

THE VIOLATION OF DOMICILE OFFENSE IN THE ROMANIAN CRIMINAL LAW

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Abstract: In this paper we have examined the pre-existing elements and the constitutive content of the offense of violation of domicile stipulated in the provisions of art. 224 of the Criminal law. Also, in order to highlight some similarities and differences between the way of regulation in the two legislations (1969 Criminal Code and the Criminal Code in force), the useful aspects from the perspective of applying the more favorable criminal law, we have conducted a comparative examination of the two offenses. The novelty elements of this paper consist in examining the pre-existing elements and constitutive content of the violation of domicile offense according to the new provisions of the Romanian criminal law, as well as the presentation of the main provisions by which the two legal norms are differentiated. Due to the depth of the examination of the constitutive content with reference to current judicial practice, the work may be useful to students from law schools in the country, as well for practitioners in this field and, last but not least, to other people who are interested in this field. This paper is part of a book entitled Criminal Law, The Special Part, to be published at Universul Juridic Publishing House, later this year.

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1. Introduction

At the current stage, the private life of the individual, member of the community represents an “important component of fundamental rights and freedoms, and the protection of the physical entity against interference of any kind in his or her personal life is an essential part of the freedom of the person. The desideratum at international and national level is to create a legal and institutional framework that ensures effective protection of individuals from interference of any kind in their private life. An essential aspect of private life is the privacy of the home, i.e. of the dwelling and its annexes (within the meaning of Article 224 of the new Criminal Code), and which constitutes the place where the freedom of the person must be able to manifest in its fullness.” [1]

The Romanian Constitution grants special protection to home and private life and even the inviolability of the domicile, by establishing constitutional norms to protect these values.

We have in this regard the provisions of art. 27 with a significant marginal designation “*inviolability of domicile*”, a text which establishes the general rule according to which *the domicile* and the *residence* are inviolable. This provision is supplemented by the provision according to which *no one can enter or stay in the home or residence of a person without his consent*.

Undoubtedly, from these general rules, the constituent legislator also provided for some derogatory rules which provide for certain express situations in which a person may enter in the residence or domicile of a person without their consent, namely:

- for executing an arrest warrant or a court order;
- to eliminate a danger to a person's life, physical integrity or property;

- for the protection of national security or public order;
- to prevent the spread of an epidemic.

The examination of the provisions of the criminal law which protects the inviolability of the domicile or residence leads to the finding that they had firstly considered the defense of a constitutional norm, namely the one stipulated in the provisions of art. 27 of the Constitution of Romania.

The domicile or residence of a natural person is also defended at European level by the provisions of art. 8, par. (1) of the European Convention on Human Rights, which provides that “everyone has the right to respect his private and family life, his home and his correspondence”.

These provisions are resumed and provided in an almost identical way in the provisions of art. 7 of the Charter of Fundamental Rights of the European Union, which states that “*everyone has the right to respect the private and family life, domicile and secret of communications*”.

We observe that, if in the Constitution of Romania, the inviolability of the home and the intimate, family and private life are protected by distinct provisions (articles 27 and 26), the European legal instruments to which we refer are included in the same legal provisions (art. 8, par. (1) of the European Convention on Human Rights and article 7 of the Charter of Fundamental Rights of the European Union).

As far as the actual incrimination is concerned, in the Romanian doctrine it was argued the fact that “home care does not concern the dwelling (the building), considered in its materiality, but the fact that this building is occupied by a person whose peaceful use should be properly respected” [2].

The “antisocial feature” of the act results, on the one hand, from harming the freedom of a person who can no longer use his home freely because of the interference of another; and, on the other hand, from the danger which it presents to society, achieving the normal development of social relations, the development of which would not be possible without the protection of people's domicile.” [2]

In its simple way, provided in the provisions of art. 224, par. (1) Criminal Code, the violation of domicile offense is the deed of a person to penetrate without any right into a dwelling, room, dependency or place enclosed by them, without the consent of the person who uses them, or the refusal to leave at request.

In par. (2) of the same article it provides for three aggravated ways to be retained in situations where the deed is committed by an armed person, during the night, or by the use of lying qualities.

