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-ABSTRACT-

Institution of Justice of the peace (The Judge of rights and freedoms)

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ABSTRACT

This thesis presents a thorough analysis of the competence of the judge of rights and freedoms which would transcend the limitations of the known types of competence (material, territorial, personal, etc). The analysis of the special competence of the judge of rights and freedoms has been the result of attempting to answer the following question: *"Why, in certain procedural situations[1], requests, proposals, complaints, appeals or certain referrals of the trial participants must only be directed to the judge of rights and freedoms for competent resolution?"*

Given the legal nature of the measures listed in article 53 of the Criminal procedures Code, as well as the legal nature of the other instances for which the judge of rights and freedoms is invested to solve certain requests, appeals, etc., I consider that this special competence of the judge of rights and freedoms, in order to be understood, must be regarded – first of all – from a historical perspective. Naturally, the other interpretations will also be used, starting with the grammatical one, continuing with the semantic one and, often appealing to the logical and theological interpretation.

In the pursuit of the answer to the above mentioned question, I appreciate that a first clue is given by the very name of this institution (judge of "rights and freedoms"), although a more suitable title would have been "judge for rights and freedoms", given the fact that this institution (implicitly this judge) represents the criminal procedural guarantor for the individual rights and freedoms facing the interventions of the state authorities.

Obviously, the measures listed in article 53 of the Criminal procedures code, as well as the other situations expressly provisioned by the law in which the judge of rights and freedoms is invested, when the measures are disposed, they (directly or indirectly) touch upon or infringe the fundamental human rights and freedoms. Considering these aspects, after presenting the historical aspects or the aspects of the comparative law, this paper has been structured in relation to these fundamental human rights and freedoms, and not in relation to the criminal procedure institutions.

[1] Generically listed by article 53 Criminal procedures Code

The first title of the thesis is dedicated to the **international historical aspects regarding the protection of the fundamental human rights and freedoms,** and it is structured into three chapters. Firstly, several definitions of the notion of "fundamental human rights "are presented, with the indication of the **Aix-en-Provence Colloquim** (France) from 1981 as a point of reference: **the ensemble of rights and freedoms** of the natural persons as well as legal persons granted by the Constitution as well as international texts, **protected** against the **executive power,** as well as the **legislative power** by the constitutional judge (or by the international judge)**.**

The historical and philosophical aspects regarding human rights are presented further, with the first philosophical ideas being identified in ancient times (Ancient Greece and Rome): "natural rights" or "innate rights".

The theory of fundamental rights originates in the "**theory of natural law",** according to which human rights are placed in the center of the legal phenomenon. The human rights are concerned with rights inherent to the human being, outside and above positive law. Aristotle would say: "*Only by law does someone become a slave or a free person, by nature people are indistinguishable."* Natural law (which precedes the "positive law") is an ideal law, universal and super state (considered rational), based on the idea that man, by nature, has a series of rights which are prior to the ones granted by the state. Charles-Louis de Secondat (known to the world as „***Montesquieu***") was the one who separated the natural law from the divine law, as well as the three powers of the state: the legislative branch, the executive branch and the judiciary.

The idea of "fundamental human rights" has had an interesting evolution over time, starting from philosophy and passing through political sciences, theology, the science of the natural law, which culminated in the 17th-18th centuries with their recognition within the positive law.

In the 17th-18th centuries, the rationalists (**Descartes, Spinoza, G.W. Leibniz**) established the scientific basis of the doctrine for individual human rights, thus substantiating "the theory of natural law", also defined as being an eternal right. Then, in **Hugo Grotius'** conception, „*the natural law is so immutable that it cannot be changed by God Himself".*

In turn, **Voltaire** (his real name François-Marie Arouet) was the first philosopher to use the notion of "human rights". He argued that being free means knowing human rights and knowing them means defending them.

Thomas Hobbes was the adept of man coming out of his natural state (because this state is characterized by **anarchy, violence, individualism, war**), and, at the same time, getting man into the social and political community, but only after concluding a ***"social agreement"*** between the community's individuals, who would name a "common power" (sovereign, monarch, Leviatan) who would guarantee that all the

members of the community comply with the contract, thus ensuring community peace.

John Locke continues Thomas Hobbes' ideas in a certain way, however – unlike the latter – even if he accepts the formation of a state based on a "social contract", he does not agree with the idea of absolute power of a form of government, proposing **the majority rules principle**.

Jean-Jacques Rousseau, through the solution of the **"Social Contract",** tried to give back two lost natural rights to the modern man: *freedom and equality.* Jean-Jacques Rousseau highlights the role of society in the life of the individual, promoting the idea of a natural state. This was the state in which the individual was before the apparition of society, when he would guide himself only based on the natural inequality (the strongest wins), which was a threat to life, property and individual freedom. Thus, people chose to limit freedom, assigning one person to lead them. This unanimous deal was named a "social contract".

Immanuel Kant developed a new theory of the "State" based on his ideas of moral. The German philosopher considered that **man has a duty to act morally,** in order to determine other people to want to act in the same way. But the other people cannot be forced to act in a certain way, because – by forcing them – human freedom would obviously be limited. Kant considered that "Freedom" was man's only innate right, and that the state must be organized based on this right, expression of pure reason. Kant was the one who introduced philosophy to the concept of "human dignity", in order to explain man's value ("human being with reason and moral").

We have also presented a series of **historical documents relevant to the evolution of acknowledging human rights,** such as:

- **Magna Carta**, also known as the" Magna Charta Libertatum" or „The Great Charter"), a document issued in England in 1215 during the reign of King John ("John Lackland"). This is the first written text historically known as being an expression of the fight of different social categories against absolutism);

- The petition of rights ("**Petition of Rights**"), promulgated on June 7, 1628 by King Charles I of England; this "petition" is considered to be one of the most famous constitutional documents, with a value equal to Magna Carta 1215 and The Bill of Rights 1689 ("The Bill of rights"), which is still valid in the United Kingdom of Great Britain as well as in Australia or New Zealand (Commonwealth). At the same time, it is considered to precede the Constitution of the United States of America.

- The bill of rights (" **The Bill of rights**"), proclaimed by the English Parliament on December 16, 1689; It establishes the limitations of the powers of monarchy and establishes new rights for parliament, including the right to free elections and freedom of speech in Parliament (" freedom of speech"). At the same time, it

establishes a series of individual rights, among which the banning of cruelty punishments or punishments which bring pain.

- ″ **Habeas Corpus Act**″ 1679, document of the English Parliament promulgated during the reign of Charles II; thus, the procedural instrument by which the court was obligated to examine and rule on the legality of the detention of an arrested individual was established. It would guarantee individual freedoms and, implicitly, illegal or arbitrary detentions were prevented.

In modern times, **the respect for the fundamental human** rights only started after **the Second World War,** this reinstatement of rights being possible by reiterating the crucial importance of respect for human dignity, as an inherent attribute of it, which is the starting point of all the human rights and freedoms.

As a consequence of the atrocities committed during the two world wars, the **United Nations Charter (UN)** adopted in the Conference of the United Nations for the International Organization from June 26 1945, San Francisco, decided upon the reaffirmation of faith in fundamental human rights, in the dignity and value of the human persona, in the equality of rights for men and women, as well as that of nations large and small.

The Universal Declaration of Human Rights Act (UN 1948) was the first and only coherent and unitary international instrument from the series of international treaties for the protection of human rights. As far as fundamental human rights are concerned, the Universal Declaration was the starting point for numerous treaties and international declarations drafted afterwards. Also, its texts have been adopted and adapted by the constitutions of numerous states, considering the fact that they acknowledge and equally protect human economic, social and cultural rights, as well as natural and civil rights, or collective rights and freedoms. **Article 20 of the Romanian Constitution** *expressis verbis* refers to The Universal Declaration of Human Rights, expressly and mandatorily stating that the constitutional provisions regarding human rights and freedoms will be interpreted and applied according to this treaty.

With regard to recent documents and current international bodies which deal with the protection of fundamental human rights and freedoms, in addition to the Universal Declaration of Human Rights, the thesis continues with an analysis of the main international documents concerning human rights: The International Covenant on Civil and Political Rights (adopted on December 16, 1966 by the UN General Assembly), The International Covenant on Economic, Social and Cultural Rights (adopted on December 19, 1966) and the Convention for the Protection Human Rights Fundamental Freedoms (entered into force on September 3rd 1953).

Regarding international bodies, the thesis presents international systems for the protection of human rights (the **League of Nations,** founded as a result of the Paris Peace Conference which ended the First World War; **The League of Nations** Treaty,

adopted in the Versailles Conference, on June 28, 1919; **The United Nations,** established after the Second World War; **The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,** adopted on December 10, 1984; **The International Court of Justice,** the only legal body of the United nation; **The International Criminal Court),** as well as the American system for the protection of human rights or the African system for the protection of human rights.

