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THEORETICAL AND JURISPRUDENTIAL ASPECTS IN THE MATTER OF INSURANCE MEASURES IN CRIMINAL PROCEEDINGS - ECHR PRACTICE

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Abstract
The taking of protective measures in the criminal process is allowed in order to repair the damage caused by the crime, in order to special confiscation and to guarantee the execution of the fine, as well as to guarantee the execution of judicial expenses. Most of the crimes committed are resulting crimes, that is, crimes that generate material or moral damages. According to the legal provisions in the matter, reparation of the damage is done in kind (restitution of things, restoration of the situation prior to the commission of the crime, etc.) or by paying monetary compensation, if reparation in kind is not possible. The Romanian legislator explicitly regulates the conditions for obtaining, maintaining, revoking and replacing them, but in the internal practice of judicial bodies we have reported violations of internal legal provisions, as well as a non-compliance with those pronounced by the European Court of Human Rights in the matter. Through this study, we aim to show jurists, but also legal practitioners, those concrete situations in which either the prosecutor or the court failed to comply with the legal provisions, thus violating the rights established by law for the suspect or defendant, the civilly responsible party or other persons. In this sense, we will present aspects of internal practice, but also ECHR practice.
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1. INTRODUCTION

Any criminal trial, as an activity organized for the purpose of finding out the truth about the crime committed, implies a limitation of the rights of the suspect or defendant (as well as of other persons), a limitation that derives from the very status of suspect or defendant. Knowledge of the legal provisions and the exercise of procedural rights in good faith are guarantees of the execution of the judicial act without abuses and violations. As European citizens, we benefit from a double protection, through the legal provisions of an internal nature, depending on the citizenship granted to each one, but also a European protection, through the legal provisions of an international nature applicable in the matter.

In this sense, both the legal provisions in the matter must be respected, as well as a proportionality between the purpose of the criminal process and the rights of the persons involved in the criminal process. The situations reported in this study indicate, on the part of the judicial bodies, either a disregard for legality (Tatu, 2009) or proportionality (Tulbure and Tatu, 2009) in the matter of security measures (criminal seizure, confiscation) and security measures (special confiscation, extended confiscation), which obviously harms the people who their rights were thus violated in the procedure of taking, maintaining, revoking and replacing these measures in the criminal process. We will present similar violations against people who are not parties to the criminal process, but whose rights were violated by making movable or immovable assets unavailable, although they do not have the status of suspect or defendant, as well as the internal practice and the practice of the ECHR in the matter, as points of reference.

2. METHODOLOGY

As the method used in the realization of this study, the theoretical information on the studied topic was used as an experimental framework, information that can be found in the legislative framework, as well as in the specialized literature, both domestically and internationally. In this way, the study has a fundamental character. In addition, the judicial practice in the matter was also researched internationally, so that the present study also has an applicative character. The study aims to show whether the national courts have respected the legal framework in the exercise of justice and whether the European courts have found violations of the provisions established by European legislation. Basically, if the rights of European citizens would be respected or violated. Aspects of the judicial practice of the European Court of Human Rights (ECHR) are presented (European Court of Human Rights, 2022).

3. THEORETICAL AND PRACTICAL ASPECTS

3.1. Safety measures

In terms of material law, the Romanian legislator enshrines in art. 107-112/1 Criminal Code the regime of safety measures, which are included in the scope of criminal law sanctions, along with punishments and educational measures, the purpose of safety measures being to remove certain conditions of danger and preventing the commission of the acts provided by the criminal law. (Tatu, 2016). The need for social defense has determined the introduction into the criminal law of some sanctions with a pronounced preventive character, which justify their presence in the criminal process due to situations that reveal a current danger, but also a danger for the future in which concerns the commission of another crime, beyond the dangerousness of the act committed. The following are security measures: compulsory medical treatment, medical hospitalization, prohibition of

occupying a position or exercising a profession, special confiscation and extended confiscation. Security measures are taken against persons who have committed unjustified acts provided for by the criminal law (art. 107 paragraph 2 Criminal Code), regardless of whether the act constitutes a crime or not and can be taken even if the perpetrator is not punished, except the measures provided for in art. 108 lit. d (special confiscation) and e (extended confiscation) and regardless of whether the perpetrator is an adult or a minor (Tatu, 2016).

