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DOCTORAL THESIS
THE CRIMINAL PROTECTION OF PRIVATE LIFE
ABSTRACT

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Though it looked for many decades as a characteristic of western civilisation, human rights doctrine evolved into a central point of international community, thus undergoing inherent transformations regarding concepts and new perspectives imposed by cultural, historical and religious differences among member states.

In this context of human rights transformation and globalisation putting in discussion the content of human rights but also the correlative obligations, reshaping the limits and the applicability criteria but also the interpretation mechanisms and the effective protection of the recognised rights seemed inevitable. Beyond the doctrine and the scientifically research, the public policy and permitted inferences, human rights doctrine is build around the individual as the primary beneficiary of the legal norms and interpretations on the subject matter. From this perspective the right to private live appears as the central element of human rights protection, being the most important aspect of daily life and through that the most fragile to infringements by private persons or national authorities.

The object of the scientific research we conducted aims at analysing the protection of private life through criminal and criminal procedure methods, both as strong mechanisms of protection and equally powerful intrusive aspects in the life of any individual. The topic is practically relevant taking into consideration the fact that most of the evidence in complex criminal cases are obtained by means of intrusive procedures, for example the technical surveillance or home and computer searches. Moreover, it is public knowledge that information from secret services are seldom used as evidence in criminal trials, and those informations are usually obtained by methods that affect the individuals intimacy.

Even though it is mostly a technical scientific approach this paper may be seen as a point of interest for law theoreticians and practitioners but also for those who do not have expertise in the field. How and at what extent we are protected from unjustified intrusions in our home or correspondence, what are the reasons and conditions that allow the public authorities to breach our privacy, how profound such an interference can be or ought to be in practice, represent topics of interest for each individual and for society in general. Knowing this legal elements, even at a minimal extent, can determine a fair and proportional response of the individual in connection with the state power, being a necessary tool in democratic tuning of the conflict between the individual right and the general interest of the society.

Having regards to the vast domain of private life we decided to approach the theme in a systematic manner, by firstly analysing the mechanisms through which the state fulfils its positive obligations and by later analysing the legal methods through which the public authorities can intervene in the private life of a person. The structure of the doctoral thesis contains 6 chapters, the first five chapters dealing with the legal provisions related to this matter and the last chapter synthesising the conclusion derived from the analysis.

While from the perspective of positive obligations we have analysed the national criminalisation of different aspects meant to protect the right of the individual to privacy by means of sanctioning illegal and unjustified intrusion by third parties, the negative obligation not to affect the recognised right is analysed *per a contrario* by researching the legal framework and conditions for legal and justified inferences.

Taking into account that human rights doctrine does not permit a strictly national approach, the method we used combines the theoretical problems with national and international jurisprudence. The European Court of Human Rights jurisprudence occupies a large part in the thesis alongside the jurisprudence of the Court of justice of the European Union and United States, German and Spanish jurisprudence. Obviously, the national jurisprudence remains the basis of our scientific study.

The first chapter of the doctoral thesis deals with ”human rights” and ”private life” concepts, in the context of their first recognition and further development. The origins of human rights can be found in the greek philosophy as well as in many religious movements around the globe, but the concept received an explicit and distinct contour only in the XVIII century, in the Illuminate period.

From the historical approach of human rights we can conclude that they evolved in distinct systems that intersected each other and borrowed concepts and notions from one another:

- a moral, philosophic and religious system that recognises the existence of human rights without norming them;

- a national legal system that legislates seldom in this area until it reached the constitutional provisions;

- an international system of human rights provisions, both regional and global, that evolved into an autonomous system of international human rights.

”Human rights are those liberties, immunities and benefits laid down in conformity with contemporaneous values, which can be claimed from the society by any individual that lives in it”.

Private life is, from all the recognised human rights, the one that raises the most problems of practical interpretation. Even though privacy seems to be a neuralgic spot of any society, the right to privacy has a volatile existence with unclear borders, being almost impossible to define it or to categorise it. It usually is one of those rights that finds its meaning on a case by case approach, who functions only by gathering in the jurisprudence all the diverse aspects of everyday life.

