"NICOLAE TITULESCU" UNIVERSITY

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PhD SCHOOL

PhD THESIS

THE ENFORCEMENT OF THE PREVENTIVE MEASURES INVOLVING THE DEPRIVATION OF LIBERTY. NATIONAL LAW AND FOREIGN ELEMENTS

THESIS ABSTRACT

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1. Preliminaries

The individual freedom along with the security of the person, are values to which the fundamental law of the state awards an inviolability status. This recognition of the importance of the protected value has led to the enshrinement within the Constitution of the general landmarks setting the limits to the derogations from the principle of the inviolability of individual freedom: the nature of the preventive measure, the duration, the competent judicial body, etc.

The constitutional principle mentioned is consecrated as a right by 5 of the European Convention on Human Rights, leaving no doubt on the European Court's constant concern to ensure a uniform level of interpretation of the legal rules regarding any restriction of the individual freedom.

The right to liberty – as proclaimed in art. 5 of the Convention, surely envisages the physical liberty of the person and the declared purpose of the protection is to guarantee that no one can be arbitrarily deprived of this right.

Despite these findings, the post-Decembrist criminal procedure legislation did not succeed to harmonize with the European spirit nor to fully comply with the principles resulting from the Strasbourg Court's case law. A major legislative intervention was needed in order to bring on a normal course the provisions of the Criminal Procedure Code and of the implementing laws and to show that Romania abides by its international obligations undertaken in the field of criminal procedure law. The legislator itself noted in the justification of the need to amend the (material and procedural) legal rules, that the amendments were aimed to ensure a uniform protection of the rights and freedoms guaranteed by the Constitution and by the international legal instruments, to streamline the criminal trial and in the same time, the fair conduct of the judicial procedures for all the participants to the criminal trial.

The legislative harmonisation in the field of the individual freedoms also addressed the rules specific to the international judicial cooperation in criminal matters. In this respect, the amendments have envisaged the compliance with the principle of mutual recognition of the courts' decisions (*lato sensu*) and of the judicial decisions – a principle which is found in the dispositions of art. 82 par. (1) points a) and d) from the Treaty on the functioning of the European Union (TFEU).

The amendment of the legal texts in the field of the individual freedoms and security was reflected both in the literature and in the case-law and the antagonistic interpretations or in some cases, at least refined, did not take long to appear. As regards the literature, the variety of ideas, options and solutions resulting from the interpretation of the legal rules able to influence the making of a decision concerning a person's liberty

is beneficial for the development of this branch of law. However, an inconsistent case-law in this filed is extremely harmful as the non-unitary practice is an indicator reflected in the lack of confidence of the legal rule's addressee in the very act of justice. Moreover, the consistency in approaching a unitary solution in a certain fundamental matter like the human freedom is required by the need to comply with the principle of equality before the law and the public authorities, such as defined in art. 16 from the Constitution.

2. The main aspects under scrutiny

In this context generated by the legislative amendments, the thesis „*The enforcement of the preventive measures involving the deprivation of liberty. National law and foreign elements*" is a **work of novelty**, placed in the field of the **current** criminal enforcement law, the **importance** of which is fully highlighted by the place occupied by the right to freedom among the concerns of the national and European authorities.

The novelty and the importance of the theme also stems from the fact that the thesis aims to achieve an **interdisciplinary analysis** of the preventive measures leading to a deprivation of liberty (detention, provisional arrest and house arrest), the proposed notions being considered and evaluated from the perspectives of criminal enforcement law, criminal procedure law and European Union law.

This PhD thesis targets important aims, clearly delimitated throughout the chapters of the work, the fulfilment of which is oriented on two major perspectives: *the theoretical argumentation* based on the doctrinal opinion and *the practical argumentation* focused on the case-law view. Each of these perspectives includes aspects of national and compared law, national and foreign literature, the case-law of the European Court of Human Rights and of Court of Justice of the European Union, decisions of the constitutional courts from Romania and from abroad, as well as a vast collection of decisions of the courts from the continental system of law, but also from the common-law.

3. The aims of the analysis

The main aims envisaged by this work are as follows:

(i) *the analysis of the preventive measures involving the deprivation of liberty from a historical perspective*, with an emphasis on the continuous evolution of the concept of "deprivation of liberty", on the social-legal context in which the provisional detention was instituted, maintained or revoked and especially, on the way in which it was enforced in the context of the old legislation concerning the imprisonment. Within these limits, we shall cover Codicele penale and Codicele de procedură criminală from

1864 (Cuza's Codes), the Criminal Code and the Criminal Procedure Code from 1936 (Charles II's Codes), as well as the Criminal Code and the Criminal Procedure Code from 1968, each of these with its specific rules on the enforcement of the prevention, including on the rights that the person deprived of freedom had under the enforcement laws;

(ii) *the analysis of the detention and provisional arrest measures* – an aim we have approached by reference to the legislations of other European states (aspect of compared law) and a complete evaluation of the way in which the provisional detention can be ordered and reviewed. The analysis has included relevant references to the European Court's case-law in cases where Romania and third European states have been convicted for the infringement of art. 5 of the Convention. The way in which provisional detention and arrest are enforced and further executed has been under scrutiny in the same context, starting with the way in which the detention place is organised and finishing with the rights of the persons detained during the preventive measure and the manner in which they are (or not) respected by the authorities;

