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## LEGALITY AND ADMISSIBILITY OF EVIDENCE IN CRIMINAL PROCEEDINGS

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### **Matis Ja. Legality and admissibility of evidence in criminal proceedings.**

The rapid expansion of information technology in recent decades has deeply influenced various societal domains, including the legal landscape. This impact is particularly notable in substantive criminal law, where new phenomena have emerged, and in criminal procedural law, where innovative tools have been introduced to facilitate the gathering of essential information for fair and efficient legal processes. Among these tools, modern recording technologies, encompassing visual, audio, or audiovisual formats, have gained prominence for their role in documenting events and serving as evidence in criminal proceedings. Governed by legal frameworks such as Article 10(21) of the Code of Criminal Procedure, these recordings are classified as information and technical means when meeting specified criteria, primarily serving as crucial evidence sources capturing sound, images, or their combination. However, challenges arise when parties involved in criminal proceedings independently procure such recordings, aiming to present them to law enforcement or the court discreetly and confidentially. This necessitates a clear differentiation between recordings obtained within the procedural framework, regulated by Article 114 of the Code of Criminal Procedure, and those obtained externally. Establishing such distinctions is pivotal for upholding the integrity and legality of evidence presented in criminal proceedings, ensuring fairness and transparency in the pursuit of justice. In this paper we will analyze the concepts of inadmissibility and legality of evidence in the context of criminal proceedings. The aim is to highlight their interrelation and to distinguish their key aspects. The focus will be on the issue of private recordings as evidence. We will analyse the conditions under which a private recording can be used as evidence in criminal proceedings. We will take into account the relevant case law of the courts and the European Court of Human Rights. This paper comprehensively analyses the issue of admissibility and legality of evidence in criminal proceedings, with particular emphasis on private recordings as evidence. The paper should provide a comprehensive overview of the issue and help in solving practical questions that arise in this context.

**Key words:** an evidence; video and audio records; private record; proving.

### **Матіс Я. Законність та допустимість доказів у кримінальному провадженні.**

Стрімкий розвиток інформаційних технологій в останні десятиліття глибоко вплинув на різні сфери життя суспільства, в тому числі на правове поле. Цей вплив особливо помітний у матеріальному кримінальному праві, де з'явилися нові явища, і в кримінальному процесуальному праві, де були впроваджені інноваційні інструменти для полегшення збору необхідної інформації для справедливого та ефективного судочинства. Серед цих інструментів сучасні технології запису, що охоплюють візуальні, аудіо- та аудіовізуальні формати, набули особливого значення завдяки своїй ролі в документуванні подій та доказуванні у кримінальному провадженні. Відповідно до правових норм, таких як стаття 10(21) Кримінально-процесуального кодексу, ці записи класифікуються як інформаційно-технічні засоби, якщо вони відповідають визначеним критеріям, і в першу чергу слугують важливими джерелами доказів, що фіксують звук, зображення або їх комбінацію. Однак проблеми виникають тоді, коли сторони кримінального провадження самостійно отримують такі записи з метою надання їх правоохоронним органам або суду непомітно та конфіденційно. Це зумовлює необхідність чіткого розмежування записів, отриманих у процесуальному порядку, регламентованому статтею 114 Кримінального процесуального кодексу, та записів, отриманих ззовні. Встановлення таких відмінностей є ключовим для дотримання цілісності та законності до-

казів, представлених у кримінальному провадженні, забезпечення справедливості та прозорості у здійсненні правосуддя. У цій статті ми проаналізуємо поняття недопустимості та допустимості доказів у контексті кримінального провадження. Метою є висвітлення їхнього взаємозв'язку та виокремлення ключових аспектів. Особливу увагу буде приділено питанню приватних записів як доказів. Ми проаналізуємо умови, за яких приватний запис може бути використаний як доказ у кримінальному провадженні. Ми візьмемо до уваги відповідну судову практику та практику Європейського суду з прав людини. У цій роботі всебічно проаналізовано питання допустимості та законності доказів у кримінальному провадженні, з особливим акцентом на приватних записах як доказах. Документ має забезпечити комплексний огляд проблеми та допомогти у вирішенні практичних питань, що виникають у цьому контексті.

