UNIVERSITY OF "BABEŞ-BOLYAI" CLUJ-NAPOCA
FACULTY OF LAW
DOCTORAL SCHOOL OF LAW

DOCTORAL THESIS

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2014

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THE USE OF WIRETAPS AND RECORDINGS OF COMMUNICATION AS EVIDENCE IN THE CRIMINAL PROCEEDINGS AND THE COMPATIBILITY OF THE PROCEDURE WITH THE INTERNATIONAL REGULATIONS REGARDING HUMAN RIGHTS

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This study is meant to be an analysis of the field of interceptions and voice recordings in the Romanian criminal procedure system by reference to the successions of laws that governs this institution at a national level and about the need for compatibility of these rules and of the procedure with the international rules regarding human rights.

The relevance of this subject results mainly from the frequency with which the prosecution uses this special method of investigation. The exposure to the public of cases in which the interceptions or the voice recordings led to rulings that were highly publicized is more and more frequent, despite all the negative consequences which the publicity of the content of a voice recordings may have in relation to the necessity of respecting the right to private life.

The theoretical base of the study is composed of numerous laws, studies, monographs, treaties and other scientific works widely exposed both in the content of the study as well as in the Bibliography. To all these, it is added the *jurisprudence*, as a constant factor of interpretation and application of the rules of the positive law, whether it belongs to the national courts, to the foreign courts or to the European Court of Human Rights.

This approach is meant to be a criticize, mainly a constructive one, of the present regulations, and has *lex ferenda* proposals which are aimed to raise the standard regarding the guarantees that already exist, and which are necessary from the point of view of the respect which has to be given to the fundamental human rights. As we have mentioned, these guarantees, imposed by the jurisprudence of the Court or by the written text of the Convention, shall not be seen as obstacles in the use of this procedure, their purpose is not that of depriving the authorities of the state which have prerogatives of preventions and punishing criminal acts, of the necessary instruments in their activity, but of guiding their activity in such a way as to respect the rule of law and democratic ideals[1].

The study has 5 chapters, each of them including sub-chapters and sections which follow on one side the legal regulation of the institution and on the other the traditional doctrinal approach of the theme that is analyzed.

Chapter I of the work entitled " Considerations about the interceptions and the voice recorders as a special method of investigation in the system of the Romanian criminal procedure

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[1] **P. De Koster**, *Terrorism: special investigation techniques*, Part I – Analytical report, Council of Europe Publishing, 2007, p. 27

law" is structured in two sub-chapters of which, the first one defines the concepts of interception, audio-video recording, communication and conversation, identifying the legal nature of the interceptions and of the audio-video recording as being a **method of investigation**, created for obtaining essential proves for achieving the aim of the criminal trial, a ***method of prove*** in the eyes of the legislator of the New Code of Criminal Procedure. The second sub-chapter wants to delineate the legal frame which regulates the institution, both regarding the national legislation and the international one, among which a serious influence is given by the Recommendation no.10 (2005) of the Council of Europe.

Chapter II entitled "The link between the interceptions or the voice recordings and the right to private life" treats the method of investigation from the point of view of the interference with the right to private life of the person subject to supervision.

The first sub-chapter analyzes the north American system, in which the essence of the right to private life is represented by *the right to intimacy* , as derived of the principle of minimum intervention imposed to the state, called "**the right to be let alone"** [2].

The principle of the minimum intervention means, from the point of view of the fundamental rights, that the restriction of a right or of a freedom only should be imposed only when necessary in a democratic society and proportional with the situation which determined it.

It is mentioned the jurisprudence of the Supreme Court of The United States regarding the interceptions in the case of *Olmstead vs US,* the Court first establishing that the proves which resulted from the voice recorders are admissible in the Court, the exception of inadmissibility of the proves *by violating the fourth Amendment,* established in the Weeks precedent being inapplicable, because of the lack of applicability of the Amendment in the field of interceptions obtained without any trespass on private spaces. The Court appreciated that any different opinion would bring serious prejudices to the society and would give an unjustified protection to the persons which committed crimes.

