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Detention

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Abstract. Preventive measures at present may be ordered only if there is evidence or well-founded character from which there is a reasonable suspicion that the individual has committed a criminal act and is necessary to achieve the aim pursued by taking them. The categories of preventive measures, with the exception of detention and preventive arrest, are changed, defending judicial control, judicial control on bail and house arrest compared to the old regulation which referred to the obligation not to leave the locality and the obligation not to leave the country together with detention and preventive arrest. Procedural aspects are extremely important in this preventive measure, such as the communication under signature of the detained person, of his/her rights and obligations, the duration for which he/she can be detained and, in certain special cases, informing the diplomatic representatives of the state of which the suspect or accused person is a citizen. In the case of certain persons, the law also requires certain additional requirements to be met in order to order detention, such as in the case of deputies or senators or judges, prosecutors or assistant magistrates. The measure of detention is the most used preventive measure and that it has a particular effect on the suspect as well as on the course of the trial. As it has a special status, being the only measure that can only be ordered during criminal investigations, I think it is very important to be aware of it. Detention is a preventive measure in the procedure of which numerous procedural errors can occur, so we considered necessary a thorough study to clarify all aspects of this preventive measure.

Keywords. Restraint, preventive measure, code, categories, traits

1. General aspects of detention

1.1. Definition and purpose of detention

The importance of preventive measures as a whole cannot be understood without reference to constitutional¹ provisions and those contained in fundamental regional human rights instruments², taking into account their specificity – outlined above – of affecting the inviolability of the person. Regarding the normative framework, these institutions - part of the procedural measures - are provided in the General Part, Title V, Chapter I, art. 202-244 Code of Criminal Procedure (applicable to natural persons), respectively Special Part, Title IV, Chapter II, art. 493 (applicable to legal persons).

Regulated as coercive institutions, their role is to prevent the suspect or defendant from undertaking or carrying out certain activities that would have a negative effect both on the conduct of criminal proceedings and on achieving its purpose, as provided in art. 1 Code of

¹ Constitution of Romania, art. 23

² European Convention on Human Rights, Article 5, paragraph 1, letter c

Criminal Procedure. Also, in order to ensure strict compliance with the legal provisions that allow these categories of procedural measures to be taken, the legislator has established certain guarantees, materialized in the general and specific conditions that must be fulfilled, cumulatively, in order to order any of the preventive measures.

A step-by-step analysis of the evolution of the judicial system is found in Jean Pradel, who identifies five stages: the corporal punishment stage; prison stage/classical school of criminal law; the status of first substitute detention measures; the stage of development of alternatives to detention; the stage of occurrence of intermedial punishment – between probation and imprisonment (Pradel, 1995: 569-570). Globally, analyzing a previous study on the history of the punishment system (Goga, 2015: 183-194), we made a gradual analysis of it, managing to synthesize some characteristics of the times, as follows:³

1. Middle Ages (sixth century/Justinian Code -second half of eighteenth century and early nineteenth century): characterized by corporal punishment, torture and public executions;

2. Modern Era (early nineteenth century / second half of nineteenth century - late nineteenth century): characterized by the predominant application of custodial sentence, incriminating codes appear that focus on imprisonment, even for minor offenses, thus appearing an "experimental fever" in prison organization;

3. Contemporary Era (early twentieth-present century): is characterized by the emergence and development of substitution measures of deprivation of liberty. This period can be divided into 3 other sub-phases:

a. The first half of the twentieth century: this is characterized by the appearance of the first measures of prison substitution such as probation and suspension of punishment;

b. The second half of the twentieth century: it is characterized by the development of alternative measures to the punishment with deprivation of liberty and to the process of individualization of punishment, by the development of the institution of suspension of sentence, etc.

c. At the end of the twentieth century- present: characterized by the development of intermediate, intensive probation punishment.

First of all, we must mention that we can talk about Romania starting from the modern period, the year 1862 is when, under the leadership of Prince Alexandru Ioan Cuza, the first General Assembly of Wallachia and Moldavia, adopted the Proclamation certifying that "Romania" is the official name of the Romanian territory.⁴

Also, the first Romanian Constitution of 1866 kept this name. However, building Romanian identity and culture is a long process, thousands of years old, and therefore when analyzing Romania's history, one must investigate the history of the Romanian geographical region found in southeastern Europe, on the lower Danube basin, south and north of the southeastern Carpathians and northwest of the Black Sea. The Middle Ages, in Romania regarding the punitive system, began in the third century and lasted until the end of the eighteenth century.

This period was characterized by a class character of justice, lack of judicial authority, predominance of cruel punishments in the detention system, which was seen as a precursor to death. At the end of the years of feudalism, the first written documents concerning punishment and their manner of execution appeared. In terms of punishment, the modern era began along

³ Ionescu D., *Criminal procedure. General part*, Sfera Juridic Publishing House, Cluj-Napoca, 2017

⁴ Criminal Code of 1886, art. 1

with the first elements of the humanization of punishment found in the Organic Regulations of 1831/1832, which imposed the humanization of punishment in the detention system.⁵

In 1864 the first Romanian Criminal Code was adopted, entering into force in 1865, together with the Criminal Procedure Code. The Criminal Code of 1864 distinguishes 3 types of offenses: misdemeanors, offenses and misdemeanors (Criminal Code, 1864, art.1). In 1874 the Law on the regime of prisons came into force. On January 1, 1930, when the law of 1874 ceased to have effect, there were 28 county preventive prison departments and 54 penitentiaries. The modern period has been characterized by the outcome of punishment, the first elements of the establishment of word release only for minors, the emergence of legal regulations regarding criminal law and the right of criminal execution, and the emergence of a large number of prisons.⁶

The contemporary period in Romania began, according to Constantin C. Giurescu in 1821 and according to Florin Constantiniu at the Paris Conference (1919-1920) and lasts to this day. We consider the beginning of the contemporary period in Romanian criminal law starting with 1930, with the entry into force of Law 1929 on the organization of penitentiary and preventive institutions, because in this act we find a more detailed description of the procedure for applying the institution and "parole". It was the above-mentioned law that transformed the purpose of solitary confinement for the committed crime into moral valorization (courses, religious assistance), intellectual (professional training courses, conferences, music, etc.), education (physical education in gyms, work becomes compulsory) and competence-based specialization, thus giving the penitentiary institution "a profound pedagogical character". The purpose of the prison is to give society "unharmful, physically healthy people who loved good and truth."

This law divided prisons into: forced labor prisons (for life or for the duration of sentence); those with forced labour; those of detention as punishment for murder; insulation; correctional; light imprisonment; detention as punishment for misdemeanors; prisons of agricultural and industrial colonies; light regime colonies and sanatoriums. Particular emphasis is placed on the treatment of detainees in terms of sanitary hygiene, free food and medical care. At the same time, the law stipulates the obligation of each county to organize in its residence a penitentiary for persons under preventive arrest and sentenced to a correctional sentence of up to 6 months or minors sentenced to up to 3 months of detention.⁷

The law also introduces "observation" of prisoners, so depending on their grades and behavior, they could move on to a lighter sentence or even obtain parole. Through the Law on the Organization of Penitentiaries and Preventive Institutions of 1929, prisons were classified into 81 units, as follows:⁸

- 5 first class, penitentiaries and prevention institutions;
- 3 class II, main penitentiaries;
- 13 of the third class main penitentiaries;
- 32 first-class county penitentiary institutions;
- 28 county second-class penitentiaries.

