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PhD Thesis

USING THE AUDIO OR VIDEO INTERCEPTIONS AND REGISTRATIONS AS MEANS OF PROOF IN THE PENAL TRIAL AND THE COMPATIBILITY OF THE REGULATION WITH THE EUROPEAN AND INTERNATIONAL REQUESTS

-Summary-

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SUMMARY

This paper presents an in-depth analysis of the national criminal procedure norms regarding the undergoing and use of the audio or video interceptions and recordings in the criminal procedure, but also of the European and international frame in the field.

The first Chapter of the work is dedicated to some general considerations related to the PhD thesis topic.

According to the ***principle of finding the truth, presented in the first Section of this chapter***, the operational information detaching from the audio-video interceptions and recordings, as means of proof in the criminal procedure, must be deciphered with maximum responsibility by the judiciary organ because understanding the meaning of the a message depends on more factors.

In the ***second sections, we underlined aspects related to the evolution of the criminal system, the object of probation, the task and administration of proofs respectively***. We analysed these aspects both from the perspective of the literature in the field, and of the jurisprudence of the European Court and the High Court of Cassation and Justice.

Also, in this sub-section we presented briefly the previous legislative experiences, and also the evolution of the regulation, analysing these aspects from the perspective of the new Code of criminal procedure.

Also in the first Chapter, we underline aspects related to the ***modality to administrate the proofs from the perspective of the jurisprudence of the European Court and the invalidation of the proofs obtained illegally.***

We approached the procedure of administration of the proofs, on the one side from the perspective of the negative considerations reflected on the persons involved in the criminal procedure, on the other hand from the perspective of the consequences that affect Romania, condemned repeatedly by the European Court.

The last section of this Chapter treats aspects aiming the means of audio video proof within the probation system.

Even though these aspects will be analysed in the following chapter, the brief mentioning in this sub-section of Chapter I are necessary to reveal the controversies in the literature in the field and the judiciary practice, regarding the use of these means of proof in the criminal procedure.

We underlined the fact that the liberty of the judiciary organs in the administration of the proofs must observe some balance between the necessity to defend the right of the person to privacy and the fundamental principles of the criminal procedure, conditions where the right to a fair trial is highly important.

The possibility to intercept the phone calls by the state authorities is mentioned, practically, in the legislations of all the states that signed the Convention, as well as the states on the other continents that benefit from advanced technology and an appropriate legislative frame, in view of combating criminality.

Chapter II is related to cases and conditions to undergo interceptions and recordings, audio-video, ***underlining in the first section the importance of the procedure to authorize in view of obtaining these means of proof, presenting the evolution of the legislation regarding the rule of the competence of the judiciary organ having the right to approve such a restrictive measure of rights, as well as the competence in case of emergency.***

In agreement with the revision of the Constitution, regarding the delegation of the attributions related to restraining the constitutional rights, from the prosecutor to the judge, the provisions of Law no. 281/2003 have brought to the judge's task the attribution to authorize the audio or video interceptions and recordings, namely of the president of the court, whose competence to judge the cause in first instance or the judge appointed by them on purpose.

Both the Convention for the defence of the human rights and the fundamental liberties, and the Universal Declaration of the Human Rights, expressly give the right to respect the private life, of the family, property and correspondence.

From this perspective, in the moment of using these proof means it is required to fulfil a series of requests reflected both in the normative acts mentioned above and in the jurisprudence of the European Court. In this sense, the interference in the private life is imposed to be mentioned in the national law, which must be of special precision, by clear and detailed rules, the intervention of authority must be necessary in a democratic society to defend a legitimate purpose, as well as respecting some proportionality between the interference and the measure disposed of by the public authority and the legitimate purpose defended.

In the following section, we presented the conditions mentioned by the Code of criminal procedure, regarding the procedure to obtain the audio or video registrations, starting from the motivated authorisation of the judge, the content of the request done by the prosecutor, of the persons susceptible to be recorded and the crimes for which such measure can be disposed. The research was based both on the opinions expressed by the literature in the field and the judiciary practice, and the provisions of the new Code of criminal

procedure. In this sense, we formed critics and suggestions of ferend law based on the interpretation and applying in practice the texts of law, as well as the lack of predictability of the law.