The dissenting opinion express in the same case by the judge Brandies that later exceeded in popularity the opinion of the majority, argues the injustice of offering a different legal treatment to the written documents as opposed to communication by means of telephone**.** It was shown that even if those two forms of communication may be easily separated, there is no

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[2] Doctrinal Creation of the Chairman of the Supreme Court of Michigan State Thomas McIntyre Cooley. See Cooley on Torts, 2d ed., p. 29, apud **S. D. Warren, L. D. Brandeis**, *op. cit*, p. 195

difference of concept between them. The interference in the private space is much more serious in the field of voice recordings, given the fact that this implies to listen to the conversations of all the other persons involved. From the point of view of the nature of the protection given, it is irrelevant the place where the phone cable were installed or the fact that proves obtained in this way proved the indictment paper, being pertinent in establishing the guilt of the defendant and regarding the admissibility of this prove it was shown that **it is prohibited for the Courts to use proves which were illegal obtained.**

The jurisprudence of the Supreme Court of United States established in the cases of *Berger v. New York* and *Katz v. New York* that there is an unjustified interference in the rights protected by the fourth Amendment. The Court appreciated that by its nature, the interception implies an **extensive intrusion in the private life.** The frequency in which procedures are used and the way in which the rights and the fundamental freedoms are respected impose an analysis of the **proportionality** of the interference and the **equability** of the procedure[3] and the establishing of some guarantees, such as:

a) an independent authority to authorize the procedure before the interception of the conversations and only if there are serious reasons

b) the request for the authorization should include the description of the crime or the one which may be committed, the place, the persons or the target things

c) the authorization should include the maxim period for interception

d) the notification of the person or the reasons for which such a notification cannot be sent

e) the procedure regarding the return of the mandate

The second sub-chapter analyses the conformity of the procedure with the requirements imposed by the European Convention and the jurisprudence of the European Court of Human Rights. The conditions of the interference, as they were mentioned in the jurisprudence of the Court, impose the interference to be provided by law, to follow a provided scope, to be necessary in a democratic society and to be proportional with the intended purpose.

The law has to be both **accessible**, which means that the rule may be known by any person and it is accomplished if the law enjoys of such a publicity which permits the recipients to acknowledge its content and **predictable**, which implies the fact that the rule is clear, written in

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[3] See Decision *Osborn v. United States*, 385 US 323 (1966).

such a way so that the recipient understands the meaning of the used terms and sufficiently precise for having a comply conduct.

The law must respect requirements such as **lex scripta**, which implies from the point of view of the fundamental rights as any enclosing of a person's right or freedom to be provided by law. The imperative requires a limitation of the law sources in the criminal field, given that the Court admits that from their category belong the law and the decisions, mentioning that the decisions may basically serve to interpret the law. **Lex certa** imposes that the text should be written with sufficient clarity so that any person may realize which are the actions or the inactions falling under its incidence. **Lex stricta** which addresses **the judge** who applies the text, and imposes the strict interpretation of the rules of the criminal procedure law and determines the inadmissibility of analogy in this field. **Lex praevia** shows the interdiction of retrospective application of the criminal law and from the point of view of the private life this imperative implies that the **subsequent adoption of a legal frame to settle an interference and to justify the action of the state's authorities is irrelevant** as far as the interference is not provided by law at the moment the wrongful act is committed.

In terms of ***legitimate aim***, we exposed notions such as ***national security*** which represents the fundamental values of the state such as its territorial integrity or the sovereignty of the state; ***the public security*** which takes into account the protection of the community against some events which may affect their existence; by ***orders*** it is considering the order which has to exist within a group; the ***prevention of crimes*** includes beyond the proper sense of the notion also the tracking and punishing of the acts which were already committed; the **public morality** will be analyzed by reference to legal system, including the protection of the interests and welfare of the persons who because of their immaturity and dependence have to benefit from an increased protection; the protection of the ***rights and freedoms*** of the other doesn't refer only to the rights guaranteed by the Convention but also to those established by the inner law.

The Court established that there is a close connection between the terms of „necessity „ and „ democratic society", reminding that the national authorities are the first which have the competence of appreciating the necessity of the interference, the states keeping a margin of appreciation which depends on the nature of the action and on the aim of the limitations, and an interference is proportional to the intended purpose only in the conditions in which its achievement is not possible by other means, less restrictive, available to state's authorities.

