

# THE VIOLATION OF PRIVACY IN THE ROMANIAN CRIMINAL LAW. THE PRE-EXISTENT ELEMENTS AND THE CONSTITUTIVE CONTENT

Bogdan Bîrzu

Lecturer, PhD, "Titu Maiorescu" University, Bucharest

*Abstract: In this paper we have examined the pre-existent elements and the constitutive content of the offense of privacy violation. As this indictment is an absolute novelty in the Romanian criminal law, in the introductory part we have emphasized its need and importance through the constitutional provisions and the European legal instruments. The novelty consists in the examination of this crime and highlighting the particular importance granted to privacy protection in Romania, in full compliance with the European legislation in this area. By the way it was designed and the depth of the examination, the paper can be useful to law students in the country, as well as practitioners and others who want to improve their knowledge in this field. The paper is part of a book called Criminal Law, The Special Part, to be published this year with the Universul Juridic Publishing House.*

*Keywords: pre-existent elements; the constitutive content; the offense*

## 1. Introduction

The privacy protection has been a constant concern of the European institutions, ensuring it has been subject to a number of provisions contained in some European legal instruments.

Such provisions are found in art. 16 par. (1) of the Treaty on the Functioning of the European Union, art. 7 (respect for private and family life) and art. 8 (protection of personal data) of the Charter of Fundamental Human Rights and art. 8 (the right to respect the private and family life) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

In Romania this right is protected by the rule and constitutional of law, the right to intimate, family and private life is considered a fundamental right.

Thus, according to art. 26 par. (1) of the Constitution, the public authorities shall respect and protect the intimate, family and private life, and par. (2) the individual has the right to dispose of himself, if he does not violate the rights and freedoms of others, public order or morals.

We note that in the recent years, at EU level, the notion of privacy protection includes the protection of personal data.

In this context, we highlight the importance given to this law, which resulted in the adoption of European legal instruments, the last of which being the Directive (EU) 2016/680 of the European Parliament and of the Council of April 27, 2016 on the protection of individuals regarding the processing data, the personal data by the competent authorities for the prevention, detection, investigation or prosecution of criminal offenses or enforcement and the free movement of such data and repealing Council framework Decision 2008/977/JHA [1].

The act of violation of privacy consist in undermining privacy, without right, by photographing, trapping or capturing images, listening with technical means or audio recording of a person in a house or room or building or private conversations or in the action to disclose, disseminate, present or convey without right, sounds, conversations or images as mentioned above, to another person or to the public.

Also, the offense will be retained, being considered to be more serious when the author places without right technical means of audio or video recording in order to commit the above mentioned acts.

The criminal proceedings shall be initiated upon prior complaint from the injured person in the case of simple legal procedures provided under par. (1) and (2), art. 226 of the Criminal Code. We specify that the crime of violation of privacy was not provided for in the Criminal Code of 1969 or in any other legislation.

Given the “principle of legality of criminal offenses referred to in art. 1, par. (2) the New Criminal Law, the offense may be detained only on the acts committed after the entry into force of the new law. For the acts committed or those in continuous form, whose performance has begun under the influence of the Criminal Code and it was exhausted under the new law, the court will consider the a sentence only for the acts committed after the entry into force of the New Criminal Code” [2].

## **2. The Pre-existent Elements**

### **2.1. The Legal Object**

The legal object consists in the social relations, whose existence and normal progress are conditioned by respecting the private life of a physical entity; in another opinion it is considered that the legal subject consists in “the intimacy of the private life of the physical entity and the social relations that are born and developed around this social value” [2].

Since the notion of privacy is not defined in the Romanian law, we also appreciate that this must be assessed in relation to the “European Court of Human Rights [3], which showed that it is neither possible nor necessary to try to define in an exhaustive way the concept of privacy. However, it would be too restrictive to limit the notion to an “inner circle” where the person could perform their personal lives as they wish to and to exclude the outside world. The respect to privacy must include to a certain extent a person's right to establish and develop the relations with peers and there is no reason of a principle to justify the exclusion of activities of a professional nature or business. There are such areas of interaction of a person with third parties, even in a public context, which may be included in the notion of privacy [4]. Referring to the notion of “private life” in terms of the European Convention and jurisprudence of the courts in Strasbourg doctrine [5] it was appreciated that on the matter there is no precise definition, its content changes depending on several factors of which we mention: the period to which they relate, environment and society in which the individual spends his life. Likewise, the European Court shows that “private life” is a broad concept that does not lend itself to an exhaustive definition [6]. The privacy of a person includes ensuring physical and moral integrity of the individual, personal and social identity, respect for personal information, sexuality, personal or private spaces [7]. Two elements of the right to privacy, which are not explicitly mentioned in art. 8 are provided in art. 10, par. 2 of the European Convention as grounds for restricting freedom of expression: the protection of a person's reputation and preventing disclosure of confidential information” [8].