(iii) *the analysis of the enforcement of the house arrest measure*, a preventive measure introduced in the legislation starting with the 1st of February 2014 – which we set out to achieve through a review of the legislations of some European states where it operates (aspects of compared law), as well as of the cases where the European Court has issued decisions and has analysed the legal nature, the conditions and the criteria to be met for a restriction of the freedom to move to be characterized as a deprivation of liberty. The national stipulations in the field of house arrest and the manner in which the authorities enforce this measure involving the deprivation of liberty have been analysed leaving for the crystalized practice of the courts to refute or why not, to confirm the assumed working hypothesis;

(iv) *the analysis of the enforcement of the preventive measures involving the deprivation of liberty during the state of emergency* – an aim revealed by the extraordinary international context generated by the pandemics declared at the beginning of 2020 – regarding which we set out to investigate the measures having an impact in the field of criminal justice relevant for the subject of the research and to identify the way that the national authorities' measures have influenced the deprivation of liberty. We have also undertaken to perform a complete examination of the way that the persons deprived of liberty can be heard by means of distance communication with a view to identifying the best means to ensure the guarantees conferred to the detained persons (the right of defence, the right to a fair trial, the right to appear in person before the court etc.). The hearing through a videoconference, including in the cases with foreign elements, has been subject also to a compared law examination, the national stipulations being censured by reference to continental and common law systems. Last but not least, the case law of the European Court has represented an important factor in our scrutiny;

(v) *the analysis of the way in which the international judicial cooperation is achieved in the field of the enforcement of the preventive measures within the procedure of the European arrest warrant ("E.A.W.")* – a context in which we set out to examine by reference to the case-law of the Court of Justice of the Union, the responsibilities and the discretion of the member states in the field of prevention needed for the issue or the enforcement of the judicial decision. In the same time, we have identified the authorities involved in this procedure, the conditions and the time limits to which the deprivation of liberty is confined and the guaranties offered to the persons required by the judicial authorities of the member states;

(vi) *the analysis of the circumstances in which the enforcement of the deprivation of liberty can be characterized as "unacknowledged detention"* and the examination of the main decisions pronounced by the European Court in the field of "secret prisons".

4. The lines of research

With a view to reaching the aims undertaken, we have deemed necessary to establish certain lines for this study to follow. The first of them targets the analysis of the legal literature relevant for the chosen subject. To this end, we set out and we have researched the main treaties, monographs, works, studies and specialized articles both from the national law and foreign bibliographical sources in our own translation.

To this end, the analysis of the national legislation applicable to the preventive measures involving the deprivation of liberty, as well as of the legislations of some European states which inspired many national provisions (for example, France, Italy, Austria, Belgium etc.) or even from the American continent (USA) appeared as mandatory.

Another line of analysis was the examination of the case law of the European Court and of the Court of Justice of the Union lacking which, in our opinion. Any scientific study would be irrelevant.

Furthermore, a level of the research focused on the analysis of the relevant judicial practice in decisions issued by the national and European courts that we set out to highlight in a doctrinal context as well. Likewise, we have estimated that the analysis of the case law of the Constitutional Court in the field of preventive measures can receive another relevance when the undertaken study also envisages decisions of similar institutions from other European states: "*Corte Constituzionale*" or "*Le Conseil Constitutionnel*".

Finally, regulations, resolutions, guides, handbooks and recommendations adopted at the European Union level have been consulted to give substance to the theme given the context that the European Commission militates for the idea of the existence of common standards concerning the duration of the pre-trial detention and for a legal

rule common to all the member states covering the intervals for a regular review of the preventive detention.

5. The methods of research

All these lines of analysis can reach their purpose only if the appropriate research methods are used. Therefore, without making a hierarchy, we set out to approach the *historical* method through which we have highlighted aspects pertaining to the legislative evolution of the preventive measures involving deprivation of liberty, the case-law and the changes of the state's punitive policy relevant for the subject of the research.

The *comparative* method has also been used in the achievement of the aims of the theme, for the analysis of different systems of law –national law, the law of certain European states, common law –and of the national and foreign case-law, as well as that of the European Court or of the Court of Justice.

In the same time, we also estimated necessary to approach the theme through the *sociological* method given that we cannot ignore the social context (we include here the political, economic, moral component) in which the legal rules relevant for the scientific research have been enacted.

As the whole approach is intended to be an analysis for the practitioner as well, the *logical* method is the one that helped in the synthesis of the documentation and why not, in the formulation of some *de lege ferenda* proposals.

Last but not least, a *statistical* approach can be reflected in the relevant data that we set out to collect throughout the thesis from our scientific interest field.

6. The synthetic presentation of the structure of the work

The work has been structured on **5 (five) parts** each of them comprising in turn **chapters, sections and subsections,** so that an in-depth analysis of the enforcement of the preventive measures involving the deprivation of liberty could be made in the context of the major legislative amendments operated by the national legislator during the last years and which could offer also a European perspective on the subject of the research, examination levels that were intended to be brought together in a horizon of the practical applicability as seen through the eyes of the practitioner.

