



The authority of electronic proof in the Penal article Wiretapping and voice recording as a model

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Abstract:

Due to the great importance of the electronic evidence, it has received great attention from the legislations of countries including Algeria, in order to keep pace with the scientific development that the world is witnessing today, so the Algerian Legislature has amended its legal system in line with this development, and this is evidenced by the amendment of the Criminal Procedure Code Under Law No. 06/22 and the Penal Code Under Law No. 06/23, which provided for the he is opposed to such actions and their validity in criminal proof.

In the end, we have concluded that the authority of wiretapping and voice recording in criminal evidence is not absolute, but remains relatively, depending on the validity of the procedures followed in this.

Keywords: electronic evidence; criminal proof; authority of wiretapping; voice recording; criminal investigators.

الملخص

نظرا للأهمية الكبيرة للأدلة الإلكترونية فقد حظيت باهتمام كبير من تشريعات الدول بما فيها الجزائر من أجل مواكبة التطور العلمي الذي يشهده العالم اليوم، لذلك قام المشرع الجزائري بتعديل نظامه القانوني بما يتماشى مع هذا التطور، ويتضح ذلك من خلال تعديل قانون الإجراءات الجنائية بموجب القانون رقم 22/06 وقانون العقوبات بموجب القانون رقم 23/06، التي نصت على أنه يعارض مثل هذه الأفعال وصحتها في الإثبات الجنائي. في النهاية، خلصنا إلى أن سلطة التنصت والتسجيل الصوتي في الأدلة الجنائية ليست مطلقة، بل تبقى نسبية، اعتمادا على صحة الإجراءات المتبعة في هذا.

الكلمات المفتاحية: الأدلة الإلكترونية؛ دليل جنائي سلطة التنصت على المكالمات الهاتفية. التسجيل الصوتي؛ المحققون الجنائيون.

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Introduction:

As a result, the use of modern scientific means has become an imperative necessity for criminal investigators in the framework of performing their tasks to the fullest, especially since relying on traditional procedures for collecting evidence is no longer sufficient alone in uncovering crimes in light of the emergence of a new type of offenders who commit crimes in advanced ways, taking advantage of technological development in this.

One of the most important scientific methods that have been talked about in the framework of these new methods is to obtain evidence that is useful in revealing the truth, whether it is the means that constitute an attack on the inviolability of private life, represented by listening devices or voice recording.

Based on the foregoing, it is extremely important to know and we pose the following problem: what is the validity of the evidence obtained from conducting wiretapping and voice recording in criminal evidence

Therefore, in order to familiarize and familiarize with all aspects of the subject of criminal evidence resulting from wiretapping and voice recording and its legal validity in criminal evidence, and from there to address the problem at hand, this study requires clarifying the concept of wiretapping and its legal validity in criminal evidence in (the first axis), and then explain the concept of voice recording and its legal validity in criminal evidence in (the second axis), relying in the study of this topic on the descriptive analytical approach, which we will explain in the following presentation.

2. The first axis: the conceptual framework of wiretapping and its legal validity in criminal evidence

Therefore, we will try through this axis to explain the concept of wiretapping and its legal validity in criminal proof, starting with determining what is meant by this procedure (section I), up to the statement of the authenticity of the evidence obtained from the wiretapping Procedure (Section II), we review it as follows:

2.1 Section I. The concept of wiretapping:



Our study in this section will focus on the definition of wiretapping first, and then the statement of the legal nature of this procedure secondly, according to the following model:

2.1.1First: the definition of wiretapping:

Since the term wiretapping is a relatively modern term, this has led to a difference of opinions on determining what is meant by this term, knowing that this disagreement was not limited to the doctrinal level but extended to include criminal legislation, and to determine the meanings and connotations of wiretapping, it was necessary to address the juridical definition and the legal definition.

*** -the doctrinal definition of wiretapping:**

There are many doctrinal attempts that have been said about conducting wiretapping, and each definition reflects the point of view of its author and the angle from which this type of electronic evidence is viewed, although they all agree that their goal is the same, which is to detect crime and catch criminals, which makes it impossible to review all the doctrinal definitions that have been said in this regard.