Since they are included in the scope of criminal law sanctions, the security measures, like the punishment, also have a coercive character in the subsidiary, by restricting the freedom of the perpetrator or by affecting his property. Unlike punishments, safety measures are not consequences of criminal liability and do not depend on the seriousness of the committed act, they can be taken even if the perpetrator is not punished (art. 107 par. 3 Criminal Code), their taking being conditioned of the state of danger generating facts provided by the criminal law. (Tulbure and Tatu, 2003) The law establishes the states of danger that attract the taking of safety measures, possibly due to various causes: mental alienation, alcoholism, lack of professional training, possession of assets that can lead to the commission of a crime, etc. The danger is closely related to the person of the perpetrator, and the security measure is taken against the person of the perpetrator. It has been shown in the literature that the nature and seriousness of the state of danger will be taken into account, as well as the possibility of removing the danger. (Lupascu, 2019)

The law does not specify the period of time they can be taken, so they can be taken indefinitely, lasting as long as the state of danger exists (Theodoru and Chis, 2021) The termination of the state of danger determines the termination of the ordered safety measure. That is why the safety measures are not prescribed, being related to the existence of the state of danger. In the case of the crime competition, only one safety measure must be taken. If several safety measures of a special nature have been taken, they are cumulative. The conditional suspension of the execution of the sentence does not attract the suspension of security measures. (art. 98 para. 2 Criminal Code) Security measures can be taken in compliance with the standards of criminal procedure, in particular the presumption of innocence (Article 6 ECHR), the right to a fair trial and the requirement to prove a crime beyond any reasonable doubt (University of Bergen, 2023). The safety measures taken during a criminal trial will be found in the court decision according to art. 404 Criminal Procedure Code.

3.2. Insurance measures

In terms of procedural law, until the final settlement of a criminal case and until the final settlement of the civil action, but also with a view to taking security measures for special or extended confiscation, security measures can be taken during the criminal process. According to art. 249 paragraph 1 Criminal Procedure

Code, the prosecutor, during the criminal investigation, the preliminary chamber judge or the court, ex officio or at the request of the prosecutor, in the preliminary chamber procedure or during the trial, may take precautionary measures, by order or, after case, by reasoned conclusion, in order to avoid the concealment, destruction, alienation or evasion of the assets that may be subject to special confiscation or extended confiscation or that may serve to guarantee the execution of the fine or legal expenses or the repair of the damage caused by criminal offence. Only in the way of appeal can security measures be taken, (according to art. 250/1 Code of Criminal Procedure) not in the other ways of appeal, by closing, and not at the completion of the judgment of the appeal by sentence, since these are taken until the definitive stay of the court decision, by decision special confiscation or extended confiscation can be ordered.

The security measures consist in the unavailability of some movable or immovable goods, by imposing a seizure on them. If preventive measures are taken to guarantee the execution of the fine, they can only be ordered on the assets of the suspect or the defendant. If the security measures are taken with a view to special confiscation or extended confiscation, they can be taken on the assets of the suspect or the defendant or of other persons in the ownership or possession of which the assets to be confiscated are located. The insurance measures in order to repair the damage caused by the crime and to guarantee the execution of the legal expenses can be taken on the assets of the suspect or the defendant and the civilly responsible person, up to the concurrence of their probable value. (paragraph 5)

The precautionary measures provided for in paragraph 5 can be taken, during the criminal investigation, the preliminary chamber procedure and the trial, and at the request of the civil party. The precautionary measures taken ex officio by the judicial bodies provided for in paragraph (1) may also benefit the civil party. These precautionary measures taken under the conditions of paragraph (1) are mandatory in case the injured person is a person without exercise capacity or with limited exercise capacity. On the other hand, assets belonging to a public authority or institution or another person under public law cannot be seized, nor assets exempted by law.

As a guarantee of the principle of legality, but also of the opportunity to maintain insurance measures, the legislator provided in art. 250/2 Criminal Procedure Code as "throughout the criminal process, the prosecutor, the judge of the preliminary chamber or, as the case may be, the court periodically checks, but not later than 6 months during the criminal investigation, respectively one year during the trial, if the grounds exist that determined the taking or maintenance of the precautionary measure, ordering, as the case may be, the maintenance, restriction or extension of the ordered measure, respectively the lifting of the ordered measure, the provisions of art. 250 and 250^1 applying accordingly" (Criminal Procedure Code, 2010). These last articles refer to the possibility of filing an appeal against the insurance measures.