These provisions have suffered numerous modifications and completions, in the conditions where the norms representing the headquarters of the matter did not confer enough procedure guarantees, the texts of law generating various interpretations and implicitly non unitary practice.

Reported to these aspects, we showed that the form in vigour of the text of law is in our scarce opinion, sense where it is imposed the intervention of the legislator to remove equivoque, on taking into account also the fact that the legislation of the criminal procedure must be of special precision.

As ferend law we suggested, as in the request to issue the authorization, to indicate in a non equivoque way the modality to accomplish these means of proof, as well as the obligation to minimize the interception of the communications not related to the cause.

At the same time, the request to issue the authorisation would be necessary to contain mentions regarding what is expected to obtain by issuing the mandate and presenting any requests previously known by the applicant, indicating the same person.

By analyzing the conditions and cases of intercepting and recording the conversations or communications on the phone or by any electronic means of communication, we noticed the fact that the norms of the Code of criminal procedure do not contain any mention regarding the persons who can be listened to, context in which any person could be subject to this interference in their private life, if are incident the provisions of art. 91^1 C.pr.pen. (European Court in Lambert cause versus France, stated to have been emptied of content the protective mechanism of the Convention).

In this sense, we made the conclusion that it is imposed by ferend law to be mentioned in the law the persons to be subject to this intrusion, others than the doer. We consider that it would also be imposed to complete the text of law with the obligation to justify by the organ of criminal procedure of a relation between the third party and the supposed doer.

We noticed that it lacks a delimitation in respect of the forms of infraction, context in which it is reached the conclusion that the interception can be authorized even if it is noticed the existence of some preparatory acts or a non incriminated attempt, aspect bringing into discussion both the observance of the principle of proportionality and the equity of the penal process. Thus, reported to these aspects, to appreciate the proportionality of the interference with followed purpose, it is necessary to quantify the gravity of the crime. In the context where it was not actually done, it cannot be evaluated the observation of this principle.

In the frame of ***the second section of this Chapter, regarding putting into practice this criminal procedure,*** we underlined the fact that the interceptions and recordings authorized by court are applied by the

prosecutor, and in case of missing corresponding techniques, it can be disposed for the operations to be done by the organ of criminal research.

Since this activity can imply specialized knowledge, as well as complex technical equipment and means, in some cases, the prosecutor or organ of criminal research can ask for the technical help of other people carrying out their activity in institutions outside the judiciary system. Such persons are specialists or technicians with other institutions, usually services or structures specialized in gathering and processing information. An important request is related to the obligation of the persons required for technical help to keep the secret of the operations done. However, this obligation gives all the persons involved (judges, prosecutors, officers of judiciary police, registrars, technicians), being an essential condition to assure the efficiency of these probation procedures.

Also, ***in this section we presented the remedies and sanctions related to not observing the various aspects regarding the authorization of the registrations and interceptions of sounds and images.***

The last section of this chapter, called "Audio-video recordings and interceptions in special criminal procedure regulations," is dedicated to the analysis of the conditions specified by other special laws, ***based on carrying out these means of probation based on Law no. 51/1991 and according to Law no. 535/2004.***

Based on the fact that the regulations in the Code of criminal procedure valid, regarding the audio or video recordings, are applicable both to the judiciary procedures carried out according to the Code, and in the frame of the judiciary procedure carried out according to some special criminal regulations, in their completion, we noticed that even though most of the facts representing menace according to art. 3 in Law no. 51/1991 are also crimes, and the procedure when it comes to national security presents some similarities with that in the Code of criminal procedure, the report between them has generated controversy both in the literature in the field and in practice.

As for carrying out these means of probation by the services of information, we notice two different procedures towards the one regulated in the Code of criminal procedure, namely the one mentioned under art. 13 in Law no. 51/1991 regarding the national safety and the one in art.20-22 in Law no. 535/2004 regarding prevention and fight against terrorism.

In the conditions where the measures to monitor in case of some possible menace to the national security, it can be disposed till present according to the procedure mentioned under art.13 in Law no. 51/1991, dispositions that were not abrogated, we appreciate that it would be necessary to modify the dispositions of art. 13-15 in Law no.51/1991 regarding the national safety of Romania, in view of making it compatible with the dispositions of the Code of criminal procedure, with the Convention for the defence of the human rights and the fundamental liberties and jurisprudence of the European Court of the Human Rights, in the sense of removing the provisions, already noticed as unconventional.

