CONTRAVENTIONAL DETENTION AND HUMAN RIGHTS

DETENȚIA CONTRAVENȚIONALĂ ȘI DREPTURILE OMULUI

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Summary

Pre-trial detention is, possibly, the most human rights restricting measure that can be imposed on a person in the course of a contraventional process. This article aims to explore the bond between human rights, which are an integral part of our social life, and pre-trial contravention detention - an extreme measure that can occur during the contravention procces. The approach of the subject gives us two opposite ways in which human rights and contraventional detention can interract. One way offers the postive part, where human rights are protected through this measure, the other offers the negative part, where human rights are violated. An essential part in this is taken by the position of law in society, whether it is properly applied or not.

Keywords: *Pre-trial detention, human rights, life, liberty, security, invioability, person, innoncet, court, trial, restriction, coercive measure*

All human beings have the right to freedom and security. The "Universal Declaration of Human Rights", in article 3 guarantees "the right to life, liberty and security of person". It follows that, altough a State may not have ratified or otherwise adhered to any of the existing human rights treaties, it is nonetheless bound by other legal sources to ensure a person's right to have their liberty and security respected. This article focuses on protecting individuals' freedom from unreasonable and arbitrary detention, as opposed to protecting personal safety - one of the most fundamental human rights along with the right to life. There are certain circumstances in which public authorities can detain a person as long as they act within the law. This applies, for example, if there is reasonable suspicion that someone has committed a crime. The "reasonableness" of the suspicion on

which an arrest must be based, forms an essential part of the safeguards against arbitrary arrest. Having a "reasonable suspicion" assumes the existence of facts or information which would convince an objective observer that the person concerned may have committed the offence.

As to the principle of legality, the Human Rights Committee has held that "it is violated if an individual is arrested or detained on grounds which are not clearly established in domestic legislation"; in other words, the grounds for arrest and detention must be "established by law". States must establish national laws indicating which officials are authorized to impose detention, and the conditions under which such actions may be taken.

At the same time, article 5 of the European Convention on Human Rights also provides the right to liberty and security, establishing that „No one shall be deprived of his liberty except in certain strictly determined cases and in accordance with a procedure prescribed by law". The requirement of lawfulness has been interpreted as referring to both procedure and substance. Moreover, lawfulness is understood to mean that any detention must be in accordance with the national law and the European Convention, and must not be arbitrary. [1, p. 9]

Freedom and inviolability of person are guaranteed in the national legislation of the Republic of Moldova, first of all, in the Constitution, article 25. These rights can easily be violated by a procedural contraventional measure – pre-trial detention – but only when it is not applied properly, illegally, as it is a way of restricting human rights and liberties, its impact on them being essential.

Detention can be expressed either through restricting one person's freedom of movement, at the scene of the incident by using forced detention during the allowed time by law in order to clear up and clarify the circumstances on the spot, or by bringing the offender to the police station and his subsequent detention.

Our national legislation also establishes, in article 443 of the Contraventional Code that a „pre-trial detention" represents a short-term limitation of the individual's freedom and can be applied in certain cases expressly and exhaustively established by the code. These cases are: committing flagrant offenses for which the code provides the sanction of contraventional detention; the impossibility to identify the person on whom the contravention process started, if all the identification measures were already used; execution of the court decision regarding the expulsion of the person; violation of the

state border regime, the border area regime or the state border crossing point regime. In other words, pre-trial detention is a procedural measure of coercion which consists of the deprivation of liberty of the person suspected or accused of committing a contravention for a certain period of time, in order to ensure public order and security. In other words, detention is a forced limitation, for a short period of time, of freedom, of action, and movement of the person and it should be applied only in cases where there is no postponement and only if two cumulative conditions are met:

- it is necessary to isolate the person because he/she could commit other crimes/contraventions, could hide or could prevent in another way the investigation/examination of the contraventional case;

- the immediate application of preventive measures is impossible (decision on their application). [2, p. 73]

All these measures are taken in order to assure that the public order is not affected. The question arises, however, whether, in a democratic society governed by the rule of law, pre-trial detention, however brief, can ever be legally justified on the basis of a legal notion so easily abused as that of public order. [3, p. 194] A democratic society is based on and maintaines intact on the public order, which is conditioned by the effective application of the law. However, there is a continuous interdependence between law and public order, as the latter determines the proper and correct application of the law, and it is the law that creates, in fact, public order. As no society has yet reached the absolute perfection of the creation and application of its laws, notions such as "public order" can be slightly distorted and the law can be interpreted extensively unfavorably.

Although there is a risk of error when invoking the notion of "public order", it should not be ignored that there is often a real danger that threatens social relations and therefore public order. This must be avoided, as the state and its authorities are the ones who must ensure the security of society as a whole, but in such a way that each individual feels protected and his or her rights and freedoms remain unaffected and untouched by a possible danger, by someone who commits illegalities.

Given the specifics of detention, but also the essential rights of the person that can be significantly harmed, this is a harsh way of social influence, as it can easily degenerate into creating extremely serious damage to the person. The person can be considerably affected psychologically. Even if the detention

time is of maximum 3 hours, during this time the person is deprived of his or her fundamental rights, of the possibility to dispose of his or her goods, to communicate freely with other people, things that produce stressful changes in the usual rhythm of one person's life.