The first title ends with a detailed analysis of the European system for the protection of human rights and the European Convention of human rights (especially), given the fact that – at the time of the drafting of the Criminal Procedure Code – the European system, respectively the European Convention and the jurisprudence of the European Court or the former European Commission, had the biggest impact on the rules of procedure.

TITLE II includes an **analysis of the legal proceedings of other states,** regarding the institution of the Justice of peace, as well as that of the Examining Magistrate, in the context of the procedural institutions which have a certain implication in the field of complying with the fundamental human rights and freedoms.

Firstly, we focus on the analysis of the French legislation, taking into account the fact that the current Criminal Procedure Code has taken elements from the French criminal law, which it has adapted to the specifics of the Romanian judicial system. Therefore, we can talk about an **influence of the French criminal procedural legislation** upon the Romanian procedural legislation. We have presented the authorities charged with the criminal action and specific instruction of the current French model, as well as their organization.

The term „*inculpat*" (*defendant)* covers several terms from French found in the French procedural code*:* „*mis en examen*" for the defendant during criminal investigation/inquiry, „*prévenu"* for the defendant in front of the court and „*accusé*" for the defendant in front of a court with a jury. In the French criminal law, crimes fall into 3 categories, based on their severity: *murders* (Court with a jury), *misdemeanor* (Correctional Court) and *offences* Police Court).

The criminal investigation is established in such a way that, in each circumspection of a court, the judicial police is under the supervision of the State Prosecutor and under the control of the judicial chamber (Art. 13 French Criminal Procedures Code.) The judicial police officers and, under their control, the judicial police agents, carry out preliminary investigations, either at the request of the Prosecutor of the Republic, either ex officio. These operations are supervised by the state prosecutor (Art. 75 French Criminal Procedures Code.).

The Institution of the **Judge of rights and freedoms** was first regulated in France, on **June 15, 2000,** by Law 2000-516/15 June 2000 on the presumption of innocence and the rights of victims. This law has introduced into the French criminal procedures a new type of judge, **different from the Examining Magistrate,** in order to lessen the difficulties connected to the detention pending trial and the compliance with the defendants' fundamental rights.

After Law 15 June 2000 entered into force, part of the judicial functions of the **Examining judge** were transferred to the **Judge of freedoms and detention.** This new magistrate was given the power of ordering **detention pending trial** or to reject the requests for temporary detention or for prolonging detention, as well as answering to any demands regarding **temporary freedom** (probation). Other competent fields were **later** attributed to this magistrate, all these fields being connected to the protection of the fundamental rights.

After that, the most important procedural institutions where the Judge of rights and detention is called to rule upon were succinctly analyzed: **house searches** and evidence gathering; **the obtaining by the judicial police of data and information** consulted by certain people who use the services supplied by telecommunication operators; **interception, recording and transcribing correspondence** sent through means of telecommunication; **installing/uninstalling by police officers of a technical device for** capturing, fixing, transmitting and recording of words, without the consent of the targeted ones, etc. The investigation courts are also presented, their structure and organization, as well as the role and the competences of the Examining Magistrate at the level of the examination court, starting with the preliminary investigation.

Chapter II is dedicated to the analysis of the **Serbian Criminal Procedure code,** with the covering of the procedural institutions where the compliance with the fundamental human rights and freedoms could encounter some barriers.

Section 1 is dedicated to the analysis of the role and competence of the **Examining Magistrate** when evidence is presented, and it describes several procedural institutions with mention of: **detention; search; temporary confiscation of letters, telegrams and other correspondences; temporary confiscation of objects and** goods which are suspected of coming from illicit activities; secret **video and audio** surveillance of the suspect, respectively the use of **special investigation techniques; the employment of a secret agent;** automatic **computerized search** of personal data and other data etc.

Then, in Section 2, the preliminary investigation is described (procedural stage previous to the criminal investigation of a suspect, regulated by article 255 and the articles following it), taking into account the competence of the **Examining Magistrate within this investigation:** the permission for gathering information from the persons

under arrest; the approval of the detention of the suspect by the police; the approval of the detention measure within the preliminary investigation; the issuing of a search warrant for a building, some other perimeter or of an order to temporary confiscate objects etc.

Art. 255 of the Serbian Criminal procedure Code reveals the activities of the bodies of the ministry of internal affairs during the **preliminary investigation:** if there are grounds for suspecting that a crime was committed, and that is passible for a pursuit in court by default, **the police** is obliged to take the necessary measures for **identifying, locating and apprehending the culprit**, in order to stop them from running away, or the suspect or accomplice being hidden, **discovery and obtaining traces of the criminal act and of the objects which may serve as evidence** as well as in **gathering information** which might prove useful for the successful unfolding of the criminal procedure.

In turn, Art. 270 of the Serbian Criminal procedure Code establishes that the **investigation** is imposed against a certain person when **there is a reasonable suspicion regarding the committing of a crime, for gathering evidence and information** necessary for the authorized prosecutor to issue a decision regarding the commencement of proceedings or the interruption of the procedure. The investigation is led by the competent Public Prosecutor and at their request, or, at the request of other authorized prosecutors, as well as the request of the defendant or the defense attorney, certain evidentiary actions within the investigation may be taken by the **Examining Magistrate**.

The last chapter is dedicated to the **ITALIAN Criminal Procedure Code,** with the presentation of the judicial bodies, based on competence.

We encounter the Justice of peace, the Tribunal judge, judicial police and the courts. The crimes in the competence of the ***Justice of peace*** are provisioned by Decree no. 274, Art.4, from August 28, 2000 and – generally – they are **less serious crimes** for which the trial was started after the injured parties have filed complaints. ***The Tribunal judge*** is competent for the crimes for which the law establishes a punishment for up to **four years** imprisonment, or a single pecuniary punishment added to the prison sentence.

Interestingly, according to art.56, the judicial police functions are carried out within the remit and under the command of the court: by the judicial police services provisioned by law; by the judicial police stations for each prosecutor's office of the Republic and formed by personnel of the judicial police services.

Also, the procedural acts specific to the Italian Criminal Procedure code are presented, as well as a series of institutions from the procedure of evidence administration where the **judge (**independent and impartial magistrate) is called upon to address the requests of the criminal investigation bodies: **the investigation of people, places and**

things; searches (corporal and local); **sequestration of evidence** as well as of other objects connected to the crime; **taking the copy of documents** and of the sequestrated documents; interception of conversations or telephone communications as well as of other forms of telecommunication.

Section 4 is dedicated to the analysis of the **precautionary measures, coercive measures and measures of interdiction,** with the detailed presentation of the conditions and the procedure in which these measures may be requested by the judge. As far as the **insurance measures and real precautionary measures** are concerned, it is revealed that these can only be taken by the **judge**, at the prosecutor's request, with the seizure of the defendant's property or immovable property or of objects owed to him, within the limitations of the law for pledge. The analysis is concluded with a summary description of the procedure of **preliminary hearing**, noticing a resemblance to the*" Directions hearing procedure"* from the national procedural law.

Title III is dedicated to analyzing Romanian **previous regulations** regarding the limitation of the fundamental human rights and freedoms during criminal trial.

Our country's old laws (**Vasile Lupu**' law and that of **Matei Basarab**) contained very few procedural provisions, the competence and way of applying criminal sanctions were governed by "the law of the land" (customary law) and by the system of „public authorities".

In the **19th century,** before the union of the Romanian Principalities, rules of criminal procedure were decreed, such as the ones from the **"Caragea Law"** of 1817 in Muntenia (Part VI), or the ones from the **"Sturdza Criminal Law Collection"** of 1826 in Moldavia (Part I) as well as the "Barbu Stirbei collection of laws on criminal procedure" from 1850 in Muntenia.

After the Wallachia union the **„Alecsandru Ioan I Cuza" Criminal procedure** code was adopted. The Criminal procedure code was promulgated on December 2, 1864, but it entered into force at the same time as the "Penal Code", on **April 30, 1865,** based on the *"French Criminal Examination Code"* from November 27, 1808.

Therefore, in **Chapter** I we encounter the analysis of the **Criminal procedure Code of the United Romanian Principalities „Alecsandru Ioan I Cuza" from December 2, 1864**, where the participants in a trial are presented, as well as the procedure of evidence management by the examining magistrate.

According to the code, the judicial police was exercised under the authority of the Appeal Courts by the following judicial bodies: police commissioner and sub commissioner; the Public Ministry of the correctional or county courts; officers and

petty officers of the infantry soldiers and gendarmes; **examining magistrates;** mayors and their helpers; sub prefects and their helpers. It is worth nothing that the law stated that ***"the examining magistrates shall be under the authority of the General Prosecutor of the Appeal Court,*** *as their functions of judicial police are touched upon*".