Even though it is largely recognised in any law system, the concept of private life brings forward the same problems and questions as it did in the beginning of its notation in international documents: which is the definition of private life that is relevant from a legal standpoint, which is the content of the right, which legal categories and typologies can we analyse under the vast domain of this right, which are the state obligations and which aspects can a person use to file a request regarding his private life.

The international treaties do not clearly define private life, they don't impose a legal qualification and they don't determine the border lines, leaving all these aspects to judicial authorities and legal doctrine.

From the point of view of international classification, the right to private live is a civil right, in essence an individual right and it first came into force as a second generation right. It can be categorised as a right of the individual but also as a public liberty or as a fundamental citizen right. It is by nature a negative right as it excludes any illegal or unjustified infringement from a third party or the state.

The most commonly known definition of private life talks about the right of the individual to a an anonymous and restrained life. Such a delimitation of the concept can not stand in existence in the context of the informational society that has eloquent tendencies of transferring the private life in a digital social environment.

In this context new currents of thought appeared, for example the reductionist school which looks at the concept of private life not as an independent and distinct concept but as an aspect that has to be inserted in other more permissive and large concepts. It is stated that private life represents the right not to be watched and the right not to be listened to, aspect that through analogy appear when talking about the right to property too. This current of thought starts from the image that private life is derived from other rights and values.

From another doctrinally perspective private life cannot be limited to a single concept and it is seen as the crossing point of several ideas: the physical space (the sphere where the territorial

solitude of the individual is protected from unwanted invasion of other sounds or objects), the right to choose (the ability of the individual to take some significant decisions without having any interference) and the flow of personal information (the control exercised by the individual regarding the way personal information is processed.)

The theory of privacy accumulation promotes a definition of private life as the sum of informational intimacy, access intimacy and expression intimacy; in other words any aspect which is defined by the control of information, limited access and individual auto determination will be looked upon as being part of the concept of private life.

The European Committee on Human Rights restructured this definition, stating that the right to private life includes the right to live protected from other persons sight as far as you desire. This concept contains, at a certain degree, the right to establish and nurture personal relations with other living persons, especially of an emotional nature, in order to develop and shape your personality..

The European Court of Human Rights tried to offer a definition for private life but chose to adopt a general, confused and cautious perspective, The Court stated that the right to private life goes beyond the right to intimacy and comprises itself of the right to live, at the extent you choose, far from publicity, but stopped at this point, mentioning each time that it is such a broad term that can not be contained in an exhaustive definition.

A single, unique definition of private life is thus legally inapplicable. One way of conceptualising the concept, more practical, is by addressing the aspects the European Court of Human Rights analysed in its cases under article 8 of the Convention. This approach is in accordance with a new theory regarding the right to private life that proposes going further away from the technique of defining the terms in relations with the common gender and specifically difference and in response applying the methods of recognising the context and the sphere of applicability, denying the a priori knowledge of the content and focusing on practical aspects. This theory proposes the conceptualisation of the idea of private life by understanding it in specific contexts and not by defining it in an abstract way.

By analysing the rich jurisprudence of the European Court of Human Rights several categories of problems regarding private life have been determined; they are not complete and don't cover the entire range of problems that can arise in this field of study.

One of the first categories of cases deal with physical and psychological integrity of the individual. In connection with this notion the Court analyses the inferences regarding the

surveillance of the individual, searches, observing the individual, interceptions, dissemination of information, images etc. A second large category of cases determined by the European Court of Human Rights, by means of analysing private life aspects, deals with collecting and divulging personal information. This aspect is closely related to the individuals right to be protected against unwanted access to personal data, against collecting and storing the data, reading personal documents or intercepting the correspondence. Last but not least another category of cases in the European Court of Human Rights jurisprudence deals with the right of the individual to live in a healthy environment.

Taking into account that a complete pre-ordinated definition regarding private life is impossible we consider that the most efficient mechanism when it comes to determining what private life means stands on the idea of large groups of problems that can be raised in this field of study. The aspects regarding private life can be separated into problems that deal with intimacy and problems that deal with personal choices.

