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CRIMINAL PROTECTION OF PRIVATE LIFE

Abstract of the doctoral thesis

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INTRODUCTION

The last few years have shown us that one of the fundamental human rights that raises the most discussions and shows some spectacular developments is the right to private life and what this concept has come to encompass. However, from a historical perspective, such great importance has not always been given to this component of the human personality.

The idea that one of the attributes of a human being is his private life has always been accepted ona social level, but without entering the scope of the existing legal norms. Later, with the development of social relations and means of communication, two of the important elements, domicile and correspondence, began to benefit from legal protection, the problem of private life in its entirety still remaining unaddressed for a long time.

The concept of the right to private life, as a fundamental human right, is relatively new, developing only after the Second World War and since then enjoying wide recognition through international treaties and fundamental laws, states assuming to protect this socio-legal value and since then continuing to legislate in the field.

The development of the protection of this new fundamental right, started relatively recently compared to other traditional rights, however, proved particularly fast, domestically and internationally, in some places even unpredictable. In this sense, we can say that, in addition to the principle regulations, states have adopted numerous secondary civil and even criminal norms to sanction violations of private life. However, all states and international courts have shied away from providing an exhaustive definition of the concept of private life, within which more and more aspects of individual existence continue to be introduced.

At the same time, internally, we observe frequent changes of perspective coming from the legislator, choosing, for example, at a given moment not to protect in any way a certain element of private life, moving directly to increased criminal law protection and later returning only to protection in tort. From this point of view, the protection of private life, with all its components, has caused numerous changes in criminal policy, in both its senses, the legislator trying every time to keep up with the development of international practices and new technologies that facilitate such violations.

Although at this moment the international and domestic regulations in the field of privacy protection are enjoying an unprecedented development, we note that the enactment of new laws regarding the protection of new elements of private life represent an essential focus of the activity of the international community, which tries to identify then those rights that

present the necessary importance to receive international protection but which have not yet been subject to attention.

To all these elements, we can also add the particularly rapid evolution of technology, methods of investigating crimes, surveillance of the population and the possibilities of limiting various components of private life.

Last but not least, we consider that the protection of private life, more than other fundamental rights, is highly influenced by a series of social or political factors, being dependent on the development of society, on the relationship between individual rights and the rights of the state and on the political options from a certain moment. By way of example, we consider that the protection of private life is a central element of everyday concerns only within a highly developed democratic society, within which other traditional fundamental rights already enjoy constant and adequate protection.

Thus, precisely the volatility of the concept of private life in the past but also in the future and its dependence on the social factor are two of the arguments for which we consider this research to be of interest, the paper proposing, in its initial part, to present the evolution of this concept, from a simple attribute of human personality to a fundamental right. In this approach, the historical and social context in which the concept evolved in this way is presented in parallel. The sources of international and constitutional law that ruled on the protection of private life in general are presented chronologically, thus recognizing the importance of the right and highlighting the necessity to adopt the necessary legislation in order to achieve this goal. Similarly, the evolution of the civil and criminal rules adopted in order to protect private life as a matter of principle is presented, taking into account the existing provisions in the special legislation.

Later, in the absence of an internal or international definition of the concept, the research focuses on identifying the evolution of all the attributes that make up the private life of the individual, trying to reach a much wider spectrum than the traditional one of the four crimes against private life enacted in the Criminal Code. Thus, the research was mainly related to the jurisprudence of the European Court of Human Rights, which is, in our opinion, the body that contributed decisively to the development of this right and the broadening of its sphere of protection.

While analysing each new identified attribute, the paper presents to extent to which is also recognized by the domestic legislation and whether it benefits from legal protection through the norms of civil law or criminal law, also presenting the evolution of the regulation. Given the lack of certainty and tradition of certain analyzed criminal norms, we consider an

integrated approach necessary, with references also to civil law provisions, in order to establish whether the state has adequately fulfilled its positive obligation to enact appropriate legislation for the protection of that component. Therefore, we believe that we can anticipate new changes in the scope of criminal law protection, in the sense of narrowing or widening it, regarding the private life of the person. Although essential for social development, we do not consider that this individual right defends an attribute of the human being so important to include it in the category of absolute rights, being a relative right, susceptible to legitimate limitations. Thus, throughout the research, regarding each of the analyzed components, the work highlights the differences between an interference in the private life of the person and a violation of this fundamental right. From this point of view, the research always pays more attention to the special situation of prisoners, minors and the relationship between employee and employer. High importance is also given to the strength of the defense of public order and national security argument.

Given the current scope of the concept of private life, the work addresses in separate chapters the issue of criminal protection of the major components of private life, namely: domicile, professional office, secrecy of correspondence, person's image, direct communications.

The work includes elements of comparative law, from a constitutional and criminal law perspective, with the aim of highlighting the impact of the social factor on the legal protection of private life and the context in which this regulation has also developed in Romania. The final chapter is based on the chronological evolution of the regulation and the jurisprudence of the European Court and analyzes globally to what extent private life, with all its elements, enjoys adequate criminal protection in Romanian criminal law. In the points where dysfunctions have been identified by referring to the international or social context, de lege ferenda proposals are made and the need for jurisprudential evolution is highlighted.