Regarding the "attributions" of the Examining magistrates, Chapter V (titled "About the Examining Magistrates") presents two distinct procedures, preparatory to the actual criminal trial: (i) **proportional to the flagrant offences** ("The first distinction") and (ii) **proportional to the ones not discovered en flagrante** „The second distinction").

Therefore, in the case of flagrant offences, the examining magister could dispose "in and by himself" all the acts attributed to the prosecutor, in accordance with the rules of the criminal investigation bodies. In *the second distinction* (when the facts were not discovered in flagrant), the examining magister would not proceed to any examination or pursuit "prior to communicating the next procedure to the prosecutor".

The examination of each trial was public, under nullity punishment, with the *Examining magistrate* having the possibility of managing evidentiary means: subpoenaing and auditing of the people indicated by denunciation or complaint, searches and the confiscation of objects destined to committing a crime or an offence.

The analysis continues with the description of the precautionary measures regulated by the Criminal procedure Code of the United Romanian Principalities, with a comparison between the role of the Examining magistrate and the role of the Judge of rights and freedoms (from the current regulation). ***The warrants for bringing someone into court*** had the purpose of *"brining the person called upon in front of justice"* with the observation that, in any criminal or correctional matter, *The Examining magistrate* would present the defendant with a "notice appearing in front of the court". ***The warrant to bring in*** is the order to urgently arrest, for a short period of time, of a person that could neither be set free, nor be arrested after ensuring individual freedom. Only the *Examining magister* could issue such a mandate, for only 24 hours and only after the hearing. ***The arrest warrant*** was for the "*detention pending trial"* of a person. *The Examining magister* could issue and arrest warrant in serious circumstances and when the arrest was essential to the investigation of the cause or is claimed by an interest of the public safety.

The arrestee could not receive or address **telegrams,** letters or other communications **without the *Examining magistrate* having knowledge of these, who would then permit the arrestee to receive and/or sent them.** The arrestee always had the right to send closed letters to the Ministry of justice and the magistrates who *"examine the deal".*

Presently, as it is known from practice, in the conditions in which **The Judge of rights and** freedoms is the one that orders the detention pending trial, the arrestee must

obtain permission from the prosecutor who pursues/supervises the criminal investigation for any type of activity, not from the Judge of rights and freedoms.

The first chapter concludes with an analysis of the procedure that the examining magistrate would follow as soon as the examination was concluded, respectively the analysis of the procedure carried out before the Court of juries.

As soon as the examination was concluded, the Examining magistrate would communicate to the prosecutor the file, who *"would have to duty to address their requisitions"* in maximum three days. If the Examining magistrate thought that the act could be considered neither a crime, nor a felony, or contravention, or that it could not be imputed to the defendant, they would declare through an ordinance that "there is no need to pursue".

Regarding the procedure taking place in front of the **Court of jurors,** if the deed was a *"crime"* by law and if the *Prosecution Chamber* was presented with enough evidence against the defendant, they would be sent before "The Court of Jurors". According to article 258 of the 1864 Criminal Procedure Code, the right to serve as jurors belonged to the following: the ones who could prove, with certificates, that they have graduated from a secondary school in any field or any other form of University education; the ones who hand an income of a minimum "one hundred gold coins"; former teachers or teachers professing at the moment of the promulgation of the law for the procedural code; the ones who had a liberal profession, merchants or industrialists; civil servants or military people in retirement, who had an annual pension of minimum three thousand lei; active public servants. The juror function could not be fulfilled if the person *"was not thirty years old, if they did not have political, civil and family rights".* Several 12 the jurors were necessary to form the *"commission of a session".*

Chapter II analyses the institutions of **„Carol al II-lea" Criminal procedure Code from March 17, 1936,** with the introduction of a short history of the code and the way it came to be known as „Carol al II-lea". This Procedural Code was promulgated by Carol al II-lea on **March 17, 1936,** being published (again) in the Official Gazette no. 66 from **March 19, 1936**, entering into force on January 01, **1937**. By republication, it came to be known as "Carol al II-lea" Criminal Procedure Code of March 19, 1936." Thus, the 1936 editions of the Code, published after March 19, 1936, are named*" Criminal procedure Code* ***Carol al II – lea*** *from March 19, 1936*". It goes without saying, the codes published before March 17, 1936 did not contain the name "Carol al II-lea" on the cover.

A description of the participants to trial follows, as well as a description of the competence of the judicial bodies (judges, courts, appeal courts, the Court of Cassation and the Jury Courts; the Ministry of Public; **the Examining Magister**). Precautionary measures are succinctly presented, since the examining magister has the ability of sequestering, by default or upon the request of a civil party, any mobile property of the defendant.

The role of the **Examining Magister** is described afterwards, during the **probationary examination.** The purpose is to gather evidence and establish whether there is evidence that the criminal is guilty, so that they can be sent to appear in front of the competent criminal courts. There were two types of examinations:

i. *Summary examination* – it was carried out directly by the prosecutor, in the case of flagrant crime and it consisted of the hearing of the defendant and sending them to trial;

ii. *The examination per se* – carried out by the examination magister. Thus, the examination was of a great importance because it came to help the courts, in preparing the solution of the trial.

Then, there is a thorough analysis of the first investigations, the pursuit and the examination are augmented due to the measures that could have been taken during these stages, making mention of: the detaining of the culprits for investigation; house and body search; arrest; sending telegrams, letters, etc. to public administrations. At the end of this chapter, Section 5 describes in detail the prevention measures that could be applied during examination: the detention pending trial and temporary liberation.

Chapter III describes the evolution of the procedural institutions with implication in the fundamental human rights and liberties, as they were regulated by the **1969 Criminal Procedure Code.** This analysis starts with a description of these procedural norms as they were **initially regulated** and entered into force on **January 01, 1969,** studying the prevention measures and other procedural measures, such as safety measures and insurance measures.

The measure of *"detaining"* could be taken by the criminal investigation body and *"the obligation not to leave town* "and *"detention pending trial"* could be ordered by the **prosecutor** or the court.

Regarding the ***detention pending trial,*** the 1969 Criminal Procedure Code distinguished between **suspect and accused.** If the legal requirements were met, the prosecutor would dispose that the **suspect** be arrested, by motivated Ordinance, which could not exceed 5 days. The duration of the trial pending detention of the defendant could be ***prolonged "****if necessary and only motivated"* by the **Chief Prosecutor of the prosecutor's office** or by the **Chief Prosecutor of the superior unit**, if the arrest warrant was issued by the Chief Prosecutor of the prosecutor's office. This could be ordered ***three times,*** each addition for maximum one month. The extension of the arrest period reached up to ***4 months*** (the initial detention pending trial, then 3 additional months ordered by the chief prosecutor or by the superior prosecutor). Also, **safety measures** could be ordered by the prosecutor, and **insurance measures** by the criminal investigation bodies. **The searches** were only carried out with the **prosecutor's** authorization. As an exception, the house search could also be done

without the prosecutor's authorization if the person whose house was about to be searched *"consented to this in writing"*.

Section 2 was structured according to the essential modifications of the dispositions regarding the limitation of the fundamental rights and freedoms, comprised in the 1969 Criminal procedure Code, with the analysis – in distinct parts – of the modifications brought on with the republishing of the 1969 Criminal procedure Code in April 30, 1997, respectively by Law no.281 from June 24, 2003 regarding the amendment of the Criminal procedure Code, but by Government Emergency Ordinance no. 109 from October 24, 2004, regarding the amendment of the Criminal procedure Code.

With the republishing of the code from **April 30, 1997** – the regulation regarding ***"the extension** of the duration of the defendant arrest"* (art.155 Criminal procedure Code 1969) was modified so that it can only be disposed by the **court,** the prosecutor still being able to order (by ordinance) **the *taking*** of the detention pending trial measure for a period no longer than 30 days.

The regulations regarding **Temporary freedom under judicial control** and **Temporary release on bail** are new measures, which did not exist in the Criminal procedure Code until the date of republishing ***(April 30, 1997***).

By Law no. 281 from June 24, 2003 it was established that the interceptions and recordings of conversations or communications on magnetic tape or on any other type of support shall only be done with the **motivated authorization of the court**, at the request of the prosecutor.

Perhaps the most important modification brought by Law no. 281/2003) regarding the respect for the right of freedom, was that – if the prosecutor would note that the legal conditions were met and would consider the arrest of the defendant necessary in the interest of the criminal pursuit, they would dispose, by motivated ordinance, the temporary arrest of the defendant for a period ***no longer than 3 days***.