Therefore, in order to understand this term more closely, we decided to take a sample of the definitions that we see the most expressive and indicative of the term wiretapping, as follows:

According to one part of the jurisprudence, the procedure of wiretapping is: "the deliberate monitoring of communications, recording and private communications, whether direct or indirect, or what people exchange in front of each other or through wired or wireless means of communication."²

Others offer a similar definition as follows: "conducting an investigation that is conducted surreptitiously and violates the confidentiality of private conversations, ordered by the judicial authority in the form prescribed by law with the aim of obtaining non-material evidence of a crime that has occurred and

²Awad Mohamed Awad, principles of Criminal Procedure Law, publishing house legal library, Egypt, 1999, p.404



includes, on the one hand, eavesdropping on the conversation, and on the other hand, keeping it on tapes by means of devices intended for this viewing."³

Some others also took the initiative to try to lay the foundations of this definition and explained its content, which came in their definition of wiretapping as:" direct listening or recording of a telephone conversation between two correspondents without their knowledge."

It is worth mentioning in this regard that part of the jurisprudence distinguishes between the term interception of telephone calls and the term of placing the telephone line under surveillance, through the fact that the first is without the consent of the concerned, while the second is at his request or with his consent and is subject to the discretion of the judicial authority.⁴

*** -legal definition of wiretapping**

The French legislator defined this process under Articles 706-96 to 706-102:"it is every receipt of a written or audible communication of any kind, regardless of the means by which it is transmitted by wire or wireless, speech or signal by the sender or others or addressed to him and fixed, which is recorded on a magnetic, electronic or paper support."⁵

As for the Algerian legislature, in its amendment to the code of Criminal Procedure by Law No. 06- 22 in December 2006, a new jurisdiction was introduced in articles 65 BIS to 65 bis 10, the law allows in Article 65 BIS 5 of the ISC: "if the necessity of investigating the crime in question or the preliminary investigation of drug crimes, transnational organized crime, crimes related to Automated Data Processing Systems, money laundering crimes, terrorism, crimes related to the legislation on corruption crimes, the competent agent of the Republic may authorize the following:

- Interception of correspondence carried out by means of telecommunication means.

³Yasser Prince Farouk, monitoring private conversations in criminal proceedings, University Publishing House, Alexandria, First Edition, year 2009, p.15

⁴AbdelrahmanKhalfi, lectures **on the code of Criminal Procedure**, Dar Hadi, Algeria, 2012, p.73.

⁵Fawzi Amara, interception of correspondence, registration of votes and leakage as a procedure for judicial investigation of penal materials, Journal of Humanities, University of Mentore Constantine, No. 33, 2010, p.248



- Making technical arrangements, without the consent of the concerned parties, for the recording, recording, broadcasting and recording of speech spoken privately or confidentially by one or several persons in private or public places or taking photographs of the person or several persons present in a private place".

It is worth mentioning that before carrying out this procedure, it is necessary to obtain prior permission from the prosecutor of the Republic in writing, signed, stamped and dated for a maximum of four months, renewable according to the requirements of the search and investigation, and must identify the intended residential or other places and identify the crime that justifies resorting to this measure, in addition to the the date and hour of the start and end of the operations should be indicated in the visual⁶, With the description or copying of the process by the judicial police officer authorized or assigned to the process of describing or copying the recorded correspondence or conversations that are useful in showing the truth in a record filed with the file, as well as transcribing and translating calls made in foreign languages, if necessary, with the help of an interpreter hired for this purpose.

It is clear from the above that intercepting correspondence, taking photos and recording sounds are characterized by a set of characteristics⁷:

A-which such actions are carried out without the knowledge or consent of the person or persons targeted.

B- That such actions infringe on the confidentiality of private life.

C-the purpose of these procedures is to obtain non-material evidence in order to confirm the accusation.

