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**VIDEO RECORDINGS AS EVIDENCE IN CRIMINAL
PROCEEDINGS**

ABSTRACT

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I. RELEVANCE OF THE SCIENTIFIC RESEARCH

The Bulgarian criminal procedural doctrine lacks a complete monographic work dedicated to the legal essence of video recordings that were not prepared according to the procedural order of Art. 125, para. 1 of the Criminal Procedure Code (CPC), and which are often in practice also called "private records". The relevance of the research stems from the fact that these video recordings are not treated as expressly provided in CPC material evidence, which determines a number of peculiarities in their inclusion in the process of proof. At the same time, the role of these records in the system of evidentiary sources in the criminal proceeding is increasingly greater in view of the digital age and the entry into it of the so-called "electronic evidence", which is a digital content of information relevant to the case.

Hence the need to transform this information into a form that can be perceived by the participants in the criminal proceedings and to include it on a magnetic or laser carrier for the purposes of the trial through the means of proof provided for in the CPC. This determines the author's desire to consistently systematize the particularities that these records reveal in the process regarding their admission, collection, verification, and evaluation. In the Bulgarian criminal law literature, there are separate works dedicated to these evidentiary sources, but not a comprehensive study that would follow the specifics of private video recordings through all stages of the evidentiary process.

A leitmotif in the exposition is also a principled distinction between the so-called "accidental records" (a concept that has acquired citizenship in judicial practice) and the so-called records that were made under the direct control of a certain person, and in this sense do not have "accidental" character. This also determines the practical context of the issue under consideration, namely the

essential distinctions made by the author between these two categories of private video recordings. Currently, private video recordings are subject to interpretation both in seminal decisions of the European Court of Human Rights (ECHR) and in the practice of national courts. However, the question of their definition and their main place in the system of evidence sources is open. Therefore, the subject of the dissertation work was not limited to commenting on the doctrine and the judicial practice, but aimed at a critical analysis of the latter in connection with the creation of a discussion on issues to which the judicial practice has not given neat and one-way answers in the modern existence of the right.

II. SUBJECT, PURPOSES AND METHODOLOGY OF THE DISSERTATION

The subject of the dissertation is the private video recordings as a source of evidence in the criminal process. In this sense, the object of analysis is both the objective Bulgarian criminal procedural law, as well as some international acts and judicial decisions of foreign and Bulgarian courts. On objective grounds, and given the lack of a detailed regulatory framework, the study cannot cover all practical hypotheses that arise when using such records in the process, but an attempt has been made to systematize the main problems that arise in connection with them in the individual stages of criminal procedural evidence.

With the monographic work, the author sets the following goals:

- i.** Clarifying the essence of private records as evidence in the process and defining the concept through the prism of so-called "electronic evidence";
- ii.** *Distinguishing from similar legal figures;*
- iii.** *Clarification of basic procedural issues in relation to their admission, collection, verification and evaluation in the overall activity of proof both in the course of the pre-trial proceedings and in the judicial phase of the*

process in "Submission to court and preparatory actions for consideration of the case in a court hearing", Court hearing before the court of first instance, appeal and cassation proceedings under the CPC;

iv. Critical analysis of Bulgarian and European jurisprudence, made in the relevant systematic places with the aim of not only commenting on certain standards that are imposed by law public authorities, but also arguing with them in order to improve the understanding of private records as increasingly important for the practice evidence sources.

In view of what has been said regarding the subject of the research and its goals, a practical orientation is directed to the construction of a unified concept regarding private records, when the latter are valued as evidence in the process, and the proposal for their explicit positive regulation in the CPC, which by legislative some ambiguities in the judicial practice would be overcome. In this sense, the examination of certain procedural problems is not only of doctrinal value, but aims to guide law public authorities to establish clear standards in the use of such records at trial. I believe that only in this way our national legislation will be in line with the European legislation and will respond to the challenges that technical progress poses to the law and the constant need for positive security of our evidentiary law in view of the new category of "electronic evidence", the unification of which coming up.

The methodology of the dissertation uses the legal-dogmatic method in an attempt to analyze the characteristics of private video recordings as evidence under the current legal framework. However, the lack of explicit procedural regulation also necessitates the use of logical and teleological methods regarding the admission, collection, verification and evaluation of private records as evidence. The least attention is paid to the historical method, since in the CPC of 1974 and the CPC of 2005 Criminal Code, only the video recording is explicitly regulated as

a strict material evidence source. On the other hand, the focus of the study is on the comparative legal method. The latter aims not only to present the regulation of video recordings as evidence in other legal systems, but also to systematize legislative authorizations regarding their overall treatment in the evidentiary process.