**Ключові слова:** доказ; відео- та аудіозаписи; приватний запис; доказування

## INTRODUCTION

The last few decades have witnessed a significant expansion of information technology, which has affected almost every aspect of society, including the legal field. In the context of substantive criminal law, these new trends have manifested themselves, for example, in the formation of new facts. In the area of criminal procedural law, various tools have been introduced to provide information that is crucial for the proper conduct of criminal proceedings. In the context of criminal proceedings, modern and effective information tools with a high degree of relevance are the making of visual, audio or audiovisual recordings. Pursuant to the provisions of Article 10(21) of the Code of Criminal Procedure, such records, if used in a procedural context and if they meet the conditions laid down, are classified as information and technical means. Their function is to act as a means of evidence, thereby enabling the acquisition of relevant information for the purposes of criminal proceedings in the form of sound, images or a combination of both. In practice, however, we encounter cases where parties to criminal proceedings provide themselves with visual, audio or audio-visual recordings in a discreet and confidential manner, with a view to their subsequent submission to the law enforcement authorities or the court. In this context, it is necessary to make a strict distinction between records in the procedural sense (pursuant to Article 114 of the Code of Criminal Procedure) and visual and audio recordings obtained outside the framework of criminal proceedings.

## GENERALLY ON THE LEGALITY AND ADMISSIBILITY OF EVIDENCE IN CRIMINAL PROCEEDINGS

The admissibility of evidence hinges upon the fundamental right to a fair trial, enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It necessitates a comprehensive evaluation considering both the inherent characteristics of the evidence and the methods employed in its acquisition.

It may be noted that these terms are often confused in the literature. The reason for this may be that the aforementioned concepts are related, intertwined, there is an organic link between them and the distinction between these concepts does not always occur, or only depending on specific procedural situations.

Mathern [1] uses the two terms but does not equate them, although he agrees that illegal evidence is inadmissible. Nett [2], who emphasizes that “illegal evidence is always inadmissible,” comes to a similar conclusion. Burda [3] emphasizes that “illegally obtained evidence cannot, in principle, be admissible in a criminal trial unless its illegality can be remedied and subsequently eliminated (so-called relatively ineffective evidence).” It may further be noted that Syrový [4] also allows the use of illegally obtained evidence in certain circumstances, stating that the provision of section 119(4) of the Code of Criminal Procedure “excludes the admissibility of evidence obtained by unlawful means, but not every. The illegality of the evidence must be given simultaneously with the coercion or threat of coercion. Therefore, illegality alone does not a priori exclude the admissibility of evidence. Šimovček states that admissibility of evidence means that a certain element of evidence is capable of supporting or refuting certain allegations or claims as a matter of law and cannot be rejected a priori by the judge. Šimovček also stresses that an important criterion for the admissibility of evidence is the lawfulness of its acquisition [5].

According to Šimovček, inadmissibility includes three categories:

**Inadmissibility due to illegally obtained evidence:** This category refers to evidence that was obtained in violation of the law, for example, through the use of coercion, torture, or illegal wiretapping.

**Inadmissibility due to the nature of the source of the evidence:** This category includes evidence that comes from unreliable or illegal sources, such as an anonymous denunciation or evidence obtained from a person who is not authorized to provide it.

**Inadmissibility due to formal defects:** This category includes evidence that has not been properly seized, processed or presented to the court in violation of procedural rules [6].

At the very outset, it is important to emphasize that the inadmissibility of evidence is a broader concept than the lawfulness of evidence. This means that any evidence obtained in an unlawful manner is automatically inadmissible. However, not all inadmissible evidence was necessarily obtained illegally [7].

Under § 119(2) of the Code of Criminal Procedure, everything that can contribute to the proper clarification of the case and that has been obtained from means of evidence under the Criminal Procedure Code or under a special law may serve as evidence. It follows from the aforementioned provision that the essence of evidence is its legality, since only what has been obtained from means of evidence within the meaning of the Code of Criminal Procedure or a special law may serve as evidence in criminal proceedings. On the other hand, the provision in question does not allow the exclusion of the use of any means of evidence obtained in accordance with the law [8].

