

THE REFLECTION OF THE ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE ROMANIAN LAW IN FORCE, INTO THE LIGHT OF THE E.C.H.R. JURISPRUDENCE¹

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Abstract: *The following article intends to show how the article 8 of the European Convention on Human Rights, concerning the right to respect for private life, finds its reflection in the Romanian law in force.*

Starting from the interpretation of the article 8 of the Convention, but also taking under consideration the official criteria for legal interpretation materialized in the jurisprudence of the European Court for Human Rights, the authors aim to identify the extent of the correlation of our national legislation, particularly the penal law, with the letter and the spirit of the Convention, in the matter debated.

This study also includes an analysis of the Romanian law in force, with its most recent modifications and completions and the required comment on the subject of the legal interpretation that should be used.

It is also considered the incidence of the constitutional principle of the preference of the international legal regulations to the national legislation, in the matter in question, as well as the most effective way to interpret and enforce the Romanian legislation, without contravening the Convention.

The reader will also find, within the study bellow, certain legal observations regarding the endless controversy aroused by the issue of the legitimacy and the legality of the disclosure, through the mass-media, of slanderous informations about public life persons, a true Pandora's box in the Romanian society.

Keywords: *European Convention on Human Rights, right to respect for private life, European Court for Human Rights, national legislation, penal law.*

The European Convention on Human Rights², adopted by the Council of Europe, at Rome, in the year 1950, although applied, by the member states, right from the year 1953, has been ratified by Romania only recently, in 1994³, becoming effective, as part of the Romanian legal system⁴, in the same year. As a consequence of that, at that time, the

¹ This article has been presented at the International Conference of the Faculty of Law and Social Sciences of the „1 Decembrie 1918” University, Alba Iulia, November 20-21, 2008

² Which will be called, below, the Convention; in fact, the Convention bears the official denomination of Convention for the Protection of Human Rights and Fundamental Freedoms, but, *brevitatis causa*, the jurisprudence imposed the shorter denomination that we use

³ Through Law 30/1994, published in the Official Gazette of Romania, no. 135/05. 31.1994

⁴ According to the second paragraph of the article 11 of the Constitution of Romania, which stipulates as follows: „Treaties ratified by Parliament, according to the law, are part of national law.”

Romanian right subject of law which considered one of their legal rights or fundamental freedoms recognized and protected by the Convention's body obtained the material right to action in front of the European Court for the Human Rights established in Strasbourg⁵.

A part of the cases judged by the Court referred different violations, some of which were only claimed, others also proved, of the article 8 of the Convention⁶ which states in the first paragraph that: "Everyone has the right to respect for his private and family life, his home and his correspondence". The text of the article continues, at the second paragraph, as it follows: „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 of 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". We can thus observe that the text of the article 8 of the Convention evokes, in a unitary regulation, the fundamental human right to respect of private and family life, including here the components of the respect for the correspondence, intimate life⁷, as well as that of the inviolability of dwelling.

Unlike the Convention, the Romanian Constitution defines the fundamental human right to intimate, family and private life⁸, of the inviolability of dwelling⁹ and of the secrecy of correspondence¹⁰, creating through the legal technique used the juridical fiction of three distinct rights. The explanation of this apparent non-conformity of our fundamental law with the international regulation can be found in the fact that, at the time of the elaboration and adoption of the Constitution, Romania hadn't obtain the status of member state of the Convention, through the ratification mentioned in *supra*. We don't understand, still, why, with the occasion of the constitutional revision¹¹, remedying this non-conformity hasn't been under consideration, be it only formal¹², especially in the context of the modification, *in illo tempore*, of the second paragraph of the article 20 of the Constitution. More precisely, by this modification it has been regulated, *ex novo*, an exception to the constitutional principle of pre-eminence of the international regulations in the field of the human rights, confronted with the internal law, giving legal relevance to the *mitior lex* principle¹³. Given the present juridical framework, the problem of identifying the most favorable legal norm is set, in the law practice, a step that faces, *ab initio*, certain difficulties deriving from the different perspective that becomes clear from the spirit and systemic appearance of the two legal acts. So, while the Convention stipulates, in the

