THE LEGAL PROTECTION OF THE SECRECY OF CORRESPONDENCE

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Abstract: *The guarantee for the secrecy of correspondence, as part of the right to respect for private and family life, has represented and still represents a constant issue for domestic and international law. Thus, on one hand, the amazing evolution of technology has created possibilities for breaking the right to the secrecy of communication, thus constituting a threat to individuals' private life.*

On the other hand, the interference of the public authorities in the private life, made on reasonable grounds, should be accompanied by guarantees indicating that there is no abuse of power.

This study intends to make an analysis of the regulations, mainly the internal ones that guarantee people's freedom to communicate by long distance communication means, as well as those stipulating the lawful interception of communications in cases of major public interests, in the light of the exigencies expressed by the case law of the ECHR.

Keywords: *Secrecy of correspondence, Public authorities, Abuse of power, Guarantee people's freedom to communicate, Interception of communications*

JEL Classification: K 39

The right of individuals to free communication is recognized within a series of international documents[1], any interference in the correspondence of a person, regardless of the chosen means, being punishable. Meanwhile, not even public institutions can always intervene upon the correspondence of an individual, even though the person should find himself in special circumstances (during the execution of a punishment, or in preventive arrest)[2].

The concept of correspondence includes within its content letters, telegrams, any postal envoys, but also telephone conversations as well as any other means of communication.

In our legislation, the Criminal Code of Charles the Second[3] was the first to incriminate by its article 501 as a felony under the name of breach of the secrecy of

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[1] Art. 8 of the European Convention on Human Rights, art. 7 of the Charter of Fundamental Rights of the European Union, art. 17 of the International Covenant on Civil and Political Rights, art. 11 of the American Convention on Human Rights

[2] Adrian Milutin Truichici, „*Implicații penale referitoate la inviolabilitatea corespondenței*" in Revista "Dreptul" no. 1272008, p. 253

[3] Published in the Official Journal, Part I, no. 65 if 18.03.1936

correspondence the deed of the person who opens without righteousness a closed correspondence or any other closed written document that is not addressed to him with the purpose of finding out its content and to take possession of it by means of copying. The same legal provision also punished the deed of the person who, after learning about certain facts from the content of an open correspondence that was not addressed or entrusted to him would divulge them, obtaining thus a material gain, or causing a moral or a material loss to another individual.

Further, art. 501[4] and 502[5] of the Criminal Code of Charles the Second regulated the felony of the theft of correspondence as well as that of fraudulent interception. Article 504 provides for an aggravated form for the felonies provided by art. 501, art. 502 and art. 503, in the situation in which these are committed by a civil servant.

The deeds that bring a prejudice to the social relations regarding the freedom of an individual to communicate with other persons by using the means of remote communication were also sanctioned by the Criminal Code of the People's Republic of Romania[6] that provided for them using the same content, with the exception of the penalty.

The Romanian Criminal Code of 1968[7] and of 1973[8] provide that the breach of the secrecy of correspondence is a crime, in the same way as it is regulated in the present by art. 195 of the Criminal Code that is now in force[9]. By Law no. 337/2007[10], art. 195 of the Criminal Code was completed with the introduction of paragraph 2^1 , which provides for an aggravated form to the crime of breach of the secrecy of correspondence[11].

The new Criminal Code[12] incriminates at art. 212 the breach of the secrecy of correspondence, and at art. 213 it sets out a punishment, as a distinct deed, for the making, the marketing, the installment and the use without right of technical means destined to intercept or to impede communication. This latter legal provision has been criticized by the legal doctrine[13] by arguing that it is ineffective in the sense that it does not incriminate the fabrication, the import, the tenure, the leasing and the sale without license etc.

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[4] „The person who steals or suppresses one of the correspondences shown in art. 501, open or closed, that were destined to another individual, thereby commits the felony of theft of correspondence that is punishable with corrective imprisonment ranging from one month to one year, and if he discloses its content, under the conditions shown in art. 501 para. 2, the penalty is corrective imprisonment ranging from one to 3 years and a fine ranging from 2000 to 5000 lei."

[5] „The person who, by acting fraudulently, obtains or intercepts a telegraphic communication or a telephonic conversation, commits the felony of fraudulent interception that is punishable with corrective imprisonment ranging from one to six months.

When the felon discloses the telegraphic communication or the telephonic conversation with the purpose of obtaining a material gain, or causes a moral or a material loss to another individual, the penalty is corrective imprisonment ranging from 6 months to 2 years."

[6] Published in the Official Journal, Part I, no. 48, of 02.02.1948

[7] Published in the Official Bulletin no. 79bis of 21.06.1968

[8] Published in the Official Bulletin no. 55 of 23.04.1973

[9] Published in the Official Journal, Part I, no. 65 of 16.04,1997. According to art. 195 of the Criminal Code, „The opening of the correspondence that was destined to another individual or the interception of a conversation or a communication established by telephone, telegraph or by any other remote communication means, without a right, is punishable with imprisonment ranging from 6 months to 3 years.

The same penalty applies to the theft, destruction or retention of a correspondence, as well as the disclosure of the content of a correspondence, even in cases when it was sent open or it became open by mistake, or the disclosure of the content of an intercepted conversation or communication, even in the case when the perpetrator became aware of it by mistake or randomly.

The criminal investigation is launched as a result of the prior complaint of the person who has suffered a harm.

The reconciliation of the parties precludes the criminal responsibility."

[10] Published in the Official Journal, Part I, nr. 841 of 08.12.2007.

