CLARITY AND PREDICTABILITY OF THE SPECIAL JUSTIFICATION CAUSE LAID DOWN IN ARTICLE 226 PARA. (4) (D) OF THE CRIMINAL CODE

DOI: 10.47743/rdc-2019-1-0001

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Abstract

The Romanian legislature has shown great concern in the past few years in offering an adequate level of protection to all fundamental rights accordingly with the ECHR's ever evolving jurisprudence. As such, the crime of violation of private life (article 226 Criminal Code) has been introduced, for the first time, in the Romanian criminal law. In its attempt to preserve the right balance between the freedom of the press and the right to private life, the Parliament has introduced a special justification clause, according to article 226 para. (4) d) Criminal Code. This article aims to analyze to what extent this clause respects the principles set by the ECHR and the Romanian Constitutional Court regarding the predictability and the clarity of the criminal law provisions. The article will also try to emphasize some aspects which could be taken into consideration by the judicial authorities when analyzing the applicability of the justification clause at least until there will be an early jurisprudence.

Keywords: *private life; public interest; freedom of press; law predictability*

The European Court of Human Rights has shown that, although Article 8 of the Convention mainly tries to defend the individual against the arbitrary interference by the public authorities, it also implies some positive obligations related to the "respect" of private life[1]. In both cases, the proportionality ratio that must exist between the interests of the individual and that of the society, as a whole, must be taken into account, thus determining the national law and the measures necessary to achieve the purposes of the Convention[2].

[1] ECHR, Judgment of 26 May 1994, *Keegan v. Ireland* , 16969/90, para. 49; Judgment of 3 September 2015, *M&M v. Croatia*, 10161/13, para. 176.

[2] ECHR, Judgment of 21 February 1990, *Powell & Rayner v. the United Kingdom*, 9310/81, para. 41.

Unlike the negative obligations, the Court places a very important emphasis on the margin of appreciation of the State in the fulfilment of the obligation to legislate, **admitting that there are several ways by which an adequate protection of the right to privacy can be achieved, and the use of means pertaining to criminal law is not necessarily the most appropriate solution**[3]. We can add that there are situations in which the use of criminal-law means is not only inappropriate, but is also incompatible with the purpose of the Convention, as granting excessive protection of private life leads to violation of other relative or even absolute fundamental rights.

Moreover, pursuant to the principle of subsidiarity and in accordance with the principle of proportionality, the European Court even encourages the states, through Article 53 ECHR, in adopting their own civil and criminal regulations, to ensure a better protection of the proclaimed rights, provided that the so-called margin of appreciation is respected. The latter implies both a respect for national cultural traditions and values, as well as the existence and use of a standard of judicial re-evaluation[4].

In fulfilling their positive obligations, the Romanian criminal legislator has decided through the New Criminal Code to extend the criminal protection of the elements of private life, creating, for the first time, a separate chapter for this category of crimes. This legislative technique demonstrates, from the first analysis, the importance given by the legislator to this personality attribute. As shown through the explanatory memorandum, in this category, in addition to traditional incriminations, several new offences have been committed, aimed at covering a regulatory gap and providing an answer to the new forms of harm or prejudice to social valuessubject to this chapter. The legislator explained that *a new incrimination is the violation of the secrecy of private life (Article 226 of the Criminal Code), a regulation necessary to complete the criminal protection framework of the values guaranteed under Article 8 of the European Convention on Human Rights. The regulation has been designed in such a way as not to hinder the press's exercise of its role in a democratic society and finds a correspondent in most of the current European criminal codes (Article 226-1 of the French Criminal Code, Article 197 of the Spanish Criminal Code, Article 192 of the Portuguese Criminal Code, Article 615bis of the Italian Criminal Code, Article 179bis-179quinuies of the Swiss Criminal Code, chapter 24 section 5-8 of the Finnish Criminal Code etc.).*[5]

In view of all these aspects, in the analysis of the constituents of this offence, in addition to the classical structure that any incriminating norm presents, it must be considered whether, from the perspective of the European Court's case law, a fact that formally meets the constituent elements of the offence is considered and an

[3] ECHR, Judgment of 26 March 1985, *X & Y v. the Netherlands*, 8978/80, para. 24; Judgment of 04 December 2003, *M.C. v. Bulgaria*, 39272/98, para. 150; Judgment din of 2 September 2010, *Mincheva v. Bulgaria*, no. 21558/03, para. 81; Judgment of 2 June 2009, *Codarcea v. Romania*, 31675/04.