⁵ Denominated, below, the Court; according to the article 32 and the following articles of the Convention, the Court has the *ratione materiae* competence in judging the causes that have as object breaches of any nature to the human rights and fundamental freedoms, as they are consecrated in the body of the Convention

⁶ The article holds the marginal denomination of „Right to respect for private and family life”

⁷ By referring to the respect for the personal correspondence

⁸ Consecrated in the article 26

⁹ Stipulated in the article 27

¹⁰ Stated in the article 28

¹¹ Published in the Official Gazette of Romania, no. 669/09.22.2003

¹² With consequences of practical nature, in the matter of juridical interpretation, as we will show in *infra*

¹³ This paragraph has the following formulation: "Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions”

article 8, a unitary vision on the analyzed fundamental right, with all its attributes – private life, family life, personal correspondence, personal domicile and residence – the constitutional texts induce, we believe, confusion, because they:

- institute, at the first paragraph of the article 26, an apparent attribute in addition to the text of the Convention, of the fundamental analyzed right: respect and protection of the intimate life, without being defined or delimited by the norms of the objective law;

- consecrate, in distinct articles, 26, 27 and 28, a unique fundamental right, in the letter of the Convention. We consider that, by doing so, the Constitution formally institutes two distinct categories of subjective right, namely, the inviolability of dwelling and the secrecy of correspondence in addition to that of the respect of intimate, private and family life;

- break, through the final thesis of the article 20, paragraph 2, the ranking of the principles of the positive law, by the fact that they give relevance to a secondary law principle, that is specific to a juridical institution¹⁴ - and recognized, even by the Constitution, only for certain law branches¹⁵, as an exception, *nota bene*, from the principle of the universality of law – and not to the general principle of the pre-eminence of the international regulations;

- contravene to the norm contained by the article 53 of the Convention, according to which „Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party...”, through the provision of the article 20, paragraph 2. In other words, as an expression of the principle of the pre-eminent application of the international regulation, the article 53 of the Convention prevents the application of the internal more favorable law in the matter of the fundamental human rights and freedoms.

An intense juridical controversy, concerning the respect for the private life, perpetuates in the post-December Romania. On one side of the barricade stand the journalists, who claim, in their defense, that the public disclosures that they make regarding dignitaries or politicians having important public functions, disclosures about their dishonorable past, or the affiliation to the repressive communist regime, are based on the freedom of speech, the right of the citizen to information and the public interest. On the other side, the subjects of the disclosures consider themselves insulted in their private life, claiming the nuisance of the article 8 of the Convention and, under the umbrella of the slowness with which the specialized institutions act to disclose these people and the disappearing from the communist regime’s archives of certain proofs, come off victorious before the Court¹⁶. The Convention, through express provisions¹⁷, fixes the rule of the priority defense of the right to respect of private life. Further still, the Court constantly stated, in finding a solution for the calumny cases through mass-media, that the respect of private life is indissolubly connected to the very human dignity, so that the journalist,

¹⁴ *Recte* exclusively in the matter of law enforcement in time

¹⁵ The referred law branches are penal law and regulation of contraventions – art. 15

¹⁶ See, in this sense, the case *Petrina versus Romania*, commentary by Mircea Toma in his article „*Jurnalisti, păzea: CEDO ne astupă gura*”, published in *Academia Cașavencu*, săptămânal de moravuri grele, no. 43(879) of 10.29.2008, p. 5

¹⁷ Article 10, which refers to the respect of freedom of speech, states, in the second paragraph, that „The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, [...] for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence...”

when he reveals public data that can be harmful for the image of the respective person, affects the fundamental right to respect of private life, and in order to be exonerated by the legal sanction, he will have to bring before the Court proofs regarding the veracity of the previous public statements, the invocation in his defense, of the journalist's status of "guard dog of society", of the right to information and to the public's interest for disclosures is not sufficient, as we have demonstrated¹⁸.

