

PERQUISITION AND LIFTING OF OBJECTS AND DOCUMENTARY EVIDENCE

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Abstract: *Since the application of precautionary measures necessarily involves the implication of an authority who accomplishes it into a person's home, even against that person's will, in order to identify and evaluate the belongings found, or to confiscate it if necessary, it is imposed conclusively that the legislator- within the limits of the Constitution-empowered the authorities invested with such an attribution with the right to enter the house of those to whom the precautionary measure is to be applied, legally ordered. Thus, it would lead to the unacceptable conclusion according to which the authority applying the precautionary measure is presenting itself without the prosecutor's authorization at the residence of the person to whom it is to be applied, as the law does not provide for such an authorization- in case of resistance to entering the residence, the authority will have to interrupt the application of the measures until the authorization is obtained, thereby jeopardizing the efficiency of the enforcement measure.*

Key words: *Perquisition, precautionary measures, distraint, authorization*

1. Domiciliary perquisition

It is well known that in our State Law the fundamental rights and freedoms of the citizens are guaranteed. In the fundamental law of the Romanian state, respectively in the Constitution, in chapter II, art. 22-49, there are presented the rights and freedoms of the citizens, among which the inviolability of the domicile. Thus, in the first paragraph of the 27th article it is stipulated that: "The domicile and residence are inviolable. No one may enter or remain in the domicile or residence of a person without their consent". However, there are some situations in which the exercise of certain rights and freedoms must be restricted, but this can only be done by law (1st paragraph of the 49th article of the Constitution). According to the 2nd paragraph of the 49th article of the Constitution, the restriction must be in accordance with the situation that determined it and can not affect the existence of the right or the freedom. In accordance with the stipulations of the 1st paragraph of the 49th article of the Constitution, the restriction may also take place in order to conduct criminal investigation which sometimes implies the inviolability of the domicile. That is what happens, for example, in the case of

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perquisition, which is the activity of criminal investigation and forensic tactics that imply the search on a person, in their residence or workplace, or in public places; of documentary evidence, objects or values whose possession or existence is denied for the purpose of discovering and administering the evidence necessary to finding out the truth in criminal cases. The 3rd paragraph of the 27th Article of the Constitution provides that: "Perquisitions can be exclusively ordered by the magistrate and may be carried out only in the forms provided by the law", and the next paragraph of the same article stipulates that

"Perquisitions during the night are prohibited, except for in the case of flagrant crime. In the criminal law sense, the expression "night time" designates the time interval between the moment when it gets completely dark to the moment when daylight appears. I consider that the constitutional provisions, according to which night searches are prohibited, are of strict interpretation, which must be the beginning, the initiation of a home search after the complete darkness cannot take place. The 103rd Article of the Constitution regarding criminal stipulations establishes that the home perquisition can be done by the criminal investigation authorities between 6-20 o'clock. The question arises whether the stipulations that have not been repealed contradict or not the constitutional provisions, and this on the behalf of the fact that, according to the 1st paragraph of the 120th Article of the Constitution, the laws and other normative acts remain in force insofar as they do not contravene the fundamental law of the state. I appreciate that the procedural provisions mentioned above are still applicable as they do not completely contradict the stipulations of the Constitution, being known that the time interval 6-20 covers a long period of time in which there still is light outside, it is daytime and, therefore, we are not in nighttime, so it is in the daytime that the home searching can take place according to the conditions implied by the law. Another issue that should be addressed next, is whether the perquisition that started during the daytime and which has not been completed until the fall of darkness, because of different reasons, can be continued or not. The Constitution does not address this issue at all, but only prohibits searches during the night, which in my opinion means that they can not be started or triggered during this time, as we have demonstrated above.. The art.103, thesis II of Code of Criminal Procedure provides that: "The search that started between 6-20 o'clock can continue during the nighttime". These provisions are still in force and, moreover, in my opinion applicable because they cannot be constituted. One of the arguments it invokes in support of this opinion is that the daytime and the 6-20 interval are the same a long period of the year.

According to the 3rd paragraph of the 27th article of the Constitution, the perquisitions can only be done according to the stipulations of the law, which can include, in my opinion and without any reservation, the continuation during the night of the perquisition that started during daytime, if it has not been completed. If the legal home perquisition started during the daytime could not continue after the dark, we could find ourselves in situations that would create more difficulties in finding out the truth and the fair settlement of criminal cases. Persons in the possession of documentary evidence, objects or values which can serve as evidence in criminal proceedings, could destroy, alienate, modify it, etc., thus prejudicing the proper conduct of criminal

investigation.