Among the decisions of the European Court for Human Rights which have "contributed" to this important modification of the criminal procedure code we make mention of the cause **Pantea versus Romania**[2]. Even if the decision of the European Court was pronounced on **June 03, 2003,** Law no.281/2003 being promulgated on June 24, 2003, it is worth mentioning that the plaintiff Alexandru Pantea had brought the matter to the European Commission for Human Rights on **August 28, 1995.** The Romanian Government itself admitted that the Romanian legislation in force at the date of the events did not comply with the exigencies of the Convention, as the ***prosecutor,*** judicial body that had the legal competence of ordering detention pending

[2] ECHR, Decision from June 03, 2003, Pantea v. Romania.

trial for 30 days, did not offer the guarantees that the notion of "magistrate" implied, in the sense of article 5, paragraph 3 of the Convention.

Finally, new aspects introduced by **Law no. 356 from July 21, 2006** for the amendment of the Criminal procedure Code, with implications on the following procedural institutions: audio or video recordings; search; prevention measures (by clearly establishing the cases in which detention pending trial could be ordered for the defendant), as well as aspects regarding the replacement or the revoking of prevention measures, security measures etc.

To be mentioned that – under the aspect of complying with the directions imposed by the European court, as well as by the treaties or conventions that Romania is part of – Law no. 356/2006 did not bring substantial modifications to the Criminal procedure Code of 1969. We can make note of the procedure for search, where Law no. 356/2006 modified article 100, paragraph (3), making it more precise, establishing the **judge** as the only body competent to order the search.

Perhaps the most important modification brought by Law 356/2006 is the one regarding the **cases in which the detention pending trial of the defendant is ordered,** some of these becoming "classic" cases, which are then also taken up by the present Criminal procedure code. Therefore, **art. 148** was completely modified by Law 356.

In **TITLE IV, „Administrative organization, functioning and composition of the Judge of Rights and Freedoms** (Judge of Rights and Freedoms), the entire applicable legislation to the matter of judicial organization, as well as the internal regulations of the courts approved by the Superior Council of the Magistracy.

However, the analysis presented in the paper shows that **Law no. 303 from June 28, 2004 regarding the status of judges and prosecutors** (Republished) does not contain a single reference to the institution of the Judge of Rights and Freedoms. In this sense, it is also worth mentioning that **Law no. 304 from 28 June 2004 regarding the judicial** organization (republished) contains only 3 (three) references to the institution of the Judge of Rights and Freedoms, which, however, do not concern the effective administrative organization of the role and responsibilities that this judge has in a court.

The collectives which the judges of rights and freedoms are part of are not shown, nor which judges are part of these collectives. It is concluded that, neither **Law no. 303/ June 28, 2004** regarding the status of judges and prosecutors, nor **Law no. 304/ June 28, 2004** regarding the judicial organization contain dispositions regarding the actual organization of the institution of the Judge of Rights and Freedoms at the level of a court of law.

However, we have appreciated that the dispositions regarding the formation of the ***"specialized collectives"*** and the „**JDL**" (Judge for Rights and Freedoms) collectives can be applied *mutatis mutandis,* even if these collectives do not correspond to the notion of ***"specialized collectives"*** which has the role of trial in a certain field of law and regarding the (subject[3]): commercial, maritime and waterway litigations, minors and families, administrative contentious etc. Thus, as it is already known, the **"JDL"** collective already operates within the criminal section of a court of law. Therefore, in the letter of the law, the JDL collective cannot be considered as being fully specialized.

Therefore, regarding the administrative organization of the collectives of "Judge of rights and freedoms", we consider that the provisions of **article 19 paragraph (3)** of Law no. 304/2004 can be taken into account, which shows that, at the beginning of each year, the Governing Board of the High Court of Cassation and Justice, at the proposal of the president of the vice president of this court, may approve the establishment of "specialized collectives" within the sections of the High Court of Cassation and Justice, depending on the number and nature of the causes, the activity volume of each department as well as the specializing of the judges and the necessity of using their professional experience.

Then, **The internal regulations of the court of law** (approved by Decision 1375, December 17, 2015 issued by the Superior Council of the Magistracy) is analyzed with the identification of several procedures specific to the effective organization of the activity of the Judge of rights and liberties within a court, such as the **exclusion from the repartition** of causes in the procedure of preliminary chamber of the collectives, who, in their quality of Judges of rights and freedoms have taken procedural acts or measures during the criminal investigation, such as **keeping separate folders regarding the decisions ruled in criminal matters, depending on their ruling by the Judge of rights and freedoms,** the preliminary chamber judge or by the court.

From an organizational point of view, it is shown that the **files** with the object of requests, proposals, propositions, complaints or appeals **by law in the competence of the Judge of rights and** freedoms are registered in the ECRIS files as distinct files, but highlighted as being in connection with the file whose object is the first request, proposal, complaint or contestation, and the Judge for rights and freedoms rules upon a first request, proposal, complaint or contestation and regularly rules upon the following requests, proposals, complaints or contestations formulated during the criminal pursuit within the same file for criminal investigation. **Thus, there is an**

[3] According to art. 35 par. (2), respectively art. 36 par. (3), of Law mo. 304/2004, within the courts of appeal, respectively within courts, there are sections, or, on a case by case basis, specialized collectives for civil causes, regardless of their object or the quality of parties, criminal causes, minor and family causes, administrative and fiscal contentious cases, causes regarding work conflicts and social insurance, companies, trade registry, insolvency, disloyal competition or for other matters as well as, in accordance to the nature and number of cause, specialized collectives for maritime and river causes; also see I. Neagu, M. Damaschin, *Criminal Procedure Treaty. General Part*, publ. house Universul Juridic, Bucharest 2014, p. 128 and the following.

explanation for the file numbers which apparently have the same number, but different terminations: „/a1", „/a2", „/a3" etc. or even „/a1.1", „/a1.2", „a1.3." etc.

The Rules of procedure from September 22, 2005 for courts (approved by Decision no. 387/2005 of the Superior Council of the Magistracy) are also analyzed, regulation which preceded the Rules of procedure from December 17, 2015 of the courts of law as well as the Regulation of September 25, 2004 regarding the organization and administrative functioning of the High Court of Cassation and Justice (republished).

The regulation comprised in Section II[2], "*Dispositions regarding the activity preceding the trial and of taking care of administrative works, in criminal trials"* and art. 103[7] and art. 103[8] consisting of express norms regarding the constitution and functioning of the collectives of Judges of rights and liberties. Inexplicably, these dispositions have **not** been taken up by the present Rules of procedure of the courts of law (17 December 2015):

Starting with **TITLE V,** the thesis concentrates on the role that the Judge of rights and freedoms has within the criminal trial, with direct involvement in the **guarantee and compliance with the fundamental human rights and freedoms.** Therefore, Title V analyses the competence of the Judge of rights and freedoms within the **preventive** measures, in the context of the fundamental balance between the two interests protected by the rule of law: **personal freedom and the safety of the society**.

Chapter I is dedicated to identifying the proper sources regarding the competence regulated by article 53. Letter a) of the Criminal procedure Code ("*prevention measures"),* and it has two sections.

The first section is dedicated to the analysis of our country's fundamental law, from the point of view of respecting personal freedom and safety (article 23 from the Romanian Constitution), as well as the jurisprudence of Romania's Constitutional Court. Thus, **Decision no. 339/2015** of the Romanian Constitutional Court has been identified and analyzed, through which the constitutional contentious court has observed that **the exigencies of the international treaties and conventions** to which Romania has adhered regarding the notion of "magistrate" are **fully compliant** through the regulation from the Criminal procedure code regarding the Judge of rights and liberties: (i) independence from the executive and (ii) the magistrate must personally hear the person brought in front of him; (iii) the competence of examining the circumstances which may or may not impose detention and that of ruling, on legal criteria, regarding the existence of reasons justifying arrest, and, in their absence to order the release of the arrested person.

Then, in **Section 2,** the paper presents the **conventional source,** as well as an analysis of the notion of *"magistrate empowered by law with the exercise of judicial attributions"*, therefore the role of the institution of the Judge of rights and liberties is justified, because "the independent and impartial court" removes the arbitrary regarding the emphasizing of the fundamental right to freedom and safety defended by the Convention and Romanian Constitution.

Prof. C. Bârsan has shown in his paper[4] that the contractual states did not understand that the notion of "magistrate" used in the Convention is not the same with the notion of "magistrate" from the internal law of the states. The notion of "magistrate" used by article 5 paragraph 3 has a certain meaning, specific to the convention, autonomous in its system, and coming close to the jurisdictional conception of "independent and impartial court", provisioned by article 6 of the Convention. As far as the expression *"judge or other magistrate"* is concerned, the European court has decided that the correct interpretation is „tribunal" (independent of executive and parties).