The intimacy issues are strictly related to the right of each individual to live without being the subject of publicity and to determine what elements of his life are known by third parties and what persons can have access to this information. The questions regarding personal choice are those that relate to personal autonomy and the personality of each individual (for example the lifestyle, the surname, sexual orientation, clothing, the decision to raise a pet, the right to personal relations or the right to decide if and whether to interact with the outside world.)

This kind of approach to private life, where the content of the right has to be determined case by case, leads to a real dilemma for the public authorities in regards to the accomplishment of their duties regarding positive obligations to protect the individual, especially in criminal law. A constant shifting in the definition of private life will create a real difficulty in drafting the legal text that incriminates aspects regarding private life, in such a manner that will be able to ensure both the necessity of legal certainty and the need to have a comprehensive text in order to encompass all the important aspects that can arise in the criminal field. It's obvious that incriminating dangerous acts that infringe private life is the most efficient method to respect the positive obligations of the state to take appropriate measures in order to protect privacy, so it was but natural that the first institutions to be analysed should be the provisions of criminal law

The Criminal Code includes in Title I of the Special Part, in Chapter IX "Crimes against home and private life". Despite the exhaustive title, the legislature included in this chapter only some of the offences that violate personal privacy, as:

- trespassing and trespassing in professional office- by whose sanctioning it protects the inviolability of the freedom of any individual, in terms of the inviolability of the home;

- invasion of privacy - which has the role to protect the individual's right to his own image and partly the freedom of private communications;

- disclosure of professional secrecy - whose incrimination is meant to ensure the confidentiality of personal data .

Although the systematisation performed in chapter IX of Title I of the Criminal Code, in the Special Part, shows homogeneity, it is not yet complete. Another incrimination which serves to protect privacy, in terms of the individual freedom to communicate, is the breach of secrecy of correspondence. The offence is laid down in the category of offences regarding malfeasance while in office, probably as a result of increased danger these acts represent in the hypothesis that it is committed by a public official .

The lack of a coherent consolidation of the offences that infringe private life can be seen as a consequence of the lack of a legal definition of the analysed concept. However, this aspect of legislative technique seems to be of minor importance in comparison with the problems that are present in the doctrine and jurisprudence regarding criminal offences which affect aspects of privacy.

Throughout the thesis we tried to address, comprehensively, the problems identified in the substantive criminal law provisions, by presenting the incriminating text, the doctrinal interpretations, the problems regarding the lack of jurisprudential uniformity and possible solutions that we identified. An example of the technique used in analysing the norms and the degree of difficulty in establishing a uniform approach on the right to privacy is the new offence of trespassing in professional offices, that we briefly present below .

Trespassing in professional offices is incriminated in article 225 of the Criminal Code which reads as follows:

Trespassing in professional offices

(1) Unlawfully entering, in any way, any of the offices where a legal entity or a natural person carries out their business or the refusal to leave them upon the request of the entitled person shall be punishable by no less than 3 months and no more than 2 years of imprisonment or by a fine.

(2) If the offence is committed by an individual carrying a weapon, during night-time, or by using false capacities, the penalty shall be no less than 6 months and no more than 3 years of imprisonment.

(3) Criminal action shall be initiated based on a prior complaint filed by the victim.

Incriminating trespassing in professional offices is a new form of protection for our private life. The legislature considered that, largely, the individual exposes his intimacy in the working environment as well, so that the intrusion of an unwanted party in such a space can be harmful. For example, in the office many employees keep their photos with family members and various items of clothing or personal use (e.g, a suit, a shaver) necessary for some professional events. We can encounter situations where - as inappropriate as it may seem- birthdays are celebrated in the the office space. In some public institutions there are offices designed to ensure a resting place, as an annex rooms.

It is therefore a reality that each of us "personalises" the space in which we work. Therefore it was natural, especially given that we spend most of the day at work, for the legislation to take into account that, inevitably, here, too, we express our privacy by combining these aspects with professional activities and, therefore, to protect us.

Criminal law does not envisage the concept of 'professional office' in the commercial sense, but as a place where an individual works.

