

Crime of Recording Audio or Visual Media (Article 286 of the Turkish Criminal Code)

Ses veya Görüntülerin Kayda Alınması Suçu (Türk Ceza Kanunu Madde 286)

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ABSTRACT

The “Crime of Recording Audio or Visual Media”, which was not regulated under the former Turkish Penal Code numbered 765, was initially regulated in Article 286 of the Second Section titled, “Crimes against the Judiciary”. It is within the Fourth Part, titled “Crimes against the Nation and the State and Final Provisions”, in the Second Book titled “Special Provisions” of the Turkish Criminal Code numbered 5237. With this crime, the act that violates the prohibition -in Article 183 of the Criminal Procedure Code numbered 5271, titled “Prohibition of using audio and visual media recording devices”- is being penalized, and the same prohibition is also included in Article 153 of the Civil Procedure Law numbered 6100, titled “Prohibition of recording and broadcasting”. Regulations state that all devices capable of providing audio or visual media recording or transferring within the courthouse and in the courtroom after the start of the hearing are prohibited. Thus, Article 286 of the Turkish Criminal Code will be applied in case of violation of these rules, aiming to ensure that procedure takes place within a certain order and, in particular, to preserve the presumption of innocence in criminal proceedings. In this study, the “Crime of Recording Audio or Visual Media”, regulated in Article 286 of the Turkish Criminal Code numbered 5237, is examined according to the examination method of crime. Besides, suggestions for necessary amendments to certain provisions related to this type of crime are included.

ÖZ

765 sayılı mülga Türk Ceza Kanunu döneminde düzenlenmemiş olan “Ses veya Görüntülerin Kayda Alınması Suçu”, ilk defa 5237 sayılı Türk Ceza Kanunu’nun “Özel Hükümler” başlıklı İkinci Kitabının, “Millete ve Devlete Karşı Suçlar ve Son Hükümler” başlıklı Dördüncü Kısımının “Adliyeye Karşı Suçlar” başlıklı İkinci Bölümünde yer alan 286’ncı maddesi ile hükme bağlanmıştır. Bu suç ile birlikte, 5271 sayılı Ceza Muhakemesi Kanunu’nun “Ses ve görüntü alıcı aletlerin kullanılması yasağı” başlıklı 183’üncü maddesindeki yasağa aykırılık oluşturan fiil cezalandırılmakta olup, söz konusu yasağın aynı zamanda 6100 sayılı Hukuk Muhakemeleri Kanunu’nun “Kayıt ve yayın yasağı” başlıklı 153’üncü maddesinde yer almaktadır. Adliye binası içerisinde ve duruşma başladıktan sonra duruşma salonunda her türlü sesli veya görüntülü kayıt veya nakil olanağı sağlayan aletlerin kullanılmayacağı ve bu kurallara aykırılık olması durumunda Türk Ceza Kanunu’nun 286’ncı maddesinin uygulanacağı şeklindeki düzenlemeler, muhakemenin belli bir düzen içerisinde gerçekleşmesinin temin edilmesini ve özellikle ceza muhakemesi bakımından masumiyet karinesinin korunmasını amaçlamaktadır. Bu çalışmada 5237 sayılı Türk Ceza Kanunu’nun 286’ncı maddesinde yer alan “Ses veya Görüntülerin Kayda Alınması Suçu”, suç inceleme yöntemine göre incelenerek, bu suç tipi ile ilgili bazı madde metinlerinde yapılması gerekli görülen değişikliklere dair önerilere yer verilmektedir.

Keywords: Investigation and prosecution, audio or visual media, recording or transferring

Anahtar Kelimeler: Soruşturma ve kovuşturma, ses veya görüntüler, kayda almak veya nakletmek

Introduction

Although the development of technology has brought conveniences to the field of law, it has also brought some disadvantages.¹ Since every technical development may also involve new dangers, criminal law has been in a continuous process of development in order to react to hitherto unknown risks.² The new era’s technological achievements, as well as the use of technical means for

¹ Erdal Yerdelen, ‘Ceza Muhakemesinde Videokonferans Yönteminin (SEGBİS) Kullanımı’, (Erdal Yerdelen (tr)) (2019) 1(2) Bilişim Hukuku Dergisi 271.

² Arnd Koch, ‘Hukuka Aykırı Resim Çekimlerine Karşı Ceza Hukuku Koruması -Alman Ceza Kanunu md. 201a-’, Yener Ünver (ed), *Özel Yaşam, Medya ve Ceza Hukuku*, (Hakan Hakeri (tr)), Karşılaştırmalı Güncel Ceza Hukuku Serisi 7 (Seçkin Yayıncılık 2007) 203-204.

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the transfer of audio and visual media, have resulted in a number of changes to traditional criminal law, not only speeding it up but also changing the attitude and understanding of the proceedings' conduct. Indeed, it is worth noting that the International Criminal Tribunal for the former Yugoslavia was one of the first in Europe to initiate trial hearings via video link or Skype, thus being referred to as a pioneer in this field.³

The adoption of technological changes without proper consideration of their possible disadvantages and the exploitation of their benefits has often led to unnecessarily negative reactions.⁴ Dizzying technical developments pose new types of dangers to the personal rights of the individual.⁵ Although it is necessary to make use of technical developments, this should be done in accordance with the principles of fair trial and equality, as well as justified and reasonable justification.⁶

The aim of criminal procedure law is to find the material truth by investigating it in a way that does not lead to human rights violations and to ensure justice.⁷ Technological advances in criminal procedure should be utilised to increase efficiency without compromising fair trials. However, it is argued that while technology is advancing, fundamental concerns centred on fair criminal proceedings and human dignity are increasingly being ignored.⁸ The increasing use of technology in criminal proceedings, even if it is considered beneficial in terms of speeding up the proceedings, may cause controversy in terms of many principles such as immediacy and orality, which are related to the right to a fair trial.⁹

It can be said that courts, like other organisations, are undergoing a transformation from paper-based processes and archiving to digital records, and from records that are primarily locally accessible to records that can be accessed online. The adoption of new media is not a new experience for courts, which have already adapted to audio and video recording, microfilm, and computer tape.¹⁰ The introduction of videotapes into the law is only a part of the development of the law of evidence regarding the use of mechanical recording devices. Audio recordings, on the other hand, entered the legal scene later but eventually reached a point where they were widely accepted.¹¹ Although duly filled and preserved¹² audio or video recordings are generally accepted as evidence, it is crucial that the material in question possesses the characteristics of admissible evidence, particularly that it is both "unmodified/intact" and "lawful".¹³ If there is a suspicion that the audio and videotapes have been tampered with or if they were not obtained in accordance with the law, they cannot be used as indicative evidence.¹⁴ In addition, in cases where the recording of audio and visual media is prescribed by the legislation, if it is carried out without complying with the procedure regulated in the legislation, the recordings made will be contrary to the law and they cannot be used as evidence in criminal proceedings.¹⁵

It is worth noting that a remote hearing refers to a hearing in which one, several, or all participants, including witnesses, experts, parties, lawyers, and judges, are not physically present in a courtroom but are instead connected through telephone or videoconferencing systems. It should also be noted that the term video-hearings may be used interchangeably with the concept of a remote hearing, where all or some of the participants are connected via a videoconferencing system that allows them to see each other using a camera.¹⁶

Videoconferencing system is composed of interactive telecommunication technologies that enable simultaneous interaction between two or more locations (via two-way video or audio transfer). This electronic communication technology aims to enhance information exchange among users. This technology permits real-time audio and video conversations between people in different locations, utilising a system of monitors, microphones, cameras, computer equipment, and other devices.¹⁷ However, there are

³ Zoran S. Pavlović, 'About Legality of On Line Trials in Criminal Procedure' (2020) 2 Journal of Eastern European Criminal Law 33, 34.

⁴ James P. Barber and Philip R. Bates, 'Videotape in Criminal Proceedings' (1974) 25(4) Hastings Law Journal 1017, 1041.

⁵ Koch (n 2) 220.

⁶ Hakan Pekcanitez, Oğuz Atalay and Muhammet Özkes, 'Hukuk Muhakemeleri Kanunu ile Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun Teklifinin (2020) Değerlendirilmesi' (*Lexpera Blog*) <<https://blog.lexpera.com.tr/hmk-ile-bazi-kanunlarda-degisiklik-yapilmasina-dair-kanun-teklifinin-2020-degerlendirilmesi/>> accessed 17 March 2023.

⁷ Cumhur Şahin and Neslihan Göktürk, *Ceza Muhakemesi Hukuku-1* (11th edn, Seçkin Yayıncılık 2020) 33.

⁸ Edie Fortuna Cimino, Zina Makar and Natalie Novak, 'Charm City Televised & Dehumanized: How CCTV Bail Reviews Violate Due Process' (2014) 45(1) University of Baltimore Law Forum 57, 103-104.

⁹ Gizem Dursun, 'Sanığın Duruşmada Hazır Bulunma Hakkı ve Bu Kapsamda Sesli ve Görüntülü Bilişim Sisteminin (SEGBİS) Değerlendirilmesi' (2016) 11(143-144) Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi 127, 128.

¹⁰ Amanda Conley and others, 'Sustaining Privacy and Open Justice in the Transition to Online Court Records: A Multidisciplinary Inquiry' (2012) 71(3) Maryland Law Review 772, 773.

¹¹ Barber and Bates (n 4) 1019-1020.

¹² Bahri Öztürk, 'Ses ve/veya Görüntü Kaydeden Araçlarla Yapılan Tespitlerin Ceza Muhakemesi Hukukundaki Değeri', *Prof. Dr. Seyfullah Edis'e Armağan* (Dokuz Eylül Üniversitesi Yayınları 2000) 226.

¹³ Yener Ünver, 'Ceza Muhakemesinde İspat, CMK ve Uygulamamız' (2006) 1(2) CHD 103, 128.

¹⁴ Mahmut Koca, 'Ceza Muhakemesi Hukukunda Deliller' (2006) 1(2) CHD 207, 218.

¹⁵ Ali Kemal Yıldız, 'Ses ve/veya Görüntü Kayıtlarının İspat Fonksiyonu' (2006) 1(2) CHD 253, 262.

¹⁶ Anne Sanders, 'Video-Hearings in Europe Before, During and After the COVID-19 Pandemic' (2020) 12(2) International Journal for Court Administration <<https://storage.googleapis.com/jnl-up-j-ijca-files/journals/1/articles/379/submission/proof/379-1-1849-2-10-20210506.pdf>> accessed 18 March 2023.

¹⁷ Eric T. Bellone 'Private Attorney-Client Communications and the Effect of Videoconferencing in the Courtroom' (2013) 8(1) JICLT 24, 26.

also various opinions in the doctrine regarding the positive¹⁸ and negative¹⁹ aspects of the videoconferencing system that can be applied in the proceedings.²⁰

Bellone suggests that technology provides high speed and efficiency in prosecuting defendants, which leads to cost savings. However, while cost savings and gains in administrative productivity are achieved, the negative effects of new technology alienate and depersonalise defendants.²¹ Indeed, in *Bruton v. United States*, Justice Brennan stated that if greater speed, economy, and convenience in the administration of the law were achieved at the expense of fundamental principles of constitutional liberty, then the price would be too high.²² However, *Bellone* also notes that the courtroom videoconferencing system can be reformed to protect lawyer-client communication by establishing appropriate procedures to ensure the free flow of this private communication and to safeguard the lawyer's ability to provide adequate assistance.²³

Although, it can be said that in a world that is rapidly digitalising due to the pandemic disease affecting everyone, it is no longer possible to give up the habits brought about by this digitalisation. Therefore, this issue has become an inevitable situation in terms of enabling the hearing to be held from another location by transferring the audio and visual media.²⁴

In this study, the "Crime of Recording Audio or Visual Media", which is regulated in Article 286 of the Turkish Criminal Code (TCC) numbered 5237, will be discussed. In this context, the legally protected interest, also the material elements, the mental element, and the unlawfulness element within the scope of the elements of this crime and the culpability related to this crime are first examined according to the examination method of crime. Then, the special forms of this crime will be highlighted, and the sanctions and rules of procedure in relation to this crime will be mentioned.

I. In General

According to Art. 378, para. 1 of the former Code of Criminal Procedure (CCP) No. 1412, there was no explicit provision in the law on whether audio and visual recordings could be made during a hearing. However, the chief judge had the duty to ensure the discipline of the hearing, and could remove from the courtroom any person who disturbed the discipline of the hearing. The chief judge also had the authority to decide whether or not to allow members of the media to record audio and visual media during the hearing.²⁵ The chief judge was also authorised to prohibit the use of audio and visual recording equipment in the courtroom in the event that members of the media caused a stampede and obstructed the course of the trial.²⁶ In addition, it was stated that audio and visual recordings may be prohibited according to Art. 377, para. 3 of the CCP on the grounds that audio and visual recordings would violate the "dignity, honour and rights of persons".²⁷ As a matter of fact, it is stated that regardless of the type of case, it is a fact that the publication of audio and visual recordings will touch the dignity, honour and rights of individuals.²⁸ It is also noted that audio and visual recordings of individuals during the trial would harm the right to protection of reputation and good name, and that audio and visual recordings should be prohibited during the trial in terms of the right to respect for private

¹⁸ According to *Hillman*, one of the most important benefits of videoconferencing system is the improved security of the courtroom. In this system, since the defendants are connected to the courtroom from the prison via video technology, the need to provide transport is eliminated. Prison and court officials would thus be relieved of the security concerns of transporting defendants through open parking lots and corridors within the court building. The use of video technology can alleviate a potentially dangerous situation between impulsive and hostile defendants. It may also alleviate the concerns of the victim who is afraid of seeing the defendant. In addition, with the removal of the need to provide transport for the defendants, fewer police and court officers are needed at the courthouse, enabling them to patrol the streets more. Another important benefit of this system realised by the government is the monetary savings achieved through the adoption of video technology. It is also argued by some commentators that the judge will be more focused on the defendant's case as all external interruptions are minimised. (Zachary M. Hillman, 'Pleading Guilty and Video Teleconference: Is a Defendant Constitutionally 'Present' when Pleading Guilty by Video Teleconference?' (2007) 7(1) *Journal of High Technology Law* 41, 47-48.).

¹⁹ *Bellone* argues that videoconferencing has a negative impact on the relationship between lawyers and clients, as well as on private communication between them. The author contends that the use of videoconferencing leads to a reduction in the personal relationship between users, which could potentially result in the alienation of defendants within the criminal justice system. This is because a lawyer cannot effectively represent a client without effective private communication. Videoconferencing, which is used during the trial when the defendant is under arrest and the defence counsel is in the courtroom, constitutes a major obstacle to communication between the lawyer and the client. According to this view, the first problem created by the videoconferencing system is the limited communication with the lawyer via video, and the second problem is the inability to communicate with the lawyer at all. As a matter of fact, the defendant's trust in his or her lawyer may decrease through video conferencing. Moreover, due to the lack of direct and unmediated communication with the lawyer, important aspects of the defendant's physical presence, such as changes in the defendant's demeanour, facial expression, and tone of voice, may be lost or misinterpreted in the video image. (*Bellone* (n 17) 27-28.).

²⁰ If the hearing of the person concerned is carried out outside the courtroom, different problems may be encountered in terms of both the seriousness of the proceedings and security. As a matter of fact, if the technical infrastructure and facilities are not sufficient in the place where the person is listened to, it is stated that it is a better practice to carry out the hearing in the courtroom of the court where the person is located, since there may be some problems such as the person being listened to may be influenced or the broadcast may be interrupted, or, for example, whether the person is playing a video that the person has previously recorded or whether the person is using "deepfake" technology. Furthermore, people who are not sufficiently interested in technology, such as the elderly, may behave differently than they would normally in front of the camera in these hearings with audio and visual media transfer. (Gökçe Varol Karaosmanoğlu, 'Ses ve Görüntü Nakli Yoluyla Duruşma Yapılmasına İlişkin Olarak 7251 Sayılı Kanun'la Yapılan Değişikliklerin Doğrudanlık İlkesi Kapsamında Değerlendirilmesi' (2022) 8(1) *AndHD* 71, 78, 80.).

²¹ *Bellone* (n 17) 47-48.

²² *Hillman* (n 18) 69; *Bellone* (n 17) 48.

²³ *Bellone* (n 17) 48.

²⁴ Selçuk Özbek, 'Hukuk Muhakemeleri Kanunu'nun Aleniyet İlkesine İlişkin 28 inci Maddesi ile Ses ve Görüntü Nakledilmesi Yoluyla veya Başka Yerde Duruşma İcrasına İlişkin 149 uncu Maddesinde 7251 sayılı Kanunla Yapılan Değişiklikler Hakkında Bazı Düşünceler' (2021) 148(66) *Adalet Dergisi* 641, 663.

²⁵ Nur Centel, 'Dürüst Yargılama ve Medya Bakımından Demokrasi Kültürü' (1994) 49(3-4) *Ankara Üniversitesi SBF Dergisi* (Prof. Dr. Yılmaz Günel'a Armağan) 57, 62.

²⁶ Hamide Zafer, 'Medya Özgürlüğü ve Adli Haberlerin Verilişi' (1999) 11(1-3) *MÜHF-HAD* (Prof. Dr. Selahattin Sulhi Tekinay'ın Hatırasına Armağan) 751, 771.

²⁷ Handan Yokuş Sevük, 'Adil Yargılanma Kapsamında Ceza Yargılamasında Aleniyet İlkesi', *Prof. Dr. Çetin Özek Armağanı* (Şan Ofset 2004) 760.

²⁸ Zafer (n 26) 771.

life under Art. 8 of the European Convention on Human Rights (ECHR).²⁹ According to an opinion in legal doctrine, it is stated that Art. 378, para. 1 of the CCP was able to meet the needs at the time this Code entered into force, but it is necessary to make legal arrangements in terms of technical developments in this regard, and it is concluded that “the principle of public hearing” will not prevent the limitation of this issue.³⁰ Another opinion in legal doctrine has pointed out that even though the prohibition of audio and visual recordings is left to the discretion of the judges, the judges who exercise this discretion should be protected against criticism from the media. This opinion also emphasised that the regulations regarding the freedom of the media, which is considered one of the fundamental freedoms in democratic societies, should be clearly and unambiguously regulated by law, without allowing for interpretations and thus avoiding polemics^{31,32}.

In the new Criminal Procedure Code (CPC) No. 5271, an explicit provision has been introduced to prohibit the use of all kinds of audio and visual recordings or transfer devices within the courthouse building and in the courtroom after the start of the hearing, with the exception of the events in Art. 180, para. 5 and Art. 196, para. 4 of the CPC^{33,34}.

