

CAUGHT IN THE ACT COMMITTED WITHIN DOMICILE. E.C.H.R. INSIGHT

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Abstract: *According to a recent legislative amendment, while caught in the act, the police officer is entitled to enter a dwelling or a well-defined area that belongs to or is used by an individual or a legal entity, in any way, complying with the law, without having the consent of the owner or legal representative and without any search warrant. However, question arises whether the new legal provision is sufficiently reliable to achieve the purpose of the criminal proceedings.*

Key words: *domiciliary raid, Romanian police, E.C.H.R, caught in the act*

1. Introduction

In Law no 218/2002, republished, on organising and functioning of Romanian police, *article 31 paragraph 1 letter e)* stipulates that *in performing his/her duties, according with the law, the police officer shall be entrusted with the exercise of public authority and has the following main rights and obligations:*

e) to enter the apartments, economic units, public or private institutions, social-politic organizations, regardless of the holder or owner, as well as on board of any Romanian means of transport, in compliance with the legal provisions, in case of the committing a crime or in case of pursuing of some criminals or a terrorist action;

For exercising the rights conferred through the aforesaid law, the police officer is bound to fully respect the human fundamental rights and freedoms, ruled by the law and by European Convention on the Human Rights.

Then, the same legal disposition, recently amended, provides by article 52 as follows:

(1) The police officer must take the appropriate measures to remedy the risks that threaten the public order or individuals' safety, in all instances where he/she becomes directly aware of them or when the matter is referred to him/her.

(2) The police officer is empowered to enter a dwelling or a well-defined area that belongs to or is used by an individual or a legal entity, in any way, complying with the law, without having the consent of the owner or legal representative and without any search warrant in order to:

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a) save the life or physical integrity of a person, if there are indications that there is an individual in danger within the premises;

b) prevent the spread of an epidemic, whether there are indications of a dead person within that location;

c) catch the perpetrator when the offence has been committed by use of a weapon or explosive, narcotic or paralyzing substance, by violence, or by a disguised individual if there are indications of the person being inside the premises;

d) catch the author of a terrorist act, whether there are indications of the person being located in that area.

(3) The right provided by paragraph 2 shall be exercised, including by force:

a) whether there are compelling reasons to anticipate armed resistance or other types of violence or if there is a risk that evidence may be destroyed;

b) in case of a refusal or if no answer was received to the police officer's request to enter that area.

(4) Before entering the private area, the police officer shall verbally report it, hierarchically, unless it is not possible. Under these circumstances, reporting shall be made as soon as possible.

(5) After danger removal or catching the perpetrator of an offence or a terrorist act, the police officer shall leave the premises, unless the entitled person gives him/her the consent to stay. **On this occasion, no specific activities of domiciliary raid are carried out.**

(6) In the event of taking measures for preserving the crime scene and lifting or preserving evidence, the police officer is entitled to temporarily remove people from the area or to require them to stay on place until they are identified.

(7) Regarding the domiciliary raid and measures taken, the police officer draws up a report. A copy of the report shall be handed over to the person to whom the premises belong to or who uses it.

The law has clarified the activities that can be carried out while caught in the act, respectively that the public order and national security bodies may conduct domiciliary raid according with article 157 paragraph 2 from Criminal Procedure Code, without search warrant or consent of the owner or user in order to establish the caught in act as provided by article 61 paragraph 2 and article 293 of Criminal Procedure Code. The flagrant shall be assigned within waivers that are stipulated by article 27 paragraph 2 letter b and c of Romanian Constitution, by case. However, **is the provision** from the above-mentioned paragraph 6 **adequate**, while performing criminal prosecution and collecting related evidence?

2. Constitutional perspective and E.C.H.R insight

ECHR jurisprudence has established that any interference by the State with respect to the rights guaranteed by the article 8 of the Convention, including here also the inviolability of domicile, shall comply with the following conditions:

- it must be provided by the law;
- it pursues a legitimate goal;

- it is necessary in a democratic society;
- it must be proportionate to the aim pursued.

