

HUMAN RIGHTS PROTECTION IN THE CASE OF PERFORMING A SEARCH

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Abstract: *The search is a complex activity which involves interference with the most intimate details of private and family life, with the rights of ownership over immovable's, over lands.*

When ordering a search, the requirements of necessity and proportionality to the purpose pursued, as well as that of respect for human dignity, must be observed.

In order for this activity to be effective, the proper tactical methods of performing it, the material means required, the amount of time necessary to carry it out, the participants must be established, without losing sight of maintaining the activity, from beginning to end, within the limits determined by the law.

Searches may be performed on a group of people, in which case measures for the surveillance and prevention of violent acts are necessary, in the hypotheses of searching for persons (either sequestered or trying to elude criminal proceedings), of searching for certain objects (such as: searches in order to find narcotics, art objects, weapons and explosives, secret writings). According to the provisions of article 100 of the Romanian Criminal Procedure Code, the search may be: search of premises or body search.

Key words: *search, human rights, investigation.*

I. General Considerations. The search is a tactical activity carried out by judiciary bodies in order to find and take away objects, documents or various valuables that are important to the case under investigation, and also in order to find persons that are trying to elude criminal liability, when the person who was asked to deliver those objects, documents or valuables denies their existence or the fact of possessing them¹.

According to article 100 of the Criminal Procedure Code, the search may be: search of premises or body search. In the speciality literature, there are numerous classifications regarding searches. These classifications are based on various criteria, among which:

a) according to the place of performance of the searches: body searches, searches of the private premises, searches of the place of employment, searches of locations open to the public²;

b) according to the time of performance, they may be: daytime searches, nighttime searches;

c) according to the participating persons: searches in which only the bodies entitled to pursue criminal procedure take part, searches in which other experts take part too;

d) according to the number of persons on which they are performed: searches performed on just one person, searches performed on the private premises of several persons.

Other classifications make reference to the search of persons, which may be: that of clothing and body search, search of the place, of buildings and open locations respectively. Regardless of its type, the search is performed by applying the same tactical rules.

It must be carried out in accordance with the legal provisions, the bodies entitled to pursue criminal procedure paying attention not to restrain the person's rights and liberties more than necessary, while still having an obligation to observe the rules of forensic tactics.

¹ I. Mircea, in the work cited, p. 298; I. Sima and collaborators, *Forensics Dictionary*, The Scientific and Encyclopaedic Publishing House, Bucharest, 1984, p. 148.

² C. Aioanițaie, I. Botoc, collectively, *Forensic Tactics*, M.I., S.E.C., Bucharest, 1989, p. 175, I. Mircea, in the work cited, p. 298; C. Aioanițaie, V. Bercheșan, I. Botoc, in *Forensic Tactics Treatise*, 2nd edition, revised and amended, Publishing House Carpați, p. 208.

With a view to this, they have the duty of ensuring the presence of the persons established by law in the place being searched, of taking measures so that the facts and the circumstances of the private life of the person on whom the search is performed and which are not related to the fact under investigation should not become public matters³.

II. Performance of the Search. In achieving the purpose of the search, an important role is that of observation, the capacity of the body entitled to pursue criminal procedure to act appropriately as reported to the variety of the situations it has to deal with, to grasp, select and give the correct interpretation to the most insignificant emotional reactions of the person being searched. The exact psychological interpretation of the situation also presupposes a clear distinction between the psychology of the person performing the search and that of the person being searched.

The body entitled to pursue criminal procedure must show self-possession, patience, perseverance, mobility of thought, attention, in order to reach the goal of the tactical activity, a quick intuition, a capacity to analyze and synthesize⁴.

In the case of searches of longer duration, especially, the judiciary body must be orderly, display a lot of composure and even some physical endurance⁵.

While performing the search, it must pay attention to grasping such psycho-behavioural manifestations as: body and hand trembling, agitated breathing, modifications of the voice and of speech, of the facial expression or complexion.

Also, the body entitled to pursue the criminal procedure must distinguish the reactions occurring in relation to the searching activity from reactions due to other causes; the affectogenic factor liable to explain feelings of anxiety, trouble, discontentment, or indignation, concern for valuable objects or objects of an emotional value, but which do not belong to the category of feelings of interest for the case.

The lack of preparation or the shallowness in performing the search has negative consequences on the case, such as the loss of material evidence necessary in order to find the truth or it may even cause the impossibility to perform the search.

