

VIOLATING THE RIGHT TO PRIVATE LIFE UNDER THE NEW ROMANIAN PENAL CODE

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Abstract

It is more and more difficult nowadays that the private life of a person to remain out of other people intervention and out of public visibility. In this context, the present paper is concentrated of a new criminalization included in The New Romanian Penal Code - article 226 from this law. It is about the violation to the right to private life which is for the first time incriminated by the Romanian Penal Code.

Keywords: *private life protection, criminal liability, The New Romanian Penal Code, crime*

Introduction

1. This study focuses on the new legal framework concerning the private life penal protection, as it results from the New Romanian Penal Code. It is well known that, nowadays it is more and more difficult nowadays that the private life of a person to remain out of other people intervention and out of public visibility. That is why the Romanian legislator felt the need to create a special chapter dedicated to the facts which violate the domicile and the private life.

2. From our point of view it is very important for all the actors involved in applying the penal law to correctly understand the law, because this is the indispensable premise for a correct application in particular cases. That is why the present study aims to analyze the constitutive elements of the offence incriminated by the article 226 New Romanian Penal Code and to explain them in accordance to some settlements of the European Court of Human Rights.

3. We will use the monographic analyze method to reveal the main elements of the crime of private life violation. Also, the study will focus on the way the European Court of Human Rights case decisions influenced the new criminalization. Moreover, we will put the new offence in the larger framework created by the legal rules included in the Chapter IX from the Title dedicated to the crimes against the person from the special part of the New Romanian Penal Code.

4. In terms of the Romanian doctrine in the field of interest, the present study has the merit to be among the first studies ever published on this topic. At national level it was already observed that the European Court of Human Rights pays a special attention to the domicile and private life protection. An important number of decisions of the European judicial institution were given in this domain and realized a large concept of private life, which cannot remain out of penal law protection. The Romanian legislator accepted in 2009 this perspective.

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A new penal code and a new conception on private life protection.

In June 2009, the Romanian Parliament adopted the Law no. 289 concerning the New Romanian Penal Code¹ which is about to enter into force in short time². This new law abolished the Law no. 301 from 2004³ concerning a former project of penal code, and the Law no. 294 from 2004 on execution of punishments and measures ordered by the court in criminal proceedings⁴, two normative acts which have never been into force⁵. In this way, it is possible for Romania to have in a short time a new Penal Code, a modern one, adapted to the need to combat more efficient the nowadays antisocial behaviours.

The new code was elaborated in a period during which Romania was the subject of several condemnation in cases brought in front of European Court of Human Rights by its' nationals. That is why the Romanian legislator made consistent efforts to adapt the new code to the European standards. This effort manifested also in the field of private life protection.

A clear proof of this effort is the fact that in this legal instrument there is a special chapter dedicated to the offences against the private life. This chapter has no correspondent in The Penal Code which is into force since 1969, but has in its content both new offences definitions (the violation of professional office) and definitions of some traditional offences (the violation of the domicile).

In the legislator's new conception, a special chapter is needed in order to assure better protection for this important social value. In this way, the importance of the value will be stressed and all the society will receive the right message.

In this chapter, there are four articles which refer to crimes traditionally known by the Romanian legislation: the violation of the domicile (article 224 New Romanian Penal Code), the disclosure of the professional secret (article 227 the New Romanian Penal Code), but also, to crimes defined for the first time in our legislation: the violation of the professional office (article 225 New Romanian Penal Code) and the violation of the private life (article 226 New Romanian Penal Code).

The social value protected by all these legal norms is represented, according to the doctrine, by all the social relations which refer to the people's intimacy and to the right to have a normal life, with the respect of private life against the acts that could endanger it⁶.

The right to private life from the european court of human rights perspective.

According to the article 8 from The European Convention of Human Rights:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

¹ Published in the Romanian Official Journal, First Part, no. 510 from 24 June 2009.

² According to article 446 from this law, the new code will enter into force at a moment to be indicated by a law which will be especially adopted to rule the entering into force of the code. Until now, this law is still a draft.

³ Published in Romanian Official Journal, First Part, no. 575 from 29 of July 2004.

⁴ Published in Romanian Official Journal, First Part, no. 591 from 1st of July 2004.