Part I – "*A historical perspective on the enforcement of the preventive measures involving the deprivation of liberty*" comprises 3 (three) Chapters dedicated to the evolution in time of the provisional detention, starting with "*belagines*" – the old written regulations from the reign of Burebista and finishing with the rules comprised in the criminal procedure provisions from the beginning of 2014.

An examination is made including through a case-law review, of the stipulations concerning the prevention comprised in *Codicele penale* and *Codicele de procedură criminală* from 1864, the Criminal Code and the Criminal Procedure Code from 1936, as well as in the Criminal Code and the Criminal Procedure Code from 1968.

The prevention was considered as held in the **first chapter** of this part, a component of the punishment which was applied at will, at the discretion of the leader. The "customary practices" or measures of a repressive nature, such as "beating" or "exile", are gradually replaced by predominantly preventive measures, namely the "persecution" and "placement under the police surveillance". The chapter follows the evolution of the preventive measures, the judicial authorities involved in ordering the prevention and the typical aspects of enforcement, in this context being highlighted with the adoption of Cuza's Codes, notions concerning the "*submission warrant* (*mandatul de depunere)*" – a procedural act based on which (at the order of the investigating judge) the "preventive prison" was enforced and the "arrest warrant" – issued for deeds from the category of crimes and offences. An analysis is made concerning the requirements for the deprivation of liberty, the procedure, the enforcement of the preventive measure and the rights of the "*remanded (prevenții)*" during the provisional detention, all in the context highlighted by the exploration of the case-law of the times evidenced in the decisions of the High Court of Cassation and Justice.

In this context, mention has been made of the Law from 1874 concerning the prison regime and its Regulation which established the regime of the enforcement of the preventive measures in the "prisons of remanded and accused" and the rights of the persons provisionally deprived of liberty, in the first major attempt to reform the Romanian penitentiary system.

The amendments brought to the Criminal Procedure Code in 1920 have led to the change of the legislator's perspective on the preventive measures, giving the investigating judge the possibility to issue an arrest warrant in all serious circumstances, when the deprivation of liberty was indispensible to the investigation or was claimed by a public safety interest. This is the moment of the appearance of the "*arrest houses*" and of the "*detention houses (caselor de opreală)*" – penitentiary institutions of the beginning of the 20th century, and the penitentiary legislation examined has revealed the way in which was enforced the provisional detention.

The analysis of the highlighted institutions was continued in the **second chapter** where the Codes of Charles II, namely the Criminal Code and the Criminal Procedure Code from 1936 were examined. The same aims undertaken have taken shape in the context of the criminal policy of the inter-war Romania. The limits of the separation of the judiciary functions are outlined and the detention has the nature of an exceptional measure which can be ordered only under the circumstances and for the reasons stipulated by the law. Detention is ordered by the judicial police for a maximum of 24 hours and the provisional arrest is a procedural security measure, ordered mainly by the

investigating judge and the duration of which is deducted from the punishment established through the final sentence. It is time for the literature to acknowledge that the final stage of the criminal trial is the "*enforcement stage*" or the "*penitentiary stage*".

Here are analysed for each of the two preventive measures, the exceptional conditions for the "*deprivation of liberty*" depending on the stages of the criminal trial as well as the actual conditions for the "agents of the public force" to be able to enforce the most harsh of the preventive measures. The penitentiary legislation is also evaluated in an interdisciplinary context, with an emphasis on the rights of the "remanded" – the right to food, the right to equipment, the right to rest, the right to walk, the right to visit, the right to package etc.

Finally, the **third chapter** is dedicated to the Codes from 1968, an analysis following the evolution of the institution of the prevention subordinated to the principle of the legality of the incrimination, but developed around the need to re-socialize the detainee. The research also follows the penitentiary legal rule, with the rights, the obligations, the penalties and rewards awarded to the persons provisionally deprived of liberty, and as well, in a mini extension, a summarized vision of the capital punishment in the national regulation, which includes the moment of the execution of the Romanian serial killer Ion Rîmaru, described by an eye witness.

Part II of the work – „*The enforcement of detention and provisional arrest*" comprises 3 (three) Chapters based on an **examination from an interdisciplinary perspective** of the preventive measures of the detention and provisional arrest, an occasion on which the analysis focused on the relevant legal provisions, the doctrinal case-law orientations asserted in European states like France, Italy, Austria, Germany and Belgium.

The first chapter is reserved to a general overview on the preventive measures involving the deprivation of liberty by reference to a vast case-law of the European Court in this field. The considerations held within the decisions issued by the Court clarify the concept and the scope of the main rights of the person deprived of liberty, and reflect in the same time the principles associated to the fundamental liberties.

Essentially, art. 5 of the European Convention of the Human Rights targets the right to physical liberty of the person and does not include restrictions of the freedom of movement, and to examine whether a person is "*deprived of liberty",* for the purpose of the said article, it must be parted from the actual situation and a set of criteria such as the type, the duration, the effects and the ways of enforcement of that measure must be taken into consideration.