Regarding the requirement of being provided by the law, Court's practice has shown that this implies a legal basis within national law and it has to be the consequence of applying the law.

The law must fulfil two requisites, namely: to be accessible to everyone, meaning that, there should be a minimum of publicity about it, and to be predictable, that is, the one to whom it applies must be reasonably have understood its meaning and realized that law enforcement concerns himself.

The predictability standard assumes that the rule in question is sufficiently precise to allow the individual to adjust his/her conduct according with its prescriptions.

Therefore, in **Rotaru v Romania** Case (February, 4th 2020) having to rule on the fact that the Law no 14/1992 regarding the organization and functioning of Romanian Intelligence Service meets the predictability conditions required by the article 8 of the Convention, European Court has pointed out that it must assess the „quality” of the legal basis on which the claimants have relied on, especially looking to find out whether the domestic law sufficiently precise stipulates the terms under which Romanian Intelligence Service may store and use information on claimant's privacy. It has noted that the law in question provides that information on national security may be collected, recorded and archived in secret files.

However, the Court has determined that no legal provision sets the limits to be observed while exercising this prerogative. Thereby, the aforesaid law does not define either the type of information that can be recorded or the categories of individuals who may be subject to surveillance and data collection and storage measures or the circumstances in which such measures may be taken. The Court has also noted that for a system of secret surveillance to be compatible with provisions of article 8 from Convention it must contain guarantees that are applicable to the controlling activity for the performing services. Such control may appear to be effective when it implies, at least as a last resort, the judicial authority granting the best guarantees of independence, impartiality and fair procedure.

So being, the Court has considered that Romanian system of data collection and storage does not provide either such guaranties or appropriate controlling procedure, which led to the conclusion that internal legislation does not deliver the clarity characteristics required by the predictability condition of the law.

In **Kilyen v. Romania** Case, the Court has assessed that the article 8 of the Convention was violated when some police officers had broken into the complainant's yard based on provisions of Law no 360/2002 regarding the Statute of police officer and Law no 218/2002 on organization and functioning of the Romanian Police.

The Court has emphasized that the above-mentioned stipulations do not enclose specific and clear provisions with respect to domiciliary raid.

Whether searches can be carried out, while caught in the act or during investigation of criminal or anti-terrorist operations, by the police based on extensive legal competences, the Court has considered that the law no 218/2002 on organization and functioning of the Romanian Police does not define with sufficient clarity the scope of

these extensive abilities and the means of performing them, so as to allow adequate individual protection against arbitrary.

Generally, the reference to the law shall not replace individual authorization of a search, setting out the subject and the scope according with relevant legal provisions either before or after.

Furthermore, the Court noted that the legal provisions of domiciliary raid have been vaguely and broadly defined and they cannot be considered legal basis for interference; they cannot provide appropriate and effective guarantees against abuse.

The Court also has found out that the search warrant had not been adjusted to the complainant' situation by clearly indicating the purpose and the extent of the search and would have been appealed in court. It has been established that human rights interference had not been lawful.

In **Urukov v. Russia** case, where under the Police law, the police officers may conduct domiciliary raids to execute some arrest warrants, without appropriate authorization for search, the Court stated that article 8 of Constitution had been violated.

In **Funke v. France** case, the Court assessed a domiciliary raid carried out under the Customs code by the customs authorities and police officers without authorisation from judicial bodies. Although it admitted that the interference was provided by the law and pursued a legitimate aim, the Court assessed its lack of proportionality, considering the missing search warrant and extensive powers of the Customs authorities in taking such measures, valuing appropriateness, frequency, duration and extent of the controlling operations.

In **McLeod v. Great Britain**, the Court determined that a legal provision of the British law allowing the police officers to enter a residence without search warrant for preventing attacks against public order, fulfilled the predictability required by the law. However, the Court considered that enforcement of the legal measure in had been unreasonable with respect to its proportionality.