THE CONCEPT OF PRIVATE LIFE

Private life has always been recognized as an attribute of the human personality, but it was not given special importance by the early normative acts, legal protection being granted only to some of the elements that compose it. Moreover, prior to the appearance of its theorization as a fundamental right, private life was defined exclusively by means of the rights and inviolabilities it included, without the concern of drafting an exhaustive, integrative definition. Mainly, both the concept and legal protection emphasized the inviolability of domicile and correspondence, these two elements benefiting from criminal protection in most

developed states since the first codifications in constitutional and criminal matters. We believe that the protection of private life before the Second World War was at an adequate level, since the complexity of social relations, the means of communication and the evolution of technology din not demand more complex forms of protection.

The real development of the protection of private life began with the development of theories regarding human rights, respectively with the appearance of the first written constitutions, by centering legal protection on the individual and the concern to limit the political power organized by the state. Thus, even starting from the 18th century, it was considered that there is a set of rights and freedoms that represent essential gifts of nature, which no one can touch in any way[1]. Human rights were thus considered to be the prerogatives conferred by domestic law and recognized by international law to each individual, in his relations with the collective and with the state, which give expression to some fundamental social values and which aim to satisfy essential human needs and legitimate aspirations, in the economic, social, political, cultural and historical context of a certain society[2]. In a similar way, given that private life is a personality right, it was considered one of the extrapatrimonial prerogatives intimately attached to the individual, which expresses the quintessence of the human being, intrinsic to the individual[3].

The inclusion of the right to private life in the category of fundamental rights contained in the first international treaties adopted after the Second World War represented the confirmation that this personality attribute represents an essential subjective right for the development of the human being and the formation of democratic societies, which must enjoy a minimum level of protection on the territory of all contracting states. The importance given to the right to private life and the evolution of the concept can also be observed through the chronological analysis of the regulations regarding its protection, both at the international, regional and domestic levels, constitutionally and through civil legislation.

Regarding the interpretation of the provisions of Art. 8 ECHR, first of all, it must be emphasized that, as in the case of other concepts, the European Court estabilshed private life as an autonomous concept. In other words, the existence of its protection and the components attributed to it from a conventional perspective do not depend on a domestic law qualification

[1] J.J. Rousseau, *Discurs asupra originii și fundamentelor inegalității dintre oameni*, Editura Științifică, București, 1958, p. 145-146.
[2] Adrian Năstase, *Drepturile omului, religie a sfârșitului de secol*, Institutul Român de Drepturile Omului, București, 1992, p. 36.
[3] Călina Jugastru, *Reflecții asupra noțiunii și evoluției drepturilor personalității*, Analele Institutului de Istorie "G. Barițiu", Series Humanistica, tom. V, Cluj-Napoca, 2007, p. 326.

or definition. Noticing the difficulties and futility of defining private life, the European Court's response was decisive in one of the most important judgments in the matter, showing that it is neither possible nor necessary to provide an exhaustive definition of the notion of private life. However, the Court stated that it would be excessively limiting for the notion to be restricted to the intimate, inner circle where the subject of law leads his personal life, far from any outer interference. Therefore, the protection of private life must include, to a certain extent, the individual's right to maintain and develop relationships with his peers. We consider this firm position of the Court correct, its jurisprudence demonstrating that a possible definition of the concept could later limit the evolution of protection and the ability to adapt to new situations.

Thus, precisely in order to ensure effective protection, all domestic and international bodies avoid the exhaustive definition of private life in legislation or jurisprudence, being aware of the importance of maintaining an open path for evolution in this matter. The preoccupation to define the concept of private life therefore constantly belongs only to the doctrine, showing that it represents the right to privacy, the right to be left alone, the right to a restricted and anonymous life[4], the right to a space in which to live without no outside interference[5]. These extreme general definitions confirm in our view the extremely wide variety of situations that they try to cover and the reason why there has been no try to enact an exhaustive regulation.

In the absence of an adequate definition of privacy, both domestically and internationally, the only way to clarify this concept is to determine its components. As shown, this approach is not a simple one either, the content varying depending on the period, the environment and the society in which the individual lives, the expansion of the notion also due to the general evolution of legal life[6].

Following the same line of thinking that also generated the refusal to provide an exhaustive definition of the concept of private life that is the object of the protection instituted by Art. 8 ECHR, the Court has taken the responsibility that its jurisprudence evolves according to possible political, economic and social changes, the Convention being a living protection instrument that must be interpreted in the light of the present conditions. Thus, the Court showed that, in order to provide an adequate and actual response, to ensure a real and effective protection system, and not theoretical and illusory, it must constantly take into account the

[4] Lindan R., *Le droit de la personalite*, Editura Dalloz, Paris, 1974, p. 16.
[5] O'Flaherty Michael, *Sexual Orientation and Gender Identity*, în Moeckli Daniel, Sangeeta Shah, Sivakumaran Sandesh, *International Human Rights Law*, Editura Oxford University Press, New York, 2010, p. 334.
[6] Radu Chiriță, „*Convenția Europeană a Drepturilor Omului. Comentarii și explicații*", vol. II, Editura C.H. Beck, București, 2007, p. 37.

changing conditions at the level of the entire Council of Europe, emphasizing that a possible failure in this endeavor would be equivalent to blocking evolution and improvement. Thus, the ECHR considers that it must adapt, for example, in the face of the state consensus that could intervene regarding the norms to be invoked. Moreover, when defining the meaning of the terms and concepts in the text of the Convention, the Court can and must take into account the elements of international law other than the Convention and the interpretations made of these elements by the competent bodies.

