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The Connection between the Institution of Special Methods of Supervision and Research and the Fundamental Principles of Law

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Abstract: The use of special methods of surveillance and research is not a social novelty, considering the fact that both technology and crime have a long existence. It should also be noted that the dynamics of the regulation of these institutions is themed on two premises, the first of which is represented, as was normal, by the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, 1950), and the second is that of constant technological evolution. In relation to this last aspect, the doctrine rightly considered that "the technical means of surveillance will always be one step ahead of the legislation" (Grădinaru, 2014, p. 7).

Keywords: *special surveillance methods; fundamental principles of law; criminal trial.*

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1. Introduction

From the perspective of analizing and implementing the legislation, we can easily conclude that the technical means of surveillance are inherently intrusive. Thus, in order to be able to determine the concrete content of the intrusion, we must appeal to the principles (Mateuţ, 2019, p. 62) of criminal procedural law. The new Criminal Procedure Code abandoned the phrase "fundamental principles" in favor of "principles". This factual interference cannot be considered *per se* one of the most judicious choices possible, considering the degree of legislative consecration. We are referring to the very basis on which the national legislation was built, namely the Convention for the Protection of Human Rights and Fundamental Freedoms.

These latter principles benefit both from a framework regulation in the Fundamental Convention for the Protection of Human Rights and Fundamental Freedoms, but also from an internal regulation in the Code of Criminal Procedure (Romanian Parliament, 2010), as amended by Law no. 255/2013 for the implementation of Law 135/2010 on the Code of Criminal Procedure and for the amendment and completion of some normative acts that include criminal procedural provisions (Romanian Parliament, 2010; 2014).

2. The principle of legality

A first principle to take into consideration is the principle of legality. It is briefly regulated by the provisions of art. 2 of the Code of Criminal Procedure (Romanian Parliament, 2014) and concerns only one of the three valences it carries, namely *nulla iustitia sine lege* or *nullum judicium sine lege*, which signifies the fact that both dynamics of the criminal process and of criminal procedures must be conducted in accordance with the law (Huidu, 2019). In the matter that is the subject of the present analysis, the principle of legality aims, for example, to comply with the legal framework in relation to the authorization of special surveillance and research methods, and by this we mean the fulfillment of the conditions expressly provided by the law (Barbu, 2015) in order to be able to authorize such of technique, carrying out the evidentiary procedure for the duration for which it was authorized.

Also in relation to the principle of legality, the specificity of the subject of the present analysis requires the treatment of the guarantees (Udroiu, 2019, p. 5) that the criminal procedural law confers against some violations of procedural legality: the application of the sanction of nullity of illegal procedural documents (art. 281 et seq. of the Criminal Procedure Code), the application of the judicial fine (art. 283 et seq. of the Criminal

Procedure Code), the control of the legality of the procedural documents according to the procedural phase (for example, the control of the legality of the procedural documents of the lower hierarchical prosecutor by the higher hierarchical prosecutor, following the formulation of a complaint on the basis of art. 336 related to art. 339 of the Criminal Procedure Code) and the sanction of the exclusion of illegally or unfairly administered evidence (art. 102 of the Criminal Procedure Code) (Romanian Parliament, 2014).

3. The principle of finding out the truth

A second principle that can be advanced as a result of the analysis of the present theme is theprinciple of finding the truth. Enshrined legislatively by the provisions of art. 5 of the Criminal Procedure Code, this is presented as a positive procedural obligation for the judicial bodies "to ensure, on the basis of evidence, the truth about the facts and circumstances of the case, as well as about the person of the suspect or the accused". Violations of this principle in the matter of special surveillance and research methods can be very easy to achieve (Barbu, 2019). The rationale is based on the consequences of using the phrase "evidence based", which implies, as the doctrine (Mateuț, 2019, p. 75) has already shown, the establishment of the factual elements, constitute the object of the evidence only from the means of evidence administered in the manner legally (Barbu & Pană, 2021). In this sense, the provisions of art. 102 paragraph (2) of the Criminal Procedure Code establishes the impossibility of using "illegally obtained evidence" in the criminal process (Romanian Parliament, 2014).

By way of example, we will invoke the provisions of art. 139 para. (4) of the Criminal Procedure Code, prohibiting technical surveillance of attorney-client relationships. In this regard, the same paragraph incorrectly stipulates that the "destruction of evidence" is required - in reality, it is the means of evidence mentioned by the provisions of art. 143 para. (4) of the Criminal Procedure Code -, but the legal issues arise not with regard to this means of evidence which, in the light of the legal provisions, is to be destroyed, but with regard to the information (Gales et al., 2019) that comes to the attention of the investigators from the lawyer-client interceptions and which may lead to the conduct of evidentiary procedures that will result in means of evidence. In this regard, the specialized literature (Volonciu et al., 2017, p. 375) conferred an optimal solution in the sense that they will be subject to the sanction of exclusion in accordance with art. 102 para. (4) of the Criminal Procedure Code (Romanian Parliament, 2014).