From the Court's jurisprudence point of view the study analyzes the existence of an interference considering that the phone calls **are not specifically mentioned** in art. 8 parag.1 of the Convention. Nevertheless, according to the jurisprudence of the Court there are included in the sphere of notion „private life" and „correspondence" *(Decision Klass and others v. Germany).*

There will be included into the sphere of incidence of art. 8 the carried surveillances made with respect to the sent messages by **pager** (*decision Sean Marc Taylor- Sabori v. United Kingdom*) as well as the phone calls which are initiated or which are sent to **professional places**, such as **attorneys offices** (*decision Kopp v. Switzerland*) or made by means of the inner system of telecommunication which works in the **Police section** (*Halford v. United Kingdom*). The achieving of **data regarding the phone calls** from the phone operator as well as **the audio recording made when the defendants were arrested** in order to obtain samples of their voice print in order to make a comparison between these and the recordings made is also a violation of art.8 from the Convention (*Decision P.G. and G.H v. Unites Kingdom)*.

The interference will exist regardless of any distinction in relation to the **owner of the line** which is supervised (Decision Lambert v France); it is **not an imperative to show the actual interception of the conversations** as a person may claim to be a victim in relation to a practice of using such investigative methods or by the existence of a legal framework that allows the authorization of such measures, without being necessary to prove the fact that such measures were actually taken against the party.(*decision Klass)*

Although the Court hesitated to rule upon the applicability of the Convention when an element of extraneity is involved, **we appreciated** that it may not represent a determinant factor in analyzing the incidents of the provisions of Convention the fact that the acts of interception were realized upon **conversations made outside the territory of the contracting state**, as long as the interference belongs to an authority of that state, relates to citizens of that state, and is disposed and executed in respect of the legislation of the state, otherwise, any state could elude its duties which results from the Convention (referring to *Decision Weber and Saravia v. Germany)*

Inside of other sections, the study analyzes the unjustified interferences such as the lack of independence of the competent authority to authorize the interference, the lack of *a posteriori* control of the legality of the interception made by an independent and impartial authority, the

lack of guarantees which refer to keeping the whole and complete character of the records and their destruction, the lack of independence of the authority which could have certify the reality and the reliability of the records, the absence of a subsequent information, the publication of the content of the interceptions in mass-media as well as the compatibility of using the proves which resulted from the interceptions with the right to an equal trial and the existing limitations regarding the correspondence of the attorneys, given that the existence of an interference seems to require a more careful check regarding the accomplishment of the protection standards, from the point of view of some possible repercussions upon the good administration of justice and upon the right guaranteed by art. 6 from Convention (*Decision Niemietz v Germany)*

Chapter III entitled „ Conditions of authorizing and execution of interceptions and recordings in order to obtain proves in the criminal trial" is structured in six sub-chapters in developed following the imperative requires of the rules of the positive law that have to be accomplished in order to authorize or to execute the interceptions and the recording of the conversations.

The law imposes the existence of a reasonable suspicion which may justify the authorization of the interference, which has to result out of the existing **proves or data** at the moment of authorization, unlike the old legislation which imposed the necessity of **existing of data or reasonable clues** regarding the preparation or committing of a crime. The accomplishment of the condition is analyzed by reference to the comparative law in respect to **the investigation elements raised from anonymous sources**, as reasonable clues in the criminal trial. We argued that in our opinion to realize a proper evaluation of the reasonable suspicion is difficult as long as the sources of the information is unknown, establishing the exact source of it is an essential element of the verification, including by reference to **the credibility of the source.**

Regarding the sphere of the crimes that may determine the authorization of the procedure, according to art. 139 al.2 The New Code, the technical surveillance may be ordered in the situation of the crimes against the national security provided by the Criminal Code and by the special laws, as well as in the crimes of drug trafficking, guns trafficking, human trafficking, acts of terrorism, of money laundering, of counterfeiting or falsification of values, of electronic payment instruments, against the patrimony, of blackmail, of rape, of deprivation of liberty, of tax evasion, in crimes of corruption and assimilated to crimes of corruption, crimes against the

financial interest of the European Union, of crimes which are committed by informatic systems or electronic communication means or of other crimes for which law provides imprisonment of **5 years or more.** The legislator analyzes both the *quantitative* criteria, that of a minimum of punishment, and the *qualitative* criteria which takes into consideration the nature of the crimes.