These special investigative procedures represent mainly modalities to gather information, yet what differentiates them is the fact that the specific activities on the line of national security are not acts of criminal procedure, and that represents exclusively components of the activity of information to realize the national safety, while the special techniques of investigation in the criminal procedure are probatory procedures.

On taking into account the above, we consider timely the harmonizing the dispositions in the special laws with those in the Code of criminal procedure and the jurisprudence of the European Court, when it comes to the conditions of authorization, the magistrate authorized to dispose the authority, in the conditions where the special normative acts refer to the prosecutors. Also, modifications are imposed when it comes to the maximum duration of the interceptions, the clear definition of the categories of crimes and persons susceptible to be subject to interception, conditions, procedure and institutions – categories of experts, authorized to check the authenticity of the recordings.

The third Chapter was dedicated to the analysis of the procedure of certification of these means of probation, starting with the ***evolution of the regulation and the importance of certification to evaluate the proof***.

We noticed that by this procedure it is formed a guarantee of the fact that the prosecutor will not take in a discussion fragments out of the context, so that they could determine the criminal character of the deed. Also, this obligation given by the legislator removes the possibility to alter the content of the conversations intercepted and recorded, in the sense of offering another connotation that the real one for the message transmitted.

The importance of the certification must be seen in the perspective of valuing the results obtained by special techniques of investigation, context in which it is imposed to be mentioned that all the technical activities done for the criminal procedure or by investigative procedures in national security must be settled by procedural acts able to create for the organs of criminal procedure and the court an image on the operations that had as result obtaining those recordings.

Also in this section we underlined aspects related to the sanction in case the procedure of certification was not fulfilled. We consider that it will be the exclusion of the reports of presentation, having as a consequence the impossibility to retain them as means of probation, in the context where they were obtained by not observing the principle of legality of the administration of the means of probation.

In the second section we presented the role of the prosecutor and of the organs of criminal procedure related to the competence of certification, underlining the fact that when the transcription is done by the prosecutor himself, who proceeds personally to interceptions and recordings, it is also imposed to obtain the certification by them, and the check and counter signing is done by the prosecutor hierarchically superior,

because the specifications of art. 91^3 C.pr.pen. are of strict interpretation, the obligation of certification operating regardless of the organ who did the transcription of the interceptions.

This opinion is reported to the jurisprudence of the High Court of Cassation and Justice that stated This opinion is reported to the jurisprudence of the High Court of Cassation and Justice that stated in the sense that, applying the mention of "I certify the authenticity" by the prosecutor is not imposed in the conditions where presenting the recorded conversations was done by them.

As for the field of national security, we presented the fact that in practice, the informative process is mistaken in most cases with the probation one in the criminal procedure, in the conditions where the documents in which are written the results of the operations to intercept and record the conversations/communications of the person based on Law no. 535/2004 are assimilated to the reports to write and certify the recordings in the sense of art. 91^3 C.pr.pen.

In fact, the certification of the recordings becomes a formal activity done by the prosecutor, who keeps all the content of the "presentation note" without having the possibility to check the possible forms of manipulation or counterfeit of the recordings received from the secret services.

In this sense, we underlined that it is imposed to settle on purpose, by legal dispositions, the possibility and the conditions to use them after, in criminal cause of common right, as means of probation, of the transcriptions of some communications intercepted initially based on an authorization issued based on the special legislation regarding the national safety. Such regulation is necessary from the perspective of settling some proper warranty for the person who was subject to such interference in their right to a private life, to remove the possibility of different interpretations, outlined by doctrine and even jurisprudence, under the aspect of legality of using such interceptions in other causes and the clarification of the way the instance invested with a cause where such transcriptions are used, would have the possibility to check the circumstances if the interception of the communications was or not done legally, even based on an authorization issued on reason of national safety.

Another section in this Chapter is destined to the procedure to present the recordings, presented as a condition necessary to get the certification, context in which we analysed both the modality to transcript the recordings in the report of presentation, and the obligation of complete presentation of the transcriptions during the presentation of the material of criminal procedure.