3.3. Violations - non-compliance with the regulations in the area of illegal measures

In order to better understand the institution of security and safety measures, we must analyze the conditions for taking and maintaining these measures during the criminal process, in order to know in each specific case if these conditions exist, otherwise they must be lifted immediately, all the more so as they can target not only the assets of the suspect or the defendant, but also of other people who are not involved in the criminal process. What we will analyze refers to the principle of the legality of the measures, as well as the opportunity. Ignoring them gives an illegal and groundless character to the measures taken, with major implications on a person's property, infringing the property right. (Udroiu, 2022) Unfortunately, judicial practice also reveals situations where the conditions for taking these measures did not exist, or they no longer existed during the criminal process.

Regarding the conditions of legality, it was appreciated (Lupașcu, 2023) that only from the moment when the alleged perpetrator of a crime has acquired the status of a suspect, it is possible to take the preventive measure, and not from the moment of the start of the criminal investigation in rem. It is normal for this to be the case, since the taking of security measures involves the administration of evidence and the assets of the suspect, the defendant, the civilly responsible party or other persons, an activity that requires the identification of the suspect and the other persons (EU Directive 2016/43 of the European Parliament). If it was ordered to carry out the further criminal investigation only for the crime of money laundering, without retaining any primary crime, the order by which preventive measures were taken is illegal. (idem)

Regarding the appropriateness of taking these measures, judicial practice is contradictory, precisely because the legislator does not oblige the judicial body to take or maintain security measures in every criminal trial, using the phrase "may take security measures" remaining at the discretion of each judicial body depending on the procedural phase in which the criminal case is located, to order in this sense. That is why, without sacrificing the purpose of the criminal process, prudence and balance must be shown between the procedural interests and those of the concerned persons against whom insurance measures can be taken, in compliance with art. 1 of Protocol 1 to the European Convention on Human Rights on the proportionality of the limitation of the right to property. According to this legal text, "any natural or legal person has the right to respect for his property. No one can be deprived of his property except for the cause of public utility and under the conditions provided by the law and the general principles of international law." The Constitution of Romania states in art. 53 the necessary and proportional nature of taking any measure within a democratic society, without discrimination and without prejudice to the existence of the right or freedom.

In judicial practice, the insuring measure of sequestration and confiscation of all assets of the defendants (Cluj Court, Cluj Court of Appeal) which can be subject to special confiscation and which can serve to guarantee the recovery of the damage caused to the state budget, was illegally ordered and maintained , and judicial expenses, as well as on assets belonging to other persons that may be subject to extended confiscation, although art. 249 of the Criminal Procedure Code states that these measures can be taken on some movable assets, their illegal nature being shown. If all the assets of the suspect or the defendant or the civilly responsible party were to be ordered, it would mean assuming that all the assets acquired by a natural or legal person would be illegal, thus operating the presumption of illegality. The Constitution of Romania (2003) presumes the lawful character of the acquired wealth, which substantiates the defenses for the lifting of seizures ordered in order to confiscate the assets of persons who do not have the capacity of parties in the criminal process. The presumption being a relative one, it can be overturned if the evidence proves that the third parties acquired these goods by committing acts provided by the criminal law, the judicial bodies being able to request proof of the manner in which they came into possession of the goods.

Also, we found the illegal character, but also unfounded, of the prosecutor's orders, since they are not motivated in fact, which restricts the right to defense and violates the right to a fair trial, but also the principle of the presumption of innocence under the civil aspect, the order being issued with the violation Art. 4 and 8 Criminal Procedure Code. Any ordinance must include the reasons on which it is based, so that the interested party, taking note of the reasons that were its basis, can challenge it. Only in these coordinates the right to defense can be effectively exercised. In many situations, the sequence of procedural documents that make up the criminal process is mainly presented, respectively: the initiation of the criminal prosecution, in rem or in personam, the continuation of the criminal prosecution, the extension of the criminal prosecution, the extension of the criminal action, etc., which obviously does not provide content in the sense of a true "motivations" of the contested ordinance. In these conditions, it is not possible to formulate a tailor-made defense, this being almost formal. Practically, it equates to a lack of defense. Only through an effective defense, the parties can benefit from a fair trial.