The Penal Code of Romania¹⁹ consecrates numerous provisions to the respect of the right to private life, among these being the ones that incriminate the offences of the domicile infraction (art. 192), disclosure of professional secrecy (art. 196), violation of correspondence secrecy (art. 195). Relating to the last of the provisions mentioned above, it should be mentioned that it just has been recently completed²⁰, through the insertion of a new paragraph with the following text: "If the deeds mentioned in paragraph 1 and 2 were committed by an employee having the legal duty to respect the professional secret and the secrecy of the informations to which he has access, the punishment is 2 to 5 years of imprisonment and interdiction of certain rights." Among the offences that this incrimination refers to is that of the disclosure of the content of a correspondence, of a conversation or of an intercepted communication. We consider that such provision contradicts the norm from the subsequent article, which contains a similar incrimination. Thus, from an objective point of view, the infraction of breaking the professional secrecy consists, alternatively, in revealing certain facts that the perpetrator became acquainted with by reason of his profession or position. Also, the infraction of breaking the professional secrecy can be committed, as it is constantly shown in the penal doctrine, by a clerk who has the legal obligation to respect the data confidentiality that he became aware of and to keep the professional secret²¹. We have, therefore, between the two norms of incrimination, on one hand, an identity on the objective side, regarding the material element, and on the other side, an identity of active qualified subject. Practically, beyond the apparently different formulation of the two texts, we find ourselves in front of the same fact, incriminated twice within the same normative act and, even more seriously, under penal sanctions slightly discrepant²².

We consider that, in regard to the demands of the defense of the respect of the private life required by the article 8 of the Convention, as it has been interpreted by the jurisprudence of the Court and delimited in the doctrine of the protection of human rights²³, the current penal code does not offer, through the incriminations it contains, a whole protection for this social value. This gap of the general penal law is eliminated in the New Romanian penal code²⁴ – whose inuring is, actually, deferred until the 1st of

¹⁸ For a more extensive comment, see Avram Filipaș, *Drept penal român. Partea specială*, Universul Juridic, Bucharest, 2008, pp. 305 - 306

¹⁹ Law 15/1968, republished in the Official Gazette of Romania, no. 65/04.16.1997, with further modifications and completions

²⁰ Through law 337/2007, published in the Official Gazette of Romania, no. 841/12.18.2007

²¹ Octavian Loghin, Tudorel Toader, *Drept penal român. Partea specială*, Casa de editură și presă „Șansa” S.R.L., Bucharest, 1996, p. 162

²² Penalty of imprisonment from 2 to 5 years and penalty of imprisonment from 3 months to 2 years or fine, respectively

²³ See, in this direction, the bibliography indicated at the end of this study

²⁴ Law 301/2004, published in the Official Gazette of Romania, no. 575/06.29.2004

September 2009²⁵ – which provides, in the chapter named “Crimes and offenses against the personal freedom”, the infraction of not respecting through any means of interception of the right to private life²⁶, but also the infraction of making-up or using devices to intercept communications – referring to the last incrimination, one can notice that the new general penal law goes up to execute even the preparatory acts of intercepting communications²⁷.

In order to see the way in which the Court has interpreted and applied the provisions of the article 8 from the Convention, having reference to the Romanian objective law, we will present *infra* some solutions given by this one in the cases where the Romanian State was accountant, as well as the reasons which supported these solutions.

For instance, in the case *Petra versus Romania*²⁸, the Court considered it being a non-compliance with the right to private life the control of the convict’s correspondence with his family, but also with the national public authorities and the European Commission for Human Rights – hereinafter the Commission - , a control realized, based on the national law, by the administration of the penitentiary where Petra was convicted; the Court noted that an intromission from the public authority in the exercise of the right to respect of the correspondence secrecy²⁹, defended by the article 8 of the Convention, occurred, through the fact that the complainant convict I. Petra was bound to report to the penitentiary commander the letters addressed to the Commission, a fact that led to a delay in transmitting the letters, and the correspondence addressed by the complainant to the Commission, also, arrived late and open. The Court criticized the Romanian law, stating that it limits itself to the provision, in terms much too generic, of the right to send and receive the convict’s correspondence³⁰.