The working space that is protected by the norm, in which the unlawful entering takes place, must be "customised" by the individual, must have some elements that are common to the private aspects of the victim, in other words the environment must be imprinted with aspects of the victims intimacy. Unlike the individual’s home, which is an area mainly affected to the private life of the individual, the professional office has mainly another destination. In this regard, we believe that not any unlawful entering in a place in which a professional activity is performed is able to meet the constitutive elements of trespassing in professional offices, being necessary to examine concretely whether the space "hides" something from the privacy of the victim. For example, it is not a criminal

offence to enter into an equipment storage building, a hall with food, a livestock farm, a shipyard or a mine of exploiting minerals, even if in these spaces different people are working, being hard to believe that by their nature these places could have connotations related to the privacy of any individual. In this respect, in the jurisprudence of other countries it was considered, rightly, that "office and business units present a greater openness to the outside, given their destination; they are meant to achieve social contacts, thereby the owner is somewhat freed of the intimate sphere included in narrower manner by the concept of home".

A key statement is that by sanctioning the offence of which we discuss, criminal law does not protect professional activity in the company or public institution, but the individual's privacy at his workplace. Therefore, by committing this offence one will not prejudice the rights of the legal person entitled to use a certain office space as professional offices, the legal person not being the victim of the offence because it can not be associated with the concept of privacy. In reality, the victim is a natural person working in headquarters that have been entered unlawfully ("employee" or "worker" in the broad sense).

This is particularly clear by means of placing trespassing in professional offices among crimes that affect the home and private life. Supporting our opinion is the jurisprudence of the European Court of Human Rights which ruled that a farm specialised in pig breeding, sheltering several hundred animals, do not enjoy - not even by extension - the protection established by Article 8 of the Convention. In this case the applicants (owners of the commercial exploitation) stated that their rights under article 8 of the Convention were evidently infringed, as veterinary services performed, without their consent, an inspection in the premises of the commercial exploitation in order to carry out a census of the animals. The inspectors did not enter the applicants homes and not even their offices (which were separated from the farm) or the administrative buildings, but solely in the buildings housing the animals, with the purpose of counting them. The European Court recalled that "home" is an extensive concept and may also cover professional premises, but in this case the farm specialised in pig breeding can not be assimilated to a place where applicants run their daily life, expressing privacy

In the jurisprudence of the European Court of Human Rights doubts have been expressed regarding the violation of art. 8 of the Convention, in terms of protecting the professional domicile, even in a case where police officers entered the cabin of an artist who directed a concert. The Court

showed that although usually the cabin will deliver a level of privacy to the occupant, in this case it was improvised during a single concert and was accessible to any artist that performed that evening.

The concept of "professional office" has already born some problems in national practice. For example, in a case, the defendants were prosecuted because, among others, during the night, they broke and entered into a warehouse belonging to a company, which operated a mill and stole from the inside three electric motors, two vats of metal mixer and more metal bars. The prosecutor indicted the defendants for the offence of aggravated theft prescribed by art. 228. (1) and Art. 229 para. (1) b) and d) of the Criminal Code, therefore without withholding that the theft was committed by means of trespassing in professional office, but the first instance changed the legal qualification, adding that aggravating circumstance and convicted the defendants. We believe that the court unduly ordered the change of the legal classification because, even if the theft was committed as a result of trespassing in a building of a legal person, in the case of a mill it can not be held that the privacy of any individuals who worked in such a place have been harmed; therefore it can not be held that the theft was committed, in the sense of the criminal law, by trespassing in professional offices. Furthermore, the judicial review court upheld the appeals, partly quashed the first decisions, removed the aggravated variant in question and convicted the defendants for the offence of aggravated theft prescribed by art. 228. (1) and Art. 229 para. (1) b) and d) of the Criminal Code.