Its main aim is the prevention of the arbitrary or unjustified deprivations of liberty. Three aspects can, especially, be identified as passing through the case-law of the Court: the exhaustive nature of the exceptions which must be strictly interpreted and must not allow for a large range of justifications based on other dispositions; the

repeated accent on the lawfulness of the detention, both from a procedural and material perspective, which requires a scrupulous observance of the rule of law; and the importance of promptness or speed of the necessary judicial control.

The compliance with the principles of the Convention based on which the European Court of the Human Rights makes, according to its case-law, an analysis of the main benchmarks in the field of the preventive measures involving the deprivation of liberty, requires: (i) the lawfulness of the detention; (ii) the compliance of the deprivation of liberty with the national legislation; (iii) the compliance with the European principles; (iv) the protection against arbitrariness and (v) the statement of reasons for the decisions on the prevention.

The aspects of compared law comprised in **the second chapter**, have highlighted the common points of regulation in the European legislations and which are based, essentially, on the compliance with the principles governing the order of the preventive measures involving deprivation of liberty on the national level: the principle of legality, the principle of necessity and that of opportunity. In the same spirit it was noted that the enforcement rules were adjusted in order to respect the human dignity and honour, to avoid any action which might be included in the category of the inhuman and degrading treatments and, taken as a whole, to try to organise the penitentiary life as close as possible to that of the free persons, with the inherent exceptions arising from the very nature of the measure enforced.

As regards the judicial body competent to order such a prevention measure, the European legislations are on the same benchmark – the detention is ordered by the prosecutor or under its direction or supervision, and the provisional arrest is the attribute of the judge, when the actual aspects of the case require the deprivation of liberty.

Noticeable is the existence of a gradual application of the preventive measures in the legislation of the European states. The recent case-law developed through the decisions issued by **Corte di Cassazione** from Italy has shown that provisional detention – "*custodia cautelare in carcere*" – can only be applied if the purpose of the prevention cannot be achieved through house arrest for the field of the preventive measures and of the liberty of the persons and is governed by the principle of the "*minimum sacrifice necessary*". Moreover, the judge must indicate the reasons leading to the estimation that the house arrest, with the control measures provided therein, is not appropriate for the case in which the provisional arrest was solicited.

The same case-law landmarks are found in the field of "*détention provisoire"* in the decisions issued by **Cour de Cassation** from France. The provisional arrest is the exception and the state of freedom is the rule that must be observed in the criminal trial.

The French literature has estimated, in recent debates, that the provisional arrest must be analysed in close connection with the enforcement of detention, in the light of the compliance with the principle of the respect of human dignity. Inadequate

conditions of detention represent in the French view, enough reasons to place the accused person under the penitentiary regime.

On its turn, **Le Conseil constitutionnel** (the French Constitutional Court) has established through a decision issued at the end of 2020, the indissoluble link between the provisional arrest and the conditions under which this measure can be enforced. Making reference to the preamble of the French fundamental law, the constitutional law court stated that the protection of the dignity of a person against all forms of inhuman and degrading treatment is a principle of constitutional value and the judicial and administrative authorities are competent to ensure that the deprivation of liberty of the persons under provisional arrest complies in all circumstances with the respect of dignity. Moreover, the legislator **must** guarantee to the persons placed under provisional arrest the possibility to address the judge when the detention conditions are contrary to human dignity, so that the measure involving the deprivation of liberty could be revoked.

However, the differences of legislative options evidently appear when the duration of provisional detention in the states of the Union is examined. If in **France** the maximum duration of the provisional deprivation of liberty is in certain cases, 4 years, in **Germany** the provisional arrest cannot be extended for a period longer than 6 months. Despite this difference, the German legislation requires the same type of reasons for the deprivation of liberty, namely: the risk for the person to flee from justice; the probability that the accused might commit other offences unless held in custody and the risk of a person's interference with the witnesses and the evidence. It must be mentioned that where a difficulty peculiar to the case is found, an unusual duration of the investigation or another important reason preventing the judge to issue a solution, the provisional arrest measure can be extended over the limit of 6 months. The German legislation does not stipulate a maximum duration of the prevention in such peculiar circumstances. Similarly, in **Ireland** and **Luxemburg** there is no maximum duration of the provisional arrest, while in **Holland**, "*pre-trail detention*" is of 104 days.

As regards the duration of the detention, the French legislation is the most permissive, even if the placing of one person under police custody cannot initially exceed 24 hours. This period can be extended under the conditions and for the reasons analysed in the paper, up to 48 hours, then up to 96 hours, and afterwards up to 144 hours.

The study of the European rules has revealed that in some law systems of the member states, the judge can assess evidence when requested to order a deprivation of liberty. In **Austria**, the judge can immediately decide on the "*Untersuchungshaft"* or **can assess evidence** if he/she estimates that the result thereof might decisively influence the evaluation of the suspicion regarding the perpetration of the offence or of the reason for the detention.

The third chapter approaches the prevention institution from a national perspective and aims to sketch the landmarks between which it can be ordered, maintained and especially, enforced the measures of the detention or provisional arrest. The magnifying glass of analysis is placed over the unfolding of the "penitentiary life" starting with the decision supressing the individual freedom, continuing with the enforcement of the judicial decision and finishing with the actual manner in which the detention is executed – the placement in the detention centre, the baggage control and the medical examination, the body search, the room distribution, etc.