The crime of recording audio or visual media is also directly related to criminal procedure.³⁵ The right to a fair trial, which can be expressed as the most fundamental right in the field of procedural law, can only be realised in a procedure if the requirements of this right are fulfilled. Otherwise, both the parties and the public will not be able to have faith and trust in the proceedings.³⁶ However, the CPC No. 5271 is capable of meeting the principles and standards foreseen in terms of criminal procedure in international conventions and European Union criteria, including human rights and, in this context, the right to a fair trial.³⁷

It should be noted here that it cannot be said that the prohibition of audio and visual recordings regulated under Art. 183 of the CPC violates “the principle of publicity”, and it would not be possible to argue that the freedom of the press has been abolished since it is possible for the press to report the case by following the case in other ways.³⁸ Since the prohibition of audio and visual recordings does not contradict the principle of publicity, and therefore the media will always have the opportunity to follow the case and narrate the event, it cannot be said that the core of the freedom of the media is harmed here.³⁹

In order to protect the rights of the subjects involved in the justice mechanism, such as suspects, defendants, lawyers, judges, prosecutors, and other judicial subjects, the legislator has included various regulations under the heading “Crimes Against the Judiciary” of the TCC, the applicability of which is of utmost importance.⁴⁰ One of these regulations is the “Crime of Recording Audio or Visual Media”, which is the subject of our study. This crime is regulated in Art. 286 of the TCC under the heading “Crimes Against the Judiciary” as follows: “*Any person who records or transfers audio or visual media without authorisation during the investigation and prosecution proceedings shall be sentenced to up to six months’ imprisonment.*”. The crime of recording audio or visual media, which was not regulated in the Turkish Penal Code (TPC) No. 765, was regulated for the first time in the TCC No. 5237. This provision is one of the innovations within the framework of criminal law reform efforts and is also important in terms of emphasising the presumption of innocence.⁴¹

In the context of comparative law, although it is generally accepted in the American criminal justice system that the defendant must be physically present at the hearing, videoconferencing was introduced in the courts in the early 1980s.⁴² Since 1996, it has been stated in legal doctrine that the USA is the leading country among the countries that frequently apply the system of participation in hearings by means of audio and visual media transfer. In American law, not only experts, parties, or witnesses are heard, but also examinations of objects such as fingerprints and maps can be made with this system. Many monitors in the courtroom

²⁹ Yokuş Sevük (n 27) 760.

³⁰ Centel (n 25) 62.

³¹ Zafer (n 26) 772.

³² It should be noted that Art. 189 of the 2002 Draft CCP prohibits the use of all kinds of audio and visual recordings and transferring devices inside the courthouse and in the courtroom after the hearing has started. This regulation has been amended as a proper regulation to ensure the order of the court, to prevent the court from being influenced and the defendant from being harmed to his or her reputation and good name, to ensure that the defence is properly conducted, and in short, to ensure that justice is duly served. (Yokuş Sevük (n 27) 760.).

³³ Bilgehan Savaşçı, ‘Haberleşme Özgürlüğünün Kovuşturma Evresinde Sınırlandırılması’ (2011) 24(96) TBB Dergisi 269, 287.

³⁴ As a matter of fact, Art. 183 of the CPC titled “Prohibition of using audio and visual recording devices” states that “*Without prejudice to the provisions of fifth paragraph of Article 180 and the fourth paragraph of Article 196, no audio or visual recording or transferring devices of any kind may be used inside the courthouse and in the courtroom after the hearing has started. This provision also applies to the execution of other judicial proceedings inside and outside the courthouse.*”. Art. 180, para. 5 of the same Code, titled “Hearing of witnesses and experts by a delegated judge or by deposition” reads as follows: “*According to the content of the above paragraphs, if it is possible to hear the witness or expert witness by using visual and audio communication techniques at the same time, the testimony is taken by applying this method. The principles and procedures regarding the establishment and use of the technical equipment that will allow this shall be specified in the regulation.*” and Art. 196 para. 4 of the same Code titled “Immunisation of the defendant from the trial”, it is regulated as follows: “(Amended: 15/8/2017-Decree-Law No. 694/Art. 147; Adopted as amended: 1/2/2018-7078/Art. 142) *In cases where the judge or court deems it necessary, the defendant who is in the country may be interrogated or decided to attend the hearings by using the visual and audio communication techniques at the same time.*”.

³⁵ Kerim Çakır, ‘Gizliliğin İhlali Suçu (TCK m. 285)’ (Master’s thesis, Marmara University 2011) 30.

³⁶ Hakan Karakehya, ‘Ceza Muhakemesinde Hakkaniyete Uygun Yargılanma Hakkına İlişkin Esaslar’ (2014) 1 Ombudsman Akademik 83, 84.

³⁷ Adem Sözüer, ‘Türk Ceza Hukuku Reformu: Dünü, Bugünü ve Yarını, Türk Ceza Hukuku Reformunun AB Üyesi Kara Avrupası Ülkelerindeki Reformlarla Karşılaştırılmasına İlişkin Notlar’ (2019) 21(SI) DEÜHFD (Prof. Dr. Durmuş Tezcan’a Armağan) 3031, 3047.

³⁸ Sesim Soyer Güleç, ‘Ceza Yargılaması Hukukunda İnsan Haklarının Bir Güvencesi Olarak ‘Halka Açıklık’ İlkesi’ (2007) 2(5) CHD 73, 95.

³⁹ Zafer (n 26) 771.

⁴⁰ Çakır, ‘Gizliliğin İhlali Suçu (TCK m. 285)’ (n 35) 140.

⁴¹ Pınar Memiş Kartal, ‘Ses veya Görüntülerin Kayda Alınması’, *Özel Ceza Hukuku-Cilt X: Adliye Karşı Suçlar (TCK m. 267-298)* (On İki Levha Yayıncılık 2021) 395.

⁴² Hillman (n 18) 45.

ensure that the videoconferencing system can be used in a procedural and correct manner.⁴³ The United States Constitution requires that all criminal proceedings be conducted in public.⁴⁴ However, courts across the country have suspended judicial proceedings, particularly criminal jury trials, in view of the clear and grave risks of exposure to the SARS-CoV-2 (COVID-19) virus.⁴⁵ It is noted that many courts today utilise a hybrid system that creates uncertainty about the long-term effects of the virtual platform.⁴⁶ However, *Hillman* argues that at this point, the use of video technology cannot be expected to be abandoned in criminal justice systems across the country.⁴⁷

In England, participation in hearings by means of audio and visual media transfer has been permitted in civil proceedings since 1999. Pursuant to the “Practice Direction 51Y-Video or Audio Hearings During Coronavirus Pandemic” dated March 25, 2020, among the new provisions introduced in terms of the videoconferencing method, there are regulations indicating that disputes such as cases without witnesses and non-contentious judicial proceedings of the courts can be heard by means of audio and visual media transfer.⁴⁸

In German criminal law, the principle of publicity of oral hearings is enshrined as a fundamental principle of judgement that is linked to the rule of law and democracy. This principle also serves as a public check to guarantee transparency in criminal proceedings, thus safeguarding against any arbitrariness on the part of the state and ensuring the general preventive purpose of punishment through public participation, information, and visibility. At the same time, this principle encompasses the protection of public access, guaranteeing the ability to passively participate in the main proceedings at any time without significant difficulty.⁴⁹ Article 169 of the German Courts Constitution Act provides that the hearing, decisions, and judgement are public, and the second sentence of this article provides that it is forbidden to make audiotapes, radio, or television recordings for the purpose of public broadcasting or playback.⁵⁰ It is also noted that many in Germany would like to see the development of regulations such as the example of the possibility of digital examination of witnesses in criminal proceedings, similar to what has long been established in civil proceedings under Section 128a of the German Code of Civil Procedure (ZPO).⁵¹ Stating that the demand for justice to be done is no different from a human right and that its violation is also a violation of international law, *Dauster* mentions that German criminal procedure law is also based on this rule, although it is not explicitly stated in German law.⁵²

In French law, the conduct of hearings by means of audio and visual media transfer was first regulated by Decree 98-729 of August 20, 1998, on the organisation of the judiciary, applicable in the overseas territories and in the territorial communities of Mayotte, Saint-Pierre and Miquelon.⁵³ In France, the Courts Constitution Act was amended in 2007 to include a separate provision on the conduct of hearings by means of audio and visual media transfer. Pursuant to Article L111-12 of the aforementioned Code, apart from the special provisions of some laws, such as the Criminal Procedure Code, hearings may be held *ex officio* by decision of the presiding judge or at the request of one of the parties, with the consent of all parties, by means of a means of communication enabling the transfer of audio and visual media in more than one courtroom directly connected to each other, ensuring the confidentiality of the broadcast.⁵⁴

In Romanian criminal law, the possibility of using audio or visual recordings was regulated for the first time by Law No. 141/1996, which added two new means of evidence, namely audio recordings and visual recordings (video or photographs), to the already existing means of evidence.⁵⁵ It welcomed the introduction of audio and visual recordings as new forms of evidence, which in many cases are the most important means of evidence leading to the resolution of a criminal case.⁵⁶

In terms of Serbian criminal law, Article 362 of the Serbian Code of Criminal Procedure provides that hearings are public, but only persons over the age of 16 may participate.⁵⁷ However, during the COVID-19 pandemic, criminal proceedings were also held online in Serbia in the form of remote hearings.⁵⁸ According to *Bošković*, the defendant’s participation in the trial by

⁴³ Varol Karaosmanoğlu (n 20) 83.

⁴⁴ Barber and Bates (n 4) 1036.

⁴⁵ Akua F. Abu, ‘Remote Justice: Confronting the Use of Video Teleconference Testimony in Massachusetts Criminal Trials’ (2020) 34(1) Harvard Journal of Law & Technology 307, 308.

⁴⁶ Madison C. DeRegis, ‘Can You Hear Me Now?: The Implications of Virtual Proceedings on Criminal Defendants’ Constitutional Rights’ (2022) 81(1) Maryland Law Review Online 71, 72.

⁴⁷ Hillman (n 18) 55.

⁴⁸ Varol Karaosmanoğlu (n 20) 83.

⁴⁹ Wilhem Bühner and Anni Rank, ‘The Effects of SARS-CoV-2 on Criminal Procedure in Germany’ (2022) 23(4) German Law Journal 672, 675.

⁵⁰ Yokuş Sevük (n 27) 759.

⁵¹ Bühner and Rank (n 49) 685.

⁵² Manfred Dauster, ‘Criminal Proceeding in Times of Pandemic’ *New Legal Reality: Challenges and Perspectives. II* (University of Latvia Press 2022) 254.

⁵³ Nur Bolayır, ‘Fransız Hukuku’ndaki Düzenlemeler Işığında Ses ve Görüntü Nakledilmesi Yoluyla Duruşmaların İcrası’ (2020) 2 Galatasaray Üniversitesi Hukuk Fakültesi Dergisi 1175, 1179.

⁵⁴ *ibid* 1182.

⁵⁵ Ion Neagu and Mircea Damaschin, ‘Audio and Video Interceptions and Recordings in Criminal Law in Romania’ (2009) 16(1) Lex ET Scientia International Journal 202.

⁵⁶ *ibid* 214.

⁵⁷ Aleksandar Bošković, ‘Questioning the Defendant via a Video Link-The Violation of the Defendant’s Rights or Not?’, Zoran Pavlović (ed), *Yearbook Human Rights Protection The Right to Human Dignity 3* (Provincial Protector of Citizens-Ombudsman/Institute of Criminological and Sociological Research in Belgrade 2020) 209.

⁵⁸ Pavlović (n 3) 39.

videoconference was neither unlawful nor contrary to the principles of publicity and immediacy, as well as the right to a fair trial.⁵⁹ Pavlović emphasizes the necessity of implementing technical resources to ensure the highest standards in the transfer of audio and visual media, as well as the examination of witnesses and presentation of other evidence, in order to facilitate the effective participation of the defendant in criminal proceeding.⁶⁰

II. Legally Protected Interest

Currently, the task of criminal law is stated as “the protection of legal interests”, and essentially, this task aims to ensure citizens may live together in peace and freedom by securing the rights and freedoms of individuals.⁶¹ Along with the commission of the crime, these protected legal interests are violated.⁶² There is no crime that cannot be associated with a legal interest, and since every crime violates a legal interest, the scope of the crime is determined by the extent of the legal interest.⁶³

The crime of recording audio or visual media is regulated under the Second Section titled “Crimes Against the Judiciary” under the Fourth Part titled “Crimes against the Nation and the State and Final Provisions” of the TCC No. 5237. In fact, the “legally protected interests” in “Crimes Against the Judiciary” have a mixed nature.⁶⁴ The classical view suggests that the state has its own specific interests that need to be legally protected in terms of these crimes, such as “political interests”, “managerial/administrative interests”, and “judicial interests”. Therefore, crimes against the interests of the state, and crimes against the judiciary, which are sub-types of this crime, are regulated under these three groups and with this understanding. On the other hand, today there is an approach that takes human rights as a criterion for the protection of judicial functions, and this approach places the protection of the rights, freedom, and personality of the individual at the centre of crimes against the judiciary and thus determines the legally protected interest as the right to a fair trial.⁶⁵ It can be said that the main purpose of punishing crimes against the judiciary is to provide judicial security in terms of the rights of the individual. The function of criminal law to provide security and protect the rights of the individual is also valid in terms of crimes against the judiciary.⁶⁶ Therefore, it is aimed to protect the right of individuals to a fair trial in terms of crimes against the judiciary.⁶⁷

In addition to the regulations made in the CPC in order to protect the right to a fair trial, which also constitutes the basis of the state of law, the acts that may cause a violation of a fair trial are also criminalised under the “Crimes Against the Judiciary” section of the TCC.⁶⁸ The legislator has also regulated the unauthorised recording or transferring of audio or visual media during the conduct of proceedings in the investigation and prosecution stages as one of these crimes and stated in the justification that this act will not constitute a crime in case of the permission of the judge. The purpose of this regulation is to punish the act that violates the prohibition in Art. 183 of the CPC. The prohibition in question is also included in Art. 153 of the Civil Procedure Law (CPL) No. 6100.⁶⁹

In legal doctrine, there are various opinions regarding the legally protected interests of the crime regulated in Art. 286 of the TCC. According to some authors, the legally protected interests of this crime are the protection of personal rights, the judiciary, and to ensure a fair trial.⁷⁰ Additionally, this crime aims to prevent the difficulty of revealing the judicial truth through the recording and transferring audio or visual media during the investigation and prosecution proceedings.⁷¹ According to another opinion in legal doctrine, the legally protected interests of the crime of breaching confidentiality and the crime of recording audio or visual media are similar, and since both types of crimes in question protect both personal rights and the judiciary, the aim is to ensure a fair trial.⁷² In addition to this, legal doctrine also puts forward the opinions that the regulation stipulated in Art. 286 of the TCC is one of the provisions aimed at preventing violations of the presumption of innocence⁷³; that the purpose of protecting this crime is to ensure tranquillity in courtrooms and courthouses, to prevent the weakening of the defence and at the same time to protect the presumption of innocence⁷⁴; and that the purpose of legislating this crime is to protect the public interest in carrying out the investigation and prosecution proceedings in accordance with the legal objectives and the function of the courthouse.⁷⁵

⁵⁹ Bošković (n 57) 213.

⁶⁰ Pavlović (n 3) 40.

⁶¹ Adem Sözüer, ‘Türk Ceza Hukuku Reformu’, Adem Sözüer, Selman Dursun and Serdar Talas (eds), *Türk Ceza Hukuku Mevzuatı* (4th edn, Alfa Yayınları 2017) 23.

⁶² İzzet Özgenç, *Türk Ceza Hukuku Genel Hükümler* (16th edn, Seçkin Yayıncılık 2020) 221.

⁶³ Selman Dursun, ‘Emniyeti Suiistimal Suçu’ (1999) 57(1-2) İÜHF 3, 5.

⁶⁴ Kerim Çakır, ‘5237 Sayılı Türk Ceza Kanunu’nda Gizliliğin İhlali Suçu ve Ceza Muhakemesi Hukuku ile İlişkisi’ (2012) 18(1) MÜHF-HAD 227, 238.

⁶⁵ Yener Ünver, *İftira, Suç Uydurma, Suç Üstlenme, Yalan Tanıklık ve Bilirkişilik, Suçu İhbar Etmemek Suçları (TCK’da Düzenlenen Adliye Karşı Suçlar)* (6th edn, Seçkin Yayıncılık 2021) 43.

⁶⁶ Çetin Özek, ‘Adliye Karşı Suçların Hukuki Konusu’ (1997) 55(3) İÜHF 13, 31.

⁶⁷ Anıl Akyıldız, *Soruşturma Evresinde Gizliliğin İhlali Suçu* (Legal Yayınevi 2021) 57.

⁶⁸ ibid

⁶⁹ Memiş Kartal (n 41) 394.

⁷⁰ Ali Parlar and Mustafa Öztürk, *Uygulamada Adliye Karşı Suçlar (TCK md. 267-298)* (Aristo Yayınevi 2018) 419.

⁷¹ Necati Meran, *Kamu Görevlisine ve Adliye İlişkin Suçlar* (Seçkin Yayıncılık 2006) 366.

⁷² Çakır, ‘Gizliliğin İhlali Suçu (TCK m. 285)’ (n 35) 30.

⁷³ İlhan Üzülmüş, ‘Türk Hukukunda Suçsuzluk Karinesi ve Sonuçları’ (2005) 18(58) TBB Dergisi 41, 56.

⁷⁴ Ünver, *İftira, Suç Uydurma, Suç Üstlenme* (n 65) 537.

⁷⁵ Hasan Tahsin Gökcan and Mustafa Aruç, *Yorumlu-Uygulamalı Türk Ceza Kanunu Şerhi* (Adalet Yayınevi 2021) vol 6, 9321.

The purpose of Art. 286 of the TCC, in accordance with our shared viewpoint, is to protect the presumption of innocence, especially in terms of criminal procedure, by ensuring that the proceedings take place in a certain order.⁷⁶ The presumption of innocence, which binds all public officials such as prosecutors, police, gendarmes, and also the courts and state institutions, must also be observed by the press and media organs. Moreover, the purpose of this regulation is to prevent defendants, witnesses, and judges from being psychologically influenced.⁷⁷ For instance, forcing the defendant to speak in front of television cameras or a microphone would greatly affect his or her right to defence and put him or her under psychological pressure.⁷⁸ Indeed, the knowledge that they are being heard and watched by many people creates psychological pressure on the subjects of the case, which may result in bias and also a sense of being actors. It is expressed that there is a concern that this situation may adversely affect both the finding of the truth and the flow of the judgement.⁷⁹ Therefore, in our opinion, the legally protected interest of the crime of recording audio or visual media also includes the prevention of witnesses, defendants, judges, and prosecutors from being influenced, especially psychologically, which may occur with the unauthorised recording or transferring of audio or visual media during investigation or prosecution proceedings.

III. Material Elements (*Actus Reus*)

A. Subject Matter

Every act that constitutes a crime has a subject matter, which refers to the object or person upon which the typical act is performed.⁸⁰

The subject matter of the crime of recording audio or visual media is the audio or visual media themselves, as they are the “objects” upon which the typical act of the unauthorised recording or transferring takes place during investigation or prosecution proceedings.

Audio is defined as “Vibrations that the ear can hear, tone, voice”⁸¹; and visual media is defined as “The form of any object produced by a lens, mirror, etc.”⁸² The scope of visual media includes photographs,⁸³ and within the context of visual media rights, it is accepted that visual media encompasses not only film or photographic shoots but also any representation that enables a person to be recognised, including caricatures, lines, photomontages, and doubles.⁸⁴ Nonetheless, visual media is also defined as the reproduction of a person’s external appearance in a manner sufficient for identification. According to one view in legal doctrine, this definition was created for painting and is adequate for photography, but it is insufficient for video. However, the opinion we concur with maintains that the term “visual media” fundamentally encompasses both photographs and videos.⁸⁵

Regarding Art. 183 of the CPC, devices such as cameras, tapes, film machines, etc., recording and transferring equipment may be considered prohibited. Drawing in courtrooms is not a problem, and these drawing methods, which are widely used in the United States of America, are also applied in our country.⁸⁶

According to an opinion in legal doctrine, the statement in the justification of Art. 183 of the CPC that “since it prohibits all kinds of audio and visual recording and transferring devices, there is no obstacle to taking photographs” cannot be accepted. The opinion further suggests that the taking of photographs should also be prohibited in order to uphold the presumption of innocence and prevent those involved in the proceedings from being influenced.⁸⁷ As a matter of fact, according to another opinion, when the wording of the said article is evaluated in terms of the meanings of the words “visual media”, “photograph”, and “camera” in our language, it is stated that photographs undoubtedly fall within the scope of the prohibition regulated in Art. 183 of the CPC and the crime specified in Art. 286 of the TCC.⁸⁸ It is also stated that the prohibition in this article extends to the act of taking photographs, and this interpretation aligns with the purpose of the provision. However, individuals present at the hearing are allowed to make sketches or take notes of the events and visuals in the courtroom without disrupting the order of the hearing.⁸⁹

It should be noted that, based on the provision in Art. 447, para. 2 of the CPL, when the regulation in Art. 31, para. 1 of the Code of Administrative Procedure (CAP) No. 2577 is evaluated, the CPL No. 6100 shall be valid in terms of the reference to the Law of Civil Procedure (LCP) No. 1086 in the relevant article. Therefore, since Art. 31 of the CAP refers to the provisions of the

⁷⁶ Memiş Kartal (n 41) 395.