[11] According to the single article of Law no. 337/2007, „If the deeds provided for by para. 1 and 2 have been committed by a civil servant that bears the legal obligation to respect the professional secret and the confidentiality of the information to which he has access, the penalty consists of imprisonment ranging from 2 to 5 years an the prohibition of several rights."

[12] Published in the Official Journal, Part I, no. 575 of 29.06.2004, modified by Government Emergency Ordinance no. 58/2005, published in the Official Journal, Part I, no. 552 of 28.06.2005, GEO no. 50/2006 published in in the Official Journal, Part I, no. 566 of 30.06.2006, GEO no. 73/2008 published in the Official Journal, Part I, no. 440 of 12.06.2008. The new Criminal Code will enter into force on 1 September 2009.

[13] Eliodor Tanislav, „*Protecția penală a dreptului la intimitate în perspectiva noului Cod penal*", in Revista „Dreptul" no. 8/2003, p. 126.

The freedom to communicate was granted by the state's fundamental law, by successive provisions comprised in art. 33 of the 1948 Constitution of Romania[14], art. 88 of the 1952 Constitution of Romania[15], art. 33 of the 1968 Constitution of Romania[16], art. 33 of the 1969 Constitution of Romania[17], art. 33 of the 1972 Constitution of Romania[18], art. 33 of the 1974 Constitution of Romania[19]. Art. 28 of the 1991 Constitution of Romania[20], revised[21], that is now in force provides the fact that "The secrecy of letters, telegrams, other postal envoys, of telephonic conversations and of the other legal means of communication is inviolable." Granting the secrecy of correspondence is considered by the Romanian legislator as a duty of the state that must prevent and punish the unlawful or arbitrary interventions committed by the public authorities or other subjects with regard to the correspondence and the telephonic conversations of the individual[22]. His right, which is inviolable, is corresponded by the correlative obligation of the state to grant it by any means that it considers appropriate and in compliance with the European legal order.

Although it is regulated by the state's fundamental law separately from the right to private life, the inviolability of the correspondence is closely conceived to it. Clearly, the censorship of thoughts, opinions expressed through telephone, in writing or by any other means is considered an element of the crime regarding the violation of intimacy[23].

The freedom of the individual to communicate through the means of remote transmission is also defended by a series of special legislation.

Thus, art. 4 para. 1 of Law no. 506/2004 regarding the processing of personal data and protection of private life in the sector of electronic communication[24] recognises the confidentiality of communication[25] effected by the means of the public electronic communication network and of electronic communications services destined to the public, as well as the confidentiality of the traffic data[26]. Further, paragraph 2 of the same legal text prohibits the listening, recording, storage and any other form of intercepting or surveillance of communication and related traffic data, excepting the situations when this is conducted by the users that participate in the communication, when these users have previously given their written consent regarding the conduct of such operations or which are conducted by the competent authorities, in accordance with the legal provisions.

Art. 43 of Law no. 161/2003 regarding certain measures to be taken for the assurance of the transparency in the exercise of public office, public functions and in the business environment, the prevention and the punishment of corruption[27] sets a penalty for the unlawful interception of an informational data transmission which is not public and which is destined for an informational system, it originates from such a system or is performed within an informational system as well as the unlawful interception of an electromagnetic emission originating from an informational system that contains

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[14] Published in the Official Journal, Part I, no. 87bis of 13.04.1949
[15] Published in the Official Bulletin, no. 0 of 27.09.1952
[16] Published in the Official Bulletin, no. 22 of 22.02.1968
[17] Published in the Official Bulletin, no. 34 of 20.02.1969
[18] Published in the Official Bulletin, no. 44 of 04.05.1972
[19] Published in the Official Bulletin, no. 167 of 27.12.1974
[20] Published in the Official Journal of Romania, Part I, no. 233 of 21 Novenbre 1991
[21] By Law no. 429/2003 published in the Official Journal, Part I, no. 758 of 29.10.2003
[22] Doina Micu, „*Garantarea drepturilor omului*", Ed. All Beck, Bucureşti, p. 69.
[23] Călina Jugastru, „*Repararea prejudiciilor nepatrimoniale*", Ed. Lumina Lex, Bucureşti, 2001, p 135.
[24] Published in the Official Journal, Part I, no. 1101 of 25.11.2004
[25] According to art. 2 para. 1 letter d) of Law No. 506/2004 „communication" means „any information sent or remitted amond a certain number of participants through an electronic communication service destined to the public; this does not include the information sent to the public by an electronic communication network as part of an autovisual programme service, as long as it cannot be established a link between the information discussed and subscriber or the identified user that receives it."
[26] By „traffic data" according to the provisions of art. 2, para. 1, letter d) of Law no. 506/2004 we understand „any data processing with the purpose of remitting a communication through an electronic communication network or with the purpose of invoicing the counter value of this operation."
[27] Published in the Official Journal, Part I, nr. 279 of 21.04.2003

informational data that are not public. The regulation has as a purpose the protection of informational data transmission from within or between the informational systems. The punishment of this deed was necessary due to the enhancement of the phenomenon regarding the interception of on line shopping conducted by various Romanian or foreign nationals that have chosen as a way of payment the credit cards, interceptions that had as a purpose the theft of data contained by those cards in order for these to be later used by other persons then the true owners[28].