In 1936, a new Criminal Code was published in the Official Gazette no. 65 of March 18. This legal document divides sentences into: 'principal', 'complementary' and 'ancillary' (Title

⁵ Criminal Code of 1886, art. 1

⁶ Criminal Code of 1886, art. 1

⁷ Demeter I., *The Declaration of Human Rights*, EP Publishing House, Bucharest, 1968

⁸ Penal Code 1936, art. 24

III) and, at the same time, differentiates custodial sentences into ordinary and political punishments (Chapter III) as follows:

The main punishments were given for common law "crimes" and these consisted of forced labor for life; forced labor for a limited period of time from 5 to 25 years; imprisonment under closed regime from 3 to 20 years, correctional imprisonment from one month to 12 years; fine from 2,000 to 20,000 lei, unless the law provides for another maximum. For political "crimes": life imprisonment; harsh detention from 5 to 25 years; fine from 2,000 to 20,000 lei, unless the law provides for another maximum. And for misdemeanors: imprisonment under open regime from one day to one month; fine from 50 to 1500 lei.⁹

The "complementary" punishments were: civil degradation (deprivation of civic rights) from 3 to 10 years, for crimes; correctional ban from one to six years, for misdemeanors. Deprivation of parental power, cases provided for by law. Publication and display of conviction sentences, according to the law. Finally, the maximum and minimum limits set for fines as the main punishment and only for offences¹⁰. Last but not least, the ancillary sentences were: civic degradation; correctional prohibition, deprivation of parental power.

The Romanian Code of Military Justice of March 20, 1937, brought in addition to the sanctions in the Criminal Code also the death penalty, as the main punishment for murder and military degradation, and discharge, as accessory punishments. However, it states that the death penalty is applied only in case of war and carried out by firing squad, and pregnant women are executed after childbirth. However, the Constitution of the Kingdom of Romania dated February 24, 1938, during the reign of Carol II, provides for the death penalty in art. 15, both in wartime and peacetime, "for attacks against the severan, members of the Royal Family, heads of state and foreign states, dignitaries in the exercise of their entrusted functions, as well as cases of robbery with murder and political assassination" (Romanian Constitution, 1938, art. 15).

In 1968 a new version of the Criminal Code was published in the Official Gazette of the Socialist Republic of Romania nr. 79 bis of 21 June. Compared to the previous Criminal Code, the 1968 Act removes political and common law sanctions. The Criminal Code of 1968 was republished twice, the first time in 1973 in the Official Gazette nr. 55 of 23 April and again, in 1997, in the Official Gazette nr. 65 of 16 April. The penalties of this code are divided as follows (Articles 53-55):¹¹

a. main penalties: imprisonment from 15 to 25 years (from 15 to 30 years in the Criminal Code republished in 1997, adding the life sentence); fine from 500 to 5,000 lei (from 500 to 20,000 lei in the Criminal Code republished in 1973 and from 100,000 to 50,000,000 lei in the Criminal Code republished in 1997);

b. Examples of complementary punishments: prohibition of rights from one to 10 years; military degradation;

c. confiscation of property, partial or total (repealed in the Criminal Code republished in 1997);

d. ancillary sentence, prohibition of certain rights expressly provided by law (Article 53);

e. The death penalty (Criminal Code, 1968, Articles 54-55) (repealed in later republished). Criminal proceedings could be replaced by administrative sanctions by the court,

⁹ Criminal Code, 1936, art. 25

¹⁰ Cod penal: 1936, art. 25

¹¹ http://inm-lex.ro/fisiere/d_176/Abstracts%20conferences%20NCCPP.pdf

but only under certain conditions. These sanctions were: reprimand; reprimand with warning or fine from 100 to 1,000 lei (modified in the 2007 version to the value between 100,000 and 1,000,000 lei)¹². The criminal act committed by minors entailed punishments or educational measures: reprimand; supervised freedom; internment in a re-education center; admission to an educational medical institute (Criminal Code: 1968, art 99-102).¹³

The precautionary measures under the Criminal Code applied to persons who have committed crimes and aimed at "removing a state of danger and preventing acts to be committed under criminal law". These measures are: "ordered medical treatments; medical hospitalization; prohibition from holding a position or exercising a profession, trade or other occupation; a ban on staying in some places; exclusion of aliens; special confiscation" (Criminal Code, 1968: Articles 111-112). The death penalty in the Criminal Code of 1968 states, "that the exceptional measure for the most serious crimes" and applies "in the cases and conditions provided for by law", except for persons under 18 years of age, pregnant women or women who have a child up to 3 years of age, at the time when the crime was committed or the sentence was pronounced (Criminal Code: 196, Art. 54).

In the Code republished in 1973 the death penalty was no longer provided, art. Articles 54 and 55 are repealed, however, capital punishment being provided for certain crimes "against the State" (Criminal Code, republished 1973, art. 156-162). In 1997, when the Code was republished, the death penalty did not appear, but "life imprisonment" was introduced, and the maximum prison sentence was changed to 30 years. Moreover, in Romania, through Decree-Law nr. 6 of 7 January 1990, the death penalty, which was "prescribed for certain offences in the Criminal Code and special laws was abolished and replaced by life imprisonment" (Decree-Law 6, 1990, art. 1).¹⁴

Parole is regulated by the Criminal Code of 1968, being applied after the prisoner "has served at least half of the sentence, in the case of imprisonment not exceeding 10 years, or at least two-thirds of the sentence in the case of punishment exceeding 10 years", and the convict states "solid evidence of correction" (art. 59).

The Criminal Code, republished in 1997, partially amends the conditions of conditional release, so the terms imposed in the original form of the Code apply this time to crimes of negligence, and the rest of the offences must be served "at least two-thirds of the sentence not exceeding 10 years, or at least three-quarters for sentences exceeding 10 years" (Criminal Code, republished 1997, art. 59).¹⁵

The conditional suspension of sentence is found in the Criminal Code of 1968 and applies if: the penalty is "imprisonment of up to 2 years or fine as well as for offences against public property with penalty imposed of 1 year at most", the offender who has not previously been sentenced to imprisonment", or the previous conviction is not considered recidivism or "it is estimated that the purpose of the sentence can be achieved even without its execution", "the offender who has not previously been sentenced to imprisonment", or the previous conviction is not considered a repeat offender and "it is estimated that the purpose of the punishment can be achieved even without its execution" (Article 81). In the Criminal Code, republished in 1997, the conditions of conditional suspension change, meaning that it applies to "imprisonment of

¹² Gheorghe Buzescu, *Particularities of contravention law*, Sitech Publishing House, Craiova 2017

¹³ Dărăngă Gh., *Preventive measures in the new Code of Criminal Procedure*, RRD, nr. 4 1978

¹⁴ Deleanu I., *Constitutional Law and Legal Institutions*, Chemarea Publishing House, Iasi, 2016

¹⁵ Antoniu G., Vasile P., Mihai P., Bogdan Ș., *Guidelines given by the Plenum of the Supreme Court and the New Criminal Legislation*, Editura Stiintifică, Bucharest, 1971

up to three years or fine" and to "the offender who has not previously been sentenced to imprisonment for more than six months" (Criminal Code, republished 1997, art. 81).

In the Code republished in 1973 we will also find the institution of suspension of punishment under supervision, applied if the court considers that the purpose of the punishment can be achieved without deprivation of liberty, by performing labor (on construction sites, in agricultural or forestry units, or in other socialist organizations), thus ordering, "ordered correctional labor to the convict, for the duration of the sentence imposed, if the punishment imposed is imprisonment for up to two years" and "the offender has not been sentenced to imprisonment" (Articles 86-1 and 86-3).

In the Code republished in 1997, the institution partially changes its conditions, so that it provides, if "the punishment imposed is imprisonment for up to 4 years" and "the offender has not previously been sentenced to imprisonment for more than one year", except in cases of recidivism (art. 86). We also found in the Criminal Code republished in 1997 the execution of the sentence at work, through which the court can order to work, "in the unit where the convict works or in another unit, with the written consent of the unit", while "the punishment is imprisonment of up to 5 years", and if "the accused has not previously been sentenced to imprisonment exceeding one year", except in cases that do not entail recidivism (Criminal Code, republished 1997, art. 86).

On January 1, 1970, Law nr. 23 of 18 November 1969 on the execution of sentences. The law stipulated that the rehabilitation of prisoners was done through work (paid outside household work), training, professional retraining, "cultural and educational activities"¹⁶, as well as promoting and rewarding those who are persevering at work and who show strong reform" (art. 5)¹⁷. Children could "continue compulsory general education and be provided with the opportunity to acquire vocational training according to their level of schooling and competence" or participate in vocational training courses (Article 6).