2.1.2Second: the legal nature of the wiretapping procedure:

Monitoring and recording phone calls is one of the means and procedures aimed at obtaining evidence in a criminal case, but is directly conducting monitoring and recording phone calls an investigative procedure Or can it be

⁶Article 65 BIS. 9 of Law No. 06-22 of December 20, 2006, C.R.C.C, No. 84, dated December 24, 2006 amends and supplements order 66/155 of June 18, 1966, C.R.C.C, No. 48, issued in June 1966, containing the Algerian code of Criminal Procedure.

⁷Article 65 bis. 10 of the same law.



considered as one of the types of procedures known in the code of Criminal Procedure

*- As for the laws that explicitly provide for the monitoring of telephone calls in the code of their criminal procedures, in this case the matter is clear because they considered it as an independent investigative procedure carried out by the investigating judge or delegated to one of the judicial police officers, its purpose is to uncover the perpetrators of the crime, and therefore it is an independent procedure with its own legal system that distinguishes it from other procedures.

*- For laws that are not explicitly classified on the monitoring of telephone calls in their code of Criminal Procedure, in this case you can include them under some kind of inspection or inspection because it is akin to wiretapping⁸.

A - as for the inspection: this procedure is not carried out only after the crime has occurred, as it is not a place for a hidden commission, and therefore we find it different from conducting monitoring and recording phone calls, and therefore it is not considered a kind of inspection⁹.

B- as for the inspection: the majority of commentators of the criminal law tend to adapt the monitoring of telephone calls as a kind of inspection, as long as the inspection is an assault on the right of secrecy, and this is what is arranged by wiretapping, and the law protects the secret, regardless of whether the secret is physical, it can be seized or moral, it can only be seized if it merges into a physical entity, as is the case in the monitoring and recording of telephone calls¹⁰.

2.2 Section II: the authenticity of the evidence obtained from the wiretapping procedure:

⁸Zerrougui Aisha, methods of proof under the Algerian code of Criminal Procedure, thesis submitted for obtaining a doctorate of science, specialization of Public Law, Faculty of law and Political Sciences, Saida University, 2017-2018, P.363.

⁹Inspection is meant as: "viewing and viewing, and it may be called examining the place and proving its condition immediately upon moving to it, that is, proving the condition of people and things related to the crime committed and proving the condition of the place and what evidence it has.

- Mohamed Hazit, investigating judge of the Algerian judicial system, Dar Houma, Algeria, second edition, 2009, p.85.

¹⁰Abdallah Wahabi, explanation of the Algerian code of Criminal Procedure, investigation and investigation, Dr. Houma, Algeria, 2015, p.319



In the context of talking about the authenticity of the criminal evidence obtained from the wiretapping procedure, it requires (first) exposure to the jurisprudence position on the wiretapping procedure, and then (second) addressing the position of the Algerian legislator on the wiretapping procedure.

2.2.1 First: the position of jurisprudence on the telephone wiretapping procedure:

The issue of integrating modern technologies in general and wiretapping devices in particular in the field of Criminal Evidence is one of the most important issues that have aroused the interest of many jurists, so their opinions differed and differed between supporters and opponents.

*** - The trend rejecting the use of wiretapping devices:** supporters of this trend believe that the use of scientific means represented by wiretapping and surveillance devices is invalid as it contradicts the rules of ethics and violates the general principles of the law, as well as violating the texts of the Universal Declaration of human rights and international conventions, in addition to relying on these means involves a real assault on human privacy, so they believe that the criminal's impunity is much better than the use of these illegal means¹¹.

As a follow-up to the above, the supporters of this trend confirm their opinion and this point of view with other arguments, including that the use of wiretaps and surveillance opens the door and gives security agencies the opportunity to falsify recordings in a way that harms the rights of the subject, and this procedure violates the principle of integrity in obtaining evidence, which in fact is a kind of fraud and deception, in addition to violating the rights of the defense, and therefore the representatives of the authority must refrain from using it¹².

***-the trend in favor of the use of eavesdropping and surveillance devices:** the supporters of this trend argued that the use of this type of scientific means is considered one of the effective means to combat crime, there is nothing to prevent the use of these means, and given the steady increase in crime rates, it is necessary

¹¹Yasser Prince Farouk, Ibid. p. 31.