The right to correspondence is also recognized to individuals that are executing a punishment depriving them of liberty according to the provisions of art. 56 of Law no. 295/2004 regarding the execution of punishment and of the measures disposed by the judiciary organs during the criminal trial[29]. The same legal text provides that the form and the content of correspondence can only be modified by the person who is executing the punishment that deprives him of liberty, and the correspondence has a confidential character and can only be open or retained within the limits and conditions provided by the law.

However, with the purpose of preventing the entering into the grounds of the prison facilities of drugs, toxic substances, explosives or of other similar objects whose holding is forbidden, the correspondence can be open without being read in the presence of the individual who is sentenced[30]. Also, the correspondence can be open and retained if there are solid indications regarding the existence of a crime. In all these the individual that finds himself during the execution of the liberty depriving penalty is immediately made aware, in writing, regarding these measures, and the retained correspondence is archived in a special file that is kept by the prison facility's administration[31].

The legal provisions that allow the opening and the retaining of the correspondence are not applicable in the case of the person who is executing a punishment that deprives him of liberty with the defender and the nongovernmental organizations that conduct their activity in the field of human rights' protection, as it is provided expressly by art. 56, para. 7 of Law no. 294/2004.

The persons who are executing a punishment that deprives them of liberty are also granted the right to telephone conversations conducted from public card telephones installed in penitentiaries. These telephone conversations have a confidential character[32].

In accordance with the provisions of the European Convention of Human Rights, our fundamental law in art. 53, para. 1 and 2 sets out the cases in which a certain limitation of the exercise of rights and freedoms in allowed. Such a limitation, clearly applicable in the case of the right on the individual to the secrecy of the correspondence is only imposed by the law in the following cases: the defense of national security, order and public health and ethics, human rights and freedoms; the deploy of the criminal instruction; the preventions of the consequences of a natural calamity, of a disaster or of a very serious casualty. In addition, the limitation can be imposed only as long as it is necessary in a democratic society. Also, the measure must be proportional with the situation that has caused it, to be applied in a non-discriminative manner and without affecting the exercise of that certain right or freedom.

In present, the possibility of public authorities to intercept communications is provided, practically, in the legislation of all the signatory states of the Convention, being generally linked to the fight against criminality.

In our national law, the provisions comprised in Section V^1 of the Criminal Procedure Code called "Audio and video recordings" were introduced in the Criminal

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[28] Costică Voicu, Alexandru Boroi „*Dreptul penal al afacerilor*", Ed. CH Beck, Bucureşti, 2006, p. 361.
[29] Published in the Official Journal, Part I, no. 591 of 01.07.2004
[30] Art. 56, para. 4 of Law no. 294/2004.
[31] The opining and the retaining of the correspondence can only be executed based on written and motivated dispositions that are issued by the head of the penitenciary, according to the provisions art. 25 para. 6 of Law no. 294/2004
[32] According to art. 58, para. 1 of Law no. 294/2004

Procedure Code by Law no. 141/1996[33], after which the text was amended as a result of the entry into force of Law no. 281/2003[34], Law no. 356/2006[35] and of GEO no. 60/2006[36]. In its current form the text of art. 91[1] of the Criminal Procedure Code allows the interception and recording of conversations and of communication performed by telephone or by any other electronic means of communication, with the motivated warrant issued by a judge, at the demand of the public prosecutor that performs or supervises the criminal investigation, under the conditions expresses by the law if there serious data or indications regarding the preparation and the committing of a crime for which the criminal investigation is done automatically, and the interception and recording are imposed in order to settle the factual situation or due to the fact that the identification or locating of the participants cannot be done by other means or the investigation would be greatly delayed[37]. Regarding the request of the impossibility of administering other means of evidence, this has been criticized by the doctrine, by proposing its elimination[38]. In what we are concerned, we consider that this condition should be maintained in order to limit the interference in the private life of individuals.

The warrant is given for the period necessary for the interception and recording but not for a period longer then 30 days, in the council chamber, by the president of the court who was given the competence to judge the case in first instance or by the equivalent court in whose district lies the headquarters of the Prosecutor's Office where the prosecutor who performs or supervises the criminal investigation is seated.

In the case when the president of the court is missing the warrant is issued by the judge assigned by him. The total length of the authorized interceptions and recordings with respect to the same individual cannot exceed 120 days.

The interceptions and recordings can be performed directly by the prosecutor or by the criminal investigator. Art. 91 of the Criminal Procedure Code regulates in detail the authentication procedure of the conversations and communications intercepted and recorded. Regarding the performance of the interception and recording the prosecutor or the judicial police clerk assigned by the prosecutor drafts a protocol that is certified for authenticity by the prosecutor that performs or supervises the criminal investigation. A copy of the support that contains the recording of the conversation is attached to the protocol within a sealed envelope. The original support is kept at the headquarters of the Prosecutor's Office, in particular locations, within a sealed envelope and will be made available to the court at its request[39]. After the court's notice the copy of the support that contains the recording of the conversation and copies of the protocols are kept by the court's registry in particular locations, in sealed envelopes and which are only available to the judge or to the panel invested with the settlement of the case. When presenting the material that resulted from the criminal investigation the prosecutor must present to the accused or to the defendant the protocols that contain the recorded conversations and to assure its listening, at his request.