But, from a slightly skeptical perspective, considering both the factual conduct of the investigation and the two conditions in the matter of

exclusion, if they were obtained directly and could not be obtained in any other way, there is a minimum possibility of sanctioning the illegal procedural attitude by the judge of the preliminary chamber - for example, when, following the interception, the prosecutor would find out where the material object of a crime of theft is located (Romanian Parliament, 2009a, art. 228), he will not be able to ask the judge of rights and liberties to approve a home search, because the sine qua non justification of the request for authorization provided for in article 158 paragraph (2) of the Criminal Procedure Code would also refer to the indication of the evidence from which the reasonable suspicion results, regarding the possession of the objects, and these evidences were not legally administered (Romanian Parliament, 2014).

On the other hand, if the statement of a witness, or even of the perpetrator/suspect/defendant, provides indications regarding the respective location where the asset is supposed to be located, we believe that the Public Prosecutor could benefit from this information in the process of obtaining the mandate referred to in art. 158 of the Criminal Procedure Code, if that statement was prior to obtaining the information, by using the special evidentiary procedure (Romanian Parliament, 2014). From the autonomy of the provisions of art. 139 paragraph (1) letter a), we can deduce a first substantive requirement for the authorization of the surveillance method, consisting of the existence of an existing criminal investigation and not necessarily a continuation of a criminal investigation against the suspect, in the sense of art. 77 related to art. 305 para. (3) of the Criminal Procedure Code, and a fortiori, of the initiation of the criminal action.

4. Collection of evidence and intrusion into private life

Next, we must state that the special evidentiary procedures in question represent by their very nature an intrusion into the private life of the individual. Thus, they affect the right of respect for private life (Barbu, 2016a; 2016b). In the prior Criminal Procedure Code this right was not enshrined, but currently it is provided both by the Romanian Constitution – which, in art. 28 para. (1) enshrines the inviolability of the domicile and residence -, as well as the new Criminal Procedure Code – which, in art. 11 paragraph (2), almost identically reproduces the provisions of art. 8 of the European Convention (Romanian Parliament, 2014).

The private life of the person is a notion that benefits from a certain autonomy in the jurisprudence of the European Court of Human Rights, including both the place where the person conducts their private life, their family life (Apostu & Petrescu, 2017), but also other such connections

(Mateuţ, 2019, p. 99), thus expanding the scope of the notion, by taking into account a just criterion of legitimacy (Damian et al., 2021), to consider that it will not be subject to intrusion (Udroiu, 2019, p. 50). Moreover, the notion of private life is also extended to legal entities, and in this case we cannot speak of a domicile, but of the place where the professional or commercial activity is carried out (Udroiu, 2019, p. 50, ECHR, Niemietz v. Germany).

It is very interesting that both the Convention and the Criminal Procedure Code allow certain intrusions into private life and therefore the violation of the right, under certain conditions focused on the supremacy of the general interest, the public over the individual. There are four conditions (Udroiu, 2019, p. 51), namely: to be provided by the law, to pursue a legitimate goal, it is necessary in a democratic society and is proportional to the goal being pursued. The four conditions are based on a single idea, the implementation by the state of a clear, predictable procedure that pursues precise goals, which are not disproportionate to the damaged social value.

Finally, it must also be shown that the entire geometry of the special surveillance and research measures aims to improve efficiency in the prevention and suppression of criminality. This operation is regulated both in the European Convention, under the marginal title of "Right to a fair trial" and in the Criminal Procedure Code, under the marginal title of "Fair trial and reasonable time" (Romanian Parliament, 2014). The distinction between the two marginal titles derives from a single fact: the notion of "reasonable term" represents nothing more than a consequence of equity, so in these conditions we can only express our regret for the plenary expression used by the Romanian legislator in the provisions of art. 8 of the Criminal Procedure Code (Romanian Parliament, 2014).

We must also mention that the Criminal Procedure Code showed innovation by regulating the purpose of the criminal trial by means of a fundamental principle, that of equity, implicitly giving the entire activity of the judicial bodies a fair character. In the same sense, equity lato sensu represents the idea of "good justice" (Mateuţ, 2019, p. 82). Next, as we previously predicted, the special methods of surveillance and research aim to be operative, to find out the truth quickly. However, this truth, although it respects the principle of the fairness of the criminal trial, will not be able to ignore the other fundamental principles.

