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Violation of Secrecy of Correspondence - Means of Committing the Offense of Criminal Acts by Public Officials. Case Studies from the Practice of the European Court of Human Rights

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Abstract: Global threat of rape submission was informed by legislators of all nations. Within the European Union, guaranteeing privacy and secrecy of correspondence is governed by the Charter of Fundamental, STI General Data Protection Regulation (679/2016) and Directive Protection of personal time in the specific activities Carried out by enforcement Authorities (680/2016). Nationally, the legislature has guaranteed secrecy of correspondence in the first phase in the fundamental law by Article 28 of the Constitution. Violation of this law is rightly seen by the legislature as the Breach of social relations That is born and Develop in relation to the safety of communication Between people in any way; therefore bu regulated as a crime in Article 302 of the Criminal Code - Special Part, Which emphasizes social danger created by the violation of secrecy.

Keywords: communication; secrecy of correspondence; personal date protection; crimes

Introduction

A fundamental need in the company's existence and even the existence of human being, one is without a doubt - communication. Without communication there can be no human relationships as we know them today. The need of individuals to express their thoughts, feelings, emotions and ideas to families and to those with whom she lives, has led to the evolution of communication - made from the beginning of simple gestures, signs or words - to a higher level, which advanced techniques involving transmission of information between individuals.

Economic relations have developed steadily between communities or states, personal relationships of an emotional or family of individuals, labor relations of people, all of us to evolve transmission of information on a variety of communication channels remotely. Extremely useful these ways to communicate hiding a vulnerability which, unfortunately, many of us remain indifferent, considering without reason that the information provided will not be transferred to third parties for use in illegal activities, causing harm in this way privacy and most often affecting privacy.

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No doubt the relationship between the state and its citizens is one indissoluble. The state can not exist without its citizens, communication between state institutions and citizens must be effective and based not only on good faith but must be governed by strict legal rules aimed at protecting the state-citizen relationship as a whole. Romanian national unity and equality among citizens is guaranteed by the Basic Law in Article 4¹.

Basis which was the basis of our commitment to address this issue lies in the many cases where civil servants (as they are defined in Art. 175² Criminal Code) prelevându the access to citizens' personal data or even have in management with the nature of their (bank clerk, tax clerk, magistrate, intelligence officer, policeman, etc.) can use these data misuse.

The goal revealing the crime of violation of secrecy of correspondence (regulated by art. 302 Criminal Code) as offense-means for committing criminal offenses or serious breach of fundamental rights is to shape social danger created by the quality of the active subjects of this crime, par. 3 of art. 302 constituting an embodiment of the offense is aggravated punished by more severe (1-5 years in prison) to variations type (3 months to 1 year or 6 months to 3 years depending on the structure of the active material element in subjects unskilled workers).

1. Analysis Offense of Violation of Secrecy of Correspondence in Terms of Qualified Active Subject - Civil Servant

Fundamental right of privacy of correspondence is revealed primarily by way of the Criminal Code criminalizing its violation. The offense is regarded as a complex, it is presented as two variants type that highlights the various ways in which this can be accomplished, or by accessing and / or seizure of correspondence of another without law and disclosure of information obtained by third parties, even if the information has arrived inform the offender mistake (art. 302, para. 1, Criminal Code) or by interception as electronic communications of any kind (art. 302, para. 2 Penal Code) and disclosure to third parties without the right even if the information they came to the attention of grșeală perpetrator (art. 302, paragraph 4, Criminal Code).

The structure of criminal offenses of the offense is filled by a distinct variation (Art. 302, par. 6), which consists of making the interception means for recording, with the aim of intercepting the execution of the free as introduced by Law 187/2012³ Implementation of the Criminal Code.

Another essential element in the structure of this crime consists of supporting specific cause (art.302, par. 5, Penal Code), under which the offender will not be held criminally liable if the act of violation of secrecy of correspondence helps to prove a or commit any other crimes or discover surprising if public showing interest and benefits to society outweigh the damage done to the passive subject.

¹Constitution Art. 4 Unity of the people and equality among citizens. (1) The State foundation is Romanian national unity and solidarity of its citizens. (2) Romania is the common and indivisible homeland of all its citizens, irrespective of race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, wealth or social origin.