On June 29, 2004, a new Criminal Code was published in the Official Gazette no. 575, which entered into force on September 1, 2009. The 2004 Code differentiates penalties imposed on individuals from penalties for legal persons. Sanctions for physical persons are of three types: main, complementary and ancillary. The main sanctions are as follows: primary penalties for crimes and primary penalties for crimes. The main punishments for crimes were: life imprisonment; severe detention between 15 and 30 years¹⁸. The main punishments for crimes were: strict imprisonment between one and 15 years; imprisonment between 15 days and one year; criminal fine between 5 and 360 days, for each day payment between 100,000 lei and 1,000,000 lei; community service, between 100 and 500 hours. The complementary punishments for crimes and contraventions were: prohibition of rights from one year to 10 years and military degradation. The accessory punishment for crimes and contraventions was the prohibition of exercising all rights provided as complementary punishment (art. 58). For criminally liable minors, the 2004 Code provided for approximately the same measures as the former Code, except for release under strict supervision, which is additionally introduced (Articles 114-115). As regards the precautionary measures provided for by the 2004 Criminal Code, they coincide with those of the previous legislation, with the addition of a new measure, namely the prohibition to return to the family home for a fixed period (Article 129). Moreover,

¹⁶ Ivan Anane, Management of criminal prosecution bodies, Pro Universitaria Publishing House, Bucharest, 2014

¹⁷ Demeter I., The Declaration of Human Rights, EP Publishing House, Bucharest, 1968

¹⁸ Ciobanu I., *Discussions on the competence to solve the complaint against the preventive arrest measure taken by the prosecutor*, R.R.D nr. 12/1997

"the execution of main custodial sentences is based on the progressive system", convicts are able to move from one execution regime to another, and sentences are served under one of the following regimes: maximum security; closed; semi-open; open (Article 60).¹⁹

Community service punishment can only be imposed with the consent of the defendant, "if the law provides for a strict sentence or imprisonment of not more than 3 years" and, therefore, "the court may sentence instead of serving the sentence, the execution of the sentence in the form of unpaid community service, for a period of at least 100 hours and 300 hours maximum, if the law provides for imprisonment or up to 500 hours, if the law provides for strict imprisonment of not more than 3 years" (art. 70).

The 2004 Code regulated the parole of a convict to imprisonment, strict imprisonment and heavy imprisonment, establishing that it applies after serving a minimum of "two-thirds of imprisonment or strict imprisonment or three-quarters of severe imprisonment" and for minors after serving one-third of the sentence (Art. 71). For prisoners sentenced to life imprisonment, parole applies "exceptionally after 20 years of imprisonment has actually been served" or 15 years for persons over 60 years of age (Article 72). The suspended sentence imposed on a natural person was provided for by the Criminal Code in 2004, the court being able to order suspension if "the punishment imposed for an offence is imprisonment or strict imprisonment of up to 5 years or criminal fine" and "the offender has not previously been sentenced to a custodial sentence unless the conviction does not mean recidivism" (art. 95). We can also find the suspended sentence under supervision applied to a natural person, where it has been ordered "the sanction imposed for the offence is strict imprisonment or imprisonment of not more than seven years" and "the offender has not been sentenced to strict imprisonment for not more than 2 years, unless there is no recidivism" (Art. 101). Romanian courts may also suspend the execution of the sentence under supervision with the obligation of the suspect to perform community service for a maximum of 300 hours (art.107).

Two new courts introduced in the 2004 Criminal Code are: waiver of punishment and postponement of punishment for an individual. In case of waiver of punishment, "the court may not impose any penalty on the defendant who had no criminal record, incorporated the prejudice caused and has solid evidence that he can reform even without imposing a punishment" (art. 108).

The postponement of the penalty can only be applied for crimes "for which the law provides for imprisonment or strict imprisonment of up to 5 years", and the conditions for waiving the sentence, described above, are met. The effect of postponement of punishment, if the defendant behaved appropriately, is non-application of punishment (Art. 109).

Law 275/2006 on the application of rules and norms ordered by the court during criminal proceedings regulated the conditions for the application of punishment in Romania between October 2006 and January 2014. The law distinguishes between prisons and special prisons (juvenile and youth prisons, women's prisons and hospital penitentiaries) and emphasizes the separation of pre-trial detention sections. There is also a distinction between regimes for the execution of custodial sentences, namely: maximum security regime; closed; semi-open and open (Articles 1-74).

The Criminal Code of 17 July 2009, which entered into force on 1 February 2014, distinguishes between main penalties, complementary penalties and ancillary penalties. The main punishments are: life imprisonment; imprisonment (from 15 days to 30 years); criminal

¹⁹ Dongoroz V., Stasi K., Grigore A., Calin B., Nicolae I., Radu S., *Theoretical explanations of the Romanian Code of Criminal Procedure. General part*, Academy Publishing House, Bucharest, 1975, Vol. I

fine (the amount of the fine is determined by the days system). The amount corresponding to a fine day is between 10 lei and 500 lei, multiplied by the number of days, which is between 30 and 400 days. If the fine is not paid in bad faith, it is replaced by imprisonment, and if the fine is not paid for reasons not attributable to the convict, the fine is replaced by the obligation to perform community service (Criminal Code, 2009: Articles 53, 60, 61, 63 and 64). Accessory punishment ("consisting in the deprivation of certain rights, from the moment when the sentence becomes final until the execution or deemed to have been served by the sentence of deprivation of liberty") (art. 54).²⁰ The complementary punishments are: prohibition of certain rights and military degradation, publication of the sentence (Criminal Code, 2009: art. 55). For minors who are criminally liable, the current criminal legislation provides for two types of non-custodial educational measures, as well as custodial educational measures (Art. 115). The safety measures ordered by the court are "recommended medical treatment; prohibition of holding an office or practising a profession; special confiscation; extended confiscation" (Article 108).

In the current Criminal Code we find, as in the previous code, the waiver of punishment, but modified so that it applies when "the crime is of minor seriousness, taking into account the nature and extent of the consequences produced, the means used, the method and circumstances in which it was committed, the motive and purpose intended" and "the person of the offender, his conduct prior to the crime²¹, his efforts to eliminate or mitigate the consequences of the crime, and its means of reform". In case of waiver of sentence, the accused "is not subject to any degradation, prohibition or incapacity that may arise from the crime", and the court only applies a warning to the person (Articles 80-82). We will also find the annulment of the sentence, modified, compared to the previous legislation, so that it applies when "the prescribed penalty, including in the case of multiple offences, is a fine or imprisonment of not more than two years"; if "the punishment prescribed by law for crimes is less than 7 years, and if the offender did not evade prosecution or trial or did not attempt to conceal the truth or identify or criminally hold the perpetrator or participants criminally responsible", if "the offender has not previously been sentenced to imprisonment, unless there had been no recidivism or rehabilitation had occurred or the rehabilitation period had been met" and "the offender consented to unpaid community service" (Articles 83, 90).

In the current Criminal Code, for the purpose of applying the suspended sentence under supervision, the following conditions must be met: "the punishment applied, including in case of crime, is imprisonment for up to three years"; "the offender has not previously been sentenced to imprisonment for more than one year, except in cases which are considered recidivism", or for which rehabilitation has occurred or the term of rehabilitation has been met and "the offender has consented to provide unpaid community service" (Article 91).

Parole applies to life imprisonment if "the convict has actually served 20 years of imprisonment" and to convicts to imprisonment, when "the convict has served at least two-thirds of the sentence, if the sentence is not more than 10 years, or at least three-quarters of the sentence, but not more than 20 years, for imprisonment of more than 10 years"; the convict "is serving his sentence under open or semi-open regime"; "has fully complied with the civil obligations established by the sentence, unless he proves that he was unable to fulfil them" and "the court is convinced that the convicted person is reformed and can reintegrate into society" (Art. 100). Since February 2014, the conditions for the application of punishment, educational

²⁰ Iliescu N., *Freedom of the person in light of the provisions of the Code of Criminal Procedure*, in T.S., nr. 3, 2011

²¹ Ivan Anane, *Investigation of criminal prosecution bodies*, Pro Universitaria Publishing House, Bucharest, 2014

and other non-custodial measures ordered by courts in criminal proceedings are regulated by Law 253 of 19 July 2013.