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[33] Published in the Official Bulletin, Part I, no. 289 of 14/11/1996
[34] Published in the Official Bulletin, Part I, no. 468 of 01/07/2003
[35] Published in the Official Bulletin, Part I, no. 677 of 07/08/2006
[36] Published in the Official Bulletin, Part I, no. 764 of 07/09/2006
[37] In the same way it can be authorized the interception and recording of conversations and communications performed through telephone or any other electronic communication means in the case of crimes against national safety provided by the Criminal Code and other special laws, as well as in the case of drug trafficking, gunrunning, traffic in human beings, terrorist acts, money laundring, money forgery or the forgery of other valuables, in the case of the crimes provided by Law no. 78/2000 regarding the prevention, the discovery and the punishing of deeds of corruption with its later amendments, in the case of other serious crimes or of crimes that are committed by using means of electronic communication. These provisions also apply in the case of recordings performed outdoors, to the locating and following by using GPS or by other electronic means of surveillance according to art. 91[4] of the Criminal Procedure Code.
[38] Bică Gheorghe, Viorel Teodor Gheorghe, „*Sfera infracțiunilor în privința cărora se poate autoriza interceptarea şi înregistrarea convorbirilor sau comunicărilor*" in Revista „Dreptul" no. 8/2006, p. 183.
[39] Art. 91[3], para. 3 of the Criminal Procedure Code

If the criminal investigation ended with a decision not to initiate a trial, the prosecutor is obliged to announce this fact to the person whose conversations or communications were intercepted and recorded. The support on which are printed the recorded conversations are archived at the headquarters of the Prosecutor's Office, in particular places, within sealed envelopes, thus insuring confidentiality, and kept until the end of the prescription period regarding the criminal responsibility for the act that has been the object of the case when they must be destroyed, a protocol being drafted in this sense[40].

By interpreting the provisions of art. 91^1 of the Criminal Procedure Code, the High Court of Cassation and Justice[41] has stated that the recording of telephonic conversations is possible under the following conditions:

a) there must exist data and serious indications regarding the preparation and the committing of a crime. The data or the serious indications can regard the preparation or the committing of a crime so that the recording can also be performed before the committing of any crime;

b) it must regard a crime among those for which the criminal investigation is disposed automatically;

c) to be useful for the purpose of finding out the truth. The utility should be appreciated by the criminal investigator that proposes the authentication, by the judge, of the interception of the telephone conversations;

d) there must exist a warrant issued by the competent judge.

Also, it was stressed the fact that the legality of interception of telephone conversations is not conditioned by the beginning of a criminal investigation, an opinion that is accepted by the doctrine[42].

It should be noted that, although the interception and recording performed by the judiciary organs is subject to severe conditions, art. 91^6 of the Criminal Procedure Code confers the value of evidence to the recordings performed by the parties or any other third parties as long as they regard conversations or communications which were had with third parties or which are not prohibited by the law[43].

Notified with the unconstitutionality exception of these legal provisions, the Constitutional Court[44] has shown that the reason of this legal text is that anybody who is in the position of an evidence that can serve for the purpose of finding out the truth to be able to present it, the legal provisions being applicable in the case of spontaneous witnessing of facts or events that are registered through audio or video means.

An important provision is the one contained by art. 91^1, para. 6 of the Criminal Procedure Code, according to which the recording of the conversation between the lawyer an the party which it represents or assists in a trial cannot be used as an evidence only if its content reveals conclusive and useful data and information regarding the preparation and the committing by the lawyer of one of the crimes provided by art. 91^1, para. 1 and 2 of the same legal text. This provision was appreciated by the legal doctrine as a positive one with respect to the drafting and adopting of a more concrete regulation regarding the interception of conversations and the opening of correspondence so that this type of interference to correspond with the requirements of the European Convention on Human

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[40] Art. 91^3, para. 5 of the Criminal Procedure Code

[41] Decision of the Criminal Departement of the High Court of Cassation and Justice no. 10 of January 7 2008.

[42] Alexandru Ţuculeanu, „*Câteva consideraţii asupra interceptărilor şi înregistrărilor audio şi video*" in Revista „Dreptul" no. 5/2004, p. 22.

[43] See the Decision of the Criminal Departement of the High Court of Cassation and Justice no.1602/2001 published in Revista Pandectele Romane no. 2/2003, p. 59. In the content of this judgment it was noted that, in that case, the audio recordings were made without a warrant, in a clandestine manner, thus constituting a breach of art. 26 para. 1 of the Constitution, without the possibility to serve as evidence. For the critical approach of this judgment see Ioan Dolţu, "*Examen critic referitor la modul de interceptare şi aplicare a prevederilor legal în privinţa probatoriului în procesul penal*" in Revista „Dreptul" no. 11/2003, pp. 152-153.

[44] Decision no. 593/2006 of the Constitutional Court, pblished in the Official Bulletin, Part I, no. 856 of 19/10/2006

Rights[45]. De lege ferenda, an amendment of the text would be necessary for the replacement of the term “lawyer” with the broader one of “defender”, so that the situations in which the party is represented by a legal adviser not to be excluded in the context of the introduction in the Criminal Code of the institution regarding the responsibility of the legal person through Law no. 278/2006[46].

The methods of proof provided by Section V[1] of the Criminal Procedure Code can be submitted to a technical expertise, at the request of the prosecutor, of the parties or automatically. In our view, due to the present technological evolution such an expertise would be obligatory in all situations.