⁷⁷ Savaşçı (n 33) 286.

⁷⁸ Zafer (n 26) 765.

⁷⁹ Centel (n 25) 62.

⁸⁰ Mahmut Koca and İlhan Üzülmöz, *Türk Ceza Hukuku Genel Hükümler* (13th edn, Seçkin Yayıncılık 2020) 116.

⁸¹ Ses, *Türkçe Sözlük* (10th edn, Türk Dil Kurumu Yayınları 2005) 1739.

⁸² ‘Görüntü’, *Türkçe Sözlük* (10th edn, Türk Dil Kurumu Yayınları 2005) 783.

⁸³ Dilek Ekmekçi, ‘Kitle İletişim Özgürlüğünün Sınırı Olarak Türk Hukukunda Adil Yargılanma Hakkına Karşı Suçlar’ (PhD thesis, Galatasaray University 2013) 357.

⁸⁴ Behiye Eker Kazancı, ‘Kişilerin İzinsiz Görüntülerinin Alınmasının TCK m. 134 Çerçevesinde Korunması’ (2007) 9(1) DEÜHFD 131, 134.

⁸⁵ Akyıldız (n 67) 71.

⁸⁶ Çakır, ‘Gizliliğin İhlali Suçu (TCK m. 285)’ (n 35) 30.

⁸⁷ Veli Özer Özbek and others, *Ceza Muhakemesi Hukuku* (9th edn, Seçkin Yayıncılık 2017) 685.

⁸⁸ Ekmekçi (n 83) 357.

⁸⁹ Soyer Güleç (n 38) 94.

LCP for the actions to be taken against the behaviour of the parties that may disturb the peace and order of the court during the hearing, Art. 153 of the CPL will now be applicable in accordance with Art. 447, para. 2 of the CPL. *Ekmekçi* states that the scope of the crime under Art. 286 of the TCC, which is referred to by the provision in Art. 153, para. 3 of the CPL, may be considered to include the hearings of administrative and tax cases in the administrative judiciary but this conclusion should not be reached in the face of the prohibition of reasoning by analogy and extensive interpretation.⁹⁰ However, in our opinion, in accordance with the explicit provision of Art. 447, para. 2 of the CPL, the regulation under Art. 153 of the CPL will also be applicable to the hearings of administrative and tax cases in the administrative judiciary. As a matter of fact, Art. 447, para. 2 of the CPL titled “Provisions related to the procedure in other laws” reads as follows: “*The references made in the legislation to the repealed Law of Civil Procedure dated 18/6/1927 and numbered 1086 shall be deemed to have been made to the articles of the Civil Procedure Law that correspond to these provisions.*”; Art. 31, para. 1 of the CAP titled “Cases where the Law of Civil Procedure and the Tax Procedure Code apply” states that “*Regarding matters on which the present Code does not provide a rule; ... the provisions of the Law of Civil Procedure shall apply to the issues related to the measures to be taken against the parties’ actions that disturb the peace and order of the court during the hearing, electronic processes, and the use of audio and visual media transferring in the conduct of the hearing. ...*” and Article 153 of the CPL titled “Prohibition of recording and broadcasting” reads as follows: “(1) *No photographs may be taken, and no audio and visual recording may be made during the hearing. However, without prejudice to the case file, the court may take photographs and recordings in cases necessitated by the proceeding. All kinds of documents and minutes in the case file, which include the recordings and footage made this way and issues concerning personal rights, cannot be broadcasted anywhere without the express permission of the court and the persons concerned. (2) The person who violates this prohibition during the hearing shall be subject to the provisions of Article 151. (3) The provisions of Article 286 of the Turkish Criminal Code shall also be applied to the person who violates the prohibition of recording and broadcasting.*”

Another point to be mentioned here is that, according to the opinion accepted in legal doctrine, crimes are divided into two as harm crimes and danger crimes, in terms of the effect of the committed act on the subject matter of the crime.⁹¹ In harm crimes, the subject matter of the act is harmed by the act in accordance with the type, while in danger crimes, it is sufficient to cause a danger for the subject matter of the act specified in the legal definition of the crime with the act committed. The danger crimes are also divided into two as abstract and concrete danger crimes. Abstract danger crimes refer to the types of crimes in which the commission of the act specified in the legal definition of the crime is deemed sufficient for the occurrence of that crime. In concrete danger crimes, on the other hand, in addition to the commission of the act specified in the legal definition of the crime, it is also necessary to investigate whether this act actually causes a danger in terms of the subject matter of the crime.⁹²

According to the opinion stating that the result of the crime of recording audio or visual media is recording or transferring, it is argued that this crime is a concrete danger crime, and although there is no need for harm to occur, the judge will evaluate the danger of harm in the specific case before him or her.⁹³ However, the opposing opinion states that this crime is an abstract danger crime, and it is accepted that a concrete result or a concrete danger is not required for the commission of the crime and that a danger arises on the legally protected interests at the time of committing the acts specified in Art. 286 of the TCC.⁹⁴

In abstract danger crimes, the legislator considers a certain type of behaviour to be sufficiently dangerous that it is not necessary for a concrete danger to arise from the beginning, and for this reason, it is considered sufficient for the perpetrator to be sentenced even if he or she only engages in an activity that poses a danger.⁹⁵ From this point of view, our shared opinion is that the crime of recording audio or visual media is an abstract danger crime, which there is an act that constitutes a danger in terms of the protection of the presumption of innocence and the conduct of the proceedings taking place in a certain order, especially in criminal proceedings, with the unauthorised recording or transferring activities during the investigation or prosecution proceedings, and there is no need for a concrete danger to arise.

B. Perpetrator

Every crime has a person, i.e., a perpetrator, who commits the criminal act.⁹⁶ Although some of the crimes may be committed by persons who have certain characteristics of perpetrators and are under a special obligation,⁹⁷ as a rule, the majority of the crimes in the Criminal Code are crimes that can be committed by anyone. Specific crimes, on the other hand, are crimes for which the legal definition of the crime states that only persons with certain characteristics can be perpetrators.⁹⁸

⁹⁰ Ekmekçi (n 83) 358.

⁹¹ Özgenç (n 62) 221.

⁹² Koca and Üzülmöz (n 80) 118-119.

⁹³ Memiş Kartal (n 41) 398.

⁹⁴ Gökcan and Artuç (n 75) 9321.

⁹⁵ Uğur Ersoy, ‘Ceza Hukukunun Gri Alanı: Tehlike Suçları’ (2020) 11(41) TAAD 27, 44-45.

⁹⁶ Koca and Üzülmöz (n 80) 112.

⁹⁷ Özgenç (n 62) 212.

⁹⁸ Koca and Üzülmöz (n 80) 113.

The crime of recording audio or visual media is a crime that can be committed by anyone⁹⁹ and is not a specific crime.¹⁰⁰

It is worth noting that press members who are present during the investigation and prosecution proceedings will also be liable under Art. 286 of the TCC if they record or transfer audio or visual media without authorisation.¹⁰¹ Therefore, there will be no difference between the perpetrator being any individual or a member of the press.¹⁰²

In addition, the perpetrator of this crime can only be natural persons, and according to Art. 20, para. 2 of the TCC titled “Individuality of criminal responsibility”, which states that “*Criminal sanctions cannot be imposed on legal persons. However, the sanctions in the form of security measures prescribed by the law due to the crime are reserved.*” Therefore, no criminal sanction will be imposed on legal persons, but security measures will be applied. These security measures are regulated under Art. 60 of the TCC.¹⁰³

C. Victim

The victim of the crime is the person to whom the subject matter of the crime belongs,¹⁰⁴ and if the subject matter of the crime belongs to a certain person or persons, the victim is also this person or persons. If the subject matter of the crime does not belong to a certain person but belongs to everyone who makes up the society, the victim is all the individuals who make up the society. On the other hand, the victim of the crime can only be a natural person, while the state is not the victim of the crime; it can only be adversely affected by the crime. Legal persons or institutions may also be adversely affected by the crime, but they cannot be the victims of the crime. Indeed, the concept of victim should not be confused with the concept of being adversely affected by the crime. Even if the victim is also the person adversely affected by the crime, the person adversely affected by the crime may not always be the person who is victimised by the commission of the crime.¹⁰⁵

According to one opinion in legal doctrine, it is stated that there is no victim of the crime of recording audio or visual media,¹⁰⁶ and according to another opinion, the person or persons whose presumption of innocence is violated are the victims of this crime.¹⁰⁷ In addition, it is also argued that the victim of this crime is the judiciary.¹⁰⁸

However, based on the opinions, which we also agree with, that the state cannot be considered the victim of the crime, but it can only be adversely affected by the crime¹⁰⁹ and that every crime has a victim as well as a perpetrator,¹¹⁰ because every crime will have a victim due to the violating nature of the crime and there can be no crime without a victim,¹¹¹ in our opinion, all individuals who make up the society are victims of this crime.

D. Act

The act as an element is necessarily included in the definition of the crime in the law.¹¹² The act constituting the crime under Art. 286 of the TCC is the unauthorised recording or transferring of audio or visual media during investigation and prosecution proceedings.

The investigation, which is included in the legal definition of this crime, refers to the stage that initiates with the receiving of information about the crime¹¹³ and lasts from the learning of the suspicion of the crime until the admission of the indictment.¹¹⁴ The task of the investigation stage is to prepare the prosecution,¹¹⁵ and the prosecution stage is the stage that initiates with the

⁹⁹ Ünver, *İftira, Suç Uydurma, Suç Üstlenme* (n 65) 538; Memiş Kartal (n 41) 397.

¹⁰⁰ Selen Evirgen, ‘Türk Ceza Kanunu Madde 286’da Düzenlenen Ses veya Görüntülerin Kayda Alınması Suçu’ (2020) 5(1) Çankaya Üniversitesi Hukuk Fakültesi Dergisi 1527, 1534.

¹⁰¹ Dilara Yüzer, ‘Basın Yoluyla Adli Haberlerin Verilişi ve Suçsuzluk Karinesi’ (2013) 15(SI) DEÜHFD (Prof. Dr. M. Polat Soyer’e Armağan) 1653, 1685-1686.

¹⁰² Gökcan and Artuç (n 75) 9321.

¹⁰³ According to Art. 60 of the TCC titled “*Security measures for legal persons*”: “(1) *In the event of a conviction for intentional crimes committed for the benefit of a legal person with the participation of organs or representatives of a private law legal person that operates on the basis of a permit granted by a public institution and by abusing the authorisation granted by this permit, the permit shall be cancelled.*”

(2) *The provisions on confiscation shall also apply to private law legal persons for crimes committed in their benefit.*

(3) *In cases where the application of the provisions of the preceding paragraphs may result in more severe consequences compared to the act committed, the judge may not order these measures.*

(4) *The provisions of this article shall be applied in cases where the law has specified separately.”.*

¹⁰⁴ Özgenç (n 62) 223.

¹⁰⁵ Koca and Üzülmöz (n 80) 115.

¹⁰⁶ Meran (n 71) 366.

¹⁰⁷ Memiş Kartal (n 41) 397.

¹⁰⁸ Meran (n 71) 366; Memiş Kartal (n 41) 397.

¹⁰⁹ Koca and Üzülmöz (n 80) 115.

¹¹⁰ Mehmet Emin Artuk and others, *Ceza Hukuku Genel Hükümler* (16th edn, Adalet Yayınevi 2022) 383.

¹¹¹ Tuğrul Katoğlu, ‘Ceza Hukukunda Suçun Mağdur Kavrınının Sınırları’ (2012) 61(2) AÜHFD 657, 682.

¹¹² Özgenç (n 62) 179.

¹¹³ Bahri Öztürk and others, *Nazari ve Uygulamalı Ceza Muhakemesi Hukuku* (12th edn, Seçkin Yayıncılık 2018) 596.

¹¹⁴ Özbeke and others (n 87) 215.

¹¹⁵ Centel N and Zafer H, *Ceza Muhakemesi Hukuku*(13th edn, Beta Yayıncılık 2016) 81.

admission of the indictment and lasts until the finalisation of the judgement.¹¹⁶ The proceedings carried out at this stage are also referred to as prosecution.¹¹⁷

It should be noted that in terms of the definition of the act in the legal definition of the crime, it is possible to classify the crimes as free-action crimes, fixed-action crimes, crimes with a single act, crimes with multiple acts, crimes with alternative acts, continuing crimes,¹¹⁸ crimes of omission,¹¹⁹ and crimes of commission.¹²⁰

Since the commission of the crime under Art. 286 of the TCC is based on active behaviour, it is a crime of commission.

Moreover, the mentioned crime is a conduct crime, meaning that it does not require a specific result for it to be considered complete.¹²¹

Furthermore, this crime is also a crime with alternative acts,¹²² which requires the unauthorised recording or transferring of audio or visual media by the perpetrator during the investigation and prosecution proceedings, in terms of the presence of a typical act.¹²³ Under this crime, even if the recording and transferring are carried out together, only one act is punishable.¹²⁴ As a matter of fact, even if all the acts specified in the statutory definition are performed, there will be a single crime, but this situation may also be taken into consideration in terms of determining the basic penalty (Art. 61 of the TCC).¹²⁵ Also, the act of recording or transferring does not need to cover the entire procedural process, and a momentary recording or transferring audio or visual media related to the procedural process also constitutes this crime.¹²⁶

In our opinion, the crime of recording audio or visual media, which is also a crime with alternative acts, is a fixed-action crime, in the legal definition of which the types of acts that can be committed are specified.

Additionally, the acts that constitute this crime, namely “recording” or “transferring” as alternative acts regulated in the legal definition of the crime, involve a continuous process. Therefore, in our opinion, this crime is a continuing crime.

According to Ünver’s opinion, which we also concur with, the use of a plural expression in Art. 286 of the TCC, as if it is necessary to record or transfer all types of audio or visual media during the investigation and prosecution proceedings, is misleading. This error should be rectified through a legal amendment, and in fact, it should be sufficient to record or transfer even ‘a single type of audio or visual medium’ during the investigation or prosecution proceedings in terms of the typical act.¹²⁷ In our opinion, the ratio legis of the text of the law, i.e., the real reason behind a law,¹²⁸ which is translated into Turkish as “öz amaç” (core purpose) in legal doctrine,¹²⁹ should be considered, therefore, the text of the article in question should be amended in such a way as to prevent erroneous interpretation, and until this amendment is made, an interpretation should be made in accordance with the legally protected interest and the ratio legis of the norm.¹³⁰

Therefore, according to the shared opinion, since the drafting of Art. 286 of the TCC is contrary to its purpose, it should be revised. As a matter of fact, if a literal interpretation is given to the wording of this article, it would also require that the subject matter of the act of recording or transferring be the audio or visual media during both the investigation and the prosecution proceedings due to the conjunction “and” used in the legal definition. However, Ünver suggests that the conjunction “or” should be used instead of “and” in the article text, thus clearly emphasising that the recording or transferring of audio or visual media during the investigation or prosecution proceedings would be sentenced.¹³¹ According to Gökcan/Artaç, even though the conjunction “and” is used instead of “or” in the article in question, the act can be committed during the “investigation or prosecution” proceedings in terms of the general meaning of the sentence.¹³² Indeed, Baytaç points out that in some cases, the conjunction “or” may be used instead of the conjunction “and”, and that the conjunction “and” may be used instead of the conjunction “or”, and that it is possible to encounter such misuses in the TCC.¹³³

Consequently, as previously stated, if the ratio legis of the text of the law, i.e., its core purpose,¹³⁴ is taken into consideration

¹¹⁶ Özbek and others (n 87) 599.

¹¹⁷ Öztürk and others (n 113) 625.

¹¹⁸ Özgenç (n 62) 183; Koca and Üzülmöz (n 80) 120.

¹¹⁹ Koca and Üzülmöz (n 80) 120; Artuk and others (n 110) 325.

¹²⁰ Artuk and others (n 110) 325.

¹²¹ Evirgen (n 100) 1539; Gökcan and Artaç (n 75) 9321, 9323.

¹²² Gökcan and Artaç (n 75) 9321; Ünver, *İftira, Suç Uydurma, Suç Üstlenme* (n 65) 538.

¹²³ Ünver, *İftira, Suç Uydurma, Suç Üstlenme* (n 65) 538.

¹²⁴ Memiş Kartal (n 41) 397.

¹²⁵ Koca and Üzülmöz (n 80) 122.

¹²⁶ Gökcan and Artaç (n 75) 9322.

¹²⁷ Ünver, *İftira, Suç Uydurma, Suç Üstlenme* (n 65) 539.

¹²⁸ Yasemin Işıktaç and Sevtap Metin, *Hukuk Metodolojisi* (5th edn, Filiz Kitabevi 2016) 204.

¹²⁹ Abdullah Batuhan Baytaç, *Kanunilik İlkesi Bağlamında Ceza ve Ceza Muhakemesi Hukukunda Yorum* (On İki Levha Yayıncılık 2018) 257.

¹³⁰ Ünver, *İftira, Suç Uydurma, Suç Üstlenme* (n 65) 539.

¹³¹ *ibid* 538.

¹³² Gökcan and Artaç (n 75) 9322.

¹³³ Baytaç (n 129) 230.

¹³⁴ *ibid* 257.

in terms of the crime of recording audio or visual media, it is believed that it will be appropriate to revise the plural expression in Art. 286 of the TCC and use "... *audio or any type of visual medium* ..." instead of "... *audio or visual media* ..." and also the phrase "... *investigation or prosecution* ..." instead of "... *investigation and prosecution* ..." in the same provision, which is contrary to the principle of legal certainty in the context of the principle of the legality of crimes and punishments. Therefore, according to our suggestion, it will be appropriate to revise Art. 286 of the TCC with a legislative amendment as follows: "*Any person who records or transfers audio or any type of visual medium without authorisation during the investigation or prosecution proceedings shall be sentenced to up to six months' imprisonment.*".

In addition to this, according to the shared opinion, the erroneous statement "... *no audio and visual recording may be made* ..." in Art. 153, para. 1 of the CPL titled "Prohibition of recording and broadcasting" has also created a situation contrary to the principle of legal certainty as to whether only audio recording or only visual recording will constitute the crime of recording audio or visual media.¹³⁵ Therefore, at this point, it is necessary to examine the ratio legis of the text of the law, i.e., its core purpose,¹³⁶ and make a legislative amendment in order to eliminate this situation contrary to the principle of legal certainty and to ensure compatibility with the regulation in the type of crime in Art. 286 of the TCC, which is referred to by Art. 153, para. 3 of the CPL, and using the conjunction "*or*" instead of "*and*" in the phrase "... *audio and visual recording* ..." Art. 153, para. 1 of the CPL would be appropriate. Thus, in accordance with our proposal, it will be appropriate to revise the first sentence of the provision in Art. 153, para. 1 of the CPL as follows: "*No photographs may be taken, and no audio or visual recording may be made during the hearing*".