In Chapter II, guarantees provisioned by national law were identified regarding the compliance with the right to freedom and safety, listing the norms of the Romanian Criminal Code which punish criminal behavior towards the right to freedom: illegal deprivation of freedom (art. 205 C. Code), harassment (art. 208 C. Code), human trafficking (art. 210 C. Code), trafficking of minors (art. 211 C. Code), forced or mandatory labor (art. 212 C. Code), unjust repression (art. 283 C. Code), ill treatment (art. 281 C. Code), torture (art. 282 C. Code) etc.

Chapter III comprises an analysis of the evolution of the procedural rights regarding the national judicial bodies competent in ordering preventive measures (with special mention of house arrest and detention pending trial), starting from the 1864 "Alecsandru Ioan I Cuza" Criminal procedure code (the Examining Magistrate), continuing with the 1936 "Carol al II-lea" Criminal procedure Code (Examining Magistrate, Public Ministry or the courts of law) and finalized with the 1969 Criminal procedure Code.

The effects of Decree no. 187 from April 30, 1949 (regarding crimes by analogy) are also covered. Article 3 of this decree stated the following: *"Acts which are considered as being dangerous for society* ***can also be punished when they are not provisioned by law as being crimes****, the grounds and limits of responsibility being determined in this case, according to the dispositions prescribed by law for* ***similar*** *crimes*". This decree did not modify the dispositions of the Criminal procedure Code, but those of the Criminal code, respectively article 1 which regulated the principle of legality. However, as it is well known, this "crime by analogy" has had devastating effects on the criminal trial,

[4] C. Bîrsan, *European Convention for Human Rights. Comment on articles. Vol I. Rights and Freedoms.* Publishing House C.H. Beck, Bucharest 2005, op.cit., p. 348.

at least from a probation aspect, respectively sending someone to prison for acts which were not provisioned by the Criminal code or special criminal laws.

Chapter IV is dedicated to the **European system,** with the analysis of the incidence of the European Convention for Human rights and of the jurisprudence of the European court, regarding the right to freedom and safety of all persons. In this sense, the effects of the Universal Declaration of Human Rights and The Charter of Fundamental Rights of the European Union are also presented, with the purpose of preventing the arbitrary deprivation of freedom of a person by the state authorities, as well as the limitation of the duration for the deprivation of freedom. The doctrine has shown that any deprivation of freedom, which is not "necessary" (does not meet an imperious social need), and it is not "proportional to the purpose of its disposition", is an arbitrary measure, contrary to the dispositions of article 5 of the Convention[5].

This chapter details the notions of "right to freedom and safety" and "deprivation of freedom", analyzing the attributions of the Judge of rights and freedoms in this context. **The right to freedom and safety,** protected by article 5 of the European Convention is a fundamental right. This right does not know nuances, in the sense that there can only be *freedom* and *deprivation of freedom.* In certain legitimate situations, legal and objectively determined, the right to freedom and safety may encounter some limitations, and some authors consider that this is not an absolute right (unlike the interdiction of torture, slavery, bondage etc.), but it is relative. The arrest of a person is ordered by the **Judge of rights and** freedoms only in accordance with the national basic and procedural rules, if these norms are compatible with the dispositions and principles of the Convention. Literature had several definitions of the notion of ***"deprivation of freedom".*** For example, it was considered that this is a measure ordered by authorities through which a person is held, against their will, for a certain period, in a limited (determined space), respectively they are prevented from leaving that space, by coercion or threatening with coercion (using force if they do not comply)[6].

Regarding the nature of ***house arrest,*** the Romanian Constitutional Court has established[7] that the measure of house arrest is similar to the ***detention pending trial one,*** "from the point of view of including them in the category of precautionary measures, as well as from the point of view of their freedom deprivation nature, identity of causes and conditions in which the two measures can be ordered and the similar way of ordering and extending them." Also, regarding the similarities between the two measures, precautionary, analyzed, the European Court for Human Rights,

[5] S. Trechsel, *Human Rights in Criminal Proceedings*, Oxford University publishing house, 2006, op.cit., p. 435.

[6] S. Trechesel, *Human Rights in Criminal Proceedings*, Oxford University publishing house, 2006, op.cit., p. 412.

[7] Decision no. 740 November 3, 2015 regarding the non-constitutional exception of the dispositions of article 222 par. (10) Criminal procedure Code, published in Official Gazette 927/15 December 2015.

through its jurisprudence has established that the house arrest measure is a measure depriving of freedom, in the sense of article 5 of the European Convention[8].

Section 3 proposes the examination of the notion of **"licit deprivation of freedom",** in relation to the provisions of article 5 paragraph 1 of the Convention, which, restrictively comprises the cases in which a person may be legitimately deprived of freedom.

The thesis, however, only analyses the cases in which **The Judge of rights and freedoms** is called upon to rule on several requests:

Letter b) – **legal arrest or detainment for not complying with a decision of the court, in accordance with the law, or for the guarantee of fulfilling an obligation provisioned by the law (letter b).**

- This Convention text takes into account **two distinct situations:** regarding the *first situation,* the European Court has decided that the following measures can be ordered in court: the detainment of recalcitrant persons in order to take biological samples; 4 (four) day detention for non-payment of a criminal fine; short-term lawful detention for a psychiatric examination, with regards to a previous refusal to execute the court order; regarding the *second situation,* the dispositions of Protocol no.4 of the Convention must also be taken into account, protocol adopted at Strasbourg, on September 16, 1963, which states that *"no person can be deprived of his freedom, for non-fulfilment of contractual obligations".*

Letter c) – **arrest and detention of a person for bringing them in front of the competent judicial authority, when there are good reasons for suspecting a crime or when there are good grounds for the necessity of preventing them from committing a crime, or from running away after committing it** (letter c);

- The European Court (and the former Commission) have decided that the interpretation of paragraph 1 letter c) cannot be done independently from paragraph 3 of all these texts, clearly resulting in the obligation of the person to present themselves in front of a *judge*;

- **The Judge of rights and** freedoms is under the obligation of verifying the compliance with the condition of reasonable suspicion, legitimate, plausible („*raisons plausibles / reasonable suspicion*") and realistic which justify a person's arrest; this is an essential guarantee against arbitrary deprivation of freedom. Reasonable suspicions refer to *"the existence of facts or information that could convince a neural observer that the person in question could have committed the crime that they are accused of, and for which arrest is requested*".

[8] ECHR, Decision from August 02, 2001, Mancini v. Italy cause; ECHR, Decision from November 28, 2002, Lavents v Latvia cause; ECHR, Decision from November 7, 2013, Ermakov v. Russia cause.

- Mention should be made of the fact that, given the initial stage of investigations in the respective cause, reasonable evidence or clues enough for ordering a preventive measure must not be of the same degree as the ones necessary for formulating and justifying a complete accusation, respectively a conviction;

- However, to order the extension, the prosecuting bodies must present to **The Judge of rights and freedoms** *other* reasons that legitimate the continuation of the deprivation of freedom. Certainly, these additional reasons must also be plausible, pertinent and enough, and the prosecuting bodies have the duty of demonstrating their diligence when investigating during prosecution.

Letter d) – **legal detention of a minor, decided for his education under supervision or for their legal detention, with view of bringing them in front of the competent authority (**letter d);

- At the end of Chapter I which concerns "Precautionary measures" from the Criminal procedure Code, we have **Section 8** which comprises the special dispositions regarding "Precautionary measures applied to minors";

- Detainment and detention pending trial can be disposed for a minor, exceptionally, "only if the effects that the deprivation of freedom might have on the personality and development are not disproportionate to the purpose of taking the measure".

Letter f) – **arrest or legal detention of a person with the purpose of preventing illegal breaking and entering a territory or against whom there is an ongoing expulsion or extradition (**letter f).

- The guarantees set up by article 5 of the Convention refer to the initial procedure of ordering the measure of expulsion or extradition, as well as the period in which the measure is executed;

- The dispositions of article 5, paragraph 1 **letter f)** of the Convention, unlike **letter c),** do not provision for the condition of plausible reasons to suspect that the person in question has committed a crime, or the condition of reasonable grounds for the necessity of preventing the person from committing a crime.

- As already known, according to art. 53, letter a) of the Criminal procedure Code, the Judge of rights and freedoms rules, ***during prosecution,*** on the requests, proposals, complaints, appeals or any other referrals regarding prevention measures. Equally, **Law no. 302 / 2004 regarding the international judicial cooperation in criminal matters**[9] does not refer to the "Judge of rights and freedoms". However, even if there is no ongoing prosecution and even if the law does not refer to the **Judge of rights and freedoms**, we appreciate that

[9] Republished in Romania's Official Gazette, Part I, no. 377 from 31 may 2011.

the demands formulated based on article 43 and the following from Law 302 / 2004 should be addressed to the **Judge of rights and freedoms**.

- Art. 43 from Law 302 / 2004 – temporary arrest in view of extradition and the continuation of the judicial procedure for the settlement of the extradition request.