Thus, in order to establish the authenticity of the audio recordings it is necessary that the expert has access to the original audio recording and to the technical recording system that was used in the recording process (recorder, CD player, magnetic recorder, microphone), due to the fact that the technical operations destined to this end consist, according to standard AES43-2000, in the analysis of the physical integrity of the magnetic tape, the analysis of the shape of the wave and of the spectrograms of the recorded audio signals, as well as the technical characteristics of the equipment used for their recording[47]. The explanation for the necessity to present the original magnetic support on which the recording was performed consists in the theoretical possibility once with the copying of the recording on a different magnetic support then the on which the recording was initially done, with or without intent, for a word or a phrase to be deleted or lost, which would give a new connotation to the recorded conversation, and which could lead to an unfair penalty[48].
Art. 13 of Law no. 51/1991 regarding the national security of Romania[49] provides the possibility of the interception of communications in the situation when there exists a threat to the national security of Romania, in the sense of the provisions of art. 3 of the same legal text.

The peace of legislation provides that the clearance for the interception of the communications is requested to the prosecutor with respecting the provisions of the Criminal Procedure Code. The request for clearance is drafted in writing and must contain[50]: data or indications that would show the existence of one of the threats to the national security and whose prevention, discovery or setback calls for the issuing of the warrant; the categories of activities for whose performance the issuing of the warrant is mandatory; the identity of the person whose communications must be intercepted, if it is known, or of the person who holds the information, the documents or the objects that must be obtained; the general description, if and when possible, of the place in which the authorized activities are to be performed; the temporal length of the requested warrant.
The authorization act is issued at the request of the organs that have attributions within the national security field, by the prosecutors that have been dully designated by Romania’s Chief Prosecutor.

If the prosecutor finds that the request is justified, he issues a warrant that must contain: the approval for the categories of communications that can be intercepted, the categories of information, documents or objects that can be obtained; the identity of the person, if it is known, whose communications must be intercepted or who is in the possession of the data, information, documents or objects that must be obtained; the organ that is designated to execute this activity, the general description of the place in which the warrant will be executed; the temporal length of the warrant.

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[45] Ovidiu Predescu, „*Convenția Europeană a Drepturilor Omului şi dreptul penal român*”, Ed. Lumina Lex, Bucureşti, 2006, p. 172.
[46] Published in the Official Journal, Part I, no. 601 of 12.07.2006
[47] C. Grigoraş, „*Expertiza înregistrărilor audio*” in Revista „Dreptul” nr. 1/2003, p. 163.
[48] Doru Ioan Cristescu, „*Tehnici de obținere a materialelor de comparație necesare unor constatări şi expertize dispuse cu prilejul investigării infracțiunilor contra securității naționale şi de terorism”* in Revista „Dreptul” no. 7/2005, p. 206.
[49] Published in the Official Journal, Part. I, nr. 163 of 07.08.1991
[50] Art. 13 para. 2 of Law no. 51/1991

A problem that arises related to the interpretation of the previously mentioned legal provisions is whether the issuing of a warrant for the interception of communications lied within the competency of the prosecutor, as the normative act expressly provides, or do the provisions of art. 91^1 of the Criminal Procedure Code apply, which exclusively grant this competence to the judge.

At a first glance, it would seen that the provisions of art. X of Law no. 281/2003 are revealing by stating that "Whenever other laws provide dispositions that refer to the disposal by the prosecutor of the adoption, maintenance, revocation or termination of the measure consisting of preventive arrest (…), of intercepting and recording conversations, search, of holding and delivering the correspondence and of the objects sent by the accused or by the defendant or those addressed to him the provisions of art. I of the current Law dully apply". By analyzing the legal provisions one can conclude that the taking of such measures lies within the competence of the judge. This is also demonstrated by the provisions of art. 15 para. 1 of Law no. 51/1991 which expressly make reference to the Criminal Procedure Code.

Indeed, a contrary solution would create an inequality between the persons that are investigated for crimes that are regulated by the Criminal Procedure Code and those investigated under Law no. 51/1991 regarding the way of intercepting the communications. On the other hand, the guarantees offered by the Criminal Procedure Code are entirely missing from the content of this normative act (the law does not contain provisions regarding the authentication of the recordings obtained through surveillance methods, the way in which they are drafted in the recording protocols, under what conditions the information obtained as a result of the authorized interceptions in accordance with the challenged text can be used as means of evidence in criminal trials, and do not offer the possibility of requesting an expertise regarding the support of the recording).

By Decision no. 766/2006[51], the Constitutional Court has rejected the unconstitutionality exception of the provisions pf art. 13 and 15 of Law no. 51/1991 regarding the national security of Romania, noting that these do not com in contradiction with the fundamental law. In the motivation of this judgment it I argued that the existence of a discrimination in the application of the law resulting from the fact that in the case of the authors of the exception have been obtained evidence by intercepting the telephone conversations in accordance with Law no. 51/1991 regarding the national security of Romania, whereas in other cases the interception of the telephone conversations is done according to the provisions of the Criminal Procedure Code cannot be accepted. The justification regarding the difference of legal regulation of the way of obtaining evidence stands in the specific object of Law no. 51/1991 and does by no means breach the provisions of the Constitution.

Also, regarding the legal provisions that confer the prosecutor the competence of issuing warrants that allow the interception of telephonic conversations under the conditions of Law no. 51/1991, these are procedure depositions that the legislator is free to adopt on account of art. 126 para. (2) of the Constitution, no other constitutional provision being able to forbid the establishment of such a competence that is coffered to the prosecutor and who, according to art. 131 and art. 132 of the fundamental law, is an independent magistrate, who represents the general interests of society and performing his activity based on the principles of impartiality and legality.

In the light of these arguments, it follows that Law no. 51/1991 contains specific provisions that confer the prosecutor the competence to decide over the interception of communications, thus derogating from the Criminal Procedure Code which is the common law in this field[52].

