

NOTIONS ON SEARCHES

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Abstract: *The domicile or residence of a person is inviolable, as guaranteed in the Constitution and by the European Convention on Human Rights. However, inviolability of the home is not absolute and unconditional, the domestic law and European Human Rights Convention establish exceptions from this principle. Besides the fact that the search is an exception from the principle of inviolability as its effect is the restriction on the exertion of certain rights or freedoms recognized and guaranteed, its disposition or accomplishment under the rule of law must be completed under the circumstances stipulated by the law.*

Key words: *principles, inviolability, search, rule of law.*

1. Introduction

Art.8 of European Convention of Human Rights states that "everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." Inspired by the text of art.29 section 2 of the Universal Declaration of Human Rights, art.8 of the European Convention on Human Rights is the first in a series of four texts of the Convention to protect rights which means social respect for the individuals.

In accordance with art.27 paragraph 1 of the Constitution, the domicile and residence are inviolable. No one may enter

or remain in a person's domicile or residence without his consent. This right is not absolute but, as the second paragraph of the same article stipulates an exemption from the provisions of paragraph (1) can operate, according to the law, for the following instances:

- a) carrying into execution a warrant for or a court decree;
- b) removing a risk to someone's life, physical integrity, or a person's assets;
- c) defending national security or public order;
- d) preventing the spread of an epidemic.

In accordance with art.100 of the Criminal Procedure Code "when the person asked to deliver one of the objects or writings mentioned in art.98 denies their existence or possession, as well as whenever the search is necessary in order to discover and gather evidence, a search may be ordered."

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2. The search

The search can be defined as procedural work, carried out in order to find the objects or documents that are hidden and if discovered may contribute to finding the truth in a criminal case. The word "search" comes from the Latin word "perquiro" meaning to search, carefully investigate everywhere.

From the very beginning, there must be drawn the distinction between the search of judicial nature whose procedure is carefully regulated by the Criminal Procedure Code, and the search of extrajudicial nature, such as customs search, the antiterrorist search on checking in at an airport, etc. The following paragraphs will analyze the legal matters related to the judicial search.

Being an evidence procedure of discovery and confiscation of the writings and material means of evidence, the search institution underwent successive changes by law no. 281/2003, Government Emergency Ordinance no.60/2006, Law no. 356/2006, Government Emergency Ordinance no. 109/2003 and the guidelines in the jurisprudence of European Court of Human Rights (ECHR).

The search is a procedural activity that can be performed not only in front of the suspect or defendant, but any other person. [1]. It can be either domiciliary or corporal and is established in section VIII chapter II of the Criminal Procedure Code, the general part.

2.1. Domiciliary search

The notion of domiciliary search does not refer only to the domicile of one person as a place where a person lives permanently, but it also means "outbuildings, bridges, barns, cellars, warehouses, sheds, enclosed spaces or hotel rooms. If the place is unrestricted or

is an access area, the rules that establish on-site investigation become applicable." [2]. The idea was also accepted that the work place is also a concept of domicile with the meaning shown in art.8 of the ECHR. [3]

According to art.100 paragraph 6 of the Criminal Procedure Code "domiciliary search may be ruled only by the judge, through motivated closing, during the criminal prosecution, upon prosecutor's request, or during trial."

Domiciliary search is ruled during criminal prosecution in the council room, without summoning of the parties. The participation of the prosecutor is mandatory. Consequently, during the criminal prosecution only the prosecutor may ask a judge to order domiciliary searches. Even if the accused party or criminal investigation body should appreciate as useful such a procedure, they cannot directly request the judge to order the procedural action. They will need to contact the prosecutor who, upon consideration that the conditions established by law are met shall submit an application regarding this aspect to the judge.

According to art.203, the final paragraph of the Criminal Procedure Code, the prosecutor may request the search authorization at the valid suggestion of criminal investigation authorities or ex officio. The law does not expressly stipulate the nature of the act by which the prosecutor notifies the court. In the specialized literature and in practice it was established that the court notification must be done either by a justified report that should state the solid evidence and indications that justify the prosecutor's opinion regarding the need of performing the search, either through an application, taking into account the textual interpretation of art. 100 paragraph 4 of the Criminal Procedure Code. [4]

The court will consider the prosecutor's request to carry out the domiciliary searches during the closed session meeting without summoning the parties and with the prosecutor after verifying the existence of any incompatibility case and competence for handling the application. During the prosecution the domiciliary search is ordered by a judge from a court which hears the case in the first instance or from the appropriate court in whose jurisdiction the prosecution office is situated, where the prosecutor directs and supervises the criminal investigation activity.