The conditions for the execution of sentences and measures deprived of liberty ordered by courts in criminal proceedings have been regulated since February 2014 by Law 254 of 19 July 2013. The law contains some changes to the previous law, made to adopt it to the new criminal regulations²². The places of execution of sentences are divided into "prisons" and "special prisons" (for young people, women and prison hospitals), while indicating the organization into "special sections for the application of educational measures deprived of liberty" and "sections of preventive arrest" in prisons (art. 11-14).²³

Currently, the penitentiary regime in Romania has 44 units, distributed as follows; 16 penitentiaries with open and semi-open regime; 16 maximum security prisons and closed regime; 6 prisons – hospital; a women's prison (including 6 women's sections in other prisons); 3 detention centers; 2 educational centers. In 23 of these units there are pre-trial detention sections (National Administration of Penitentiaries, 2015: 3).

After studying the prison system in Romania, we see that it fits the general characteristics identified for the three historical phases, observing an evolution of punishment from corporal punishment in medieval times to intense deprivation of liberty in modern times.

The Romanian state is currently updating the legal provisions, in line with the current trends of European penal policies, to develop intermediate punishments and alternatives to imprisonment.

1.2. Features and measures of fulfillment of restraint

Detention is a measure involving deprivation of liberty for a short period of time, but very important at the present stage of criminal proceedings, which justifies its importance only at the criminal investigation stage and therefore only towards the accused.

Restraint is the easiest of preventive measures, given its short duration. It consists of isolating the accused in certain special places and prohibiting him from leaving them for a maximum of 24 hours. In terms of duration, the current regulation of detention differs from the existing regulation in the previous Code of Criminal Procedure, which offers the possibility for the prosecutor to extend the detention from 24 hours to 5 days.

The reason for imposing that measure was determined by the need to immediately isolate the person who committed an offence in order to prevent his disappearance and to ensure the proper conduct of the criminal proceedings.

As a measure involving deprivation of liberty, detention is usually taken at the beginning of the criminal investigation, when the identity or domicile of the defendant is unknown, or when he has tried to flee, hide or destroy traces of the crime.²⁴

Starting from the finding that deprivation of liberty is common to both detention and preventive arrest, detention has been considered "the younger sister of preventive arrest" in the literature. Detention is similar in some respects but differs in others from certain known actions in criminal proceedings, such as apprehending or apprehending offenders, police detention of

²² Gheorghe Buzescu, *Police Law - university course*, Sitech Publishing House, Craiova, 2019

²³ *Conferences of the New Code of Criminal Procedure*, National Institute of Magistracy, Bucharest, 2015

²⁴ Antoniu G., Vasile P., Mihai P., Bogdan Ş., *Guidelines given by the Supreme Court Plan and the New Criminal Legislation*, Editura Stiintifică, Bucharest, 1971

the person for identity²⁵ verification or execution of a warrant; prohibition to remove himself from the courtroom until the end of the investigation.

1.3. General conditions for detention

In a different or similar regulation in terms of content, duration or method of execution, detention is known to all modern criminal procedural laws and is subject to conditions regarding the duration and procedure of this measure.²⁶

As far as the law on criminal procedure Romanian is concerned, it establishes certain conditions to be fulfilled cumulatively, in order to take the measure of detention, by art. 43, para. 1 and 2 Code of Criminal Procedure. Within the limits of these provisions, detention may be ordered only during the criminal investigation phase, if:

- there is evidence or serious indications that the suspect has committed an act prescribed by criminal law.²⁷;
- For the offence committed, the law provides for the punishment of life imprisonment or imprisonment;
- There is one of the cases provided by art. 148, irrespective of the limits of imprisonment provided by law for the offence committed (Article 143, paragraph 2).

If the abovementioned conditions are met vis-à-vis the person concerned, preventive detention can undoubtedly be taken. The issue that has triggered some discussions in the literature concerns the legal body that can take this measure.

The Romanian Constitution includes among the guarantees of the freedom of the person in criminal proceedings the rule according to which "Detention may not exceed 24 hours" without making any express mention of the judicial body that can take such a measure. In developing the mentioned constitutional principle, the Code of Criminal Procedure, by art. 143 para. 1, states that "the measure of detention may be taken by the criminal investigation body, in relation to the accused". The criminal investigation bodies that may take the measure of detention are those provided by art. 207 Code of Criminal Procedure (which refers to the competence of special criminal investigation bodies).

According to the provisions of art. Art. 143 Code of Criminal Procedure, the measure of detention may be taken by the criminal investigation body against the suspect, if there is evidence or solid indications that he committed an act provided for by the criminal law. The criminal investigation body is obliged to inform the prosecutor immediately that the detention measure has been taken.

The criminal investigation body will inform the defendant that he has the right to hire a lawyer. He is also informed that he has the right not to make any statement, being warned that what he declares can also be used against him. This right was called the right to silence and aroused a lively interest in our legal literature. The measure of detention may also be taken by the prosecutor, under the conditions of para. 1, in which case the head of the public prosecutor's office to which he belongs shall be notified²⁸. The measure of detention shall be taken in the cases provided for in art. 148, irrespective of the limits of imprisonment prescribed by law for the offence committed. For a unifromal interpretation of the law, clarifications have been made

²⁵ Ivan Anane, *Elements of computerized evidence of the person*, Pro Universitaria Publishing House, Bucharest, 2015

²⁶ Volonciu N., *Treatise on Criminal Procedure*, general part, vol. I, Ed. Paideia, Bucharest, 2016

²⁷ Gheorghe Buzescu, *Elements of Public Order*, Pro Universitaria Publishing House, Bucharest, 2016

²⁸ Dabu J.V., Gușan A.-M., *The right to silence*, fundamental right, Law nr. 9/2013

in the provisions of art. 143 last para., in the sense that there are solid indications when the existing data in question show the assumption that the person against whom the criminal investigation is carried out has committed the act.

According to the provisions of art. Art. 144 Code of Criminal Procedure, the measure of detention may last up to 24 hours.²⁹ From the duration of the detention measure is deducted the time during which the person was deprived of liberty as a result of the administrative measure of driving to the police headquarters, provided by art. 31 paragraph 2, letter b) of Law 218/2002 on the organization and functioning of the Romanian Police.³⁰ The order ordering detention must state the day and hour on which detention began, and in the release order, the day and hour on which detention ended. When the criminal investigation body considers it necessary to take the measure of preventive arrest, it shall forward to the prosecutor, within the first 10 hours from the arrest of the accused, together with the notification referred to in art. 143, para. 1, a reasoned report. The prosecutor, if he considers that the conditions provided by law for taking the preventive arrest measure are met, shall proceed within the term provided by para. 1, according to art. 146.