In another case³¹, the Court condemned the Romanian State for the lack of promptitude of the national authority in taking actions in the defense of the inviolability of dwelling, considering that, thus, the public authorities qualified for this purpose have harmed this attribute of the right to respect of the private life, in the light of the article 8 of the Convention. The Court noted that, in the test case, the authorities haven’t responded to the repeated penal complains of the complainant for over five years, for the repeated violations of his dwelling, although the fact had been proved. The fact that, between the authors of the dwelling violation and the complainant victim, there were, in the same period of time, judicial litigations having as a subject the property right over the building in case cannot excuse the lack of action of the Romanian State in the salvagardation of a fundamental

²⁵ In accordance with the provisions of the Government’s Ordinance of Urgency no. 73/2008, published in the Official Gazette of Romania, no. 440/06.12.2008

²⁶ Article 209 of the New penal code

²⁷ Article 213 of the New penal code incriminates „the manufacturing, commercialization, installation or use, with no right, of technical devices for the interception or obstruction of communication”

²⁸ Ruled in September, 23, 1998 and published in the Official Gazette of Romania, no. 637/12.27.1999

²⁹ The same solution has been ruled in other cases before, as *Campbell versus The United Kingdom of Great Britain and Northern Ireland*

³⁰ The Court ruled an identical solution in a similar case, *Cotleț versus Romania*, in June, 3, 2003, published in the Official Gazette of Romania, no. 422/05.19.2005; in addition to that, the Court established, as a violation of the right to respect the secrecy of correspondence, the lack of action from the national authority, consisting in the fact that it hasn’t provided the complainant convict all that was necessary for his personal correspondence (envelopes, post marks, paper)

³¹ *Surugiu versus Romania*, decision of April, 20, 2004, published in the Official Gazette of Romania, no. 388/05.05.2006

human right, the Court considered, taking into account that exactly the national authorities have maintained the controversy regarding this right of property, releasing a title deed for a third, or the State cannot be exonerated by the responsibility through the invocation of its own irregularity – *nemo auditur propriam turpitudinem allegans*.

A notorious case in the recent practice of the Court is, no doubt, the case *Moldovan versus Romania*³², case where a number of serious violations of the human rights were found, in continuous form, against an entire ethnic group, committed by the Romanian State. More precisely, limiting ourselves to the theme of the present study, the complainants lacked in the exercise of the right to private life, through the direct action of the representatives of the State, the Court noting, concerning the factual situation, the following: the claimants' habitations were destroyed, signally through arson, in a strong action of the local police, the claimants being chased away from the village, forced to live in promiscuous, deplorable conditions, and when, more than a decade later, they received, from the authorities, recoveries, a part of the destroyed houses have not been rebuilt, and the ones rebuilt are uninhabitable, so that most of the victims have never returned to the village. Taking into account all these, the Court draws the conclusion that the Romanian State seriously harmed the right of the complainant to respect of dwelling, it has continuously maintained the feeling of uncertainty given by this privation, it hasn't promptly and completely ensured the necessary conditions to the plain exercise of the right to respect of the private and family life. From the Court's perspective, the member states don't have only the duty to acknowledge and respect the right to private life, but also, the duty to take all steps in order to ensure, in the shortest period of time, the re-establishment of the exercise of this fundamental right.

RELEVANT PUBLICATIONS:

Corneliu Bârsan, *Convenția europeană a drepturilor omului, volumul I – Drepturi și libertăți*, Ed. C. H. Beck, Bucharest, 2005;

Bianca Selejan-Guțan, Horațiu Alexandru Rusu, *Hotărârile C.E.D.O. în cauzele împotriva României (1998-2006)*, Ed. Hamangiu, Bucharest, 2006;

Radu Chiriță, *Convenția europeană a drepturilor omului, volumul II*, Ed. C. H. Beck, Bucharest, 2007;

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www.echr.coe.int

SPECIFIC LEGAL FRAMEWORK:

Romania's Constitution, in force;

Convention for the Protection of Human Rights and Fundamental Freedoms, in force, adopted in the Council of Europe, at Rome, on November, 4, 1950;

Law 30/1994, regarding the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms, in force;

Penal Code of Romania (Law 15/1968), in force;

New Penal Code of Romania (Law 301/2004), published, not in force.

³² Decision no. 2 of July, 12, 2005, published in the Official Gazette of Romania, no. 317/04.10.2006; this is the "Hădăreni case"