⁵ This technique was possible due to the modification of Law no. 24 from 2004 concerning the legislative technique rules (published in Romanian Official Journal, First Part, no. 777 from 25 August 2004 – by the Urgent Ordinance of the Govern no. 61 from 2009 - published in Romanian Official Journal, First Part, no. 390 from 9 June 2009). According to a new text, under article 1¹, a normative act may be modified and even abolished before the moment of entering into force. So, the Law 301 from 2004 is not and never were the active Romanian Penal Code, even some electronic documentation sources indicate it in this position – ex. <http://legislationline.org/documents/section/criminal-codes>.

⁶ V. Dobrinioiu, N. Neagu, Drept penal, Partea specială, Editura Wolters Kluwert, București, 2011, p. 176.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

As observed, the Article 8, in the first part, paragraph 1, sets out the precise rights which are to be guaranteed to an individual by the State – the right to respect for private life, family life, home and correspondence. In its second part, the Article 8 paragraph 2 makes it clear that those rights are not absolute in that it may be acceptable for public authorities to interfere with the Article 8 rights in certain circumstances. These must be only interferences which are in accordance with law and necessary in a democratic society in pursuit of one or more of the legitimate aims listed in Article 8 paragraph 2 will be considered to be an acceptable limitation by the State of an individual’s Article 8 rights⁷.

In the doctrine it is observed that, concerning this article, that The Court has held that, given the fundamental nature of the Convention rights, the first paragraph should be widely interpreted, and the second one narrowly. Rights must therefore be “stretched”, and limitations limited. Also, individuals need only show that there was an interference with a right protected by the Convention in their case; the State then bears the onus to prove that that interference was lawful and justified in Convention terms.⁸

As it concerns the definition of the private life, as a social value, protected by the penal law, according to the European Court, this is a broad concept which is incapable of exhaustive definition⁹. The only consensus which exists is that the concept is clearly wider than the right to privacy, however, and it concerns a sphere within which everyone can freely pursue the development and fulfilment of his personality. In a particular decision, the European Court stated that it would be too restrictive to limit the notion of private life to an “inner circle” in which the individual may live his own personal life as he chooses and to exclude there from entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings¹⁰.

It is said that the 8th article of the European Convention of Human Rights is only the first text from a series of four articles which protect rights meaning the social respect due to the individual¹¹. In this series are included: the right to the private life and to a family life, the right to domicile and to correspondence (article 8), the right to the freedom of thought, conscience and religion (article 9), the freedom expression, and to information (article 10) and the freedom of association (article 11).

In this context, it is accepted by the doctrine that the respect for the private life is a complex right, with multiple aspects, as it results from the European Court of Human Rights jurisprudence. It includes, for instance, the privacy (the private life secrecy), the right to a personal identity and, as a new come, the right to a healthy natural environment¹².

⁷ Ursula Kilkelly, The right to respect for private and family life. A guide to the implementation of Article 8 of the European Convention on Human Rights, <http://echr.coe.int/NR/rdonlyres/77A6BD48-CD95-4CFF-BAB4-ECB974C5BD15/0/DG2ENHRHAND012003.pdf>

⁸ Douwe Korff, The Standard Approach under Articles 8 – 11 ECHR and Article 2 ECHR, http://ec.europa.eu/justice/news/events/conference_dp_2009/presentations_speeches/KORFF_Douwe_a.pdf

⁹ Costello-Roberts v. the United Kingdom, judgment of 25 March 1993, para. 36.

¹⁰ Niemietz v. Germany, judgment of 16 December 1992. 11 Appl. No. 8257.

¹¹ Corneliu Bărsan, Convenția europeană a drepturilor omului, Comentariu pe articole, Editura C.H. Beck, București, 2005, pag. 593.

¹² Bianca Seleşan-Guțan, Protecția europeană a drepturilor omului, Editura C.H. Beck, București, 2004, p. 150.

The first component refers to the private life secrecy, as a right to live protected from the foreign eyes, as a right to be left alone. This right includes also the protection of the domicile, as the space the private life takes place. Under this prerogative enters the private opinion secrecy, protected against the correspondence secret violations or against any modern investigation methods authorities might use: tapping, creation and communication of personal data files, storing and using data without person's accord¹³.

The protection is extended over the particulars' intrusions and that is why the state has the duty to prevent and to punish the abusive behaviours by a strict legal regulation of the private detectives and journalists' responsibility.