In another case it was recorded that, on the night of 31.10. - 01.11.2014, around 02.00 am, the defendant V.Ş.C. went into the neighbourhood to get a drink. As he was unable to borrow money for this purpose, he went to the grocery store belonging to SC ... SRL, located near his house, where, finding that the store is closed, tried to force the access door but did not succeed to open it. Subsequently, using a stone he found on the terrace of the store, he smashed the window next to the access door and entered the premises, stealing several packs of cigarettes and some money he found under the counter, then left the scene. The defendant was convicted of aggravated theft by means of trespassing in professional offices, the court reasoning in favour of the aggravated element because V.Ş.C. broke into the premises of the injured person without having authorisation from the owner. The solution was upheld by the appellate court.

We think that this decision is open to criticism, given that the accused broke into a grocery store, in the space designed for marketing products, an area which by its nature is accessible to the public and it is unlikely that the intimacy of the employees would manifest there.

If in relation to criminal offences that affect the right to privacy interpretation of one concept raises crucial issues regarding the enforcement of criminal law and the way the individual will be sanctioned in criminal procedure the technique used in drafting the text must allow in the same time a high degree of protection of individual rights and a margin as high as possible for the actions of public authorities to prevent and combat crime. The third chapter of the thesis, intended for criminal procedural measures affecting privacy, examines how the national legislator intended to balance individual interests and the public interest.

Respect for privacy is one of the fundamental human rights, while being enshrined as a fundamental principle of criminal proceedings. The reason for placing it among the fundamental principles of criminal procedure is linked to the fact that the judicial bodies are using increasingly more often processes and measures that affect this right.

The doctoral thesis deals with technical surveillance (including technical surveillance in the special procedure for finding a wanted person), withholding, delivery or search of mail deliveries, preservation of computer data, searches (also with reference to special procedure for finding a wanted person), other intrusive procedure (identification of individuals , forensic examination, physical examination, forensic psychiatric expertise, genetics judicial expertise, photographing and fingerprinting, the order to appear with authorisation to enter into private spaces).

One of the issues analysed refers to a new institution introduced in our criminal procedure, designed to ensure prompt and effective criminal investigation, namely the extension of house searches to neighbouring places. Thus, where during a house search, it appears that evidence or data were transferred or that the wanted persons are hiding in neighbouring places, under the law, the initial search warrant is valid for these places too, and continuing the search in these areas is allowed by the prosecutor [art. 158 para. (3) Criminal Procedure Code]. The prosecutor will advise the persons in those areas about expanding the search [art. 159 para. (7) Criminal Procedure Code].

These legal provisions have undeniable practical utility. Their purpose lies in the emergency character of the situation, the danger of losing the evidence being obvious: if there would not be any mechanism to allow the immediate search of neighbouring areas the effectiveness of the whole action would be compromised.

Analysing the provisions of art. 158 para. (3) from the Criminal Procedure Code three aspects must be observed:

- in case of transferring the evidence, "the search warrant is valid under the law, for those places too" - thus searching the neighbouring places stands lawfully from the warrant issued by the judge;

- "the continuation to perform the search in this case is conceded by the prosecutor" - so it's not a new house search, but the previous one authorised by a judge, that solely continues;

- the provision that regulates this mechanism is placed between that which describes the content of the application for authorisation [art. 158 para. (2) Criminal Procedure Code] and the one that indicates which is the content of the decision and of the search warrant [art. 158 para. (7) Criminal Procedure Code].

The hypothesis in which the prosecutor may approve continuing the search in a neighbouring place can be determined by correlating the provisions cited above.

Thus, art. 158 para. (2) a) of the Criminal Procedure Code provides that the request for authorisation of a house search must contain "a description of the place where the search will be performed, and if there is a reasonable suspicion of the existence or possibility of transferring evidence, data or wanted persons in neighbouring places the description of these places". Also, in the decision to authorise the search the court will indicate "the description of the place where the search is to be made or, where applicable, of the neighbouring places".

Of the foregoing it results that "neighbouring areas" are not those "where the search is to be made" in the sense that the prosecutor does not request and the judge does not authorise the search in advance.

The logic of the texts bases itself on the mention in the art. 158 para. (2) a) of the Criminal Procedure Code: the description of the places close to the one where the search is authorised will be noted only if there is a reasonable suspicion regarding the existence or the possibility of transferring evidence, data or people.