[4] In this regard, see M. Udroiu, O. Predescu, *Protecția drepturilor omului și procesul penal roman. Tratat.*, C.H. Beck Publishing House, Bucharest, 2008, p. 16-17.

[5] Explanatory Memorandum for the Law no. 286/2009 on the Criminal Code.

infringement within the meaning of Article 8 ECHR and Article 26 of the Romanian Constitution, and the application of a sanction in criminal matters responds to the principle of the minimum incidence of criminal law. On the other hand, a possible solution of conviction for committing the crime provided by Article 226 of the Criminal Code may also represent a prohibited violation of the freedom of expression of the active subject, protected by Article 10 ECHR and Article 30 of the Constitution.

With regard to the level of protection granted to private life at a given time, the European Court has shown on several occasions that in order to provide an adequate and current response, due consideration must be given to the changing conditions in all Member States, thus ensuring a real and effective, and not theoretical and illusory protection system, finally pointing out that a possible failure in this approach would be equivalent to blocking the evolution and improvement[6]. By this interpretation, the Court has also rejected the role of broadening the scope of Article 8 ECHR and changing the level of protection granted to this right, in any direction, in the praetorian way. As we will show below, however, the Court has greatly extended the concept, and the extent to which it has respected these self-imposed limitations is questionable. Also, the level of protection granted in relation to freedom of expression has constantly fluctuated. Following this action by the European Court, Member States often have a difficult task to keep up with these frequent changes of optics and to adopt normative acts to ensure the degree of protection sought. Last but not least, it is the task of judicial bodies to carry out a unitary practice through interpretations which, in their turn, comply with the protection standard in question.

The Romanian legislator sought to execute the positive obligation incumbent upon it, the historical analysis of several regulations demonstrating that the normative acts followed the trend of the practice of the European Court. For example, observing the increase of the standards of protection of freedom of expression, sometimes to the detriment of some attributes of private life, the legislator discriminated insult and slander, thus considering that the civil and administrative law means are sufficient to provide adequate protection in case of an overrun of the limits of freedom of expression. Subsequently, observing a tendency to increase the level of protection of private life, sometimes even to the detriment of freedom of expression, the Romanian legislator paid much more attention to this attribute of personality through the New Civil Code and the New Criminal Code.

In civil matters, we note that the legislator not only limited to proclaiming the necessity of protection of the right to private life, but also indicated, according to Article 74 of the Civil Code, by way of example, a series of prejudices that can be brought to private life, noting that most of them describe a constitutive content very similar to that

[6] ECHR, Judgment of 25 April 1978, *Tyrer v. United Kingdom*, 5856/72, para. 36; Judgment of 27 September 1990, *Cossey v. United Kingdom*, 10843/84, para. 35; *Christine Goodwin v. the United Kingdom*, *cited work*, para. 74; Judgment of 25 May 2002, *Stafford v. United Kingdom*, 46295/99, para. 67-68.

of crimes against private life. Still in civil matters, the legislator also established a series of definitive or provisional measures that can be taken by the court, at the request of the injured persons, for an effective removal of the interference caused.

In criminal matters, the legislator has criminalized the offence of violation of privacy, according to which: *"Article 226 (1) (1) The unlawful violation of privacy, by photographing, capturing or recording images, by listening using technical means or by recording audio of an individual, in a house or room or outbuilding related to them or to a private conversation shall be punishable by no less than 1 month and no more than 6 months of imprisonment or by a fine. (2) The unlawful disclosure, dissemination, presentation or transmission of sounds, conversations or images set out in para. (1) to another person or to the general public shall be punishable by no less than 3 months and no more than 2 years of imprisonment or by a fine. (3) Criminal action shall be initiated based on a prior complaint filed by the victim. (4) The following do not constitute offences: a) the act committed by the individual who attended the meeting with the victim during which the sounds and conversations were recorded and photos were taken, if there is a legitimate interest; b) if the victim has acted with the explicit intention to be seen or heard by the perpetrator; c) if the perpetrator has records of the commission of an offence or helps prove that an offence was committed; d) if public-interest acts are recorded, which are meaningful to the life of the community and whose disclosure has public advantages that outweigh the damage to the victim. (5) Unlawfully installing technical means for audio or video recording, in order to commit the acts set out in para. (1) and para. (2), shall be punishable by no less than 1 and no more than 5 years of imprisonment.*

Although the parallel provision in the civil law and in the criminal law of certain facts constituting, at least at an apparent level, both civil unlawful fact and the constitutive content of an offence is not an element of novelty in the Romanian law and does not necessarily constitute an irregularity from the perspective of the principle of legality and legal certainty, we consider that in the matter of protection, the special object of the offence of violation of privacy, the legal provisions do not respect the conventional and constitutional standards imposed, as they are unpredictable.

