CONSIDERATIONS REGARDING THE RIGHT TO RESPECT OF THE PRIVATE LIFE AND FAMILY

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In the article 12 from the Universal Declaration of the Human Rights is provided that “nobody will be the object of any arbitrary interferences in the private life, in his family, in his residence or in his mail, or of any prejudice of his integrity or his reputation. Each person has the right to protection of the law against such interferences or prejudices.” The same in article 17 paragraph 1 from the International Pact regarding the civil and political rights it is prescribed that “nobody can be ever subjected to any arbitrary or legally interferences in his private life, in his family, his residence or his mail, or to illegal prejudices brought to his integrity and reputation”, and in the paragraph 2 that “Each person has the right to the protection of the law against such interferences or prejudices.”

The European Convention from Strasbourg provides in article 8 that “each person has the right to respecting his private life and family, his residence and mail” so that in paragraph 2 to be disposed that “it is not admitted the interference of any public authority only if this interference is provided by the law and if this constitutes a measure which is necessary in a democratic society for the national security, the public safety, the economical welfare of the country, the protection of the order and prevention of the penal deeds, the protection of the health or of the moral or the protection of the rights and freedoms of somebody else”. From the content of these regulations it results that the inviolability of the residence and of the mail are formulated in a close bound with the respecting of the private life and family.

In this way, in order to be in compliance with the provisions of the Convention, encroachment of the state authority, in the exercise of the protected rights by the article 8 must be provided by the law, must follow a legitimate goal and must appear as necessary in a democratic society. At the same time the state encroachment must regard a right protected by the Convention and must be proportional with the followed goal.

Also it must be imputable to the state authorities, so that it can be resulted from the activity of a judicial organ, field which concerns the applicability of *ratione materiae* of the rules belonging to the penal trial too. That is why it supposes a decision of this regarding the person that complaints about the existence of *alegati* prejudice. But beyond these decisions, as the European Court of Human Rights decided, can constitute an encroachment in the rights of protection by the article 8 and the existence of some legal regulations (internal) opposite to the stipulations of the Convention, as the legal norms are which authorize the secret observation of the mail. In the end, it must be carried out in a restraint imposed to the owner of the protected right, consisting, for instance in preventing the exercise of some right, as it is the case of interdiction of the right to mail of a detainee.

Regarding the condition for the encroachment to have a legal basis, it was shown that the prejudice brought to the defended rights by the Convention must be the consequence of the application of the norms which provide it.

2 C.E.D.O., 6th September 1978, Klass s.a.c. Germany, Series A, no. 28, paragraph 41.
3 C. Birsan, op. cit., page 672
At the same time it was decided that it is not enough for the law to provide an encroachment in the exercise of a right, but it has to fulfill two criteria, firstly to be accessible to everyone, it means to be public 4, and to be predictable, it means to be precisely enough to allow the individual to regulate his behaviour according to its prescriptions. As a result the law must define the length and the modality of exercising of the functions of the public competent authorities in the matter with sufficient clarity, in order to protect the individual against the arbitral. Under this aspect, in the case Rotaru versus Romania, 5, it was decided that the Romanian system of collecting and keeping in public records of the information does not contain enough guarantees and either an adequate control procedure, lacking the internal right in matter by the required qualities by the condition of the predictability of the law.

Regarding the subordination of the encroachment of a legitimate goal, it was shown 6 that this is subordinated to the appreciation of the organs of the Convention, through the point of view of the enumerated circumstances in the paragraph 2 of article 8 from Convention. In the matter of the house search it was decided that such a measure followed eventually by the taking away of objects, could be considered as legitimate, in order to obtain material proofs of the committing of some offences. But the intern law must offer all the guarantees against some eventual excesses from the competent authorities. 7

The Romanian Constitution from 1991 with the brought changes through the law from 2003 contains similar provisions with those of the European Convention regarding the right to respecting the private life, the family life, of the residence and of the mail. From their content results the inviolability of the domicile and residence, as well as the secrecy of mail and of the other means of communication are fundamental independent rights. So the article 27 paragraph (1) from the Constitution disposes that “the domicile and the residence are inviolable. Nobody can enter or stay in the domicile or residence of a person without his permission.”