When the measure of detention is taken by the prosecutor, if he considers it necessary to take the measure of preventive arrest, he proceeds, within 10 hours from the taking of the measure of detention, according to art. 146. As far as the court is concerned, it will not be able to take the measure of detention because, as I have indicated, it is taken only towards the suspect (and the person sent to trial has the status of defendant). In the case of audience offences, committed during the hearing, the court may order the preventive detention of the defendant and the President issues a warrant for his arrest (Article 229 paragraphs 1 and 2) of the Code of Criminal Procedure. Some clarifications are also required in relation to the acts and procedural measures by which the preventive measure of detention may be taken. As follows from the provisions of Art. 144, para.2 Code of Criminal Procedure, the measure of detention shall be ordered by the criminal investigation bodies by ordinance. In order to create the possibility of verifying compliance with the law in this field, the Code of Criminal Procedure describes, in art. 137, the content of the act by which the preventive measure is taken. According to that article, the act by which the preventive measure is taken must show: the act which is the subject of accusations, the text of the law in which it falls, the punishment provided by law for the offence committed and the concrete grounds which led to the preventive measure. To these general mentions we must add the special particulars required by Art. 144, para. 2, Code of Criminal Procedure and covering the day and hour on which detention began. We must also not lose sight of the particulars which an order must generally contain, namely: the date and place of its drafting, the surname, forenames, capacity and signature of the person drawing it up. The calculation of the duration of detention shall be made in accordance with the provisions of Art. 188, the time at which detention begins and the time at which it ceases entering into the duration of this procedural measure. The adoption of all the particulars that the ordinance must contain will enable the legality in this matter to be verified or respected.³¹

Detention is ordered by order, with the mention that during criminal prosecution all acts of the prosecutor are ordered by order. It should be pointed out that there is no longer a

²⁹ Ivan Anane, *Elements of criminal procedural law*, Pro Universitaria Publishing House, Bucharest, 2015

³⁰ Iliescu N., *Freedom of the person in light of the provisions of the Code of Criminal Procedure*, in T.S., nr. 3, 2011

³¹ Ciobanu I., *Discussions on the competence to solve the complaint against the preventive arrest measure taken by the prosecutor*, R.R.D nr. 12/1997

distinction between acts ordered by resolution and acts ordered by ordinance, as in the case of the previous Code of Criminal Procedure. Also, no detention warrant is issued, the ordinance being the act by which the person concerned is deprived of liberty. There are very important changes in the notification after the measure of detention, which unfortunately benefits from a repetitive regulation that does not bring additional procedural guarantees.

Art. Article 209 of the Code of Criminal Procedure provides for the procedure to be observed in situations where detention is ordered. From our point of view, regarding the detention of the suspect / defendant, the legislator provided 3 categories of activities to which certain rights and obligations correspond, in stages, thus. In the first category we included the activities prior / prior to detention consisting of: identifying / establishing the identity of the suspect / defendant and calling him to the criminal investigation body (or detecting and catching him if he absconds or tries to flee / is on the run); hearing of the suspect or accused person by the criminal investigation body in the presence of the lawyer chosen or appointed *ex officio* (according to the procedure of Articles 107-110 of the Code of Criminal Procedure and in compliance with Article 209, paragraphs 7-9 of the Code of Criminal Procedure). The second category includes actual activities regarding detention, which include: drawing up the ordinance (the procedural act through which detention is ordered according to Article 209, paragraph 10 of the Criminal Procedure Code); handing over a copy of the order and immediately informing him, in the language he understands, of the crime of which he is suspected and the reasons for his detention (pursuant to Article 209, paragraphs 2 and 11, Code of Criminal Procedure); the communication, in writing and under signature, of the rights provided by art. 83 and Art. 210, para. 1 and 2 Code of Criminal Procedure, respectively the right of access to emergency medical care, the maximum duration for which the measure can be ordered and the right to complain against the measure (according to art. 209, para, 17).³² If the detainee refuses or is unable to sign the communication, a report will be concluded. The third category includes post-detention activities, namely: informing the detained person that he has the right to inform, personally or through the judicial body ordering the measure, a family member or other designated person about the detention measure and the place where he is detained; if the detained person is a minor, it is mandatory to inform the legal representative or person in whose care he/she is; if the detained person is not a Romanian citizen, he/she has the right to request the notification of the diplomatic mission or consular post of the state of which he/she is a citizen or, as the case may be, of an international humanitarian organization (if he/she does not wish to benefit from the assistance of the authorities of his/her country of origin); if the person concerned has refugee status or is under the protection of an international organisation, has the right to inform or request information from such authority.

Regarding these categories of persons, the General Inspectorate for Immigration must always be informed, *ex officio*, by the judicial bodies; If there are good or exceptional reasons that require the delay of notification (usually arguments related to the manner of conducting / conducting the investigation) or the refusal to exercise the right to personally make the notification, it may be delayed for up to 4 hours, and if personal information is refused, it must be recorded substantiated in a report.

As mentioned above, detention is ordered by order, for no more than 24 hours, by the criminal investigation bodies or the prosecutor. If the procedural document is drawn up by a criminal investigation body, it must inform the prosecutor exercising its supervision about the measure, immediately and by any means (pursuant to Article 209, paragraph 13).

³² Udriou M., *Criminal procedure. General part*, Universul Juridic, Second Edition, Bucharest, 2015

1.4. Categories of retention activities

A complaint may be filed against the order of the criminal investigation body ordering the detention measure before the expiry of the 24 hours. If the measure has been ordered by a criminal investigation body, the complaint can be made to the prosecutor supervising the criminal investigation. If detention has been ordered by a prosecutor, the complaint can be made to the first prosecutor of the prosecutor's office or to the hierarchically superior prosecutor (chief prosecutor, general prosecutor, chief prosecutor of the division, depending on the competent prosecution structure). If it is found that the detention was taken in violation of the legal provisions or if there are only grounds justifying the deprivation of liberty, the preventive measure will be revoked by order (according to Article 207, paragraphs 14 and 15 of the Code of Criminal Procedure).

As regards the detention measure, the New Code of Criminal Procedure does not provide for the possibility for it to be appealed separately with a complaint before the judge of rights and freedoms; Such rules shall not be incompatible with the provisions of Art. 5, para. 4 of the European Convention which does not stipulate the need for a review of the lawfulness of deprivation of liberty by a judge for short-term deprivations of liberty; at this end, the European Court ruled in *Lolova-Karadzova v. Bulgaria* (judgment of 27 March 2012) noting that the applicant was detained for 29 hours and released before the judge ruled on her deprivation of liberty.³³

The European Court stated that Art. 5 para. Article 4 of the European Convention refers only to remedies which must be available while a person is deprived of liberty in order to obtain a rapid assessment of the lawfulness of detention capable of leading to his release. This provision of the European Convention does not cover other remedies that may serve to verify the lawfulness of the already terminated deprivation of liberty, including, with regard to short-term deprivations of liberty (29 hours as was the case in question).

Detention may be taken against the suspect or accused person by the criminal investigation body or by the prosecutor only in the case of criminal prosecution (Art. 203, para. 1). According to art. Art. 209 of the New Code of Criminal Procedure: "detention may be ordered for a maximum of 24 hours" (para. 3) and "only after hearing the suspect or defendant, in the presence of the lawyer chosen or appointed ex officio. (paragraph 5).³⁴

„Reținerea se dispune de organul de cercetare penală sau de procuror prin ordonanță, care va curpinde motivele care au determinat luarea măsurii, ziua și ora la care reținerea începe, precum și ziua și ora la care reținerea se sfârșește” (alin.10).

"Against the order of the criminal investigation body by which the measure of detention was taken, the suspect/defendant may complain to the prosecutor supervising the criminal investigation, before the expiry of its duration. The public prosecutor decides immediately by order. If the prosecutor finds that the legal provisions governing the conditions for taking the detention measure have been violated, he shall order its revocation and the immediate release of the detained person" (para. 14).

'Against the order of the prosecutor by which the detention measure was taken, the suspect or defendant may file a complaint before the expiry of its duration with the first prosecutor of the public prosecutor's office or, as the case may be, with the hierarchically superior prosecutor. The first public prosecutor or the hierarchically superior prosecutor decides

³³ Dabu J.V., Gușan A.-M., *The right to silence*, fundamental right, Right nr. 9/2013

³⁴ Ionescu D., *Criminal procedure. General part*, Sfera Juridic Publishing House, Cluj-Napoca, 2017

immediately by order. If the first prosecutor or the hierarchically superior prosecutor finds that the relevant provisions governing the conditions for detention have been violated, he or she shall order its dismissal and the immediate release of the defendant" (para. 15).³⁵

Therefore, unlike the measure of detention of the defendant (the person against whom criminal proceedings were initiated – Article 82 of the Code of Criminal Procedure), the detention of a person having the procedural status of suspect (the person regarding whom, from the existing data and evidence in the case, there is reasonable suspicion that he has committed an act provided for by the criminal law – Article 77 of the Code of Criminal Procedure) may be ordered for a maximum period of 24 hours, only after criminal proceedings have been initiated against him.

