

SOME CONSIDERATIONS ON NATIONAL AND INTERNATIONAL LEGAL GUARANTEES OF THE INVIOABILITY OF DOMICILE

Associate Professor Mircea TUTUNARU, PhD.

Titu Maiorescu University, Faculty of Law Tg-Jiu, (ROMANIA)

mircea_tutunaru@yahoo.com

Abstract

This article makes a comparative analysis of the concepts of domicile and residence as well as guarantees in accordance with the constitutional rules of law, civil law, criminal law and international documents. Legal term of "domicile" and the "residence" used in art. 27 para. (1) of the Constitution have other meanings than those known and commonly used, these terms are used with different meanings in civil law to criminal law and to constitutional law. The right to housing and the right to inviolability of private life are related to a person, it is guaranteed by domestic legal norms and rules of European and international legal.

Keywords: *domicile, residence, inviolability, domicile searches*

1. The legal concept of "domicile" and "residence"

Residence, as shown in the general theory of civil law, is an attribute identifying the person and aims its location in space. [1]

Legal term of *domicile* and the *residence*, used as art. 27 para. (1) of the Constitution, have other meanings than those known and commonly used. Terms of *domicile* and the *residence* are used with different meanings in civil law to criminal law and constitutional law. [2]

Domicile in the sense of dwelling is presented as a natural human right to have a shelter in which to carry out their work safely and private life without being disturbed by other people. [3]

As stated prof. Cristian Ionescu, the right to housing does not have its source in a legal reasoning complicated, is not the result of theories subtle but a necessity elementary society in a spirit of solidarity, should ensure any person who, for lack of financial resources or materials can not meet. [4]

As results from the analysis made in the literature and the Romanian Constitution, the right to housing and the right to inviolability are guaranteed and protected by the state, being related to private life. In this regard, the Civil Code stipulates in art. 87 that: "The domicile of individual, to exercise his rights and freedoms civilian, is where it says it has its main dwelling." Also in the Civil Code covered four types of home: common law domicile, legal domicile, business domicile and chosen domicile.

Common law domicile is that it voluntarily declare an individual. Any individual can choose or change their residence whenever desired, or to establish a main residence anywhere in the country, respecting the laws in force. Since domicile, as main residence, by its nature, is a home steadfast, he is unique. Considering the provisions of art. 90 para. (2) of the Civil Code, we note that it establishes a presumption home: "In the absence of residence, the individual is deemed to reside at the place last home, and if it does not recognize the place where that person is."

Legal domicile is established by law for certain categories of individuals and it signifies a measure of protection.

Business domicile refers usually to the person who has a business, and the economic obligations that are running there. It is usually set in the place where the enterprise is located.

Chosen domicile It is governed by the provisions of art. 97 of the Civil Code provides that "Parties to a legal act may give an chosen domicile in order to exercise or enforcement of obligations arising from that act." Being an imperative requirement of the legislature, the chosen of domicile must be in writing.

As results from the analysis of the legal issues concerning civil law domicile, it has as distinct features the *obligativity*, *uniqueness* and *stability*. [5]

The concept of residence is governed by the provisions of art. 89 of the Civil Code. As apparent from the provisions of this article, " residence of the individual is the place where is the secondary house." Unlike domicile, which is required, as stated in the literature, the residence is an optional attribute of

personal identification, meaning that any person may have a residence but it is not required to have. [6]

The concept of domicile in the provisions of the Criminal Code has a lato sensu regulation. Penal Code criminalizes and punishes the offense of trespassing in art. 224, which states that: "The penetration without, in any way, in a house, room, outbuilding or place fenced taking them without the consent of the person using them, or refusing them leave to request punishable by imprisonment from 3 months to 2 years or a fine." In para. (2) of same article the legislator provided an aggravating offense of trespassing in the sense that: "If the offense is committed by a gunman at night or by using false impersonations, the penalty is imprisonment 6 months to 3 years or a fine. "

Also, the Code of Criminal Procedure and the conditions under which it may be ordered house searches and procedures carried out.