In the relevant places, a distinction has been made with similar legal figures, and an attempt has been made to comprehensively define the essence of this type of evidence. In this sense, some proposals *de lege ferenda* have been made, which have a practical focus and are aimed at a critical reading of this "special" type of evidence.

III. EXTENT AND STRUCTURE

The dissertation consists of a total of 285 pages, which include a table of contents, a list of abbreviations used, an introduction, three chapters, a conclusion, as well as a bibliography and an appendix with a synthesized set of over ten propositions *de lege ferenda*; 308 footnotes were added to the dissertation, and the bibliography includes 70 titles, of which 50 are in Bulgarian, and 20 in English, German, French, Russian and Romanian.

The text is in accordance with the current legislation and case law as of 04/01/2022.

IV. MAIN THESIS IN THE DISSERTATION: CHAPTER ONE

Within the framework of Chapter One of the dissertation, the historical development and comparative legal analysis of private video recordings have been consistently examined. Tracing the historical genesis of private video recordings in

the criminal process goes through a review of their regulation in the CPC of 1974 and the CPC of 2005. By necessity, the author has investigated some forensic aspects such as the peculiarities of the camera as a means of fixation and the creation of the first cinema and photographs. It has been clarified that in the court photography and cinematography, we cannot talk about so-called "accidentally" created records, from the perspective of their reproduction and the conditions under which they are created. It is essential for this part of the dissertation that private records do not find explicit legal regulation, which also predetermines the historical method as the one with the least importance in relation to the issues under consideration. It is the ineffectiveness of this approach, in turn, that determines the comparative law method as a source of practical solutions in the work of public bodies. In a comparative aspect, special attention is paid to the regulation of video recordings in German; Romanian and Serbian; and Russian legislation.

In summary, it can be concluded that in the Constitutions of these countries, private video recordings may affect the right to privacy or the **"right to informational self-determination"** (according to German law). Emphasis is placed on the role of German jurisprudence, which should systematize the cases in which the latter can be limited, namely the limitation: *1) should be provided for in a law, and not in a normative act of a lower level; 2) be proportionate to the pursued goal; 3) to be specific in view of the degree of infringement of the fundamental right - i.e. whether the data is retained permanently, what degree of identification is achieved, etc.*

The criminal-procedural laws of Romania and Serbia were also examined consistently, paying attention to the similarity with the treatment of private video recordings according to our national legislation, where the latter are defined as material evidence. Some legislative proposals for improving the procedural

regulations of the Republic of Serbia and the placement of private video recordings in specific frameworks are also the subject of research. A focus is placed on the importance of providing such videos in their original form, whenever possible, as an investigative methodology in these two legal systems.

In a comparative plan, the existence of private video recordings according to Russian legislation and jurisprudence is also examined. The leitmotif in the study of their dual legal nature is their dual nature - on the one hand, such records can be considered as material evidence, and on the other hand - as "other documents", since they fall under the list under Art. 84, par. 2 of the Code of Criminal Procedure of the Russian Federation. Special attention in the Russian doctrine is paid to the need to verify their credibility, which in practice requires special knowledge in the field of technique.

Finally, Chapter I discusses some criteria of the European Court of Human Rights (ECHR) in the inclusion of private records in criminal proceedings in the context of the right to private and family life of citizens under Art. 8 of the Convention. The presented overview of the fundamental judicial decisions of the ECHR in this area is not self-serving, but takes into account the benefit of knowing specific criteria regarding the possibility of using private records in the process of proof and the application of these criteria by national law enforcement authorities.

In summary, looking at private records through the lens of the comparative law method provides scope for normative and practical permissions not only in trying to define those records, but also in view of the safeguards that should be provided to third parties when private records threaten their rights and legitimate interests.