In support of this opinion, we come with two main arguments. First of all, judicial practice has had the opportunity to rule on this offence only on very few occasions, mainly of reduced complexity, and the practice in civil matters is not a constant one. Second, the provisions of Article 226 para. (4) (d) of the Criminal Code use very broad and unclear terms, such as "public-interest", "meaningful to the life of the community", likely to render vulnerable the entire incriminating rule.

The European Court has shown that there can be several ways to guarantee respect for private life, and the nature of the state's obligation will depend on the specific aspect of the private life in question, **as criminal remedies do not exclude *per se* the existence of a remedy also in matters of civil law**[7]. Moreover, the rule on liability

[7] ECHR, Judgment of 2 October 1996, *Stubbings and Others v. the United Kingdom*, 22083/93, para. 63-66.

for unlawful acts must remain within the scope of civil law, as the criminal law is intended to sanction only the most serious interferences, according to the principle of minimum intervention. However, from this perspective, it is natural that the general protection norms belong to the civil law, while criminal regulation only intervenes punctually.

Although it is known that a higher degree of social danger of the crime compared to the other forms of legal illicit (civil, administrative, disciplinary) leads to qualitative differences between the offence and the extra-criminal illicit acts, such as civil offences or contraventions[8], the degree of generality of some of the new regulations make it difficult to determine the civil or criminal character of a possible interference with private life, which makes it up to the practice to decide the appropriate form of liability based on the concrete social danger of a deed.

In the context of this unstable balance between the right to privacy and freedom of expression, both in the European context and in the national context, but also in the context of a legislative parallelism likely to generate confusion between the appropriate forms of legal responsibility, the legislator instituted in this matter the cause of removal of typicality laid down in Article 226 para. (4) *(d) of the Criminal Code, according to which an act committed shall not be construed as an offence if public-interest acts are recorded, which are meaningful to the life of the community and whose disclosure has public advantages that outweigh the damage to the victim*. As we will show below, in our view, this justification does not comply with the standards regarding the quality of the law in criminal matters, as the incriminating norm becomes unclear and unpredictable.

With regard to the legal nature of the case, the doctrine was not sharp in qualifying it as a cause for removing typicality or a special justification cause. Thus, the majority opinion created[9] shows that the incidence of the provisions of Article 226 para. (4) of the Criminal Code leads to the removal of the first feature of the offence, namely typicality. According to another opinion[10], which we agree with, it is shown that this constituted a special justification cause, attracting the incidence of the impediment to the exercise of the criminal action provided by Article 16 para. (1) (d) of the Criminal Procedure Code. Finally, according to a third opinion[11], we are dealing with a cause of

[8] In this regard, see Const. Mitrache, C. Mitrache, *Drept penal roman. Partea generală*, eighth edition, revised and extended, Universul Juridic Publishing House, Bucharest, p. 104-105.

[9] In this regard, see M. Udroiu, *Drept penal. Partea specială*, fourth edition, C.H. Beck Publishing House, Bucharest, 2017, p. 217; S. Bogdan (coord.), *Noul Cod Penal. Partea specială. Analize, explicații, comentarii*, Universul Juridic Publishing House, Bucharest, 2014, p. 190.

[10] In this regard, see N. Neagu in V. Dobrinoiu and Others, *Noul Cod Penal Comentat. Partea specială*, third edition, revised and extended, Universul Juridic Publishing House, Bucharest, 2016, p. 213.

[11] In this regard, see I. Vasiu in G. Antoniu, T. Toader (coord.) *Explicațiile noului Cod penal. Volumul III (Articolele 188-256),* Universul Juridic Publishing House, Bucharest, 2015, p. 265; V. Cioclei, *Drept penal. Partea specială I. Infracțiuni contra persoanei și infracțiuni contra patrimoniului*, C.H. Beck Publishing House, Bucharest, 2016, p. 220.

exclusion, of non-existence of the crime, without expressly indicating the consequences of its incidence.