Regarding the concept of domicile in terms of criminal law, the legislature took into account a broader sense than in civil law, namely: housing, room, outbuildings or place enclosed which is integral with main house, as provided in article 224 of the Penal Code in force. [7]

According to art. 157 par. (2) of the Criminal Procedure Code, domicile is the housing or any delimited space, in any way, belonging to or used by a person or entity. [8]

Given the fact that the legislator stated the concept of domicile in relation to the procedure to order a house searches by the judge gives us the guarantee to protect the right to inviolability of the domicile against abuses or acts of arbitrary search. It is important to remember that no matter the place or body building where is the house or outbuilding about who is speaking in art. 22 Criminal Code. To be invoked art. 224 of the Criminal Code, the role dwelling home must have actually inhabited by the person who has the right to inviolability of domicile or residence.

The Constitution uses the notion of domicile but, in reality, the guarantee of inviolability extends to all necessary places for domestic use, as set out in the Criminal Code. [9]

The offense of trespassing is a criminal offense in the Criminal Code with other criminal offenses affecting the private life of citizens. Penalizing those facts, the legislator guarantees and protects the freedom and privacy of individuals, as these social values are based on a democratic society and the rule of law protects these values through both social and constitutional rule through criminal law. [10]

The doctrine shows that the law protects the person who actually owns the dwelling, no matter how precarious is his title against illegal closure of any acts taken by another person. [11]

Under art. 224 of the Criminal Code state that both come domicile spaces role and the role of residence.

By constitutional provision was regulated inviolability of domicile and residence, as an important aspect of protecting freedom and privacy of the person. [12]The concepts of domicile and residence are not situational separately understood by them, in accordance with art. 27, in a general formula, the space in which a person actually resides, either permanently constant or occasional. Everyone has the discretion to opt for a main residence and steadfast that uses the destination home or have their residence. From the constitutional point of view it is important that no one may restrict a person's right to freely use their domicile or residence.

The right to a home is a manifestation of freedom of the individual and his private life. In this sense, constitutional law (art. 27 of the Constitution), as well as criminal law, protect the social relations that consider the defense of personal freedom in terms of freedom of domestic life and the right to inviolability of the home. [13]We note that the constitutional text does not distinguish between right holders on established between natural and legal persons, but on legal persons, we mention the broad interpretation of the concept of domicile formulated by the

European Court of Human Rights. Therefore, entitled to respect for the home include, according to that Court, the right to the respect of the registered office of his business premises or agents. [14]

In the Romanian constitutional system is already a tradition normative regarding constitutionalising inviolability of the home (art. 15 of the Constitution of 1866, 1923, 1938, and art. 29 of the Constitution of 1952, art. 32 of the Constitution of 1965). Please note also that the current constitution legislator has not protected residence as a good heritage but as a right for every citizen to have as a condition of freedom and his private life, a place which one to use freely others or the public authorities. [15]

It is a full agreement between the European conceptions regarding inviolability of the home as part of the freedom of the individual and Romanian constitutional theory. Even if the legal norm some public authorities would be entitled to enter the domicile or residence of a person, intrusion into private life should be conducted in compliance with legal requirements. Violation of the inviolability of the dwelling must be legitimate, that is necessary and without abuse of power. [16]

2. Protection and inviolability of domicile and residence in the international documents

Since value is a social-human inviolability of the home is enshrined in international documents on the matter of human rights and fundamental freedoms. Universal Declaration of Human Rights adopted by the UN General Assembly on 10 December 1948, provides in art. 12: "No one shall be subjected to arbitrary interference with his privacy, family, home [...]".

Art. 17 paragraph 1 of the International Covenant on Civil and Political Rights, adopted in 1966 at the UN, resume content of Article 12 of the Universal Declaration of Human Rights, and states that "No one shall be subjected to any arbitrary interference or unlawful privacy, family, home or correspondence [...]"

Also art. 8 par. 1 of the European Convention on Human Rights states that "Everyone has the right to respect for his private and family life, his home and his correspondence."

