

# THEORETICAL AND PRACTICAL ASPECTS REGARDING THE SECRECY OF CORRESPONDENCE IN LIGHT OF ECHR JURISPRUDENCE

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**Abstract:** *The rights, freedoms and duties of man are fundamental, par excellence, in an institution of constitutional law and, as such, quite naturally, they are contained in the body of the Constitution<sup>1</sup>.*

*Article 8 para. 1 of the European Convention on Human Rights refers to the right of every person to respect for his private life and family life, his home and his correspondence. This text corresponds to art. 12 of the Universal Declaration of Human Rights, which stipulates that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation.*

*Also, art. 8 para. 1 of the Convention proclaims the right to communicate thoughts and opinions by writing, by telephone or two-way transmission or by any other means of communication, without being known to others, blacked out or made public. Accordingly, article 8 protects all types of correspondence, including communication by electronic means.*

*This right is guaranteed and protected by art. 17 of the International Covenant on Civil and Political Rights<sup>2</sup>.*

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<sup>1</sup> See M.Constantinescu *et al.*, *Constituția României. Comentată și adnotată*, Regia Autonomă Monitorul Oficial, 1992, p. 35.

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In this article, we set out to address theoretical and practical considerations on the right to correspondence.

The Romanian Constitution stipulates, in art. 28, the protection of the inviolability of correspondence. Thus, it stipulates that “Secrecy of the letters, telegrams and other postal communications, of telephone conversations, and of any other legal means of communication is inviolable”.

Under the marginal name “*Violation of secrecy of correspondence*”<sup>3</sup> in art. 302, the *New Criminal Code* criminalizes the act of “opening, withdrawing or withholding without right any correspondence addressed to another person, as well as disclosing without right the contents of such correspondence, even when it was sent open or was opened by mistake, punishable with imprisonment from three months to one year or a fine”; para. (2) art. 302 of the new Criminal Code criminalizes “interception without right of a call or communication made by telephone or by any electronic means of communication, punishable with imprisonment from 6 months to 3 years or a fine.”

A first aspect that we analyze targets a special interest that has been expressed in the doctrine and jurisprudence of the European Court of Human Rights regarding written correspondence, especially prisoners’ correspondence.

By *art. 45 para. (1) of Law no. 275/2006 on the execution of sentences and measures taken during the criminal trial*, the right to correspondence of persons in execution of custodial sentences is guaranteed. Likewise, according to *art. 45 para. (2)*, correspondence is

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<sup>2</sup> Adopted and open for signature by the General Assembly of the United Nations on 16 December 1966. Entered into force on 23 March 1976, under art. 49, for all its provisions except those at art. 41; on 28 March for the provisions at art. 41. Romania signed the Pact on 31 October 1974 by Decree no. 212, published in the “Official Gazette of Romania”, part I, no. 146 of 20 November 1974.

<sup>3</sup> E. Tanislav, *Teoria penală a dreptului la intimitate*, Revista de Drept Penal nr. 3/1998, p. 42.

confidential and cannot be opened or withheld except within the limits of and under the law. Finally, pursuant to art. art. 45 para. (3) of the Law, prisoners' correspondence can be opened, without being read, in their presence. Legal provisions have a preventive purpose, namely to prevent the introduction of drugs, toxic substances, explosives or other such objects whose possession is prohibited into prisons. Moreover, according to Art. 45 para. (4), in conjunction with art. 45 para. (5), the correspondence of a person in execution of a custodial sentence can be opened and withheld if there are solid clues about a crime and only based on orders issued in writing and accompanied by justification, by the judge, for the execution of custodial sentences<sup>4</sup>.

At the same time, *art. 46 of Law no. 275/2006 on the execution of sentences and measures ordered by the court in criminal proceedings* also stipulates measures to ensure the exercise of a convict's right to correspondence, such as: providing the convict with materials required for correspondence; installing mailboxes within the prison etc. Art. 47 of the Law stipulated that persons in execution of custodial sentences have the right to make phone calls from card-based public phones installed in prison, under visual supervision and guaranteeing their privacy.