This criteria was also analyzed by reference to the compared law, the Romanian system being different from the Italian one because it doesn't impose that the crimes for which the authorization may be ordered to be committed with intention, the only requirement refers to the fact that the law has to provide the punishment of imprisonment of 5 years or more, situation in which the interference may be ordered towards crimes such as **involuntary** manslaughter.[4]

In the old regulation the data or the reasonable clues referred to crimes for which the prosecution is done **ex officio.**

We appreciated that by committing a crime according to the code of criminal procedure the legislator referred to the consumed crime and the punishable attempt while the preparation of the crime had into account the unpunishable attempt and the unpunishable preparatory acts which are circumscribed to the notion, showing that the serious crime means the crime against the person`s life, some crimes against the patrimony, crimes against the freedom of the person or other crimes which are serious either by referring to the way of execution or by the result which is produced, according to Law 39/2003.

Even if in the doctrine it was critically shown that this legal text does not include an enumeration of the serious crimes which may be applicable to the entire criminal law and its provisions cannot be extended by law upon other institutions, we appreciated that the reference to the legal text is an efficient one to establish the applicability of the text. It is true that crimes which are already incriminated, such as determination and facilitating suicide or infanticide or other crimes which may be incriminated in the future are not included in the list of art. 2 from Law 39/2003, although in respect to the consequence they produce and to their seriousness such crimes should be taken into consideration as ground of authorization of the interference, as the list in the legal text ***is not a limited one.***

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[4] The sphere of involuntary crimes for which the law provides the imprisonment of more than 5 years is limited, the consequences of these crimes being quite big. So, the law takes into consideration bigger punishments when involuntary are caused consequences as the death of some person (art. 192), a disaster (art. 255 NCP) etc. Nevertheless, we appreciate that the Italian rule offers a superior protection under the aspect of proportionality of the interference, which may be replaced in the Romanian system by the appreciation of the judge at the moment of authorization.

Regarding **the use of evidence resulted from the interception** we showed that the text of the Code of criminal procedure refers to the way in which the probation is admitted, situation in which, a related to the exception the admissibility of using *some interceptions* in other criminal cases, the interceptions which are not in accordance to the legal text cannot be used as *evidence* in any criminal trial.

Regarding the **involuntary** crimes which *are going to be committed*, they cannot be taken into consideration when authorizing the interference because the committing of these crimes cannot be anticipated; with respect to those which were *already committed* an authorization may be ordered; the situation is identical with the situation of the crimes already committed with exceeded intention.

Regarding the offenses to be committed in exhausted forms that are characterized by exceeded intention, the authorization of wiretaps can be granted only if the intentional offense that is absorbed in the content meets the requirements of art. 139, para. 2 of the New Code of Criminal Procedure (art. 91^1 Criminal Procedure Code 1968). For example in case of a rape that caused the death of the victim (incriminated by art. 197 paragraph 3 sentence II of the Criminal Code in 1968) committed upon a family member or on a minor or the crime of deprivation of liberty (incriminated under art. 189, para. 6) that resulted in the death of the victim are characterized by exceeded intention. The ground for a authorization will be the offense intended to be committed, as the latter result could not be anticipated, being at that time only a mere possibility.

If the deliberate crime absorbed does not meet the requirements of art. 139, para. 2 of the New Code (art. 91^1 Criminal Procedure Code 1968) and that has not been committed the situation is rather different. For instance in the case of bodily injury causing death committed by simply hitting the victim. The offense to be committed according to the original criminal resolution is battery or other kind of violence, which obviously does not meet the selection criteria prescribed by the legislation, in terms of the severity of the offense. In these circumstances authorization of interception cannot be ordered prior to the offense, under the pretext of a possible more severe result. Otherwise the provisions on the seriousness of the offense, which must exist at the time of authorization, could be easily surpassed.

