Wiretaps interference of public authorities in the right to privacy and correspondence

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Abstract

The author aims to examine whether the changes of the legislation wiretaps would be able to comply with the European Convention in order to prevent condemnation of Romania in the European Court. Given modern technical means of investigation, trial, respect for privacy life has gained increasing importance. An eloquent proof in this regard is the fact that, in practice, the parties frequently invoke the violation of Article 8 of the European Convention on Human Rights to request the annulment of evidence produced by a party or by an act of the test administration.

In 1996, Italy was the penultimate state of the European Union to adopt a Law on the respect for personal privacy.

The right to private life is typical to the English common-law, reason for which the European jurisprudence still uses the English term “privacy”. In the first decades of the twentieth century, the theoretical assertions regarding the sacred character of the “private life” notion was opposed to a rather corrective society regarding the individual and, as consequence, a cautious approach from the part of the judiciary power. Indeed, the private life issue has been stated more often in the sphere of the torts, or in that of the private law, anyway. Furthermore, in 1928, the Supreme Court of the United States restated that the principle of the right to privacy is based on the property right, as there is no constitutional autonomous right to private life emerging from the Fourth Amendment, which forbids unjustified searches and seizures. The case Olmstead vs. The United States, of 1928, is based on the FBI having wiretapped several private telephone conversations without an authorisation from a prosecutor. The Supreme Court ruled that wiretapping did not constitute a violation of the right to property (and to privacy, implicitly) and that the information had been acquired legitimately. (Losano, G., Mario, 2004)

In Italy:

The Public Ministry – a magistrate – has to make a request to a judge for preliminary investigations (G.I.P.), when he considers that wiretaps are indispensable for his inquiry. We refer here to infractions with punishments of over five years, detention, crimes related to smuggling, gunrunning or drug trafficking, or when using the telephone to commit a crime (telephone threatening, phone calls made by sexual maniacs, etc). The authorisation – to wiretap...
Communications – is valid up to 15 days and it can be renewed. The results of the wiretaps are recorded and then transcribed; they must have a special regime. The defense lawyer of the accused can access them. In emergency cases, the Public Ministry may act without a G.I.P. for 24 hours. People in charge for the anti-mafia or antiterrorist fight benefit from special powers to organize the wiretapping; hence, they avoid this process (Diaconescu, 2001).

In Romania

Law No. 51/1991 on national safety comprises, under art. 13, provisions appreciated as incompatible with the provisions of the Convention, but which did not change even after the modification of the Code of criminal procedure and which were even considered constitutional by motivating with their “special” character. These provisions are not compatible with art. 8 of the Convention, because they allow six-month wiretapping by the specialized information service, based on a simple authorisation emitted by the prosecutor who, as magistrate of the public ministry, does not meet the criterion of independence from the executive power. The six-month period can be extended to three more months consecutively, without any time limit stipulated by law.

Moreover, when there is a doubt on the reality or reliability of a tap – for the cause, the only national authority that could have certified the reality or reliability of a wiretap, proceeding to a comparison of voices, was the Romanian Information Service. This was precisely the authority in charge of tapping the conversations, of transcribing them, and of certifying their authenticity, reason for which the independence and impartiality of this institution could be questioned. Following this reasoning, we believe that there should be a clear and effective possibility for these wiretaps to be analyzed by a public or private centre, independent from the wiretapping institution. (case Dumitru Popescu vs. Romania, Decision of 26 April 2007, in M.Of. [Official Gazette of Romania] No. 830 of 5 December 2007)

The wiretap of telephone conversations will always represent an intrusion of the public authorities in the right to privacy and correspondence, thus violating art. 8 parag. 2 of the Convention unless it observes the legal provisions, it has one of the purposes stated in art. 8 parag. 2, and it is necessary in a democratic society in order to reach the said purpose. (Toader, T., 2010)

When the purpose is wiretapping a person’s conversation, it is mandatory to ensure the observance of the demands related to the correspondence secrecy for each person submitted to such interception, and not only for the person targeted by the said measure.

Art. 8 parag. 1 of the Convention states that everybody has the right to respect for his private and family life, his home, and his correspondence. The provisions of art. 8 comprise both negative obligations – no interference by a public authority in the private life, home, and correspondence (no interference with the exercise of this right), and positive obligations – to protect the rights guaranteed by art. 8 against unjustified interferences of the authorities or other private persons.

In both cases, it is necessary to take into account the mandatory proportionality relation between the interest of the person and that of the society as a whole; in addition, in both hypostases, the state benefits from a margin of appreciation.

The provisions of art. 8 of the European Convention were adjusted accordingly in the national criminal legislation of numerous European countries.

