Provisions of Principle with European Constitutional Value on the "Person's" Right to Freedom and Security

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Abstract: Among others, the Convention for the Protection of Human Rights and Fundamental Freedoms contains principle provisions on the "person's" right to freedom and security. These principle provisions – with European constitutional value – were reaffirmed both in the other EU main legal instruments, which, for its Member States, have the force of "Jus cogens", and in the constitutions of the EU Member States.Under these principle provisions, expressed in Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights ordered that a person's deprivation of liberty by arrest or detention can be made only by a Court decision, under the law, and only by a Magistrate, and not by the Prosecutor's decision.However, the provisions of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms also reveal that, by the deprivation of liberty, no person shall be deprived of legal protection "against the arbitrary", hence the need for a better knowledge and, ipso facto, for the correct application of the provisions of this Article.

Keywords: Human Rights; Fundamental Freedoms; European Court

1. Provisions of Principle on the Person's Right to Freedom and Security

In the European Union Law, we find not only "general principles" (Dură, 2013) regarding the fundamental rights and liberties of man (Dură, 2010a; Dură & Mititelu, 2012) and their juridical protection (Dură, 2010b), but also previsions of principle on the "person's" right to freedom and security. Indeed, among others, the main legal instruments of the European Union – such as the Convention for the Protection of Human Rights and Fundamental Freedoms (Mititelu, 2015; Dură & Mititelu, 2015) – contain a lot of provisions of principle regarding the "person's" right to "freedom and security", which have a European constitutional value (Mititelu, 2013).

Regarding the "person's" right to freedom and security, the Convention for the Protection of Human Rights and Fundamental Freedoms enunciated the following provisions of principle, namely:

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a) The right to liberty and security is "an inalienable right, which no one can renounce to, and its guarantees the security of all persons, including those who are in custody" (Bîrsan, 2010). As such, a person may be deprived of the "right to liberty and security" only by an act of conviction issued by a competent Court.

b) The two rights, namely the "right to freedom" and "the right to security of the person" are "two rights closely interrelated and interdependent" and the word "safety" must be inevitably related to the word "freedom" (Bîrsan, 2010).

c) A person arrested or detained must be brought before a "judge" or a "magistrate" authorized by law to exercise judicial power, because the "administrative detention" is legal only "through the intervention of a magistrate" (Bîrsan, 2010).

d) Deprivation of liberty of a person by arrest or detention may be made only by a Decision issued, under the law, by a "Court", i.e. by a Magistrate.

Among other things, in its decisions – which actually created the jurisprudential Law of the European Union – the European Court of Human Rights has stated that the detention of a person or extension of detention "by the prosecutor's decision, without the possibility to communicate in any way with someone from the exterior and without being brought before a judge, is a violation of Article 5 paragraph 3 and of Article 5 paragraph 4 of the Convention" (Bîrsan, 2010).

e) Any deprivation of liberty must be "consistent with its purpose; protection of the individual against an arbitrary interference" (Bîrsan, 2010).

The legal protection of a person "against the arbitrary" also involves the exploitation of another fundamental human right, namely the right to freedom and security, otherwise expressly enunciated and guaranteed by the European Convention on Human Rights, which has a European constitutional value, hence the obligation of the EU Member States to also reaffirm this principle provision in the text of their Constitutions.

The jurisprudence of the European Court (Dură & Mititelu, 2014) emphasized that the two rights – the right to freedom and the right to safety – are ontically and mutually interrelated and interdependent; therefore, we are entitled to say that there is no "security" without "freedom" and no "freedom" without "security".

2. The Provisions of the Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms

A hermeneutical analysis of the text of the Convention for the Protection of Human Rights and Fundamental Freedoms – be it brief – will allow us to notice that these principle provisions were laid especially in the wording of article 5.

Among other things, the text of this Article reveals that "everyone has the right to freedom and security" and that a person "shall be deprived of freedom" only "by the lawful detention after conviction by a competent Court;" (Article 5, paragraph 1a).

The same article 5 of the European Convention on Human Rights provides that "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful" (Article 5, paragraph 4).

Article 5, paragraph 3 of the European Convention on Human Rights states that "everyone arrested or detained... shall be brought promptly before a judge or other officer authorized by law to exercise judicial power...".

According to the European Convention on Human Rights, the person arrested or detained must therefore be given to judicial authority, which may be either a "judge" or a "magistrate" authorized by law to exercise judicial functions, hence the fact that, in this case, "the judge" and "the magistrate" – empowered by law with judicial powers – have "the same responsibilities, the same power..." (Bîrsan, 2010).