Analyzing these international documents containing explicit reference to inviolability of the home seen as an essential component of individual freedom, and the European Convention on Human Rights, we note that there is no distinction on the content, the role and features of the inviolability of the dwelling to a person used it a domicile or residence. It is essential to mention that protect those documents but not domiciled or resident person's private life in the complexity and diversity of its components. [17]

Article 8 requires states two types of obligation: negative and positive. The ratio of negative obligations, states must refrain from committing acts likely to hinder the exercise of rights holders which they are recognized, except when such acts are legitimate in relation to the provisions of paragraph 2. The rights guaranteed by art. 8 are not absolute rights, so any intervention by the State in the exercise of these rights constitutes a violation of art. 8, but only those that do not comply with the three cumulative conditions imposed by paragraph 2 of art. 8. The State interference is given a legitimate if it is prescribed by law and pursued a legitimate aim and is necessary to achieve this goal. [18]

By virtue of its positive obligations under article 8 states should legislate private relations and family to ensure compliance and to intervene by the means available to ensure the legislation, including sanctioning touches unjustified interference with the private life and family relationships between private individuals. [19]

State liability is a good solution for providing legal force of regulations of the European Union, especially the directives not or wrong transposed into national law. [20]We note that, compared with the system of human rights protection that exists in the UN, the European mechanism, the European Convention for the Protection of Human Rights offers us the image of a system more integrated with broader opportunities to repair human rights violations, it

comprising three main bodies: the European Commission of Human Rights, European Court of Human Rights and the Committee of Ministers of the Council of Europe. [21]

Democracy does not admit intrusions illegitimate constitutional state and any person in private individuals. Respecting privacy of individual privacy is the rule and the legal and legitimate state intrusion is the exception. Always legitimate interference of state authorities in the privacy of a person must be motivated by public interest on its expansion due to impairment of certain fundamental values protected by the state and individuals who owe respect. [22]

Both Article 8 of the European Convention on Human Rights and the constitutional and legal provisions that protect domestic inviolability of the home and residence are binding both states and individuals. [23]

In the system of the European Convention on Human Rights, as in national legislation, inviolability of the home, being by nature an individual freedom, the holder can not give it up. Nobody has the right to disregard or violate privacy of domicile or residence of a person only as provided by law in accordance with national constitutional provisions. [24]

Examination art. 27 of the Constitution is clear on two distinct situations intrusion into private homes. The first situation is when it enters the home with the consent of that person. The second situation is where the derogation can enter the house of a person without consent, but only in cases expressly provided for by art. 27 of the Constitution. [25]

We find a similar formulation in art. 8 of the European Convention on Human Rights but in literature and the jurisprudence of the ECHR noted that the interests protected by the provisions of art. 8 are a free person and, consequently, it may validly waive, in the exercise of rights that the holder of rights available. In jurisprudence, the European Court of Human Rights considers that the concept of domicile must include a broad interpretation, which could also include the trailer used as a home, holiday home or other dwelling spaces as

secondary. European Court extends inviolability of the home at the business premises of a legal person (eg a person's Law Office). [26]

Also we mention that there is a rich jurisprudence of the European Court of Human Rights in infringement person to inviolability of their homes with home destination (for example cause of Varga against Romania).

3. The conditions in which constitutional guarantee of inviolability of domicile or residence does not operate

The owner of the inviolability of domicile and residence is any individual citizen of Romanian or foreign holding, compliance with legal requirements, a home or a residence. In accordance with art. 27 para. (2) of the Constitution, the inviolability of domicile and residence can not be invoked in several cases expressly and exhaustively set out in the constitutional norm. The constitutional text is, therefore, consider the following:

- The execution of an arrest warrant or a court order;
- Removing a risk to life, physical integrity or assets of a person;
- Defending national security or public order;
- Preventing the spread of an epidemic.

Logical interpretations of these provisions should be stated that the derogation from para. (1) art. 27 of the Constitution is just a possibility that recourse. Therefore, the public authority or any other person who enters the domicile or residence of a person under the conditions set by par. (2) art. 27 of the Constitution would do so only if necessary if necessary and if entering into such housing does not affect the principles of constitutional democracy.

In our opinion, the constitutional provision that applies violation of the inviolability of domicile or residence must be proportionate to the situation that caused it.