The legislator shows in the Explanatory Memorandum that the main reason for establishing the justification laid down in Article 226 para. 4 (d) of the Criminal Code consisted of the observance of the freedom of expression of the press and the right of the public to be informed. The privileged status enjoyed by journalists, according to the case-law of the European Court, is easily explained by the role of the press, which is essential in a democratic society in order to prevent and control any kind of deviations. Thus, it is envisaged that the press, traditionally referred to as the "*watchdog of society*" or "*watchdog of democracy*", has an extremely important role to bring to the public attention any actions or omissions of governments or any problems of public interest.

The Court expressly emphasized that freedom of the press includes both pre-publication acts, such as documentary activities, and investigative activity specific to journalists[12]. The court stated that when national courts apply any sanction to a journalist who has acted in this professional capacity – civil or criminal, patrimonial or non-patrimonial sanction, however gentle in fact, they must take into account the potential deterrent effect, which is likely to threaten the role of the press as a "watchdog". Moreover, the Court emphasized that the contracting states enjoy a certain margin of discretion in order to appreciate the existence of the necessity in a democratic society of a sanction, but this margin is doubled by a European control, having as object both the law and the decisions for its application, even when they come from an independent jurisdiction. Therefore, ***the European Court has shown that it is competent to rule in the last instance if a sanction in criminal matters applied to journalists is reconciled with the freedom of expression granted under Article 10 ECHR[13]***. All the principles set out above, however, should not lead to the conclusion of an unlimited protection granted to journalists, close to impunity[14]. In this regard, it should be noted that the multiple rights that the press enjoys naturally attract a series of obligations and responsibilities, which must be respected precisely by the media agencies to successfully claim the protection granted under Article 10 regarding the freedom of the press. Thus, the European Court did not grant freedom of the press in cases where a journalist was sanctioned in criminal matters after it was proven that, in the course of the documenting operation, they acted in bad faith and without respecting professional ethics[15]. In such conditions, we can conclude that the commission of crimes when carrying out a journalistic investigation far exceeds the admissible limit of freedom of the press according to Article 10 ECHR.

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[12] ECHR, Judgment of 26 April 1979, *Sunday Times v. UK, (no. 1)* [MC], no. 6538/74, para. 51; Judgment of 25 April 2006, *Damman v. Switzerland,* no. 77551/01, para. 52.

[13] ECHR, Judgment of 16 September 2008, *Cuc Pascu v. Romania*, no. 36157/02.

[14] ECHR, Judgment of 20 October 2015, *Pentikäinen v. Finland* [MC], no. 11882/10, para. 90-91.

[15] ECHR, Judgment of 10 December 2007, *Stoll v. Switzerland [MC],* no. 69698/01, para. 108-161.

In domestic law, the Constitutional Court[16] has shown that the rights enshrined in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms are not absolute rights, they may be subject to certain limitations or restrictions on the part of the authorities. Among the components of the right protected by Article 8 of the Convention, there is the observance of the right to private life, which may be subject to certain interferences, as long as they are provided by law, pursue a legitimate purpose, appear as necessary in a democratic society, concern a right defended by Convention and are proportionate to the purpose pursued.

Therefore, the existence of the incrimination applicable to journalists and the justification does not *per se* constitute a violation of European case-law, but even a transposition into national law of principles arising from the jurisprudence of the European Court, however, the inadequate manner of regulation of criminal law is likely to generate a violation of the principle of legal certainty.

The formulation of the provisions in question includes expressions with a high degree of relativity, making it difficult to establish a clear hierarchy between two different entities: the public advantage versus the personal injury[17]. To determine the extent to which an interference with the right to privacy took place and the public interest scope was exceeded in obtaining information through the press, account was taken, for examples, of the techniques used by journalists. Thus, the use of high-performance devices, which allow the capture of images and/or sounds from a great distance, in an intrusive way, without the permission and knowledge of those concerned, is a serious violation of the right to image[18].

Also, the importance of the subject addressed is of particular relevance. For example, in a case[19] in which a private conversation of an insurance broker was intercepted and broadcast showing the broker using non-commercial and non-ethical practices in the brokerage activity, the Court considered that the subject addressed was of particular importance, and the public interest prevailed.

In the case of public persons, the difficulty lies in establishing a limit between public life and private life, a fact that can be based either by the fiction of tacit consent, that is, the person who engages in public activities accepts by themselves the fact that the sphere of their private life is to be restricted and, implicitly, their facts and acts be subject to publicity to a greater extent, or by concurrence with the public's right to information[20]. The doctrine provides an example in which it is considered that it would

[16] Constitutional Court of Romania, Decision no. 485 of 2 April 2009, published in the Official Gazette of Romania, Part I, no. 289 of 4 May 2009.

