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An unlawfully obtained vs. unlawfully taken evidence in civil litigation

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Abstract

The academic paper analyses some interpretation problems associated with assessing unlawful evidence. In current legal practice, one of the most significant and debated issues in court proceedings is handling the evidence obtained. This question is all the more complex when the court finds itself in a situation where it has to decide on the admissibility and relevance of the evidence obtained unlawfully. A pressing question then is: How should the court deal with evidence obtained in violation of the law? Is it possible for such evidence to be recognised as admissible and to influence the decision on the merits, or is it the court's duty to reject such evidence unreservedly?

Keywords: evidence, unlawful evidence, proportionality test.

1. Introduction

These days, the legal community is intensively reflecting on the issue of unlawful evidence and the issue of its admissibility in the context of civil proceedings before the court. This topic has become the subject of detailed analysis and discussions among lawyers, judges, and academics. The main objective is to find an optimal balance between the effective application of the law and the protection of fundamental rights and freedoms of individuals. The key problem is that evidence obtained in violation of legal standards can potentially be declared inadmissible in court proceedings. This issue requires a thorough legal analysis and balanced jurisprudence that considers the principles of the rule of law and the need to protect legal certainty and justice. Such inadmissibility is essential in civil proceedings as it may directly impact the outcome of the dispute. The importance of this issue is further accentuated by the fact that current case law from different jurisdictions offers diverse approaches and solutions, reflecting the diversity and dynamics of legal practice in this area. At the same time, technological progress has brought new challenges. Developing technical aids, such as sophisticated recording devices, advanced software for monitoring and analysing communications, or even drones capable of recording images and sounds, makes obtaining evidence with relatively little effort possible. These technologies can significantly contribute to the efficiency of the legal process, but at the same time, they place demands on the legality of their use. Although obtaining evidence through such technical aids may be considered practically undemanding, it is essential to consider the legal aspects. In many cases, these intrusions into privacy may conflict with the legal standards of personal data protection, confidentiality of communication or other fundamental rights. For this reason, it is necessary to pay particular attention to legal processes for obtaining evidence and to ensure that they comply with applicable law and the principles of a fair trial. Courts must be vigilant and constantly evaluate evidence in the context of its

legality to avoid situations where unlawful evidence would be improperly used and thus damage the integrity of the civil trial. Given these circumstances, it is evident that the issue of unlawful evidence and its inadmissibility in civil proceedings remains significant and requires constant attention and an analytical approach on the part of the legal community to ensure fairness and protection of the rights of all parties involved.

In this context, it should be remembered that the right to judicial protection is one of the fundamental pillars of the rule of law. This principle guarantees that each individual can turn to court and receive a fair and impartial ruling. In the spirit of this right, the entire civil process should be conducted so that the formal framework of the legislation and the principles of justice and equality are respected. Nevertheless, in practice, it is not infrequent that the requirements for an ideal judicial ruling, which should be legal, correct, and fair, are not always satisfied. It is this context that gives rise to the unlawful evidence dilemma. If the court rejects the evidence, it can ensure compliance with the legality of the proceedings, but this can lead to ignoring important information that could affect the correctness and fairness of the ruling. On the other hand, if the court were to accept unlawful evidence, it could mean a violation of the law and potentially undermine public trust in the judicial system. Such contradiction creates controversy, which is the subject of legal discussions and interpretations. Each case must be assessed individually, with the court obliged to consider all relevant circumstances, including how the evidence was obtained, its relevance to the decision on the merits and the potential impact on the parties' rights. The result of this legal contemplation may be an impeccable ruling in compliance with the legality of the proceedings but may be factually incorrect or even unfair. This leads us to conclude that judicial practice and legal theories must constantly seek a balance between upholding formal legal standards and achieving fair and correct rulings that reflect the letter and the spirit of the law.

2. History

In the history of judicial practice, the attitude towards the admissibility of unlawful evidence and means of proof has been subject to considerable reserve and criticism. The courts have long emphasised that the basic pillar of their proceedings must be compliance with the law and the rule of law. This principle was considered an integral part of a fair and equitable process, the basis of the democratic rule of law. Individual verdicts and court rulings consistently reflected this approach in the past. It was emphasised that evidence obtained violating the law should not be part of the court proceedings. The courts were aware that if such evidence were admitted, it could set a dangerous precedent and undermine public trust in the justice system. The decisive argument for this rejection was the belief that civil court proceedings should serve as a protection of legality. The courts aimed to ensure that their actions were not associated with violations of the rights of individuals or entities. It was exactly this view that became decisive in giving direction to judicial practice on the admissibility of unlawful evidence. As a result, the courts sought to strengthen trust in the legal system through transparency and fairness of judicial proceedings. This attitude was the cornerstone for ensuring that court rulings were based solely on lawful and morally indisputable evidence. With this approach, the courts undertook to protect the rights of all parties involved and to promote the rule of law, which is essential for a just society. In this context, it is worth mentioning the doctrine of "fruit from a poisoned tree", which has its roots in the jurisprudence of the United States of America and has found its application in our legal system – the poisoned tree rule says that a poisoned tree (i.e., unlawfulness) cannot bear a healthy fruit (lawful results). According to this theory, it is necessary to exclude from evidence taking not only evidence obtained unlawfully (e.g., a video recording) but any evidence is derived from or obtained based on it (e.g. witness testimonies of witnesses who testify under the influence of unlawful evidence) – the evidence obtained in this way is considered ineffective. It must be excluded from the assessment in establishing the facts of the case. If the evidence was obtained unlawfully, then not only the evidence where the unlawfulness was caused but also any evidence that was obtained on the basis of this evidence is considered unlawful^[1].