2. The Criminal Code in force in Relation to the Previous Law

The offense of domiciliary violation was also provided in the 1969 Criminal Code in art. 192, with the same marginal name, in a wording similar to the current one.

Thus, as the elements of identity we observe the marginal name, as well as the provisions of the normative type way.

The elements of differentiation appear in the content of the aggravated way from par. (2) in the case of both incriminations, where in the previous law it is also incriminated the deed committed by two or more persons together.

In connection with the renouncing of the legislator of the new Criminal Code to the retention as aggravated way of the situation in which the crime was committed by two or more persons together, the doctrine states that in this case “it shall retain the form of the offense and the legal aggravating circumstance provided by art. 77, letter a) of the new Criminal law (if the act is committed by three or more persons together).” [3]

Another differentiation consists in the fact that in the new law the criminal action moves to the preliminary complaint of the injured person in both ways, whereas in the old law the criminal action was moved to the preliminary complaint of the injured person only in the case of the simple normative way provided in par. (1) of art. 192.

A last differentiation refers to the sanctioning regime which in the old law is more severe (imprisonment from 6 months to 4 years in the old law, where as in the new law imprisonment from 3 months to 2 years or fine in the case of the simple normative way and imprisonment from 3 to 10 years in case of aggravated normative ways provided by the old law, and imprisonment from 6 months to 3 years or fine in case of aggravated normative ways, provided by the new law).

3. The Constitutive Content

3.1. The Objective Side

The *material element* of the objective side is accomplished by two alternative actions, namely, the penetration in any way in a dwelling, room, dependency or enclosed space by them without the consent of the person using them and the refusal to leave them at the request of the person using them.

By *penetrating* action it is understood the action of the perpetrator to enter with the whole body into a dwelling, room, dependency or place enclosed by them; the simply insertion of a leg or head does not meet the requirement of the law. There is no legal relevance as to the existence of the offense, the mode of penetration used by the perpetrator, because the text of the law provides the phrase “in any way”.

If the perpetrator penetrates the house with the purpose of killing, violates, etc., and these acts are committed or remain in a punishable form (tentative), the offense of home violence will compete with them.

As in the case of the robbery offense, the law provides for a distinct normative way to art. 234 (qualified robbery), par. (1) letter f) of the Criminal Code, respectively the robbery committed by the violation of domicile or professional premises, if the author penetrates into a person's home, without his consent and commits the robbery offense, it will not hold the contest between the violation of domicile and robbery, but only the offense of qualified robbery provided in art. 234, par. (1) letter f) of the Criminal Code.

The same situation will occur also in the case of theft committed through burglary, escalation or the use without right of a real or a false key, in which case the author will only be charged with the offense of qualified theft, according to the provisions of art. 229, par. (1) letter d) Criminal Code, not the offense of violation of domicile in the contest with the crime of theft.

In this respect, it was decided in the judicial practice that in the case where the theft was committed through burglary, escalation or use without right of a real or a fake key, there is only one offense - the one provided in art. 208-209 Criminal Code. Under these circumstances, the offense committed by the defendant to the injured person is, according to art. 41, par. (2) Criminal Code, a complex offense, in the objective aspect of which is also the act of violation of domicile [4].

At the same time, if the burglary did not serve the defendant to penetrate into the courtyard of the injured person's home, but only in committing the crime of theft, the two offenses - domiciliary violation and qualified theft - retain their individuality and they are in real competition [4].

The offense of the violation of the domicile cannot exist in its materiality unless it is not established the prior existence of a domicile.

Having regarded the provisions of art. 224, par. (1) of the Criminal Code, it can be appreciated that by the term *domicile within the meaning of criminal law* is meant any dwelling, room, dependence or enclosed place with respect to them. The term “domicile” within the meaning of criminal law is not confused with the notion of *domicile* within the meaning of civil law.

In the Romanian doctrine, it was argued that in the sense of the criminal law, “the domicile comprises not only the actual dwelling of a person but also its dependencies, taken in a broad sense (bridge, cellar, shed, stable and generally all other annexes of the household), as well as the location within the fence.