The Italian criminal code – in art. 615 bis.(1), referring to the unlawful interference in private life – states that all those who, by means of visual or sound recording devices, unlawfully obtain information or images concerning the private life inside any other’s domicile or inside any other kind of private residence is punished with detention from six months to 4 years. Except for the cases when it constitutes a more serious crime, the same punishment goes for any person who reveals or broadcasts to the public – regardless of the means – the information or images obtained through the methods stated above. (Udroiu, M., Predescu, O., 2012)

As solicited by most part of the doctrine, the New Romanian Criminal Code – adopted on 26 June 2009 through Law No. 286/2009, after the Government assumed responsibility before the Chamber of Deputies and the Senate, during the common session of 22 June 2009, to take effect starting with a date that will be determined in the law issued for its application (predictions state July 2013) – was completed with Title I. This is called “Crimes against the person” and it comprises a distinct chapter on the incrimination of deeds that constitute crimes against the intimate and private life or the image of a person. This way, this category includes, besides the traditional
incriminations, several new crimes, meant to fill a gap in the regulation and to provide an answer to the new forms of injuring or endangering the social values that constitute the object of this chapter. According to Chapter IX, entitled “Crimes against the domicile and private life”, new crimes were introduced. We refer here to Violation of the office (art. 225) and Violation of private life (art. 226). In addition, existing crimes were rephrased: violation of domicile (art. 224), Breach of professional secrecy (art. 227). (Lupascu D., 2012)

This way, the violation of the office was incriminated as distinct crime considering that, according to the jurisprudence of the European Court of Human Rights, the head office of a legal person or the office of a physical person were also covered by art. 8 of the Convention (see the decision in Niemietz vs. Germany, of 16 December 1992).

Hence, the incrimination stated above is present in most legislations (art. 191 Portuguese Crim. Code, art. 203; Spanish Crim. Code, § 123; German Crim. Code, § 109; Austrian Crim. Code, § 6, chap. 4; Swedish Crim. Code, § 355; Norwegian Crim. Code Crim. Code). Where it is not stated explicitly, such a deed was still punished by extensively interpreting the text on the violation of domicile (see the jurisprudence of the Italian Court of Cassation – for instance, Dec. No. 5767 of 08.06.1981 – in the application of art. 614 Crim. Code).

Another new incrimination is the violation of private life secrecy (art. 225); this regulation is necessary to complete the framework of criminal protection of the values guaranteed under art. 8 within European Convention of Human Rights. The regulation was elaborated in such a manner as to allow the press to exert its role in a democratic society has correspondences in most current European criminal codes (art. 226-1 French Crim. code, art. 197; Spanish Crim. Code, art. 192; Portuguese Crim. Code, art. 615bis; Italian Crim. Code, art. 179bis-179quiniues; Swiss Crim. Code, chap. 24 sect. 5-8; Finnish Crim. Code, etc).

Finally, the breach of professional secrecy was rephrased. It will only concern the elements that the person who was supposed to keep the secret had access to, with the agreement of the person targeted by these data. This goes for both cases, either that he got the information directly (for instance, a confession to the priest, the data provided by a client to his attorney, etc), or that he concluded them based on his profession or function, with the agreement of the person in question (as in the case of the physician who makes investigations on the patient’s health state).

The disclosure of different kinds of data (private information, professional secrets, etc) makes the object of distinct incriminations, in the chapter regarding professional crimes.

The principle of the inviolability of correspondence (including its more recent component – electronic correspondence) and of telephone conversations could also be restricted. Regarding this issue, both the legislation of democratic countries and the legal practice have underlined that the exercise of this freedom should be restricted when the interest of justice is involved, meaning in order to identify crimes and offenders. This right to obtain, retain, read, and use – in trials – the incoming and outcoming correspondence of the persons accused of a criminal offence has to respect the law, to occur by a strict procedure, and only under the approval of the competent body in the matter, respecting at the same time all the rights of a person, mostly the rights to family, intimate, and private life.

From this perspective, art. 98 parag. 1 Code of Crim. Proc. states the following. “The criminal investigation body, with the prosecutor’s approval, or the court, if requested by the interest of the criminal investigation or the trial, may order that any post or transport office retain and deliver the letters, telegrams or any other correspondence, or the objects sent by the defendant, or addressed to him either directly or indirectly”. Art. 91 parag. 2 Code of Crim. Proc. also presents the situations in which these interceptions and recordings can be authorized. “In the case of offences against national security provided by the Criminal code and by other special laws, as well as in the case of offences such as drug trafficking, gunrunning, human trafficking, terrorist acts, money laundering, forgery of money or of other valuables, in the case of crimes provided by the Law No. 78/2000 on preventing, discovering, and sanctioning of corruption acts, with its subsequent amendments, in case of other serious crimes or of the crimes committed by means of electronic communication”.