Within the sophisticated and complex system of legal practice characteristic of democratic states governed by the rule of law, a second substantial view, which is worthy of closer examination, has emerged. This view, which has been gradually incorporated into the case law, concerns the controversial issue of admissibility, i.e., the admissibility of evidence obtained unlawfully. An essential springboard

for this view is that in certain, exceptionally specified cases, unlawful evidence can be admitted as relevant and credible evidence in court proceedings. This idea, which reflects a certain flexibility in the approach to legal standards, has been the subject of intense legal discourse. Its essence is the conviction that strict compliance with formal regulations should not automatically lead to the exclusion of evidence that could be crucial to a fair court ruling. From this point of view, room is being made for the possibility of including evidence in court proceedings, even if it was originally obtained in violation of applicable law. However, an important aspect of this view is the condition that applies to the person whose rights have been affected by the unlawful evidentiary procedure. This person must consent to the use of the evidence thus obtained. Consent granted ex-post, i.e., after the unlawful act has been carried out, may be considered as a form of endorsement of the originally unlawful act. It is important to emphasise that this consent is not ordinary but is specific because it comes after the evidence has been given and serves as a tool to correct the initial unlawfulness. This correction, which can be described as an ex-post correction, is the process by which we seek to achieve justice within the rule of law, despite the original violation of the rule of law. It is a process that considers the dynamic nature of the law and its ability to adapt to changing circumstances and needs of society while still maintaining its integrity and the essence of ensuring justice. Therefore, The result is a legal opinion reflecting the search for a balance between unwavering compliance with the law and the need to achieve a fair outcome of court proceedings. This view was presented and developed in judicial practice, opening a discussion on the possibilities and limits of the admissibility of unlawful evidence in court proceedings.

On 9 December 2014, the Constitutional Court of the Czech Republic marked a historic moment that meant a fundamental change in legal practice and doctrine in using unlawfully obtained evidence. The finding in question is recorded under case reference II. ÚS 1774/14, represents a milestone in interpreting the law and its application in the judiciary. Before that date, the practice of the judiciary was characterised by the almost absolute inadmissibility of unlawfully obtained evidence. This rigorous stance resulted from the imperative of protecting fundamental rights and freedoms, with the primary emphasis on the legality of procedures for obtaining evidence. Thus, the legal framework of the Czech Republic had traditionally excluded the use of evidence obtained in breach of law to ensure that trials are fair and not based on illegitimate practices. However, with the finding of the Constitutional Court of the Czech Republic, referred to as II. ÚS 1774/14, this doctrine was definitively broken. In this ruling, the Constitutional Court stated that in strictly defined cases, unlawfully obtained evidence may be considered admissible. Such a statement significantly modifies the existing approach and opens the door for new legal considerations and interpretations. The essence of this finding is the introduction of the proportionality test, which is designed to balance the interests of justice with compliance with the law. The proportionality test is a process that allows courts to assess whether the benefits of using a particular piece of evidence outweigh the negative consequences of obtaining it unlawfully. This test requires a thorough analysis of the specific case, taking into account every aspect, including the seriousness of the accusation, the importance of the evidence for the case, and the extent of the breach of legal standards in obtaining the evidence. In conclusion, the finding of the Constitutional Court of the Czech Republic, case reference II. ÚS 1774/14 represents a key moment in legal theory and practice that has changed the approach to unlawfully obtained evidence up to then. This precedent opens the door for further legal discussions. It allows courts to apply a more comprehensive view of the assessment of evidence while still upholding the rule of law and protecting citizens' fundamental rights [2].

3. Legislation

In times of transnational cooperation of the European Union, it seems inappropriate to limit the examination of any problem exclusively to national legislation. Even though European Union law does not regulate the admissibility of unlawful evidence in any legal standard, in several of its rulings, the European Court of Human Rights has found that Article 6 of the European Convention of Human Rights and Fundamental Freedoms does not regulate issues relating to admissibility of evidence, the evaluation of evidence or the burden of proof, as these issues fall within the scope of national law. The Convention entrusts the regulation of evidence admissibility to national law, usually governed by procedural codes.