Moreover, in terms of the provision in Art. 183 of the CPC, it is necessary to first focus on the problem of determining when the trial will start. As stated in the first sentence of Art. 191, para. 1 of the CPC, the hearing starts after it is determined whether the defendant and his or her defence counsel are present and whether the summoned witnesses and experts have arrived. Pursuant to the third sentence of the same article, the chief judge or the presiding judge shall announce the commencement of the hearing by reading the decision on the admission of the indictment. In this situation, there may be hesitation as to whether the moment when the hearing starts is the moment when the roll call is taken or the moment when the decision on the admission of the indictment is read. According to *Özbek et al.*, especially in hearings that must be held in private, the decision on the admission of the indictment must also be private, and for this reason, the moment when the hearing starts should be accepted as the moment of the roll call, which is an earlier stage. Such an acceptance is also compatible with the purpose and meaning of the prohibition of recording.¹³⁷

Furthermore, the prohibition in Art. 183 of the CPC covers all judicial proceedings inside and outside the courthouse,¹³⁸ and it can be concluded that this provision as a whole is a prohibition only for judicial proceedings. According to *Soyer Güleç*, if this regulation is intended to be interpreted in such a way that the prohibition of recording is only applicable to the conduct of judicial proceedings and not to all kinds of acts and processes, then it would be more appropriate to explicitly state this without any hesitation. When interpreting the aforementioned Art. 183 of the CPC, it is necessary to examine the main purpose of the legislator,¹³⁹ i.e., its core purpose.¹⁴⁰ From this point of view, it can be concluded that the legislator, in fact, aims to protect the presumption of innocence and the right to a fair trial, and gives a special and separate importance to the stage after the start of the trial. Therefore, the prohibition of recording "during the hearing" and "during the conduct of all judicial proceedings inside and outside the courthouse" is absolute. In fact, this prohibition shall be applicable while the defendant is being taken to the courtroom in the corridors of the courthouse, during the conduct of an autopsy or discovery process, or while the showing of the crime scene processes is being carried out by the police. Thus, the harm to the reputation and good name of persons who do not yet have a final judgement of conviction against them is prevented,¹⁴¹ and it is also tried to prevent these persons from being portrayed as criminals by the press during the discovery and showing of the crime scene processes. This is because when it is later realised that the suspect or defendant is innocent, no reports are made on this matter.¹⁴²

The aforementioned article does not protect processes related to misdemeanours or disciplinary crimes, and examples of cases that constitute the crime of recording audio or visual media include the acts of recording or transferring processes such as crime scene investigation or taking statements of suspects or witnesses during the investigation stage. In addition, similar acts regarding processes such as hearings or discovery conducted by the court will also constitute this crime.^{143,144}

However, since the subject matter of this crime is the unauthorised recording or transferring of audio or visual media during

¹³⁵ Ekmekçi (n 83) 357.

¹³⁶ Baytaz (n 129) 257.

¹³⁷ Özbek and others (n 87) 686.

¹³⁸ Savaşçı (n 33) 286.

¹³⁹ Soyer Güleç (n 38) 93.

¹⁴⁰ Baytaz (n 129) 257.

¹⁴¹ Soyer Güleç (n 38) 93-94.

¹⁴² Özbek and others (n 87) 687.

¹⁴³ Gökcan and Artuç (n 75) 9322.

¹⁴⁴ "..... In the examination made by taking into account that the appeal for the reversal of judgement in favour of law will not have adverse consequences, according to the scope of the file; by means of Article 153, paragraph 3 of the Civil Procedure Law No. 6100 and Article 286, paragraph 1 of the Turkish Criminal Code No. 5237, considering that the unauthorised recording of audio or visual media during the hearing in the civil courts constitutes a crime, and that the discovery processes are subject to the same disciplinary rules that the hearings

the investigation and prosecution proceedings, it will not constitute the crime specified in Art. 286 of the TCC if it is recorded and transferred between sessions, rather than during the investigation and prosecution proceedings.^{145,146} Indeed, according to *Ekmekçi*, if the prohibition in question is not limited in scope to judicial proceedings, even the taking of souvenir photographs by an acquitted defendant and his or her lawyer or colleagues working in the clerk's office in a courthouse building or making video recordings for similar personal purposes would have to be accepted within the scope of this prohibition, which is incompatible with the purpose of the relevant article.^{147,148}

It should be noted here that if the public prosecutor conducting the investigation proceedings or the judge conducting the prosecution proceedings gives permission, the recording or transferring of audio or visual media during these proceedings will not constitute the crime regulated in Art. 286 of the TCC. The public prosecutor is authorised to initiate, conduct and finalise the investigation proceedings. The chiefs and officers of the judicial police do not have the authority to permit the recording and transferring of audio or visual media during the aforementioned proceedings. In terms of investigation proceedings, the authority for processes such as identification, crime scene observation and determination, crime scene discovery, showing the crime scene processes carried out by the suspects, autopsy processes, hearing of witnesses, suspects and experts is the public prosecutor. Therefore, recording or transferring audio or visual media without authorisation during the investigation proceedings, which continue until the admission of the indictment, is prohibited. Violations of this prohibition constitute the crime regulated in Art. 286 of the TCC.¹⁴⁹ In terms of prosecution proceedings, the judge may authorise the recording of the hearing.¹⁵⁰ Therefore, if a person performs the said act of recording or transferring without authorisation, this crime will be committed. The aforementioned authorisation does not necessarily have to be in writing. Even if this permission is given orally, the perpetrator will be deemed "authorised" for this act of recording or transferring, and the act performed will be considered lawful.¹⁵¹

In addition, it should be noted that in cases where the legal definition of a crime provides for the unauthorised conduct of the act or the absence of the permission of the competent authority, the issue arises as to whether this is to be considered within the scope of the material elements of the crime or as a reason for legal justification. At this point, it is necessary to evaluate whether the act constitutes wrongfulness worthy of punishment without violating the requirement of obtaining permission from the competent authority.^{152,153} In terms of this evaluation, it is also necessary to determine the purpose of the permission granted by the authority,

are subject to, the authority did not deem it appropriate to decide to accept the objection on the grounds that the discovery is not an investigation and prosecution proceeding, which is an element of the crime imputed, and that a decision of acquittal should be made for the defendant, and the said decision should be reversed in accordance with Article 309 of the Criminal Procedure Code No. 5271, the necessity of reversal of the aforementioned decision in accordance with the request of the Ministry of Justice dated 02.11.2016 and numbered 94660652-105-63-6869-2016-Reversal of the judgement in favour of law, with the notification of the Chief Public Prosecutor's Office at the Court of Cassation dated 18.11.2016 and numbered 2016/389007 and the decision of the 8th Criminal Chamber of the Court of Cassation dated 23.11.2017, case numbered 2017/9393 and decision numbered 2017/13181 with the decision of lack of jurisdiction was notified, and the case documents were submitted to the chamber; Therefore, ordered, adjudged, and decreed that:

Since the request for reversal in the notification based on the request for reversal of the judgement in favour of law is deemed appropriate in accordance with the scope of the file examined, the decision of the Sanliurfa 1st Heavy Criminal Court dated 11.03.2016 and numbered 2016/204 shall be REVERSED in accordance Article 309 of the Criminal Procedure Code No. 5271, Court of Cassation 12th Criminal Chamber (CC.), 07.03.2018, Case No. (C.) 2017/11910, Decision No. (D.) 2018/2544.

¹⁴⁵ Parlar and Öztürk (n 70) 420-421.

¹⁴⁶ "..... Considering that it is understood that the visual media subject matter to the crime was not taken at the time of the trial, and since the elements of the crime imputed to the defendant have not been fulfilled, the decision should have been made to acquit the defendant in accordance with Article 223, paragraph 2-a of the Criminal Procedure Code No. 5271, while it is deemed contrary to law to decide 'acquit the defendant in accordance with Article 223, paragraph 2-e of the Criminal Procedure Code due to the fact that the crime has not been proven to have been committed by the defendant', and this is a mistake that may be amended without retrial in accordance with Article 280, paragraph 1-a, and Article 303, paragraph 1 of Criminal Procedure Code,

By removing the 1st paragraph of the ruling and replacing it with 'ACQUITTED in accordance with Article 223, paragraph 2-a of the Criminal Procedure Code since the legal elements of the crime imputed to the defendant have not been fulfilled' and leaving the other parts as they are, the verdict is AMENDED,

Since it is understood that there is no procedural or substantive violation of law in the decision of the first instance court other than the matter amended above, that there is no deficiency in the evidence or proceedings, and that the evaluation in terms of evidence is appropriate, in the light of the above-mentioned amendments, the decision in accordance with Article 280, paragraph 1-a and 1-c of the Criminal Procedure Code, DISMISSAL OF THE APPEAL AS BEING AMENDED," Adana Regional Courts of Appeal (RCA) 9th CC., 03.02.2022, C. 2019/1370, D. 2020/796.

¹⁴⁷ Ekmekçi (n 83) 364.

¹⁴⁸ "..... considering the fact that the photographs taken by the defendant outside the courtroom did not include the court board and that his or her action was not of the nature to record the proceedings of the prosecution conducted during the hearing, and the defendant's defence that he or she took the photograph of his or her friend as a souvenir; to decide to convict the defendant as written instead of acquitting the defendant of the crime imputed, without considering that there is no sufficient, clear, and convincing evidence that the defendant acted with the intention of recording the court board and/or the audio and visual media related to the proceedings carried out in the hearing,

As it is contrary to the law, the defendant's request for an appeal has been deemed appropriate in this respect, and since the said unlawfulness may be amended without retrial in accordance with Article 280, paragraph 1-a, and Article 303, paragraph 1-a of the Criminal Procedure Code No. 5271,

By completely removing the part of the ruling paragraph regarding the conviction of the defendant for the crime of 'recording audio and visual media' and its consequences; For; 'Although a public case has been filed against the defendant with the request for punishment for the crime of 'Recording Audio or Visual Media'; since the act imputed has not been proven to have been committed by the defendant, the defendant is ACQUITTED of the imputed crime in accordance with Article 223, paragraph 2-e of the Criminal Procedure Code, The costs of the judicial proceedings on the public'

DISMISSAL OF THE APPEAL AS BEING AMENDED due to the writing these statements and the contradiction of the law," Kayseri RCA 7th CC., 03.02.2022, C. 2022/86, D. 2022/162.

¹⁴⁹ Parlar and Öztürk (n 70) 419, 421.

¹⁵⁰ Erdener Yurtcan, *Yargıtay Kararları Işığında İftira Suçu (Adliye Karşı Diğer Suçlar)* (3rd edn, Seçkin Yayıncılık 2019) 471.

¹⁵¹ Gökcan and Artuç (n 75) 9322.

¹⁵² Neslihan Gökürk, 'Suçun Yasal Tanımında Yer Alan 'Hukuka Aykırılık' İfadesinin İcra Ettiği Fonksiyon' (2016) 7(1) İnÜHFD 407, 444-445.

¹⁵³ As a matter of fact, according to *Gökürk*: "..... if the act has the content of wrongfulness that is worthy of punishment solely due to the absence of the required licence or permit; in other words, if a judgement of worthlessness cannot be made about the act without taking into account the necessity of the permit, or if the act is socially appropriate, it is the objective element of typicality and the absence of the permit prevents the typicality of the act. This is a matter that requires a separate evaluation for each type of crime." (ibid 445.)

and “.... if the permission is intended to establish a more effective control mechanism over the desired behaviour, or at least to ensure compliance with the social contract, the failure to obtain such permission is an element of typicality”.¹⁵⁴ From this point of view, in our opinion, the act of recording or transferring audio or visual media in this type of crime cannot be deemed worthy of punishment for having wrongful content without taking into account the phrase “... *without authorisation* ...” stated in the relevant article. This is because the phrase “... *without authorisation* ...” used in the legal definition of this crime regulates the punishment of the act constituting the crime based on the absence of the specified “authorisation”. Therefore, a judgement of worthlessness cannot be made about the act of this crime without taking into account the necessity of the “authorisation” expressed in the text of the article, and since the aim of the requirement of “authorisation” here is to provide a more effective control and supervision mechanism for the specified act, the presence of the requirement of “authorisation” does not serve as a reason for legal justification; rather, it is an element included in the typicality in the context of the material elements of the crime.

1. Recording

One of the alternative acts in the legal definition of the crime of recording audio or visual media is “recording”.

Recording is defined as “Transferring audio or image onto magnetic tape”.¹⁵⁵ The term “recording” is used to refer to any activity aimed at making a conversation capable of being listened to again.¹⁵⁶ Today, there are many types of recording devices. It is necessary to evaluate all kinds of data recorded with audio, visual media, or audio and visual media recording devices within this scope, and such recordings are important in terms of criminal procedure, sometimes because they contain evidence of a crime and sometimes because their content constitutes a crime.¹⁵⁷ Recording with an audio recorder, an audio-visual recording device capable of recording audio or visual media, a camera, a mobile phone with such functions, etc., is included within this scope.¹⁵⁸ Devices that record audio or visual media, based on their technical specifications, shall also be considered within the scope of the crime under Art. 286 of the TCC.¹⁵⁹

In legal doctrine, it is stated that the provision under Art. 147, para. 1, subpara. (h) of the CPC, which states that “*Technical means shall be utilised in the recording of a statement and interrogation processes*”, imposes an obligation to use technical means for the statement and interrogation of suspects during the investigation stage, but it is also necessary to have the opportunity to use technical means for this purpose. Therefore, while it would be appropriate to make a recording to prevent allegations of unlawfulness during a statement and interrogation, it should be taken into account to what extent the use of technical means is within the bounds of possibility. Although the Code mentions the recording of a statement and interrogation by making use of technical means, it does not specify how the recordings should be made or which specific technical means should be utilised. In this regard, the Audio-Visual Information System (AVIS) may be used.^{160,161}

2. Transferring

Another alternative act in the legal definition of the crime regulated in Art. 286 of the TCC is “transferring”.

Transferring is defined as “Performing the act of transfer, conveying from one place to another, transmitting”.¹⁶² In legal doctrine, it is stated that the act of recording the statement of the suspect taken at the prosecutor’s office without authorisation and giving it to third parties can be considered the act of “transferring” regulated under Art. 286 of the TCC, and broadcasting the interrogation of the defendant at the hearing on television with audio and visual media can also be considered within this scope.¹⁶³ As in the act of “recording”, in the act of “transferring”, transferring with an audio recorder, an audio-visual recording device capable of recording audio or visual media, a camera, a mobile phone with such functions, etc., is within this context.¹⁶⁴

It should be noted that the conduct of the hearings by means of audio and visual media transfer, which is an important technological opportunity, was first introduced with the CPL.¹⁶⁵ One of the regulations referred to in Art. 153 of the CPL is Art.

¹⁵⁴ *ibid*

¹⁵⁵ ‘Kaydetmek’, *Türkçe Sözlük* (10th edn, Türk Dil Kurumu Yayınları 2005) 1114.

¹⁵⁶ Mahmut Koca and İlhan Üzülmüş, *Türk Ceza Hukuku Özel Hükümler* (7th edn, Adalet Yayınevi 2020) 536.

¹⁵⁷ Yıldız (n 15) 253.

¹⁵⁸ Gökcan and Artuç (n 75) 9322.

¹⁵⁹ Yurtcan (n 150) 471.

¹⁶⁰ Faruk Turhan and Murat Aksan, ‘Ceza Muhakemesinde Şüphelinin İfadesinin Alınması ve Sorguya Çekilmesine İlişkin Hükümlerin Eleştirel Bir Değerlendirmesi’ (2020) 24(2) AHBVÜ-HFD 289, 321.

¹⁶¹ AVIS is defined in Art. 3, para. 1, subpara. (c) of the Regulation on the Utilisation of Audio-Visual Information Technology Systems in Criminal Procedure: “*AVIS: The Audio-Visual Information System, in which audio and visual media are transferred, recorded, and stored electronically at the same time in the National Judiciary Informatics System.*”. AVIS record is defined in Article 32 of the Regulation on the Execution of Administrative and Clerical Services of Regional Courts and First Instance Courts of Judicial Jurisdiction and Chief Public Prosecutors’ Offices as “(1) *It is the record that contains the phases of the processes regarding the use of AVIS to record and store visual media and audio of persons who were deemed necessary to be heard. (2) This record consists of the columns of sequence number, name of the department and case number, title and identity information of the person being heard, date and time of the hearing, type of crime, name of the unit and hall where the testimony will be taken, and the thoughts.*”.

¹⁶² ‘Nakletmek’, *Türkçe Sözlük* (10th edn, Türk Dil Kurumu Yayınları 2005) 1452.

¹⁶³ Yurtcan (n 150) 471.

¹⁶⁴ Gökcan and Artuç (n 75) 9322.

¹⁶⁵ Öztekin (n 24) 661.

151 of the same Law, and the conclusion that can be drawn from the provision in Art. 153 of the said CPL is that even if the hearing is conducted by means of audio and visual media transfer, the said audio and visual media transfer cannot be recorded by the court or the parties as a rule,^{166, 167, 168}

In addition, it should not be possible to record audio and visual media during the hearings as per the explicit provisions of Art. 153 of the CPL and Art. 14, para. 2 of the Regulation on the Conduct of the Hearings by Transferring Audio and Visual Media in Civil Procedure, and Art. 15, para. 2 and para. 3 of the same Regulation. In order for the hearing held via videoconference to be recorded, the court must make a decision regarding this matter if it is necessary due to a mandatory requirement of the proceeding. In this case, pursuant to the provision in Art. 28, para. 1, subpara. (d) of the Personal Data Protection Law (PDPL),¹⁶⁹ the PDPL will not be applicable,^{170, 171}

E. Result

Crimes can be divided into two categories as conduct crimes and result crimes, according to the presence or absence of a result in their legal definitions.¹⁷² As a matter of fact, most crimes are completed with the conduct of the act, and in legal doctrine, these crimes are referred to as conduct crimes. On the other hand, in order for some crimes to be completed, apart from the conduct of the act, the result specified in the legal definitions must also be fulfilled, and these crimes are named as result crimes in legal doctrine.¹⁷³

From this point of view, the crime of recording audio or visual media is a conduct crime that does not require a result for its completion and is completed by the unauthorised recording or transferring of audio or visual media during the investigation or prosecution proceedings.¹⁷⁴

F. Causation

Causation establishes the objective relationship between the perpetrator and the result of his or her act.¹⁷⁵ However, causation is a necessary fact in crimes that include the result as well as the act in the legal definition, and in conduct crimes, since it is sufficient to perform the act in terms of the occurrence of the crime, a causation problem will not arise in these crimes.¹⁷⁶

Therefore, since the type of crime under Art. 286 of the TCC is a conduct crime, there is no causation problem.¹⁷⁷

IV. Mental Element (*Mens Rea*)

It is necessary to understand the mental element of typicality as the mental connection between the person and the act he or she committed.¹⁷⁸ The first thing that comes to mind in terms of the mental element of the crime is intent and negligence, which are understood not as forms of culpability but as forms of wrongfulness.¹⁷⁹ According to the level of the perpetrator's knowledge of

¹⁶⁶ Barış Mıdık, 'Medenî Yargıda E-Duruşma Pilot Uygulaması ve Yargının Elektronik Dönüşümü Üzerine Bazı Düşünceler' (*Lexpera Blog*) <<https://blog.lexpera.com.tr/medeni-yargida-e-durusma-pilot-uygulamasi-ve-yarginin-elektronik-donusumu-uzerine-bazi-dusunceler/>> accessed 17 March 2023.