The possibilities of concealing the goods, the valuables and the documents that are the object of the search, the places to be examined, the specific methods of searching and the technical means appropriate for carrying out such activities are established according to the data obtained in reference to the person being searched, to the place undergoing the search, to the goods, valuables and documents that make up the object of the search.

The tactical rules to be applied when carrying out the search itself are as follows:

- it is performed minutely, methodically and systematically;
- the behaviour of the person being searched will be permanently under observation;
- it will be performed in strict observance of the legal provisions⁶.

In order for the search of the premises to be legal, it must only be ordered by the judge, through a motivated ruling, during the criminal proceedings, at the prosecutor's request or during the trial.

During the criminal proceedings, the search of premises is ordered by the judge of the court that would be entitled to hear and determine at first instance or of a court of a corresponding degree in the jurisdiction of which are the headquarters of the prosecution department to which belongs the prosecutor that carries out or supervises the criminal proceedings.

The body search ordered during the criminal proceedings is carried out by the prosecutor or by the body entitled to pursue the criminal proceedings, accompanied, as the case may be, by operative workers.

³ E.A. Mihuş, *Forensics. Forensic Technique and Tactics*, University of Oradea Publishing House, 2006, pp. 235-236.

⁴ T. Bogdan, *Judicial Psychology Course*, Educational Printing House, Bucharest, 1957, pp. 381-383; E.A. Mihuş, in the work cited; p. 236.

⁵ E. Stancu, *A Treatise on Forensic Science*, 3rd edition revised and amended, Publishing House Universul juridic, Bucharest, 2004, p. 455.

⁶ Idem, in the work cited, pp. 461-462.

The taking away of objects and documents, as well as the search of premises, can only be performed between 6:00 and 20:00, and within other time intervals only in case of flagrant offences or when the search is to be performed in a public location. If the search began within the interval 6:00 – 20:00, it may be continued during the night.

The judiciary body that is to perform the search is obliged to prove its identity and, in the cases established by law, to produce the authorization released by the judge.

The taking away of objects and documents, as well as the search of the private premises are done in the presence of the person whose objects or documents are taken away or whose premises are searched and, if he/she is absent, in the presence of a representative, of a member of the family or a neighbour endowed with legal capacity.

This condition will be fulfilled even when the person on whom the search is performed is detained or arrested and cannot be brought over to the search place.

The search is a particularly complex and difficult activity, no other activity involves such interference with the most intimate details of private and family life, with the rights of ownership over immovables, over lands.

Before taking a decision about ordering the performance of the search, the judiciary body must possess enough data regarding the characteristics of the objects, of the valuables or of the documents searched for, the characteristics of the persons who are the object of the criminal proceedings, or about the person who owns them and about the place where they might be.

On the other hand, the order to perform the search will have to take into account the observance of the requirements of necessity and proportionality to the purpose pursued, as well as that of respect for human dignity.

In order for this activity to be effective, the proper tactical methods of performance must be established, as well as the necessary material means, the amount of time required, the participating persons, without losing sight of maintaining the entire activity, from beginning to end, within the limits determined by law.

The body search is performed by searching the person's clothing and/or body, for the purpose of finding traces of the deed committed, of the objects, valuables, documents that may be used as means of evidence, injuries received while struggling with the victim, objects illegally held. As a rule, a body search is performed on a person caught in the act on the occasion of establishing the committing of the offence, on the person caught after being followed by the authorities, on the person whose private premises are being searched and on the person who is to be arrested.

A special regulation regarding the body search is also present in article 55, alignment 1, item (c) of Law no. 257/2006 regarding the execution of punishments and of the measures ordered by the judiciary bodies during the criminal trial, and in article 62, alignment 1, item (c) of The Law Implementing Regulation⁷.

Persons deprived of liberty are obliged to allow a body search to be performed on them upon arriving at the first place of detention, as well as throughout their period of deprivation of liberty, whenever necessary. In the sense of the above-mentioned regulation, the search is the action by which a thorough check is done on persons deprived of liberty, on equipments, luggage, storerooms and all places these persons have access to, in order to prevent unusual events, risk situations, and it is also the action of taking away prohibited objects.

This type of search is only carried out by persons of the same gender as the searched person and in the presence of assisting witnesses. If the situation imposes an intimate search too, this may only be performed by a doctor or a qualified nurse, while still respecting the person's dignity⁸.

The prohibited goods and sums of money found on persons liable to be deprived of liberty as a result of the search are subject to seizure.

The body search does not include collecting biological evidence with a view to performing a DNA expertise⁹.

⁷ Approved through Government Decision no. 1897/2006.