The provisional arrest must be ordered **exceptionally** and as ***extrema ratio***, that is only in case the other preventive measures are not enough. Also the measure must be ordered by a judge in hypotheses strictly and exhaustively regulated in the national procedure and under the condition concerning the existence of the necessary evidence. From this point of view, the national rules are fully compatible with the decision of the Court of Justice of the European Union issued in case C-310/18 from the 19th of September 2018 establishing that art. 3 and art. 4 par. (1) from the Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings must be interpreted as not precluding the adoption of preliminary decisions of a procedural nature, such as a decision taken by a judicial authority that pre-trial detention should continue, which are based on *suspicion or on incriminating evidence*, provided that such decisions do not refer to the person in custody as being guilty.

The deprivation of liberty triggers a specific **mechanism**, able to guarantee to the defendant held in custody the exercise of the procedural rights, such as, among others, the right to be informed about the reasons of the arrest and of the accusations brought, the right to urgent medical assistance or the right to challenge the measure ordered. Concerning this latter right, the compatibility of the national rule with the spirit of the regulation in art. 5 of the Convention is complete because: (i) it awards the person under provisional arrest or detention the possibility to initiate procedures able to question the compliance with the procedural and material conditions essential to the "lawfulness" of the deprivation of liberty; (ii) although it is not necessary for the procedure concerning the preventive measure to award to the defendant the same rights as those stipulated in art. 6, it has a judicial nature and it offers guarantees appropriate for the type of deprivation of liberty in question; (iii) the procedure is adversarial and it ensures the "equality of arms" between the prosecutor and the person deprived of liberty; (iv) the person placed under provisional arrest must have the possibility to challenge within reasonable intervals of time, the lawfulness of the detention and (v) the hearing of the defendant deprived of liberty is a necessity when the procedure falls under the "scope" of art. 5 par. 1 let. c) of the Convention.

A major point of interest was the examination of the rights of the persons provisionally deprived of liberty, through a congruence of theoretical aspects and the practice of the courts and that of the European Court. Thus have been drawn the limits to the exercise of the right to the respect of the religious beliefs, the right to mail, the right to visits, the right to legal assistance, etc. The investigation of some problems concerning a non-unitary judicial practice has been taken into consideration within the whole of this part of the work and, especially, the finding of precise and reasoned answers to the questions tormenting the judicial community in the field of detention has been the object of our concern.

Therefore, subjects like the possibility for the defendant placed under provisional arrest to leave the place of detention to participate to the funeral of a close relative, the moment when prevention ceases or the possibility for the chief of the detention place to censor the list with the recipients of phone calls presented by the defendant deprived of liberty are fully answered within the pages of this research paper. On the same benchmark note have been explained notions and conditions concerning the order and the enforcement of detention: standard of proof, reasonable suspicion, presumptions, the participation in person to the procedure, the need to state the reasons of the decision etc. – all doubled by personal opinions the declared purpose of which is to settle the non-unitary interpretations in the field.

Also, the chapter includes aspects specific to the organization and the functioning of the detention places, a radiography of the penitentiary environment and of the way in which the rules specific to the enforcement of the prevention have been amended following the decisions issued by the European Court in cases like Bragadireanu against Romania, Iacov Stanciu against Romania and Rezmiveș and others against Romania. The case-law of the European Court developed around these cases has shown that overcrowding of the detention place, the obligation of the person in custody to share the bed with other persons, the damaged mattresses or the inappropriate sanitary utilities are capable to lead to characterize the treatment applied to the person deprived of liberty during the detention as inhuman and degrading. Within a relatively short time, other almost 100 decisions have been issued against Romania for the breach of art. 3 of the Convention, holding the overcrowding of the detention places, the insufficient or inappropriate alimentation, the limited number of toilets, the limited access to showers, the lack of hygiene, the lack of natural light, the insufficient ventilation and passive smoking.

This reality has led to the change of the organization and functioning of the penitentiary life, and the respect for human right during the execution of the prevention has become the aim claimed by the authorities, after long periods during which this was seen as a "theoretical luxury".

Part III of the work – "*The enforcement of house arrest*" comprises 3 (three) Chapters focusing on a **complete analysis of the house arrest**, a preventive measure

lacking any tradition in the Romanian legal landscape. In order to fully illustrate the legal nature, the conditions and the way of enforcement of the house arrest, the legislations of the states where the measure has been implemented for a longer time – **France, Italy and Austria**, have been evaluated from a European perspective, in **the first chapter** (of compared law).

Regulated in art. 284 of the Italian Criminal Procedure Code, the house arrest – "***arresti domiciliari***" implies the obligation of the defendant not to leave home or residence or the place where he/she receives medical care or public assistance. The judge is the one who establishes the place where house arrest shall be executed, taking into account the need to ensure the protection of the victim of the offence.

The Italian Court of Cassation has constantly held there is a full equivalence between house arrest and the provisional arrest and the purpose of the deprivation of liberty through house arrest is twofold: to avoid contact between the defendant and the participants to the perpetration of the offence or even third parties, as well as to facilitate the police controls. Thus being, at the time when the house arrest is ordered, the judge must establish the measures by which the fulfilment by the defendant of the obligations imposed can be verified, with the possibility to use electronic means of other technical means and if the defendant refuses, he/she shall be arrested.