This operation should be done in literary form of the content of the conversation, maintaining the specific of people's speaking, namely regionalism, argotic terms or jargon, particularities of pronunciation.

We appreciate that special importance must be given to using the signs of punctuation and phraseology, in view of presenting the intonation, tone of voice, since these aspects can lead to another connotation of the sense of the message transmitted.

The fourth section is represented by the procedure to certify in front of the prosecutor, *and here we presented the* ***selection of recordings related to the cause.***

Following the analysis of the legislation, the literature in the field and jurisprudence, we noticed the fact that in practice we can find among the pieces of the file the reports presenting some conversations not related to the cause, conditions in which we suggested as sanction to exclude them from the probation material before informing the court, by request done by defence in the moment of presenting the material of criminal procedure.

Thus, in the context where the prosecutor does some abusive selection, we revealed that it should be imposed for the instance, in phase of trial, upon the party's request or by default, to realize a supplementary selection, by which they remove from the probation material the recordings not related to the cause or those that touch private life.

Another aspect analysed in this chapter refers to removing and destroying the useless recordings or those related to private life. Making a comparison between the regulation valid and the one mentioned in the new Code of criminal procedure, we noticed that the legislator brings improvement to the current disposition, in the sense of mentioning a term for their destruction, namely after one year from the definitive solution of the cause, the competence belonging to the prosecutor, who writes the report.

Another problem subject to the research within this section is that related to the modalities to certify related to the kind of recordings (phone calls, conversations in the open, images).

In Law no. 141/2003, the modalities and conditions to do recordings of conversations and their certification were applicable also in the case of recording images, except for the presentation in written form, according to the case. Mentioning the phrase "according to the case" proves useful in the situation where audio-video recordings were done. In practice, related to some circumstances caught in images, the person authorized to write the report of presentation includes certain comments presenting the behaviour of the person recorded.

The interceptions, recordings, localization or prosecution regulated by art. 91^1-91^5 C.pr.pen. are not means of probation, but probation procedures by which data, information, images are obtained, afterwards presented in reported or on photo board, certified by the prosecutor.

The reports or photo boards represent in fact the means of probation that can be used to establish the de facto situation and finding the truth in cause, to the extent in which it is corroborated with other means of probations administrated in the cause.

The last section of this chapter is destined to the probation value of the audio-video recordings. From this perspective, we presented the fact that we can use in the trial only those recordings that had been previously certified.

We noticed, under the aspect of the probation value of the means of probation mentioned under art. 91^1-91^6 C.pr.pen. that, in some situations, actually extremely rare in practice, the conversations or communications intercepted and recorded can give information of special probation value, representing direct proof. This hypothesis interferes only in the conditions when from their content it results both forming the constitutive elements of the infractions representing the object of the cause, and the guilt of the accused or culprit. In most case though, the conversations recorded and presented completely in the report mentioned under art. 91^3 C.pr.pen. can only represent indirect proofs, which will have to be corroborated with other direct or indirect proofs in the criminal cause.

At the same time, the lack of certification of the reports presenting the intercepted conversations cannot attract but their relative nullity, the only procedural remedy being their removal from the probation material.

From the perspective of art. 91^2 paragraph 5 C.pr.pen., we analysed the situation of the third parties who communicate with the person whose conversations are intercepted and recorded and related to which there is the possibility to commit numerous abuses, underlining that these conversations should not be used as proof against third parties but, at most, as simple information in view of a possible referral office.

We ended this section, analysing the modality to check the registration by the court, after the information, stating that in view of finding the truth and for a correct appreciation of the proofs, it is very important for the audio recordings to contain the complete conversations, not only fragments, how it happens in practice.

We underlined the importance of the fact that the court that must solve the cause disposes the visualization of the audio-video recordings or the audition of the audio recordings, since perceiving the proofs directly, the judges have more capacity to find out the truth than in case these proofs would perceive from the documents where they were written and we suggested in this sense the completion of the text of the law.

At the same time, we focused on the possibility that this means of probation should be contested in practice by the parties. In this situation, we consider that their audition or visualization is imposed only after certifying the authenticity, since the interceptions done cannot be valued as probation in case they are not authentic.