Thus, we can say that the notion of private life is continuously defined by the elements considered by the Court, at a given moment, as being part of this general notion. Through this interpretation, the Court also took the role of widening the scope of protection of Art. 8 ECHR in a Praetorian way. By creating autonomous notions (terms of the Convention that are given a specific interpretation), the Court guarantees the existence of a single system of protection, and not 47 national systems based on the interpretations of domestic judicial authorities[7]. The Court has established certain limits in which it can interpret the concepts evolutionarily, showing that, by applying this mechanism, it will not protect a right that was not taken into account at the time of the regulation, thus not being able to reach a jurisprudential expansion of the scope of application of the ECHR. The analysis carried out throughout the entire paper demonstrates how the Court has greatly expanded the scope of the notion of private life, being debatable to what extent it has respected these self-imposed limitations.

The same chapter presents the chronological evolution of the sphere of protection of the right to private life in the Court's jurisprudence, explaining the meaning of the terms used, both in domestic law and in the Court's jurisprudence, indicating the way in which the national legislator protected the respective attributes and highlighting the weight between protection by means of criminal law and those of civil or contraventional law. Later, however, considering the scope of the approach, the research focuses through separate chapters of the work on the following attributes: the inviolability of the domicile, the inviolability of the professional headquarters, the secrecy of correspondence, the protection of the right to the image and of private conversations.

The following elements of private life are thus analyzed: personal identity, sexual freedom, family life, respect due to deceased persons, the right to a healthy environment, the right to physical and mental integrity and to dispose of one's own person, the protection of

[7] Corneliu-Liviu Popescu, *La Declaration universelle des droits de l'homme et la Convention europeenne des droits de l'homme: entre succession et secession*, publicat în Analele Universității din București, seria Drept, nr. 4/2009, Editura C.H.Beck, București, p. 16.

personal data. The evolution of domestic regulation regarding the criminal protection of honor and reputation was also analyzed.

VIOLATION OF DOMICILE

This chapter analyzes the constitutive content of the crime of violation of domicile, provided in Art. 224 of the Criminal Code.

Initially, given the fact that violation of domicile is a traditional crime, the historical regulation and also relevant elements of comparative law are presented. Afterwards, the analysis is carried out following the traditional scheme of the crime.

Among the important aspects, we highlighted that, if the deed is committed by a public official in the exercise of his duties, although the majority doctrine is expressed in the sense of identifying the offense of abuse of office, provided in Art. 297 of the Criminal Code, we appreciate that the recent jurisprudential developments regarding the latter offense require a reevaluation of the opinion. In this sense, the malfeasance does not ensure protection of the social value targeted by the crime of violation of domicile. Last but not least, the positioning of another traditional offense for the protection of private life, namely the offense of violating the secrecy of correspondence provided in Art. 302 of the Criminal Code, in the chapter regardind malfeasances, makes it difficult to understand the real will of the legislator regarding the manner in which criminal protection is granted to the interference of state authorities in various elements of private life. The extensive argumentation of this opinion is carried out in relation to the crime of violation of private life, provided in Art. 226 of the Criminal Code, the crime in question not justifying a different legal treatment.

The situation of private detectives and state bodies with attributions in the field of national security is also analyzed and we have reached the opinion that criminal protection is granted to privacy, regardless of the existence of a valid title for the use of the space, and not the existence of a real right or claim which gives legitimacy to the occupation of that space. Regarding the consequences of a plurality of passive subjects, we appreciate that the absolutization of the generally recognized rule in the matter of crimes against the person may lead to unjustifiably severe legal treatments. Thus, we show that when a single housing unit, an apartment or a house, is broken into, identifying a single crime appears to be the correct solution, the judicial practice being consistent in this sense. We can say that, in such a hypothesis, the perpetrator violates a single intimate space inside which the personality attributes belonging to several passive subjects intertwine. Surely, when a perpetrator breaks into, for example, successively all the apartments in a block of flats, he assumes that he is

violating a multitude of intimate spaces, thus in such a case being no justification for identifiying one single crime.

Throughout the analysis of the objective side of the crime, jurisprudential examples are provided regarding the notions of home, room, dependency and enclosed place. Also, with regard to the essential requirement of the material element, the hypotheses in which the inviolability of the domicile can be restricted are presented in detail. Regarding the consent of the injured person, we appreciate that it does not have to be an explicit, express consent, but the will of the holder of the protected value in the sense of allowing the access of the perpetrator must be univocal and, in the hypothesis where several people live together in the same residence, the consent of one of these for the legal entry into the home, showing no relevance if the other persons do not express themselves or, on the contrary, show their opposition to the entry of the perpetrator.

As regards the subjective side, although we have identified multiple jurisprudential examples in which it was stated that the crime could only be committed with direct intent, we believe that it can also be committed with indirect intent and the purpose is not relevant.