¹⁶⁷ As a matter of fact, according to Art. 151 of the CPL titled "Order of the hearing" reads as follows: "(1) The judge shall prohibit the person who disrupts the order of the hearing from doing so and, if necessary, order him to be removed from the courtroom immediately, except for lawyers. (2) If a person disrupts the order of the court or continues to utter an inappropriate word or behave in the presence of the court despite the warning, he or she shall be immediately arrested and subjected to disciplinary detention of up to four days. The provision of this paragraph shall not apply to lawyers. (3) If the act that disrupts the order of the court or the improper words or behaviour in the presence of the court constitutes a separate crime, a report shall be sent to the Chief public prosecutor's office and, if necessary, the arrest of the perpetrator, except for lawyers, shall be ordered."

¹⁶⁸ ".... Failure to write the phrase with reference to Article 153, paragraph 3 of the Civil Procedure Law No. 6100 while determining the basic punishment for the defendant who violated the prohibition of recording during the hearing in the civil court,

Since it is contrary to the law and the decision is therefore REVERSED, and since it is possible to amend this matter without retrial in accordance with Article 322 of the Code of Criminal Procedure, the decision, which is in accordance with the procedure and law in other aspects by adding the phrase 'with reference to Article 153, paragraph 3 of the Civil Procedure Law No. 6100' to the first paragraph of the ruling after the phrase that corresponds to the action, is UPHeld WITH AMENDMENTS," Court of Cassation 9th CC., 05.02.2014, C. 2013/12037, D. 2014/1340.

¹⁶⁹ Art. 28, para. 1, subpara. (d) of the PDPL titled "Exceptions" states that "Personal data processed by judicial authorities or enforcement authorities with regard to investigation, prosecution, proceeding, or execution processes."

¹⁷⁰ Varol Karaosmanoğlu (n 20) 88.

¹⁷¹ According to Art. 14, para. 2 of the Regulation on the Conduct of the Hearings by Transferring Audio and Visual Media in Civil Procedure, titled "e-Hearing" regulated as follows: "No photographs may be taken, and no audio or visual media recording may be made during the e-Hearing. However, in cases where the trial necessitates it, the court may record. The provisions of Article 286 of the Turkish Criminal Code dated 26/9/2004 and numbered 5237 shall be applied to the person who violates the prohibition of recording and broadcasting." Art. 15, para. 2 of the said Regulation titled "Recording and storing" reads as follows: "The records obtained through the e-Hearing System shall be transferred to the computer on which the e-Hearing is conducted by the court or to a device capable of storing data and kept in the Central Recording System for two weeks to be stored in its file. At the end of the period, these data in the Central Recording System shall be irreversibly deleted." In the para. 3 of the said Article as follows: "The recordings obtained in this way cannot be broadcasted anywhere without the express permission of the court and the persons concerned."

¹⁷² Koca and Üzülmöz, *Türk Ceza Hukuku Genel Hükümler* (n 80) 127.

¹⁷³ Özgenç (n 62) 191.

¹⁷⁴ See also, Evirgen (n 100) 1539; Gökcan and Artaç (n 75) 9321, 9323.

¹⁷⁵ Özgenç (n 62) 191-192.

¹⁷⁶ Koca and Üzülmöz, *Türk Ceza Hukuku Genel Hükümler* (n 80) 130.

¹⁷⁷ See also, Evirgen (n 100) 1539.

¹⁷⁸ Koca and Üzülmöz, *Türk Ceza Hukuku Genel Hükümler* (n 80) 144.

¹⁷⁹ Özgenç (n 62) 242, 244.

the material elements of the crime committed, the intent is divided into two as direct intent and eventual intent. Direct intent is defined as the fact that the perpetrator knows or foresees with certainty that his or her act will fulfil the legal type.¹⁸⁰ In cases of eventual intent, although it is considered probable that the act decided to be committed will cause a certain result described by the law, the occurrence of this result is accepted, and the perpetrator does not refrain from committing the act.¹⁸¹

The crime regulated under Art. 286 of the TCC is a crime that can be committed intentionally,¹⁸² and can be committed with both direct intent and eventual intent. In terms of this crime, it is not required to act with a specific purpose or motive.

Although it is stated in legal doctrine that it is not possible to commit this crime with eventual intent,¹⁸³ it has been pointed out that some authors who hold this view have not stated their justifications.¹⁸⁴ Moreover, another author who argues that it is not possible to commit this crime with eventual intent justifies this position with their opinion that it is not possible to commit abstract danger crimes with eventual intent.¹⁸⁵

However, according to the opinion we agree with, in the case that the material elements of the crime in the legal definition of Art. 286 of the TCC are foreseen and accepted by the perpetrator, this crime may be committed with eventual intent.¹⁸⁶ For instance, if the perpetrator foresees and accepts that he or she is unauthorisedly recording or transferring audio or visual media during the investigation or prosecution proceedings, it is necessary to accept that he or she acts with eventual intent. In such a case, the penalty of the perpetrator will be compulsorily mitigated in accordance with Art. 21, para. 2 of the TCC.¹⁸⁷

While it is accepted that a crime can be committed intentionally even if it is not explicitly stated in the code, in order for the said crime to be committed through “negligence”, it is necessary for it to be clearly regulated in the code.¹⁸⁸ Therefore, this crime cannot be committed through negligence.¹⁸⁹

Since motive is not required for the commission of this crime,¹⁹⁰ the motive with which the perpetrator commits the act of recording or transferring is not important.¹⁹¹

It should be noted that, as explained under the heading “Act”, the presence of the “authorisation” in recording or transferring audio or visual media during the investigation or prosecution proceedings is not a reason for legal justification; since it is an element included in the typicality in the context of the material elements of the crime, when evaluated in terms of the relationship between intent and mistake, the crime of recording audio or visual media can be evaluated within the framework of mistakes that negate the intent, specifically, within the context of a mistake of fact. Therefore, the fact that the perpetrator does not know that it is necessary for him or her to have “authorisation” to record or transfer the audio or visual media is also within the scope of the mistake of fact under Art. 30, para. 1 of the TCC and negates the intent of the perpetrator regarding the crime. As a matter of fact, in order to establish the perpetrator’s intent, it is necessary for him or her to know this feature of the element included in the typicality that constitutes the basis of the wrongfulness.¹⁹² If it can be concluded that such a result would not have occurred if the required care and attention had been taken in relation to the result, in this case, although there will be wrongfulness committed with negligence,¹⁹³ since the legal definition of the crime of recording audio or visual media does not clearly state that it can be committed with negligence, the perpetrator will not be held criminally liable for this reason.

V. Unlawfulness Element

Unlawfulness as an element of the crime means that the act committed is contrary to and in contradiction with the whole legal order.¹⁹⁴ The reasons for legal justification, on the other hand, eliminate the unlawfulness and make the act recognised as legitimate by the law.¹⁹⁵ In the TCC, the reasons for legal justification are grouped under four main categories such as justification

¹⁸⁰ Koca and Üzülmöz, *Türk Ceza Hukuku Genel Hükümler* (n 80) 168-169.

¹⁸¹ Özgenç (n 62) 255.

¹⁸² “.... due to the defendant’s defence at all stages that his hand accidentally went to the camera while trying to end the call while he was in the courtroom and that he did not take any footage, an expert examination was carried out on the mobile phone registered in the order 2017/10545 of the evidence used in the crime. Since it was reported in the expert report prepared as a result of the examination that there were no footage and videos taken during the hearing on 05/12/2017, the date of the hearing on which the incident allegedly took place, and that no deleted photographs, audio recordings, and videos were found in the examination made using various programs in the phone memory, since there is no sufficient evidence to prove that the defendant acted with criminal intent, contrary to his or her defence, the decision of the first instance court shall be annulled . . . the imputed ‘Recording of Audio and Visual Media’ crime has not been proven to have been committed by the defendant, he or she is ACQUITTED in accordance with Article 223, paragraph 2, subparagraph (e) of the Criminal Procedure Code” Adana RCA 9th CC., 17.02.2021, C. 2019/2247, D. 2021/387.

¹⁸³ Meran (n 71) 369; Parlar and Öztürk (n 70) 421.

¹⁸⁴ Ünver, *İftira, Suç Uydurma, Suç Üstlenme* (n 65) 540.

¹⁸⁵ Ekmekçi (n 83) 377.

¹⁸⁶ See, Ünver, *İftira, Suç Uydurma, Suç Üstlenme* (n 65) 540; Memiş Kartal (n 41) 399; Gökcan and Artuç (n 75) 9322; Evirgen (n 100) 1540.

¹⁸⁷ Ünver, *İftira, Suç Uydurma, Suç Üstlenme* (n 65) 540.

¹⁸⁸ Hakan Karakehya, *İradilik Unsuru Bağlamında Ceza Hukukunda Kast* (Savaş Yayınevi 2010) 161.

¹⁸⁹ Ünver, *İftira, Suç Uydurma, Suç Üstlenme* (n 65) 540.

¹⁹⁰ Memiş Kartal (n 41) 399; Parlar and Öztürk (n 70) 421.

¹⁹¹ Parlar and Öztürk (n 70) 421.

¹⁹² Göktürk ‘Suçun Yasal Tanımında Yer Alan’ (n 152) 446.

¹⁹³ Özgenç (n 62) 480.

¹⁹⁴ Koca and Üzülmöz, *Türk Ceza Hukuku Genel Hükümler* (n 80) 264.

¹⁹⁵ Artuk and others (n 110) 485.

by authority of the law (Art. 24, para. 1 of the TCC); self-defence (Art. 25, para. 1 of the TCC); exercise of right (Art. 26, para. 1 of the TCC) and consent of the relevant person (Art. 26, para. 2 of the TCC).¹⁹⁶

When the crime of recording audio or visual media is evaluated in the context of the reasons for legal justification, the provisions of Art. 180, para. 5 of the CPC and Art. 196, para. 4 of the CPC constitute exceptions from the prohibition specified in Art. 183 of the CPC in terms of justification by authority of the law, which is one of the reasons for legal justification. However, according to the opinion in legal doctrine, which we also agree with, it is stated that it lacks precision due to including only the provisions of Art. 180, para. 5 of the CPC, and Art. 196, para. 4 of the CPC in Art. 183 of the CPC; despite the provisions of Art. 52, para. 3 of the CPC, Art. 58, para. 3 of the CPC, and Art. 87, para. 5 of the CPC,^{197 198}

Moreover, Art. 81, para. 1 of the CPC; Art. 94, para. 2 of the CPC; Art. 135 of the CPC; Art. 140 of the CPC; Art. 147, para. 1, subpara. (h) of the CPC; Art. 219, para. 1 of the CPC and Art. 236, para. 5, para. 6, para. 7 and para. 8 of the CPC¹⁹⁹ may also be considered exceptions to this prohibition. Therefore, all these provisions may constitute a reason for legal justification in terms of the crime regulated under Art. 286 of the TCC when the relevant conditions are met.

Furthermore, Art. 149 of the CPL²⁰⁰ will also constitute a reason for legal justification, in addition to Art. 5 of the Law on Police Duties and Powers No. 2559 and Additional Art. 6, para. 15 of the same Law titled “Judicial duties and powers”; Art. 57, para. 5 of the Code on Establishment and Rules of Procedures of the Constitutional Court No. 6216 titled “Hearing”; and Art. 9 of the Law on International Judicial Cooperation in Criminal Matters No. 6706 titled “Judicial cooperation through audio-visual communication techniques” may constitute a reason for legal justification in terms of the crime regulated under Art. 286 of the TCC when the relevant conditions are met.

Within the scope of the exercise of right, which is one of the reasons for legal justification, the right to inform in connection with mass communication should also be evaluated.²⁰¹ It should be noted that the freedom of the press and the right of access to information constitute an inseparable part of the right to freedom of expression.²⁰² In addition, the right to information, which

¹⁹⁶ Özgenç (n 62) 324.

¹⁹⁷ Soyer Güleç (n 38) 92.

¹⁹⁸ Art. 52, para. 3 of the CPC titled “Hearing of witnesses” reads as follows: “Images or sounds during the hearing of witnesses may be recorded. However, recording is mandatory for witnesses who are; a) Child victims, b) Persons who cannot be brought to the hearing and whose testimony is mandatory for the discovery of the material truth, this registration is mandatory for their testimony.”; Art. 58, para. 3 of the same Code titled “Preliminary questions to be asked to the witness and the protection of the witness” as follows: “If hearing the witness in the presence of those present would constitute a grave danger for the witness and this danger cannot be prevented otherwise or would constitute a danger for the discovery of the material truth, the judge may hear the witness even without those who have the right to be present. Audio and visual media transfer shall be made during the hearing of the witness. The right to ask questions is reserved.” and in Art. 87, para. 5 of the same Code titled “Autopsy”, it is stated that “While the processes mentioned in the above paragraphs are carried out, the visual media of the corpse are recorded.”

¹⁹⁹ Art. 81, para. 1 of the CPC titled “Establishment of physical identity” reads as follows: “If it is necessary for the establishment of identity of a suspect or defendant for a crime punishable by imprisonment of two years or more, his or her photograph, body measurements, finger and palm prints, other features of his or her body that will establish his or her identity easier, and his audio and visual media shall be recorded by order of the public prosecutor and placed in the file related to the investigation and prosecution proceedings.”; Art. 94, para. 2 of the same Code titled “Bringing the arrested person to court” as follows: “If the arrested person cannot be brought before the authorised judge or court within twenty-four hours at the latest, the interrogation or taking of a statement of the arrested person shall be conducted by the authorised judge or court within the same period at the courthouse where the person was arrested or, if not available, using the audio-visual communication system established at the nearest courthouse.”; Art. 135 of the same Code titled “Detection of communication, wiretapping, and recording” as follows: “(Amended: 21/2/2014-6526/Art. 12) In the investigation and prosecution of a crime, in the presence of grounds for strong suspicion based on concrete evidence that a crime has been committed and in the absence of any other means of obtaining evidence, with the decision of the judge or the public prosecutor in cases where delay is inconvenient, the telecommunication communication of the suspect or defendant (...) may be wiretapped, recorded, and signal information may be evaluated. . . .”; Art. 140 of the same Code titled “Surveillance with technical means” as follows: “If there are grounds for strong suspicion based on concrete evidence that the following crimes have been committed and evidence cannot be obtained by any other means, the activities of the suspect or defendant in public places and his or her workplace may be subjected to surveillance using technical means, and audio or visual media recording may be taken: . . .”; Art. 147, para. 1, subpara. (h) of the same Code, titled “The style of a statement and interrogation”, as follows: “Technical means shall be utilised in the recording of a statement and interrogation processes.”; Art. 219, para. 1 of the same Code titled “Minutes of the hearing” reads as follows: “Minutes shall be kept for the hearing. The minutes shall be signed by the chief judge or the presiding judge and the clerk of the court. In the event that the processes at the hearing are recorded by technical means, these records shall be converted into a written record without delay and signed by the chief judge or the presiding judge and the clerk of the court.”; Art. 236, para. 5 titled “Hearing the victim and the complainant” of the same Code, “(Additional: 17/10/2019-7188/Art. 22) The statements of children who are victims of the crimes regulated in the second paragraph of Article 103 of the Turkish Criminal Code during the investigation stage are taken by experts under the supervision of the public prosecutor in the centres providing services for them. The statements and visual media of the child victim shall be recorded. In the prosecution stage, however, if it is mandatory to take the statement of the child victim or to take another action in order to discover the material truth, this process shall be carried out by the court or the delegated judge to be appointed by the court through experts in these centres. The processes specified in this paragraph shall be carried out by taking the child victim to the nearest centre regardless of the jurisdictional and territorial boundaries.”; In the para. 6 of the said Article, “(Additional: 17/10/2019-7188/Art. 22) The provision of the fifth paragraph shall also apply to the statements of the victims of the crimes regulated in the second paragraph of Article 102 of the Turkish Criminal Code during the investigation stage. However, the consent of the victim is sought in the recording of statements and visual media.”; In the para. 7 of the said Article, “(Additional: 17/10/2019-7188/Art. 22) Statements and visual media recordings taken within the scope of the fifth and sixth paragraphs shall be kept in the case file, shall not be given to anyone and necessary measures shall be taken for their confidentiality” and in the para. 8 of the said Article, “(Additional: 17/10/2019-7188/Art. 22) The statements and visual media recordings taken within the scope of the fifth and sixth paragraphs shall be converted into a written report. This report shall be given to the suspect, defendant, defence counsel, victim, attorney, or legal representative who made the request. The statement and visual media recordings may be shown to these persons under the supervision of the investigation and prosecution authorities while protecting their confidentiality.”

²⁰⁰ Article 149 of the CPL, titled “Conducting a hearing by means of audio and visual media transferring or elsewhere” reads as follows: “(Amended with Title: 22/7/2020-7251/Art. 17) (1) Upon the request of one of the parties, the court may decide that the requesting party or his or her attorney may attend the hearing and perform procedural processes from the place where they are located by means of simultaneous audio and visual media transfer. (2) The court may, ex officio or upon the request of one of the parties, decide to hear the witness, expert, or specialist from the place where they are located by means of simultaneous audio and visual media transfer. (3) The court may decide ex officio to hear the parties concerned in the cases and affairs that the parties cannot freely dispose of, from the place where they are located at the same time, by means of audio and visual media transfer. (4) The court may decide to hold the hearing in another place within the provincial borders due to factual obstacles or security reasons, with the assent of the justice committee of the regional court of appeal within the jurisdiction. (5) The procedures and principles regarding the implementation of this article shall be determined in the regulation.”

²⁰¹ Özgenç (n 62) 326.

²⁰² Vuslat Dirim, ‘Savcılık ve Medya İlişkileri’ (2010) 2(3) Fasikül 18, 19.

gives meaning to the right to inform, can also be evaluated as a reason for legal justification in terms of the crime under Art. 286 of the TCC.²⁰³ However, it can be stated that the right of defence cannot be a reason for legal justification in terms of the crime of recording audio or visual media; for example, it may be possible for the defence counsel to commit the crime under Art. 286 of the TCC in this context.²⁰⁴

When the consent of the relevant person is evaluated in the context of the reasons for legal justification, the said reason for legal justification will not be applicable in terms of the crime of recording audio or visual media, since the person does not have an absolute right to dispose of it at this point.²⁰⁵

Although the unlawfulness element is essentially one of the elements of the crime, even if it is not necessary to specify it separately in the legal definition of the crime, in some types of crimes, it is sought that the act be carried out without a permit or decision given by the competent authorities by using phrases such as “without consent”, “against consent”, “without decision”, “unlawfulness”, “without permission” or “without a licence”.²⁰⁶ In this respect, as evaluated above under the heading “Act” among the material elements of the crime of recording audio or visual media, the act of unauthorised recording or transferring of audio or visual media during the investigation or prosecution proceedings has the content of wrongfulness that is worthy of punishment solely due to the absence of the specified “authorisation”.²⁰⁷ In our opinion, since the aim of the requirement of “authorisation” here is to provide a more effective control and supervision mechanism for the specified act, the presence of the requirement of “authorisation” does not serve as a reason for legal justification; rather, it is an element included in the typicality in the context of the material elements of the crime. As a consequence of this situation, as we explained under the heading “Mental Element (*Mens Rea*)”, when evaluated in terms of the relationship between intent and mistake, the crime of recording audio or visual media can be evaluated within the framework of mistakes that negate the intent, specifically, within the context of a mistake of fact. Hence, the fact that the perpetrator does not know that it is necessary for him or her to have “authorisation” to record or transfer the audio or visual media is also within the scope of the mistake of fact under Art. 30, para. 1 of the TCC and negates the intent of the perpetrator regarding the crime, and since the legal definition of the crime of recording audio or visual media does not clearly state that it can be committed with negligence, the perpetrator will not be held criminally liable for this reason.