CHAPTER TWO

Chapter II of the dissertation is key to clarifying the nature of private video recordings. By necessity, this part of the exposition begins with a brief overview analysis of the development of the technique and various technical devices on which such records can be created. The very recording of biometric data and its subsequent capture on optical media requires knowledge of the peculiarities of digital and analog devices for recording circumstances of a certain criminal act

The leitmotif of the monographic research is the author's attempt to define the concept of "private records" through the prism of the so-called "electronic evidence", and a principle proposal was made to consider them as material evidence pursuant to Art. 109 of the CPC and as a carrier of "computer information data" pursuant to Art. 163 of the CPC. The criteria for the inclusion of private video recordings are consistently summarized through the lens of national practice. For the purposes of the dissertation, a distinction is made between the so-called "accidental records" (a concept that has acquired citizenship in judicial practice) and so-called records that are made under the immediate control of a certain person.

The noted distinction is not explicitly held in judicial practice, but the same has an important meaning in all stages of the criminal-procedural evidence discussed in Chapter III. New to the monographic work is the adopted new concept of the "collection" of private records as carriers of "computer information data". It is stated that this thesis currently does not find support in national jurisprudence, but it should be the subject of discussion with a view to improving the legal framework.

In Chapter II, private video recordings are also distinguished from other similar figures, namely: from material evidence; from the video recording of the interrogation of the accused and the interrogation of a witness; from the video conference; from the special intelligence means; from the written evidence.

Pointing out the characteristics of the private video recordings of these legal figures aims to emphasize once again the special nature of these evidentiary sources and the need to define them and extract their main features.

CHAPTER THREE

Chapter III of the dissertation examines the doctrinal and practical features of private records at all stages of the evidentiary process, namely admission, collection, verification and evaluation. This part of the presentation is also the largest in the exposition, not only because of the principle statements that are relevant to the problems of these records in the individual stages, but also because of the extensive overview of some special laws and judicial practice. In Chapter III, the most proposals *de lege ferenda* are also published, and structurally, the definition of private video recordings in Chapter II creates a smooth transition to the discussion of the practical aspects of their inclusion in the next chapter.

In the "admission" stage, the monographic study focuses on the standards laid down in Art. 31, para. 1 and para. 2 of the Constitution of the Republic of Bulgaria, where it is declared that the private life of citizens is inviolable. Hypotheses where a person can be recorded have been analyzed from here, namely:

- i. **In cases provided by law.** Here, special attention is paid to some special laws such as the Road Traffic Act; Law on protection of public order during sports events; Law on private security activity; Law on Electronic Communications.
- ii. **With the knowledge of the persons about it;**
- iii. **In the absence of knowledge or despite their express disagreement.** Here, emphasis is placed on two criteria for making private recordings in this hypothesis: 1) *is there a "provocation to crime"* and 2) *a "balance of*

interests" test, and some generally accepted standards established in the practice of ECHR, as well as others that the author considers applicable by the Court's authorities and the authorities of the pre-trial proceedings.

In the "collection" stage, the dissertation examines the main evidentiary methods by which private records are included in criminal proceedings, namely: inspection, search and seizure, and search. It should be noted that the most common way to do this is through the so-called "voluntary surrender", which is not among the methods listed under the CPC, but has acquired a wide field of application in practice. In view of this, some fundamental considerations in the use of this method are discussed and some recommendations to public authorities are offered in this regard.

In the "verification" stage, the author has analyzed the main methods for verifying private records as evidentiary sources - inspection, expertise, examination of witness/accused and recognition, and the problem necessarily requires a distinction between the so-called "accidental records" and records that have been made under the control of a specific person ("deliberate records"). The advocated thesis is that the inspection is a mandatory procedural-investigative action, through which the principles of immediacy and competition in criminal proceedings are observed in the process. A special place is devoted to expertise as a way not only to collect, but also to verify private records, and the specifics of video-technical, facial-identification and phonoscopic expertise are successively examined. In this regard, issues that require special knowledge in the context of private records are discussed, as well as peculiarities in taking comparative samples from the accused person.

Under "interrogation" is indicated the examination of the witness who handed over such a recording for the purposes of the investigation, both when the latter is "accidental" in nature, and when it was carried out "intentionally/

deliberately". In terms of "recognition", various practical scenarios are discussed where identification can be made using comparative material from a private record (exported photograph), as well as whether there is a substantive procedural violation if the person recognizing has previously viewed the record.

At the end of the "verification" stage, some essential conclusions and proposals *de lege ferenda* are set aside in an attempt to improve the regulatory framework and to bring more clarity in which cases an expertise can be assigned. On these issues, there is no unified opinion in the doctrine, nor has the practice given unified permissions, which presupposes the relevance of the research.