If he considers that the arrest of the defendant is necessary: "the prosecutor shall notify the judge of rights and freedoms of the competent court, in order to take the measure of preventive arrest against the detained defendant at least 6 hours before the expiry of the duration of his detention" (art. 209, para. 16). And, according to art. 210, para, 6m of the Code of Criminal Procedure, "exceptionally, for good reasons, the notification may be delayed for up to 4 hours." Pre-trial detention may be taken against the defendant, during criminal investigation, by the judge of rights and freedoms, in preliminary chamber proceedings, by the judge, and during the trial by the court (Article 203, paragraph 3).

The revocation of the preventive measure of detention is the procedural measure by which the measure of detention of the suspect or defendant is reversed, if the grounds that determined it have ceased or new circumstances have arisen from which the measure is illegal.
³⁶

The measure of detention shall be revoked ex officio or upon request in the event that new grounds justifying its termination have arisen or old ones have ceased. In this case, the immediate detention of the suspect or accused person is mandatory, but only in the event that another measure deprived of liberty is not ordered in another criminal case.

In the event that the measure has been ordered by the criminal investigation body, it is obliged to inform the prosecutor immediately, in writing, of any circumstance that could lead to the revocation or replacement of the preventive measure. In this regard, if the public prosecutor considers that the information communicated justifies the revocation or replacement of the preventive measure, he orders it.³⁷

The request for revocation or replacement of the preventive measure of detention made by the defendant is addressed either to the criminal investigation body that ordered the measure (with the obligation to immediately forward the request to the prosecutor) or to the prosecutor supervising the criminal investigation in question.

The new Code states that: "at least before 6 hours from the expiry of the detention period, the prosecutor has the possibility to notify the judge of rights and freedoms in order to take the measure of preventive arrest against the detained defendant". If in the old regulation it was established that the duration of detention was deducted the time during which the person was deprived of liberty as a result of the administrative measure of driving to the police

³⁵ Udriou M., *Criminal procedure sheets. General part. The special part. The New Code of Criminal Procedure*, Second Edition, Universul Juridic, Bucharest, 2015

³⁶ Istrate I., *The freedom of the person and its procedural and criminal guarantees*, Romanian Writing Publishing House, Craiova, 2014

³⁷ Gheorghe Buzescu, *Place and role of the civil servant in the state apparatus*, Sitech Publishing House, Craiova, 2017

headquarters, the new regulation does not include the time strictly necessary to drive the suspect or defendant to the headquarters of the judicial body, although it is a legal deprivation of liberty of the person. Judicial control, as a preventive measure, is regulated by the new law by the provisions of Art. Articles 211, 212, 213, 214 and 215 relating to the general conditions; taking the measure of judicial control by the prosecutor; the appeal against the measure of judicial review shall be available to the public prosecutor; the taking of the measure of judicial review by the preliminary chamber prosecutor or the trial court and the content of the judicial review.

The general conditions laid down in Art. 211, refer to the general conditions for the application of all categories of preventive measures, and the measure is necessary in order to achieve the aim of 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 crime. The conditions of provisional release under judicial supervision from the vigilant law provided for in art. 166 correspondent in the provisions of Art. Article 211 of the new regulation mentioned the possibility of granting release only for crimes committed by negligence, as well as for intentional crimes for which the law provided for imprisonment not exceeding 18 years. The taking of the measure of judicial review by the prosecutor and the appeal against the judicial control ordered by the prosecutor do not find their counterpart in the vigilant law of 2013. This measure is taken by the prosecutor by reasoned order after hearing the defendant who is compulsorily assisted by the lawyer chosen or appointed *ex officio*. The time limit within which an appeal may be lodged against the measure of judicial review taken by the public prosecutor is 48 hours, which runs from service.

An important condition is the absence of a case involving the initiation or exercise of criminal proceedings, provided by art. 16 Code of Criminal Procedure (according to Article 202, para. 2). The existence of any of the impediments provided for in art. Art. 16 The new Code of Criminal Procedure when initiating or bringing criminal proceedings must lead to a decision to close the case, making it impossible to take a measure in question.

The measure of detention must be proportionate to the seriousness of the accusation brought against the suspect / defendant and must be necessary to achieve the purpose by ordering it (according to art. 202, paragraph 3) is the fifth condition.

The last general condition is that the suspect/defendant must be heard beforehand, in the presence of a lawyer chosen or appointed *ex officio* (according to Article 209, paragraph 5). On this occasion, the legislature regulates a guarantee of the right to defence, both by itself and by the lawyer, of the suspect/defendant, which thus removes the possibility of taking the measure involving deprivation of liberty arbitrarily and allows the criminal investigation bodies to assess in concrete terms whether the measure is necessary and proportionate to the purpose of the prosecution.³⁸

In order to effectively exercise the right to defense, the criminal investigation bodies have the obligation to inform the suspect or defendant, before the first hearing, the act provided for by the criminal law for which he is a suspect or for whom criminal proceedings have been initiated and its legal classification, as well as the rights provided by art. 83 New Code of Criminal Procedure.

Before the hearing, the investigating body or the prosecutor is obliged to inform the suspect/defendant that he/she has the right to be assisted by a lawyer of his/her choice or *ex officio* and the right not to make any statement, except to provide information about his/her

³⁸ Dabu J.V., Guşan A. M., *The right to silence*, fundamental right, Right nr. 9/2013

identity, drawing his/her attention to the fact that what he/she declares can be used against him/her.³⁹

The suspect or defendant has the right to personally inform his/her chosen lawyer or to request the criminal investigation body or prosecutor to inform him/her. The manner of making the notification shall be recorded in the minutes, the suspect or defendant may not be refused the exercise of the right to make personal notification except for good reasons, which shall be recorded in the minutes.

The lawyer has the obligation to appear at the headquarters of the judicial body within 2 hours of notification. In case of non-appearance of the lawyer chosen, the criminal investigation body or prosecutor appoints a lawyer *ex officio*. In order to prepare the defence, the lawyer of the suspect or accused person has the right to communicate directly with him, under conditions that ensure confidentiality.

If the suspect or accused person refuses to give statements, the prosecuting body must draw up a report stating the refusal to give statements; If the suspect / defendant and / or the lawyer chosen or from his own office refuse to sign this report, the criminal investigation body will record this procedural attitude in the minutes. In addition to these general conditions, the detention of a minor person (between 14 and 18 years old) must be done only exceptionally (this is because the provisions of Title V, Chapter I of the New Criminal Code, regarding the regime of criminal liability of minors, must also be taken into account) and only if, the effects that deprivation of liberty would have on the minor's personality, are not disproportionate to the aim pursued by ordering detention.

Also, according to art. 360 Code of Criminal Procedure, in the case of audience offences, if the President finds that a criminal act has been committed during the hearing and identifies the perpetrator, he draws up a conclusion of the hearing which he must send to the prosecutor. As the prosecutor is obliged to participate in all cases pending before the courts (according to Article 353, paragraph 9 and Article 363 of the Criminal Procedure Code), he can declare that he starts criminal investigation, initiates criminal proceedings and can detain the suspect or defendant, even without first hearing him in the presence of a lawyer, as has been correctly assessed. We argue this idea by the fact that, from the point of view of criminal procedure (including judicial practice itself), restoring order and solemnity to the court hearing is a primary objective. In addition, it would be almost practically impracticable to hear the suspect or defendant in the courtroom prior to detention in the presence of a lawyer, given that the preventive measure in question must be ordered by the prosecutor (pursuant to Article 360(2) of the Code of Criminal Procedure). This does not eliminate the right of the detained person to benefit from a lawyer (according to Article 89, paragraph 2, Code of Criminal Procedure) equivalent to the prosecutor's obligation to appoint a legal aid lawyer (if there is no lawyer chosen or he did not appear in time to the prosecutor), but only with regard to the actual detention procedure which, From a temporal point of view, it is subsequent to the moment of hearing the suspect / defendant, according to art. 209, para 5. In addition to the general conditions listed above, for certain persons the law requires additional requirements to be met in order to order the measure of detention.