In respect of offenses that are committed through electronic means of communication in the Italian doctrine there were some disputes concerning the interpretation of this concept on the

need to determine whether the expression covers a restrictive interpretation in relation to offenses of insult, threat or harassment by phone, when the content of this crime contains such a constituent element or a broad interpretation which considers the commission of any offense by phone.

Considering the provisions of the New Code we have criticized the view that of a broad interpretation due to the fact that in such a circumstance the method can be authorized only in consideration of the fact that it was committed by phone. We argued that the scope should be to restrict the criminal offenses to those that have as a constituent element the using of means of electronic communication.

In relation to the seriousness of the offense a particular situation is the authorization of the interference upon a request formulated by the injured person to the prosecutor, in which case, pursuant to art. 140, para. 9 New Code (Art. 911 para. 8 Criminal Procedure Code 1968), the prosecutor may request the authorizing of the interception and recording of conversations or communications made over the phone or any electronic means of communication, regardless of the nature of the offense which forms the object of the request. We argued, referring to the views already expressed in the doctrine, that such a provision could allow serious abuses regarding the respect of private life.

Derived from the new requirement introduced in the New Code, the proportionality between the need to use the method and the restriction of fundamental rights and freedoms, taking into consideration the particular circumstances of the case, the importance of information or evidence to be obtained and severity of the crime we argued that a judge may refuse to allow the interception of conversations of persons that are required to preserve professional secrecy.

On the indispensability of the method the origins of this principle, beyond the interpretation of the Convention are that the text of art. 91^1 provides that authorization shall include reasons for which the establishing of the facts and identifying or locating other participants cannot be made through other means. This condition is prescribed by the New Code, according to art. 139, para. 1 let. c the measure can be authorized only if the evidence could not be obtained otherwise, if this acquisition would encounter special difficulties that would prejudice the investigation or if there is a threat to the safety of persons or property value.

Regarding the need to initiate the criminal investigation we have argued contrary to the considerations of the Constitutional Court decision no. 962 of 2009 that such a condition does

not exist the old legislation. We have appreciated that the provisions of art. 140, para. 1 of the New Code that the technical supervision may be ordered during the phase of the criminal investigation is opened to criticism, because considering the dispositions of art. 305, para. 1, such an investigation can be opened only on crimes already committed, in which case the question of authorization in the case of offences that are to be committed can be raised.

We suggested that the future law should expressly provide that the need to meet the condition of an existing criminal investigation should refer only to crimes already committed, as such a condition should not operate regarding crimes to be committed. We argued that this interpretation is also valid in respect to the current legislation as the interference can be authorized for offenses under preparation, therefore we considered reasonable to interpret that law imposes a condition of an existing prosecution only in cases in which this is allowed.

The existence of an authorization issued in compliance with the requirements imposed by the national legislation was analyzed as a condition of performing the interception.

Chapter IV, entitled "Procedure for authorizing the usage of interceptions and records of conversations as evidence in the criminal trial" deals in the first subchapter with the categories of persons who may be affected by process and the exceptions established by law or considered necessary in comparative law. Regarding the defense attorney under the new code of Criminal Procedure art. 139, para. 4 provides that the relation between the lawyer and the person to be assisted or represented cannot be the subject of technical supervision, if there is no information that the lawyer is engaged in or preparing an offense of those provided in par. 2. We appreciated the new art form text. 139 enlarges the sphere of excluded relations offering protection in respect to all clients. In relation to the minority view expressed in the italian doctrine we argued that this is a preventive limitation, and as a consequence the relationship between the lawyer and the person he represents cannot be subject to technical supervision.

We analyzed a number of other professional relationships that involve the obligation of confidentiality as those of doctor-patient, psychologist-client, priest-parishioner, private detective-client, journalist-source and notary public-client.

As a future proposal we appreciated that the law requires the intervention of the legislature in respect to some of these relations, given the undeniable fact that in the priest-parishioner ratio or psychologist-client report the granting of the interference would cause a lack of protection to such relationships and contribute decisively to violation of the reasonable

expectation of privacy or the exercise of other fundamental freedoms such as freedom of religion. Exercise of the right of defense cannot be the only reason for imposing a limitation, given the fact that there are enough rights and freedoms equally important, which may require the establishment of a limitation.