The absence of protection against press intrusions or the disclosure in the media of highly intimate, non-defamatory details of private life has not yet been subject to significant challenge in European Court of Human Rights jurisprudence. Some complaints have been declared inadmissible for failing to exhaust domestic remedies¹⁴. Determination of whether issues might arise under private life in relation to press intrusion might be influenced by the extent to which the person concerned courted attention, the nature and degree of the intrusion into the private sphere and the ability of diverse domestic remedies to provide effective and adequate redress.

This is the component the Romanian legislator from 2009 chose to protect by criminalizing the facts described by the article 226 from The New Romanian Penal Code.

The Private Life Violation Under The New Romanian Penal Code

Under all these influences, in the article 226, the New Romanian Penal Code incriminates for the first time in Romania, the private life violation. The offence consist, in its basic form, in a behaviour of a person who affects the private life of a person, without legal justification, by photography, by capturing or recording images, by listening with technical instruments or by tapping a private conversation held in a house, in a room. In a close relationship with this first form, the second paragraph of the article 226 of the Romanian New Penal Code states that represent an even more serious offence these facts: the unlawful disclosure, dissemination, presentation or transmission of sounds, conversations or images provided in the first paragraph to another person or to the public.

According to paragraph 5 from the article 226, represents an offence even the fact to place without an authorization technical devices to audio or video tapping, in order to commit the private life violation.

According to the Romanian doctrine, the norm from the article 226 New Romanian Code respond to a necessity to prevent the unlawful use by the press, by any person or by some specialized authorities of modern technical recording instruments in order to tape private conversation and to interfere with the victim 's right to privacy¹⁵. In the same time, it is observed that the new criminalization is formulated in a manner which allows the press to fulfil its role in a democratic society, and to realize a correct equilibrium between the right to private life and the freedom of expression¹⁶.

¹³ *Leaner v Suedia Case*, 1987.

¹⁴ Case no. 18760/91 v. Ireland, 1993; Case no. 28851/95 and 28852/95, *Spencer v. the United Kingdom*, 1998.

¹⁵ P. Dungan, T. Medeanu, V. Paşca, op cit., p. 247.

¹⁶ V. Dobrinioiu, N. Neagu, op. cit., p. 175-176.

That is because the legal text itself, in the paragraph (4), indicates four causes to justify the facts described by the rest of the provisions. In these cases the fact will lose its unlawful character: the author participated to a conversation with the victim and taped the sounds, the images or the conversation in this occasion, having a legal interest to do this; the victim explicitly acted in a way to make her (him) seen or heard by the author; when the author tapes a person committing a crime or proves an offence; when the author tapes public interest information, and their divulgation brings more important advantages than the prejudice created for the individual.

The criminal law specialists¹⁷ have already expressed their concern about this last hypothesis, because it will be impossible as in concrete situations to determine when the prejudice produced by the divulgation act is less important than the prejudice for the private life. That is because often this prejudice has a moral nature, which makes it impossible to quantify.

Such an offence might be committed in the future by a private detective hired by a jealous wife who uses technical recording at distance instruments to tape images or conversations the husband has with his mistress in her home¹⁸.

Because of the way the legal text is formulated, there are already disputes in the doctrine concerning the incriminated behaviour. For instance, in one opinion, this element is represented by the „private life perturbation”, seen as any action which facilitates by all means a direct contact with someone's private life¹⁹. In another opinion, the illegal behaviour consists from facts such as shooting, capturing or recording images, listening with technical instruments or tapping a private conversation held in a house, in a room²⁰. We agree this second opinion, because the private life perturbation is the result which the offence produces and not the interdicted behavior.

There are some essential conditions to be met in order to establish the offence was committed. Firstly, it is necessary to see that all the acts described by the law were committed without having a valid legal order to allow them, or, without having the victim's consent. This special condition takes into account the fact that, under some particular circumstances, it is possible for the judicial authorities to tape the sounds, the conversations or the images without breaking the law. For instance, according to the article 138 from the New Romanian Penal Procedural Code, during the investigations may be used some special survey techniques. Among these techniques there are: the interception of conversations and communications, the access to a computer, the video, audio photo survey, the localisation or the taking of a person, getting the phone calls listing, etc. So, it is possible to conduct all this activities without committing the offence defined by the article 226 from the New Romanian Penal Code. But, in order to remain in the legal framework, all the conditions imposed by the law must be respected. For instance, according to the article 140 from this legal instrument, the technical survey is possible only after the judge for rights and liberties authorises it. In special cases, the prosecutor has also this possibility, but only for a short duration (48 hours).