¹²Zerrougui Aisha, Ibid. p. 365.



to choose the appropriate means to combat it and to say otherwise will lead to stagnation in the face of crime¹³.

The authors of this trend justify their opinion that these means are a product of scientific development that has come to color various aspects of life, and the field of criminal investigation should not lag behind, considering that the use of wiretapping and surveillance devices would lead to the development of methods of research and criminal investigation¹⁴.

In the same context, the authors of this trend affirm that resorting to the use of eavesdropping and surveillance devices is necessary to achieve a balance between the right of society to detect crime and the right to privacy, this can only be done by determining the legality of surveillance, considering that the human right to privacy is not an absolute right but is limited by the public interest, which necessitates a careful balance between the two rights.

It should be noted that wiretapping and surveillance devices have received great international attention from international bodies and organizations, in addition to some conferences held to search for ways to protect the accused and fundamental rights¹⁵.

The most prominent example given in this regard was the international conference held in Tehran in 1962 on the need to respect private life in light of the achievements achieved in recording techniques and the inadmissibility of compromising the inviolability of private life, while the Hamburg conference in 1979 recommended not to accept any evidence obtained illegally or violated human rights¹⁶.

2.2.2Second: the position of the Algerian legislator on the phone tapping procedure:

There is no legislative provision that allows the monitoring and recording of telephone communications, so opinions differed between supporters and opponents

¹³Yasser Prince Farouk, Ibid. p. 29.

¹⁴Ben Taleb Linda, electronic evidence and its role in criminal evidence (comparativestudy), thesis for obtaining a doctor of Science degree majoring in law, faculty of law and Political Science, University of MouloudMaamariTiziOuzou, 2019, P.215.

¹⁵Yasser Prince Farouk, Ibid. p. 30.

¹⁶Zerrougui Aisha, Ibid., p. 366



of this measure, and this remained the case until the Algerian legislature intervened and issued Law No. 06-22 dated December 20, 2006, which introduced fundamental amendments to the procedural code.

Where the subject of monitoring telephone calls or communications has become allowed to be adopted as evidence, a chapter has been devoted to it in the code of Criminal Procedure, which is the fourth chapter of the second part of the first book under the title "interception of correspondence, registration of votes and taking photos" in articles 65 BIS 5 to 65 bis 10.

It is worth mentioning that the Algerian legislator has set a set of guarantees and conditions for conducting wiretapping of telephone calls in order to ensure the effective protection of the private life of individuals, added by amending the Penal Code Article 303 BIS, Article 303 BIS 1, as well as Article 303 BIS 2. Under these articles, illegal wiretapping and recording of calls were criminalized

3. The second axis: the conceptual framework of the audio recording and its legal validity in criminal evidence

Therefore, we will try through this axis to explain the concept of sound recording (section I), up to the statement of the authenticity of the evidence obtained from the sound recording Procedure (Section II), we review it as follows:

3.1 Section 1: the concept of voice recording

Our study in this section will focus on the definition of voice recording first, and then the indication of the place where the procedure is considered secondly, according to the following model:

3.1.1 First, the definition of voice recording:

There are many Fiqh attempts that have been said about the audio recording procedure, and each definition reflects the point of view of its author and the angle from which this type of electronic evidence is viewed, although its goal is the same, which is to detect crime and catch criminals, which makes it impossible to review all the Fiqh definitions that have been said in this regard.



Therefore, in order to understand this term more closely, we decided to take a sample of the definitions that we see the most expressive and indicative of the term audio recording, as follows:

According to one side of the jurisprudence, the sound recording procedure is: the process of translating temporary changes of sound waves for speech, music, or any other type of waves or permanent changes, or it is the process of translating temporary changes of sound waves for speech or its resonance by a machine that transfers sound waves to special vibrations, which correspond to the sounds they make exactly.