Therefore, the legal subject regards “protecting only certain parts of the notion of privacy as there were retained in the European Court of Human Rights” [2].

Although there are several practical ways that can affect the privacy of individuals, as shown by the provisions of art. 74 of the Civil Code, however the act will only be an offense if the violation of privacy is achieved through one of the activities expressly incriminated in the law; possible breaching of the privacy of the individual by means other than those expressly mentioned in art. 226 par. (1), (2) and (5) of the Criminal Code will not be an offense, being still a tort of the author.

### **2.2. The Material Object**

In the recent doctrine there were expressed two different opinions, one of them claiming the existence of a material object and the second opinion its inexistence.

In the first opinion it is appreciated that the *material object* “is represented by photos, documents, recordings on tapes, footage and other material where the victim is found. Means of intercepting data, information, images or sounds are not part of the material object, as they are not the material correspondent of social value which has been infringed, but the goods with which the offense was committed and which will be submitted to special confiscation” [9], or the material object “is represented by the material entity, the paper, magnetic, or digital support that fixed, recorded, copied the filmed data, listen or recorded (on issues of privacy of the person, it may be, for example, the USB key, videotape, CD etc.)” [10].

In another opinion it is sustained that this offense, “in principle, it does not have, as the incrimination of violation of privacy is protected by the right to privacy” [2]. The same author states that “the technical audio or video means placed and used for committing the offense is not the material object, but they are goods with which one commits an offense and are subject to security measure of special confiscation” [2].

In our case we consider as well that the offense has material object which in relation to the actual circumstances of the offense and the used means may be represented by photographs, documents, records, tapes, etc.

### 2.3. The Subjects of the Offense

a) *the active subject* of the crime can be any natural or legal person who meets the general conditions required by the law.

According to the doctrine, “it can be the active subject the landlord, the owner of the room, outbuilding (for example, in the case where he rented the home of the injured person and before release he installs technical devices to capture images)” [2].

Criminal participation is possible in all its forms; assuming that it will retain co-authorship or complicity of at least three participants, it will be incident with the aggravating circumstance provided for in art. 77, letter a) Criminal Code (the commission of the offense by three or more persons together).

b) *the passive subject* may be an individual in life, the act is not typical if it concerns a dead person. It cannot be a passive subject of this crime a legal person; the plurality of passive subjects will attract the retention of contest offenses.

## 3. The Constitutive Content of the Offense

### 3.1. The Objective Side

*The objective side* comprises the material element, essential requirements, the immediate consequence and causality link.

*The material element* of the objective side is performed by distinct alternative actions, by which it is brought prejudice, without right, to the privacy of individuals who are in a house or room or outbuilding, which in the case of paragraph (1) consist in: shooting, trapping or capturing images, listening with technical means or audio recording of a person in a house or room or outbuilding.

As for the meaning of the house, room, outbuilding it is identical to the existing legal content of the offense of trespassing (previously analyzed), that is why we do not provide any other explanation.

“*Photo shooting*” means setting the image of an object or a person on a plate or photo paper, film or storage on a digital device (e.g. photo shooting a person in a building at a meeting or private party, no matter what conjuncture).

In the event where it is photographed only property, things or animals, the act will not be typical.

*Capture or record images* involve the recording, visual perception distributions on magnetic, digital support or information or obtain video recording [9]. Capturing images relating to a person can be done by any technical means (webcams, surveillance cameras, etc.). Capture images does not include their recording [2].

In the doctrine it was expressed the view that “it is not typical the deed to capture images relating to privacy of a person without using technical means, but “the naked eye” (e.g. by spying on a person with binoculars or through the key hole), even in the event that it is followed by the reproduction in the form of drawings, sketches, etc.” [2].

Regarding “*recording images*”, this (recording) must concern images with the injured party, not home, room, animal or its annexes (of the injured party) [2].

In the event where the “activity of the perpetrator consists in following repeatedly the victim or repeated supervision of the home, workplace or other places frequented by this person, accompanied by capturing images of his home it will hold the contest between the offense of harassment and the violation of privacy” [2].

*Listening by technical means* must regard “the discussions of a person in the house, room or outbuilding, regardless of their nature (personal discussions, intimate, relating to labor relations, etc.) and it should be achieved by technical means (e.g. by the use of microphones through which there can be captured the sounds from adjacent private space)” [2] being excluded “the wiretaps through the use of microphones or software specialized of the persons in their private spaces prescribed by the law” [2].