Lastly, the final stage of criminal procedural evidence - the "evaluation" of private records, is examined. Emphasis is placed on the evidentiary value of these records and the possibility that the latter may be treated as direct evidence in the process of proof. This issue is also not discussed in practice, and after analyzing judicial decisions in the context of the issue under consideration, the author comes to the conclusion that the law enforcement authorities seem to avoid discussing this issue in their reasons. It is the novelty of these evidence sources such as "electronic evidence" that raises the question of the need to divide them into "accidental" and those of a "deliberate" nature, which division has been carried out consistently throughout the monographic work.

In the final part of Chapter III, some features related to the reading of the protocols with which private records are included, as well as the admission, collection, verification and evaluation of private records in appeal and cassation proceedings are also discussed. In this part, two key judgments of the ECtHR are analyzed, namely: *D. v. Finland*, 2009, ECHR, and *Maksim Savov v. Bulgarie*, 2020, ECHR, whose principle permits public authorities to be challenged to request and include such records at the earliest possible stage of the

"investigation", with a view to the accused person being able to challenge such a record before at least two instances.

V. MAIN CONTRIBUTION POINTS OF THE MONOGRAPHIC STUDY

- i. An attempt has been made to define the concept of "private records" through the prism of "electronic evidence" entering the digital age. According to the proposed definition, private records are *„electronic evidence that is not prepared in accordance with the rules and regulations of the CPC, and represents a digital load of factual data stored in electronic form, and representing material carriers of information from the subject of evidence, on which the crime left tracks“*. The need to transform this information into a form that can be perceived by the participants in the criminal proceedings and to include it on a magnetic or laser carrier for the purposes of the process is done through the methods of proof provided for in the CPC. For the first time, a proposal was made, depending on the method of inclusion of the record, that the latter be considered not only as material evidence according to art. 109 of the CPC (as accepted in practice), but also in certain cases as a carrier of "computer information data" according to Art. 163 of the CPC. The records themselves contain digital information - in the form of electronic data, which can be considered as "computer data" according to Art. 93, item 22 of the CPC, as the non-material nature of the digital source of information is converted into material evidence, if the procedural order of Art. 160 - 163 of the CPC;

- ii. Arguments are presented why in case law a strict distinction should be made between so-called *"accidental recordings"* (which are made with a recording device previously placed in a public place or on private property) and *"intentional" ("deliberate")* recordings which are carried out under the immediate control of a certain person. In view of this, the author allows himself to use the concept of *"intentional" ("deliberate")*, which is not legal, to make the necessary clarifications in the inclusion of such records as evidentiary sources at all stages of the process of proof;
- iii. In the context of "admission" of private records, the constitutional standard under Art. 32, para. 2 of the Constitution of the Republic of Bulgaria is examined. In the first hypothesis, *"recording of persons in cases provided for by law"*, a brief overview of some special laws is made, and practical aspects related to the requirement of videorecorder recordings and the rights of the accused person in relation to this are discussed; legislative changes have been proposed in connection with the unification of the terms for keeping such records, and a minimum term of six months has been proposed in accordance with the provision of art. 81, para. 3 of the CPC for filing a writ of summons (given the fact that in these cases the initiative to collect evidence is the responsibility of citizens who do not have the capabilities of the pre-trial proceedings); regulation of the procedure for storage and destruction of private records and the need to create a protocol in the order and form provided for in the law, with previously established requisites for its compilation. In the second hypothesis *"recording of persons with knowledge of this"* it is proposed to create additional standards for notifying persons that they may be recorded, regardless of the established presumption of knowledge in places that can be defined as "public". The discussed

problems in the third hypothesis - "*recording of persons in the absence of knowledge or despite their explicit opposition*" are also of a contributing nature. Here, the author has considered two criteria: the possibility that the recording was made in an attempt to "*provocation to commit a crime*" (whether the crime was going to be committed before/despite the recording, or the recorder with his actions aims to provoke the person to the point of motivating him/ tends/provokes the commission of a crime) and a "*balance of interests*" test, with priority in all cases given to the second criterion. The latter would allow such a record to form the basis of the final prosecutorial/judicial act if the proportionality judgment prevails over the right of a certain person not to be recorded according to the constitutional standard;