In the case of the commission of resulting crimes, such as tax evasion, the prosecutor's orders do not develop in a broken-down manner for each defendant how the damage created was calculated, by showing an amount in a determined amount for each defendant, the amounts being kept in common by all the defendants. We deduce from the contested ordinance that all the defendants had the same criminal activity, drawn to indigo, without the ordinance distinguishing for each of them. The ordinance is not motivated in terms of the degree of

involvement and the form of participation in which the defendants did it, respectively authorship, co-authorship, instigation, complicity.

Regarding the third parties against whom the insuring measure of seizure was ordered by making available some movable or immovable property, the administered evidence should have revealed the fact that the third parties are interposed persons with the help of which the defendants used the money resulting from the criminal activity (tax evasion, forgeries). Committing one of the crimes provided by art. 112/1 para. 1 Criminal Code does not automatically lead to the taking of insurance measures on assets belonging to persons who are third parties to the commission of one of these crimes, because this would only involve a cold and implacable mathematical calculation, the magistrate who ordered the measure being nothing more than an instrument that he will not be able to form his own opinion, or the criminal law has a completely different purpose and connotations, as well as the magistrate who applies it. The fact that the defendant drove a car that is registered in the name of another person does not justify ordering the seizure of that car.

Although the date of acquisition of each good by the indicated owner must be shown, so that in this way it can be checked whether the goods on which insurance measures have been instituted can form the object of extended confiscation, this is not done exactly. According to the Decision of the Constitutional Court no. 11/2015 published in the Official Gazette no. 102/9 February 2015, if the insurance measure is taken with a view to extended confiscation, it does not apply to assets acquired before the entry into force of Law no. 63/2012 amending the old, but also the new Penal Code, respectively April 22, 2012. Since the date of acquisition of the assets on which the insurance measure was ordered has not been established with accuracy, the rule provided by paragraph 8 art. 112/1 of the Criminal Code, according to which "the confiscation cannot exceed the value of the assets acquired in the previous period. of paragraph 2, respectively of 5 years prior to the conviction, which exceed the level of the lawful income of the convicted person.

Also, the legal conditions for taking insurance measures are not met even when there is no evidence of the transfer of assets by suspects/defendants or third parties to a family member or a legal entity over which the defendants have control, according to art. 112/1 paragraph 3 Criminal Code. In order for this provision to operate, the assets should have been owned by the defendants/third parties, and subsequently, in order to evade the payment of possible compensation in the event that they are found guilty, these assets should have been moved, transferred, by concluding new transferable property deeds in the name of other people, relatives, friends, etc. Regarding third parties, it is obvious that they should have an agreement prior to the conclusion of a property transfer deed with the suspects/defendants who will later become convicted, which is not proven by any means of evidence in the present case.

The reasoning consisted in the fact that from the administered evidence it resulted that "even though the goods appear in the names of third parties - in family relationships, as well as close friends of the suspects, they are owned by the defendants", although the existence of a family relationship /friendship is not included among the legal conditions for taking measures, the measures being taken in violation of the right to private property. It would mean that any goods belonging to relatives, friends or acquaintances could be subject to insurance measures, without limits, which is obviously unthinkable.

In order to be able to order the insurance seizure measure on assets whose owners are other people than the defendant, it is necessary that the conclusion of such contracts is done for the purpose of defrauding the law. (Mateut, 2019) From this perspective, it means that both the defendants and the people who entered the contest, i.e. the current owners of the goods, acted with direct intent, the purpose being a determined and illegal one, that of defrauding the law, through the support given to the defendants to evade the payment of civil compensations, in the event of their civil liability. In this sense, the existence of a fraudulent intention of third parties must be established, which had to exist at the time of the conclusion of the sales-purchase contracts or other transferable property titles.