If the suspect or accused person is a Deputy or Senator, he may not be detained without the consent of the Chamber to which he belongs, which may be ordered only after hearing them, except in cases where the offence is flagrant, where prior consent is not required, but there is

³⁹ Pavel D., *Considerations on the Presumption of Innocence*, R.R.D nr. 10/1978

no obligation for the prosecution to inform the Minister of Justice. He shall immediately inform the Speaker of the Chamber of his detention.⁴⁰

The need for consent to be taken into custody against judges, prosecutors and assistant magistrates who may be detained only with the consent of the relevant Superior Council of Magistracy section, except in cases where the offence is flagrant, where prior consent is not required. There is, however, an obligation for the criminal investigation bodies that took the measure of detention to inform the Superior Council of Magistracy. If the suspect or defendant is the Ombudsman himself, he may be detained only with the consent of the presidents of the two chambers of Parliament, and the deputies of the Ombudsman may not be remanded in custody without prior notification to the Ombudsman.

2. Regulation of preventive detention measures in other States

2.1. Detention in the Republic of Moldova

Detention is judged ordered by the competent law body to deprive of liberty the person who committed a criminal act for up to 72 hours (Article 6 of the Code of Criminal Possibility of the Republic of Moldova, hereinafter referred to as Criminal Procedure).

Detention is a deprivation of liberty of an individual, for a short period of time, which applies until a decision has been taken on the application of the preventive measure, a decision on the application of a sanction or other measures provided for by law (e.g. expulsion of aliens).

Any situation in which a person cannot move freely is considered a deprivation of liberty because he is obliged to do so (e.g. a person who is locked in a cell, etc.), or because of a legal obligation to obey instructions from law enforcement officers (e.g. an order from an officer not to leave a place or go to a place).⁴¹

According to the current legislation, any person suspected of committing a crime or contravention can be detained only if the measures provided by art. 165 para. Article 2 of the Code of Criminal Procedure lists who may be subject to criminal detention. Thus, they can be retained:

- persons suspected of committing a crime for which the law provides for imprisonment for more than one year;
- the suspect, the defendant who violates the conditions of the non-custodial preventive measures taken against him, as well as the protection order in case of domestic violence, if the crime is punishable by imprisonment; and
- convicts in respect of whom decisions have been adopted to annul the sentence with conditional suspension of execution of the sentence or to annul the conditional release from the sentence early. Art. Art. 172 The Criminal Procedure, which regulated the procedure for detaining new third-class persons (convicts), was repealed, essentially not being possible to detain them for the reasons indicated.⁴²

Article 166 of the Law on Criminal Procedure provides::

- If there are reasonable grounds to suspect that he has committed a crime for which the law provides for a penalty of one year's imprisonment, the prosecuting body has the right to detain the person: 1) If caught on the spot; 2) Whether witnesses, including the victim, directly

⁴⁰ Bucurenciu G.A., *Preventive measures in Romanian legislation and some aspects compared to European legislation*, 2011

⁴¹ Gribincea O., Hriptievski N., Rotaru V., Vidaicu M., Zaharia V., *Research on the institution of detention in the Republic of Moldova*, Cartier Publishing House, 2011

⁴² <http://www.soros.md/files/publications/documents/Research%20retention.pdf>

identify the perpetrator; 3) If obvious signs of crime are found on the person's body or clothing, in his home or in the transport unit.

- In other circumstances where a criminal offence can reasonably be suspected, only those who attempt to hide or do not have permanent residence or whose identity is unknown may be detained.

- Detention may also be ordered if there are reasonable grounds to believe that the suspect will evade prosecution, obstruct the investigation of the truth or commit other crimes.

Detain an adult for the reasons specified in section 4. (It can be done before the crime is recorded in the manner prescribed by law. The crime is registered immediately, but no later than 3 hours after bringing the detainee to the criminal investigation agency, and if the detainee's actions are not properly recorded, the person is released immediately, with the exceptions provided for in art. 273 p. 2).

The legislation of the Republic of Moldova does not exhaustively list the categories of state representatives who may detain a person. Therefore, any police officer has the power to detain a person within the meaning of the provisions of the Police Act. The initiative to detain a person may come from prosecution agencies, courts and on their own initiative.

The main powers of the lawyer are as follows: to know the essence of suspicion (Article 68 para. 1 of the Code of Criminal Procedure; Meetings with the suspect, confidential, without limiting their time or duration (Article 64 paragraph 1) and Art. 68 para. 2) of the Criminal Procedure, confidential meeting until the first hearing (Article 64 paragraph 2) of the Code of Criminal Procedure; Art. 167 of the Code of Criminal Procedure; To participate in the hearing of the detained client (Articles 64 para. 1) and 68 para. 1) of the Criminal Procedure; To participate in procedural actions performed with his/her client (Art. 64 para. 1/ Art. 68 para. 1 of the Code of Criminal Procedure; Explain the client's rights; To take note of the materials submitted by the OUP to confirm the detention and the necessity of arrest (Article 68 paragraph 2) of the Code of Criminal Procedure); Submit requests and objections to OUP actions and request that they be entered in the minutes; To take note of the minutes drawn up with the participation of the lawyer and to request their completion.

From the above, it can be concluded that lawyers in the Republic of Moldova have quite broad rights and could provide an effective defense to their clients. However, the practice of providing legal aid in the country varies and clients are often rightly dissatisfied with the services received.

2.2. Detention in other EU Member States

In the Member States of the European Union, the deprivation of liberty of a person by a warrant or for the enforcement of a court decision takes place according to similar regulations. The situation is different as regards the grounds for deprivation of liberty, duration and schedule.

Warrantless detention is the property of the police (or Gendarmerie, for example in Italy) exercised according to the rules. This may vary by country.⁴³ For example, in Sweden, the police cannot arrest/detain anyone without the permission of the prosecutor, in France, the police have 24 hours to notify the prosecutors of detention, in England, the police can deprive someone of their liberty for up to 36 hours, the same in Wales.

Detention without a warrant is carried out by the police or gendarmerie, in all Member States EU national law authorises the police to use the measure. Police officers must have

⁴³ <http://soros.md/files/publications/documents/ Detention in criminal proceedings.pdf>

indicators ranging from "rational" to "serious" or "intense" from country to country, that a person has committed or will commit a criminal offence in order to apprehend him.

In Sweden, however, police necessarily need the approval of a prosecutor to detain someone without a warrant and for only 12 hours. The duration of police detention is 24 hours in 15 EU countries (Portugal can extend the period to 48 hours and Ireland to 7 days), with 7 other countries providing 48 hours for this preventive detention measure. In Finland and Sweden, the duration is the "third day at noon" calculating from the first moment of contact between suspects and police. In Hungary and Estonia, detention can last 72 hours, and in Italy detention can be 96 hours.

However, all EU member states have certain criteria that must be respected during detention without a warrant, i.e. until the suspect is brought to court. A remarkable problem is bringing the suspect to police headquarters for identity verification and/or preliminary investigation, a distinct measure of warrantless detention. It is clear that the individual concerned is deprived of liberty during the "driving" period, even if he is allowed to leave after the hearing. For this type of deprivation of liberty it would be natural to activate some guarantees for the suspect.⁴⁴

Several countries have legal anticipations of driving time to establish/verify identity and/or preliminary investigations. Thus, in France, the police body can lead the defendant for a maximum of 4 hours, after which the suspect is either released or placed in the care of the prosecutor.

In the Netherlands, the measure is taken for 6 hours, with the possibility of postponing once for another 6 hours. Note that the hours between 12 p.m. and 9 a.m. do not count. The defendant is notified from the first moment that he has the right not to answer questions put to him that are not related to his identity. After the expiry of 6 or 12 hours, the defendant is released or placed in custody on the order of a prosecutor or a senior police officer.

In Slovenia, the police body can drive to premises suspects found at the scene of a criminal offence or who are believed to be able to help with information in the investigation. The retention period is a maximum of 6 hours. If the police body considers that time is not enough to carry out preliminary investigations (identity, etc.) within 6 hours, then, before the end of the time, it hands over to the suspect a written decision on his deprivation of liberty for a maximum of 48 hours. The decision can be appealed in court.