All the hypotheses of the aggravated variant are presented and, as regards the commission of the act by an armed person, it is necessary that the arming takes place prior to the entry or, in the hypothesis of the refusal to leave, it can be carried out afterwards but for the purpose of remaining in that space.

VIOLATION OF PROFESSIONAL HEADQUARTERS

This chapter focuses on the analysis of the constitutive content of the crime of violation of the professional premises, provided in Art. 225 of the Criminal Code. Considering the multiple similarities with the crime of violation of domicile, this chapter is exclusively aimed at the analysis of the passive subject and the notion of professional establishment. The work highlights that, at least from a historical point of view, criminalization is not an absolute novelty in Romanian law, the Criminal Code of 1936 granting criminal protection to a person's "business premises".

As regards the passive subject, the paper shows how the European Court grants legal protection at a similar level to domicile and professional premises, the discussion remaining open regarding the subject of protected right, owner of the damaged legal value. First of all, we highlighted that the incriminating norm itself can be misleading, referring to "premises where a legal or natural person carries out his professional activity", leading to the idea that the passive subject can be both the natural person and legal person. In the same direction, the Court

granted protection within the meaning of Art. 8 of the Convention to both natural and legal persons. However, such a circumstance does not oblige the Romanian legislator to grant criminal protection to the headquarters of the legal entity in any situation, as it is known that the standard of protection imposed by Art. 8 of the Convention does not automatically trigger the need for criminal sanctions. In other words, although the Court protects the headquarters of the legal entity apparently without any reference to the activity of natural persons working in its interest, the provisions of Art. 225 of the Criminal Code may have a narrower scope.

The national scientific literature generally appreciates that the active subject can be any natural person, examples of liberal professions being given in this regard, or any legal person. Starting from the ECtHR jurisprudence, especially the Leveau and Fillion case against France, but also from the international doctrine, we noted that the right to the inviolability of the domicile is recognized to legal persons not in consideration of their corporate interests, but in the interest of the natural persons who compose it[8]. In the same sense, although the holder of the protected right is the legal entity, it only benefits from protection except in consideration of the fact that natural persons conduct a large part of their private life in its premises[9].

Thus, we appreciate that the legal person cannot be a passive subject of the crime provided in Art. 225 of the Criminal Code, the crime affecting the privacy that a natural person should also enjoy at work, the space where he spends most of his time and where he connects most of his social relationships being, to a certain extent, an extension of the classic notion of domicile. Therefore, we believe that it is not the privacy of the legal entity that is harmed, considering the very existence of such a concept to be questionable, but the privacy of the employees of the legal entity that owns the space against which the crime was committed.

Regarding all categories of premises, relevant for the granting of criminal protection is the actual performance of a professional activity by natural persons who have a legitimate expectation of a level of privacy protection within that space. It does not matter whether the natural person in question is an associate or administrator of the legal entity, owner of the form of organization of the liberal profession or just an employee of the natural or legal person that owns the professional headquarters. We therefore appreciate that, on the one hand, the criminal protection of the professional headquarters can be granted in premises that do not constitute a headquarters in the sense of the civil law, but, on the other hand, the simple qualification of a space as a s headquarters and the performance of the publicity formalities provided by law will

[8] Geert Corstens, Jean Pradel, *European Criminal Law*, ed. 1, Kluwer Law International, Haga, 2002, p. 390.
[9] R.Chiriță, *op. cit.*, p. 62.

not automatically lead to granting of criminal protection in respect of that space. Finally, cases of spaces where permanent professional activity is not carried out, for example archives, warehouses, technical rooms, and professional spaces open to the public during a certain time interval are also analyzed, concluding that not every headquarters has the ability to allow employees to demonstrate of private life. In this crime, unlike home invasion, injury is not presumed, the home being primarily and primarily affected by the private life of the individual, so that unauthorized intrusions automatically damage the tenant's privacy, while the workplace has mainly another destination, sometimes not being able to ensure any degree of privacy to the employees.

VIOLATION OF PRIVACY

This chapter is the central part of the thesis, analyzing this criminalization with a novelty character for Romanian criminal law, respectively the crime of violation of private life provided in Art. 226 of the Criminal Code. Initially, the context of the ECtHR jurisprudence that created the need for such an incrimination and the relevant aspects of comparative law that could guide the legislator in a possible first revision of this norm is presented. Next, the analysis follows the traditional scheme of the crime. Throughout this chapter, special attention is paid to the normative parallelism with civil legislation and the means that judicial bodies have at their disposal in order to delimit criminal acts from civil wrongdoing.

Regarding the active subject of the crime, a broad analysis of the case of the commission of the crime by a public official is carried out starting from the Decision of the High Court of Cassation and Justice no. 14/2015 of May 12, 2015, published in M.Of. no. 454 of June 24, 2015, in which, although in a different matter, an extensive analysis of the position of the crime of abuse of office in the architecture of criminal legislation is carried out. We therefore appreciate that, when the active subject of the crime is an official or a public official, he commits only the crime of violation of private life, provided in Art. 226 of the Criminal Code, not an ideal conjuncture of offenses with the crime of abuse of office, provided in Art. 297 of the Criminal Code, or, in another opinion, only the latter crime.