²Penal Code Art. 175 civil servants. (1) Civil servants, for the purposes of criminal law, an individual who, permanently or temporarily, with or without remuneration:

a) attributions and responsibilities established by law in order to achieve the prerogatives of the legislative, executive and judicial;

b) exercising a public dignity or public office of any kind;

c) exercise alone or with others, in an autonomous, of another operator or a legal entity owned or majority state tasks related to achieving the object of its activity. (2) It is also considered a civil servant within the meaning of criminal law, the person who exercises a public service which was invested by public authorities or is subject to control or supervision of the completion of their respective public service.

³Published in the Official Gazette, Part I no. 757 of November 12, 2012

Finally, the aggravated (art.302, paragraph 3, Criminal Code) the crime is given by qualified active subject of the offense, it consisting of individual civil servant is just as responsible service confidentiality protection. Aggravated variants on this we will focus below.

Object of the crime in question is the subject of special legal - it is shaped by social relations that are born and developed in conjunction with the normal and safe communication between people - and the subject material - which is the very correspondence was stolen or destroyed or passage in which the communication line connected the device to intercept. (Dobrinou, et.alli., 2016, p. 592)

Active subject if aggravated variant is directly only a person who is a civil servant. In this case they will be outlined situations in which to commit the criminal offense involving more than one person, so we faced a stake improper.

The interest is possible in all its forms, but supports certain shades depending on the form of the participații namely:

→ instigator and accomplice will be held criminally responsible for aggravated form of the crime if they knew or could provide quality poster public official, otherwise they are subject to prosecution for one variant type of crime according to the material element done;

→ if coautoratului, a prerequisite is that all who work directly for carrying material element to have the status of civil servants to be able to retain this form of participation, otherwise, those who acted directly in the act and have Varant aggravated required quality will meet one variant type depending on the material element done.

The discussion regarding passive subject does not require a thorough analysis, it can be any natural or legal person. It has noted, however, that there is a general and immediate passive subject, represented by the company, whose interest in the private life of persons is violated by violating secrecy.

One issue that will be examined for nuances complexity offense of violation of secrecy of correspondence is the criminal unit. We initially discusses the legal unit of the crime is, the offense in question, a plurality of actions as the law provides a single crime. (Boro & Anghel, 2016, p. 78) If the material element described in Article 302, paragraph 1 of the Criminal Code is committed by civil servants in several actions (opening, theft or destruction of mail) at different times and under the same criminal, against the same passive subject, the offense will get a continued character. For this purpose the crime continued to be detained, it needs to remember the essential conditions to be met:

→ be unity so active subject and the passive subject - one civil servant has committed any act of enforcement, targeting the same passive subject.

→ be a plurality of actions committed to a particular time - is a condition related to the essence of the offense repeated, each of the actions specified in paragraph 1 of article 302, can form single material element of the offense: for example, if a public official correspondence destroy a person, and the next day open its correspondence, it answers for the crime of violation of secrecy of correspondence through repeated and not a contest of two counts of violation of secrecy corepondenței.

→ be a unit of content - every action of civil servant to destroy, steal, withhold or opening the mail will make content the same offense violation bascretului mail aggravated whether undertake acts mentioned or cumulative two or more among them. It will not matter if some of these actions remains tentative stage, others will consume as reporting facts will be consumed.

→ be unit criminal intention - the public servant will have to have representation assembly activities in advance of the first action and want to achieve while shares of content the same offense, in other words, to deliberate form of guilt can be only intention.

→ acts are committed at different times - the uniqueness of criminal intention is that the intervals must be reasonable in duration as follows: to be higher than normal interruptions (the normal mail delivery by courier) but less than the time between acts that would lead to the conclusion that there is not a single criminal resolution (in this case will hold the contest between the two counts of violation of secrecy of correspondence, even if there is unity of subject passive and active). (Boro & Anghel, 2016, p. 79)

Another unit crime, in addition to the legal unit, is the natural unit of crime, which will find applicability in option-type offense of violation of secrecy of correspondence given in paragraph 2 of Article 302 of the Criminal Code, the action interception without right to any kind of telephone or electronic communication shall be extended over time after time consuming, until the time of the last track (depletion) (Boro & Anghel, 2016, p. 76).

The characteristics of continuous form variant-type as provided in paragraph 2 of Article 302 are that there is only one criminal intention, enforcement of interception without right to extend the time to be committed only with intent to have a single active subject qualified (acts are committed by the same public official) crime unit is maintained throughout the interception without right.

Essential in our discussion concerning the material element of interception by public persons is this intercept is not right. This implies the absence of a warrant from a judge of rights and freedoms for interception, which is a special surveillance measure that can be used during the criminal proceedings under Article 138, para. 1 point a)¹ para. 2² the same article defines the concept of interception as it is permitted only under mandate interception.