[17] G. Bodoroncea, V. Cioclei and others *Codul penal. Comentariu pe articole. Art. 1-446*, C.H. Beck Publishing House, Bucharest, 2014, p. 407.

[18] S. Sandru, *Protecția datelor personale și viață privată*, Hamangiu Publishing House, Bucharest, 2016, p. 80-81.

[19] ECHR, Judgment of 24 February 2015, *Haldimann and Others v. Switzerland*, no. 21830/09.

[20] C.-F. Popescu, M.-I. Grigore-Rădulescu, *Aspecte privind respectarea dreptului la viață privată de către mass-media*, in Pandectele Române no. 10/2014, p. 26.

be of public interest and with significance for the community's life to photograph the mayor in his mistress's house during catastrophic floods, while he was supposed to coordinate the rescue and evacuation of the inhabitants of the commune[21]. This difference in treatment cannot be regarded as a violation of the principle of equality before the law, which implies the establishment of equal treatment only for situations which, according to the purpose pursued, are not different[22].

The doctrine emphasizes that the feeling of curiosity towards the personal and family affairs of another person cannot be qualified as legitimate interest[23]. Thus, we consider that legitimate, serious public interests and problems that are aimed at a relatively high number of people must be identified.

For example, in a case concerning the transmission to the press of the photograph from the passport of a person suspected of committing a crime and its broadcast in a television show, the Court established that the provisions of Article 8 ECHR were violated. In its analysis, the Court showed that the judicial authorities did not justify any legitimate purpose for broadcasting the photograph, and there was no indication that the plaintiff would have evaded criminal case and public support would have been needed to find him. Moreover, the Court also considered the fact that the criminal case was still in a non-public phase, prior to the referral of the court[24].

Also, in another case,[25] the plaintiffs, employees of a newspaper specialized in journalistic investigations, helped a group of police collaborators, in exchange for money, to detain a person suspected of blackmail. Following those events, the plaintiffs decided to spend one evening at the sauna with four of the officers. The court held that later, the plaintiffs were contacted by a police officer and were asked not to publish an article that would appear the next day and to refrain from publishing articles that would criticize the Ministry of Internal Affairs. Subsequent to the publication of the article, the national television station from the newspaper where the plaintiffs worked transmitted a broadcast dedicated to the phenomenon of corruption and ethics of journalists, presenting video recordings secretly taken in the sauna, with the plaintiffs being presented in their underwear, apparently in a drunk state, engaging in activities of an erotic nature, while the faces of other people were blurred. The Court, in its analysis, found that no legitimate interest or purpose was found to justify secret registration of journalists in such situations and the broadcast of such images and found that the moral damages awarded by national courts, of approximately EUR 220 to each, were derisory. Thus, relevant from this perspective, are the criteria regarding the contribution to a debate of general interest, the notoriety of the person concerned and the subject of a

[21] N. Neagu, *cited work*, p. 213.

[22] Constitutional Court of Romania, Decision no. 379 of 26 June 2014, published in the Official Gazette of Romania, Part I, no. 590 of 07 August 2014.

[23] P. Kayser, *apud*. Gh. Mihai, G. Popescu, *Introducere în teoria drepturilor personalității*, Publishing House of the Romanian Academy, Bucharest, 1992, p. 82.

[24] ECHR, Judgment of 23 October 1996, *Khuzhinand Others v. Russia*, 13470/02.

[25] ECHR, Judgment of 5 July 2011, *Avran and Others v. the Republic of Moldova*, 41588/05.

report and/or the photograph (in this regard, it is necessary to distinguish between the persons of private law and persons acting in a public context, as political personalities or public persons; [...] whereas a person of private law not known to the public can demand a special protection of their right to privacy, this is not valid for public persons), to the previous behavior of the person concerned, to the content, form and repercussions of the publication and to the circumstances in which the photographs were taken.

In domestic law, we only found one decision of the Constitutional Court of Romania rendered regarding the provisions of Article 226 of the Criminal Code[26], occasion on which, analyzing the notion of "room" in the content of the norm, showed that the incrimination of certain facts or the reconfiguration of the constituent elements of an offence remains at the discretion of the legislator, a margin that is not absolute, as it is limited by constitutional principles, values and requirements. The notion of margin of discretion is based on the idea that each society has the right to exercise a certain discretion regarding the establishment of a balance between the rights of the people and the national interests, as well as in the resolution of conflicts arising from the existence of different social values and moral convictions.