⁸ M. Udriou, O. Predescu, *Human Rights Protection and The Romanian Criminal Trial. A Treatise*, Publishing House C.H. Beck, Bucharest, 2008, p. 350.

Once the person to be searched has been immobilized and traces or substances that might constitute means of attack have been taken away, a thorough examination of his/her clothing follows.

Each portion of clothing will be carefully examined, such as: linings, seams, shoulder cushions, buttons, coat and shirt collars, trouser turn-ups and belongings.

If there are specific objects or valuables that need to be found, before searching the person in question, he/she is asked to hand them over. If he/she refuses to do so or pretends not to have them about himself/herself, the search begins.

The search of the private premises presupposes, in its unfolding, the following of several successive stages: going to the spot, blocking it off, entering the premises that are to be searched and performing the search itself.

The way of going to the spot is conditioned by the concrete circumstances under which action is taken and it is done by a means of transportation, which will be parked in a place that cannot be spotted from the premises that are to be searched.

The first measures taken on the search scene are as follows:

- a quick investigation of the whole place that is to be searched;
- taking the measures necessary in order to counteract any violent action;
- gathering all the persons found on the search scene in the same room;
- a careful study of and familiarization with the place that is to be searched;
- organizing the search itself¹⁰.

Entering the premises that are to be searched represents the beginning of the search of premises and is done by taking advantage of various favourable circumstances meant to prevent the actions of the searched person that might result in the destruction of compromising objects, documents and valuables.

After entering the premises of the searched person, the head of the team proves his/her identity and passes on to identifying the person to be searched and, in the cases established by law, he/she must produce an authorization released by the judge.

The body entitled to pursue criminal action will ask the searched person for information regarding the space he/she inhabits, exclusively and jointly¹¹ and, in case the building has undergone changes, measurements will be made to determine whether the interior dimensions correspond to the exterior ones, including to establish whether or not the breadth of walls is uniform.

In the case of a search of premises, the judiciary body has the right to open the rooms or other means of preservation in which the objects or documents searched for might be, if the person entitled to open them refuses to do so.

The judiciary body will only take away objects and documents related to the investigated fact and, in case that, on the occasion of performing a search, objects or documents whose circulation or possession is prohibited are found, they will be taken away.

As a consequence of the search, there is the possibility that facts and circumstances of the private life of the person on whom the search is performed become known by other people. Therefore, it is necessary that the judiciary body take measures so that such facts and circumstances, which are not related to the case, should not become public knowledge.

In the case of a computer search, the judiciary body will take the measure of preserving informatics data or the data regarding informational traffic, which presupposes preserving the already existing data, obtained by means of an information system and recorded on a particular material carrier, in order to avoid the alteration, degradation or erasure of those data¹².

According to article 54, alignment 5, of Law no. 161/2003, if several service suppliers possess data regarding informational traffic, the service supplier is obliged to provide the body entitled to pursue criminal proceedings or the court of justice with the amount of information

⁹ Idem, p. 351.

¹⁰ E. Stancu, in the work cited, p. 460.

¹¹ C. Aioanițoiaie, V. Bercheșan, I. Botoc, in the work cited, p. 226.

¹² M. Udriou, O. Predescu, in the work cited, p. 859.

necessary in order to identify the other service suppliers, with a view to rendering the authorities aware of all the elements of the communication chain used.

After performing the search and taking away the objects and the documents, a record of proceedings is drawn up. The record of proceedings must bear on every page and at the end the signature of the person who has drawn it up, as well as those of the assisting witnesses and of the persons mentioned in it, having to include: surname, first name and capacity of the person who has drawn it up; surname, first name, occupation and address of assisting witnesses, when there are any; a thorough description of the findings, as well as the measures adopted; surname, first name, occupation and address of the persons who are the object of the record of proceedings, their objections and justifications; the mentions established by law for special cases; the place where and the conditions under which the documents and the objects were found and taken away, with their minute enumeration, so that they can be recognized; mentions regarding objects that were not taken away, as well as those left for their owner to keep.

Searches can also be performed on a group of persons, in which case it is necessary to take measures of surveillance and for the prevention of violent actions, in the hypotheses of searching for persons (either sequestered or trying to elude criminal proceedings) or for certain objects (such as: searches in order to find narcotics, art objects, weapons and explosives, secret writings).

In such cases, the searches are performed by qualified personnel that must assist with the control at border checkpoints. In order to detect stupeficient substances, beside chemical reagents always present in the special forensic kits, dogs especially trained for this purpose are used.