A special situation involves the lawyer`s employees. The law does not expressly provide a limitation in this case so we pointed out, that the object of protection is the relationship between the lawyer and the person he is assisting regardless of the person through which this is exercised, as long as it engages in conversation the lawyer's office.

The interception of persons related to the suspect or the accused, that have the right not to make a statement, is rather different. These persons, close to defendant, have a faculty to refuse to testify but this fact does not impose any limitation on the process as this cannot be regarded as an obligation of professional secrecy. The confidentiality of the call is at the discretion of the spouse, former spouse or the relative of the suspect or defendant, for which it cannot be said that there is a reasonable expectation of privacy of the suspect or accused regarding these talks.

In the analysis of procedural immunities, according to the Romanian Constitution the Presidential immunity prohibits the authorization, but in respect of the members of Parliament there is no such prohibition. We criticized the existence of a limitation in relation to search and seizure of a senator but not on interceptions of communications. We recognized the need of secrecy to ensure the purpose of the procedure, but there is no reason why these procedures should be regulated in the same manner. The reviewing of the content of procedural immunity is necessary and has to take into consideration the specific activities that the members of Parliament carry out and the possible pressure to which they may be subjected. From the perspective of diplomatic immunity the procedure cannot be ordered in respect of Judges of the European Court of Human Rights or accredited diplomatic personnel, under the express provisions such as art. 30 of the Convention on Diplomatic Relations, signed at Vienna on 18 April 1961, that provides inviolability of correspondence of such persons.

Regarding judges and the method of forming their intimate conviction, as part of the deliberation process, we have argued they enjoy a special inviolability that prohibits the authorization of recording the deliberation phase, as a mean to acquire evidence in criminal proceedings.

The second subchapter examines the ordinary procedure of authorization, that under art. 140 attributes the competence of authorizing the interference to the judge of rights and freedoms, a specialized judicial body created to separate the judicial functions and to meet the need of a specialized judge called to decide on an interference with the fundamental human rights. The law provides superior guarantees in respect to the old regulation. However we felt that the new regulation does not innovate as the general practice under the old regulation created *de facto* this judge, given the fact that the Chief Justice often appointment a specialized judge whenever he appreciated it necessary, thus delegating authorization function. The *de jure* regulation of the current practice is likely to bring significant benefits to ensure compliance with the requirements imposed by such interference.

Regarding the recordings made by parties The Constitutional Court stated that the interference is consistent with respect of privacy, the reason of the regulation being to offer the possibility that recordings done by the parties to be entered as evidence, if not prohibited by law. Possible abuses may occur if the investigative bodies have an active conduct in obtaining the evidence, whether this materializes in providing logistic support, information or expert advice. Under these conditions we found that interference of authorities in achieving these records, made without following the procedure for obtaining the necessary authorization, constitutes a serious interference with the right to privacy and the sanction required is the exclusion of evidence obtained in this manner.

On the unlawful nature of the evidence and the moment for the exclusion of evidence obtained unlawfully, under the Code of Criminal Procedure of 1968 we have shown that the defendant's right to be informed of the evidence to be used in the indictment, although limited in the prosecution stage due to the secrecy of the phase, in the trial phase the defendant should be aware of all the evidence supporting the indictment, including their validity. Establishing the evidence supporting the indictment should be carried out prior to a ruling on the merits of the case if any question regarding the legality of acquiring these exceptions is raised. The judge is not required to state weather an evidence was illegally obtained only on final deliberation. What the judge has at most is an option not to state upon the legality of evidence but we argued that it was desirable, under the old regulation, to rule on the exclusion of evidence after reading of the indictment, to avoid any restriction on the rights of the defense. This view was also shared by the Romanian legislator and under the New Code of Criminal Procedure, art. 345 provides that the

chamber judge is competent in a newly created pre-trial phase to exclude the evidence illegally obtained.