Romanian Constitution stipulates in article 27 the circumstances under which legal waiver from inviolability of the domicile may take place.

However, enforcing the constitutional dispositions and complying with Court' standards, law must provide unambiguous rules, in an accessible and predictable manner, for an efficient performance of judicial activities. The regulatory provisions shall explicitly comprise nature and extent of these activities, must not be open to different interpretations and consequently, possible vulnerabilities that may arise in terms of the binding European standards.

Thoroughness of the legal stipulations is welcome, whereas vulnerabilities may concern infringement of fundamental rights, such as the right to privacy (in the event of a domiciliary raid), on one hand, or they may affect the very purpose of the criminal procedure norms, that is to ensure an efficient exercise of the duties of judicial bodies and to avoid cases of misunderstanding or operational error, when much of the evidence may be invalidated.

New rules of criminal procedure do not provide any dispositions other than those already presented, which outline the activities that would be carried out by the public order and national security bodies for establishing the criminal offence.

Therefore, taking into account the existing legal provisions, the potential domiciliary raid conducted by the public order and national security bodies, while caught in the act, followed by a search without warrant and missing the consent of the individual using the domicile, is likely to be considered a violation of article 8 of the European convention for the protection of human rights and fundamental freedoms (as described above).

Still, there is one exceptional circumstance when the search may proceed without handing the copy of the search warrant, without prior request for individual surrender or objects handing over and also without prior notice for inquiry of a lawyer or person of trust. This exception is stipulated in article 159 paragraph 14 of the Criminal Procedure Code and concerns the situation in which the search warrant has been issued by the judge of rights and freedoms.

On the other hand, according with article 61 paragraph 2 from the Criminal Procedure Code, the public order and national security bodies have the obligation to take appropriate measures to preserve the crime scene and to lift or preserve evidence. While caught in the act, they have the right to carry out body or vehicle search, to catch the offender and to immediately present him/her to prosecution bodies. However, the provisions of article 61 from the Criminal Procedure Code do not grant to these bodies the right to conduct domiciliary raids.

In practice, there are circumstances when the offender may find refuge within a residence while being pursued right after committing the offence or when the public order and national security bodies are caught the offence while running within a residence. Such cases allow the police officer to apply the provisions of article 31 paragraph 1 letter e) from Law 218/2002 regarding Organisation and Functioning of Romanian Police, republished, namely to enter the housing premises. The legal stipulation does not mention the possibility of conducting a domiciliary raid.

Furthermore, paragraph 2 of the same article, explicitly points out the obligation to precisely comply with the human rights and fundamental freedoms provided by the law and the European Convention for Protection of human rights and fundamental freedoms.

One of these rights is ruled by article 8 of the Convention on the right to respect for private and family life.

The respect for private and family life, for individual's home and for one's correspondence secrecy, imposes negative obligations of the state authorities, namely obligations to not perform any activity that would hinder the exercise of these rights.

In **France**, police officers may enter a dwelling or premises of an individual or a legal entity, "while caught in the act, without any authorization issued by a judicial authority".

In **Germany**, entering a person's domicile may be conducted in cases of imminent danger. A typical case of imminent danger is when, the police officers, on grounds of urgency and without holding any related court decision, carry out a domiciliary raid in criminal proceedings.

3. Conclusion

Although, the new provision has regulated the domiciliary raid while caught in the act, I

believe that the rule does not achieve its purpose under the circumstances of criminal prosecution, since it may allow disappearance or destruction of evidence that can not be preserved. Therefore, I would propose to insert within article 157 from Criminal Procedure Code a new stipulation which should provide, as an exception, while caught in the act, police officer may carry out domiciliary raid based on prosecutor's 48 hours-authorisation . Afterwards, within maximum 24 hours from issuance, this permit would be subject to authorization by the judge of rights and freedoms (a similar treatment to the provisional authorization of the technical surveillance measures submitted by the prosecutor according with article 141of the Criminal Code Procedure).

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