

THE CIVIL, CRIMINAL AND CONSTITUTIONAL ISSUES REGARDING THE GUARANTEE AND ENFORCEMENT OF THE RIGHT TO HAVE A DOMICILE FROM A NATIONAL AND INTERNATIONAL PERSPECTIVE

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Abstract: *The current study analyzes the right to have a domicile including its two aspects, the intangibility of the domicile and the free choice, change or use of the domicile. We are analyzing this theme from a threefold perspective, that of civil law, criminal law and constitutional law without leaving out the meaning of this notion as provided by the European Court of Human Rights as a result of its practice.*

Key words: *domicile, intangibility, ECHR jurisprudence, civil law, criminal law.*

1. The notion of domicile in internal regulations

As it represents one of the main elements of identification of a person along with name and civil status, the concept of domicile is subject to numerous definitions provided by the doctrine.

Thus, according to the definition as provided by the dictionary, the domicile is that “certain attribute which individualizes a person in space, resulting in a personal non patrimonial right which gives the person the choice to establish its permanent or main location in a certain place, according to the law, thus resulting in some judicial consequences.

A space identification element of the person, establishing the place where the

stable or permanent residence of a person is”[7].

Also, the domicile is defined as “the certain identification attribute of a person which individualizes that person in space, by indicating a place with this judicial meaning” [3].

According to the French doctrine, the domicile is the place where “a person is located in the eyes of the law”[4] or “the place which is connected to a person”[10]; it is also stated that the domicile “operates the judicial location of each individual”[6].

According to the legal definition of article 87 of the Civil Code “a person’s domicile is where he declares his main residence in order to exercise his legal rights and liberties”, whereas Government’s Emergency Ordinance no

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97/2005 regarding the domicile, residence and identification documents of Romanian citizens establishes, in article 27 the first alignment that “a person’s domicile is where he declares he is mainly located”.

As stated by doctrine “following a thorough analysis of the content of the quoted legal text, it would appear that the Romanian lawmaker of 2009 considered the result of the person’s declaration regarding its domicile, which means that a person’s domicile is where he declares it to be and not where he is mostly located”[12].

As for the notion of location or main residence, it is defined by the specialty literature as “the center of business, activities and interests of a person”[4].

Similar regulations are found in the Quebec Civil Code art.75, which states that “a person’s domicile, as well as the exercise of its rights, is where his main residence is located”[13] and in the French Civil Code art. 102, align. (1), according to which “the domicile of any French man in regard to the exercise of his civil rights is located where he declares his main residence”[9].

In regard to the judicial character of domicile, it is characterized by obligation, uniqueness, stability and intangibility.

In close connection to the first listed character, that of obligation, is the assumption of domicile as stated by Romanian law - art. 90, align. (1) and (2) Civil Code [14] - “(1) the residence will be considered as domicile when the latter is unknown. (2) If a person does not have a residence, its domicile is considered to be his last known location and if this is also unknown, its domicile will be its current location”.

In regard to uniqueness, this results from the content of article 86 second alignment of the Civil Code, according to which “if the law does not state otherwise, a person can only have one domicile and one

residence, even if he owns more than one house”, as well as from the content of article 26 second alignment of Government’s Emergency Ordinance no 97/2005 regarding the domicile, residence and identification documents of Romanian citizens, according to which “Romanian citizens can only have one domicile and/or one residence. In case they own multiple houses, they can establish their domicile or residence in any of these”.

The intangibility of the domicile must be analyzed in close connection to the constitutional provisions, which clearly state that “both the domicile and the residence are intangible.

No one can enter or remain in a person’s domicile without permission” according to art. 27, alin. (1) of Romanian Constitution [15].

The exceptional situations which do not follow this rule are expressly stated by law and are justified by special cases.

In regard to the different types of domiciles regulated by law, these are - of common law, legal, professional, chosen or conventional.