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[51] Published in the Official Journal, Part I, no. 25 of 16.01.2007

[52] Bică Gheorghe, Viorel Teodor Gheorghe, „*Sfera infracțiunilor în privința cărora se poate autoriza interceptarea şi înregistrarea convorbirilor sau comunicărilor*" in Revista „Dreptul" no. 8/2006, p. 182.

Law no. 51/1991 provides the fact that the means to obtain the information required for the national security must not affect by any way the fundamental rights and freedoms of individuals, their private life, their honor and reputation or to submit them to illegal limitations.

In what we are concerned we consider that the guarantees offered by Law no. 51/1991 regarding the limitation of the interference of public authorities in the private life of individuals are insufficient, thus being able to lead to an abusive conduct on the part of authorities.

However, the European Court of Human Rights has pronounced a ruling regarding the legality of the interception of telephonic conversations based on Law no. 51/1991 by the judgment given on 27 April 2007 in the case of Dumitru Popescu v. Romania. The European Court has ruled that Law no. 51/1991 does not confer minimal protection guarantees against the arbitrary regarding the interception of telephone conversations, noting the breach of the provisions of art. 8 of the European Convention. In the motivation of the judgment it noted the lack of independency of the prosecutor the authority that is designated to approve the measure, the lack of a temporal limit regarding interceptions and the absence of a judiciary control in this field[53].

According to the provisions of art. 20 of Law no. 535/2004 regarding the prevention and the fight against terrorism[54], "the threats to the national security of Romania, provided at art. 3 of Law no. 51/1991 regarding the national security of Romania, including the terrorist acts provided by the current law represent the legal base that is invoked by the public authorities that have competence in the field of national security and that request the prosecutor, in justified cases, the approval of the performance of certain activities with the purpose of gathering information consisting of: the interception and the recording of communications (…)"

Further, art. 21 provides that the proposal[55] is transmitted to the general prosecutor of the Prosecutors' Office of the High Court of Cassation and Justice and is examined in the grounds of validity and legality by the prosecutors that are namely designated by him. If within a period of 24 hours beginning from the registration of the request it is considered that the proposal is founded and the conditions required by the law are fulfilled, the general prosecutor of the Prosecutors' Office of the High Court of Cassation and Justice or his dully designated substitute files a written request to the president of the High Court of Cassation and Justice for the approval of the proposed activities. Considering the provisions of art. 46, the last paragraph of Law no. 535/2004 it could be considered that the provisions of art. 13 of La no. 51/1991 have been implicitly abrogated[56]. However, the case-law has not accepted this point of view[57].

Art. 33 of Law no. 218/2002 regarding the organization and the functioning of the Romanian Police[58] provides that with the purpose of preventing and fighting corruption, trans-boundary criminality, human beings trafficking, terrorism, drug trafficking, money laundry, informational crimes and of organized crimes, at the request of the General Inspector of the Romanian Police, with the approval of the Ministry of Internal Affairs and

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[53] Alexandru Țuculeanu, „*Noi abordări referitoare la percheziție şi înregistrările audio şi video*" in Revista „Dreptul" no. 12/2007, pp. 223-224.

[54] Published in the Official Journal, Part I, no. 1161 of 08.12.2004

[55] The proposal must be drafted in writing and to consit of the approval for the categories of communications that can be intercepted, the categories of information, documents or objects that can be obtained; the identity of the person, if it is known, whose communications must be intercepted or who is in the possession of the data, information, documents or objects that must be obtained; the organ that is designated to execute this activity, the general description of the place in which the warrant will be executed; the temporal length of the warrant.

[56] Mihail Udroiu, Radu Slăvoiu, „*Tehnici speciale de investigare în domeniul securității naționale*" in Revista „Dreptul" no. 9/2008, p. 192.

[57] See Decision no. 1250/2008 of 25.11.2008 of the Constitutional Court, published in the Official Journal, Part I, no. 871 of 23.12.2008

[58] Published in the Official Journal, Part I, no. 305 of 09.05.2002

that of the prosecutor designated by the General Prosecutor of the Prosecutor's Office of the Appeal Court, the Romanian Police can use informers and under cover policemen in order to collect information with the purpose of using them as evidence in a trial. The warrant of the prosecutor will be issued in writing for a maximum period of 60 days and can be prolonged under the same conditions for periods of maximum 30 days. The information sources, the methods and means of the activity consisting of the gathering of information that have a confidential character and cannot be disclosed by nobody in any circumstances, with the exception of the cases in which the duties of the function, the needs of justice and the law imposes their disclosure.

According to the provisions of art. 98 of the Criminal Procedure Code during the criminal investigation or during the trial the court, at the prosecutor's proposal can dispose that any postal or transport unit to deliver the letters, telegrams and any other sent correspondence by the accused or the defendant or the ones addressed to him. This measure is taken if the conditions imposed by art. 91^1 para. 1 of the Criminal Procedure Code are fulfilled. In urgent and serious cases the keeping and delivery of the letters can be disposed by the prosecutor who is obliged to inform immediately the court. In every case the correspondence that is not linked to the case is returned to the addressee.

A series of special normative acts belonging to the field of criminality and fight against corruption allow, also, the access of the criminal investigator to the telecommunication and informational system.

Thus, art. 23 para. 1 of Law no. 143/2000 regarding the prevention and the fight against the illegal use of drugs[59] provides that if there are serious indications that an individual who is preparing to commit one of the crimes provided by this normative act or who has committed such a crime uses telecommunication or informational systems, the criminal investigator, with the authorization of the prosecutor, can have access to these systems and can supervise them for a determined period of time. The provisions of art. 91^1-91^6 of the Criminal Procedure Code are to be dully applied.