On the other hand, the notion of dwelling and room is not limited to buildings (house, apartment, room) built specifically for use as a home, in the sphere of these notions entering any construction

in which a person understands to live his life, even if it could not normally serve this purpose (e.g. cabin, hut, boat with dwelling).

Finally, the criminal law does not associate the notion of domicile with the idea of continuity (permanence), so that the place occupied for a short time or by a passenger, a person (for example, the room rented in a resort, during the leave, the room from a hotel, even if the stay is only one day or one night)” [2].

For the purposes of the Criminal Law, “the buildings not occupied by anyone (uninhabited), the premises of non-residential buildings (shops, warehouses, etc.) or the common spaces of a building (ladders, lifts, etc.). It is irrelevant if the building is intended for use as a dwelling or if it is actually used as a dwelling. Whether it is temporary or permanent, the housing is the place chosen by a person to pursue his personal life” [1].

Also, “it does not include in the sphere of the notion of domicile the common spaces of a building (access ways, stairs, lift) that are used and accessible to all. It does not cover the notion of domicile a home that is vacant (empty) or not occupied although a repair order has been issued for it. [2]

In the recent doctrine, it is argued that within the meaning of the criminal law (article 224, par. (1) of the Criminal Code), “home” means “the place freely chosen by a person in which he permanently or temporarily carries out her personal life. Thus, *domicile*, within the meaning of criminal law, encompasses not only the actual dwelling of the person, but also its dependencies taken in a broad sense (the bridge, the shed) and the enclosed place (such as the courtyard, the garden). The term dwelling and room is not limited to real estate (house, apartment, studio) built specifically for use as a home because any building or room in which a person understands to live his life may be used as a dwelling, even if the building does not have the facilities (e.g. tent, cottage, yacht, boathouse, etc.).

The criminal law does not associate the notion of domicile with the idea of continuity (permanence), considering even the legally occupied room for a short time (hotel room, sleeping carriage, etc.). As it has been emphasized in the court practice, if the entry into the home was made for the purpose of committing other crimes (theft, rape, etc.) and these are committed, home violence will compete with these offenses. The space occupied by a pupil at a boarding school is a dwelling, within the meaning of the criminal law, which protects the freedom of use of any living space, regardless of the way of administration or the rules governing the operation of the building (5). The room is defined as being the only part of a dwelling-building (for example, living in the same building where it also has a dental room). The room and the house have the same legal status” [1].

The dependencies “are those places that constitute an extension (an accessory) of the dwelling and which complete its use. There are dependencies - for example - the kitchen, the pantry, the cellar, etc. It does not matter if the dependents make a common body with their home or they are separate. It constitutes dependencies also the common spaces of a building (ladder, hall, covered terrace, etc.)” [6].

In order to complete the material element of the offense, it is necessary to ascertain the fulfillment of the first essential requirement, which presupposes that the penetration is carried out without right. This requirement will also be met if the perpetrator misuses the right to enter another person's home without his or her consent.

If the person or persons entering a person's domicile performs this action under the law (for example, a home search, an action by the bailiff), the act of domiciliary violation is not typical, even if the person who uses the dwelling opposes penetration.

In this respect, it was decided in the judicial practice that, in his capacity as bailiff, the intimate C.D.C. initiated the forced execution procedures, at the request of the S.P. creditor, of the civil decision no. 1068 / 15.11.2007 of the Galati Tribunal, whereby the request was made by the applicant S.P. and it was ordered to stop the work of the defendants P.V. and P.M. They were executing them at the building located in Galati, until the final settlement of the file no. (...) /

233/2007 of the Galati Court and issued the order no. 87/2008, requesting the debtors to comply with the said civil decision and to pay the total debts of court costs, execution costs and executor fees. It has been rightly found that the offense of domicile violation cannot be withheld by the intimate task, since one of the essential requirements for the existence of this crime is missing, namely as a material element of the objective side constituting an action of unjust penetration. However, it was clear from the preliminary documents that the access of the bailiff took place on the basis of a legal basis, following a request for enforcement of a court decision. As a result of the verifications carried out at the stage of the previous acts, the forced execution procedure was carried out by the intimate executor in compliance with the legal provisions, and it is rightly assumed that there are no indications and elements of which it results the offenses demanded by the petitioner in charge of the intimacy [3].