If the court considers it justified, it will approve the request or otherwise it will reject it. The court shall decide on the prosecutor's request without disclosing the reasons, which must include the amendments specified in art.305 paragraph 1 of Criminal Procedure Code.

The question whether the conclusion of the meeting which authorized the search should include or not the mention "pronounced in open court" under article 310 paragraph 1 of Criminal Procedure Code was debated by the practitioners. If the provision of article 310, paragraph 1 were followed, it would achieve the principle governing the work of criminal investigation, namely the lack of advertising. The purpose of this stage of the trial is precisely to gather the best evidence for both the defense and prosecution of the accused. [5]

If the prosecutor's request is granted, the judge issues the search authorization which is given to the prosecutor in order to be applied. Art.100 paragraph 4 of Criminal Procedure Code states the data that must be included in the search authorization: a) the name of the court, b) the date, time and place of issue, c) name, surname and the person's position who issued the search authorization, d) the period for which the authorization was issued, e) the place where searches are going to be performed;

f) the name of the person who lives in the searched residence, g) the name of the defendant.

According to art.311 of Criminal Procedure Code, the closing of the case through which the judge solves the prosecutor's request for search authorization is the decision of the court.

The authorization may be used only once, in the sense that the judicial bodies cannot perform several searches of the same person under the same authorization. [6]

In the specialized literature, regarding *flagrante delicto*, there were expressed different views on the need of authorization issued by a judge. Thus, some authors [7] have argued that this authorization is not necessary for flagrant crime, while other authors [8] claim the opposite justified by the fact that none of the texts regulating the flagrant offense provides any such exemption, and on the other hand, the systematic interpretation of art.27 of paragraph 3-4 of the Constitution shows that the search is always ordered by a judge and the time of making it is during the day.

During the trial, domiciliary search may be performed during a local research. This procedural provision indicates that the court cannot perform the search as an autonomous procedural act.

The closing that approved the order of a search authorization does not have a legal remedy. The legislative failed to separately regulate such a remedy for the completion ordering the search or the rejection of the prosecution's request. According to art.361, paragraph 2 of Criminal Procedure Code, the decision can be brought to action only once.

The law provides the possibility of repeating such a request when the criminal investigation bodies present clues of the existence of evidence in the domicile necessary for the fair resolution of the case.

Currently, there is no time limit on the validity period of the search authorization issued by the court. Under paragraph 4 point d. of art.100 of Criminal Procedure Code, Courts issue search authorizations presenting in their contents the validity period.

According to art.103 of the Criminal Procedure Code, searches can be performed between 6:00 a.m. to 8:00 p.m., and at other times only in case of *flagrante delicto*, or when the search is to be performed in a public place.

The term *flagrante delicto* is defined in art. 465 of Criminal Procedure Code: "a crime is flagrant when if discovered during or immediately after its perpetration. Also, a crime is flagrant if the criminal immediately after the perpetration, is followed by the injured person, witnesses or by public callings, or is found close to the place of the perpetration with guns, instruments or any other objects which could make him presupposed participant in the crime."

Regarding the search in a public place, according to the provisions of art.27 paragraph 4 of the Constitution, art.103 of Criminal Procedure Code no longer finds its applicability. This is an implied repeal of the legal text, since the basic law prohibits searches during the night unless it is a flagrant crime. That is not the situation of the searches started between 6:00 a.m. to 8:00 p.m., which may continue during the night for opportunity consideration. Such legislation is justified as an interrupted search could not reach its purpose. On resuming the search, the subjects may destroy or hide in another place the objects searched by the judiciary.

The above provisions are not inconsistent with the basic law, as long as the person entered the domicile before the time the night begins to fall. In the specialized legal literature, the words *during the night* mean the time when darkness falls. Twilight is not part of the

night (darkness has not yet fallen, the people attention is not affected by night), while the dawn does.

According to art.104 paragraph 2 and 3 of Criminal Procedure Code, the domiciliary search is carried out in the presence of the person undergoing the search, and in his absence, in the presence of a representative, of a family member or of a neighbor, having capacity of exercise. In order to ensure that this activity is carried out within the law, the searching operation is performed by the criminal investigation body in the presence of assistant witnesses. It is not permitted to search at the same time with any other procedural acts in the same case, which by their nature prevent the person from that domicile from participating in the search.

The domiciliary search is performed in two phases: firstly, the place to be searched is acknowledged, the obligations of each investigator are being established, the search order is set and orientation pictures of the place and the outline pictures are taken. The second phase consists of searching objects and places where they may be hidden.[9] The judicial body that performs the search has the right to open the rooms or other means of enclosing where the objects or the writings wanted may be found if the person entitled to open them refuses to do so. The judicial body must limit itself to confiscation of objects and writings connected to the deed committed; objects and writings whose circulation and possession are forbidden are always taken away. The judicial body must take measures so that facts and circumstances in the personal life of the person whose place is searched, which are not connected with the case, are not made public.