Similar legal provisions can be found in the content of art. 23 of Law no. 678/2001 regarding the prevention and fight against the trafficking of human beings[60], art. 27 of Law no. 656/2002 regarding the prevention and sanctioning money laundering[61], art. 27 of Law no. 78/2000 regarding the prevention, discovery and sanctioning of corruption deeds[62], art. 16 of GEO no. 43/2002 regarding the National Anticorruption Department[63] and art. 15 para. 1 of Law no. 39/2003 regarding the prevention and fight against organized crimes[64].

It should be noted that neither the criminal procedural legislation nor other normative acts differentiate according to the public or private nature of communication. It is seemingly however that the legislator had in mind the field of confidential communication, without being necessary for example a warrant for the recording of a public speech. The distinction between the two types of communications is not always simple, due to which in the legal doctrine it was appreciated that all communication must be defended through a presumption of confidentiality, regardless of the public or private location in which they are conducted and without taking into account elements such as the tone of the voice of the two discussion partners, their withdrawal to different locations etc[65].

Article of the Convention regarding the protection of human rights and fundamental freedoms[66] recognized the right of any person to the respect of private and family life, of his home and of his correspondence. Also, paragraph two of the same article provides that, as

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[59] Published in the Official Journal, Part I, no. 362 of 03.08.2000
[60] Pulished in the Official Journal, Part I, no. 783 of 11.12.2001
[61] Pulished in the Official Journal, Part I, no. 904 of 12.12.2002
[62] Pulished in the Official Journal, Part I, no. 219 of 18.05.2000
[63] Pulished in the Official Journal, Part I, no. 244 of 11.04.2002
[64] Pulished in the Official Journal, Part I, no. 50 of 29.01.2003
[65] Mihail Udroiu, Radu Slăvoiu, „*Tehnici speciale de investigare în domeniul securității naționale*" in Revista „Dreptul" no. 9/2008, p. 194.
[66] Ratified by Law no. 30/1994 published in the Official Journal, Part I, no. 135 of 31.05.1994

an exception, a public authority can intervene in the exercise of this right as long as „it 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".

Within the case-law of the European Court of Human Rights a special emphasis is layed on the breaches of the right to written correspondence of the detainees, whether it is the case of a simple limitation of their possibility to correspond (Golden v. United Kingdom – 21 February 1975, Campbell and Fell v. United Kingdom / 28 June 1984) or the forfeit of correspondence (Silver v. United Kingdom – 25 March 1983). Emphasizing the importance of the right to correspondence within the prison facilities, the Court has stated a real causality presumption and observes the breach of art. 8 in the case in which the defendant state is not capable to prove that the letters addressed to the detainee have indeed reached him (the case of Messina v. Italy)[67].

In the case of Silvestru Cotleț v. Romania[68], the European Court has noted the breach of art. 8 of the Convention regarding three aspects: the delay in transmitting the applicant's correspondence, the opening of the correspondence and the refusal of the prison administration to allow the applicant to correspond with the Court.

Regarding the interceptions of communications conducted by telephone, these have caused real difficulties to states before the Strasbourg Court, especially regarding the way in which they are performed[69]. The Court has admitted such interferences only when they are 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. As long as the telephone interferences are necessary for the protection of democratic states against terrorist acts or criminality, there must exist sime guarantees so that these measures would not become arbitrary, in the sense of showing the type of crimes that allow such interference from the part of the state.

In the case of Kruslin v. France and Huving v. France the Court has stated that telephonic hearings against the applicants were not compatible with the provisions of art. 8 of the Convention due to the fact that the persons against whom this measure was taken had not been clearly designated; the nature of the crimes that could have justified this measure was not defined; there were no limits set regarding the length of the measure; there were no provisions regarding the drafting of a minute regarding the interceptions; there were no provisions with respect to the cautions regarding the transmitting the performed recordings to the defense and to the judge who could not control the length of the recordings; the methods in which the tapes which contained the recordings would be destroyed were not mentioned.

In the case of Craxi v. Italy, the Court has settled that the Italian authorities have breached the obligations required by art. 8 by not allowing the publishing in the media of certain telephone conversations of strictly private character that were intercepted during the course of the criminal trial conducted regarding the applicant[70].

Regarding electronic correspondence, an issue that should be discussed is the protection of this type of correspondence within the work environment. Thus, although the employee may send and receive this correspondence on the computer belonging to the employer, the content of the texts having a private character must be protected.

Confronted with such a situation, the American case-law[71] has stated that there cannot be a reasonable expectancy of the employee regarding the protection of his private life in the context of correspondence conducted through electronic mail if: the server is

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[67] Frederic Sudre, „*Drept european şi internațional al drepturilo omului*", Ed. Polirom, 2006, p. 321.

[68] The Judgment of the European Court of Human Rights of 03.06.2003, published in the Official Journal no. 422 of 19.05.2005

[69] Bianca Selejan-Guțan, „*Protecția europeană a drepturilor omului*", Ed. C.H. Beck, Bucureşti, 2006, p. 151.

[70] Bianca Selejan-Guțan, *op. cit.*, p. 151

[71] United States v. Monroe, 50 MJ 550 (A.F.C.C.A. 1999), published in Revista Pandectele Române no. 2/2003, p. 126.

owned by the public authority where he is employed; the accounts of electronic mail can be used only regarding the official activity of the institution and there was a previous notification of the employee regarding the fact that the electronic mail is monitored by the system administrator of the institution.