Thus, the audio or video recordings serve as means of probation in the criminal procedure by themselves, if they are not contested or by their confirmation of technical expertise, in case there are doubts on their conformity with reality.

We underlined the fact that with the validity of Law no. 202/2010, the text of art. 91^6 C.pr.pen. was modified, leaving the possibility of the parties, prosecutor or court, by default, to expertise not only from the technical viewpoint the audio or video recordings, but also from the psychological point of view, in view of

analysing the gestures, mimic, tone of voice, rhythm of discussion, position of the parts involved in view of deciphering the message transmitted.

This modification let open the path to carry out any kind of expertise, only only the technical one, representing newness in the check of these means of probation, so that apart from a criminal technical expertise, the recordings of the conversations between the subjects in question, can be analised also from the psychological point of view, from the perspective of the language, mimic, gestures, in the case of the video recordings.

We analysed in this section the opinions of specialty expressed in the judiciary practice related to these aspects, by Prof. PhD Aurora Liiceanu, Prof. PhD Ioan Dafinoiu, Prof. PhD Adrian Miroiu, Prof. PhD Octav Brudaru, Prof. PhD Gheorghe Ilie Farte.

In Chapter IV, we analysed the admissibility of carrying out the audio video interceptions and recordings in the preliminary acts, the debut section refers to the notion, juridical nature, content and probation value of the preliminary acts.

As for carrying out this means of probation in the stage of the preliminary acts, we brought arguments regarding the inadmissibility of using such techniques to monitor at this stage.

We noticed that, unlike the current regulation placing the preliminary acts outside the criminal procedure, in the vision of the new Code of criminal procedure they will disappear as separate stage. Thus, all the (operational) activities carried out by the organs of police will be done within the prosecution.

These specification support our opinion regarding the inadmissibility of using these techniques of special investigation at this stage, contrary to the jurisprudence of the High Court of Cassation and Justice, revealed in this paper, but in agreement with the decisions of the Constitutional Court.

We highlighted the fact that even though there are solutions to solve this situation, through both a legislative initiative according the Constitution as well as through the regulation, by the Code of Criminal Procedure, of the possibility to further appeal on points of law, by the Attorney General, the Minister of Justice and the management boards of the Courts of appeal or Prosecution Offices attached, up to this very moment all the foregoing institutions ignores this matter that, for the pending cases, presents a special importance.

Given the practice of the Supreme Court, we consider that there is no chance that an appeal on points of law would lead to the unification of jurisprudence for the purpose of inadmissibility of interceptions and recordings conducted without initiating Criminal proceedings. In this case, and also taking into account the opinion of the Constitutional Court, that settles this issue in decisions no. 962/2009 and 1556/2009, we consider mandatory that the members of the Commission "The unification of judicial practice", in the CSM, to eliminate this contradiction.

One section of this chapter covers the personal reasons supporting this thesis. These are based on the fact that art. 91^1 of the Criminal Procedure Code states the obligation for interceptions and recordings of audio and/or video to be carried out only when, establishing facts or identifying perpetrators may not be conducted based on other types of evidence. This express provision of the law is to be strictly interpreted, especially considering that the legislator stated that interceptions and recordings of audio and video are permitted as an alternative and only if the use of traditional evidence may not lead to the establishment of the facts, or to identification of the perpetrators.

Although we accept the idea of protecting fundamental rights and freedoms against abusive actions by imposing the condition of an authorization issued by a judge, we believe, to the extent that a person is not indicted in a case, the judge should not be involved, since his involvement can be interpreted as a substitution of investigative bodies, thus conducting activities other than judicial ones, normally occurring in a criminal trial.

Moreover, placing interceptions and audio-video recordings outside the procedural framework contradicts the art. 98 of the Criminal Procedure Code, where we can notice that the legislator expressly regulates a similar matter, namely the retention of mail, but only regarding the indicted or the defendant. Therefore, under these circumstances, we emphasized that a potential dissociated interpretation of the law is not justified, since the essence for this measure is identical.

Further, ***throughout this section we highlighted the controversies expressed both in specialized literature and judiciary practice regarding the admissibility of these special techniques in the stage of preliminary acts.***

Another section covers the probative value of the recordings carried out prior criminal prosecution.