Even short periods in detention disrupt family and private life and the ability to work, with potentially long-term consequences. The most dangerous is that detention is often combined with other coercive measures, such as physical examination. Even more frequently, when a person is detained, physical force is applied, thus affecting their physical integrity. If such a measure is applied to a person by mistake, when the suspicion has proved to be unjustified, by restraint, the person's dignity is humiliated. [4, p. 100] This is why pre-trial detention shall be used as a means of last resort in both criminal and contraventional proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim, in this context it is particularly important that the mechanism of this coercive measure contains safeguards and effective tools to prevent human rights abuses, but also to restore them if they have been violated. [5]

Only the competent authorities can apply the detention, as it is not a specific and a common measure of sanctioning. The legislation provides an exhaustive list of these authorities: the police; Border Police, in cases of violation of the state border regime, the regime of the border area or the regime of state border crossing points; Customs service, in case of contraventions related to its competence; The Migration and Asylum Office of the Ministry of Internal Affairs, in case of contraventions related to its competence. This moment is important, as detention, as a measure to ensure the contravention procedure, should be applied only as exception, in certain cases, not as a rule. The justification lies in the fact that the application of detention leads, mainly, to the violation of a fundamental right - the freedom and inviolability of the person, guaranteed by the Constitution (art. 25). This aspect ensures that the detention is applied correctly, in strict accordance with legal norms, the person thus obtaining certain guarantees, being assured that he or she is not detained arbitrarily, his or her rights being respected and protected by the state authorities.

Once a person is subject to a pre-trial detention, they have certain rights, which, in one or another way, guarantees his or her integrity and inviolability. A person deprived of their liberty must be promptly informed of the reasons therefor, in a language which he or she understands and in sufficient detail so as to

be enabled to request a prompt decision by a judicial authority on the lawfulness of their deprivation of liberty. [3, p. 184]

For instance, the detained person is not completely deprived of the possibility to communicate with other persons. The Contraventional Code assures that he or she is immediately granted the possibility to communicate to two persons, of their choice, about the detention. The fact of communication or refusal to communicate shall be recorded, by signature, in the minute of the detention. Also, access to lawyers is not only a key safeguard for a fair trial, but also for the prevention of torture and ill-treatment. However, in order for this safeguard to be efficient, pre-trial detainees need to be able to communicate with a counsel of their own choosing – without delay, interception or censorship and in full confidentiality.

Any deprivation of liberty places the person in a vulnerable position and exposes them to various risks (torture, cruel punishment, degrading or inhuman treatment), which can have serious mental and physical consequences, including long-term ones. Even if the time in which the person is detained is relatively short, it is inadmissible to subject him or her to torture, mistreatment, or inhumane conditions.

It is known that in many countries, people in pre-trial detention are held in overcrowded, cramped and insanitary conditions, at risk of mistreatment and violence. This should be completely avoided, especially in a respectable democratic state where the dignity of the person must take the lead

Prison conditions are often worse for those in pre-trial detention than for sentenced prisoners, despite the internationally enshrined legal principle that accused persons should be treated as innocent unless and until they are proven guilty. [6, p. 7] Here also appears the greatest risk of this procedural measure. The guilty person's rights can easily be affected without his or her guilt being proven in a trial.

Conditions experienced by detainees during transport may also give rise to concerns about inhumane or degrading treatment. This might include crowded vehicles, inadequate temperature and ventilation and lack of consideration for hygiene. [7, p. 4]

During detention, although it sounds paradoxical, the person's freedom must not be affected. Pre-trial detention may contravene the right to liberty, which incorporates a right not to be detained arbitrarily. This is why when a

person is detaind, a strict procedure must be followed, assuring the fact that the detained person, as well as the rest of the society, is protected.

At the same time, the detainee is guaranteed the right to a fair trial, given that, although detained, he is presumed innocent until proven guilty, respectively he or she must be treated as innocent while in detention. Courts should only use pretrial detention when there is objective evidence that someone poses an immediate risk of harm to public safety or a strong risk of not returning for their trial. And pretrial conditions of release should be used in the least restrictive and most effective ways possible to advance public safety and ensure a person's appearance in court.

Everyone deprived of his or her liberty has the right to challenge the lawfulness of his or her arrest or detention before a court so that the court may decide without delay on the lawfulness of the detention or order the person's release if the detention is not lawful. [3, p. 197]

Still, a state can always use alternative measures to pre-trial detentions, measures that are giving a lot of benefits for the individual, but also for other persons. For instance, an alternative method can avoid the disintegration and stigmatization of communities associated with the personal, family, and social consequences of pretrial detention; it lowers the repeat offender (recidivism) rate; it makes more efficient use of public resources; it is a way of optimizing the social utility of the contraventional justice system and of the resources available. An alternative method can be reporting on a periodic basis to a judicial authority, the police or other authority; accept supervision by an agency appointed by the judicial authority or to submit to electronic monitoring; not to meet specified persons without authorization; to surrender passports or other identification papers.

In the context of the procedural activity of detention, during the development of the procedural actions, there is a considerable reduction of the person's rights, their limitation by establishing certain conditions, their modification compared to the rights of other persons not involved in the process. Consequently, the person cannot fully dispose of themself or the property in his or her possession, or he or she may suffer other inconveniences regarding the change of the volume of their rights. Detention is a coercive measure that involves an increased risk of exceeding the limits necessary for its exertion. Therefore, it is a measure that can easily go from a restriction of human rights to a violation of human rights. From this point of view, it is particularly important that the mechanism of this

coercive measure contains effective safeguards and tools to prevent human rights violations, to sanction them, and to restore the human rights thus violated. Pre-trial detention shall only be admissible when it is the only way to ensure that the purposes of the proceedings are accomplished. Even if it is a risky measure, it ensures the sake of public safety and security, for the sake of the integrity of the contraventional process.

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