According to the magistrates of the European Court, the adverb "immediately" – from the text of Article 5, paragraph 3 – emphasizes the need to immediately exercise the judicial control over the arrest and detention of a person, and, of course, through it, the need "to ensure the removal of arbitrariness regarding the enhancement of a fundamental right under the Convention – the right to freedom and security" (Bîrsan, 2010).

However, in the EU States, as in the other Contracting Parties to the Convention, there is no uniform regulation on the judicial procedure of a person's deprivation of liberty.

Noting that there is no "unity of regulation on the state authority called to arrest a person, order his/her detention for a certain period, perform acts of prosecution, draw up the indictment (the indictment act) and, finally, send them before a court", the European Court magistrates required a clear statement on "what state authority first intervenes – in arrest or detention – and which is the state authority able to control it..." (Bîrsan, 2010).

This clear delineation between the two fundamental moments, i.e. arrest or detention and the judgment by the Court, is necessary especially since, in some EU States, "the arrest or detention is performed, usually, by the police..., the customs authorities, the gendarmerie, etc., in any case an administrative authority, subordinate to the executive" (Bîrsan, 2010), and not by the judge or magistrate, who has judicial functions.

According to Article 5 (paragraph 3) of the European Convention, "the state authority that controls detention should also be able to decide on maintaining the arrest until the trial by the Court of first instance: this is why we talk about preventive detention or release of the arrested person, even prior to the trial" (Bîrsan, 2010).

3. "Judge" and "Magistrate". Some notional precisions

Some Romanian jurists stated that the wording of Article 5 (paragraph 3) of the European Convention reveals that the concept of "judge" is synonymous to the one of "magistrate" (see Article 5 paragraph 3), and, in the signatory States of the European Convention, it is "universally acknowledged" that, when referring to "judge" or "magistrate", in fact, reference is made to "the magistrates court" (Chiriță, 2008) exercising a jurisdictional function.

Indeed, the one who judges a case, settles a dispute, i.e. exercises a jurisdictional function, is none other than the "territorial judge", who is "independent of the executive in any of the Contracting States" (Bîrsan, 2010). However, under Article 5 (paragraph 3) of the European Convention on Human Rights, the status of "magistrate" is awarded and recognized only to the one who is "authorized by law to exercise judicial power..." (Article 5, paragraph 3).

In term of the two concepts, i.e. "judge" and "magistrate" used in the text of the European Convention – some jurists of the European Court specified that they "are not equivalent". Or, in the economy of the wording of Article 5, paragraph 3, they have "the same responsibilities, the same powers..." (Bîrsan, 2010), because the two functions belong only to the system perceived by the authors of the Convention, not to the law of the EU Member States. Yet, the European Court of Human Rights stated that, "for the European Court", the term "judge" should not be confused with the "judge" (Bîrsan, 2010).

However, the specifications of the European Court reveal and emphasize that, in the text of Article 5 of the European Convention, "the Magistrate" exercising judicial functions cannot be identified with the "Prosecutor", who, in case of a person's deprivation of liberty – by arrest or detention – acts not only in order to "guarantee the independence and impartiality inherent to the concept of *magistrate* within the meaning of Article 5, paragraph 3 of the Convention" (Bîrsan, 2010) but also "the condition of independence from the executive" (Bîrsan, 2010).

Therefore, the prosecutor "is not an independent magistrate, under Article 5, paragraph 3 of the Convention since, compiling the indictment, becomes party to the criminal proceedings, as a representative of the State" (Bîrsan, 2010).

Regarding the confusion caused by the two concepts, *id est* "Judge" and "Magistrate" – from the text of Article 5 of the European Convention on Human

Rights – the Romanian constitutionalist, namely Professor Radu Chiriţă, also stated that, formally, in the British legal system, the magistrate is not "judge" but "his/her powers are substantially identical to those of a judge" (Chiriță, 2008).

Although, under Article 5 of the European Convention, the two functions have "similar duties", "they do not confuse each other" (Chiriță, 2008). Moreover, the European Court of Human Rights stated that "the Magistrate" should meet certain guarantees. "Thus, the first institutional requirement refers to independence from the parties and from the executive, plus a procedural requirement consisting in the magistrate's obligation to hear personally the defendant, and the substantive requirement to review the circumstances of the case and to decide under the legal basis on the existence of the reasons justifying the deprivation of liberty and, failing that, to order the release of the person concerned. Third, the Court states that the magistrate should have the legal power to examine all the contentious issues related to detention and to take a final decision in relation to objective legal criteria, i.e. have the power to release a person if detention is not justified" (Chiriță, 2008).