The landmarks of the scope of the concept of "home" or "residence" have been established by reference to the case-law of the *Corte di Cassazione,* given that the Italian legislation incriminates as a form of escape, the leaving by the defendant of the building where house arrest is executed. The possibility to communicate directly with third parties, by means of distance communication or even through posts on the socialization site Facebook have been subject to documentation, the Italian legislation allowing for the establishment of restrictions, limitations or prohibitions like the prohibition to use the telephone, the prohibition of communication with other persons, the prohibition of contact or of the visits of certain persons, etc.

Also in a doctrinal and case-law context it was highlighted the manner of enforcement of the house arrest, the possibility to leave the house and the circumstances under which the measure can be revoked or replaced. Moreover, we have highlighted that the provisions of art. 47-ter from Law no. 354 of 26 July 1975 (the Italian enforcement law) establish that house arrest represents an **alternative to the enforcement of the punishment** under another regime than the penitentiary one, a circumstance which called for a short analysis of this institution.

In the French law, house arrest under electronic surveillance – "*assignation à résidence avec surveillance électronique"* – may be ordered against a person accused of a crime, namely only against a defendant and has been introduced in the legislation a decade ago through Law no. 1436 of 24 November 2009. Part of the legal rules specific to house arrest have been taken from the previous criminal procedure legislation applicable to another preventive measure, that of the judicial surveillance,

and which could include among the obligations imposed on the accused, the obligation to remain inside the residence for a certain period of time. As the French Cassation Court stated, the legislator's intention was to regulate a new preventive measure, **alternative** to the penitentiary environment, placed from the point of view of restrictions between the judicial surveillance and provisional arrest.

When the punishment stipulated by the law is up to 7 years imprisonment, the surveillance of the execution of the measure is ensured through a *system* which allows the remote detection of the presence or absence of the accused inside the building where house arrest is executed. This surveillance system can also include the possibility for the surveillance body to require the defendant to wear a device incorporating a transmitter throughout the whole duration of the house arrest.

In the case of some perpetrations the penalty limits of which exceed 7 years imprisonment, the defendant is placed under an electronic mobile surveillance regime, a situation which requires the obligation to wear a device incorporating a transmitter and which allows at any time the remote location of the accused throughout the who;e national territory.

The obligations and the prohibitions imposed during the execution of house arrest, the management and use of the data resulting from the surveillance exercised by the Penitentiary service for integration and probation, the replacement or the cease of the preventive measure have also been carefully analysed.

Similar to the legislative option from Italy, the French system has opted on its turn for the regulation of house arrest both as a preventive measure and a **manner of execution of the penalty.**

The same option was presented to the Austrian legislator, the house arrest being also a manner of execution of the penalty applied to the condemned. Regulated within the Regulation concerning the enforcement of penalties and of provisional arrest through house arrest electronically monitored, as well as by the Law of the Penitentiary Administration, the measure is rather a continuation of the provisional arrest. The order of house arrest is allowed if the provisional arrest cannot benefit from one of the "lighter" measures, and the purpose of the detention can also be achieved through this type of enforcement of the provisional arrest, given the fact that the accused is placed in an orderly life situation and agrees to be monitored through the appropriate means of electronic surveillance.

The enforcement of house arrest implies the electronic monitoring based on a "surveillance profile", drafted by the penitentiary staff, defining the specific temporal and local components of the daily routine according to the life conditions of the person deprived of liberty.

The second chapter includes an analysis of the **entire case-law of the European Court** in the field of house arrest, in the decisions issued against Romania, Italy, Spain, Bulgaria, the Republic of Moldova, Lithuania and Albania.

Without repeating the arguments held by the Court within the analysed decisions, it must be noted that having regard to the effects and the methods of enforcement, ***house arrest represents a deprivation of liberty*** for the purpose of art. 5 of the Convention, and the duration of a detention is in principle "lawful" if it is based on a court's decision.

Under no circumstances an *abstract evaluation* could be made on the reasonable nature of the duration of a detention and any deprivation of liberty of an accused, even for a short time, must be convincingly justified by the authorities.

For this purpose, the *arguments* for and against the deprivation of liberty must not be general and abstract, but they have to be based on precise facts and on the personal situation of the defendant justifying the detention. These criteria are not met by the "reasons" which are in fact mere paraphrases of the legal grounds based on which the preventive measure is ordered and the authorities have the obligation to rule on the arguments put forward by the defendant. In this context, the *elusion danger* must be evaluated in the context of the factors related to the personality of the defendant, namely: his/her moral values, his/her residence, his/her occupation, his/her assets, family ties and all types of relations to the state where he/she is prosecuted.

The house arrest measure can be lawfully ordered under art. 5 of the Convention and based on the national legislation, **only if** the judicial body complies with the material and procedural rules, in order to prevent an arbitrary deprivation of liberty of the persons. Therefore it is essential that the legal rule concerning the conditions for the deprivation of liberty to be clearly defined and that the law itself must be predictable in its application. Only in this case can be achieved the "lawfulness" standard established by the Convention, a standard which demands that all laws be precise enough to allow to any person to reasonably foresee the consequences that a certain action might have.