In the end, the substantial guarantees provisioned by article 5 of the Convention are presented, regarding the right to freedom and safety:

- **The right to be informed on the reason of arrest -** this right has the purpose of ensuring that every person would be informed on the reasons of their arrest, so that the arrested person is allowed to contest the foundation of the "reasonable suspicions" that exist regarding the committing of a crime by the respective person[10]; also, **The EU 2012/13 Directive from May 22, 2012** of the European Parliament and Council has established special regulations regarding the **right to information** of the suspected or accused person regarding their rights during the criminal procedures; The member states must ensure that the people who are accused or suspect, arrested or detained are promptly issued a ***Written Note*** regarding their rights.

- **The right to be promptly brought in front of a judge** who must circumscribe the exigencies of independence and impartiality, so that arbitrary or unjustified measures are avoided; in order for this person to be brought in front of a judge it is not necessary that the person contests the initial decision for detainment or arrest, the procedure of being brought in front of a judge being ***by default***[11]

- **The right to appeal in front of a court** in order to rule in a short period of time on the legality of detention and to order their release in case of illegal detention; The Court called upon to analyze the legality of the detention must be independent from the executive and the parties in question[12], impartial[13] and competent, according to national laws, to order the release of the person in question if their detention is illegal[14]. The Romanian Constitutional court[15] has shown that the notion of *"independent and impartial court"* is of an autonomous nature, developed in the jurisprudence of the European Court. This notion

[10] ECHR, Decision from 13 December 1978, X. v. Germany.

[11] ECHR, Decision from 29 April 1999, Aquilina v. Malta; EDO Commission, ECHR, Decision from 13 October 1982, McGoff v. Sweden

[12] ECHR, Decision from 27 June 1968, Neumeister v. Austria

[13] ECHR, Decision from 02 March 1987, Weeks v. Great Britain

[14] ECHR, Decision from 26 February 1996, Singh v. Great Britain; ECHR, Decision from 26 September 2002, Benjamin and Wilson v. Great Britain.

[15] Decision no. 599 from 21 October 2014, published in the Official Gazette no. 886 from 5 December 2014.

must be regarded in the sense of the Convention for the protection of human rights and fundamental freedoms;

- **The reasonable term of detention pending** trial; in the purpose of complying with the provisions of art. 5 para. 3 of the Convention, when appreciating the total duration of deprivation of freedom, all the periods of time when the person was arrested for the same accusation will be taken into account; Appreciating *the reasonability of the duration of the detention pending* trial is done by analyzing the relevant and sufficient grounds indicated for justifying the deprivation, respectively extension / maintaining of the deprivation of freedom, as well as by analyzing the *"special diligences"* filed by the competent bodies (especially the Public Prosecutor) for the investigations in question[16], complexity of the cause, the number of the investigated people, the size of the file, the implementation of special measures for criminal investigation, necessary for the cases of organized crime[17]. The reasonable grounds are applied on a case by case basis (specific facts), the detention being justified if a real necessity of public interest exists[18].

- **The notion of public policy** – taken from the model of the German Criminal Procedure Code, this new legal feature of the concrete danger for public policy, respectively the *actual character*, concerns proving it now when it is decided upon the request of the prosecutor regarding the taking or extending of a precautionary. "*The removal of a state"* supposes the concrete existence (in the present) of a state that must be removed. Therefore, we can no longer talk of a hypothetical situation, but of an actual danger state, which already exists.

The last chapter presents general dispositions regarding the precautionary measures in the current criminal process, detailing the general conditions for taking precautionary measures, the way of choosing a precautionary measure (according to the principles of **proportion** and **necessity)**, as well as the conditions for the form of the act through which the precautionary measure is taken. A landmark in the appreciation of the concrete degree of danger for the crime could be some of the conditions from **art. 318 paragraphs (1) and (2) Criminal procedure Code** which regulate the *"Abandonment of criminal prosecution*".

[16] ECHR, Decision from 28 October 1998, Assenov v. Bulgaria; ECHR, Decision from 27 august 1992, Tomasi v. France; ECHR, Decision from 31 July 2000, Zannouti v. France; ECHR, Decision from 18 January 2011, Erimescu v. Romania.

[17] ECHR, Decision from 18 December 1996, Scott v. Spain; ECHR, Decision from 20 September 2011, Fedorenko v. Rusiei.

[18] ECHR, Decision from 2 February 2006, Iovchev v. Bulgaria.

Maintaining the order established by article 53 of the Criminal procedure Code, **TITLE VI** is dedicated to the analysis of the competence of the judge of rights and freedoms within **the precautionary measures,** being established that the intervention of the Judge of rights and freedoms only takes place when **the measure** disposed by the prosecutor is **contested** during prosecution.

As it is known, respecting the **right to property,** as well as the **right to a fair trial,** has obliged the lawmaker to ensure a **judicial control** (offered by an independent and impartial magistrate) **efficiently and concretely** on the measure of the freezing of goods taken during a criminal.

According to **art. 250 paragraph (1) Criminal procedure Code** *„against the precautionary measure taken by the prosecutor or the way they are accomplished the suspect or defendant or any other interested party may appeal, in 3 days from the date of communication of the order to take measures, or from the date they were accomplished, to* ***The Judge of rights and*** *freedoms from the court they would have the competence to rule on the cause*".

The intervention of the Judge of rights and liberties also takes place when, during prosecution, the prosecutor that order the precautionary measure of sequestration appreciates that the **evaluation of the sequestered mobile** goods is necessary, but the owner of the goods **does not consent** to it or the consent does not exist. Thus, the prosecutor that ordered the precautionary measure of sequestration, notifies the Judge of rights and freedoms with a motivated proposal of evaluation of the sequestered goods (according to article 252^2 of the Criminal procedure Code, entitled "The evaluation of the mobile goods sequestered during prosecution").

The right to a fair trial can also be analyzed in relation to the restraint / negation of procedural guarantees regarding civil rights, respectively the right to private property. Therefore, the regulation of an effective appeal in the benefit of the people whose right to property was affected by the restrictive procedural measures ordered by the prosecutor, are an exigence that the law bodies have the duty to respect in view of protecting and guaranteeing the right to private property. Then, in addition to the obligation of offering each person the effective possibility of addressing an (independent and impartial) court and to defend their legitimate rights and interests, the legislator must also give this possibility that "equitable character" by which it would offer legal competence[19].

Chapter I presented the right sources regarding the competence of the Judge of rights and liberties, regulated by the provisions art. 53 letter b) of the Criminal procedure Code ("*precautionary measures*"). The **first Section** contains an analysis of the dispositions of the Constitution of Romania, as well as the jurisprudence of the

[19] B.S. Guțan, *European Protection of Human Rights* 4th Edition, Publishing House C.H. Beck, București 2011, p. 219 and the following.

Romanian Constitutional Court regarding the interferences generated by ordering the sequestration in the criminal trial of the suspect's, defendant's, the civil responsible person's or other people's mobile and immobile goods. In the contents of the right protected by article 44 of the Romanian Constitution, we mention the right of a natural person to obtain property and free use of said property, as well as the right to be able to transfer said rights to others.

In the Second section we can find the research of **conventional sources,** respectively the **First Protocol** additional to the European Convention of Human Rights, **the Charter** of Fundamental Rights of the European Union and **Directive no. 42/2014** of the European Parliament and the Council regarding freezing and confiscating instruments and products of the crimes committed in the European Union, as well as the International **Convention** regarding the elimination of all forms of racial discrimination, the International pact regarding civil and political rights, etc.

In **Chapter II** we have identified the guarantees provisioned by the national law regarding the respect for the right for property, enumerating the norms of the Romanian Criminal Code that punish criminal behavior which touches upon the right to property, respectively **crimes against patrimony:** grand larceny, robbery, or grand assault, abuse of trust, destruction, disturbance of possession etc.

Chapter III focuses on the evolution of procedural rights regarding the national judicial bodies competent to order precautionary measures during the criminal trial:

- Section I is dedicated to the **1936„Carol al II-lea"** Criminal procedure Code – **The Examining Magistrate** could sequester by default or by demand of a civil party (*"at their own responsibility")*, any mobile goods that belong without a doubt to the defendant, regardless of whose hands the property might be in, but only up to the total amount of the damage. Temporary sequester could also be applied, in the above-mentioned conditions, by the **judicial police officers** during the first investigations, but only with the **authorization of the Prosecutor's Office.** The Code shows that, *"in the event of theft or dilapidation from the State's fortune, temporary sequestration was* ***mandatory***".

- Section II of the **1969** Criminal procedure Code – precautionary measures were taken during the criminal trial by the prosecutor or by the court.