The mention of the certainty criteria regarding the transfer of evidence ("existence") is really unnecessary. It is absurd to think that, given that it is known from the beginning that evidence were hidden in other places, the prosecutor would not request and the judge would not authorise an actual search of those premises, but both would limit themselves to describe, without any legal consequence the neighbouring premises. In reality, the premises in discussion will be the object of an actual search warrant, so there will be no question of expanding the search warrant, with the consent of the prosecutor

The hypothesis concerning the possibility of transferring the evidence is the hypothesis that will actually be of importance for this discussion. It is envisaged the situation where the prosecutor knows that evidence are to be found in a certain place, but has also some indications that, in the context of judicial authorities' intervention, they could be transferred to a neighbouring place. For example, in a case of smuggling, it is known that cigarettes are stored in a shed in the yard of the perpetrators, but studying the perimeter in advance, it appears that there is an opening, through a window, to the adjacent courtyard belonging to a company or a relative; there is therefore the risk that goods would be thrown into the yard. The prosecutor has no certainty that the assets will be transferred, but the risk is real.

In such a situation, it will not require a search for the adjacent premises, but, as it is reasonably expected for the goods to be transferred, this place will be described in the request for the search warrant, so the judge would be informed on the assumption that, if necessary, the search will continue in these neighbouring places.

We believe that the provisions of art. 158 para. (3) of the Criminal Procedure Code are in this sense. If, during the search, the prosecutor actually notes that goods have been transferred to a neighbouring property, which means that the initial suspicion is confirmed, the search warrant will be valid for this place too, which is also indicated in the search warrant. In other words, noting "the reality on the ground", the prosecutor only assess the need and effectiveness of extending the activity in these circumstances, allowing the continuation of the search in the neighbouring place stated in the warrant. Basically, we can say that in this situation, the search warrant issued by the judge authorised the search in a certain place and if adjacent conditions are met in the adjacent places too (if the suspicion of the prosecutor is confirmed) .

It is important to note that the provisions of art. 158 para. (3) of the Criminal Procedure Code can not be interpreted autonomously, outside the connection with the provisions of art. 158 para. (2) a) and of art. 158 para. (7) f) of the Criminal Procedure Code. If, during the search, there is a transfer of evidence on a property regarding which no previous suspicion existed and which was neither indicated in the warrant, we believe that the prosecutor is not entitled to approve the extension of the search warrant.

Any other interpretation would lead to the conclusion that art. 158 para. (3) of the Criminal Procedure Code establishes a true exceptional hypothesis, in which case the search is carried out without any authorisation from the judge (who does not know about the existence of the property,

since the prosecutor identified the place only during the search) in a place that is not provided in the warrant (occupied, in many situations, by people who have no connection with the criminal case) and only based on a simple allowance given by the prosecutor. However, such an interpretation would make the provisions of art. 158 para. (3) of the Criminal Procedure Code be in breach of those of art. 27 para. (3) of the Constitution, which states that only a judge can authorise searches.

If in criminal procedure the balance and protection of individual rights are ensured not only by the legal provisions but also by the intervention of judicial authorities and the unclassified character of the criminal process for the stakeholders, we can not overlook that the interference in private life exists also within other legal procedures, falling outside the criminal process and those procedures are typically not characterised by publicity. Therefore, in Chapter IV of the thesis we analysed the technical surveillance of the individual by intelligence services, for reasons of national security. The importance of the theme is revealed, on the one hand, by the fact that the subject was rarely discussed in the legal doctrine in Romania, and on the other hand by the fact that the information provided through such processes may be included as evidence in criminal proceedings.

Thus, according to art. 11 para. (1) d) of Law no. 51/1991, information regarding national security may be disclosed to the prosecution authorities when they are in relation to an offence

Also, according to art. 21 para. (1) of Law no. 51/1991, when the data and information of interest to national security resulting from authorised activities indicate the preparation or commission of an offence under criminal law, they are retained and transmitted to the competent prosecution bodies, in the form of a referral report drafted in accordance with art. 61 of the Criminal Procedure Code. These provisions are supported by art. 61 para. (1) c) of the Criminal Procedure Code, which assigns the quality of fact-finding organism to the institutions responsible for matters of national security, for offences discovered during the completion of their duties, prescribed by the law, but also by art. 66 para. (3) of Law no. 304/2004, which requires intelligence services to provide to the competent prosecutor's office all the raw data and the information, held in connection with an offence.