We pointed out that the acceptance, in practice and specialized literature, of the possibility to carry out interceptions or audio-visual recordings in preliminary stages involves, as regards the evidentiary aspect, the need of a distinction between the report of a full conversation or communication intercepted and recorded, as stated by the art. 91^3 par. 1 Criminal Procedure Code, on the one hand, and the report of carrying out preliminary acts, on the other hand.

Conducting interceptions and audio-visual recordings at the stage of preliminary acts will gain evidentiary value only through the minutes of finding, referred to in art. 224 par. 3 in the Criminal Procedure Code. Thus, conversations or communications played entirely by the prosecutor or the prosecuting authority in accordance with art. 91^3 of the Criminal Procedure Code, will necessarily be included in the report of carrying out preliminary acts or in an appendix of it. In this situation, they will have the same evidential

value as any prior provisions reported in the records provided by art. 224 par. 3 in the Criminal Procedure Code, which may constitute evidence in a court.

Another issue researched throughout this section is the evidential value of recordings ordered pursuant the law on national security and law no. 535/2004, prior criminal prosecution.

The documents drawn up by employees of the intelligence services, in which they report the result of interceptions, are confirming acts and these can constitute means of proof only to the extent that the facts are personally perceived by the official who draws it. Or, as it comes for interception and recording of communications, items of information relevant under criminal law are not the outcome of immediate personal observation, but they rather derive from conversations of the suspects that are monitored.

Therefore, we pointed out that the document which contains the transcripts resulted pursuant an interception or a recording of communications, carried in accordance to Law no. 535/2004, cannot be assimilated with the protocols or certification of transcripts from recordings, as stated by art. 91^3 of the Criminal Procedure Code. These documents which provide only records of special investigative procedures have the legal nature of documents outside the procedural framework, drawn by other bodies than judicial ones.

Chapter V entitled "Correlation of national legislation with the European legal instruments in the matter", contains an analysis of the forms of international cooperation, of European framework, focusing on the interception of telecommunications in the European legal system and on the European institutions with responsibilities in judicial cooperation.

The next section is intended for the analysis of European requirements in matter of interceptions and audio-video recordings with reference to European Court case law relative to this mean of proof. We have found that such intrusive measure has to be provided by the law and should be mandatory in a democratic society, imposing at the same time, conditions of accessibility, predictability and consistency with the rule of law, the purpose of privacy intrusion by the State authorities being required to be a legitimate one.

From the perspective of current national legislation with reference to art. 91^1-91^6 of Criminal Procedure Code, we noticed an obvious breakthrough as regards the guarantees conferred to individuals subjected to such measures, one of the most essentially amendments being represented by the role attributed to courts regarding the authorization of intrusions.

Legal provisions regarding the interceptions and audio-video recordings have been the subject of several exceptions of unconstitutionality, but the Constitutional Court decided exclusively to reject them by removing all arguments brought by the authors of the exceptions as regards inconsistencies between these texts and the provisions of basic Law.

Although the Court held that any further breaching of these regulations is not an issue of constitutionality, but one of implementing, which exceeds its jurisdiction, we emphasized that foresee ability of the law is not met, meaning that the law is not specific enough about the terms used, thus failing to provide the conditions under which the authorities may require this surveillance measure.

Another aspect analyzed in this section refers to the use as evidence of recordings of conversations between a lawyer and his client. We highlighted that these provisions should be applied with extreme caution, given that they are capable of violating the professional secrecy, while undermining attorney-client relationship. At the same time, by tapping lawyer`s conversations are violated the rights of all its customers, and a possible information leak may irretrievably compromise cases in which they are involved.

Towards these considerations, the solution offered by the laws in force appears as an attempt to maintain a balance between the need to protect the professional secrecy and the effective fight against certain forms of crime.

The current framework fails to meet the requirement of predictability, thus existing the risk of arbitrariness, as regards interception limits, with reference to the fact that it is not specified the manner and the person who has attributions in the selection of conversations related to the exercise of a mandate given by a client, as well as issues unrelated to the activity of legal consultancy, assistance and representation.

A subdivision of this section refers to the compatibility of art. 91^2 par. 5 of Criminal Procedure Code, concerning the use of intercepted communications as evidence in other cases, with the European requirements.