VI. Qualified Elements

There are some elements that the legislator has added to the basic form of the crime and that are accepted to influence the content of the wrongfulness; therefore, it is possible to foresee that the crime in question will be punished less severely or more severely. In fact, for the majority of crimes, the law regulates elements that make it necessary to mitigate or aggravate the punishment in relation to the basic forms, and these elements²⁰⁸ are named qualified elements.²⁰⁹

In terms of the crime regulated under Art. 286 of the TCC, there is no qualified element that requires an aggravation or mitigation of the penalty.²¹⁰

VII. Culpability

Culpability refers to the determination of the conditions of the formation of the will of the perpetrator regarding the wrongfulness committed by the perpetrator and the judgement as to whether it is necessary to condemn him for the wrongfulness, he or she has committed based on this determination.²¹¹ It should be noted that the reforms in other countries in terms of the principle of culpability, such as the acceptance of the mistake of law and taking culpability as the main criterion in determining the punishment, are also present in the new TCC No. 5237.²¹² As a matter of fact, indirectly, the principle of the rule of law in Art. 2 of the Constitution and the principle of the individuality of criminal responsibility in Art. 38, para. 7 of the Constitution; and directly, the provisions of Art. 23, Art. 25, para. 2, Art. 30, para. 3, and para. 4, Article 31, Art. 32, and Art. 61, para. 1 of the TCC are related to the principle of culpability, and the aforementioned regulations have eliminated liability without culpability in terms of the TCC.²¹³

²⁰³ Aykut Ersan, ‘Gizliliğin İhlali Suçu (TCK m. 285)’ (2013) 8(2) CHD 117, 134.

²⁰⁴ Ekmekçi (n 83) 377.

²⁰⁵ Memiş Kartal (n 41) 400.

²⁰⁶ Göktürk ‘Suçun Yasal Tanımında Yer Alan’ (n 152) 408-409.

²⁰⁷ It should be noted that Ünver argues that the word “authorisation” in the legal definition of the crime is misleading and that such acts performed without adhering to the legal conditions or the conditions and elements of legal justification, even if performed by an authorised person, are still unlawful and constitute this crime. The author states that the expression “without authorisation” herein should be understood as “unlawful” and that in each concrete case, it is necessary to look at whether the act is conducted in accordance with the law rather than the status of the authority that approves, decides, or performs. (Ünver, *İftira, Suç Uydurma, Suç Üstlenme* (n 65) 540.). On the other hand, according to Ekmekçi, since the provision in question uses the expression “without authorisation”, it is not possible to confuse this expression with the person who is authorised in the sense of authority. This is because, by using the expression “without authorisation”, the legislator has indicated that this crime will not be committed in every case where the recording or transferring is unlawful and has essentially left an intermediate area of security for the investigation and prosecution authorities. (Ekmekçi (n 83) 376.).

²⁰⁸ Koca and Üzülmöz, *Türk Ceza Hukuku Genel Hükümler* (n 80) 140.

²⁰⁹ Özgenç (n 62) 227.

²¹⁰ Evirgen (n 100) 1546.

²¹¹ Özgenç (n 62) 402.

²¹² Sözüer, ‘Türk Ceza Hukuku Reformu: Dünü, Bugünü ve Yarını’ (n 37) 3046.

²¹³ Koca and Üzülmöz, *Türk Ceza Hukuku Genel Hükümler* (n 80) 52.

The crime of recording audio or visual media does not have any features in terms of culpability, and therefore, the provisions related to culpability may be applied to the crime in question.²¹⁴

However, this crime can be evaluated in terms of a mistake of law, which is one of the mistakes that affect culpability. If the perpetrator of the mentioned crime claims that he did not know whether the act of unauthorised recording and transferring of audio or visual media during the investigation or prosecution constitutes wrongfulness, it is necessary to determine whether this mistake is avoidable or not,²¹⁵ and if it is concluded that the mistake is inevitable, the perpetrator will not be held culpable and will not be sentenced for the act he or she carried out. On the other hand, if it is concluded that the mistake was avoidable, the perpetrator shall be sentenced for the crime committed intentionally. The diminishment in the degree of the perpetrator's culpability may also be taken into consideration in terms of determining the basic penalty pursuant to Art. 61 of the TCC.²¹⁶

VIII. Special Forms of Crime

A. Attempt

The perpetrator may be punished if the acts committed by him or her are in the nature of acts of conduct for the crime he or she intended to commit, but if the acts in question are not yet in the nature of acts of conduct, he or she shall not be punished.²¹⁷ In order to determine whether or not the act performed by the perpetrator is at the phase of the act of conduct, the act in question must be connected to the act in the type of crime to be committed in this respect. In terms of the initiation of the conduct, there must not be any connection, but there must be a direct connection. Whether the connection between the act in the type of crime intended to be committed and the preparatory acts is direct or not shall be determined, as *Sözüer* states, "according to the understanding revealed by the ordinary experiential knowledge of general life".²¹⁸ The distinction between preparatory acts and acts of conduct is based on an objective criterion with the phrase "directly initiating the conduct" in Art. 35, para. 1 titled "Attempt to Commit a Crime" of the new TCC No. 5237.²¹⁹

The type of crime regulated under Art. 286 of the TCC is a conduct crime. As a matter of fact, this crime is completed by the unauthorised recording or transferring of audio or visual media during the investigation or prosecution proceedings, and is regulated as a conduct crime.²²⁰

In our opinion, in terms of this crime, the conduct of the act will begin with the operation of the devices that enable the recording or transferring of audio or visual media, and thus the act of recording or transferring, and the placement of these devices will only constitute preparatory acts. For example, in the case that the device intended to be used within the scope of the intention to commit the crime of recording audio or visual media has not yet been activated, that is, if the person is caught with a device that is not operable, the acts that have taken place will be considered preparatory acts, and the person will not be sentenced.

In terms of this crime, the act of recording or transferring may be carried out by acts that can be spread over a certain period of time and can be divided. If the perpetrator has initiated acts of conduct but these acts are interrupted against his or her will, then the provisions on attempt to commit a crime shall be applied.²²¹ For example, if it is understood that the perpetrator was about to take photographs during the hearing but was prevented from doing so, the crime in question should be considered to have remained at the phase of attempt.²²² However, if the acts of the perpetrator have been completed, since a concrete result is not required, the provisions regarding the completed crime will be applied, not the provisions regarding the attempt, by accepting that the crime has been committed with the conduct of the act.²²³

Although it is stated in legal doctrine that if the acts of recording or transferring are more or less conducted, this crime will be considered completed,²²⁴ in a previous judgement of the Court of Cassation in a situation where the photographs allegedly taken by the defendant were not clear, all of them were blurred, and one of them was completely dark, it was found contrary to the law

²¹⁴ "..... At the end of the trial conducted in accordance with the reversal order, the medical board report of Elazig Mental Health and Diseases Hospital dated 13.03.2014 was evaluated together with the entire file scope, and it was concluded that the defendant, within the scope of a judicial investigation initiated by the Elazig Chief Public Prosecutor's Office, recorded the audio and visual media during his statement dated 26.11.2013, which was mentioned by the public prosecutor as a suspect, with a hidden camera mounted on his right arm without authorisation, and when committing the crime of audio or visual media under Article 286, paragraph 1, he or she was suffering from a mental illness called 'Bipolar affective disorder' and was under the influence of this disease to the extent that it eliminated his ability to perceive the intent of law and its consequences of the act committed and to direct his behaviour in relation to this act, therefore the court accepted and decided that he was not criminally responsible for the crime he committed, rejecting the appellate objections of the defendant and the defendant's defence counsel regarding the certitude and the decision based on incomplete examination, the decision is UPHHELD in accordance with the request," Court of Cassation 12th CC., 03.02.2021, C. 2020/1573, D. 2021/1100.

²¹⁵ Özgenç (n 62) 494.

²¹⁶ Koca and Üzülmöz, *Türk Ceza Hukuku Genel Hükümler* (n 80) 371-372.

²¹⁷ Özgenç (n 62) 506.

²¹⁸ Adem Sözüer, *Suçta Teşebbüs*(Kazancı Hukuk Yayınları 1994) 211-212.

²¹⁹ Özgenç (n 62) 511.

²²⁰ Evirgen (n 100) 1539; Gökcan and Artuç (n 75) 9321, 9323.

²²¹ Ünver, *İftira, Suç Uydurma, Suç Üstlenme* (n 65) 541.

²²² Gökcan and Artuç (n 75) 9323.

²²³ Ünver, *İftira, Suç Uydurma, Suç Üstlenme* (n 65) 541.

²²⁴ Parlar and Öztürk (n 70) 422.

not to discuss whether the defendant's act remained at the phase of attempt or not, and it was decided to reverse the verdict given by the local court.²²⁵

In our opinion, an assessment regarding the impossible attempt should be made if the devices enabling the recording or transferring audio or visual media are operated and started to be used but are not suitable for technical reasons in terms of committing the crime of recording audio or visual media. An impossible attempt is a situation in which the perpetrator is unable to complete the crime, contrary to the perpetrator's idea of the crime, due to the initial deficiencies arising from the material elements of the crime. An impossible attempt has different forms depending on the material element of the crime on which the inadequacy is based. The most common forms of these are the inadequacy of the means used in the crime, the inadequacy of the subject matter of the crime, the inadequacy of the means in the inadequacy of the subject matter of the crime, and the inadequacy of the perpetrator.²²⁶ The impossible attempt, which may also present itself as the inadequacy of the means used in the commission of crime, will also be considered when the means used in the commission of a crime are not adequate and appropriate for the commission of this crime.²²⁷ In terms of the crime that is the subject of our study, if the means, i.e., the technical devices that enable the recording or transferring audio or visual media, are inadequate, it cannot be said that the acts of conduct have begun. Our opinion is that it will be appropriate to have an expert examination conducted on these devices when deemed necessary in order to determine whether they possess the necessary technical competence.

The crime that cannot be completed due to the lack of subject matter is called the impossible crime,²²⁸ and in our opinion, if the audio or visual media on which the act of unauthorised recording or transferring during the investigation or prosecution proceedings, which constitutes the subject matter of the crime in terms of the crime of recording audio or visual media, does not exist, the impossible crime will be considered. For example, in a situation where a device that enables the unauthorised audio recording is activated during the investigation or prosecution proceedings but no audio can be recorded due to the absence of conversation, the crime constitutes an impossible crime due to the lack of subject matter of the crime. However, it should be noted here that it is not possible to punish impossible crimes on the basis of the regulation on attempt in the TCC, and in the case of an impossible crime, the perpetrator should not be held liable for attempting the crime he or she intended to commit but should be held liable for those crimes if the act or acts he or she has committed so far constitute another crime or crimes.²²⁹ In fact, in the case of an impossible crime, the perpetrator has shown that he or she is a dangerous personality for society with the act he or she has committed, and for this reason, it is argued in legal doctrine that a security measure should be imposed on the person in question, whose dangerous personality has been exposed, in proportion to the dangerousness he or she presents,²³⁰ or the attempt to commit impossible crimes should be punished through an explicit regulation to be made in the law.²³¹

In fact, when the legal regulation regarding the crime in Art. 286 of the TCC is examined, by using the phrase of "... *investigation and prosecution* ..." it is stated that it will be necessary to carry out the act of recording or transferring audio or visual media in both stages of proceedings for the typicality of the act, and if only one of these actions is interrupted after one of these acts has been carried out or while the second has not yet been carried out, the provisions on attempt to commit a crime shall be applied.²³² However, in relation to this issue, as we have previously explained under the heading "Act", we would like to refer to our opinion that the ratio legis of the text of the law, i.e., its core purpose,²³³ should be considered regarding the use of the conjunction "and" instead of the conjunction "or" in the legal definition of the crime, and to state that the phrase "... *investigation and prosecution* ..." in the regulation on this crime should be understood as "... *investigation or prosecution* ...". From this point of view, according to the opinion that we also agree with,²³⁴ to reiterate our suggestion, in order to eliminate this situation contrary to the principle of legal certainty, we believe that it will be appropriate to make a legislative amendment in terms of the phrase "... *investigation and prosecution* ..." in the legal definition of the crime in question and to use the conjunction "or" instead of the conjunction "and", that is, to amend this provision as "... *investigation or prosecution* ...".

In addition, in our opinion, since the crime of recording audio or visual media is a continuing crime, as stated above under the heading "Act", this crime shall be deemed to be completed, and the provisions regarding the attempt shall not be applied if, after the acts of unauthorised recording or transferring of audio or visual media during the investigation or prosecution proceedings have been begun, the conduct of the acts has been terminated due to reasons beyond the perpetrator's control while continuing its conduct. Therefore, the provisions regarding the attempt at the crime of recording audio or visual media, which is a continuing crime, can only be applied until this crime is completed.

²²⁵ Court of Cassation 4th CC., 04.10.2012, C. 2012/4798, D. 2012/19664.

²²⁶ Gözde Kazaker, 'Elverişsiz Teşebbüs ve Mefruz Suç Ayrımı' (2020) 9(1) Social Sciences Research Journal 129-130.

²²⁷ ibid 133.

²²⁸ Koca and Üzülmöz, *Türk Ceza Hukuku Genel Hükümler* (n 80) 433.

²²⁹ ibid 434.

²³⁰ Özgenç (n 62) 520; Koca and Üzülmöz, *Türk Ceza Hukuku Genel Hükümler* (n 80) 434.

²³¹ Koca and Üzülmöz, *Türk Ceza Hukuku Genel Hükümler* (n 80) 434.

²³² Ünver, *İftira, Suç Uydurma, Suç Üstlenme* (n 65) 539.

²³³ Baytaş (n 129) 257.

²³⁴ Ünver, *İftira, Suç Uydurma, Suç Üstlenme* (n 65) 538.

B. Participation

The forms of participation are regulated between Art. 37 and 41 of the TCC under two main distinctions as perpetration and complicity. According to this, perpetration can occur in three forms as direct perpetration, co-perpetration, and indirect perpetration. Complicity, on the other hand, is divided into instigation and aiding, and the responsibility of accessories depends on the act of the perpetrator. The principles regarding this matter are specified in the principle of accessoriness in Art. 40 of the TCC.²³⁵

In terms of participation regarding the crime of recording audio or visual media, the provisions regulated in relation to participation can be applied to this crime.

Since this crime is a continuing crime, it is possible to participate in the conduct of this crime as long as it continues to be committed by the perpetrator, and in this case, the provisions for participation shall apply.

It should be noted here that, although it is not possible to participate as a co-perpetrator in a crime committed by an act of conduct through act of omission, if the person does not become the perpetrator of another crime due to his or her act of omission, he or she shall only be held liable for participating as an accessory in a crime committed by act of omission.²³⁶ In the case of not preventing the commission of a crime committed by another person, this will constitute aiding in the crime of commission. On the other hand, if the act of omission is defined as a distinct crime in the law for the person who commits this act of omission, in this case, this person will no longer be held liable as an accessory, as an aider to the crime committed by another person by the act of omission but as a perpetrator for the distinct crime of omission in question.²³⁷ As a matter of fact, the reason that a person is liable for his own crime of omission is the principle of the primacy of perpetration over complicity.²³⁸ Therefore, in our opinion, it is not possible to participate as a co-perpetrator with an act of omission in the crime of recording audio or visual media, which can be committed with an act of conduct, but only be held liable as an accessory, as an aider by the act of omission. However, if the act of omission constitutes a distinct crime regulated by the law, it will be necessary to punish the person as a perpetrator for the distinct crime committed by this act of omission in accordance with the principle of the primacy of perpetration over complicity.

In addition to this, as *Demirel* states, within the scope of the principle of accessoriness in participation in crime, the presence of an act in accordance with the type and the presence of an unlawful act are required. In this respect, the presence of an act in accordance with the type requires the presence of the material element in terms of the acts of the perpetrator and the accessories. Therefore, in addition to the occurrence of the material element in terms of the act of the perpetrator, the acts of the instigator and the aider must also be typical in terms of the material element. Indeed, unless there is an act performed in accordance with the type and/or in an unlawful situation, it cannot be argued that there is unlawful, completed complicity.²³⁹ From this point of view, when assessing “authorisation”, which, as we have explained under the heading of “Act”, is an element included in the typicality of the material elements of the crime of recording audio or visual media, in the case of recording or transferring audio or visual media “without authorisation” during the investigation or prosecution proceedings, the state of being “unauthorised” must be present in terms of the acts of both the perpetrator and the accessory, i.e., in addition to the state of being “unauthorised” with respect to the act of the perpetrator, it must also be present in terms of the acts of the instigator and the aider, in order for there to be complete complicity.

C. Aggregation

Considering the singleness of the act or the multiplicity of the act in terms of aggregation, it should be noted that even if the number of acts in the natural sense is more than one, in such cases, a single act is considered to have been committed in the legal sense. These acts, which are more than one in the natural sense, are taken into consideration in terms of determining the wrongful content of the crime committed.²⁴⁰ As a matter of fact, it is emphasised that the TCC, by singleness of the act in the legal sense as a basis, examines the spatial and temporal unity between them in determining whether the act committed is single or not.²⁴¹ In terms of the crime of recording audio or visual media, more than one act performed during a judicial proceeding, such as taking more than one photograph, must be considered a single crime.²⁴²

In terms of determining which of the rules of aggregation will be applied in case of violation of more than one norm in criminal law, firstly, the rules of apparent aggregation should be examined, but if the problem cannot be solved in this way, according to the principle stated as “there are as many crimes as there are acts, and there are as many penalties as there are crimes”,²⁴³ the

²³⁵ Artuk and others (n 110) 740.

²³⁶ Koca and Üzülmöz, *Türk Ceza Hukuku Genel Hükümler* (n 80) 461.

²³⁷ Özgenç (n 62) 578-579.

²³⁸ Koca and Üzülmöz, *Türk Ceza Hukuku Genel Hükümler* (n 80) 461; Özgenç (n 62) 579.

²³⁹ Muhammed Demirel, *Suçta İştirakte Bağlılık Kuralı* (On İki Levha Yayıncılık 2017) 361, 365.

²⁴⁰ Özgenç (n 62) 183-184.

²⁴¹ Muhammed Demirel, ‘Karar Analizi Tehlike Suçları-Zarar Suçları Arasındaki İlişkinin İçtima Kuralları Kapsamında Değerlendirilmesi’ (2013) 71(1) İÜHFM 1479, 1483.

²⁴² Gökcan and Artuç (n 75) 9323.

²⁴³ Demirel, ‘Karar Analizi Tehlike Suçları-Zarar Suçları’ (n 241) 1480-1481.

factual aggregation rule, in which separate penalties will be imposed for each crime committed and each penalty will maintain its distinctness,²⁴⁴ and whether the rules of successive crime, conceptual aggregation of the same types of crimes and conceptual aggregation of different types of crimes, which are exceptions to this rule, may be applied.²⁴⁵

Pursuant to the special-general norm relationship, which is one of the forms of apparent aggregation, if one of the various norms that are apparently applicable to the same act contains some additional elements and features in addition to the elements of the other norms, in this case where the special-general norm relationship is in question, the special norm will prevent the application of the general norm in accordance with the principle of the priority of special law, and only the application of the special norm will be sufficient.²⁴⁶ Therefore, in our opinion, there is a special-general norm relationship between the crimes regulated under Art. 136 of the TCC²⁴⁷ and the crimes under Art. 286 of the TCC. As a matter of fact, the regulation in Art. 286 of the TCC, which stipulates that the unauthorised recording or transferring of all kinds of audio or visual media during the investigation or prosecution proceedings shall be sentenced, is the general norm; in contrast to this regulation, if the subject matter of the crime regulated in Art. 136 of the TCC is the statements and visual media recorded in accordance with Art. 236, para. 5 and para. 6 of the CPC titled "Hearing the victim and the complainant", the penalty to be imposed according to Art. 136 of the TCC shall be increased by one, is the special norm, and within the framework of the special-general norm relationship between both regulations, in accordance with the principle of the priority of special law, the provision of Art. 286 of the TCC will be withdrawn as the general norm and the criminal responsibility of the perpetrator will be determined according to the special norm, which is Art. 136 of the TCC.