Furthermore, analyzing the mentioned professional prohibitions, we consider that private detectives can be an active subject of the crime provided in Art. 226 para. (1) of the Criminal Code as regards all the alternatives of the material element, with the exception of the recording of a private conversation held in public spaces or intended for the public. Regarding the passive subject, the specific hypothesis of the detained and the extent to which protection is granted to the deceased regarding this aspect are analyzed.

With regard to the standard version provided in Art. 226 para. (1) of the Criminal Code, the paper presents the alternative modalities of the material element and we proposed an extensive interpretation of the notion of "room". Thus, despite some non-decisive or decision-making considerations of the Constitutional Court, we support the opinion that leans towards an autonomous interpretation of the notion of "room", independent of that related to the crime of violation of domicile, according to which the room is any space closed inside which the person can express his privacy. Such an approach is otherwise natural, the contrary reasoning leads to a series of arguable situations, generating differences in legal treatment completely foreign to the rationale of the regulation. Thus, scientific literature expressed the opinion that it would have been more suggestive to use a broader phrase, which manages to capture the main attribute of these spaces, namely their private character, without realizing the limitation to the spaces used for living, being considered absurd that the act of photographing a person in a public toilet cubicle should not constitute a crime, and photographing of the same person in the toilet of his home should fall under the criminal law. This example can be taken even further and thus a person could benefit from criminal protection in the situation where he is photographed in the living room of his apartment, at an event attended by a significant number of people, but the same person would not benefit from criminal protection inside a public toilet with individual cubicles, the expectation of privacy being obviously much higher in the second situation.

Although we have shown that there may be situations in which the issue of violation of the right to private life at work may arise, the legislator seems to have chosen not to grant extended criminal protection in such a situation, leaving the passive subject with the possibility to engage in tortious civil liability against the guilty person. In these conditions, although we do not agree with the legislator's opinion, with the exception of the nuances that we have presented regarding the notion of "room", we appreciate that the constituent elements of the crime are not met if the passive subject is surprised in a place where public access is restricted but which is part of a public space. In other words, we appreciate that the passive subject cannot perceive the same level of protection regarding this social value as in the case of the crime of violation of the professional premises, provided in Art. 225 of the Criminal Code.

However, the discussion remains open regarding spaces at the workplace but which, by excellence, assume a very high level of privacy, namely an individual changing room, a public toilet, a treatment room within a medical facility or that offer cosmetic services. Even the European Court, in a case concerning the situation of employees and their right to privacy at work, made such a distinction, even emphasizing the need for protection in certain places.

Thus, the expectation of privacy is very high in certain spaces that are, by nature, private, such as changing rooms or toilets, where increased protection or even a total ban on video surveillance is warranted, remains high in closed work spaces, such as offices, and is significantly smaller in places visible or accessible to colleagues or, as in this case, to the general public[10].

With regard to the standard version provided in Art. 226 para. (2) of the Criminal Code, the work lists the arguments in favor of the solution adopted by the High Court of Cassation and Justice in Decision no. 51/June 24, 2021, the Panel competent to resolve law issues, published in M.Of. no. 1050 of November 3, 2021, which established that the typicality of the crime of violation of private life in the way enshrined by Art. 226 para. (2) of the Criminal Code is not conditional on possessing sounds, conversations or images made without the right, by photographing, capturing or recording images, listening with technical means or audio recording of a person in a home or room or dependency holding of them or of a private conversation.

We also note that another condition imposed by law is that the image, sounds or conversations that are divulged are private at the time they are made public by the active subject in one of the ways provided in Art. 226 para. (2) of the Criminal Code.

Regarding the assimilated version provided in Art. 226 para. (5) of the Criminal Code, its links with the assimilated version provided in Art. 302 para. (6) of the Criminal Code and it is argued that the equipment does not have to be concealed, camouflaged, but the absence of any minimal form of concealment, specialization, prior training of the active subject will not justify the detention of this alternative variant with an aggravating character. In this sense, we consider that even the most rudimentary form of registration with the help of a technical means that is not kept on the person requires a prior action of placement, the reason of the legislator cannot be that of retaining, almost every time, the two crimes in real contest. Practice has already confirmed that this alternative variant is identified only in the case of more elaborate methods of action of the active subject.

Furthermore, this paper gives special importance to the four special justifying causes enshrined in Art. 226 para. (4) of the Criminal Code, appreciating that they are capable of creating great difficulties in practice.

Regarding the justification cause provided in Art. 226 para. (4) lit. a) of the Criminal Code, an analysis is carried out from the perspective of the provisions of Art. 139 para. (3) of

[10] CEDO, Hotărârea din 17 octombrie 2019, *López Ribalda și alții împotriva Spaniei*, (MC).

the Code of Criminal Procedure and states that this must be verified separately for each of the variants of the offense provided in Art. 226 para. (1) and (2) of the Criminal Code. Thus, the existence of a legitimate interest in the recording of a conversation that the active subject has with the passive subject does not necessarily mean that the same legitimate interest is maintained per se also with regard to a possible disclosure of the recording.

In what the justification cause provided in Art. 226 para. (4) lit. c) of the Criminal Code is concerned, the paper extensively analyzes the limited possibility that state authorities are protected by it when carrying out generalized surveillance activities. Finally, regarding the justification cause provided in Art. 226 para. (4) lit. d) of the Criminal Code, the paper provides a detailed analysis of the jurisprudence of the European Court of Human Rights regarding the relationship between the right to private life and freedom of expression, with an emphasis on the situation of journalists.