Seizures are also ordered on all jewelry and watches found during the home search, in violation of the provisions of art. 935 Civil Code, text that regulates the acquisition of the right of movable property through good faith possession. Although the evidence showed that some of them belong to the defendant's wife and children, who are bona fide possessors, some being inherited from generation to generation, and others received as a gift, the measure of seizure was not lifted, so the measure is illegal. In practice, it was decided that the seizure that ensures a patrimonial sanction is illegal if it is applied to the defendant's wife's own assets (The Supreme Court, Decision no. 3047/1973). For common sense, it does not apply to the defendant's children's own assets either. Then, the measure of sequestration was ordered on some sums of money of various commercial companies, although part of them were intended for the current activity, payments of social insurance contributions on the account of the states, taxes on salaries, etc., the criminal investigation bodies assuming obviously illegal that all the sums of money are the result of criminal activities.

In this regard, Directive 2014/42/EU on the freezing and confiscation of instruments and products of crimes committed in the European Union provides in art. 8 as guarantees: "Third parties have the right to claim a property title or other real rights, including in the cases mentioned in article 6. Consideration no. 33 of Directive 2014/42/EU. According to him, it is necessary to provide for specific safeguards and remedies to also guarantee respect for the fundamental rights of third parties who are not subject to criminal prosecution. It further states that these guarantees include the right to be heard for third parties who claim to be the owners of the seized property.

Also, in the case of Agosi v. the United Kingdom (application no. 9118/80, series A, no. 108, ECtHR Judgment of October 24, 1986), it is stated: "For confiscation under Article 1(2) of Additional Protocol to the Convention, it is sufficient that the state has maintained a balance between the public interests and those of the person concerned [...]. Maintaining a balance depends on numerous factors; in this sense, the behavior of the property owner, including the degree of culpability or diligence that he has shown, is only one element of the many circumstances that must be taken into account. Consequently, even if Article 1(2) does not contain any explicit procedural requirement, the [ECtHR] must consider whether the procedures applicable in the case allow, inter alia, adequate consideration of the degree of culpability or diligence of the applicant company or, at least, the relationship between the company's conduct and the crime [...]. It is also necessary to establish whether the procedures in question offered the applicant company an adequate opportunity to support its point of view before the competent authorities". (Summary of the preliminary ruling request - Case C-393/19).

In the case of Silickiene against Lithuania and in similar cases (Case of Sporrong and Lonnroth against Sweden, Case of Weissman and others against Romania, Judgment of February 12, 2013 pronounced in the Case of Dzugayeva against Russia, Case of Jahn and others against Germany) it is stated that: "in regarding the ratio of proportionality between the purpose of confiscation and the fundamental rights of the petitioner, the European Court of Human Rights reiterates the idea that in the case of confiscation of properties the fair balance between purpose and rights depends on many factors, including the behavior of the owner, national courts having to evaluate the degree of involvement of the owner or at least the relationship between his behavior and the crimes committed. (Case of Ünsped against Bulgary, 2015)

4. CONCLUSIONS

Through this study, we tried to review the theoretical aspects, but also the domestic and international practice, in the matter of insurance measures and safety measures taken in the criminal process. The situations shown are aimed at sensitizing the theoreticians and practitioners in the matter, so that in the future we will no longer be in the presence of situations in which the fundamental rights of the people involved in criminal trials have been violated, or that there will be as few such situations as possible. The analyzed examples are part of a multitude of other examples. There are many situations in which national courts respect the framework provisions in the matter.

The purpose of the article is to make a relevant analysis between the internal provisions regarding insurance measures and security measures regulated by domestic law and the provisions of the ECHR, so implicitly we analyzed the rights of European citizens, but also the cases of non-compliance with the framework

provisions in the analyzed matter. The analyzed principles, whether it is legality, opportunity or proportionality, the right to a fair trial, the presumption of innocence, the right to defence, were subjected to analysis against the decisions handed down by the European Court of Human Rights, an international body empowered precisely to identify those situations where the law has been violated and therefore our rights.

As can be seen, not only the Romanian courts have issued solutions contrary to the provisions of the European Convention on Human Rights, but also the courts of other countries. This prompts each one of us to a continuous improvement, to a thorough knowledge of the domestic and European legislation, so that illegal decisions are no longer pronounced. Of course, the current study is only a presentation of the most current problems, certainly there are others, which will probably be pointed out by other authors in their articles and studies.

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