The consuming-consumed norm relationship, which is another one of the forms of apparent aggregation, arises in cases where it is concluded that one of the norms violated as a result of the act committed consumes the other norm due to the fact that it contains the other norm, and thus it is applied by accepting that it has the feature of consuming norm. Non-punishable subsequent acts are also considered examples of the consuming-consumed norm relationship.²⁴⁸ Accordingly, in terms of the crime under Art. 286 of the TCC, if the perpetrator, after performing one of the alternative acts of "recording" or "transferring" the audio or visual media during the investigation or prosecution proceedings without authorisation, performs the other alternative act specified in the said article, in this case, the subsequent alternative act will fall within the scope of the non-punishable subsequent acts, and the consuming-consumed norm relationship, which is one of the forms of apparent aggregation, will be considered.

After evaluating the scope of application of the rules of apparent aggregation in relation to the crime of recording audio or visual media, it should be examined whether the rules of successive crimes, conceptual aggregation of the same types of crimes, and conceptual aggregation of different types of crimes, which are exceptions to the rule of factual aggregation, may also be applied.

Successive crimes have four conditions, of which three are objective and one is subjective. These conditions are the presence of more than one act; these acts constitute the same crime; these crimes are committed against the same person and are committed more than once at different times; as a subjective condition, multiple crimes are committed within the framework of the conduction of a decision to commit a crime.²⁴⁹ Regarding successive crimes, the provisions of successive crimes may be applied to the crime of recording audio or visual media if the conditions are met.²⁵⁰ In addition to this, it is necessary to apply the provisions of successive crime primarily in terms of crimes in which everyone who makes up the society is a victim,²⁵¹ and as we have explained under the heading "Victim", which is one of the material elements of the crime of recording audio or visual media, in our opinion, since the victim of this crime is all individuals who make up the society, the provisions of successive crime may be applied in case this crime is committed successively. As a matter of fact, if the act constituting the crime of recording audio or visual media is committed during the judicial proceedings of the same investigation and prosecution at different times, Art. 43, para. 1 of the TCC will have to be applied.²⁵²

In terms of conceptual aggregation of the same types of crimes, it should be noted that the multiplicity in the number of victims in relation to the crime of recording audio or visual media will not be evaluated in the context of aggregation, but this is a matter to be evaluated in terms of determining the basic punishment in accordance with Art. 61, para. 1 of the TCC titled "Determination of the punishment".

There are various opinions in legal doctrine in terms of the crime of recording audio or visual media in relation to the conceptual aggregation of different types of crimes. According to *Ersan*, if a person commits the crime under Art. 286 of the TCC and the

²⁴⁴ Neslihan Göktürk, 'Türk Hukuku'nda Suçların İctimar' (2016) 2(1-2) Ceza Hukuku ve Kriminoloji Dergisi-Journal of Penal Law and Criminology 31.

²⁴⁵ Demirel, 'Karar Analizi Tehlike Suçları-Zarar Suçları' (n 241) 1481.

²⁴⁶ Kayıhan İcel, 'Görünüşte Birleşme (İctima) İlkeleri ve Yeni Türk Ceza Kanunu' (2008) 7(14) İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi 35, 37.

²⁴⁷ Art. 136 of the TCC, titled "Unlawful delivery or acquisition of data" states that "(1) Any person who unlawfully delivers personal data to another person, or disseminates or acquires the same through unlawful means, shall be sentenced from two to four years' imprisonment. (2) (Additional: 17/10/2019-7188/Art. 17) If the subject matter of the crime is statements and visual media recorded pursuant to the fifth and sixth paragraphs of Article 236 of the Criminal Procedure Code, the penalty to be imposed shall be increased by one."

²⁴⁸ Demirel, 'Karar Analizi Tehlike Suçları-Zarar Suçları' (n 241) 1481.

²⁴⁹ Koca and Üzülmöz, *Türk Ceza Hukuku Genel Hükiimler* (n 80) 521-522.

²⁵⁰ Evirgen (n 100) 1545.

²⁵¹ Özgenç (n 62) 625.

²⁵² Gökcan and Artuç (n 75) 9323.

crime under Art. 285 of the TCC with a single act of the unauthorised recording or transferring audio or visual media during the investigation and prosecution proceedings, and if such visual media is broadcasted in such a way as to cause persons to be perceived as guilty during the investigation and prosecution stages, or if the confidentiality of the investigation or closed hearing is breached, then the person shall be liable according to the rule of conceptual aggregation of different types of crimes since he or she has committed both the crime under Art. 286 of the TCC and the crime under Art. 285 of the TCC.²⁵³ *Memiş Kartal* states that in the case of the unauthorised recording of audio and visual media during the investigation proceedings, if the conditions specified in the code are met, both the crime under Art. 285 of the TCC and the crime under Art. 286 of the TCC will be committed, and in this respect, the perpetrator will be sentenced for the crime that requires the most severe penalty, since he or she has caused the occurrence of more than one different crime with an act committed within the scope of Art. 44 of the TCC.²⁵⁴ According to *Tunçak*, in cases where the crime is regulated in Art. 286 of the TCC may be seen together with the crime regulated in Art. 285 of the TCC, the person will be held responsible for the crime that requires the heaviest penalty in accordance with the rules of conceptual aggregation.²⁵⁵ *Türkoğlu* stating that Art. 285 of the TCC includes the protection of the audio and visual media of the investigation and prosecution proceedings, and mentions that the unauthorised recording or transferring audio or visual media during the investigation proceedings under Art. 286 of the TCC may also constitute the crimes of breach of confidentiality of the investigation. According to this author, in this case, since the perpetrator has caused the occurrence of more than one different crime with a single act, the provision of conceptual aggregation of different types of crimes will be applied, and the perpetrator will be sentenced for the crime that requires the most severe penalty in accordance with Art. 44 of the TCC. According to the same author, the unauthorised recording or transferring audio or visual media during the prosecution proceedings may also breach the confidentiality of the statements and visual media in the closed hearing, and in such a case, since the perpetrator has committed more than one different crime with a single act, the provision of conceptual aggregation of different types of crimes will be applied.²⁵⁶ *Yılmaz* states that the perpetrator may, with a single act, not only transfer the audio and visual media during the investigation proceedings without authorisation but also breach the confidentiality of the decisions or proceedings taken during the investigation stage, which must be kept confidential to the persons who are parties to the investigation, and in this case, the act of transferring will constitute the crime regulated in Art. 286 of the TCC and the crime in Art. 285, para. 2 of the TCC, and thus the provisions of conceptual aggregation will be applied.²⁵⁷ *Bayraktar* also states that there may be a conceptual aggregation relationship between the crimes under Art. 286 of the TCC and the crime of breach of the closure of the hearing under Art. 285, para. 3 of the TCC.²⁵⁸ According to *Ekmekçi*, for example, in the case of the simultaneous broadcasting of the visual media of the defendant by using 3G technology while he or she was taken out of the vehicle in handcuffs and taken to the courthouse building, since more than one different crime has been caused by one act committed, the provisions of conceptual aggregation should be applied in accordance with Art. 44 of the TCC. Thus, the perpetrator must be sentenced according to Art. 285, para. 5 of the TCC, which is the crime that requires the most severe penalty.²⁵⁹ However, in legal doctrine, *Yılmaz*, who evaluates the regulation in Art. 285, para. 5 of the TCC, states that the act of “transferring”, which is one of the alternative acts in Art. 286 of the TCC, means sending the visual media to a place or person, therefore, by stating that the act of “transferring” specified in this crime does not also constitute the act of “broadcasting the visual media of persons in such a way as to cause them to be perceived as guilty” regulated in Art. 285, para. 5 of the TCC, and argues that only the crime of breach of confidentiality will be committed in the case of the broadcasting of the aforementioned audio or visual media.²⁶⁰ *Parlar/Öztürk* also states that Art. 285 of the TCC should be applied in the case of broadcasting audio or visual media if the elements are present.²⁶¹ *Akyıldız*, who holds an opposing view, points out that there is a difference of opinion as to whether the act of “broadcasting” the visual media is also considered the act of “transferring”, and argues that the act of “broadcasting” the visual media in Art. 285, para. 5 of the TCC may overlap with the act of “transferring” regulated in Art. 286 of the TCC, and in this case, the application of the rules of conceptual aggregation will be possible to this case.²⁶²

However, in our opinion, if an evaluation is to be made regarding the applicability of the rule of conceptual aggregation of different types of crimes in terms of the crime of recording audio or visual media, the rule of conceptual aggregation of different types of crimes (Art. 44 of the TCC) will be applied in the case of publicly breaching the confidentiality of the investigation (Art. 285, para. 1 of the TCC) by the unauthorised recording or transferring of audio or visual media during the investigation or prosecution proceedings (Art. 286 of the TCC) with a single act, and the perpetrator will be sentenced only for the crime regulated under Art. 285, para. 1 of the TCC, which requires a more severe penalty. The perpetrator who breaches the confidentiality of the decisions and the actions taken in accordance with them during the investigation stage and which must be kept confidential to the

²⁵³ Ersan (n 203) 139-140.

²⁵⁴ Memiş Kartal (n 41) 401.

²⁵⁵ Senanur Tunçak, ‘Suçsuzluk Karinesini Bir Koruma Yöntemi Olarak Gizliliğin İhlali (TCK m. 285) Suçu’ (2019) 2(3) TİHEK Dergisi 69, 84.

²⁵⁶ Gökhan Türkoğlu, ‘Türk Ceza Kanunu’nda Yer Alan Gizliliğin İhlali Suçları (TCK m. 285/1-3)’ (Master’s thesis, Istanbul University 2019) 138, 173.

²⁵⁷ Merve Nur Yılmaz, *Türk Ceza Kanunu’nda Düzenlenen Gizliliğin İhlali Suçları* (TCK m. 285) (Adalet Yayınevi 2019) 195.

²⁵⁸ Köksal Bayraktar, ‘Gizliliğin İhlali’, *Özel Ceza Hukuku-Cilt X: Adliye Karşı Suçlar* (TCK m. 267-298) (On İki Levha Yayıncılık 2021) 392.

²⁵⁹ Ekmekçi (n 83) 379.

²⁶⁰ Yılmaz (n 257) 245.

²⁶¹ Parlar and Öztürk (n 70) 421.

²⁶² Akyıldız (n 67) 143.

persons who are parties to the investigation (Art. 285, para. 2 of the TCC), by the unauthorised recording or transferring audio or visual media during the investigation or prosecution proceedings (Art. 286 of the TCC) with a single act, will be sentenced for the crime in Art. 285, para. 2 of the TCC, which is the most severe of these crimes, by applying the rule of conceptual aggregation of different types of crimes. In the case that the perpetrator publicly breaching the confidentiality of the statements or visual media in the hearing that is required to be closed or has been ordered to be closed according to the code (Art. 285, para. 3 of the TCC) by the unauthorised recording or transferring of audio or visual media during the investigation or prosecution proceedings (Art. 286 of the TCC) with a single act, he or she will be sentenced for the crime in Art. 285, para. 3 of the TCC, which has the most severe penalty, and the perpetrator will be sentenced according to the provision of Art. 285, para. 1 of the TCC in accordance with the explicit provision in Art. 285, para. 3 of the TCC. An important issue to be considered here is whether the act of “broadcasting” under Art. 285, para. 5 of the TCC and the act of “transferring” under Art. 286 of the TCC overlap in the concrete case. As a matter of fact, in the case of partial overlapping of the acts of conduct, although there is more than one act and it may be considered that the rule of factual aggregation will be applied, this issue should be taken into consideration in terms of determining the punishment to be imposed on the perpetrator. Since the overlapping acts in question are effective on the wrongful content of the act related to both crimes at the same time, these acts should not be evaluated more than once in terms of determining the punishment. Otherwise, this would constitute a violation of the prohibition against double jeopardy.²⁶³ Accordingly, in our opinion, if a single act of the perpetrator, in which the acts of “transferring” under Art. 286 of the TCC and “broadcasting” under Art. 285, para. 5 of the TCC overlap, leads to the occurrence of multiple different crimes, namely, the unauthorised “transferring” of audio or visual media during the investigation or prosecution proceedings (Art. 286 of the TCC) and the “broadcasting” the visual media in such a way as to cause persons to be perceived as guilty during the investigation and prosecution stages (Art. 285, para. 5 of the TCC), the perpetrator will not be sentenced separately for each of these crimes, but only for the crime regulated under Art. 285, para. 5 of the TCC, which is the most severe of these crimes, in accordance with the rule of conceptual aggregation of different types of crimes.

Considering the order followed among the rules of aggregation of crimes in terms of determining the responsibility of the perpetrator, the application area of the rule of factual aggregation should also be evaluated in relation to the crime of recording audio or visual media. In legal doctrine, there are various opinions regarding the applicability of the rule of factual aggregation to this crime. According to *Çakır*, if recording of visual media was made without authorisation of the relevant authorities and caused the public to perceive the persons on trial as guilty, the perpetrator should be held responsible for both the crime of recording audio or visual media and the crime of broadcasting the visual media of the persons in accordance with the rule of factual aggregation.²⁶⁴ Moreover, *Evirgen* states that the person who unauthorisedly records and broadcasts the visual media during the investigation proceedings will be sentenced both for the crime regulated in Art. 286 of the TCC and for the crime regulated in Art. 285, para. 1 and para. 2 of the TCC, and argues that the person who unauthorisedly records and broadcasts the visual media in a closed hearing will be sentenced both for the crime regulated in Art. 285, para. 3 of the TCC and for the crime regulated in Art. 286 of the TCC. In addition, the same author states that in the event that the audio or visual media recorded without authorisation during the investigation and prosecution stages are broadcasted in such a way as to cause persons to be perceived as guilty, both the crime regulated in Art. 286 of the TCC and the crime regulated in Art. 285, para. 5 of the TCC will be committed, and in this respect, there is a factual aggregation relationship between Art. 285 of the TCC and Art. 286 of the TCC.²⁶⁵ Furthermore, according to *Ersan*, although the crime under Art. 286 of the TCC may also be considered in cases of breach of confidentiality regarding public hearings in terms of the prosecution stage, the crime under Art. 285, para. 3 of the TCC will occur if the person breaches the confidentiality of the statements or visual media in the hearing that is required to be closed or has been ordered to be closed.²⁶⁶

On the other hand, if an evaluation is to be made in terms of the scope of application of the rule of factual aggregation in relation to the crime of recording audio or visual media, in our opinion, in cases where the acts of “broadcasting” the visual media in such a way as to cause persons to be perceived as guilty during the investigation and prosecution stages (Art. 285, para. 5 of the TCC) and the unauthorised “transferring” of audio or visual media during the investigation or prosecution proceedings (Art. 286 of the TCC) do not overlap, i.e., they are completely different acts, the perpetrator will be sentenced separately for both the crime regulated under Art. 285 para. 5 of the TCC and the crime regulated in Art. 286 of the TCC by applying the rule of factual aggregation.

²⁶³ Göktürk, ‘Türk Hukuku’nda Suçların İçtimar’ (n 244) 47.

²⁶⁴ Çakır, ‘Gizliliğin İhlali Suçu (TCK m. 285)’ (n 35) 30.

²⁶⁵ Evirgen (n 100) 1546.

²⁶⁶ Ersan (n 203) 129.

IX. Sanctions and Rules of Procedure

A. Penalties and Security Measures

The sanction for the crime regulated in Art. 286 of the TCC is a penalty of up to six months' imprisonment. Since the legal definition of the crime does not specify the minimum term of imprisonment, the minimum term of imprisonment for this crime is one month's imprisonment in accordance with Art. 49 of the TCC.²⁶⁷

The prison sentence to be imposed on the perpetrator of the crime of recording audio or visual media may be suspended in accordance with the provision in Art. 51, para. 1 of the TCC²⁶⁸ if the conditions are met.

In addition, the crime regulated under Art. 286 of the TCC is an intentional crime, and if the person is sentenced to imprisonment for this crime, the person in question will face deprivation of the use of certain rights listed in Art. 53, para. 1 of the TCC²⁶⁹ due to this crime.

According to Article 54 of the TCC,²⁷⁰ if the conditions are met, the property used in the commission of the crime of recording audio or visual media may be confiscated. However, as it is known, since the confiscation orders must be proportionate, if the confiscation order will have much more severe consequences compared to the act committed and therefore is thought to be contrary to equity, confiscation may not be ordered. In this case, the judge is given discretionary power. Thus, when it is possible to confiscate some parts of the goods, the judge may order to confiscate only a part of the goods or may not order confiscation,^{271, 272, 273}

It should be noted that, since the maximum term of imprisonment of the crime regulated under Art. 286 of the TCC is a penalty of up to six months' imprisonment, pursuant to Art. 231, para. 5 of the CPC, a decision to defer passing sentence may be made against the perpetrator if the conditions are met.²⁷⁴

²⁶⁷ Ünver, *İftira, Suç Uydurma, Suç Üstlenme* (n 65) 541.

²⁶⁸ Art. 51, para. 1 of the TCC titled "Suspension of imprisonment" reads as follows: "A person sentenced to imprisonment for a period of two years or less for a crime he or she has committed may have his or her sentence suspended. The upper limit of this period is three years for persons who have not completed the age of eighteen or have completed the age of sixty-five at the time of committing the crime. However, in order for a suspended sentence to be granted,

a) The person must not have been sentenced to imprisonment for more than three months for an intentional crime before,

b) The court must have a conviction that the person will not commit the crime again due to the remorse shown during the judicial proceedings after committing the crime."

²⁶⁹ According to Art. 53, para. 1 of the TCC titled "Deprivation of the use of certain rights": "As a legal consequence of a conviction to imprisonment for a crime committed intentionally, a person is deprived of;

a) From undertaking a permanent, temporary, or temporary public office; in this context, from being a member of the Grand National Assembly of Türkiye or from being employed in all civil offices and services subject to appointment or election by the State, province, municipality, village, or institutions and organisations under their supervision and control,

(b) The capacity to elect and be elected (...),

(c) From the right of custody; from performing a service belonging to guardianship or trusteeship,

(d) Being a manager or auditor of foundations, associations, unions, companies, cooperatives, and political party legal persons,

(e) Practising a profession or art subject to the permission of a public institution or a professional organisation having the status of a public institution as a self-employed person or a merchant under his or her own responsibility."

²⁷⁰ Article 54 of the TCC titled "Confiscation of property" reads as follows:

"(1) Property used in the commission of an intentional crime or allocated for the commission of a crime, or caused by a crime shall be subject to confiscation, provided that it does not belong to bona fide third parties. Goods prepared to be used in the commission of a crime shall be confiscated if they are dangerous for public security, public health, or public morals. (Additional sentence: 24/11/2016-6763/Art. 11) In case there is a limited real right established in favour of bona fide third parties over the goods, the confiscation order shall be made on the condition that this right is reserved.