2.The notion of domicile from the perspective of criminal law

From a criminal perspective, the respect for human personality implies the respect for their domicile and has two aspects, the intangibility of the domicile and its free choice, change or use.

In criminal law, the notion of domicile has a different meaning from that of civil law, as it comprises the domicile as well as the residence of a person, including any place where a person and his family live.

The notion of domicile must not be mistaken with that of property; in public law, the residence is the domicile of a person even if he is not the owner, but he has the right to legally occupy the location (for example, dorm room, hotel room).

By examining article 27 of the Romanian Constitution, we have two distinctive situations regarding entering a person's domicile.

The first situation is when a person enters another person's residence with consent and the second situation is when a person enters another person's residence without consent and approval, but only in the cases clearly stated by article 27 second alignment of the Constitution.

By using the second alignment, the Constitution aims to limit the situations in which, by law, the basic constitutional principle of intangibility of domicile can be surpassed [11].

If, in regard to the situations stated at points a), c) d), these are exclusively those in which enforcing the law justifies entering a person's residence: domicile search, arrest of a person, insurance measures, the situation stated at point b) - removing a threat to the life, physical integrity or the goods of a person also comprises the situations in which, although the law does not order it, it also does not sanction entering a person's domicile without consent.

This is because, in the course of social-human life, there can be any number of situations caused either by the action or inaction of people or by emergency causes which endanger social values which are protected by law and protecting these values can only be achieved by immediately entering a person's residence.

An important role in respecting constitutional provisions is played by the incrimination in the Criminal Code of the crime of "trespassing".

The antisocial character of this deed results from endangering a person's freedom, as he can no longer use his domicile freely, but also from the interference of another person and the danger which it represents for society by

endangering the normal development of social relations which would not be possible without protecting a person's domicile [8].

We will also point out the crimes stated in our current law which endanger the domicile and professional headquarters of a person or company. The current Criminal Code regulates, in Chapter IX, the crimes which endanger the domicile, private life and correspondence.

However, this chapter also regulates a series of new crimes, meant to cover a legal void and provide a solution to the new forms of endangering the social values which are protected by law; thus, we mention the crimes of trespassing or invasion of privacy.

By regulating the crime of trespassing in this chapter named "crimes against the person" and not in the chapter which regulates crimes against the patrimony of a person, the lawmaker aims to justify that by committing this crime, the freedom of a person is endangered, in regard to his domestic life and not the right to ownership of a person. Article 224 of the Criminal Code regulates the crime of trespassing in a typical form and in an aggravated form.

The typical form is when the entering of a domicile is achieved without right, in any way, inside a residence, room, dependence or any surrounded place connected to those previously mentioned, without consent from the person who uses it or the refusal to leave the premises following a request by that person.

The aggravated form is regulated in the second alignment and has three alternative ways of committing the deed: by an armed person, during the night or by using deceitful qualities.

The crime of trespassing can be committed by any person who is criminally liable, whereas the passive subject is the person using the domicile that has the right

to allow or refuse the entering or staying inside the domicile of another person.

We must also mention that the lawmaker, by incriminating this crime, aims to protect the rightful owner of the residence, regardless of the precariousness of his title.

The lawmaker clearly states that the action of entering must occur without right, without any legal reasons and without consent of the person living in a residence, room, dependence or any surrounded place in connection with the previously mentioned.

The passive subject's error in regard to the lack of consent from the rightful person is reason for not punishing that person – art.22 Criminal Code [16].

Some authors in specialty literature feel that the phrasing used by the lawmaker is redundant, as it is understood that if the entering was achieved without right, there was no consent from the person using the domicile.

By using the term “house” we mean every place effectively and usually destined for the domestic use of one or several persons, regardless of whether it is permanent or temporary.

In the sense of criminal law, the notion of “house” is a much wider concept, as it refers to the place where a person leads their private life, regardless of whether it is an actual house or a building designed for any other purpose, provided it is used as a house at the moment the crime was committed.