5. Special measures of surveillance and investigation by reference to the right of defence

Among the principles that could be disregarded by the judicial bodies is the right to defense, a right that derives from the principle of the

legality of the criminal trial. The right to defense, regulated by the Criminal Procedure Code in the provisions of art. 10, can be violated, in our opinion, in only one hypothesis, but one more has been identified in the doctrine: the latter is the procedure regulated by art. 143 paragraph (4) of the Criminal Procedure Code, which provides for the certification of authenticity by the prosecutor. The doctrine (Mateuț, 2019, p. 695) considered it a violation of the right to defense due to the lack of mention regarding the completeness contained in art. 143 para. (4) of the Criminal Procedure Code (Romanian Parliament, 2014), but we cannot agree with such a hypothesis, since we are essentially only talking about an apparent violation of the right to defense. In reality, we are talking about two verbal processes: the first refers to art. 143 in paragraph (1), which includes the result of the activity and therefore, the entire activity carried out and which is not subject to certification by the prosecutor (Udroiu, 2019, p. 470); a second report is drawn up in accordance with paragraph (4), regarding the in concreto reproduction of "conversations, communications or discussions", thus corroborating the two paragraphs with paragraph (2) of the same article, which provides that the process, which is first a verbal one (the one relating to the entire activity), together with the support or a certified copy, will be kept at the prosecutor's office, in case they are requested, thus any irregularity can be covered.

Therefore, the "truncated" rendering and, a fortiori, the methodology for assessing the information in the procedure provided for in paragraph (4) is not likely to lead to a per se infringement on the right to defense and,, even more so, to the correlative sanction of relative nullity, the special surveillance method being legally ordered (Volonciu et al., 2017, p. 383). The appropriate hypothesis on the right to defense is covered by the procedure provided by the provisions of art. 145 of the Criminal Procedure Code, which imposes the positive procedural obligation on the prosecutor to inform, in writing, within 10 days at most, each subject of a technical supervision mandate about the respective measure (Romanian Parliament, 2014).

The violation of the right occurs when, according to para. (4) of the same article, the prosecutor postpones the fulfillment of the legal obligation imposed on him, and the respective person is not able to benefit from the "necessary facilities" to which they are entitled according to art. 10 para. (2). Of course, in this situation, after the completion of the criminal investigation and therefore reaching the deadline until which the postponement can produce effects, the suspect/defendant can propose the administration of evidence. The sanction of the violation of the right to defense by rejecting all, or some, but untimely or unmotivated/illegal evidence, has valences on

the act of referral of the case to the court, a situation that will have to be taken into account by the judge of the preliminary chamber (Volonciu et al., 2017, p. 387; Barbu et al., 2021).

In this matter, it must be pointed out that according to Decision no. 244/2017 (Constitutional Court of Romania, 2017), the Romanian Constitutional Court declared the unconstitutionality of the legislative solution provided for by art. 145, which does not allow people other than the suspect/defendant to have the right to an a posteriori control on the interferences to which they were subjected, in the sense of the provisions of art. 8 paragraph 2 of the European Convention. Also, as was normal, the substantiation of the solution was also focused on the provisions of art. 13 of the Convention, which guarantees the litigants "the right to an effective remedy", and in this sense we appreciate that the failure to implement an appeal with specific elements aimed at both the reliability and legality of the evidentiary procedure, and implicitly the means of evidence, constitutes per se a violation of art. 13 and art. 8 para. 2 of the Convention. Alongside other authors (Volonciu et al., 2017, p. 388), we propose that, de lege ferenda, the implementation of a timely and reliable appeal be done. Moreover, as we have shown, we appreciate that the said appeal should concern both the legality and the reliability of the evidence, considering the possible situations of disadvantage for the defendent of the people who are subjects of the warrants.

6. The evidentiary system and the presumption of innocence

A final principle to be discussed, which concerns not only the issue at hand but also the entire evidentiary system, is the principle of the presumption of innocence (Romanian Parliament, 2014). This principle essentially represents a foundation, a corollary of all the others because, even if the means of proof were administered, or as the case may be, the evidenciary procedures were carried out in compliance with the rules of procedure, in case they lead to doubts, assumptions, suppositions, suspicions, and not certainties, in view of the object of the judgment, i.e., "the facts and persons shown in the act of referral to the court" (Romanian Parliament, 2014, Art. 371), the court, noting this fact, will not convict and *ubi aedem est ratio, aedem solutio debet esse*, waiving the application of the penalty or postponing the application of the penalty, or will be obliged to order an acquittal.