Concluding observations on crime unit in the forms of this crime, it can get a continued criminal offenses (art. 35, para 1³) Where the public official correspondence violates the same person at different times given the same criminal (Mitrache & Mitrache, 2017, p. 133) or a continuum where the public servant intercepts a person naturally without the right to obtain information and continuously pursued criminal resolution. (Mitrache & Mitrache, 2017, p. 119)

To make the transition to the next section of our study we will have to address the subjective side of the offense of breach of secrecy. Undoubtedly, the existence form of knowledge required for the offense is the intention, directly or indirectly, by executing the perpetrator of the material element and having its representation will follow-up actions.

The content of this crime is linked to a phone or a goal, but if it exists and is in the form of other crimes, the situation becomes complex, meeting the requirements of a series of offenses, the offense of violation of secrecy of correspondence becomes infractiune- middle.

¹Criminal Procedure Code - Special methods of surveillance or investigation Art. 138. General. "(1) The special surveillance or research methods: a) the interception of communications or any kind of distance communication; ..."

² Criminal Procedure Code - Special methods of surveillance or investigation Art. 138. "... (2) interception of communications or of any type of communication means intercept, access, monitoring, collection and recording of communications by telephone, computer system or by any other means of communication ..."

³ Criminal Code, Art. 35, para 1- continued crime unit and the complex. "(1) The offense is continued when a person performs at different intervals of time, but to achieve the same resolution and same subject passively against actions or inactions presenting, each one, the content of the same offense ..."

2. Use the Offense of Violation of Secrecy of Correspondence as Offense-Means for Committing Other Criminal Acts

Why I am qualified for this study crime of violation of secrecy of correspondence as offense-means for committing other criminal acts? - to define how this crime can be used to perform other criminal offense, thus achieving in this way a series of offenses charged perpetrators. Realization of offenses will outline creating a plurality of offenses, ie two or more crimes related legal entities through a personal connection or real. (Boro & Anghel, 2016, p. 85)

For the concurrence of offenses are necessary as more conditions are met, namely: to be committed at least two offenses by the same active agents (described in our case - the civil servant or official), and the latter can be criminal liability for at least two counts. In our study, we will analyze situations in which the crime of violation of secrecy of correspondence is put into the context explained above, is used as a weapon to commit another offense by a public official.

There will be confused whether the offense addressed in this study is the goal perpetrator pursued by the resolution of crime, committing a criminal offense to obtain information from private correspondence of a person - where the violation of secrecy of correspondence is an offense-purpose not an offense-means, being us but still under the influence of a series of offenses.

All crimes are committed through violation of secrecy of correspondence, from those against life and person (murder, manslaughter, battery or other violence, etc.), against property (burglary, theft, robbery, etc.) to crimes against forces army and state security, the latter qualified active subject with a leading role.

To narrow the range of offenses the violation of secrecy of correspondence is the USER as offense-means, we lean out several criminal active subject qualified person civil servant or official has the opportunity higher to act as follows: false identity, extortion and unjust repression.

→ false identity (art. 327 Criminal Code - is presented in the form of a variable type that consists in presenting under a false identity or assigning a false identity to another person presentation made by a public official or sent to a public body by illegally using a document or identification document, authorization to mislead a public servant in order to produce legal consequences for himself or for another, an alternative-compounded when the presentation identity false used a real identity of a person; a variant-treated in the custody of an act that is used without authorization to be used as (Dobrinou, et.alli., 2016, p. 712) - to define where that crime is a crime-purpose using violating the secrecy of correspondence as offense-means we bring into question the assumption that a public official of the National Agency for Fiscal Administration access information and correspondence of someone who wishes to revenge, with an iT operator within the same institution - the latter providing information from negligence, intentional or no guilt - and uses this information to create the account and the name of that false debts. In this case, the civil servant shall be liable for the crime of violation of secrecy of correspondence in competition with the offense of false identity. Regarding IT operator,

- Intent - accomplice to a crime contest between violating the secrecy of correspondence and false identity if he knew the intentions public official or other violation of postal secrecy only if it provides information knowing that it requires a civil servant is not right

- fault - will be liable to disciplinary or will be subject to a lighter pdeapsă

- without guilt - not criminally responsible, and eliminating this competition offenses hypothesis presented initially as the sole active subject will be held criminally liable for the crime of false identity.