We analyzed these articles, highlighting that the failure in the legal text of the phrase "intercepted and recorded according to the law" or "intercepted and recorded legally" can lead to abuse in terms of "ensuring proportionality of the interference within the right to privacy with the aim pursued", as this goal should be sound, practical, known, verified and analyzed by the judge at the time of authorization and not a future, hypothetical one that could occur later in other cases. Also, another question mark rises as regards the legal basis for the purposes of the quality and compatibility with the rule of law, and with archiving and storing of communications for a long time for the purpose of using them in other future cases.

Also in the contents of this section we have analyzed the provisions of art. 91^3 of the Criminal Procedure Code from the perspective of European provisions and proposed safeguarding the right of the attorney to participate at this criminal investigation activity.

Our assessment takes into account the Spanish legal system, which avoids the rise of any suspicion by requiring that all transcripts to be carried out by an officer of the court, in the presence of both parties, defense counsel and the prosecution. Any disagreement as to the accuracy of the transcript is thus resolved at this stage of the proceedings and not during the trial.

We have also emphasized the importance of the expressly stating, in the provisions art. 91^3 of the Criminal Procedure Code, the possibility for the defense to obtain a copy of any transcripts and recordings.

The next section of this chapter is designed for the possibility of verifying these evidences, enshrined in art. 91^6 of the Criminal Procedure Code, through which the prosecutor, the parties or the court may request a technical expertise report on interceptions, in order to establish their authenticity and veracity.

We highlighted the fact that the National Institute of Forensic Expertise is a public institution having legal personality, subordinated to the Ministry of Justice, conditions in which in our opinion, this institution does not provide sufficient guarantees as concerns its impartiality.

Another issue researched in the contents of this section, that raises numerous controversies, is to determine whether recording a conversation with the accused or defendant performed by the denunciator or by another person, with electronic devices (eg. a tape recorder), fulfills the requirements of the art. 91^6 of the Criminal Procedure Code.

We pointed out that including in the category of evidences some recordings, made by the parties or other persons, that does not comply with the provisions of the Criminal Procedure Code, just because they concern their own conversation or communication held with third parties, as well as any other recordings "if they are not prohibited by law" is inconsistent with the requirements of art. 91^1 of the Criminal Procedure Code and with the European Court case law, given that such intrusive measures should remain an exception.

At a comparative view into the New Criminal Procedure Code, although we have encountered some welcomed changes, we cannot overlook the fact that the legislator point of view is expressed to the extent that evidence administered in violation of legal provisions may exceptionally be used to support the prosecution, if it does not affect the fairness of the trial as a whole. We consider that these provisions are yet capable to suppress the idea of fairness of the proceedings and the parity of arms.

The comparative analysis between national laws of several states conducted in the the contents of the sixth chapter led to some lex ferenda proposals as reflected in the whole thesis.

Thus, we brought to attention the safeguards provided by the legislation of other states in matters of interceptions and recording of conversations or communications, starting from issues related to the need for a warrant or an authorization to intercept, the competent authorities to apply and issue such orders, or recordings made by one of the parties.

At the same time we compared the content of the authorization and that of the application, in accordance with the legal provisions in many states, the circumstances justifying the issuance of an authorization or a warrant, the duration of surveillance actions, circumstances justifying the urgency, the admissibility and use of evidence thus obtained.

We have also reviewed transcribing, notice or filing procedure and the use of information obtained about individuals or offenses that does not fall within the limits of the warrant. The integrity and probative value of evidence, the necessity of drawing up reports outlining the legality of the ordered surveillance measures and the implications of violations of the laws regarding electronic surveillance and interception are other provisions that have been investigated, being detailed in the others sections of this chapter.

The last chapter is finalized with conclusions and lex ferenda proposals, the research that we have undertaken emphasizing positive and negative aspects, detached from both theoretical and jurisprudential levels, concerning the methods of carrying out interceptions and audio-video recordings.

From the criminal procedure perspective, the extent of the criminal phenomenon and recent developments of technology imposes a continuous need for adjusting the legal regulations, fact that requires a review of various legislations who have had greater successful challenges in fighting and preventing crime.