So as it was acknowledged in the specialty literature 8, due to some objective necessities, the actual Constitution, as it was changed through the Law from 2003, admits that from the rule of inviolability can be derogated through law in the following situations:

“a) for the execution of a warrant for arrest or of a Court decision;

b) for the removing of a danger regarding life, physical integrity or the goods of a person;

c) for the prevention of spreading of an epidemic.”

In the same context, the paragraphs 3 and 4 of the article 27 from the Constitution contain two extremely important provisions which have the aim to guarantee the observing of this penal procedural principle. So “the search is being disposed by the judge and is performed in the forms and conditions provided by the law”. 9 “The searches during the night are forbidden, except the case of the flagrant offences.”

The other rule, of the inviolability of the mail is established in the Constitution in a distinctive text, in article 28, in which is provided that “the secrecy of the letters, telegrams, and other postal expeditions, of the phone calls and of the other legal means of communication is inviolable”. At the same time it is provided in the OUG no. 56/2003 too, in the present being abrogated by the Law no.257/2006 but reproduced in the content of the law in identical terms, which establishes in article 45 paragraph 1 that “it is granted the right to receive mail of the persons who are in prison executing punishments which deprive them of freedom.” More than that it is provided expressly that “the form and content of the mail can not be changed but by the person who executes the punishment which
deprives him of freedom”, and the mail has a confidential character and can not be opened or retained except the limits and conditions provided by the law”. Regarding this it is shown that “it can be opened and retained if there exist grounded evidence regarding the committing of an offence.”

Regarding the control of the professional mail between the lawyer and his client, was considered that the search of the office of a lawyer, within a following procedure, represents an encroachment in the exercise of his right to receive mail. At the same time taking with this occasion of a document belonging to one of his clients constitutes an encroachment in his private life.10 More than that, because it must be respected the confidentiality of the relations between client and his lawyer, the European Court has decided that the carrying out of the communication between these can be made in the detention units in such a way in order to ensure a free discussion between them, without the encroachment of the supervisors in this place.11 Regarding the written mail between the detainee and his lawyer, was also decided that the prison authorities can open letters addressed to the detainee by his lawyer, but without reading them and only if they contain illicit elements, which were made evident through the normal means of detection. The reading of the letters of a detainee, which are destined to the lawyer or come from him can not be authorized only if there are plausible motives to believe that in the content of these could be found elements which threaten the security of the detention place, of other persons or other elements related to an offence.12

Regulations which ensure the respect of the intimate, private life and family of the persons who take part at the penal trial, for instance those referring to the hearing of the witnesses (article 80 Penal Procedural Code provides that the husband and the closed relatives of the accused or defendant are not obliged to give evidence as a witness), to the handing over of the objects and documents (article 97 paragraph 3 Penal Procedural Code, changed, obliges the judicial organ who take this object or document from a person to ensure the observing of the secrecy or of the confidentiality regarding these documents or objects) or to the protection measurements in case of detaining or preventive arrest (article 161) or in case of postponing of the execution of the penalty (article 453 letter c).

Also the tapping and the audio or video recordings of calls or communications, as means of evidence will be made under the control of the judge, who will take into consideration the jurisprudence in the matter of the European Court of the Human Rights.13

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10 C. Birsan, op.cit, page 651
11 C.E.D.O., 30th August 1992, Campbell versus United Kingdom, Series A., no.233, paragraph 46
12 C.E.D.O., 8th July 2002, Erdem versus Germany, Recueil 2001- VII, paragraph 61

In each case it is to be noticed that the European Court going from the practical necessities of the fight against the criminality, especially of the serious criminality, admits the existence of some legal disposals which aloe the interception of the mail, of the postal expeditions and telecommunications, obviously in exceptional situations being necessary for the protection of the public order and prevention of the offence.14

But for this The European Court must convince itself of the institutions of some adequate and sufficient guarantees against the possible excess in the matter, valuation being made from case to case, according to some certain criteria, as nature, length and duration of the measurements, the reasons for which they were disposed, the execution and the control of their execution, as well as the attack way which can be used the injured one in his right, against of such a measure. It is not sufficient the existence of some intern legal provisions, compatible with the dispositions of the Convention, but their application by the national Courts to be compatible with these, offering an effective protection of the right to mail which the inter law confers it.15

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14 C. Birsan, op. cit., pag. 654 and next