As regards the measure of preventive arrest, the same European Court of Human Rights has held that, in criminal cases, it may not be exercised by "the prosecuting party, for the case where, prior to court referral, it had given its opinion on the arrest; thus, we deduce – specified the European Court – the lack of independence from the parties in the preliminary stages of the trial" (Chiriță, 2008).

Therefore, the prosecuting party does not enjoy the independence provided by Article 5, paragraph 3 of the European Convention.

In order o remove any terminological and jurisprudential doctrinal ambiguity, "the Court stated that the analysis of the regularity of the detention by a magistrate lacked of impartiality contravenes the purpose of Article 5", which provides, indeed, for "the condition of the magistrate's independence and impartiality, in order to comply with the provisions of Article 5, paragraph 3" (Chiriță, 2008).

The same European Court of Human Rights found that a person's right to a "fair" and public trial,"... by an independent and impartial Court, established by law..." (Article 6 of the European Convention), is, in fact, part of the criteria established in order to determine the independence and impartiality of the a trial body.

However, taking into account the criteria established under the European Convention on Human Rights, "the Court stressed several times that a prosecutor cannot pass as independent and impartial, so that the arrest ordered by him/her, without automatically presenting the arrested person before a judge in order to determine the lawfulness of detention, is contrary to Article 5" (Chiriță, 2008).

This jurisprudential doctrine, established by the European Court of Human Rights, remains, of course, the best "*interpres legume*", in respect to the magistrate, and,

ipso facto, it can also bear this name within the national law, *recte* the Romanian one. Moreover, we hope that the analysis of the text of the European Convention on Human Rights and of the jurisprudence of the European Court – presented in the above lines, even briefly will help us to clarify further the concept of "magistrate".

According to the same jurisprudential doctrine, the Prosecutor is not entitled to assess the lawfulness of preventive arrest, nor to rule on the lawfulness of detention and to order the release of the detainee because he/she has "complete independence from the executive and the parties" (Chiriță, 2008).

Referring to the specifications of the European Court, the same Romanian constitutionalist, Professor Radu Chirita, also noted that "by the establishment of the conditions for the magistrate, the Court established this term as an autonomous concept, giving it a European meaning, different from the one that the term has in the national legislations of the states signatories to the Convention. Thus, this excludes the state's possibility to invoke its different meanings from the domestic law, in order to avoid the imposition of the safeguards required by the Court" (Chiriță, 2008).

Nevertheless, by its conditionality, the European Court of Human Rights gave the term "magistrate" a European meaning and also granted the signatory States the possibility to clearly distinguish its role and legal status.

4. The European Court of Human Rights and its Change to Ensure an Effective Protection of Conventional Rights

The "main aim" of the European Court of Human Rights was "to ensure the effective protection of conventional rights in Europe", i.e. those referred to expressly in the text of the European Convention on Human Rights; in this respect, "the reference to the national law is occasional, the Court preferring to develop a system of independent concepts to which to report" (Chiriță, 2008).

This is also revealed by the interpretation of Article 5 of the European Convention on Human Rights. Based on this article, the European Court developed a system of independent concepts, hence the requirement for the Romanian magistrates to know and apply both the European Convention on Human Rights and the interpretations of its text by the European Court.

Referring to this urgent and obvious need, a Romanian jurist stated that, in post-revolutionary Romania, "... the protection of fundamental (human) rights has not been, at any time, among the priorities of the political parties that succeeded to power... The only state power which would have had the required judicial intervention levers in this area – i.e. the judiciary – has declined to do so" (Chiriță, 2008).

The same Romanian jurist, Professor Radu Chirita, noted that the provisions of this European Convention on human rights would not be respected by the Romanian state, which, although "...pays millions of Euros from convictions..., tends, through all its institutions, to ignore the rights of its own citizens.... Worse, except for some scattered courageous court decisions, that however often end up being scrapped by higher courts, nothing seems – he concluded – to change in the near future" (Chiriță, 2008).

In our opinion, we can only go back "*ad fonts*", i.e., in this case, to the provisions of Article 5 of the text of the Convention for the Protection of Human Rights and Fundamental Freedoms, which states that any person has the right to freedom and security, and he/she cannot be deprived of his/her freedom except from the lawful detention after the conviction by a competent Court.

