complaint to the prosecutor that monitors the criminal investigation, as provided by article 140 [2], the measure of the criminal investigation body being considered a malversation and therefore entering under the supervision of the prosecutor according to article 216 from the Criminal Procedure Code.

The opinion that the administrative measure of detention may be taken also by the police that executes a warrant of preventive arrest released in the absence of the defendant in order to show him before a judge in view of hearing has been issued in the reference literature [3].

2. Conclusions

We consider this approach to contradict the precise stipulations of article 152 paragraph 3 from Criminal Procedure Code, according to which the police proceeds to arresting the individual mentioned in the warrant and shows him before the judge who issued the warrant, while handing over a copy of the warrant to the defendant. If the police officer executes an arrest warrant, it obviously means that the deprivation of liberty of the individual is based on this warrant, without the need for a submission of a detention report as an administrative measure. The same conclusion can also be drawn from the regulations of article 149 paragraph 1 of Code of Criminal Procedure, according to which, in case of detention ordered in the absence of the defendant, the duration of the arrest starts from the date of the execution of the warrant. It is natural for the police officer who made the arrest to draw up a report,

but not for the detention as an administrative measure but to know the date of execution of the arrest warrant.

As a conclusion, it must be underlined the need of a more rigorous regulation of the above-described action. The amendment of the jurisprudence of the European Court of Human Rights in the last few years, regarding the extension of the liens in article 5 from ECHR Convention over all the cases of limitation of liberty, mostly performed by police officers leads to the necessity of drawing up a new legal regulation in the matter. *De lege ferenda*, the new regulations will clearly stipulate the circumstances in which such a constabulary measure may be taken, under what conditions it will cease de jure, respectively under what terms this measure can be absorbed or not by the preventive detention, once the criminal law suit has commenced, in its prosecution phase. In my opinion, within the new criminal procedural and constabulary settlement, this introductory measure of the investigation should no longer be absorbed within the procedure of preventive detention. Such a situation would not infringe, in my opinion, the article 23 paragraph 3 from the present Romanian Constitution, because of the different nature of the constabulary action compared to the criminal procedural action.

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