Also, “it is irrelevant whether the discussions heard are understandable or not (for example, the act will be typical also in the case where hearing a person was achieved in his house, but due to the failure of technical means it has been partially or wholly unintelligible); in the case of technical means only noises were heard in the house, room or outbuilding, the act is not typical (for example, noises of animals held in a house)” [2]; at the same time, in the literature it is appreciated that the existence of the offense is not necessary for the “perpetrator to proceed also to record the listened conversations” [2].

Audio recording must “regard the discussion of a person in the private space regardless of their nature, and not any other sounds; it is not relevant whether the recorded discussions are intelligible or not” [2].

In the case where the perpetrator takes more alternative actions for violation of privacy (among those enumerated in the text) it will hold committing a single offense of violation of privacy (e.g. capture images and audio recording); this aspect is important in the process of individualization of criminal law sanction to be applied by the court.

In the recent doctrine it was appreciated that the “typical act must be committed against an individual in a house (his or someone else's) room or outbuilding (e.g. the dressing of a fitness facility, rooms where there are shooting a film), not when it is a place surrounding them. In the case where the individual is not in a house or room or outbuilding (for example, if a person is in an outbuilding which he does not keep - arable land outside town - or a the road, on a beach, the deck of a boat, a car, etc.) the achievement of privacy by the above means is not, in principle, a typical action” [2].

The act will not be typical also in the case where the employer clearly has installed video cameras to supervise the professional activities of its employees. If, however, “installing cameras or microphones have clandestine feature, the employer seeking to register or images or private conversations of the employee, or both professional and private pictures or conversations (e.g. the clandestine installation of microphones in the office of a female employee in order to listening to private conversations thereof) will be able to hold the commission of the offense under art. 226 of the New Criminal Code when it is obvious that they were aimed at interfering with the privacy of the employee receiving this right at work” [2].

The *essential requirement* of the material element of the objective side presupposes the achievement of the intimate privacy of individuals to be done without right; the deed will not be typical if the action is permitted by the law (layout of technical supervision by the judge of rights and freedoms in accordance with art. 139 of the Criminal Procedure Code)

*The material element* of the objective side can be achieved through the interference, without right of privacy of individuals by technical means listening or recording one or more private conversations [art. 226 par. (1) Criminal Code].

The doctrine held that “it is irrelevant whether this conversation takes place in a house, room or outbuilding, in a place, even in public, having relevance only its private feature pertaining to the resorts of intimate private life”, the incrimination regards “only tapping the private ambient conversations, of a person, not by phone or electronic means of communication, it will retain the charge of violation of secrecy of correspondence provided by art. 302, par. (2) of the New Criminal Code; it is not excluded retaining the real competition of the two offenses” [2].

*The essential requirement* of the material element implies that affecting the privacy of a person to be achieved without right.

*The immediate result* is violation of the privacy of a person, his intimacy.

In the recent doctrine it was considered that the immediate consequence “consists in the infringement of privacy by the carried out criminal activity; given the wording of the legislator of the incrimination norm (the undermining of privacy), we consider that the offense provided by art. 226, par. (1) of the New Criminal Code is the result of an offense” [2].

*The causation link* must be established each time, as it is necessary to establish the existence between the action and the immediate consequence of the perpetrator.

### **3.2. The Subjective Side**

The examined crime is committed with direct intent or indirect in the case of normative way provided for in paragraphs (1) and (2), as the perpetrator foresees and follows or although he does not follow this ending he accepts the possibility of it, and direct intent in the case of normative way provided in par. (5).

For the existence of the crime, in the case of normative way referred to in paragraph (1) and the aggravated normative ways provided for in par. (2) the motive and purpose have no legal relevance, but still showing importance within the individualization activity of the criminal law sanction.

### **4. Conclusions**

At the level of European Union the privacy was a priority in practice which it has resulted in the adoption of legal instruments aimed at insuring the defense of values considered to be particularly important. As mentioned in the introduction of the paper, such provisions are found in some legal instruments known at European level.

Wishing to ensure the harmonization of national legislation with the European Union, and therefore to enforce this right, in Romania it was protected by constitutional legal rules.

With the adoption of the new Criminal Code, the protection of privacy is ensured by criminal law provisions that were under consideration.

The conducted examination has highlighted on the one hand the importance and the need to protect the privacy by criminal law rules and the analysis of the constitutive content of this crime.

As one general conclusion we appreciate the usefulness of this incrimination and also the way in which it was provided in the legal content its main actions which were incriminated.

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