→ Blackmail (Article 207, Criminal Code - is presented as a variant-type consisting of coercion of a person to give something, do something, do not do something that normally would have done without coercion or suffer some everything in order to acquire unduly avail patrimonial, a variant-treated which is threatening to give the public or to a third false or real, compromising the person threatened or to a family member of that order get a non-economic use; one-compounded version of the previous embodiments in which the actions are employed in order to obtain a patrimony. (Dobrinioiu, et.alli., 2016, pp. 115-116) - in this case we will bring into question the assumption that an officer working in the Romanian Intelligence Service, intercepts without right (without a warrant to intercept issued by a judge and a request from organuleor IP) electronic mail and calls a friend's family, threatening to provide information accessed if her husband will not get a steady amount of money or sexual favors. In this case, the officer will be criminally liable for the crime of violation of secrecy of correspondence in the competition with the aggravated offense of blackmail.

→ crackdown unfair (art. 283 Criminal Code - is presented as a variable type that is the initiation of criminal proceedings, the arrangement of preventive measures custodial or indictment of a person, knowing that it is innocent one embodiment, which consists in retaining worse, arrest or conviction of a person, knowing that innocent. (Dobrinioiu, et.alli., 2016, p. 472) - also if the information obtained illegally by violating secrecy of correspondence by an intelligence officer or by an investigative body, are altered or modified to create fake reasonable suspicion of an offense that will lead to the initiation of criminal proceedings and detention of a person, will be retained in the offense of unfair competition repression of the crime of violation of secrecy.

Violation of secrecy of correspondence is an offense classified as an offense in the Criminal Code service, which has a correspondent in the previous Penal Code criminalized in Article 195 which appears in the current indictment novelty is the option even worse in qualifying active subject, making it is transferred from the category of offenses against personal freedom in the category of service offenses. (Dobrinioiu, et.alli., 2016, p. 590)

3. Case Studies of European Court Of Human Rights Concerning the Violation of Secrecy of Correspondence by Officials

We focused attention on two case studies that have been brought before the European Court of Human Rights to address situations in which breached the fundamental right of privacy of correspondence, namely:

- Gagiu against Romania¹ (Prisoner died in prison. Responsibility death. State obligations - Application no. 63258/00 - JUDGMENT STRASBOURG February 24, 2009) - the Court exposure, the letter E shows that the version of the applicant, he complained that he was prevented correspondence to European Court of Human Rights by the civil prison asking him money (under the pretext that these services are not guaranteed to him by the free State - defendant is obliged to sell their food to buy stamps that can send letters) to facilitate the mail and keeps them letters. At point F, paragraph 39, stated that the applicant submitted two complaints regarding the violation of secrecy of correspondence, they were dismissed as a result of death,

Among the many applications of the applicant in relation to the right to life and health officials violated prison notified the Court held in paragraphs 87-92 violation of Article 8 of the European

¹ <http://jurisprudentacedo.com/Gagiu-c.-Romaniei-Detinut-decedat-in-penitenciar.-Responsabilitatea-decesului.-Obligatiostatului.html>

Convention on Human Rights and decided regarding refusal of prison AiuD to allow the applicant needs to correspondence, to give it its right end.

- Petri Sallinen et against Finland¹ - brings a new perspective on the notion of trespassing. In this case, the applicant requested that the business premises of which were built HardDiskDrive sites after some searches may be regarded as the home because he spends most of his time in that location and not the one that figure as the home of law and the search must be conducted according to procedures home search. The Court granted the request and gave the plaintiffs.

Following the admission decision the applicant's complaint, the search warrant that the investigating authorities have enforced loses its effectiveness, their actions turning into trespassing and violation of secrecy of correspondence and the evidence and information collected in this no way are considered as obtained, can not be used as evidence in a court.

4. Conclusions

Following the analysis in this paper, bending us and the views of the European Court of Human Rights applied solutions given consider as beneficial regulation offense of violation of secrecy of correspondence, sanctions fair and having an effective displays the contents of association. However, we believe that the actions of prevention of this crime are poor, even after classification function DPO (Data Protection Officer - responsible for the protection of personal data) that has been newly introduced by the General Data Protection Regulation.

Therefore we propose the establishment of autonomous bodies to supervise constant state agencies through their duties have access to and using personal data of citizens, developing public reports quarterly or annually to ministries related with proposals to amend the rules causing incidents, and their powers prosecution bodies competent to enter and notification in case of committing criminal offenses.

Given these findings, we welcome the idea of establishing the Judicial Inspection as autonomous and independent body according to the draft amendment of the law on organization and functioning of justice.

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