Another aspect of jurisprudence also defined it as: saving the Hadith on a device or other means prepared for this, with the intention of listening to it later or transferring it to a place other than the one that was recorded, and the sound is recorded on tapes by transferring sound waves from their sources with their tones, individual characteristics and their own characteristics to a recording tape inside a cassette box, so that the sound can be re-heard to identify its content and realize the properties that constitute the elements of the approach when comparing it to the voice of the person attributed to him, which decides to attribute it to him or deny it¹⁷.

It should be noted, that the devices prepared for recording differ from one device to another, there are those whose function is to capture sound and there are those who capture sound and image, and there are two prominent types, automatic recording and magnetic recording.

3.1.2 Second, the place where it is considered to make the voice recording:

To determine the reliable place to make the audio recording, three criteria were adopted, between one objective criterion, another subjective, and a double criterion combining both objective and personal, we review them as follows:

***-objective criterion:** it is the one that takes into account the privacy of the place and does not take into account the privacy of the conversation, because this was in a private place, it may not be recorded except with the permission of the

¹⁷Samir Al-Amir, telephone surveillance, audio and video recordings, second edition, the House of the Golden Book, united group presses, 2000, p.27.



competent authorities, but if it is in a public place, it may be recorded such as roads, public transportation, cinemas and other public places.

***-personal criterion:** it is the one that takes into account the privacy of the conversation, as some believe that the privacy of the conversation derives from the nature of the topic around it, not the place where it occurs, if the conversation is focused on a topic that the speaker is keen to hide from others, and not reveal it only to his speaker, then the conversation is personal, regardless of whether it is in a private or public place, which is worthy of the protection of the law for him, or if the conversation, even if it takes place in a private place, concerns public matters that do not concern the speaker, such as political and economic matters, recording or transmitting it is not a violation of the human right to his private life, and therefore does not constitute intrusion it's a crime¹⁸.

***- the double standard:** the authors believe that the privacy of the conversation is determined on the basis of the nature of the place on the one hand, and the nature of the conversation itself on the other hand, it is considered private when it took place in a private place regardless of its subject and is also considered private if it concerns personal matters of the speaker, even if it takes place in a public place, and therefore it is covered by legal protection, because many private topics take place in public places, and this is not meant to deprive them of their privacy, and whether the conversation taking place in a public place as private or not depends on the loudness of the speakers, the position they were in, and the extent of the crowding of the place where there is talk about whether or not and other different circumstances and considerations¹⁹.

3.2Section II: the validity of the audio recording in the criminal evidence:

Recording private conversations, like monitoring phone calls, has two conflicting interests, the first is the interest of investigating the use of voice recording devices eavesdropping on the conversations of the accused and detecting the crime, the second is the interest of the person in preserving his privacy, and in front of this conflict, talking about the authenticity of the evidence obtained from the audio recording requires exposure to the position of jurisprudence:

¹⁸MutassimKhamis, proving the crime with colloquial evidence, Journal of Sharia and law, United Arab Emirates University, No. 56, 2013, P.38.

¹⁹Zerrougui Aisha, Ibid., p. 373



3.2.1 First: the position of jurisprudence on the evidence obtained from the audio recording:

The majority of jurists have not explicitly decided their position regarding the authenticity of the audio recording in the evidence, so two trends have emerged, one of which is an opposing doctrinal trend and a doctrinal trend in favor of using the audio recording as evidence:

***-the trend opposed to the use of audio recording as evidence:**

A group of jurists agreed on the non-authoritative use of audio recording devices in the investigation, among the arguments that support their opinion:

There are those who say that hidden registration is not authentic because it violates the rights of a person, which is his right not to be infiltrated by anyone into his private life, which is called the right of privacy, which is an absolute right of natural human rights. Therefore, surreptitious registration is considered a null procedure, even if authorized by the investigating judge, because it infringes on his right to privacy, which no one has the right to intrude through voyeurism.

As for the second argument that the jurists came up with the non-validity of this means because the confession is issued by a non-Free Will, which confirms that if we ask the question, Would the accused have made the confession he made in his statements if he knew that a recording had been prepared for him to eavesdrop on what he was saying inevitably, the answer is no, and according to this opinion, the preparation of the recording would be cheating and fraud, even if authorized by the investigating authority, because he created a belief contrary to the truth that he was wrongly deluded by safety and security, and this cheating spoils his will and deforms his confession²⁰.