In England and Wales there is a measure called street bail, which means that a person who does not want to reveal their identity (Britons do not have ID cards) is let loose in exchange for bail and rules (usually going to police on a set date and time). Of course, bail is not valid in all situations and cannot, as a rule, replace driving to the police body, but it is an alternative to the initial deprivation of liberty.

In Hungary, the police body has the right to arrest the suspect for 8 hours with a single 4-hour delay. The exceptions in which this measure applies are: implementation of an arrest warrant issued by the competent authorities; escape from detention; suspicion of a criminal offence.

Throughout the action, the Hungarian police body has the legal right to use force. The short-term suspect must be informed of the duration and reason for the arrest and can notify his family of his situation. However, if police believe that notifying the family would hinder

⁴⁴ Bucurenciu G. A., *Preventive measures in Romanian legislation and some aspects compared to European legislation*, 2011

investigations, this right no longer applies. Also, the suspect will have the right to the presence of a lawyer, but the police body can interrogate him/her in his/her absence.⁴⁵

3. Rights of the detained person

Since criminal prosecution is carried out in secret, non-contradictory and mainly through written documents, the defendant's participation is limited to several procedural means, namely: applications, pleadings, participation sometimes in carrying out criminal prosecution acts and, when considered wronged, in formulating complaints against criminal prosecution acts. Through applications, the defendant may request the taking of evidence or that it take into account certain situations or that certain procedural aspects be carried out, or that some procedural measures be revoked, replaced or terminated or resolved in a manner of the case.

The pleadings explain the defenses made arguing innocence or the extent to which she is guilty, the form of guilt, participation, the circumstances in which the act was committed and any other circumstances justifying the adoption of a certain solution. The submission of applications and pleadings is not subject to a time limit during criminal proceedings.

Participation in the criminal prosecution of the accused is optional, having the right to participate in carrying out those that concern him directly, such as: search (Article 104), investigation on the spot (Article 129), reconstruction (Article 130, paragraph 2), as far as expertise is concerned, it is provided in art. 120, para. 4 Code of Criminal Procedure, that the parties may participate in their performance, except for the situations provided by art. 119, para. 2 Code of Criminal Procedure.⁴⁶

The investigating body may not prohibit participation in such acts, but if they do not appear at the place and date for which they were notified, the acts may also be carried out in their absence. The participation of the defendant in the other acts of criminal investigation is possible only with the approval of the criminal investigation body.⁴⁷

The defendant has the right to be assisted throughout the criminal investigation and trial by counsel, and the legal bodies are obliged to inform him of this right. The complaint against the acts of criminal prosecution is an important means that the defendant has at hand to challenge them when he specifies them, illegal and groundless. Thus, the defendant may use the procedure provided by Art. 140 against preventive measures taken by the prosecutor against other measures or acts of criminal prosecution or the one provided by art. 147, para. 2, Code of Criminal Procedure and Art. 249 Code of Criminal Procedure, as amended by Law nr. 42/1993. The defendant may object to the prosecutor or criminal investigation worker who is in an incompatibility case. During the criminal investigation, the defendant has additional rights and guarantees arising from the extension of the right of defence⁴⁸. If the measure of arrest is taken by indictment and there is no situation provided by art. 254 Code of Criminal Procedure, it is mandatory to hear the defendant and present the accusation and the reasons for arrest in the presence of the defender, the provisions of art. 23, para. 5 of the Romanian Constitution and art. 137 Code of Criminal Procedure, under penalty of absolute nullity of the arrest measure and implicitly of the document instituting the proceedings.

⁴⁵ <http://soros.md/files/publications/documents/ Detention in criminal proceedings.pdf>

⁴⁶ Damaschin M., *Criminal procedural law*, Wolters Kluwer Publishing House, Bucharest, 2010

⁴⁷ Popescu D., *Criminal Judicial Practice*, vol. IV, Ed. of the Romanian Academy, Bucharest, 2013

⁴⁸ Pop T., *Criminal procedural law, Introductory part*, Tipografia națională S.A., Cluj, 1946

Being a party to the proceedings, the judicial bodies have the obligation to ensure the full exercise of procedural rights under the conditions provided by law and to administer the evidence necessary for the defense⁴⁹.

In order to guarantee the right to defence, the defendant must be made aware by the judicial authorities about the act for which he is accused, about its legal classification and ensure the possibility of preparing and exercising the defence. The defendant will be notified before the first statement of the right to be assisted by defence counsel is taken. Proof that this right has been fulfilled shall be furnished by entries in the minutes of hearing⁵⁰. If legal aid is mandatory, according to the law, judicial bodies are obliged to take measures to ensure legal aid for the defendant if he does not have a chosen defence counsel.⁵¹

During the trial, the defendant acquires several procedural rights. They derive from the quality of defendant, as well as from the principles governing judgment: publicity, orality, contradictoriness, immediacy. It should not be forgotten that the presumption of innocence acquires other valences. Although it would appear that the indictment rebuts the presumption of innocence, the court must regard the defendant as an innocent person, being obliged to re-administer all prosecution evidence and form a conviction of guilt on the basis of all the evidence accumulated at the prosecution as well as during the trial.

By introducing the presumption of innocence between fundamental rights and freedoms, it is no longer just a single rule of proof, covering with its effects the entire criminal process until a final decision is reached.

As regards the means at his disposal, he has the same possibilities as the prosecutor and the other parties, having the right to make requests, raise exceptions and make conclusions (Article 301, paragraph 1 of the Code of Criminal Procedure). For the exercise of these rights, several safeguards are provided. Thus, the defendant is notified and summoned to court hearings by summonses, the failure of the court to fulfill this obligation preventing the trial (Article 291 of the Code of Criminal Procedure).

If the defendant is detained, the court may proceed to trial only in his presence, under penalty of absolute nullity (Articles 341, 484, 197, paragraphs 2 and 3 of the Code of Criminal Procedure).

Minors shall be tried in their presence, except in cases where they abscond.

Military defendants or detainees are summoned at every hearing (Article 291, paragraphs 7 and 8 of the Code of Criminal Procedure).

Since participation in the court hearing of the defendant is a right, if he is prevented from attending and informs the court, the court cannot proceed to trial under the action of relative nullity (Article 379 paragraph 2, letter b) Code of Criminal Procedure).

Other procedural rights of the defendant are:⁵²

- to know the file throughout the trial, which means that he can consult it before court hearings, personally or through counsel, and if he is arrested, he must be served with a copy of the document instituting the proceedings (Article 311 of the Code of Criminal Procedure) ;

⁴⁹ Antoniu G., Papadopol V, Popovici M, Ștefănescu B, *Guidelines given by the Supreme Court Plan and the New Criminal Legislation*, Editura Stiintifică, Bucharest, 1971

⁵⁰ Păvăleanu V., Iacobuță I. , Covalciuc M., *Criminal Procedural Law*, Panfilius Publishing House, Iasi, 2015

⁵¹ Bucurenciu G. A., *Preventive measures in Romanian legislation and some aspects compared to European legislation*, 2011

⁵² Țuculeanu A., *Guarantees of inviolability of domicile. Domiciliary search*, in Law nr. 2/2016

- to explain the accusation against him (Article 323 of the Criminal Procedure Code) ;
- ask questions during the hearing of other parties and witnesses (Articles 323(2), 327(1))
- require the taking of new samples (Art. 66(2), Art. 320)
- not to prove his innocence (Article 66)
- have the final say on the merits of the case (Art. 340)
- to make use of ordinary and extraordinary remedies (Articles 387, 386)

The right of defence is ensured by the possibility for the defendant to be assisted throughout the trial by counsel of his choice, in cases where assistance is mandatory and the defendant does not have counsel of his choice, the court is obliged to provide ex officio assistance under the sanction of absolute nullity.⁵³

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⁵³ Damaschin M., *Criminal procedural law*, Wolters Kluwer Publishing House, Bucharest, 2010

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