BREACH OF THE SECRECY OF CORRESPONDENCE

This chapter aims to analyze the constitutive content of the breach of the secrecy of correspondence provided in Art. 302 of the Criminal Code.

Initially, since the breach of the secrecy of correspondence is a traditional crime, the historical regulation and also relevant elements of comparative law are presented. Afterwards, the analysis is carried out following the traditional scheme of the crime. First of all, we expressed our disagreement with the legislator's option of repositioning the crime within malfeasances, presented the difficulties it generates and the debates it creates. Regarding the relationship between the crime of abuse of office and the crime of violation of private life, we can say that the only positive result of the repositioning of the latter crime is the standard of clarity that the criminal law must achieve.

Regarding the aggravated version provided in Art. 302 para. (3) of the Criminal Code, the active subject is circumstantiated two times: he must have, first of all, the capacity of a public official, and, secondly, he must have the legal obligation to respect professional secrecy and confidentiality of information. The quality of public official, as defined by the criminal law, is necessary but not sufficient for the aggravated version provided in Art. 302 para. (3) of the Criminal Code. Thus, the legal obligation must be identified, enshrined in primary regulations which oblige the civil servant to keep secret the information he comes into contact with in the exercise of his professional activity. Emphasizing that Art. 308 of the Criminal Code does not refer at least to Art. 302 para. (3) of the Criminal Code, we note that the private official cannot be the active subject of the qualified variant; he will answer like an

uncircumstantiated active subject. We believe that this legislative choice is not correct given that, currently, private postal and courier services have significantly exceeded the share of public ones, a difference in legal treatment between them not being fully justified.

With regard to the standard version provided in Art. 302 para. (1) of the Criminal Code, the notion of "correspondence" is defined, concluding that, in principle, the package does not have the necessary features to be classified as correspondence. The main characteristic of protected correspondence according to Art. 302 para. (1) of the Criminal Code is that it has a material existence, the message sent by the sender to the recipient is not a computer data or a magnetic impulse, but is printed on a physical medium. The alternative ways of the material element consisting in "opening, evading, destroying or retaining" the correspondence are presented below, highlighting the relation with the general crimes that incriminate these actions.

With regard to the disclosure of correspondence, the provision of "disclosure" as an alternative method of the same standard variant may initially lead to the conclusion that a single offense provided in Art. 302 para. (1) of the Criminal Code will be identified. However, after presenting multiple arguments of legislative coherence, we concluded that, in the case of an opening, evasion or retention of the correspondence, followed by the unlawful disclosure of its content, the active subject should be held to have committed two crimes provided in Art. 302 para. (1) of the Criminal Code in a real conjuncture of offenses.

In what the standard variant provided in Art. 302 para. (2) of the Criminal Code is concerned, the paper presents the differences between conversations protected by Art. 226 para. (1) of the Criminal Code and long-distance communications. The notions are also defined and the differences compared to computer crimes are highlighted. Thus, by way of example, we note that the fact of accessing the e-mail box or the profile from an instant messaging application meets the constitutive elements of the crime of unauthorized access to a computer system enshrined in Art. 360 para. (1) of the Criminal Code. In order to be charged with the crime of breach of privacy, it is necessary that the transmission is intercepted while it is being made to the recipient's terminal or immediately upon arrival at the recipient's terminal, if the chosen method of entry into the system is not via the network , but through the terminal, so it is essential that the transmission operation is not completed. In the same sense, the act of finding out the content of an SMS communication by unauthorized access to the mobile terminal after the message had already been received does not constitute interception within the meaning of Art. 302 para. (2) of the Criminal Code.

This paper also analyzes the implications of the presumption of consent established by Art. 76 of the Civil Code and a series of hypotheses regarding the relations between spouses or parents with minors in care, concerning the essential requirement of the material element.

As regards the surveillance carried out by the authorities, the conditions under which the protection of national security and the special situation of detainees can be invoked are presented.

At the same time, the paper highlights the multiple difficulties and unjustified differences in treatment created by the positioning of the assimilated variant of Art. 302 para. (4) of the Criminal Code, especially in the case where the act is committed by public officials.

Regarding the assimilated version enshrined in Art. 302 para. (6) of the Criminal Code, we express our doubts regarding the possibility of including software components in the category of means to which the assimilated version refers. First of all, both the possession and especially the manufacturing lead to the idea of a device with material existence, thus the opinion that a computer program is manufactured cannot be accepted; it could only be designed. Thus, we appreciate that computer devices or programs designed or adapted for the commission of the crime of illegal interception of a computer transmission do not fall within the scope of the Art. 302 para. (6) of the Criminal Code. In such a case, we believe that the constitutive elements of the crime of illegal operations with computer devices or programs, enshrined in Art. 365 of the Criminal Code, are met. The assimilated variant can be identified even from the moment when the act of execution was carried out, even if not for the purpose of carrying out unlawful interceptions, this being one of the essential differences from the offense provided in Art. 226 para. (5) of the Criminal Code.