The use of information arising from technical surveillance in national security issues as evidence in criminal proceedings is permitted under art. 139 para. (3) sentence II of the Criminal Procedure Code.

The law provides no restrictions regarding the type of offence which might be discovered. It is not necessary to be an offence against national security. The obligation to notify the judicial

authorities subsists even if the facts are not prosecuted ex officio. In judicial practice it was decided that there is no problem of legality and it does not constitute grounds for exclusion of evidence the fact that the defendant was not prosecuted for any of the acts referred to in art. 3 of Law no. 51/1991, but for another offence, because the national security warrant is subsumed under the provisions of special law, and not those of the Code of Criminal Procedure. On the other hand, during the criminal trial changes of the legal classification can occur. The duty of all authorities, including those with responsibilities in national security, to provide the prosecuting authorities all information which may constitute evidence in criminal proceedings, regardless of the means by which they were obtained, was established by the Romanian legislature not only by means of special legal provision but also by means of general rules of criminal procedure. Romanian criminal procedure legislation does not provide for any express restriction on the use of the evidence in a criminal trial if the information was provided by intelligence services.

The written record constitutes the document instituting the criminal investigative body and will be accompanied by:

- the physical support that contains the original digital content of intercepted conversations and communications (and the written transcript) or, where applicable, of the recorded images. They represent the evidence supporting the findings in the wording of the report;

- National security warrant, proposed for total declassification or for declassification in extract.

Annexation of the warrant is needed to prove the legitimacy of the resulting information provided to the criminal investigative body. The lack of the warrant on file results in the exclusion of evidence, as they can not be censored in terms of legality in enforcing the intrusive measure.

Declassification of the national security warrant is necessary to ensure the suspect or defendant the opportunity to know its contents, so as to organise his defence. Declassification is not accomplished by the intelligence service which prepared the report, but by the warrant issuer, in this case The High Court of Cassation and Justice. Declassification may be total or in excerpts (i.e., a partial declassification would occur when evidence resulted from one activity among many authorised by a judge and the other activities have to remain classified). We believe that any refusal to declassify can be safeguarded by the decision to allow the defender access to warrant, under art. 352 para. (11) of the Criminal Procedure Code: otherwise, the evidence can not be used as grounds for a conviction [art. 352 para. (12) Criminal Procedure Code.].

The physical support containing the conversations or communications intercepted, or, where appropriate, the recorded images will have in its turn to be declassified by the intelligence service or at least access to these evidence has to be ensure for the defender of the accused. Otherwise the provisions of art. 352 para. (12) of the Criminal Procedure Code are applicable as well, and the conversations, communications or images can not be grounds for a conviction

In this regard a case from the European Court of Human Rights retained our attention as the Court admitted, however, that the right to ask for disclosure of relevant evidence is not absolute; in specific criminal proceedings there may be competing interests - as those regarding national security - that can be weighed against the rights of the accused. In some cases the concealment of evidence from the defence can appear as necessary in order, to safeguard certain important public interest..

In our opinion, these considerations remain void in domestic proceedings. Although the case law of the European court applies with priority in national law, art. 20 para. (2) of the Constitution states that, in the event of any inconsistency between the covenants and treaties on fundamental human rights to which Romania is a party and internal laws, the international regulations shall prevail "unless the Constitution or national laws comprise more favourable provisions". The principle is therefore the enforcement of the most favourable provision regarding human rights, whether internal or international. Or, in the situation analysed, the more favourable provisions for the defendant is the national law [art. 352 para. (11) - (12) Criminal Procedure Code], taking into consideration that it does not allow a conviction based on evidence to which the defence had no access.