5. Instead of Conclusions

Analyzing the text of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the informed reader could retain that in the literature of specialty still persists the confusion caused by the two concepts, i.e. "Judge" and "Magistrate". On the other hand, as stated both by the European magistrates and by some Romanian constitutionalists, these two functions have similar but not identical powers.

Under the provisions of the same article, a person's deprivation of freedom by arrest or detention can be performed only by a court decision, i.e. by a judge, not by a Magistrate's decision, if he/she is not empowered under the law to exercise some judicial functions. Moreover, only the Judge is entitled to verify the legality of the detention, and not the prosecutor who ordered the arrest.

It is well known that, in Romania, the notion of "Magistrate" is used in order to describe the profession of "Prosecutor". Therefore, in order to avoid any terminological ambiguity or confusion – and, thus, in order to fall within the spirit of the jurisprudential doctrine of the European practice –the text of Article 5 of the European Convention should be subject to a careful study in our Law Schools.

Finally, we recall that everyone's right to freedom and security remains a fundamental human right, expressly provided and guaranteed by the wording of the first EU legal instrument, with the power of "*Jus cogens*", i.e. the Convention for the Protection of Human Rights and Fundamental Freedoms.

Having an European constitutional value, the provisions of principle enunciated by the text of this Convention, on the "person's" right to freedom and security, was in fact reaffirmed in the text of all other main legal instruments of the European Union, including in the text of the Constitutions of the EU Member States (Dură, 2006). As, for example, the Treaty establishing a Constitution for Europe,

published in Lisbon in 2007, which embodied in its text all the provisions of principle regarding the "Person's" right to freedom and security.

6. References

Bîrsan, C. (2010). *Convenția europeană a drepturilor omului. Comentariu pe articole/European Convention on Human Rights. Comments on Articles.* Ed. 2. Bucharest: C.H. Beck.

Chiriță, R. (2008). *Convenția Europeană a drepturilor omului. Comentarii și aplicații/European Convention on Human Rights. Comments and Applications*. Ed. 2. Bucharest: C.H. Beck.

Dură, N.V. (2006). Drepturile şi libertăţile omului în gândirea juridică europeană. De la „Justiniani Institutiones" la „Tratatul instituind o Constituţie pentru Europa"/The human rights and freedoms in the juridical European thinking. From the "Justinian Institutiones" to the "Treaty establishing a Constitution for Europe". *Analele Universităţii Ovidius. Seria: Drept şi Ştiinţe Administrative/ Annals of Ovidius. Series: Law and Administration Sciences*, No. 1, pp. 129-151.

Dură, N.V. (2010a). The Fundamental Rights and Liberties of Man in the E.U. Law. *Dionysiana*, Vol. IV, No. 1, pp. 431-464.

Dură, N.V. (2010b). The European juridical thinking, concerning the human rights, expressed along the centuries. *Acta Universitatis Danubius. Juridica*. Vol. VII, No. 2, pp. 153-192.

Dură, N.V. (2013). General Principles of European Union Legislation Regarding the Juridical Protection of the Human Rights. *Journal of Danubius Studies and Research*, Vol. III, No. 2, pp. 7-14.

Dură, N.V. & Mititelu, C. (2012). Human rights and their universality. From the rights of the "individual" and of the "citize" to "human" rights. *Exploration, Education and Progress in the third Millennium*, Vol. I, No. 4. Galaţi: Galati University Press, pp. 103-127.

Dură, N.V. & Mititelu, C. (2014). The right to Freedom of Religion in the Jurisprudence of the European Court. *Journal of Danubius Studies and Research*, Vol. IV, No. 1, pp. 141-152.

Dură, N. V. & Mititelu, C. (2015). The human fundamental rights and liberties in the Text of some Declarations of the Council of Europe. *Exploration, Education and Progress in the Third Millennium*", Vol. I, No. 5. Bucharest: ProUniversitaria, pp. 7-22.

Mititelu, C. (2013). Europe and the Constitutionalization Process of EU Member States. *"Ovidius" University Annals, Economic Sciences Series*, Vol. XIII, No. 2, p. 122-127.

Mititelu, C. (2015). The European Convention on Human Rights. *The European Integration – Realities and Perspectives, EIRP Proceedings Vol. 10.* Galati: Danubius University Press, pp. 243-252.