The European system is analyzed in **Chapter IV**, with the description of the incidence of the **European Convention** for human rights and **other** European **legal instruments**, referring to the protection of the right to property. Section 1 is dedicated to the European Convention for Human Rights and the additional First Protocol, with an interpretation of the content of Article 1 of the Protocol, respectively an identification of the field of application of these regulations which constitute an international control regarding the way in which national authorities of the signing states ensure the compliance with the right to property.

Starting with the ruling from **Sporrong and Lönnroth v. Sweden**[20], the European court stated that article 1 of the Additional Protocol no.1 contains three distinct rules[21]:

(i) *The first rule*, of a general nature (found in the first phrase of the first paragraph), enunciates the **general principle of the necessity of respecting property**, so that the people may happily enjoy this right;

(ii) *The second rule* (mentioned in the second phrase of the first paragraph) concerns the **possibility of deprivation of the property right** and gives conditions to it;

(iii) *The third rule* (found in the second paragraph) recognizes the States' competence of controlling and **regulating the use of goods** which form the object of the property right, in accordance with the general interest.

We also find the analysis of the notions of "goods" and of "deprivation of property", as well as an identification of rights over "goods", in the sense of the same article 1 from Protocol no.1. The notion of **"goods"** (French: „*biens*"; English: „*possessions*") from art. 1 of the Additional Protocol no.1 comprises mobile and immobile goods, with an autonomous signification, not limited to the property of tangible goods (objects), by "goods" it is understood goods and any other *"ensembles of rights and interests of a person"* that may be considered assets,[22] (extensive interpretation is permitted)[23].

The end of this chapter concentrates on the regulation of the use of goods and on the (legal) restraints of property, with the detailing of the role of the Judge of rights and freedoms within these procedures.

Section 2 presents an analysis of **Law no. 318/2015 for the establishment, organization and functioning of the National Agency for the Management of Preserved goods,** and Section 3 presents the analysis of **Directive no. 42/2014 of the European Parliament and the Council regarding the preservation and confiscating of instruments and products of crimes committed in the European Union**, their implications within a criminal trial, regarding the precautionary measures, being more than obvious.

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[20] ECHR, decision from 23 September 1982, Sporrong and Lönnroth v. Sweden; see also ECHR, decision from 9 December 1994, Holy Monasteries v. Greece; ECHR, decision from 15 March 1999, Iatridis v. Greece; ECHR, decision from 21 February 1986, James and others v. The United Kingdom of Great Britain.

[21] J.-F. Renucci, Treaty of *European Law for Human Rights*, Publ. House Hamangiu 2009, p. 556 and following

[22] ECHR, decision from 23 February 1995, *Gasus Dosier-und Fordertechnik Gmbh v The Netherlands*; ECHR, decision from 30 November 2004, Oneryildiz v. Turkey.

[23] J.-F. Renucci, *Treaty of European Law for Human Rights, Publ. House* Hamangiu 2009, p. 560 and following.

TITLE VII continues the analysis of the competence of the Judge of rights and freedoms, but, this time, the object of the analysis are **the medical precautionary measures**, considering that these measures also present the coercive character of the means for coercion, needing (in some cases) to impose some deprivations or restrictions.

Therefore, the competence of the Judge of rights and freedoms is presented regarding the temporary precautionary measures, directly referring to the medical precautionary measures, respectively the **temporary obligation to medical treatment (art. 245 and the following from the Criminal procedure Code.)** and the **temporary medical lawful detention (art. 247 Criminal procedure Code)**.

The intervention of the Judge of rights and freedoms is justified by the fact that the temporary medical lawful detention may be the most serious precautionary measure that can be taken against a person. The paper shows that, it firstly touches upon the **right to freedom,** because the **suspect** or the defendant **is forcibly hospitalized.** Secondly, the suspect or defendant **is obliged** (thus a new "forcing") **to follow medical treatment,** as we are talking about "non-voluntary medical lawful detention".

Therefore, **The Judge of rights and freedoms** has the duty to motivate in detail and justify such a serious measure in front of any critique. For example, through the ruling in **Payer v. Switzerland**[24], The European Commission has decided that the commitment of a person in a certain educational special center, the interdiction of exiting said place represents **"*deprivation of freedom*"**.

Chapter I is dedicated to the identification of the law sources regarding the competence regulated by art. 53 letter c) Criminal procedure Code ("*temporary precautionary measures*"), being divided in two sections. **The first section** analyses our country's fundamental law, in relation to the Individual freedom and personal safety (art. 23), respectively the Right to life and physical and mental integrity (art. 22). In **Section** 2, we have analyzed the conventional source (European) and international, starting from **The Criminal Lunatics Act** („*The Criminal Lunatics Act 1800*" (Great Britain), this being the first act by which the measure of "temporary medical commitment" as regulated. Then, in addition to the European Convention for Human Rights, dispositions of other international treaties are analyzed, such as: the Universal Declaration for Human Rights; the Declaration for the protection of all people against Torture and Other Cruel, Inhuman or Degrading Treatment; the Charter for Fundamental Rights of the European Union; the African Chart on human and peoples' rights etc.

Chapter II analyses the incidence of the provisions of **art. 5 paragraph (1) letter. e)** of the European Convention on Human Rights, with reference to the competence of the Judge for rights and liberties for ordering the medical temporary precautionary

[24] ECHR, decision from 13 December 1977, Payer v. Swizerland.

measures: temporarily ordering medical treatment and the temporary medical commitment of the suspect or defendant. As it is shown by art. 5 paragraph 1 letter e) of the Convention, no person can be deprived of their freedom "*unless it is about* ***the legal detention of a person susceptible of spreading a contagious disease, of persons of unsound mind, alcoholics, drug addicts or vagrants***". In this sense, we have analyzed the provisions of the Convention, as well as the jurisprudence of the European Court for human rights.

Chapter III is dedicated to the analysis of the incidence of the provisions of **art. 3 of the** European **Convention** on human rights, with reference to the competence of the Judge for rights and liberties for ordering the medical temporary precautionary measures.

The States are obliged[25] to take all the necessary measures for preventing people from being tortured or undergoing inhumane or degrading treatments. The state's responsibility will be called upon when the reasonable measures for preventing the risk of degrading treatments were not taken, which authorities knew or should have known[26].

Under this aspect, the paper demonstrates that the measure of temporary medical commitment, in addition to the forced commitment (non-voluntary), also implies forcing a person to follow a certain treatment, against their will. Therefore, it is shown that, from that person's point of view, the forced medical commitment, followed by the respective treatment (forced), may constitute veritable acts of "degrading treatment".

In the doctrine[27], ***degrading treatments*** were considered as gross humiliation of a person, who may be obliged to act against their will or conscience. As we stated before, a person's forced medical commitment may be considered a gross humiliation if it is not done under the law, especially if the person violently refuses (opposes) commitment[28].

Chapter IV identifies **the guarantees provided by the national law regarding medical precautionary measures**, listing criminal procedural provisions (the principle of human dignity), as well as the provisions for this matter (**Law no. 487 from 11 July 2002** for the mental health and the protection of people with disabilities), respectively **the regulation from 15 April 2016 for applying the Mental health Law** and the protection of people with psychological disorders no. 487/2002.

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[25] R. Chiriță, *European Convention on Human Rights. Comments and Explanations 2nd Edition*, Publishing House CH Beck, 2008, op.cit., p. 105.

[26] ECHR, Osman v. United Kingdom, decision from 23 September 1998; ECHR McGlinchey and others v. United Kingdom, decision from 29 April 2003.

[27] J.-F. Renucci, *Treaty* of *European Law for Human Rights*, Publ. House Hamangiu 2009, op.cit., p. 120.

[28] A.M. Apetrei, *Human Rights in the European Union*, Publishing House Lumen 2010, p. 88.

Chapter V is dedicated to a historical analysis regarding the national judicial bodies competent to order medical precautionary measures, with the mention that the first Romanian Criminal procedure Code that mentioned these types of measures was the one promulgated by **Carol II** on 17 March 1936. The provisions of the 1969 Criminal procedure Code are also analyzed, as well as the subsequent modifications regarding the medical precautionary measures (Law no. 281/2003 and Law no. 356/2006 for the amendment of the Criminal procedure Code).

Over the course of **Chapter VI,** we find several discussions regarding the duration of the temporary medical lawful detention, with the mention that the **current code does not provide a maximum term referring the duration of the temporary medical lawful detention.** In this sense, there is a comparison to the **previous Criminal procedure Code,** which, through the provisions of art. 162 paragraph (1), showed that during prosecution, the precautionary measure can be ordered for a duration **no larger than 180** days, temporal limit common to the detention pending trial.

The last chapter presents the general provisions and the role of the Judge of rights and liberties regarding the ordering of medical precautionary measures in the current criminal trial, and it is divided into two sections: temporary obligation to medical treatment and temporary medical lawful detention.