We must also state that in order for this crime to exist, the simple destination of house of a certain room is not enough; the inhabitant must actually live there.

In judicial literature, it was stated that the crime of trespassing also occurs when illegally entering a separate room which the subject occupies in special location, such as a monk's room, the separate room of a sick person [17].

A room is a part of a construction which is destined to be used as a house and is effectively used as such.

To provide an example, we mention the deed of the person who illegally enters a room in a house where a person effectively resides.

The dependences are those particular places, which, directly or indirectly, are connected to the main residence, as they represent an extension, an accessory of the residence.

This crime is also committed when the perpetrator illegally enters a cellar or a room which belongs to the residence of a person.

By surrounded place, we mean any place which is separated by a fence but is connected to the residence or dependence.

There is no need for surrounding walls; even a mere fencing is enough in order to express the will of the owner to stop the entrance of others without consent [1].

If the surrounded place has no connection to domestic use and the residence of a person, there is no such crime.

Judicial practice has demonstrated that those who commit this crime follow a certain purpose and in order to achieve it, they commit other crimes (murder, rape, destruction); thus the crime of trespassing is added to the other crime.

The action which forms the material element of this crime can also consist of a refusal to leave the residence following a request by the rightful owner, which means that the entering was achieved in a legal manner.

The legal text does not list the means which can be used by the author of the crime, as it is generally described as “any means available”.

The two types of this crime are of alternative character, thus, if the perpetrator, following a request by the rightful owner, refuses to leave, we will

still be in the presence of just one crime and not two added crimes. In order for the material element of trespassing to exist, there are two essential conditions which need to be met.

The first one is that the incriminated action is achieved “without right”. If the person who enters another person’s residence acts in a legal manner, there is no such crime. The second condition is that the action of entering or staying in a person domicile occurs without consent from the person who uses it.

In order to be in the presence of the aggravated form of this crime, several other conditions must be met. Thus, the deed is considered to be more serious if committed by an armed person - art. 179 Criminal Code [16].

The deed is more serious given the intimidation of the victim and the lack of any resistance because of the weapon as well as the possibility of the perpetrator of actually using the gun, all these resulting in an increased social danger of the deed and also a much more dangerous perpetrator.

Also, the deed is considered to be more serious if committed during the night.

The crime is thought to be committed at night if it occurs between sunset and sunrise of the following day, thus occurring during the night time; this time is different in regard to season, geographical position, and atmospheric conditions.

Committing this crime during the night increases the social danger of the perpetrator, as he is aware of the fact that the victim has limited means of defending themselves.

A final aggravated type of this crime is the use of a deceitful quality. In case the perpetrator uses a certain quality, as the one of policeman, prosecutor or relative, a quality which enables him to commit the crime, we are in the presence of an aggravated form of this crime.

Article 225 of the Criminal Code protects the private life of any person or company, as well as the space where that person works.

Thus, the current regulation made a clear distinction between the notion of domicile, specific to persons and the notion of headquarters, which implies the space where a company is located. Article 225 of the Criminal Code regulates the crime of trespassing in regard to professional headquarters, a regulation which has no correspondent in previous regulations.

According to ECHR jurisprudence the professional headquarters of a company is protected by the regulation of article 8 of the European Convention of Human Rights, as we are about to show in the following section.

The material element of the crime can be achieved either by the action of illegally entering the professional headquarters of a company or by the refusal of leaving the headquarters following the request of the rightful owner.

The lawmaker sanctions trespassing if it occurs in headquarters, but also in any kind of location where people work, thus substantially increasing protection for people at their work place. The place where a person works is where he effectively and constantly goes to work.

The headquarters is to companies what the domicile is for a person. Criminal law provisions that the trespassing occurs without consent from the entitled person and without right, abusively, without any legal justification.