***-the trend in favor of using audio recording as evidence:**

Some jurists considered that resorting to voice recording is not a Invalid procedure, as long as these statements and communications were issued freely and by choice from him and without any influence, provided that the recording was not made in a way that violates the law, such as if the recording occurred after he

²⁰Zerrougui Aisha, Ibid. p. 374.



entered the dwelling illegally and justify this opinion by applying the rule of personal conviction of the criminal judge, he has the right to reject or accept it.

The authors of this opinion add that resorting to such practical means in the fight against crime, especially those activities related to organized crime, because criminals nowadays have become harnessing the fruits of scientific progress in committing their crimes and getting rid of punishment, and therefore it has become impossible in most cases to confront and fight these crimes without the use of countermeasures, foremost of which is conducting eavesdropping and voice recording²¹.

3.2.2Second: the position of the Algerian legislator on the evidence obtained from the audio recording:

After the promulgation of law 06/23 amending and supplementing the Penal Code, the recording of private conversations in secret became illegal and could not be relied upon as evidence, but the Algerian legislature criminalized under Articles (303 BIS and 303 BIS 1) of the Algerian Penal Code any attack on the inviolability of a person's private life, whether by registration or transfer.

However, according to the code of Criminal Procedure, the recording of private conversations is permissible in two cases:

- *- if the said procedure is carried out at the request of and under the supervision of the competent judicial authorities, in accordance with the conditions and guarantees provided for in articles 65 BIS7 to 65 bis 10 of the ISC.

- *-the audio recording of personal conversations shall be made in certain and limited crimes and shall be in the crime in question or in the preliminary investigation of the said and specified crimes in accordance with the text of Article 65 BIS 5 of the S. E. C. C.

It is worth mentioning that the Algerian legislator has not distinguished between eavesdropping on personal conversations in a public place or taking place in a private place, he has given protection to the conversation itself, no matter

²¹The virtue of living, explaining the Criminal Procedure Law between theoretical and practical with the latest amendments, Al-Badr press, revised and more Edition, p.109.



where it took place according to Article 303 BIS of the ISC, which states: "it is punishable by imprisonment By capturing, recording, or transmitting private or confidential calls or conversations without the owner's permission or consent..."

Therefore, talking about the authenticity of the evidence obtained from the audio recording is a legitimate procedure, but the condition is that it is authorized by the competent judicial authorities and under their supervision, and it is in specific crimes or in crimes committed in flagrante delicto, with the need to take into account the principle of legality in this procedure, that is, respect the rights of Defense and human dignity²².

4- Conclusion

Through this topic, I have tried to analyze the role of wiretapping and voice recording and their legal validity in criminal evidence, and the discussion of this topic through the above-mentioned presentation has resulted in some observations that can be summarized as follows:

- The Algerian Legislature has authorized the use of both telephone wiretapping and voice recording in order to detect crime and criminals, but not in an absolute form, but in accordance with certain conditions.

- It is unfair to deprive the judiciary of one of the effective modern means of criminal investigation and it is necessary to achieve the desired result of conducting wiretapping and voice recording.

- It is necessary to establish judicial control over the legality and integrity of the procedure and its freedom from any excesses that make it illegal. The validity of voice recordings and telephone wiretaps as a relative technical proof depends on the validity of the procedures taken to carry them out. if the procedures followed in the wiretapping or recording are correct, they become a stand- alone evidence and it is valid to take it.

In light of the results shown by this study, we can say that these means, in fact, we find that they are a two-sided currency, on the one hand, they pose a great

²²Nasreddinehenouni and Darineyedeh, judicial discipline in Algerian law, Dar Houma, Algeria, second edition, 2011, pp. 80-81



danger to human rights, especially with regard to the inviolability of private life devoted internationally and nationally, and on the other hand they are considered one of the means that can contribute to obtaining revealing evidence about crime and criminals.

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