Although we oppose the possibility of continuing the home perquisition during the night as it is legal according to the stipulations of the Code of Criminal Procedure in force, we specify that the judicial authority to conduct a search must be of good faith and to prove professional ethics. That is, even the authority is in the possession of the magistrate's order or authorization, should not begin the perquisition near nighttime, relying on the fact that the perquisition can also be continued during the night. Such an attitude could be described as abusive, infringing on human rights on the one hand, and on the other hand violating the fundamental rights and freedoms of the state. Apart from these, it is one thing to carry out a pretentious criminal investigation activity, such as the search at night, and another thing during the day, of course considering the purpose and the results which are to be achieved.

2. The perquisition of motor vehicles

In our country, human dignity, the rights and freedoms of citizens, the free development of human personality, justice and political pluralism are supreme values and are guaranteed. However, it should be noted that sometimes the exercise of certain rights or freedoms may be restricted. In the following, we will examine such a restriction, which concerns the right of police officers to carry out perquisitions on motor vehicles or their trunks.

The method (especially recently) has shown that criminals, especially elements quarreled with the law, speculator, traffickers, thieves, etc., often use their vehicles in order to transport or hide criminals or properties derived from contraventional or criminal acts. Some of these people, when they were stopped for control, even put up resistance regarding the checking of the trunk, arguing that these activities require the authorization of a prosecutor, thereby making it very difficult for those who were performing these actions.

In my opinion, in order to carry out the control of vehicles (including their trunks) which are driven on public roads, especially when it is pursued in an organized way the detection of some people that are known to commit crimes already, to need the authorization of a prosecutor or other approvals means to add to the law and at the same time to make it very hard for the police authorities which, both day and night, in particularly difficult conditions, carry out the activity throughout the entire country.

In support of my opinion, I bring the following arguments- the Romanian Constitution guarantees, among other things, the inviolability of the person, domicile, secrecy of correspondence and telephone conversations, not providing anything in connection with other goods, such as vehicles or their trunks. At the same time, in the Code of Criminal Procedure at art.157 it is expressly provided that the home perquisition can be done (with some exceptions) with the authorization of the prosecutor. However, such a requirement is not provided in the case of carrying out body searches provided in art.166 Code of Criminal Procedure. Moreover, the above-mentioned law does not show anything and does not impose any restrictions on the control and verification of vehicles (including their trunks) belonging to individuals or legal persons. Therefore, there is no

lead to indicate the necessity of some approvals for the control of vehicles and their trunks. But then, we cannot, in any circumstance, accept the notion of the fact that the vehicle or the trunk is identical to that of the residence. "By domicile it is meant a dwelling or any other delimited space that belongs to or it is used by an individual or legal person". On the other, by "dwelling" we mean the house (the building) actually and currently intended for the domestic use of one or more persons. In accordance with the updated art.6 GEO 195/2002, by "motor vehicle" we mean "any vehicle equipped with a propulsion engine, commonly used for the transportation of people or goods, on the road, or for towing vehicles used for the transportation of people or goods".

On the other hand, "motor vehicle" is defined as being one self-propelled land vehicle with wheels, tracks or sliding soles. The term "trunk" or "luggage compartment" means the portion of the body of the vehicle in which the luggage is carried. Therefore, the assimilation of the motor vehicle or the luggage compartment with the residence is unfounded. Since sometimes the control of motor vehicles necessarily involves the verification of the trunk, even against the will of the owner, in order to discover some goods derived from various illicit acts, it is necessary to conclude that the legislator empowered the invested authorities with such attribution (without other approvals), giving them the right to specifically verify those that raise suspicion on the line of committing crimes. Otherwise, it would come to the unacceptable conclusion that the authority responsible with the verification and control of motor vehicles which travel on public roads, can present itself without any approval- as the law does not provide such approval- in case of opposition to this control to have to stop applying the measures until the necessary authorization is obtained, thus effectively endangering the implementation of these measures.

3. Precautionary Measures

According to the Penal Code, it is considered to be a crime entering a residence, room or any fenced place without the consent of the owner. These legal provisions are in accordance with those of art.27(1) of the Romanian Constitution, according to which the domicile or residence of a person are inviolable. "No one may enter or remain in a domicile or residence of a person without their consent". By corroborating the first text with the second one, it is concluded that there are no differences between them in terms of protection of domicile or personal residence, with a special emphasis on respect for the rights and freedoms of citizens, as otherwise provided, in art.15 (1) of the fundamental law (citizens benefit from the rights and freedoms enshrined in the Constitution and other laws ...). However, it should be noted that the right to residence inviolability is not absolute and in certain cases and conditions it may become restricted.