However, we found that when confronted with ensuring the right balance between the public's interest in being informed and the individual's right to privacy, the Constitutional Court performed an analysis similar to that of the European Court of Human Rights, referring essentially to the same set of criteria[27].

As can be easily observed, the only instrument available at this time to the judicial bodies in order to analyze the possible incidence of the provisions of Article 226 para. (4) (d) of the Criminal Code is the broad case-law of the European Court of Human Rights, as the national doctrine and practice are not developed under this aspect. Moreover, the vast majority of cases analyzed by the European Court had as premise the obligation of journalists to pay material damages and not to condemn them as a result of committing criminal liability, which makes the analysis in this case clearly different. Last but not least, it is noted that the Court's case-law is highly dependent on the concrete circumstances of the analyzed case, as the decisive argument of the solution is different each time. In such a case, we believe that the principle of the legality of incrimination, as we will explain it, cannot be considered as being respected at present.

In the case-law of the European Court, the principle of the legality of incrimination laid down in Article 1 para. 1 of the Criminal Code and Article 7 para. 1 of the ECHR, as interpreted, shows that the rules of incrimination must meet certain qualitative conditions, namely those of predictability and accessibility. Thus, their wording must be

[26] Constitutional Court of Romania, Decision no. 33 of 19 January 2017, published in the Official Gazette of Romania, Part I, no. 320 of 4 May 2017.

[27] In this regard, see the Constitutional Court of Romania, Decision no. 415 of 14 April 2010, published in the Official Gazette of Romania, Part I, no. 294 of 5 May 2010.

sufficiently clear and precise to enable the conduct of stakeholders to be regulated[28]. This requirement is fulfilled when a litigant has the opportunity to know, from the text of the relevant legal norm, when necessary, with the help of its interpretation by the courts and after obtaining adequate judicial assistance, which are the acts and omissions that can engage their criminal liability and what is the punishment they face[29]. The Court has always had a balanced approach, accepting that there may be a need to clarify doubtful issues and to adapt to changing circumstances. In addition, it has been shown that certainty, although highly desirable, is sometimes accompanied by excessive rigidity; however, law must know how to adapt to changing situations[30]. However, it has been constantly emphasized that the result of this gradual clarification of incriminating norms must be consistent with the substance of the crime and reasonably foreseeable[31], as the lack of accessible and reasonably foreseeable jurisprudential interpretation could even lead to the finding of violation of Article 7 by a defendant[32]. Thus, the existence of a regulation that does not allow those interested to know or reasonably foresee the meaning and extent of criminal law is inappropriate both by reference to the general notion of quality of the law and by reference to the specific requirements on legality of criminal law[33].

Still with regard to predictability, the European Court has shown that after the application of several administrative sanctions it can be appreciated that the incriminating norm law in criminal matters also becomes predictable[34]. However, as long as not even cases on giving rise to civil liability under tort law enjoy predictability in domestic law, the case-law created cannot be the basis for predictability in the interpretation of criminal law.

In this construction, the case-law plays an essential role, which can, on the one hand, clarify the excessively permissive texts or, on the other, contribute to the state of unpredictability incompatible with the principle of legal certainty. However, not even a consistent and predictable case-law can always cover the vices of overly broad and general regulation[35]. As shown[36], the lack of uniformity in the interpretation of the law applicable by the courts, especially those of the last degree, might lead to the violation of the right to a fair trial, enshrined by Article 6 ECHR.

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[28] In this regard, see C. Bîrsan, *Convenția europeană a drepturilor omului. Comentariu pe articole*, vol. 2, C.H. Beck Publishing House, Bucharest, 2010, p. 577-578.

[29] ECHR, Judgment of 20 January 2009, *Sud Fondi SRL and Others v. Italy*, para. 107-108.

[30] ECHR, Judgment of 27 January 2015, *Rohlena v. Czech Republic*, no. 59552/08, para. 92; Judgment of 12 February 2008, *Kafkaris v. Cyprus*, [MC, no. 21906/04], para. 141.

[31] ECHR, Judgment of 22 November 1995, *S.W. v. United Kingdom*, 20166/92, para. 36; Judgment of 22 November 1995, *C.R. v. United Kingdom*, 20190/92, para. 34.