- iv. A number of hypotheses with practical application have been considered in the "collection" of private records. In the context of the issues raised, a proposal was made to re-seize the record, if possible, in cases where the latter was handed over to the state authorities by post, courier or other remote means. The purpose of the personal visit by the relevant authorities is stated in order to ensure that the recording will be captured in an appropriate format and will eliminate possible manipulations when capturing it on optical media. A stance is taken on the "collection" of private records from mobile devices that are presumed not to be "accident" in nature. In view of this, emphasis is placed on the need to provide a specialist - technical assistant in order to avoid the possibility of manipulations in the record;
- v. In the "verification" stage of the private recordings, emphasis is placed on the need to perform a procedural-investigative action "review" of a private

recording regardless of the preparation of video technical and facial identification expertise. As a subject for discussion, the question was raised whether a blind juror can participate in the composition of the Court, if a private video recording is included as evidence in the case, which requires its direct perception. Of practical importance is also the need for special knowledge when including such records in the process, given the possibility that the latter may be manipulated. In connection with this, specific criteria are also listed to be taken into account by the expert when drawing up such conclusions. In principle, a proposal was made *de lege ferenda* to provide a new item 6 in Art. 144, para. 2 CPC with the following content: "***Expertise may also be assigned in cases where there is doubt about the authenticity of an audio or video recording that has not been included as material evidence source, as well as when establishing images in a video recording where a person can be identified.***" In the presence of a sound sample for the purposes of the phonoscopy examination and the need to attach voice information to the covers of the case by means of a special protocol, I consider that a proposal has also been made to add a new para. 4 of Art. 144 of the CPC: "***Expertise can also be appointed in cases where an audio or video recording contains traces of voice information (speech)***". A novelty in the research is the author's desire to be rethought the case law, according to which the examination of a person in a court hearing could replace deliberate photography for the purposes of facial identification expertise. In connection with this, the authorization in the French doctrine, according to which the forced photographing of a person can be carried out to clarify the circumstances of the case, is discussed as a field for discussion, and the possibility of taking samples for comparative research is discussed;

vi. At the "evaluation" stage of the private recordings, a discourse is placed on the question whether video recordings, which are not prepared according to the order and rules of the CPC, and which are included in the trial as material evidence, can be valued as direct evidence in the trial. Here again the author opens up a field for discussion in the context of the division of private records themselves into "accidental" and those made under the direct control of a particular person. The problem that arises with the current arrangement of private records, with the view that the latter are included only as material evidence, and not as material evidence source, is represented here again;

vii. The inclusion of private records at a later stage, namely in the course of the appellate judicial investigation in criminal cases, is of particular contribution. Here, there is an open debate on the issue of whether the accused had a sufficient opportunity to challenge the credibility of a video recording that was not prepared in accordance with the rules and regulations of the CPC, if the recording was collected for the first time in the proceedings before the appellate instance, and according to the author, the answer to this question is negative. The question of whether the appellate court can issue a new conviction in fulfillment of its powers under Art. 336, para. 1, item 2 of the CPC, by reassessing only a private record included in the process, without conducting a judicial investigation..

VI. PUBLICATIONS RELATED TO THE DISSERTATION

1. „THE ADMISSIBILITY OF VIDEO RECORDINGS AS EVIDENCE IN THE CRIMINAL PROCEEDINGS IN CASE OF LACK OF

KNOWLEDGE OF THE PERSONS OR DESPITE THEIR EXPLICIT DISAGREEMENT WITH THE RECORD ACCORDING TO ART. 32, PARA. 2 OF THE CONSTITUTION OF THE REPUBLIC OF BULGARIA“ – NORMA, 2021, № 2;

2. „LEGAL NATURE OF PRIVATE VIDEO RECORDINGS AS EVIDENCE IN CRIMINAL PROCEEDINGS“ – DE JURE, 2021, vol. № 12, book № 1;
3. „EXPERTISE AS A MEANS OF COLLECTING AND VERIFYING PRIVATE VIDEO RECORDINGS IN CRIMINAL PROCEEDINGS“ – NORMA, 2022, № 5;
4. „STANDARDS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN ADMITTING PRIVATE VIDEO RECORDINGS IN CRIMINAL PROCEEDINGS“ (in press) – DE JURE, 2022 , vol № 13, book. № 2.