Although it has some common aspects in terms of research methods and objectives the domiciliary search differs from the place search activity by the range of action and intended purpose. "To perform the

search, in relation to the nature and specifics of the case, the achievement of one or more of the following purposes is ensured: a) the discovery of objects or inscriptions bearing traces of the crime; b) the discovery of objects, documents or valuables which have been used or designed to serve the crime; c) the discovery of objects, documents or valuables as the effect of the crime; d) identification and collection of goods coming from crime; e) finding individuals escaping from criminal prosecution, trial or serving their sentences, f) finding missing people from home, dead bodies or parts of bodies g) the discovery of objects, documents or valuables held against the legal provisions; h) the discovery of objects, documents or valuables owned by the perpetrator or civilly liable person in order to repair the damage caused by the offense or in order to guarantee the enforcement of fine. " [10]

2.2. Body Search

The body search consists of the inspection of clothing and confiscating possessions of the searched person that can contribute to finding the truth. It can be ordered by the criminal investigation body, the prosecutor or judge and is performed by the body that ordered it or the person appointed by this body with the obligation to prove its identity and, in the cases stipulated by the law, present the authorization given by the prosecutor. Corporal searches can be performed by the inspection authorities mentioned in art.215 of the Criminal Procedure Code. The corporal search is performed only by a person of the same gender with the person being searched. The report, being the conclusion of the search is part of evidence.

The question that arose was whether or not these provisions come into contradiction with the constitutional

provisions of art.27 section 3 which establish that the search is only ordered by the judge. In the specialized literature it is considered that the two legal texts are consistent for the following reasons [11]:

- art.27 of the Constitution regulates the fundamental social relations through which the inviolability of the home is ensured but not of the individual, this text referring only to the domiciliary search.
- the corporal search is regulated by art.23, paragraph 2 of the Constitution, generically called "individual freedom", which mentions "search, detainment, or arrest of a person shall be permitted only in the cases and under the procedure provided by law."

We conclude therefore that corporal search is an exception to the principle of individual freedom enshrined in art.23 of the Constitution.

2.3. Computer systems Search

Art. 56 of Law 161/2003 on measures to ensure transparency in the exercise of public dignities, public functions and business environment preventing and sanctioning corruption (published in Official Gazette no. 279 of April 21, 2003) reads: whenever for the purpose of discovering or gathering evidence it is necessary to investigate a computer system or a computer data storage medium, the prosecutor or court can order a search. If the criminal investigation body or the court appreciates that seizing the objects that contain the data referred to in paragraph (1) would severely affect the activities performed by the persons possessing these objects, it can order the making of copies that would serve as evidence and that are achieved in agreement with art. 55, paragraph (3). When, on the occasion of investigating a computer system or a computer data storage medium it is found

out that the computer data searched for are included on another computer system or another computer data storage medium and are accessible from the initial system or medium, the authorization can be ordered at once to perform the search in order to investigate all the computer systems or computer data storage medium searched for. Paragraph 4 of the same article stipulates that the provisions of the Criminal Procedure Code regarding searches at home are applied accordingly.

2.4. Vehicle Search

Before Law 356/2006, the Criminal Procedure Code does not expressly stipulate the manner in which the vehicles search is performed, creating many difficulties to practitioners. Currently, however, art. 100 paragraph 5 expressly states that the vehicle search follows the same procedure as body search.

3. Conclusion

The search has the effect of restricting the exercise of rights or freedoms recognized and guaranteed in the Romanian Constitution. The order or arrangement of a search under conditions other than those provided by law may entail disciplinary penalties according to art.99 of Law no. 303/2004 on the status of judges and prosecutors or criminal penalties according to art.192 of Penal Code (residence violation) or art.247 of Penal Code (abuse of office by rights restriction). According to art.64 paragraph 2 of Criminal Procedure Code, pieces of evidence that were illegally obtained may not be used in the course of the criminal trial. The contestation of the legal character of the reports may be made by reference to art.197 of Criminal Procedure Code on trial's nullity. Along with other authors [12] we consider that the decision

of High Court of Cassation and Justice [13] can be criticized, which, in a case involving drug trafficking decided that there is no domiciliary search, according to art.100 of the Criminal Procedure Code regarding the confiscation of objects containing drugs found by police officers in a house after a complaint for disturbing the public peace before the prosecution. This operation is legal according to art.213 of the Criminal Procedure Code.

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