The evidence obtained from the means of proof must therefore be lawful. The legality of the evidence means the finding that it was obtained from a source provided for or permitted by law, that it was secured and carried out by an authorised person, and that it was done so at the appropriate stage of the criminal proceedings and by a procedure which is in accordance with the law. Failure to do so shall constitute unlawful evidence.

In addition to the legality of evidence, there is also the so-called *procedural applicability of evidence (inadmissibility of evidence)*, where it is in principle legal evidence, which, however, due to certain circumstances, cannot be used in the further course of the proceedings and cannot be relied upon to establish the facts of the case [9].

#### PRIVATE RECORDING AS EVIDENCE IN CRIMINAL PROCEEDINGS

In the field of criminal proceedings, a question arises regarding the legality and usability of video-sound recordings made by a private person (i.e. a person other than the law enforcement agency) without the consent of the person being recorded. This issue is highly controversial in practice and in the decision-making activity of law enforcement authorities. There is no settled case law or unifying opinion of the Supreme Court of the Slovak Republic that would comprehensively define this issue.

In the context of application practice, the term “private recording” is understood in particular as visual, audio or visual-sound recordings made by natural or legal persons (e.g. detective services) without the consent of the person being recorded. These recordings capture the likeness, speech or both of the natural person concerned.

There are two types of private recordings:

- **Covert recordings:** the person being recorded is not aware that they are being recorded.
- **Unclassified recordings:** the person being recorded is aware of the recording but does not consent to it (e.g. publicly expresses his/her disapproval).

Various devices are commonly used to make private recordings, such as mobile phones, cameras, dictaphones or CCTV.

The assessment of the (un)legality of making such records and the procedural (un)usability of such records made by a private person in criminal proceedings is quite controversial in practice, as it comes up against the provision of Section 119(2) of the Criminal Procedure Code. as well as the provision of § 12 of the Civil Code. In this respect, it should be stressed that the purposeful (intentional) recording of another person without his/her consent always comes into conflict with the provision of Section 12 of the Civil Code, while the depiction of another natural person, for example, by means of taking a picture or a video recording without his/her consent, is always an interference with the right to protection of the personality of the person whose picture or recording is taken.

The existing legal provision (§ 12 of the Civil Code) is logical, as the state has no interest in facilitating surveillance or monitoring among private individuals, nor in substituting the activities of law enforcement agencies. Moreover, it aims to prevent individuals from intentionally capturing and utilizing images of specific individuals without their consent for various purposes.

Both scholarly literature and law enforcement agencies have long sought to “override” the provision of § 12 of the Civil Code, as well as § 119 paragraph 2 of the Criminal Procedure Code, through various interpretations aiming to allow the use of private recordings to establish the factual circumstances of a

case in criminal proceedings, despite their acquisition being in violation of the law (as per § 12 of the Civil Code). Consequently, such recordings should rightfully be rejected in criminal proceedings (§ 119 paragraph 2 of the Criminal Procedure Code).

It is remarkable how, despite the relatively clear wording of § 119 paragraph 2 of the Criminal Procedure Code, attempts persist to contaminate criminal proceedings with unlawful evidence, justifying this approach through various, often subjective, value judgments rather than an objective interpretation of the law.

It is essential to distinguish private recordings, as defined in the previous section, from instances of incidental interception of individuals in a public place.

Typically involves the photographing or filming of cultural sites, natural scenery, or other objects in public. Incidental capture of other individuals is an incidental, unintended result of the activity. Such incidentally obtained evidence in criminal proceedings does not, as a rule, raise doubts as to its legality, provided that the rights of the persons concerned have not been abused in its acquisition.

For instance, a tourist, while photographing a landmark, accidentally captures another person committing a crime. Such footage may serve as evidence in criminal proceedings. If the tourist misuses the footage for other purposes (posting it on the web, YouTube, etc.), this would be an illegal act. Even in the case of accidental capture, it is important to respect the privacy of individuals and only publish recordings that do not result in unauthorized interference with their personal rights. The distinction between private recordings and incidental public recordings is crucial for assessing their applicability in legal proceedings.