This is expressly provided in Article 49 (1) of the Constitution, according to which the exercise of certain rights or freedoms may be restricted not only by law and only if it is imposed, as the case may be, for - the defense of national security, order, public health or morals, citizens' rights and freedoms; conducting criminal investigation; preventing the consequences of a natural disaster or a particularly serious disaster. Paragraph two of the same constitutional text also provides that "Restriction must be proportionate to

the situation which determined it and may not affect the existence of a right or freedom". It should be noted that restrictions are an exception to the fundamental rule of free exercise of the constitutional rights of citizens.

Looking at the text invoked from a literary point of view, it can be concluded that when the legislator considered it necessary to apply for a special approval to enter a person's home, he did so expressly through various legal texts.

Thus, according to art. 27 (3) of the Constitution, searches may be ordered exclusively by magistrates and may be carried out only in the forms provided by law. It is also specified that night perquisition are prohibited, except for in the case of flagrant crime.

On the other hand, the Code of Criminal Procedure art.158 provides that 'Domicile perquisition may be ordered during criminal proceedings, at the request of the prosecutor, by a judge of rights and freedoms from the court which would have jurisdiction to hear the case in the first instance or from the appropriate court in its jurisdiction, in which district is located the headquarters of the prosecutor's office of which the prosecutor who conducts or supervises the criminal investigation is part.

During the trial, the perquisition is ordered, by default of at the request of the prosecutor, by the court invested with the trial of the case. The residence perquisition (art.101 alin.2 Code of Criminal Procedure) can be done without the authorization of the prosecutor only if the person at whose home the perquisition is to be made consents in writing to it.

As it can quite easily be seen, Romania's new fundamental law contains a whole series of innovative ideas that are specific to the rule of democratic law, but there is no provision in which to insert that in case of taking precautionary measures of distrait there should be any approval from the magistrate, as otherwise provided in the case of a residence perquisite.

A convincing argument in support of our opinion also is the fact that the previously analyzed text it is expressly provided the exercise of some rights that can be restrained not only by law or if required by the case, but also for..."the protection of citizens' rights (often, the damages caused in the moment of committing crimes must be repaired) or for carrying out criminal investigations", (application of distrait being part of the activity carried out within the criminal investigation).

So, that is how the art. 49 of the Constitution refers to the provisions of the Code of Criminal Procedure which obliges the criminal investigation authority to take precautionary measures.

It is undeniable that in the case of distrait, after entering the home of the individual person, the perquisition authority identifies the goods, evaluates them, sometimes picking them up for handing over to public or private units, which involves an interference with the intimate and private space of the family and home of the person concerned.

At the same time, it should be noted that sometimes the distrait is applied not only at the home of the accused or defendant, but also to civilly responsible persons who did not contribute with anything to the crime, as they are anchored in these activities only in civil matters.

It would be difficult to assume that the magistrate intrusion of the police worker into the person's home in order to apply the distraint long as the legislator does not oblige him to do so.

It turns out quite clearly that according to the legal provisions in force, the police investigation authorities can enter the residence of a person for applying the distraint measure only if they give their consent (written consent).

Following a scientific analysis, we come to the conclusion that taking the precautionary measure of seizure can be made even when the person in question does not give his consent and even without the permission of the magistrate (which is also allowed by the provisions of Article 49 of the Constitution " for the conduct of the criminal investigation ").

Given the fact that Romania is a state of democratic and social law, in which the human dignity, the rights and freedom of citizens, the free development of human personality, justice and political pluralism are supreme values and are guaranteed by law, we consider it would be useful for the Code of Criminal Procedure to include a regulation regarding the authorization that has to be given by the magistrate in order to facilitate the possibility of entering the home of various entities that carry out seizure enforcement activities, of course, this only happening in the absence of consent (written consent) of the person who owns the respective residence.

The confirmation by the magistrate of the order to take the precautionary measure would implicitly include the authorization of the authority that carries it out to enter the domicile or residence for this purpose.

From the above, there are some cases and conditions in which the constitutional right to inviolability of the home and private property may be restricted.

These are observations that we considered useful to be made in the conditions of the existence of the current Constitution of Romania, which puts a special emphasis on the respect of the rights and freedoms of the citizens.

To consider otherwise would be to tie up some basic categories of fundamental human rights, such as the inviolability of the home and the right to property, expressly provided for in our fundamental law.

References

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