The presumption of innocence is imposed on both the authorities and on individuals. It must be pointed out that this violation, seen as an infringement of a subjective right, is sanctioned differently by the legislation

in force. Thus, by violating the presumption of innocence, the sanction of nullity of the respective acts does not become incident (Udroiu, 2019, p. 23), but rather the sanctions that could intervene are of an administrative nature (in the event that the state bodies violate the presumption of innocence) and/or civil. Civil liability is incurred in this case by regulation in the provisions of art. 1349 related to art. 1357 of the Civil Code (Romanian Parliament, 2009b) on tortious civil liability for one's own acts.

However, incurring criminal liability is not excluded, given that the different ways of violating the presumption of innocence can materialize in serious deviations from the positive law and therefore can acquire a criminal nature. In such conditions, we must bring to light some of the forms of state criminal coercion: the crime of divulging a professional secret (Romanian Parliament, 2014, art.227), violating the secrecy of correspondence (Romanian Parliament, 2014, art.227), the crime of misleading the judicial bodies (Romanian Parliament, 2014, art.268) etc. However, we must not omit specifying that the three types of liability can be cumulative.

We have to show that the presumption of innocence is closely related to the notion of "accusation in criminal matters". The explanation is simple: the "consideration" of an innocent person is no longer required, if that person is not accused of anything. The accusation in criminal matters benefits from autonomy in the jurisprudence of the European Court of Human Rights and Fundamental Freedoms, which is not confused with the simple accusation made by litigants before the external phase of the crime (Mitrache & Mitrache, 2014, p. 277), and represents the situation of a person against whom the competent bodies have charged the commission of a certain crime, a measure that presents certain repercussions (Volonciu et al., 2017, p. 16, ECtHR, Tejedor Gracia v. Spain). Such a moment has particular valences, in the sense that formulating a "criminal charge" is represented by the provisions of art. 305. paragraph (3) of the Criminal Procedure Code (Romanian Parliament, 2014), which aims to order the continuation of the criminal prosecution against the suspect.

7. Aspects of jurisprudence

In practice, situations may arise when the notion of "accusation in criminal matters" is extended to certain non-criminal procedures, according to domestic law, but considered "criminal" in the sense of ECHR jurisprudence. In principle, in this hypothesis, we consider the "parallelism" (Udroiu, 2019, p. 30) of administrative and fiscal procedures, procedures that provide for sanctions and repercussions (complementary administrative penalties) that can be considered impeding elements in the sense of the

provisions of art. 16 para. (1) letter j), meaning that "there is res judicata authority", so the classification or termination of the criminal process will be imposed. In this matter, both the jurisprudence and the doctrine (Volonciu et al., 2017, p. 16; Udroiu, 2019, p. 30) have retained the possibility that an administrative or financial-fiscal sanction can be considered as an impeding condition. In this sense, the jurisprudence of the European Court has provided certain criteria in determining the "criminal" character of a non-criminal act in domestic law, such as: "complementarity of investigations, the role of imposed sanctions", the severity of sanctions etc.

Suceava Court of Appeal, by Criminal Decision no. 46 of 19.01.2018, considered that the defendant was trialed for committing the crime of smuggling, after he had previously been sanctioned for it as a contravention, therefore he had to execute both a main penalty and a complementary penalty. Thus, the appellate court held that, by reference to the ongoing procedure and the administrative-contravention procedure, the requirements provided by art. 4 of Protocol no. 7 to the European Convention are met and therefore, it retained the impeding condition provided by art. 16. paragraph (1) letter j , consequently ordering the termination of the criminal trial.

8. Conclusions

A consequence of the presumption of innocence is the principle *in dubio pro reo*, which assumes, according to art. 4 paragraph (2) of the Criminal Procedure Code, that "after the administration of all the evidence, any doubt in forming the conviction of the judicial bodies is interpreted in favor of the suspect or the accused". In essence, the applicability of this principle presupposes a priori the administration of evidence, evidence that - although the legal text uses the phrase "the whole", leaving the impression of the administration of all possible evidence, disregarding the sanctions that may appear in the matter of evidence during the course of the criminal process – actually only mean the existing evidence in the case file at the time when the judicial body will have to order a solution, which will later be assessed by the judicial body, and as a result of its assessment, no certainty can be established in order to order any favorable solutions, nor any contrary solution (Mateuţ, 2019, p. 74). In such situations, the court will not be able to pronounce an unfavorable solution, but will be obliged to retain the impediment provided by the provisions of art. 16 para. (1) letter c), pronouncing the acquittal.

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