In **TITLLE VIII**, the thesis aims to analyze the competence of the Judge of rights and freedoms within the **enforceability of searches, of using special surveillance or investigation methods and techniques or in other probationary procedures in accordance with the law**.

It was noticed that the procedures of **art. 53 Criminal procedure Code offer a certain grouping (association)** to some institutions, mainly since these surveillance or investigation methods are part of the evidence matter in the criminal trial, and secondly, because it **concerns the same fundamental human rights and liberties**. The implication of the Judge for rights and liberties was also justified in ordering these trial evidence procedures, with the purpose of avoiding any arbitrary mixtures, any sudden interferences of the state bodies into the private and family life of a person, as well as regarding domicile and correspondence.

Chapter I presents the law sources regarding the competence of the Judge of rights and liberties regulated by art. 53 letter e) ("*the approval of searches, of using special surveillance or investigation techniques or other evidentiary procedures in accordance with the law")*, with the analysis of the provisions of the Romanian Constitution, as well as those of the European Convention for Human Rights or the Charter of Fundamental Rights of the European Union. According to **art. 8 of the European Convention** for Human Rights, provides "a right to respect for one's private and family life, his home

and his correspondence". The provisions of **article 10 ECHR** *("Freedom of Speech")* are also considered to protect the right for the individual's private life, for it guarantees the protection of the secret of correspondence, the protection of a person's reputation and the prevention from divulging confidential information. Therefore, the conventional text states that any person has the right to free speech. This includes the freedom of opinion and the freedom to receive or **communicate information or ideas without interference from public authorities** and without frontiers. The present article does not prevent the States from imposing an authorization regime[29] for the radiobroadcast, cinematography and television companies.

The guarantees provisioned by the national law regarding the respect for the right to private life are identified over the course of **Chapter II**, listing the norms of the Romanian Criminal Code that punish criminal behavior that touches upon the right to private life. We list the crimes of **trespassing of domicile or professional headquarters, the violation of the secret of correspondence, divulging secret state information, divulging secret work or non-public information** etc.

Chapter III contains a short historical analysis regarding the national judicial bodies competent to order for searches, use of special surveillance methods or other evidentiary procedures which touch upon the right to private right, the research starting with the 1864 "Alecsandru Ioan I Cuza" Criminal procedure Code.

Chapter IV is dedicated to the **European system,** with the incidence of the European Convention for Human Rights and the jurisprudence of the European court in the evidentiary matter, with the direct implication in the ordering by the Judge of rights and liberties of searches, special surveillance methods or other evidentiary means which touch upon the right to private life.

Therefore, the notion of **"private life"** (comprising the person's[30] physical and moral identity, as well as the intimate sphere of an individual's life), in order to approach later on the notion of **"domicile"**, in the sense of art. 8 of the European Convention, establishing that this represents the main place of living, as well as any secondary residence, as well as the place (office, headquarters) where a natural or legal person carries their professional or commercial activity. Finally, with reference to the right to private life and the role of the Judge of rights and freedoms, the paper also presents an analysis of the notion of **"inviolability of correspondence"**, a component of "private life".

Section 4 of this chapter describes the limitations of the rights guaranteed by article 8 of the Convention with noting down the (allowed) interferences of state authorities. The conditions in which these interferences may occur are also detailed: (i) that they

[29] I. Lolies, *La protection penale de la vie privee*, ed. Presses Universitaires d'Aix-Marseille, 1999, p. 55.

[30] ECHR, decision from 16 June 2005, Storck v. Germany

are provisioned by law, which must know a certain publicity and predictability; (ii) that it has a legitimate purpose; (iii) to appear as necessary in a democratic society.

In **the final Section,** the paper identifies and analyzes the ECHR jurisprudence which has led to the naming of the Judge of rights and freedoms as the sole judicial body competent to order evidentiary procedures that touch upon the right to private life, with mention of: **Vasilescu v. Romania**, **Pantea v. Romania**, **Dumitru Popescu v. Romania** (voting unanimously, the European Court has decided that the ordering of the prosecutor of technical surveillance methods infringe on the provisions of article 8 ECHR, appreciating that the defendant **Dumitru Popescu** had not benefitted from the "minimum degree of protection against the arbitrary imposed by the principle of the lawful preeminence in a democratic society").

Chapter V presents the north-American system and the incidence of the American Convention regarding human rights and the jurisprudence of the United States of America courts, demonstrating that the notion of "private life", in the belief of the north-American doctrine, represents the right to privacy, as derivate of the principle of minimum intervention imposed to the state under the name of „*the right to be left alone*".

The final title of this thesis is dedicated to the analysis of the competence of the Judge of rights and freedoms within other situations expressly provisioned by the law, by these referring to the situations provisioned by article 53 of the Criminal procedure Code, through the following paragraphs: d) the prosecutor's documents, in the cases expressly provisioned by the law: f) the procedure of the pre-trial hearing: g) other situations expressly provisioned by the law.

Chapter I contains the research done on **psychiatric medical-legal** expertise, this type of expertise representing a branch of medical-legal expertise. Thus, as it is well known, with the help of this probationary means, the discernment or the mental state at the time of the act of a person is established, in the context of article 184 of the Criminal procedure code. However, in the cases when the suspect or defendant refuse – during the criminal investigation – the expertise or does not come in front of the psychiatric medical-legal committee for examination, the criminal investigation body notifies the prosecutor or the Judge of rights and freedoms with view of them issuing a warrant to appear in front of the psychiatric medical-legal committee. Also, if a complex examination is needed, which requires the medical commitment of the suspect or the defendant into a specialized sanitary institution, but they refuse commitment, the prosecutor may ask that the Judge of rights and freedoms take the measure of non-voluntary commitment, for maximum 30 days, for a psychiatric expertise.

Chapter II presents the procedure of **issuing a warrant for arrest,** this being an order given by the prosecutor or the judge, addressed to the criminal investigation bodies

of the judicial police or the public policy bodies to bring a certain person in front of the prosecutor or the court. However, during prosecution, when **breaking into a domicile or headquarters without consent** is necessary, the arrest warrant may be ordered, at the prosecutor's motivated request, only by the Judge of rights and freedoms. The incidence of the European court's decisions is also analyzed by the ruling in Rupa v. Romania (16 December 2008).

In Chapter III we find the **analysis of the procedure for issuing a European arrest** warrant, with reference to Law no. 302/2004 regarding the international judicial cooperation in criminal matters, establishing that, in the prosecuting stage, the Judge of rights and freedoms appointed by the court president of the trial, is competent to issue this warrant, by default or at the request of the prosecutor who carries out or oversees the criminal investigation of the person.

Chapter IV, dedicated to the procedure of **physical examination** (internal and external examination of the body; the taking of biological samples), is divided into two sections. In the first part, the thesis analyzes the national regulations and the role that the Judge of rights and freedom has when this evidentiary procedure is necessary, but there is no written consent of the person in question. Section 2 presents the incidence of the provisions of article 3 of the European Convention and of the jurisprudence of the European court, since the guarantees established by Article 3 represent the right of a person not to suffer from treatments contrary to human dignity, an inalienable human right, based on values common to all cultural patrimonies and social systems. At the same time, in relation to this evidentiary procedure, the right of not self-incriminating is also analyzed for people who are suspected or accused of committing a crime.

Within Chapter V, the thesis presents the procedure of the **pre-trial** hearing (art. 308 Criminal procedure Code), by referring to the competence of the Judge of rights and freedoms and the role that they have in this procedural institution.

Chapter VI refers to the **appeal regarding the duration of the criminal** trial, analyzed in the context of the right to a fair trial, respectively the decisions and recommendations of the Committee of Ministers and the European Council for counteracting the excessive duration of procedures. Therefore, for causes under criminal investigation, the appeal may be introduced after a minimum of one year from the beginning of the criminal investigation, the Judge of rights and liberties being competent in ruling on it.

Chapter VII succinctly analyzes the **procedure of issuing an APB** (all-points bulletin), reported to the fact that, for identifying, searching,, locating and apprehending people (for which an APB has been issued) a series of activities already presented in the thesis, from the perspective of limiting fundamental human rights and freedoms, as well as the competence of the judge of rights and freedoms in these matters (technical

surveillance; search; withholding, surrender and search of correspondence and objects etc.).

The last chapter of this paper (entitled **"The recusal of the prosecutor in the procedures conducted in front of the Judge of rights and freedoms")** approaches a theme that is not *expressis verbis* regulated by the Criminal procedure Code. Decision no.625 of 26 October 2016 of the Constitutional Court has led to the amendment of the provisions of art.70 of the Criminal procedures Code, in the sense that – in the procedures conducted in front of the Judge of rights and freedoms – the only person that can pronounce on the recusal of the court meeting prosecutor is the respective Judge of rights and freedoms.