The ruling on application regarding technical supervision is given in accordance with art. 140, para. 3 of the New Code, by the judge stating on the rights and freedoms, on the day of the application, in secret chamber, without summoning the parties but disproportionate and contrary to the principle of equality of treatment, with mandatory participation of prosecutor.

The judge cannot provide a *per relationem* reasoning in reference to the prosecutor's request, as such a method reduces the level of attention and involvement in the decision, causing a predilection to adopt the public ministry conclusions. The ruling requires an exposure of conditions, specifically justifying the authorization decree, with a proper indication of legitimate reasons.

Regarding the authorization procedure in urgent cases issued by the prosecutor we have indicated the need to regulate an obligation to keep track of such orders of authorization and the imperative that this record must be subject to control by an independent authority. The former regulation required the ordinance authorizing the interference to be entered in the special register provided for the art. 228, par. [1]. The New Code does not provide a similar mandatory rule, which led us to emphasize on the unjust termination of a proper safeguard regulated in the past.

The role of such records is to confer the possibility of verifying the existence of interference and, consequently preventing arbitrary rulings, the lack of such a safeguard being itself an interference. The obligation to notify the judge on the authorization issued, so that he may rule on the legality of the measure generates illusory guarantees given that the number of such authorization cannot, in the absence of any evidence, be compared with the number of applications submitted.

The need to keep such records is regulated in comparative law, in many cases the executive has to report either to the legislature or to a committee appointed by it, the number of authorizations granted due to address a need of emergency.

Regarding the authorization given by the prosecutor we consider that the judge should not be aware of the content of the evidence that resulted from the interception of communications. The prosecutor`s authorization must meet the same requirements as those imposed ordinance judge's conclusion and probable cause must be considered in respect to circumstances that existed at the date of issue of the order and not the subsidiary acquired

evidence. The review of legality cannot be achieved by reference to data other than those existing in the initial on file; otherwise the arbitrariness of the procedure is evident. For these reasons we argued that in future the law must expressly prohibit the judge to become aware of evidence obtained in operations that were the result of the analyzed interference.

Chapter V entitled "Procedure for executing the interception of communication and sound or video recordings" advocates the need to establish a specialized unit, similar to that which operates within the National Anticorruption Directorate, under the direct control of the prosecutor. We emphasized on the need to own technical equipment and ensure the direct enforcement of the authorization for as additional guarantees of secrecy and effectiveness.

Regarding the transcription of the recordings, the New Code brings a significant change in terms of the reports of the interception activity. Art. 143 provides that the prosecutor or the criminal investigation body shall prepare a report for each of the technical supervision entitled report on the recording activities. We argued that this report needs to be prepared on each individual activity given that to enable an effective control over the arrangements for implementation of surveillance operations, it will need to meet certain requirements regarding the accuracy of the data, that are difficult to achieve if the record would be drawn up at the end of the entire activity of interception.

Regarding the selection of recordings that needs to be introduced as evidence we have indicated that attributing such a task to the prosecutor may constitute an unjustified interference, to the extent that the person concerned is denied the right to examine all records in question, and the possibility of entering evidence other than those selected by the prosecutor.

Although the art. 306, para. 3 of the New Code provides certain guarantees on achieving a proper selection, given the fact that the prosecutor is obliged to enter evidence in favor of the defendant, which translates into an obligation select conversations or communications which do not support the indictment, as they may even form the prosecutor`s opinion about the need for a dismissal of charges, the law does not established a procedure in which the parties are able to participate in evaluating the content of the intercepted conversations, in a complete disregard of the rights of defense . The law should provide that any conversation that the prosecutor deems appropriate can be contradicted by the party, in the criminal trial.

In the future we appreciated that the law should require assigning a power to the judge of rights and freedoms in a special adversarial procedure for selecting the intercepts and records of

conversations and communications. Such an approach would provide superior guarantees in respect to current legislation, particularly useful in ensuring the selection of calls useful to the defense.

It is also necessary to regulate a procedure by which the intercepted conversations are to be fully available to the person concerned, so that he can achieve its own selection of calls that are considered useful for the defense. The lack of such a procedure generated an uneven practice in the courts on whether an application for remission of copies of all the entries in question.