We also specify that the search be ordered only by the judge [art. 27 para. (3) of the Constitution] and carried out under conditions and forms provided by law. House searches being a form of limiting the inviolability of the home is ready when the person was asked to teach an object or document that may constitute

evidence, denies the existence or ownership of, or when there are serious indications that performing a search is necessary discovery and gathering of evidence. [27]

This is done in the terms and forms stipulated by law; is prohibited during the night, except for crimes in flagrante delicto. Code of Criminal Procedure provides that "house searches times of goods in home may be ordered if there is reasonable suspicion of committing a crime by a person or in possession of items or documents that relate to an offense allegedly search may lead to the discovery and gathering evidence regarding this crime to preserving the traces of the offense or catching the suspect or defendant "[art. 157 par. (1) Code of Criminal Procedure]

4. Conclusion

Respect human personality involves to respect his home and his residence, and that involve two common aspects, namely the inviolability of the home, freedom of choice, change or use of residence. To avoid any speculative interpretation of its provisions, the Constitution uses the notion of residence.

Constitutional law, as well as the theory and practice of criminal law guarantees the inviolability of the dwelling that uses constantly or occasionally, anyone legally resident on Romanian territory. Violation of inviolability of domicile or residence is an exception and must be proportional to the situation that caused it. Derogation from the regime inviolability of the home and residence is exclusively a public authority which has independence from other state bodies, thus being excluded arbitrary action of an organ of state power. Social relations, as relations state - citizen, suppose drawing lines of demarcation between the public interests of society and the private interests of individuals, whatever their status.

International documents and European Convention on Human Rights contain explicit reference on the guarantees inviolability of the home as a natural component of the individual. Although the Romanian state has an adequate legal

framework guaranteeing individual rights to a healthy environment to enjoy your own home, though Romania has been condemned by the Court in Strasbourg for violation of this right due to failure of a series of positive obligations. We note also that the Romanian state authorities within fail to ensure effectiveness of implementing rules which ensure the inviolability of the domicile and residence.

References:

- [1] Constantin Stătescu. *Civil law. Individual. The legal entity. Real rights*. Bucharest: Didactic and Pedagogical Publishing House, 1970, p. 146
- [2] Cristian Ionescu. *About constitutionalising right to inviolability of the home*. In: *Dreptul* magazine no 8/2016, pp. 75-76
- [3] F. Sudre ș.a. *The great decisions of the European Court of Human Rights*. Bucharest: International Rosetti, 2011, p. 395; J.F. Renucci. *Treaty of European human rights law*. Bucharest: Hamangiu, 2009, p. 282
- [4] C. Ionescu, op.cit., p. 76
- [5] Ernest Lupan, S. Sztranyczki, *Individuals in the new Civil Code*. Bucharest: C.H. Beck, 2012, p. 138
- [6] Flavius-Antoniou Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, *The new Civil Code, comment on articles*. Bucharest: C.H. Beck, 2012, p. 97
- [7] Nadia Elena Dodescu, *Romanian criminal law*, vol. I, Craiova: Arves, 2015, pp. 118-119
- [8] Voinea, Nadia Elena Dodescu, *Criminal Procedural Law. The special part*. Craiova: Arves, 2011, p. 18
- [9] V. Dobrinoiu, N. Neagu, *Criminal law. The special part*. Bucharest: Universul juridic, 2014, p. 183; Nadia Elena Dodescu, Pantelimon Boștină, *Romanian criminal law. The special part*. Craiova: Arves, 2013, p. 113
- [10] George Antoniu, Tudorel Toader (coord.), *Explanations of the new criminal code*. Bucharest: Universul juridic, 2015, p. 245
- [11] Idem, p. 184
- [12] Cristian Ionescu, op.cit., p. 79
- [13] A. Ionaș, A.F. Măgureanu, C. Dinu, *Criminal law. The special part, under the new criminal code*. Bucharest: Universul juridic, 2015, p. 173
- [14] Corneliu Bîrsan, *The European Convention on human rights. Comment on articles*, vol. 1, Bucharest: AllBeck, 2005, p. 662
- [15] Ioan Muraru, Elena Simina Tănăsescu, *Constitutional law and political institutions*, 13th edition, vol. 1, Bucharest: C.H. Beck, 2008, p. 170
- [16] Cristian Ionescu, op.cit., p. 80
- [17] Corneliu Bîrsan, op.cit., p. 657
- [18] Radu Chiriță, *The European Convention on human rights. Comments and explanations. 2nd edition*, Bucharest: C.H. Beck, 2008, p. 416
- [19] Idem, p. 474
- [20] Ana Daniela Bobaru, *The Court of Justice of the European Union - the guarantor of uniform application of European Union law*, Bucharest: University Publishing House, 2014, p. 173
- [21] Victor Duculescu, *Legal protection of human rights*, Bucharest: Lumina Lex, 1998, p. 107
- [22] Tudor Drăganu, *Constitutional law and political institutions. Elementary Treaty*. vol. I, Bucharest: Lumina Lex, 2000, p. 161
- [23] Marin Voicu, *European protection of human rights. Theory and jurisprudence*. Bucharest: Lumina Lex, 2001, p. 162
- [24] Ioan Muraru, *Constitutional law and political institutions*, Bucharest: Actami, 1997, pp. 220-221