In Slovak criminal proceedings, the question of admissibility of illegally obtained private recordings as evidence appears to be a complex issue with various interpretative pitfalls. In practice, the case law of Czech courts is commonly argued, but this argumentation has its limits and is not necessarily applicable in Slovak conditions [10].

The argumentation based on the jurisprudence of the Supreme Court of the Czech Republic and the Constitutional Court of the Czech Republic stems from the reference to the provision of Section 89(2) of the Czech Code of Criminal Procedure. According to this case-law, the use of a visual or audio recording made by a private person without the consent of the recorded persons as evidence in criminal proceedings is not excluded. The reason is that even evidence obtained in violation of Section 12 of the Czech Civil Code may be usable in criminal proceedings if the interference with privacy is justified by the interest of the person who obtained and used the recording.

However, this reasoning runs into a fundamental problem: Czech and Slovak legislation in this area differs. While in the Czech Republic the case law interprets Section 89(2) of the Code of Criminal Procedure, in Slovakia the relevant provision is Section 119(2) of the Slovak Code of Criminal Procedure. These provisions differ in content and therefore the case law from the Czech Republic is not directly applicable to the Slovak situation.

We can conclude that it is not possible to admit an illegally obtained private recording as evidence in criminal proceedings in the legal conditions of the Slovak Republic only with reference to the legal reasoning set out in the decisions of the highest courts of the Czech Republic, because it refers to the interpretation of a substantively different provision than the provision of Section 119(2) of the Criminal Procedure Code. The provision of Article 2(12) of the Code of Criminal Procedure or the provision of Article 119(2) of the Code of Criminal Procedure cannot be omitted (ignored) only by referring to the case law of the courts of a foreign state which does not have the same legal regulation as the Slovak Republic.

However, in the territory of the Slovak Republic a diametrically different legal regulation applies in terms of content (in terms of legality). It is clear from the content of the definition of the provision of Section 119(2) of the Code of Criminal Procedure that the term “everything” is exclusively linked to “lawful everything”, i.e. the term “everything” is associated only with such means of evidence which have been obtained pursuant to the Code of Criminal Procedure or pursuant to another statute, as the case may be. In contrast to the legal regulation in the Czech Republic, in the legal conditions of the Slovak Republic, the legislator itself has defined the space within which the evidence obtained must fall. Everything that is outside the boundaries of the space of legality, the legislator has excluded from the notion of “everything” and thus also from usability as evidence in criminal proceedings. The fact that in the legal conditions of the Slovak Republic the legislator places obvious emphasis on the legality of the evidence obtained can undoubtedly be deduced from the basic principle of criminal procedure defined in the provision of Article 2(12) of the Code of Criminal Procedure [11].

Another argument of the proponents of the use of even illegally obtained private recordings in criminal proceedings is the reference to and use of the case law of the European Court of Human Rights (ECtHR). In this respect, reference is generally made to the ECtHR's decision in *Schenk v. Switzerland*<sup>1</sup>, which shows that if evidence has been obtained in violation of national law, this fact in itself may not constitute a violation of the right to a fair trial within the meaning of Article 6 of the ECHR.

In this regard, reference may be made to the resolution of the Regional Court in Bratislava, Case No. 4To/61/2018 of 8 November 2018, which stated that “the relevant provisions of the Criminal Procedure Code (Sections 2(12) and 119(2) of the Code of Criminal Procedure) cannot be circumvented merely by a general reference to the jurisprudence of the Convention for the Protection of Human Rights and Fundamental Freedoms, which, moreover, does not provide for any rules on the admissibility of evidence. Ignoring the national provisions of the Code of Criminal Procedure in question by merely referring to the Convention in a laconic manner (the basis of which is that the national authority must act, in the first instance, in accordance with its own law) cannot justify the use of unlawful evidence in criminal proceedings’. Finally, these conclusions also follow from the case-law of the ECtHR, which has repeatedly held that the Convention does not regulate the admissibility of evidence in criminal proceedings, since this area is primarily a matter of national law and it is not for the ECtHR to pronounce in abstracto a prohibition on the use of any illegally obtained evidence. All it can do is to assess the fairness of the criminal proceedings as a whole [12].