Disclosure of all the conversations intercepted regarding the defendant is an important right of defense. Listening to recordings allows the defense to compare the conversation with the text of the prosecutor`s reports. In practice, however, courts have provided contradictorily solutions on the extent of the rights recognized in terms of the possibility of issuing to the defense counsel a copy of the recordings, in order to acknowledge of the contents of records.

We criticized the rulings of national Courts that allowed the release of the intercepts that the prosecution did not refer to only if the defendants request is supported by evidence. The fulfilling of such a condition is illusory and leads to a vicious circle. If the defendant did not record their own conversations there is no way he could prove, in court, the existence of a call or its usefulness. On the other hand if such a personal recording has been made regarding their own calls given the fact that it can be directly entered into evidence by the defendant such a request would be futile.

Regarding the possibility of verifying the authenticity of the intercepts through an expertise, the New Code does not regulate such a provision as it would be superfluous given that an expertise can be ordered under the general terms of art. 100.

With regard to the storage of supports the New Code brings changes that generate a certain ambiguity. The provisions of art. 143, para. 2 expressly provide that support or a certified copy shall be kept at the premises of the Prosecutor`s office, in special places, in a sealed envelope and will be made available to the court, upon request.
The ambiguity derives from the expression used that refers to both the support and a certified copy. The text does not provide when the prosecutor keeps only a copy, and what happens to the original. We argued that the legislature opted for maintaining the solution of keeping the original supports at the prosecutor`s office, in a sealed envelope throughout the trial phase, and a copy can be stored only if the originals are made available to the court.

The novelty consists in keeping the records at the court, if the prosecutor orders a dismissal of charges and the solution was not contested under art. 340 or the complaint was rejected. In this case the prosecutor shall immediately notify the judge who issued the authorization that imposes the preservation of the support or a certified copy on the court premises in special places and in a sealed envelope, to ensure confidentiality.

The text fails to refer to the situation of wavering criminal charges, as the termination of the criminal action can be performed according to art. 17 of the New Code by waiver. We consider that for the same reasons in these cases the recordings should be filed at the court, given that from the provisions of art. 146 it can be deducted that the legislature intended that in all such cases the court should keep these supports to ensure confidentiality.

Express provisions regarding the prosecutor access to records archived, for subsequent copying and for it to be used in another criminal case, are not repeated in the New Code, but one opinion, however, shows that it can be inferred from the provisions of art. 142 para. 5 of the New Code, according to which data from technical surveillance measures can be used in other criminal cases if from their content results conclusive and useful data or information regarding the preparation or commission of any of the offenses referred to in art. 139, para. 2.

As far as we are concerned we do not share this view. On the one hand it is undeniable that given the conditions prescribed by art. 142, para. 5 such data can be used in other criminal case, but on the other hand art. 146 only sets out the conditions required to be met in order to retain the data, without explicitly indicate how they can subsequently be accessed. In this situation we consider that the absence of express provision requires the prosecutor to use such data or copy them, prior to preservation, access being disallowed after the data is archived.

As an additional argument art. 142 paragraph 6 provides that data from surveillance measures which do not concern the offence subject of investigation or do not help identify the location or participants, shall be stored on the premises floors, in a special place to ensure confidentiality, if not used in other criminal cases in *according to par. 5* (s.n.B.B.). So archiving takes place only after the prosecutor determines whether or not they will be used in another case.

The last chapter concludes the study and contains the findings, reiterating main coordinates of the research and proposals for new texts which we proved necessary. Without claiming to have exhausted discussions generated by gaining evidence as a result of interception of communications or audio and video recordings in criminal trial, we wanted to bring our own

contribution to the evaluation and improvement of legislation that regulates the matter, which constitutes the object of our analysis.

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19. *Silverman v. United States*, 365 U.S. 505 (1961)
20. *Smith* v. *Maryland*, 442 U.S. 735 (1979)
21. *United States v. Karo*, 468 U.S. 705 (1984)
22. *United States v. Knotts*, 460 U.S. 276 (1983)
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24. *United States v. U.S. District Court*, 407 U.S. 297 (1972).
25. *United States v White* 401 U.S. 745 (1971)
26. *Weeks vs. United States* 232 U.S. 383 (1914).