[25] Idem, p. 221

[26] Fr. Sudre ș.a., *op.cit.*, p. 45 și urm.

[27] Marieta Safta, *Constitutional law and political institutions. Vol.1. General theory of constitutional law. Rights and freedoms*. Bucharest: Hamangiu, 2014, p. 200

Bibliography:

- A. Antoniu George, Toader Tudorel (coord.). *Explanations of the new criminal code*. Bucharest: Universul juridic, 2015
- B. Baias F.-A., Chelaru E., Constantinovici R., Macovei I. *The new Civil Code, comment on articles*. Bucharest: C.H. Beck, 2012
- C. Bîrsan Corneliu. *The European Convention on human rights. Comment on articles*. Vol. 1, Bucharest: AllBeck, 2005
- D. Bobaru Ana Daniela. *The Court of Justice of the European Union - the guarantor of uniform application of European Union law*, Bucharest: University Publishing House, 2014
- E. Chiriță Radu. *The European Convention on human rights. Comments and explanations. 2nd edition*, Bucharest: C.H. Beck, 2008
- F. Dobrinioiu Vasile, Neagu Norel. *Criminal law. The special part*. Bucharest: Universul juridic, 2014
- G. Dodescu Nadia-Elena, Boștină Pantelimon. *Romanian criminal law. The special part*. Craiova: Arves, 2013
- H. Dodescu Nadia-Elena. *Romanian criminal law, vol. I*, Craiova: Arves, 2015
- I. Drăganu Tudor. *Constitutional law and political institutions. Elementary Treaty*. Vol. I, Bucharest: Lumina Lex, 2000
- J. Duculescu Victor. *Legal protection of human rights*, Bucharest: Lumina Lex, 1998
- K. Ionaș A., Măgureanu A.F., Dinu C. *Criminal law. The special part, under the new criminal code*. Bucharest: Universul juridic, 2015
- L. Ionescu Cristian. *About constitutionalising right to inviolability of the home*. In: *Dreptul* magazine no 8/2016
- M. Lupan Ernest, Sztranyiczki Szilárd. *Individuals in the new Civil Code*. Bucharest: C.H. Beck, 2012
- N. Muraru Ioan, Tănăsescu Elena Simina. *Constitutional law and political institutions*, 13th edition, vol. 1, Bucharest: C.H. Beck, 2008
- O. Muraru Ioan. *Constitutional law and political institutions*, Bucharest: Actami, 1997
- P. Renucci Jean-Francois. *Treaty of European human rights law*. Bucharest: Hamangiu, 2009
- Q. Safta Marieta. *Constitutional law and political institutions. Vol.1. General theory of constitutional law. Rights and freedoms*. Bucharest: Hamangiu, 2014
- R. Stătescu Constantin. *Civil law. Individual. The legal entity. Real rights*. Bucharest: Didactic and Pedagogical Publishing House, 1970
- S. Sudre Frederic ș.a. *The great decisions of the European Court of Human Rights*. Bucharest: International Rosetti, 2011
- T. Voicu Marin. *European protection of human rights. Theory and jurisprudence*. Bucharest: Lumina Lex, 2001
- U. Voinea Dan, Dodescu Nadia-Elena. *Criminal Procedural Law. The special part*. Craiova: Arves, 2011