(2) In the event that the goods falling within the scope of the first paragraph are removed, disposed of, consumed, or confiscation is rendered impossible by any other means; an amount of money equal to the value of these goods shall be ordered to be confiscated.

(3) If it is considered that the confiscation of the goods used in the crime would have heavier consequences compared to the crime committed and therefore would be against equity, confiscation may not be issued.

(4) The production, possession, use, transport, purchase, and sale of goods that constitute a crime shall be confiscated.

(5) If it is necessary to confiscate only some parts of a thing, and if it is possible to separate this part without damaging the whole, only this part shall be confiscated.

(6) Regarding the goods in which more than one person is a shareholder, only the share of the person who participated in the crime shall be confiscated."

²⁷¹ Artuk and others (n 110) 1013.

²⁷² "..... Deciding to confiscate the mobile phone registered in the order of 2018/5515 of the Izmir Chief Public Prosecutor's Office Evidence Room, which is understood to have been used in the commission of the crime according to its known value, would have more severe consequences compared to the crime committed, it is contrary to equity to order its confiscation instead of returning it to its owner in accordance with Article 54, paragraph 3 of the Turkish Criminal Code,

As it is contrary to the law, although the appellant's claims of appeal are therefore appropriate, since this contradiction is a mistake that can be amended in accordance with Article 303 of the Code No. 5271, by removing the paragraph on confiscation from the ruling and replacing it with the phrase 'The confiscation of the mobile phone registered in the order of 2018/5515 of the Izmir Chief Public Prosecutor's Office Evidence Room, which is understood to have been used in the commission of the crime according to its known value, would have more severe consequences compared to the crime committed, and since it is contrary to equity, it should be returned to its owner in accordance with Article 54, paragraph 3 of the Turkish Criminal Code', DISMISSAL OF THE APPEAL AS BEING AMENDED" Izmir RCA 8th CC., 16.12.2019, C. 2019/1186, D. 2019/2811.

²⁷³ "..... In the examination made by determining that it was decided to sentence the defendant by the first instance court due to the crime of recording audio and visual media, that no decision was made in the said decision regarding the evidence registered in the order of 2017/1054 of the evidence room, that the defendant requested the return of the Samsung S-4 mini brand mobile phone belonging to the defendant in his petition dated 09/01/2019, that it was decided to reject the request with the additional decision dated 09/01/2019, that the defendant appealed this additional decision within the time limit;

When the scope of the file is examined, since it is understood that there is no obstacle to the return of the phone to the defendant and that it is not the subject matter of the crime itself, the decision to reject the request for the return of the evidence registered in the order of 2017/1054 of the evidence room is inexact and contrary to law; although it is possible to amend this issue without a trial in accordance with Article 280, paragraph 1-c of the Criminal Procedure Code;

By removing the 1st paragraph of the additional decision dated 09/01/2019, case numbered 2017/1204, and decision numbered 2018/154 from the ruling and replacing it with the following sentence: 'The visual media subject matter to the crime in the mobile phone registered in the order of 2017/1054 of the evidence room shall be taken from the mobile phone and transferred to the flash memory and returned to the defendant after the costs related to this process are paid by the defendant, and the flash memory shall be kept in the file', DISMISSAL OF THE APPEAL AS BEING AMENDED" Gaziantep RCA 7th CC., 15.01.2021, C. 2019/1107, D. 2021/51.

²⁷⁴ According to Art. 231, para. 5 of the CPC titled "Passing of the sentence and defer passing sentence": "(Additional: 6/12/2006-5560/Art. 23) If the penalty imposed at the end of the

B. Statute of Limitations

Since the maximum term of imprisonment for the crime under Art. 286 of the TCC is a penalty of up to six months' imprisonment, the limitation of prosecution is eight years according to Art. 66, para. 1, subpara. (e) of the TCC.

According to Article 66, para. 6 of the same Code, since the statute of limitations begins to run from the date of discontinuation in continuing crimes, the limitation of prosecution for the crime of recording audio or visual media, which is a continuing crime, will commence from the date of the discontinuation of this crime.

Since the maximum term of imprisonment for the crime regulated under Art. 286 of the TCC is a penalty of up to six months' imprisonment, the limitation of punishment according to Art. 68, para. 1, subpara. (e) of the TCC is ten years.

In addition, if a confiscation order has been issued for the crime of recording audio or visual media, pursuant to Art. 70 of the TCC, this confiscation order cannot be enforced after twenty years have elapsed since its finalisation.

C. Procedure Condition, Court with Competence and Jurisdiction

The crime under Art. 286 of the TCC is not a crime subject to complaint but a crime that is investigated and prosecuted *ex officio*.

An important issue to be mentioned here is the prepayment. As a matter of fact, for some crimes, the fulfilment of the prepayment terminates the investigation or prosecution.²⁷⁵ Since the sanction of this crime is a penalty of up to six months' imprisonment, the prepayment provisions shall be applied to this crime pursuant to Art. 75, para. 1 of the TCC,^{276 277}

Another important point to be mentioned is the simplified procedure, which is also called the procedure without hearing, and this procedure may be applied to some summary crimes.²⁷⁸ Since the sanction of the crime regulated under Art. 286 of the TCC is a penalty of up to six months' imprisonment, the simplified procedure may be applied for this crime in accordance with Art. 251, para. 1 of the CPC,^{279 280 281}

trial for the crime charged to the defendant is imprisonment for two years or less or a judicial fine, the court may decide to defer passing sentence. Provisions regarding conciliation are reserved. Defer passing sentence means that the judgement does not have any legal consequences for the defendant."

²⁷⁵ Şahin and Göktürk, *Ceza Muhakemesi Hukuku-I* (n 7) 89-90.

²⁷⁶ "..... In the case where it is alleged that the defendant, who was in the listeners' rows during the hearing of the case numbered 2018/318 of the Batman 1st Heavy Criminal Court dated 30/10/2018, recorded visual media during the prosecution proceedings on his mobile phone without authorisation, the crime regulated in Article 286, paragraph 1 of the Turkish Criminal Code that corresponds the defendant's action is one of the crimes subject to prepayment in accordance with Article 75, paragraph 1 of the same Code, although it has been understood that the prepayment proposal by the Batman Chief Public Prosecutor's Office was notified directly to the defendant's address in the central civil registration system and notified in accordance with Article 21, paragraph 2 of the Notification Law, the defendant was prosecuted and convicted on the grounds that the defendant did not comply with the prepayment proposal in due time;

According to Article 10, paragraph 1 of the Notification Law No. 7201, which regulates notification at the known address, notification shall be made at the last known address of the addressee. According to paragraph 2 of the same article added by Article 3 of the Law No. 6099, if it is understood that the last known address is not suitable for notification or notification cannot be made, the address of the addressee's residence in the address registration system is accepted as the last known address and notification is made to this address.

According to Article 30, paragraph 1 of the Regulation on the Implementation of the Notification Law, except for the notifications issued by giving a notation to the residential address in the address registration system, if none of the addressee or those who can be notified on behalf of the addressee is permanently absent at the address shown, the notification officer must inquire from the neighbours, managers, janitors, mukhtars, board of aldermen or council members, law enforcement chief, and officers who are likely to know the reason for the absence at the address and write their statements on the notification warrant and have them sign it, and if they refrain from signing, they must write this situation and sign it.

Article 48 of the same Regulation states that 'in order to determine the address of the person who cannot be notified in accordance with the provisions of this Regulation, whose address cannot be determined by the notification officer, and whose residential address is not found in the address registration system, an address search is carried out by the authority issuing the notification. The authority issuing the notification may investigate and determine the address of the addressee primarily from official or private institutions and offices, and if no results are obtained from these, through law enforcement officers. If the address of the addressee cannot be determined despite the investigations, the address shall be deemed unknown. Notification to those whose address is unknown is made by announcement'.

In the light of these explanations, when the concrete case is examined, it is understood that the prepayment proposal was notified to the defendant's address in the central civil registration system by stating that this address is the address in the central civil registration system, but the notification made at the address in the central civil registration system instead of the address notified by the defendant during the investigation stage is invalid, and the address where the justified decision was also notified, even if this address is the same as the address in the central civil registration system, it is necessary to send a prepayment proposal again without specifying that it is the address in the central civil registration system, and if the notification cannot be made at this address, it is necessary to send a notification to the address in the central civil registration system and specifying that it is the address in the central civil registration system, and not considering that the legal status of the defendant should be determined and appreciated according to the result, Since it is contrary to the law and the defendant's objections to the appeal are deemed appropriate in this respect, in accordance with the subparagraph (f) added to Article 280, paragraph 1 of the Criminal Procedure Code with the Law No. 7188 REVERSED," Gaziantep RCA 6th CC., 08.11.2019, C. 2019/3211, D. 2019/2102.

²⁷⁷ See also, Izmir RCA 2nd CC., 27.09.2017, C. 2017/2260, D. 2017/2235; Gaziantep RCA 4th CC., 12.10.2017, C. 2017/1665, D. 2017/1535; Gaziantep RCA 3rd CC., 03.07.2018, C. 2018/18, D. 2018/1380; Istanbul RCA 1st CC., 20.05.2019, C. 2019/2, D. 2019/1065; Antalya RCA 3rd CC., 14.02.2020, C. 2019/1830, D. 2020/362; Ankara RCA 6th CC., 21.01.2021, C. 2019/3375, D. 2021/63; Court of Cassation 12th CC., 21.11.2017, C. 2017/3067, D. 2017/9120.

²⁷⁸ Cumhur Şahin and Neslihan Göktürk, *Ceza Muhakemesi Hukuku-II* (11th edn, Seçkin Yayıncılık 2021) 215.

²⁷⁹ See, Memiş Kartal (n 41) 402; Gökcan and Artaç (n 75) 9323.

²⁸⁰ "..... The defendant's act is related to the crime of 'recording audio or visual media' regulated in Article 286, paragraph 1 of the Turkish Criminal Code No. 5237, the basic penalty for the crime of recording audio or visual media is determined as 'sentenced to up to six months' imprisonment' in Article 286, paragraph 1 of the Turkish Criminal Code; in terms of the basic penalty amount, it will be subject to the 'Simplified Procedure' regulation in Article 251, paragraph 1 of the Criminal Procedure Code No. 5271, which was rearranged with Article 24 of the Law No. 7188 dated 17.10.2019; with the cancellation decision of the Constitutional Court dated 25.06.2020, case numbered 2020/16-decision numbered 2020/33 published in the Official Gazette dated 19.08.2020 and numbered 31218, it is understood that the regulation in Article 5, paragraph 1-d of the Law No. 7188 has been cancelled in terms of the files that have been passed to the prosecution stage and the simplified procedure may be applied; since it is necessary to evaluate the provisions of Article 251 of the Criminal Procedure Code in line with the aforementioned cancellation decision of the Constitutional Court and it is necessary to re-evaluate the file in terms of the 'Simplified Procedure' due to the necessity, ...; For this reason, the decision of the Serik 3rd Criminal Court of First Instance dated 06/07/2021, case numbered 2020/452, decision numbered 2021/347, pursuant to Article 280, paragraph 1 of the Criminal Procedure Code, REVERSED," Antalya RCA 11th CC., 02.06.2022, C. 2022/1189, D. 2022/1786.

²⁸¹ See also, Ankara RCA 23rd CC., 18.11.2020, C. 2019/2421, D. 2020/3662; Ankara RCA 23rd CC., 18.11.2020, C. 2019/2060, D. 2020/3675; Adana RCA 9th CC., 25.01.2021, C. 2020/397, D. 2021/198; Adana RCA 9th CC., 16.02.2021, C. 2020/1707, D. 2021/379; Sakarya RCA 6th CC., 24.03.2021, C. 2020/2291, D. 2021/1003.

The court with competence is the Criminal Court of First Instance pursuant to Art. 11 of the Law No. 5235, since the maximum term of imprisonment regulated for the crime under Art. 286 of the TCC is a penalty of up to six months' imprisonment.

As a rule, the court with jurisdiction is the court where the crime is committed, according to Art. 12, para. 1 of the CPC. However, pursuant to the provision of paragraph 2 of the same article, in the case that the crime regulated under Art. 286 of the TCC remains in the phase of attempt, the court where the last act of conduct was committed; as the crime in question is a continuing crime, the court where the discontinuation occurred; and in the case that this crime is committed as successive crimes, the court where the last crime was committed will have jurisdiction.

Conclusion

In terms of the legally protected interests of the crime regulated in Art. 286 of the TCC, the purpose of the regulations stating that all kinds of audio or visual media recording or transferring devices cannot be used within the courthouse and in the courtroom after the start of the hearing and that Art. 286 of the TCC will be applied in case of violation of these rules is to protect the presumption of innocence, especially in terms of criminal proceedings, by ensuring that the proceedings take place in a certain order.

This crime is an abstract danger crime, in which there is an act that constitutes a danger in terms of the protection of the presumption of innocence and the conduct of the proceedings taking place in a certain order, especially in criminal proceedings, with the unauthorised recording or transferring activities during the investigation or prosecution proceedings, and there is no need for a concrete danger to arise.

The crime regulated in Art. 286 of the TCC can be committed by anyone and is not a specific crime. Also, all individuals who make up the society are victims of this crime.

The crime of recording audio or visual media, which is also a crime with alternative acts, is a fixed-action crime, in the legal definition of which the types of acts that can be committed are specified.

As the acts of "recording" or "transferring", which are the alternative acts regulated in the legal definition of the crime in question and which constitute the specified crime, are acts that have a continuous process to be carried out, in our opinion, this crime is a continuing crime.

Since it is misleading to use a plural expression regarding the crime under Art. 286 of the TCC as if it is necessary to record or transfer all types of audio or visual media during the investigation and prosecution proceedings, we believe that it will be appropriate to revise the plural expression in Art. 286 of the TCC and use "... *audio or any type of visual medium* ..." instead of the "... *audio or visual media* ..." by taking into consideration the ratio legis of the text of the law, i.e., its core purpose. In addition to this, in terms of the phrase "... *investigation and prosecution* ..." in Art. 286 of the TCC, since the conjunction "*and*" used in the legal definition would require that the subject matter of the act of recording or transferring be the audio or visual media during both the investigation and the prosecution proceedings, this constitutes a situation contrary to the principle of legal certainty in the context of the principle of the legality of crimes and punishments, and therefore, we are of the opinion that it will be appropriate to use the phrase "... *investigation or prosecution* ..." instead of "... *investigation and prosecution* ..." in the same provision by taking into account the ratio legis of the text of the law, i.e., its core purpose. Thus, according to our suggestion, it will be appropriate to revise Art. 286 of the TCC with a legislative amendment as follows: "*Any person who records or transfers audio or any type of visual medium without authorisation during the investigation or prosecution proceedings shall be sentenced to up to six months' imprisonment.*".

In addition to that, the erroneous statement "... *no audio and visual recording may be made* ..." in Art. 153, para. 1 of the CPL titled "Prohibition of recording and broadcasting" has also created a situation contrary to the principle of legal certainty as to whether only audio recording or only visual recording will constitute the crime of recording audio or visual media. Thus, at this point, it is necessary to examine the ratio legis of the text of the law, i.e., its core purpose, and making a legislative amendment in order to eliminate this situation contrary to the principle of legal certainty and to ensure compatibility with the regulation in the type of crime in Art. 286 of the TCC, which is referred to by Art. 153, para. 3 of the CPL, and using the conjunction "*or*" instead of "*and*" in the phrase "... *audio and visual recording* ..." Art. 153, para. 1 of the CPL would be appropriate. Therefore, in accordance with our proposal, we suggest that the first sentence of the provision in Art. 153, para. 1 of the CPL be revised to read as follows: "*No photographs may be taken, and no audio or visual recording may be made during the hearing.*".

In our opinion, the act of recording or transferring audio or visual media in the crime under Art. 286 of the TCC cannot be deemed worthy of punishment for having wrongful content without taking into account the phrase "... *without authorisation* ..." stated in the relevant article. This is because the phrase "... *without authorisation* ..." used in the legal definition of this crime regulates the punishment of the act constituting the crime based on the absence of the specified "authorisation". Therefore, a judgement of worthlessness cannot be made about the act of this crime without taking into account the necessity of the "authorisation" expressed in the text of the article, and since the aim of the requirement of "authorisation" here is to provide a more effective control and

supervision mechanism for the specified act, the presence of the requirement of “authorisation” does not serve as a reason for legal justification; rather, it is an element included in the typicality in the context of the material elements of the crime.

The crime of recording audio or visual media is a conduct crime that does not require a result for its completion and is completed by the unauthorised recording or transferring of audio or visual media during the investigation or prosecution proceedings.

Since the type of crime under Art. 286 of the TCC is a conduct crime, there is no causation problem.

In the case that the material elements of the crime in the legal definition of Art. 286 of the TCC are foreseen and accepted by the perpetrator, this crime may be committed with eventual intent.

As explained under the heading “Act”, among the material elements of the crime of recording audio or visual media, the presence of the “authorisation” in recording or transferring audio or visual media during the investigation or prosecution proceedings is not a reason for legal justification; since it is an element included in the typicality in the context of the material elements of the crime, when evaluated in terms of the relationship between intent and mistake, the fact that the perpetrator does not know that it is necessary for him or her to have “authorisation” to record or transfer the audio or visual media is also within the scope of the mistake of fact under Art. 30, para. 1 of the TCC and negates the intent of the perpetrator regarding the crime.

In terms of the crime regulated under Art. 286 of the TCC, there is no qualified element that requires an aggravation or mitigation of the penalty.

The crime of recording audio or visual media does not have any features in terms of culpability, and therefore, the provisions related to culpability may be applied to the crime in question.

In terms of this crime, the conduct of the act will begin with the operation of the devices that enable the recording or transferring of audio or visual media, and thus the act of recording or transferring, and the placement of these devices will only constitute preparatory acts.

When an evaluation is made in the context of the impossible attempt, in terms of the crime under Art. 286 of the TCC, if the means, i.e., the technical devices that enable the recording or transferring audio or visual media, are inadequate, it cannot be said that the acts of conduct have begun. Our opinion is that it will be appropriate to have an expert examination conducted on these devices when deemed necessary in order to determine whether they possess the necessary technical competence.

If the audio or visual media on which the act of unauthorised recording or transferring during the investigation or prosecution proceedings, which constitutes the subject matter of the crime in terms of the crime of recording audio or visual media, does not exist, the impossible crime will be considered.

The provisions regarding the attempt at the crime of recording audio or visual media, which is a continuing crime, can only be applied until this crime is completed.

Moreover, since this crime is a continuing crime, it is possible to participate in the conduct of this crime as long as it continues to be committed by the perpetrator, and in this case, the provisions for participation shall apply. In addition to that, in our opinion, it is not possible to participate as a co-perpetrator with an act of omission in the crime of recording audio or visual media, which can be committed with an act of conduct, but only be held liable as an accessory, as an aider by the act of omission. However, if the act of omission constitutes a distinct crime regulated by the law, it will be necessary to punish the person as a perpetrator for the distinct crime committed by this act of omission in accordance with the principle of the primacy of perpetration over complicity.

Furthermore, in this study, after evaluating the scope of application of the rules of apparent aggregation in relation to the crime of recording audio or visual media, it has been examined whether the rules of successive crimes, conceptual aggregation of the same types of crimes, and conceptual aggregation of different types of crimes, which are exceptions to the rule of factual aggregation, may also be applied.

Last but not least, since the sanction of the crime regulated under Art. 286 of the TCC is a penalty of up to six months' imprisonment, the prepayment provisions shall be applied to this crime pursuant to Art. 75, para. 1 of the TCC, and the simplified procedure may also be applied for this crime in accordance with Art. 251, para. 1 of the CPC.

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