The Romanian legislator regulated the possibility of interference with the right to correspondence of the defendant or convict in art. 147 para. (1) of the New Code of Criminal Procedure, which refers to withholding, handing over and searching postal items.

This measure also applies to the special procedure of investigation in order to identify, search, locate and capture wanted persons.

Withholding, handing over and searching postal items can be ordered by the rights and freedoms judge of the court in whose jurisdiction the case would be heard in trial or the court that is equivalent in rank to it, in whose jurisdiction the office of the prosecutor who prepared the proposal is located, with regard to letters, postal items or objects sent or received by the criminal, suspect, defendant or any

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<sup>4</sup> M. Udroui, O. Predescu, *Protecția națională a drepturilor omului și procesul penal român.*, Editura C.H. Beck, București, 2008 p. 215.

person who is suspected of receiving or sending, by any means, such items goods from the criminal, suspect or defendant, or items intended for such person.

To order such correspondence or objects to be withheld, handed over and searched, under Article 147 para. (1') of the Code of Criminal Procedure, the following conditions must be met:

a) that there is a reasonable suspicion about the preparation or commission of an offense;

b) that the measure is necessary and proportional to the restriction of fundamental rights and freedoms, given the particularities of the case, the importance of information or the evidence to be obtained or the seriousness of the offense;

c) that the evidence could not be obtained otherwise, or that obtaining them would require particular difficulties that would prejudice the investigation, or that there is a threat to the safety of persons or valuable property.

The need to respect this right of the person is also apparent from the decisions of the European Court of Human Rights. The Court pays particular attention to the damage brought to the respect for written correspondence of prisoners, be it a simple limitation of the possibility of prisoners to correspond<sup>5</sup> or the seizure of correspondence<sup>6</sup>. Focusing on the importance of the right to respect for correspondence in the prison system, the Court, on the one hand, appeals to a true presumption of causality and ascertains the violation of art. 8 in the case when the respondent State is not able to prove that the letters addressed to the prisoner where indeed received by him<sup>7</sup>, and on the other hand, stipulates that the state has a positive obligation to provide material for the prisoner to be able to correspond<sup>8</sup>.

In the case *Petra v. Romania*<sup>9</sup>, the Court found that the prisoner had his written correspondence examined while serving his sentence,

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<sup>5</sup> See *Golder v. United Kingdom*, 1975.

<sup>6</sup> See *Silver v. United Kingdom*, 1983.

<sup>7</sup> See *Messina v. Italy*, 1993.

<sup>8</sup> See *Coteleț v. Romania*, 2003.

<sup>9</sup> See Decision of 23 September 1998, para. 31-39.

without this being ordered by judicial decision and without there being any possibility of filing a complaint against this measure. The Court noted that the Romanian state violated art. 8 of the European Convention on Human Rights by preventing the applicant from corresponding both with the European Commission and with his family and domestic public authorities.

Similarly<sup>10</sup>, the Court found that the Romanian authorities violated art. 8 of the European Convention on Human Rights, by:

a) refusing to provide prisoners with the necessary materials for their correspondence with the courts in Strasbourg;

b) opening the correspondence of the applicant convict, intended for the European Commission and the Court, or received from the court;

c) delaying the arrival and dispatch of the applicant's correspondence, intended for the European Commission.

The court ruled that the provisions of Art. 8 of the European Convention on Human Rights in relation to the individual's right to respect for his correspondence are violated if action is taken to censor correspondence sent by the applicant from prison. The Court also noted that the convict's right to secrecy of correspondence is also violated when the correspondence addressed to his lawyer or the European Commission is examined.

Correspondence with the lawyer, both during the proceedings, and even after the judgment of conviction becomes final, enjoys a privileged status for the purpose of protecting the confidentiality of information transmitted, as well as ensuring respect for the right of the person accused of a crime to benefit from the time and facilities required for preparing the defense. Authorities may only open correspondence between lawyer and the detained person if they have plausible reasons to believe that this has an illegal content, which cannot be revealed by other means. In these circumstances, correspondence should only be opened and not read, some guarantees being necessary in this regard,

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<sup>10</sup> See *Cotleş v. Romania*, 2003, para. 29-65, published in the Official Gazette of Romania no. 422 of 19 May 2005.

such as, for example, opening correspondence in the presence of the detained person<sup>11</sup>.