When admitting an illegally obtained private recording as evidence in criminal proceedings, it is often argued that the conclusions of the ECtHR case law based on the fact that it is necessary to examine whether the illegally obtained evidence was the only or only one of several incriminating evidence and whether the defendant had the opportunity to challenge it in the criminal proceedings, it should be added that the Criminal Procedure Code does not allow circumventing the provisions of Sections 2(12) and 119(2) of the Code of Criminal Procedure. nor on the ground that the illegally obtained private recording is only one of the incriminating evidence against the accused, or that the accused or his defence counsel had the opportunity to comment on this evidence and to challenge it. It cannot be accepted that the admissibility or inadmissibility of a particular piece of evidence in a criminal trial depends on whether there is other incriminating evidence in the criminal case or whether there is.

No court shall, without defying the good administration of justice, consider evidence which has been illegally obtained. If it does so, the proceedings cannot be fair within the meaning of the Convention. [13].

Some theorists argue that the Criminal Procedure Code applies only to law enforcement agencies and courts and does not provide rules for private parties in the seizure of evidence, including private recordings. However, this argument is misguided. The provision of Article 119(2) of the Code of Criminal Procedure refers to what and under what conditions may be evidence in criminal proceedings and not to who provides the evidence. The provision in question therefore applies to the taking of evidence not only by law enforcement authorities but also by private persons [14].

Private recordings of other people are not commonly used as evidence in criminal proceedings. This is due to the protection of privacy guaranteed by the Civil Code. Recording without a person's knowledge and consent is illegal and such evidence would be inadmissible in court.

However, there are exceptions. In justified cases, a recording may be used if it is for:

**Self-help:** According to Section 6 of the Civil Code, if an unjustified interference with a right is imminent, the person so threatened may, in a reasonable manner, avert the interference. For example, the victim of an assault may use a recording to document the course of the incident and use it as a defense in criminal proceedings.

**Analogous application of the provisions of Article 85(2) of the Code of Criminal Procedure:**

In this respect, it should be recalled that, pursuant to the provisions of Article 85(2) of the Code of Criminal Procedure, anyone may restrict the personal liberty of another person who has been caught in the act or immediately after the act, if this is necessary to establish his identity, prevent his escape, secure evidence or prevent further commission of a criminal offence. These include, for example, establishing the identity of the offender, preventing the escape, securing evidence or preventing further criminal activity ( a recording of the offender's escape from the scene of the crime or the course of the crime may assist in his or her apprehension and conviction). the offender to the victim). In such cases, although the

<sup>1</sup> Decision of the ECtHR of 12.7.1988, no. 10862/84.

conduct is formally contrary to the provisions of Article 12 of the Civil Code, it is also conduct that is materially close to the apprehension of the suspect by another person.

**Additional consent of the person being recorded:** If a person additionally consents to the use of a recording made without his/her knowledge/consent, the recording becomes usable. Consent must be properly documented.

**Recording by the perpetrator of the crime:** Recordings made by a perpetrator of a crime against another person (e.g., rape, torture) are usable as evidence because the victim's will is not free in such a situation.

It is important to stress that each case must be considered on its own merits. The question of the usability of a recording in criminal proceedings is complex and depends on various factors such as the circumstances of its making, its content and the purpose of its use.

#### CONCLUSION

When considering whether or not to allow the use of illegally obtained evidence in criminal proceedings, a key starting point is the understanding that adherence to the rule of law is a fundamental pillar of a fair criminal trial. The fact that the truth of the matter cannot be achieved at any cost is indisputable. If violations of the law in the gathering of evidence by private individuals are tolerated, a path is opened which inevitably leads to the unreliability of the criminal process and undermines the fundamental principles of justice.

The manner in which the evidence was obtained cannot therefore be ignored, nor can its illegality be disregarded simply because its contents might be useful in establishing the facts necessary for a decision. A legislative shortcoming in the current legislation is the absence of specific rules for assessing the usability or otherwise of records obtained by private parties in the context of criminal proceedings. This lack of clear and predictable rules leads to frequent contradictions in the decisions of law enforcement authorities and prevents the establishment of established judicial procedures that could at least partially compensate for the absence of a statutory framework.

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