Such interceptions and recordings can be done at the justified request of the victim regarding his conversations or communications by telephone or by any other electronic means of communication, regardless of the nature of the infraction, with an authorisation from the prosecutor (art. 91 parag. 8, Code of Crim. Proc.).
The dispositions of art. 91 in the Code of Criminal Procedure do not conflict with the constitutional provisions of art. 28 and 53, because precisely the texts invoked provide to the legislator the freedom of such a regulation, as the correspondence secrecy is not an absolute right, but it is susceptible to certain restrictions, justified, in their turn, by the need of criminal instruction. This way, the democratic societies are menaced by an ever more complex criminal phenomenon, reason for which the states have to be able to fight effectively such threats and to monitor the subversive element that acts on their territories. In this case, such legislative dispositions become necessary in a democratic society, in order to ensure the national security, the protection of public order, or the prevention of crimes (Constitutional Court, Decision No. 410 of 10 April 2008, published in the Official Gazette of Romania, Part I, No. 338 of 1 May 2008).

As for the interceptions and recordings mentioned, the prosecutor or the person within judiciary police delegated by the prosecutor draws up an official report (certified for authenticity by the prosecutor who performs or supervises the respective criminal investigation), to which he attaches a tape or reel containing the recorded conversation, sealed with the seal of the criminal investigation body. The original support is kept at the headquarters of the prosecutor’s Office, in particular locations, in a sealed envelope and it will be made available to the court at its request. Moreover, the circumstances and methods of interceptions and recordings mentioned above also apply in the case of recordings performed outdoors, to locate and follow by using the GPS system or by other electronic means of surveillance. At the same time, the body of evidence also includes image recordings, in accordance with the procedure provisions invoked above, with the mention that their certification procedure is the one stipulated for interceptions and recordings of conversations or communications, except for the transcription, where not applicable. Similarly, the Law on the national security of Romania No. 51/1991 states, in art. 13, that when there is a threat to the national security, the prosecutor can be requested to authorise – in accordance with the code of criminal procedure – certain actions in order to collect information. These measures include the following: interceptions of communications, access to a place or thing, opening of this thing to seek intelligence, documents, or handwritten notes; getting/replacing an object or document with the aim of examining it for intelligence purposes, use of various methods for recording, copying, or obtaining excerpts from documents; installing objects, ensuring their maintenance, and recovering them. However, the law also stipulates that the means for obtaining the information required by the national security must not endanger, by any means, the fundamental rights and freedoms of the citizens, the private life, their honour or reputation, or to subject them to unlawful restrictions. This way, the citizen who considers himself injured in his rights or freedoms may inform any of the standing committees for the defence and ensuring of the public order, of the two chambers of the Parliament (art. 16 parag. 3) (Barsan, C., 2005).

Currently, the expertise of audio-video interceptions within a case has become the favoured weapon of the lawyers in order to delay the terms of the trial indeterminately, or even until the prescription of the crime, for the luckiest ones. Paradoxically, the moment the court admits such an evidence, the defendant is not asked about what he does not agree with from the taps, reason for which all the taps must be analyzed minute by minute, which implies hundreds of hours, because there are always hundreds of minutes and hundreds of hours to analyze. This method is used in practice, though Romania was condemned by the ECHR (case Dumitru Popescu vs. Romania). The Court believed it was an excessive measure to include in the case file all the conservations wiretapped from a telephone number because it would violate several rights, such as the respect for the private life of other people that made calls from the wiretapped phone.

According to legislation, the audio and video pieces of evidence are provided, at the request of a court, by the National Institute of Forensic Expertise and by the experts within the Ministry of Justice of the Central Bureau for Technical Expertise. The audio analysis procedure of the NIFE is as follows. The objective of speech and audio analysis undergone within the NIFE consists of comparing a voice from the recording of a litigation to another voice, recorded in similar conditions (the same technical equipment and the same system of transmissions, or at least compatible, in some cases), in order to determine a relation between the probability for the voice samples compared to belong to the same speaker, or to different speaker, respectively. The audio analysis only concerns authentic
analogous recordings, authentic digital recordings, or duplicates of authentic digital recordings. The NIFE analyses also concern the authenticity of the recordings or of the storing devices.

The alterations brought by the new Codes do not solve the issue of wiretapping because, on one side, the special legislation is still in effect, though it has been proven that it violates flagrantly the provisions under art. 8 in the European Convention. On the other side, no adequate formula was found to regulate the institution of independent experts; in fact, Romania is the only European country with an expertise institute under its authority. Furthermore, the taps must be made by an independent central unit, under the authority of the Parliament, which can guarantee the impartiality and authenticity of the operations.

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