In our personal opinion, the convicts' right to secrecy of correspondence is not violated, but restricted, this restriction is a legal measure taken by prison management for reasons of national security.

A separate issue that created controversy in doctrine and jurisprudence refers to correspondence by means of telecommunication. Wiretaps are necessary to safeguard democratic states against terrorist threats or crime.

ACTA (Anti-Counterfeiting Trade Agreement) is a multilateral agreement proposing a series of international standards for intellectual property rights enforcement. The agreement, negotiated by a small number of countries, in coordination with certain segments of the industry, is controversial both in terms of its development process and in terms of its content. From the name we can realize that ACTA will cover many fields, from consumer goods to medicine and the Internet.

Thus, the agreement will have major implications for the freedom of expression, access to culture and private life, will affect international trade and will represent an obstacle to innovation.

It seems to me that, in this area, it would be necessary for the scope and exercise of power of authorities to be clear and precise. In this respect, the law should precisely stipulate the crime types allowing such interference from the state. In addition, we believe that in an increasingly developed world, ruled by advanced remote communication techniques, as well as crime phenomena, not only must wiretapping be decisive in the search for evidence and clues, but telephone surveillance must be precise, i.e. there must be a causal link between wiretapping a person and suspecting that same person of committing certain offenses under the law.

Correspondence by means of telecommunications has created great inconvenience to the states before the Court, especially in terms of how phone- tapping is practiced. The Court has upheld such tapping only when the interference is necessary in a democratic society for reasons of national security, defense of public order or

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<sup>11</sup> See Campbell v. United Kingdom, Decision of 25 March 1992, para. 44-48.

prevention of crime<sup>12</sup>. Wiretapping constitutes interference with the right to privacy, often penalized for lack of legal basis. Article 8 shows a “horizontal effect” and the national authorities have a positive obligation to take steps to prevent disclosure of private telephone conversations and, equally, to conduct an effective investigation to uncover the causes of such acts<sup>13</sup>.

In two cases the reference<sup>14</sup>, the Court established several elements showing that phone-tapping taken against the applicants were not compatible with art. 8 of the European Convention on Human Rights:

a) the persons against whom wiretapping action had been taken were not clearly designated;

b) the nature of the offenses justifying such interceptions was not defined;

c) there were no limits set on the duration of the measure;

d) there were no provisions on drafting the report recording the interception;

e) there was no provision of the precautions on communicating recordings to the defense and the judge, who could not control the length of records;

f) the ways in which the tapes containing the records were to be destroyed were not defined.

These findings of Court led, on the one hand, to changes in French legislation in this matter and, on the other hand, to the creation of a set of criteria applicable to this matter, used by the Court in subsequent jurisprudence<sup>15</sup>.

Electronic correspondence is a relative novelty in the overall landscape of correspondence protection. A first issue is protecting this type of correspondence at work.

Thus, as the employee benefits from a certain scope of privacy against the employer and at work, with regard to personal written correspondence, personal emails should enjoy similar protection.

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<sup>12</sup> See B. Selejan-Guțan, *op. cit.*, p. 151.

<sup>13</sup> F. Sudre, *Drept european și internațional al drepturilor omului. Traducere de Raluca Bercea și colectiv*, Editura Polirom, Iași, 2006, p. 318

<sup>14</sup> See *Kruslin v. France*, 1990 and *Huvig v. France*, 1990.

<sup>15</sup> B. Selejan-Guțan, *op. cit.*, p. 151.

Although, in most cases, the employee receives and sends this correspondence using the employer's computer, as the contents of such texts has a private character, they must be protected, insofar as these messages are marked for this purpose<sup>16</sup>.

Human rights, the assertion of personality, the guarantee for the possibility of respecting such rights in a wide range of fields, are inconceivable, no matter what country in the world we are talking about, without clear and effective regulations, without accepted and respected rules of conduct, and without educational programs to guarantee education for all in the spirit of freedom.

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<sup>16</sup> B. Selejan-Guțan, *Protecția europeană a drepturilor omului. Ediția 2*, Editura C. H. Beck, București, 2006, p. 152.