[32] See ECHR, Judgment of 10 October 2006, *Pessino v. France*, 40403/02, para. 35-36; Decision of 24 May 2007, *Dragotoniu anf Militaru-Pidhorni v. Romania*, no. 77193/01 and 77196/01, para. 43-44.

[33] ECHR, Judgment of 20 January 2009, *Sud Fondi S.R.L. and Others v. Italy*, 75909/01, para. 117.

[34] In this regard, see the ECHR, Judgment of 16 September 2004, *Delbos and Others v. France*, no. 60819/00.

[35] ECHR, Judgment of 25 May 1993, *Kokkinakis v. Greece,* 14307/88.

[36] ECHR, Judgment of 2 November 2010, *Ștefănică and Others v. Romania,* no. 38155/02.

In domestic law, the Constitutional Court has expressly admitted that it intended to acquire the standard of the European Court on the principle of legal certainty[37]. The Court holds that, in the case of offences, if the legislator only respects from a formal point of view the constitutional competence to legislate, without, through the normative content of the incriminating text, establishing clearly and precisely the constitutive content of the offence, this may lead to a lack of predictability of the respective text[38]. The Court emphasizes that the recipients of the incriminating criminal rule must have a clear, objective and subjective representation of the constitutive elements of the offence, so as to be able to foresee the consequences arising from the non-observance of the rule and adapt their conduct accordingly[39], and contract a legal professional, if necessary[40].

The Constitutional Court found, for example, that the phrase "*commercial relations*" contained in the provisions of Article 301 para. (1) of the Criminal Code confers a lack of clarity, precision and predictability to the legal object of the offence of conflict of interest, as the recipient of the norm is unable to adapt their conduct in relation to an incriminating norm that does not respect the quality conditions of the law[41].

An important decision[42] for the present research is that by which the Court analyses the clarity of the phrase "*public interest*" in the provisions of Article 318 para. (2) of the Code of Criminal Procedure, noting that the phrase is not defined by the criticized text and the elements listed in its content as determination criteria are not capable of defining the previously referred notion. In this respect, by Decision no. 390 of 2 July 2014, published in the Official Gazette of Romania, Part I, no. 532 of 17 July 2014, the Court held, in essence, that a legal concept may have an autonomous content and meaning, different from one law to another, provided that the law using that term defines it. According to the same decision, otherwise, the recipient of the rule is the one who will establish the meaning of the notion, on a case-by-case basis, by an assessment that can only be subjective and, consequently, discretionary. In view of all these arguments, according to Court findings, the legislator had to accurately foresee the obligations of each judicial body, which need to be circumscribed to the concrete way of carrying out their duties, by unequivocally establishing the operations they fulfil in the

[37] Constitutional Court of Romania, Decision no. 717 of 29 October 2015, published in the Official Gazette of Romania, Part I, no. 216 of 23 March 2016.

[38] Constitutional Court of Romania, Decision no. 363 of 07 May 2015, published in the Official Gazette of Romania, Part I, no. 495 of 06 July 2015.

[39] Constitutional Court of Romania, Decision no. 732 of 16 December 2014, published in the Official Gazette of Romania, Part I, no. 69 of 27 January 2015.

[40] Constitutional Court of Romania, Decision no. 903 of 06 July 2010, published in the Official Gazette of Romania, Part I, no. 584 of 17 August 2010.

[41] Constitutional Court of Romania, Decision no. 603 of 06 October 2015, published in the Official Gazette of Romania, Part I, no. 845 of 13 November 2015.

[42] Constitutional Court of Romania, Decision no. 23 of 20 January 2016, published in the Official Gazette of Romania, Part I, no. 240 of 31 March 2016.

exercise of their duties. Finally, the Court concludes that in resolving the case, the prosecutor cannot depart from its content, making delimitations that fall within the competence of the legislative power.

Applying these principles to the criticized provisions, we find that there is no definition of the terms in question and no criteria to define them at least at the principle level. Thus, compared to the current legal provisions, the judicial bodies are called upon to distinguish between what falls within the competence of the legislative power and all in the context of an unstable practice. Moreover, in the case of the provisions of Article 318 of the Criminal Procedure Code, there were a number of criteria that could have been considered for the assessment of the public interest, but they were found insufficient by the Court.