Considered unequivocally a measure involving the deprivation of liberty, the house arrest requires a different analysis according to its content and the defendant's possibility to leave or not the building because the difference between the deprivation and the restriction of liberty refers only to the degree of the intensity and not to the nature or the substance of the measure.

Although some of the **restrictions** that can be imposed to an accused, taken individually, cannot lead to a "deprivation of liberty", a cumulative analysis can give the contrary answer. The obligation of the defendant issued from a residence order, to remain within a certain space, even of a considerable size, under the surveillance of police authorities, is thus able to be characterized as house arrest, even in the absence of physical barriers due to the fact that what matters is the method of enforcement of such a measure.

The third chapter approaches in the spirit of the conclusions resulting from the European compared law aspects and the case-law of the Court, the national stipulations applicable to house arrest.

We have undertaken and in our opinion, we have succeeded in relating our own assessments on the judicial practice crystallized up to this moment. The limits within which house arrest can be ordered, the scope of the concept of "family member" based on which the legislator imposed certain derogations or the obligations of the defendant during the enforcement of the measure, which represented frequent themes of debate in the literature and case-law, have received a reasoned solution. The examination of house prevention also resulted in short references to the European protection order – an instrument of judicial cooperation almost unknown to the law practitioners.

A mandatory component in the study of the enforcement of the house arrest measure consisted in the presentation of the activities of the surveillance body from the receipt of the judge's decision ordering the preventive house arrest and the achievement of all the measures stipulated in the surveillance plan. The conduct of unexpected visit, the restriction of rights, the possibility to "borrow" some obligations from the field of judicial surveillance and the consequences of the breach of the obligations imposed – including the analysis of the typical elements of the escape offence in the context of the unauthorized leaving of the building – have been related within this chapter beside a rich case-law.

Regulations and procedures comprised in the enforcement Law and in orders and dispositions issued by the Ministry of Justice and the Home Affairs Ministry have been highlighted beside the practical procedure used by the enforcement body in the fulfilment of its competences concerning the enforcement of house arrest and the surveillance of the compliance with the obligations imposed to the person deprived of liberty through the judge's decision.

Part IV – "*The enforcement of the preventive measures involving the deprivation of liberty during the state of emergency*" comprises 5 (five) Chapters and it targets **the enforcement of the preventive measure** in the extraordinary international context generated by the pandemics declared at the beginning of 2020.

In **the first chapter** we have analysed the measures adopted by the national authorities and their legal nature as well as the consequences of the establishment of the state of emergency for the criminal justice. Conceived and applied singularly in the post-Decembrist Romania, indissolubly related to the miners' riots from 1999, the law concerning the state of emergency proved to be a legal rule far from the Constitutional spirit which subsequently generated new regulations of an infra-legal nature.

The next two chapters relate the measures taken at the judicial level by the Leading boards of the courts and by the Superior Council of Magistracy having an impact over the enforcement of the preventive measures, as well as the shortcomings of the decisions adopted.

The resulting context represented the ideal occasion for the analysis of the possibility for the parties to participate to the criminal procedures by means of distance

communication, including in the cases with foreign elements. We made a documentation of the hearing by videoconference, including aspects of compared law (France, Italy and the United States of America), the relevant case-law of the European Court and national stipulations from the criminal procedure, the enforcement law and the law on judicial cooperation.

The analysis performed has led to the establishment of a precise conclusion: the participation to trial of the accused person, even executing preventive measures involving the deprivation of liberty, and its hearing by means of distance communication is in itself compatible with the requirements of the Convention and it respects the right to a fair trial.

It is however necessary for the type of evidence to be regulated by the criminal procedure rules and to serve for a legitimate aim (*for example*, the preservation of public order, the prevention of criminality, the protection of witnesses and of the victims of the crimes, the compliance with the reasonable time). The audio-video connection must be fluent, even if at certain times there might be dysfunctions related to the limitation of some technical possibilities of the equipment, and it must allow the accused to hear and to see everything that is happening in the court room, including the persons present (the judge, the prosecutor, the lawyer, the parties and the participants – witnesses, experts, interpreters – of that case). On their turn, the persons present in the court room must perceive the defendant both visually and acoustic.

Equally important are the defendant's possibilities to give declarations freely and to be assisted by his/her lawyer, whether chosen or appointed by the court. The guarantees offered by the Convention are respected both in the hypothesis that the lawyer is present in the court room while the accused participates by videoconference from the detention place, having the possibility of confidential communication through a telephone line ensured against any attempt of interception, and in the case where the lawyer is present with the defendant in the room of the penitentiary.

In **the last two chapters** we have investigated the way in which the enforcement of the detention and provisional arrest has been influenced by the decisions taken by the judicial authorities (courts and prosecutors' offices) and by the management of the detention places subordinated to the Home Affairs Ministry and to National Prison Administration, but also by the stipulations concerning the extension of the state of emergency.