CONCLUSIONS

Substantial criminal law has traditionally depended on the will of the national legislator, who considers himself the best placed to establish the state's criminal policy. The national component of this branch of law has always been very pronounced, the vast majority of states being reluctant to accept international incriminating norms or other norms that have a direct influence on substantive criminal law. We believe that this branch has always been the most reluctant to change, which is a perfectly normal behavior up to a point, the predictability of the criminal law being a general principle of the legality of incrimination.

Against this backdrop, the concept of "private life" constantly receives new valences, covers new attributes of personality and grants legal protection to new elements of human existence in today's society. As we have constantly emphasized throughout the paper, we

appreciate that the legislator is faced with a highly difficult mission, namely to keep up with a social reality that moves with great effervescence and to regulate, quickly and appropriately, legal situations which were until recently unheard of. In criminal matters, this mission is all the more difficult since, based on new, unsettled concepts, clear and predictable incriminating norms must be developed.

The work aimed, at the beginning, to present the extent of the role that the European Court has assumed in relation to maintaining the of the protection offered by Art. 8 of the Convention and to highlight chronologically the evolution of the practice of this international court. Thus, we presented the new valences of the analyzed concept and specified the manner in which the legislator chose to grant criminal protection to the respective elements. We believe that the concern expressed by several authors that a giant fundamental right is being created that risks losing everything fundamental about it is fully justified. We appreciate that, from one point, a series of limits must be imposed regarding the expansion of the scope of application of fundamental rights precisely to maintain their fundamental character. It is obvious that the more the content of the same fundamental right varies, the less fundamental it becomes and its content is more relativized[11].

Moreover, this potential turn can be seen from the fact that, from the perspective of national criminal law, the protection of the values that constitute "social life" in the sense of Art. 8 of the Convention brings incriminating norms from the entire positive criminal law, far exceeding the traditional scope of crimes specific to the matter.

Without claiming that any interference with the right to private life protected according to Art. 8 of the Convention requires the existence of a remedy of a criminal nature in the national legislation, we also presented the incidental civil legislation, the latter having to remain, in our view, the main relevant provision in the engagement of legal responsibility for the commission of an illegal act.

Art. 20 para. (2) of the Romanian Constitution establishes the prevalence of international law over domestic law in matters related to fundamental human rights. Traditionally, international law (especially ECtHR) has visibly influenced criminal procedural law, thus there are multiple situations in which derogations from internal rules are required in order to respect the right to a fair trial. Contrary to the way in which practitioners are used to refer at least to the Special Part of the Criminal Code, the criminal protection of private life

[11] Johan Callewaert, *The European Convention on Human Rights and European Union Law: a Long Way to Harmony*, în Jonathan Cooper (editor), *op. cit.*, p. 782.

presents unusually many interferences with international law, especially with the standard of protection ensured by the provisions of Art. 8 of the Convention. So, in this matter, unlike other traditional matters, the international dimension of the analysis is mandatory for a compliant interpretation of the domestic norms.

Under these circumstances, in the analysis of the constitutive content of the analyzed crimes, we proposed to logically integrate the conventional standard of protection, highlighting hypotheses in which the analysis of the international dimension even reaches the stage of applying sanctions and individualizing the punishment. We also aimed to provide as many elements as possible, criteria necessary for a correct analysis of the constant conflict between freedom of expression, on the one hand, and the protection of private life, on the other.

From the perspective of the quality of the analyzed criminal law, we can state that, in principle, the legislator has shown particular diligence in keeping up with the international vision on the protection of private life, the identified inconsistencies being explainable especially in the context where the protection of private life is extremely to be influenced by the permanent development of the electronic means of its containment. Thus, in a full digital revolution, it is difficult to anticipate, at this moment, what new ways of communication will appear or what new dimensions people's existence will acquire. For example, what are the long-term implications of telecommuting, and to what extent will our well-researched assessments of the employee-employer relationship hold up? In the same sense, we can ask ourselves how the development of Metaverse-type environments will influence human interaction, will it be considered an extension of the real world, will legal protection be granted within it?

Until the moment of identifying some answers to the questions asked, based on the present research, we can make a series of de lege ferenda proposals, which do not necessarily mean that the existing incriminating norm presents major errors.

Regarding the crime of **violation of domicile**, provided in Art. 224 of the Criminal Code, we believe that the tradition of such a regulation is observed, both doctrine and practice being constant on the vast majority of the analyzed elements. We appreciate that, following the Italian and Spanish models but also returning to the legislative option related to the Criminal Code of 1865, the criminalization norm should provide an aggravated variant for the hypothesis in which the act is committed by a public official. Thus, it would be advisable to even opt for a differentiation between the situation of the private official and the public official or, at least, the situation of the one invested with public power.

As we have shown in detail with regard to the crime of violation of private life, we appreciate that resorting to the detention of the crime of abuse of office must become a solution

of last resort, having, in our view, a residual role in the architecture of the entire criminal regulation, and not only in relation to malfeasances. The jurisprudence of the High Court of Justice and the Constitutional Court demonstrates a growing reluctance to resort to this crime, correct conduct from our point of view, compared to the extreme level of generality of the expression and the manner in which it was previously applied to the CCR Decision no. 405/2016. Moreover, establishing a conjuncture of offenses exclusively on the basis of the plurality of legal objects represents an approach that does not take into account the entire regulation. In this sense, it is, in our view, difficult to explain why the retention of the crimes of domestic violence and abuse of office would be justified in conjuncture but, regarding another traditional element of private life, the crime of violating the secrecy of correspondence would be retained exclusively. Finally, the option of retaining only the offense of abuse of office does not provide criminal protection specific to private life and ignores the abstract assessment of the social danger, assesment made by the legislator at the time of establishing the punishment limits applicabile to each crime.