3. The notion of domicile in the European Court of Human Rights jurisprudence

In the European Court of Human Rights jurisprudence it was noted that “the right to have a domicile entails the security and welfare of a person”[5], thus appreciating

in doctrine that “all other rights as mentioned in article 8 are connected to the right to have a domicile (...), as a person’s private life is developed in relation with its domicile” [2].

All these result in the importance which the European Court of Human Rights gives to the domicile, thus having multiple implications, as we can see from the jurisprudence of the Court.

While in internal law the meaning of domicile is very well defined and regulated, the ECHR jurisprudence extends the content of this notion.

Such an example is the solution given by the court in the case *Niemietz vs. Germany*, when the court acknowledged the violation of article 8 of the Convention. In the filed complaint, the plaintiff, a lawyer, argued that the previously mentioned text was violated as a result of the search performed by the German authorities at his office.

In appreciating the existence of a violation of the right to have a domicile as regulated by article 8 of the Convention, the Court stated the following : in arriving at its opinion that there had been an interference with Mr Niemietz’s “private life” and “home”, the Commission attached particular significance to the confidential relationship that exists between lawyer and client.

The Court shares the Government’s doubts as to whether this factor can serve as a workable criterion for the purposes of delimiting the scope of the protection granted by Article 8.

Virtually all professional and business activities may involve, to a greater or lesser degree, matters that are confidential, with the result that, if that criterion were adopted, disputes would frequently arise as to where the line should be drawn.

The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of “private life”. However, it would be too restrictive to

limit the notion to an “inner circle” in which the individual may live his own personal life as he chooses and to exclude therefrom 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 beings.

There appears, furthermore, to be no reason of principle why this understanding of the notion of “private life” should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world.

This view is supported by the fact that, as was rightly pointed out by the Commission, it is not always possible to distinguish clearly which of an individual’s activities constitute a part of his professional or business life and which do not.

Thus, especially in the case of a person exercising a liberal profession, his work in that context may be part and parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment of time.

To deny the protection of Article 8 on the grounds that the measure was believed to have only been related to professional activities - as the Government suggested it should be done in the present case - could moreover lead to an inequality of treatment, in that such protection would remain available to a person whose professional and non-professional activities were so intermingled that there was no means of distinguishing between them.

In fact, the Court has not heretofore drawn such distinctions: it concluded that there had been an interference with private life even where telephone tapping covered both business and private calls (...)

As regards the word "home", appearing in the English text of Article 8, the Court observes that in certain Contracting States, notably Germany, it has been accepted as extending to business premises.

Such an interpretation is, moreover, fully consonant with the French text, since the word "domicile" has a broader connotation than the word "home" and may extend, for example, to a professional person's office.

In this context also, it may not always be possible to draw precise distinctions, since activities which are related to a profession or business may well be conducted from a person's private residence and activities which are not thus related may well be carried out in an office or commercial premises.

A narrow interpretation of the words "home" and "domicile" could therefore give rise to the same risk of inequality of treatment as a narrow interpretation of the notion of "private life".

More generally, to interpret the words "private life" and "home" as including certain professional or business activities or premises would be consonant with the essential object and purpose of Article 8, namely to protect the individual against arbitrary interference by the public authorities (see, for example, the *Marckx v. Belgium* judgment of 13 June 1979, Series A no. 31, p. 15, para. 31).

Such an interpretation would not unduly hamper the Contracting States, for they would retain their entitlement to "interfere" to the extent permitted by paragraph 2 of Article 8 ; that entitlement might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case"[18].

4. Conclusions

Our present work aims to point out the specific content of the notion of domicile,

in the meaning provided by criminal, civil and constitutional laws.

From a civil point of view, the domicile is defined as the place where a person declares its main residence, whereas from a criminal perspective, the domicile comprises the civil domicile as well as the residence of a person, including any place where a person and his family live.

By analyzing ECHR jurisprudence, we can easily notice that the meaning provided by the ECHR is much wider than that found in national law.

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