The measures meant to mitigate the impact of the reduction of certain rights of the persons deprived of liberty during the state of emergency have been highlighted in this context beside the attempts of the authorities to allow under conditions of medical security, the exercise of the procedural rights of the defendants provisionally held in custody. The exercise of the right of defence through a direct contact of the provisionally arrested with the lawyer has been possible through the arrangement of special spaces, with a separation panel and through the performance of the

epidemiologic triage. Similarly, the accommodation of persons during the prevention, the transfer, the guarding and the surveillance, the hearing or the exercise of the right to phone calls and on-line communications have found the appropriate regulation during the state of emergency.

Part V – "*International judicial cooperation in the matter of the enforcement of the preventive measures involving the deprivation of liberty*" comprises 2 (two) Chapters and **it was destined to the enforcement of the prevention in the context of the European arrest warrant ("E.A.W.")** – an instrument of cooperation applicable throughout the Union **and to the enforcement of the unacknowledged deprivation of liberty in secret prisons („*black sites*").**

The first chapter places in a European context the institution of international judicial cooperation and of the establishment of the scope of the ("E.A.W") as interpreted in the case-law of the Court of Justice of the European Union which we have examined on this occasion. We have analysed the types of orders of the ("E.A.W.") by the national judicial authorities and the enforcement of the ("E.A.W.") issued on the territory of another member state. The attributions and the powers of the Ministry of Justice, of the courts and prosecutors' offices have been studied as well as the guarantees enjoyed by the requested persons based on the framework decision adopted at the Union's level.

Mainly, the European arrest warrant is a judicial decision issued by the judicial authorities of a member state for the arrest and surrender of a wanted person when the person is identified on the territory of another member state. Thus being, we have detailed the way the Framework decision on the European arrest warrant (2002/584/JHA) has been transposed in the national legal rules and particular aspects stemming from the interpretation of the international judicial cooperation instrument.

The Court of Justice established in its case-law that the European arrest warrant represents a *judicial decision*, which requires for it to be issued by a *judicial authority* – a concept which does not refer only to the judges and the courts of a state, but to any judicial authority of the issuing member state which, according to the law of that state, is competent to issue a European arrest warrant.

In the same context we have highlighted the enforcement of the detention and provisional arrest based on an alert entered in the Schengen Information System ("SIS") and of the provisional arrest with a view to surrender the requested person.

The alert entered in the "SIS" concerning a wanted person to be arrested is equivalent to a European arrest warrant in all the cases where Framework decision-2002/584/JHA is applicable concerning the "E.A.W.". When the cooperation instrument is not applicable, an alert entered in the "SIS" has the same legal effects as a request for provisional arrest for extradition.

The enforcement and the derogatory stipulations concerning the prevention applicable in the cases envisaged by the European warrant, the rights of the requested person, the deduction of the deprivation of liberty or the autonomous meaning of the concepts "detention" and "deprivation of liberty" in the Union law have also been detailed in the chapter.

The second chapter is consecrated to the evaluation of the circumstances where the enforcement of the deprivation of liberty can be characterized as "*unacknowledged detention*". Punctually, we have analysed and presented the decisions where the European Court has been confronted with breaches of art. 5 of the Convention based on the denial of all guarantees offered to the detainees in the context of the existence of secret prisons on the territory of eight states, part of them European, among which Romania. The way in which the measure involving the deprivation of liberty was enforced, the detention places, the authorities involved and the consequences of the authorization of such an approach have been stressed in the context of the criminal enforcement law.

The use of "*advanced interrogation techniques*" **including** the immobilization of the face, the hitting against a wall, slapping, the placement in a box with insects, the deprivation of sleep or feigning drowning have proved to be incompatible with the rights that the person deprived of liberty must enjoy. The case-law of the European Court reiterated that even in the most difficult circumstances, like the fight against terrorism, the Convention does not allow torture and inhuman or degrading punishments of treatments, regardless of the conduct of the person in question.

A restriction of the freedom to move followed by the detention of the person without an efficient control from the national courts is contrary to the purpose of art. 5 of the Convention. The authorities' failure to preserve the registration data – such as the date, time and place of detention, the name of the person deprived of liberty, as well as of the grounds of the detention/arrest and the name of the person making the records must be understood as incompatible with the same rule of the Convention.

Moreover, submitting the person deprived of liberty to an extremely harsh detention regime, in circumstances of complete isolation is likely to have a particularly powerful psychological impact on the detainee and it produces a physical and mental suffering which falls under the concept of "inhuman treatment" stipulated by art. 3 of the Convention.

Last but not least, the chapter evaluates the reaction of the states at a decisional level, as well as of the judicial bodies (courts and prosecutors' offices) at the frail attempts from the authorities to investigate the circumstances under which the unacknowledged deprivations of liberty took place.

I deem necessary to point that throughout this scientific research, I have formulated many *de lege ferenda* proposals that I have centralized in an addendum to

the thesis. The proposals undertaken beside the solutions highlighted in every chapter of the work, are able to reveal the most important problems raised by the case-law in the field of the enforcement of the preventive measures involving the deprivation of liberty.

As a final remark, I would like to show that this work, based on an in-depth analysis of the national and international literature and on a practical examination of the judicial practice from our country and from abroad, in a close connection to the case-law of the European Court of Human Rights and of the Court of Justice of the European Union, but also with that of the constitutional law courts, fully contributes to the forming of a complete image on the enforcement of the prevention, on the background of an interdisciplinary evaluation.