The second essential requirement is to penetrate in a person's home *without the consent* of the person.

Also, the act will not be typical and in the hypothesis in which the perpetrator penetrates in a home used by more than one person and has the consent of one of these people.

The second simple normative way is achieved by the refusal to leave, which presupposes that the perpetrator has entered in the victim's home and, for whatever reasons, he refuses to leave that home.

Undoubtedly "the refusal to leave must be explicit and preceded by an explicit request from the person who uses the space to leave (of the error of fact will take advantage the perpetrator); the request to leave the home can be made not only by the owner but also by any person using it, by the family members or by any other person who lives with him or who represents the one who uses the dwelling." [3]

Similar to the first simple normative way, and this time for completing the material element of the objective side, it is necessary to fulfill a first essential requirement, which presupposes that the penetration must be achieved *without right*.

It has been recognized in the case-law that, in any of its alternative content - the entry into a home without right or the refusal to leave it on demand - domiciliary violation implies a violation of the freedom of the person using the dwelling. This means that the request to leave the home can be made not only by the owner, but also by any person using it, by the members of his family or by any other person who lives with them or represents the owner. There is a domicile violation offense even if the defendant lawfully entered into the injured person's home, but he continued to remain there, although he was urged to leave. [3]

The second essential requirement is to penetrate a person's home *without the consent* of the person.

The doctrine states that "the lack of consent may result from an outright opposition from the entitled person, in the sense that he has attempted to prevent the perpetrator from entering his home, or from a prior warning, i.e. the disclosure to a person, by the person entitled to forbid access to his home. In the absence of explicit opposition, the lack of consent is presumed until proving the contrary, that the perpetrator can do with any means of evidence from which it would result in the victim's consent." [2]

We do not fully share this view, as the lack of consent cannot imply in all cases the victim's outright opposition or a prior warning. We have in view also the concrete situations in which the victim is not present at the time of entering without right to his / her home, in which case the issue of opposing him / her or of warning the perpetrator that he / she does not have the right to enter in another person's home cannot be raised.

We also disagree with the view according to which the contrary proof (of the existence of consent) must be done by the perpetrator, since the task of proof in the criminal proceedings belongs mainly to the prosecutor and the suspect or defendant enjoys the presumption of innocence.

Prohibition or permission to enter a home “can be given either by the person using it, that is by the holder and by the members of his family or by other persons living with him or by accident represent him in his absence.” [2]

If the perpetrator, through his actions, achieves both simple normative ways, such as the unlawful intrusion into a person's domicile without his consent and the refusal to leave it at the express request, we shall have only one offense.

This attitude of the perpetrator is only relevant in the process of individualizing the sanction of criminal law.

Under the assumption that “in a home where someone is illegally entering or refusing to leave where more people live, it shall retain an offense contest, with a plurality of passive subjects facing a crime against the person” [3].

The immediate consequence is “to create a state of violation of the person's freedom resulting from the perpetrator's penetrating into one of the components of the domicile (room, dependency, etc.) or from his refusal to leave” [2].

The causality link results from the fact that it is unnecessary to be found by the judicial bodies.

3.2. The Subjective Side

The form of guilt with which the active subject of the offense acts is the intention, which may be direct or indirect.

For the existence of the offense, the mobile or the purpose has no legal relevance, these being of importance only for the court in the complex process of individualizing the penalty of criminal law.

4. Conclusions

The examination of this offense in the light of the new provisions of the Criminal Code in force was imposed on the background of identifying the elements of differentiation in relation to the incrimination under the old law.

In the paper, in the introductory part we have highlighted the importance of protection the domicile and the private life and implicitly the inviolability of the place of residence, which are first ensured by constitutional law norms supplemented by the criminal law norms.

We have also insisted on the fact that these general provisions defending the domicile and privacy of the individual may be violated under certain conditions expressly provided for by the law.

As a general conclusion it can be appreciated that the preservation of the norms by which the act of violation of domicile is incriminated it was imposed due to the necessity to defend these extremely important values of the physical person.

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