Also with regard to the crime of domestic violence, we believe that the principle of availability was excessively extended, given that the abstract social danger of the aggravated version, at least in the hypotheses of the commission by an armed person or by the use of false qualities would justify maintaining the official character of the action criminal.

In what the crime of violation of the professional premises is concerned, in addition to all the mentions formulated in relation to the twin crime, the violation of domicile, we believe that the legislator should clarify the holder of the social value protected by this crime, respectively the natural person in the course of his professional activity. Currently, the judicial practice is almost unanimous in considering that the passive subject of the crime is the legal entity that owns the professional headquarters. Based on this assessment, the condition of the making a prior complaint and withdrawing it is analyzed, the seriousness of this error being therefore significant. In this approach, we believe that the legislator could follow the German and Spanish models, in the sense of expanding the crime of violation of domicile so that it also covers the professional premises, therefore the waiver of the different criminalizations. Such an option would represent a return to the regulation contained in the Criminal Code of 1936 and an enumeration like "dwelling, room, outbuilding or enclosed place related to these, as well as in the professional premises" would lead to the conclusion that the passive subject can be only the natural person.

With regard to the crime of **violation of private life**, in addition to the urgent need to establish an aggravated variant for the hypothesis in which the crime is committed at least by a public official, we consider necessary to redefine the notion of "room" contained in paragraph. (1) in such a way that criminal protection is also granted to the person in the closed spaces that imply privacy by excellence, but which are part of a public space, such as a public toilet or an individual locker room related to the gym. At this moment, the doctrine is the majority in assimilating the notion with the identical one provided in Art. 224 of the Criminal Code, but we do not consider that such reasoning can be accepted. However, we are not of the opinion that it is necessary to grant criminal protection to the person who is in a fenced area, as intrusion cannot be compared, as in the case of the offense provided in Art. 224 of the Criminal Code, with the capture of images, enshrined in Art. 226 para. (1) of the Criminal Code. In other words, by way of example, a person in the balcony of his apartment with a glass railing may have a reasonable expectation of privacy from the perspective of the crime of violation of domicile, but not from the perspective of the crime of violation of private life in the variant regarding the registration of images.

Although the special justifying causes are a particularly general regulation, especially in the case provided in Art. 226 para. (4) lit. d) of the Criminal Code, we do not consider that an additional circumstantiation of them is possible at this moment. The multitude of possible hypotheses, as also results from the ECtHR jurisprudence, cannot be covered otherwise from the perspective of the legislative technique. Finally, we believe that the assimilated variant provided in Art. 226 para. (5) of the Criminal Code should be circumstantial only for the concealed placement of the means of registration, only a premeditated, professional preparatory act, justifying an independent sanction that provides more severe punishment limits than the purpose crime. Moreover, the lack of circumstantial evidence of the placing action could lead to the retention of the assimilated variant and in the hypothesis where the perpetrator places the mobile phone on the table with the video camera pointed at the bed where he is going to have sexual relations with the injured person, any recording made with a equipment not carried by the perpetrator necessarily involving placement.

Finally, regarding the crime of **breach of the secrecy of correspondence**, we believe that it should be repositioned alongside the crimes that protect the private life of the person, as there is no justification for the legislator's current option. After the repositioning, we consider that the aggravated version provided in Art. 302 para. (3) of the Criminal Code should be maintained and possibly extended to private officials as well.

The most serious deficiency of the incriminating rule enshrined in Art. 302 of the Criminal Code, is the topography of the paragraphs, more precisely the positioning of para. (4). We accept that the opening of correspondence presents a lower abstract social danger than the interception of conversations, but we do not identify the arguments for which the disclosure of the intercepted conversation would present a lower abstract social danger than the disclosure of the content of the correspondence. Moreover, the wording of para. (1) in the sense of including the action of disclosure in its content may lead to the conclusion that the disclosure is an alternative way of the material element and we would not be in the presence of a crime with an alternative content, as is also correct. Considering all these aspects, following to a certain extent the model of the crime of violation of private life, we appreciate that para. (1) should be limited to the alternative ways of "opening, evading, destroying or retaining" correspondence, para. (2) could maintain its wording, para. (3) could criminalize the act of disclosing the content of the intercepted correspondence or conversation, not being justified by a difference in the sanctioning regime and, finally, para. (4) could represent an aggravated variant for para. (1), (2) and (3) when the act is committed by an official.

Considering all the aspects presented, we can only state that, indisputably, the right to private life is not only the right to stay at home to exclude others, but also the right to leave the house to go to others[12]. How we will go to others and how we will be protected along the way by updated criminal law regulations still remains to be found.

[12] J.P. Marguenaud, *La Cour europeenne de droits de l'homme*, Dalloz, Paris, 2002, p. 66, apud. Jean-Francois Renucci, *op. cit.*, p. 256.