Decision no. 405 of 15 June 2016 published in the Official Gazette of Romania, Part I, no. 517 of 8 July 2016 is particularly relevant to the principle of legal certainty and to the principle of minimum intervention of the law. Thus, after a summary of the own case-law and of case-law of the European Court of Human Rights on the principle of legal certainty, the Constitutional Court found that the term "defective" cannot be regarded as an appropriate term for use in the criminal field, especially as long as the legislator has not circumscribed the existence of this element of the constitutive content of the crime of abuse in service to fulfilling certain criteria. In other words, the legislator did not provide express circumstantial evidence in the sense of specifying the elements against which the defect should be analyzed. Further, referring to the principle of minimum intervention of criminal law, it ruled that the legislator should dose the use of criminal means according to the protected social value, and the Court can censure the legislator's option only if it contravenes the constitutional principles and requirements. The court explained that in exercising the legislative competence in criminal matters, the legislator must take into account the principle according to which the incrimination of an act as an offence must intervene as a last resort in protecting a social value, being guided by the "*last ratio*" principle, meaning that the criminal law is the only one able to reach the aim pursued, while other measures of a civil, administrative nature are improper in achieving this purpose.

Finally, we consider it appropriate to point out a potential additional issue regarding this justification cause. Traditionally, the incidence of the causes of removal of typicality or of justification causes is analyzed by reference to the time of the offence. Specifically, the analysis of the relationship between the public interest and the private life of the individual must take place by reference to the time of photographing, capturing, recording, listening, and the time of disclosure, dissemination or presentation, respectively. However, judicial bodies carry out this analysis for a potentially long period of time, at which point they can have a concrete picture on the impact that the deed had on the public interest and attention. In other words, the active subject is inherently exposed to the danger of facing criminal liability insofar as the public benefits and the significance for the life of the community have not reached the expected or at least anticipated level.

CONCLUSIONS

We consider that this last justification cause will be the most frequently invoked in practice and will create the conditions of a non-unitary case-law, as the level of generality of the regulation does not offer, in our opinion, sufficient guarantees from the perspective of the principle of legality of incrimination. Moreover, we cannot ignore that the legislator sought to refer to the standard set by the European Court of Human Rights regarding the balance between the rights established by Article 8 and Article 10 ECHR. However, by carrying out a historical analysis of the Court's case-law, it is found that this is not very constant over time, as an exponential increase in the protection granted to freedom of expression at the expense of private life was recorded at the beginning, while the current situation has turned and an increasing protection is granted to private life. The European Court has emphasized the possibility that a consistent and uniform case law would cover the flaw of clarity or predictability of the incriminating rule[43], but we do not consider that there is a context for the formation of that constant case law. We showed that an essential role in the matter could be played by the High Court of Cassation and Justice in its role of unifying and directing the practice,[44] but, given the rules on material jurisdiction or the capacity of the applicable person, it is unlikely that the supreme court rules on the text in question in the medium term.

We consider that the criticized text creates the premises of the violation not only of the rights of the active subject, but also of the right of the passive subject to the protection of private life, while the judicial bodies regard with reluctance this incriminating norm that is likely to be over-interpreted. However, the omission and the legislative imprecision are those that generate the violation of the allegedly violated fundamental right[45].

De lege ferenda, we consider that the introduction of several concrete applications of the general justification cause provided by Article 226 para. (4) (d) of the Criminal Code would be able to ensure a higher predictability of the incrimination rule. Such a measure would restrict the scope of the case, as it may even be a form of increasing the incidence of crime, but not in a manner capable of violating the freedom of the press or the right to freedom of expression. In this regard, it should be emphasized that even in the absence of such a justification cause, the judicial bodies would have had the obligation, according to the case law of the European Court of Human Rights and the

[43] ECHR, Judgment of 1 February 2000, *Schimanek v. Austria*, no. 32307/96.

[44] ECHR, Judgment of 27 January 2009, *Ştefan and Ştef v. Romania*, no. 24428/03 and 26977/03.

[45] Constitutional Court of Romania, Decision no. 503 of 20 April 2010, published in the Official Gazette of Romania, Part I, no. 353 of 28 May 2010.

Constitutional Court of Romania, to check to what extent a conviction solution did not constitute a violation of Article 10 ECHR.

Thus, the introduction of more detailed hypotheses would more clearly highlight the legislator's choice regarding the level of protection it intends to provide and would constitute a minimum basis on which to build a constant case-law. The legislator initiated this step somewhat by the justification cause laid down in Article 226 para. (4) (c) of the Criminal Code, which is in fact a concrete application of the case provided by Article 226 para. (4) (d) of the Criminal Code, legally stating that the discovery and evidence of a crime have a higher public interest than the interest of the passive subject in respecting their private life.