Secondly, in the assimilated modality, it is necessary to observe that the offender disseminated the sounds, the conversations or the images to other people or to the public. In the doctrine it is opinionated that, in this modality, when the person keeps the sounds, the conversations or the images for himself, the offences defined by the article 226 paragraph 2 the New Romanian Penal Code cannot be committed²¹.

¹⁷ P. Dungan, T. Medeanu, V. Paşca, op cit., p. 254.

¹⁸ V. Dobrinioiu, N. Neagu, op. cit., p. 176.

¹⁹ P. Dungan, T. Medeanu, V. Paşca, op cit., p. 251.

²⁰ V. Dobrinioiu, N. Neagu, op. cit., p. 176.

²¹ P. Dungan, T. Medeanu, V. Paşca, op cit., p. 253.

Defined as we have seen, the private life violation offence from the article 226 of the New Romanian Penal Code has a modern content, in accordance with the legal texts from other European countries legislation.

For instance, the Penal Code of Spain, in the first chapter from the 10th title defines „The offences against the intimacy, the right to a personal image and the right to the privacy of the domicile”. According to the article 197.1 from this chapter, a person will be punished for facts committed in order to discover someone's secrets or to affect someone's private life, without the victim's consent will use personal documents, letters, postal messages, electronic postal messages, or intercepts he victim's communications or uses interception, transmission, tapping technical instruments.

In the same way, the Italian Penal Code regulates, in the article 615 bis, the offence of illicit interference with someone's private life. According to this text, anyone who, using audio or video taping devices gets in unlawful way information or images which affect someone's private life will be punished under this legal text.

Conclusions

1. The present paper has as a starting point the Romanian legislator's decision to include under the penal law protection a new area – the private life.

The decision was taken under the influence of some European Court of Human Rights decisions. Moreover, the social value protected by the legal norms from this chapter is defined not by the national legislation, but by the European judicial institution decisions. The new offence is about to become effective in particular situations (once the New Romanian Penal Code will enter into force). That is why the present paper analyzed its particularities in order to facilitate a better understanding of the new legal text.

2. This study represents a documentation source for every person interested in criminal law field, both theorists and practitioners. The impact on the doctrine will be an important one because there are only a few such studies published in Romania, which reveal the specific elements of a new offence incriminated by The New Romanian Penal Code – the private life violation. Also, the paper has the merit to include an analysis of the way the European Court of Human Rights jurisprudence has influenced the definition included in the article 226 from The New Romanian Penal Code.

The study will be interesting for the practitioners in order to have a doctrinal guidance when the new law will enter into force. In this way, the text will be better understood and better applied.

3. This study opens the perspective for future researches related to this topic. It is about a new domain included under the influence of the Romanian penal law and that is why such future studies should concern some particular aspects of the right to private life and the way penal law succeeds in creating effective guaranties for their protection. It might be interesting to observe the component of the right to a healthy natural environment and the way that the penal legislation protects it. A subject like this is interesting from the both theoretical and practical perspective as well.

References

- V. Dobrinou, N. Neagu, Criminal Law, Special Part, Wolters Kluvert P.H., Bucharest, 2011.
- Ursula Kilkelly, The right to respect for private and family life. A guide to the implementation of Article 8 of the European Convention on Human Rights, <http://echr.coe.int/NR/ronlyres/77A6BD48-CD95-4CFF-BAB4-ECB974C5BD15/0/DG2ENHRHAND012003.pdf>
- Douwe Korff, The Standard Approach under Articles 8 – 11 ECHR and Article 2 ECHR, http://ec.europa.eu/justice/news/events/conference_dp_2009/presentations_speeches/KORFF_Douwe_a.pdf
- Costello-Roberts v. the United Kingdom, judgment of 25 March 1993, para. 36.
- Corneliu Bârsan, European Convention of Human Rights, C.H. Beck P.H., Bucharest, 2005, pag. 593.
- Bianca Selejan-Guțan, European Protection of Human Rights, C.H. Beck P.H., Bucharest, 2004.
- P. Dungan, T. Medeanu, V. Pașca, Criminal Law, Special Part, Universul Juridic P.H., Bucharest 2010.