Regarding the limitations on the right to respect the secrecy of correspondence, according to art. 8 para. 2 of the European Convention on Human Rights these must fulfill several conditions> the interference must be provided by the law, it must e necessary in a democratic society and to have a legitimate purpose.

With respect to the condition that the restrictive measures should be "provided by the law", the case-law of the European Court[72] has stated that this expression means that the interference must have a base in the national law and that the law that applies should be sufficiently accessible to the citizen. Also, the law must be precise enough in order to allow the citizen to foresee in a certain degree the consequences of his behavior.

In the case of Monroe v. United Kingdom[73], the Court has emphasized that the law by itself, in contrast with the administrative practice, must establish the executive's greatness and its methods to exercise of the power to appreciate in the field of interceptions, with sufficient clarity, in order to offer a proper protection to the individual against the arbitrary.

In the case of Rotaru v. Romania[74], the Court has noted a breach of this request and implicitly of the provisions of art. 8 of the Convention arguing that the national legislation regarding the holding and the use of information regarding the Romanian Information Service, more exactly the provisions of Law no. 14/1992 do not indicate with sufficient clarity the limits and the methods of exercising the margin of appreciation conferred to the authorities. Consequently, the holding and the use by the Romanian Information Service of data regarding the private life of the applicant were not measures that were "provided by the law".

With respect to the condition that the interference must be necessary in a democratic society, the European Court has explained the meaning of the expression "necessary in a democratic society" by showing that this must correspond to "an important social need" to take the respective measures, and these measures must e "proportionate with the legitimate purpose that is being followed"[75].

For example, in the case of Silneko v. Latvia the Court has noted the importance of keeping a fair balance between the legitimate purpose that is being followed (in this case the national security was invoked, which was protected by averting the soviet military from the territory of the Latvian state) and the measures that were taken: the authorities should have taken into account the fact that the applicants were integrated in the Latvian society, that they were the daughter and the wife of a retired military (who no longer posed a threat to national security). Consequently, the interference (obliging them to leave Latvia) could not be considered "necessary in a democratic society"[76].

With reference to the fact that the interference must benefit of a legitimate purpose, this condition represents practically the focal point of the limitation measures provided by art. 8 of the Convention. The legitimate purposes are enumerated in a limited way in paragraph 2 of this article.

Within the form of different regulations, the protection of the secrecy of correspondence can be found in the legislation of all western states.

The French Criminal Code dedicates a separate section to the breaches regarding the right to a private life, by incriminating at art. 226-1 the acts of recording or transmitting

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[72] Judgment of 25.03.1983 of the European Court of Human Rights given in the cae of Silver and Others v. United Kingdom

[73] Judgment of the European Court of Human Rights of 12.08.1984

[74] Judgment no. 2/2000 of 04.05.2000

[75] The case of Silver and Others v. United Kingdom, afore mentioned.

[76] Bianca Selejan-Guțan, *op. cit*., p. 153.

without the consent of the individual of the words pronounced in private or in a confidential manner, and art. 226-3 the production, import, holding and marketing in illegal conditions of devices conceived for committing this type of crimes.

In the German legal system the breach of confidentiality of words by their recording, in the case in which they were pronounced in a private environment as well as the violation of the secrecy of correspondence are sanctioned by art. 201 and 202 of the German Criminal Code[77].

Art. 615 of the Italian Criminal Code sanctions the act of the individual who, by using video and audio recording devices illegally procures information and images that are linked to the private life which unfold within the home of a person or in other locations that are linked to it, against the express or tacit will of the individual who has the right to forbid these acts, and art. 616 sanctions the acts of secrecy violation[78].

In the United Kingdom the case-law has sanctioned the breaches of the right to a private life under the form of violation of secrecy. A specific aspect is represented by the fact of qualifying a conversation as intimate according to the location where it is conducted. By doing so, the British case-law separates itself from the French, American or Canadian legislations that take into account the nature of the communication, protecting verbal conversations by any means of telecommunications and regardless of the location as long as the author does nor expect for the respective conversation to be intercepted by another person then the one for whom it is destined.

In what the American legal system is concerned, the acts that have caused a harm to the individual's intimacy (the illicit entering in private locations with the intention of overhearing of supervising a person, installing audio and video devices in private locations or installing audio and video devices outside the private locations with the purpose of remote overhearing of the conversations) were incriminated in order to protect the so called "right to be left alone". It should be noted that in the American legislation the right to information and freedom of the press was given priority over the right to a private life or the right to an image.

The Romanian legislation, although improvable, comprises provisions that protect the private life and the intimacy of the individual, including the issue of the protection of correspondence and of communication conducted through remote transmitting devices which are in accordance with the coordinates fixed by the case-law of the European Court of Human Rights.

A universal regulation that would offer sufficient and appropriate guarantees for the protection of the individual against the arbitrary of the authorities in such a delicate field is certainly necessary. This is also shown by Recommendation no. 509 of the Consultative Assembly of the Council of Europe of 31 January 1968 which has emphasized the fact that, under the present conditions of life, the advances interception devices for telephone conversations used in a clandestine manner represent a threat for the rights and freedoms of the individual.

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[77] Alexandru Boroi, Mihaela Popescu, „*Dreptul la intimitate şi la viaţă privată*" în Revista „Dreptul" no. 5/2003, p. 165.
[78] *Ibidem*, p. 165.