Overall, analysing the legislation on national security, we find a positive aspect concerning the interest of the legislature in prescribing adequate safeguards against unjustified intrusion into the privacy of individuals. National security legislation was harshly and constantly criticised by the European Court of Human Rights; since February 1st, 2014 we can see an attempt, partly successful, to align the national provisions with the requirements arising from the case law of the European court. For example, the intrusive methods that intelligence services can use for reasons of national security were clearly listed, a limit on the duration for which these measures can be used has been imposed, the procedure for obtaining authorisation on these measures from the competent authority was detailed.

Although undoubtedly positive, in our view the legislative process in this area remained half way. We noticed for example such legal provisions which establish the control of a judge in terms of

how information regarding national security is collected by methods which restrict the exercise of fundamental civil rights. However, we have emphasised that, while the magistrate has no access to files held by the intelligence service, this control is likely to turn into one rather artificial. We also noticed - in a positive note - the regulation regarding mandatory information of the surveilled person once the measures have ceased. None the less we stated that the wording of the exceptions to this obligation (exceptions that are permitted by the European Court of Human Rights), is creating a situation where the roles are reversed: the notification becomes the exception, the lack of notification becomes the rule.

The role of intelligence services in today's society, threatened by extreme forms of terrorism and frequent cyber attacks (to refer only to a small part of the risk) is undoubtedly essential for the preservation of democracy. We do not believe that a functioning state can be conceived without the work that these public institutions are carrying out and its necessity becomes more acute every day. Denying this reality is merely an expression of attitudes of bad faith. We wonder under these circumstances why our country's legislation still leaves room for doubts and suspicions on what must be the lawfulness of the secret process of obtaining information, creating a permanent impression of bias and a constant attempt to bypass outside and independent control of national security activity. We believe that the enactment of clear rules that eliminate the idea of formal control would respond more appropriately to the imperatives of a balanced society that wants to evolve towards Western civilisation.

Chapter V is dedicated to institutions that fall outside of the scope of proceedings in criminal matters or investigations of threats to national security, analysing still an issue as important as the criminal policy of the state, namely the situation of persons that are living their private life under strict supervision and under the control of state authorities. When discussing the privacy of persons deprived of their liberty we are not in the presence of punctual interference from public authorities, but in a hypothesis circumscribed to privacy restrictions and interference, this time mainly preventive.

The right of every individual to know the personal data held by state authorities and the way they are stored and the individual’s ability to control information flows is transformed, in the case of convicted persons, in the right to inspect individual file and obtain copies of existing documents in the file, which has as a premise the lack of control of the individual regarding personal data being collected and stored in the prison.

The reason we considered the analysis of the situation of convicted persons necessary is mainly determined by the overthrow of the rights recognised. Aspects that for people at large are a normal state of privacy for prisoners constitutes often an exception from which they are benefiting under certain conditions and mostly temporary. One aspect within the meaning of the above aims inmate communication with the outside world, either directly or by means of distance communication. By art. 63 of Law no. 254/2013 the prisoner right to correspondence is guaranteed, both with the public authorities (right to petition) and with his social circle but only within certain limits, for a short duration of time and with the possible termination by means of disciplinary law.

Likewise, for liaising with people from the inner circle, the law provides that the convict may receive visits and packages, has to be informed about the special family events and has the right to receive intimate visits, but the right is circumscribed to safety rules in the detention space and also to the behaviour of the detainee.

Analysing the legislation in respect of enforcing private life rules but also limiting this right has led us to dedicate the last chapter of his doctoral thesis to conclusions and proposal of legislative and jurisprudence changes. Overall, the thesis is intended to be an analysis of how the Romanian state decided to respect the positive obligations to protect private life and what are the methods through which the negative obligation is met in the case of the most important social value for the human being: his private life.

The research was done with the desire not to avoid any of the issues of importance to this subject. The proposed solutions are based on arguments derived from the national law and Western law and from the jurisprudence of the national and foreign courts. The interpretations are not intended to be seen as exhaustive and do not claim to be the only possible or permissible. But there are always logical and legal arguments, that derived from the idea that in legal research, any discussion is based on the essential question "Why?".

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