If a party motions for the use of evidence in proceedings that was obtained unlawfully, a conflict of two different interests arises. One is the interest in the correct finding of the facts of the case, which is

the basis for a factually correct ruling. In the civil process, this is how the right of the litigating parties to a fair trial is guaranteed in Art. 46 para. 1 of the Constitution of the Slovak Republic is implemented. In these cases, the obligation of the party to bear the burden of proof may be subject to the taking of unlawfully obtained evidence. The second interest is the acquisition of evidence by applicable law (in particular, the interest not to interfere with personality rights in violation of the law, not to violate contractual obligations, etc.). According to some authors, this interest corresponds to the principle of legality enshrined in Art. 2 para. 2 of the Constitution of the Slovak Republic. Thus, a competition of two interests follows from the above [3].

Within the framework of national legislation, a universal and unambiguous definition of unlawful evidence is still out of grasp in legal science; it can be constructed and understood in the broader context of existing legal principles and definitions related to evidence. Unlawful evidence is not only a matter of its obtaining but also of using it in a trial. Suppose the evidence is presented to the court and accepted by the court even though it violates the rule of law. In that case, this may result in serious doubts about the fairness and legitimacy of the entire court proceedings. Therefore, the legal community must engage in the search for an accurate and practically applicable definition of unlawful evidence to ensure the integrity of the legal process and the protection of fundamental human rights and freedoms. On the other hand, the definition of evidence itself is much better understood and described in legal science. Thus, the definition of unlawful evidence can be derived from the definition of evidence itself.

Evidence obtained from lawful means must be lawful [4]. According to Section 187 (1) of the Code of Civil Litigation Procedure, evidence means "everything that may contribute to proper clarification of the case and that has been obtained lawfully from means of proof" [5]. Following the interpretation provided by the definition in question, it can be concluded that the term "evidence" represents a specific outcome resulting from using certain means of proof. These means are applied to obtain relevant information that is necessary for the process of ascertaining and reconstructing the facts of the case. It is important to emphasise that the relevance of evidence depends on its ability to contribute to clarifying and supplementing the mosaic of acts under review. For this reason, not every means of proof can be considered effective because not all information has the necessary connection with a given situation or can be properly verified. That is why evidence, as a result of properly selected and applied means of proof, is crucial for establishing the facts. Each means conceals certain information that may or may not be relevant to the case. Their full potential is revealed only when they are thoroughly examined in the evidentiary proceedings. Only the result of this examination will answer whether a particular means of proof has undergone a transformation from a possible source of information into actual evidence. Not every means of proof can result in the evidence necessary for a decision in a given case. Many means of proof may remain unused or be disproved as unreliable.

In theory and practice, the concept of unlawful evidence is already established, but based on the above, it may be stated that the concept of unlawful means of proof should be the form on which the unlawful evidence would be based. However, in connection with the term "evidence," we often encounter confusion of the former with the term "means of proof." This phenomenon can be explained by the tendency to simplify complex legal concepts for more effective communication in legal circles. Therefore, evidence is any material or testimony that aims to support or refute a claim before a court and that is presented following the procedural rules and laws in force in the given jurisdiction. This basic characteristic of evidence is important because it provides a framework from which the concept of unlawful evidence can be inferred.

Therefore, unlawful evidence could theoretically be understood as one obtained or used in violation of applicable law. This means that any evidence obtained without consent, through violation of the law, by force, fraudulently, or in any other way that is contrary to the principles of a fair and equitable trial could be considered unlawful. In addition, if procedural rules are violated when presenting evidence, it may also lead to its classification as unlawful.

There are two main theoretical approaches to the definition of unlawful evidence. In terms of the first approach, unlawful evidence is evidence or a means of proof obtained by a party (not by a court) unlawfully, i.e., in violation of objective law. A cited example may be a telephone conversation recording without the callers' knowledge. According to the second approach, evidence obtained in

violation of the law by a court (not a party) may be considered unlawful evidence. For example, this may be a situation where the court obtains unlawful evidence by breaching the confidentiality obligation under special regulations. Under certain circumstances, an unlawfully obtained means of evidence may be admitted by the court at the stage of evidence taking, which, in the event of non-infringement of the mandatory procedural standards governing the taking of evidence, will result in evidence obtained *prima facie* lawfully, unless it stems from an unlawfully obtained means of evidence. On the contrary, in the event of a breach of mandatory procedural standards governing the taking of evidence, the original, even legal, means of proof becomes *de facto* unlawfully obtained evidence [6].

Unlawfully obtained evidence (by the court or after evidence has been taken) cannot be used as a basis for a court ruling, as it violates the rules of evidence set out by mandatory standards [7].

The admissibility of unlawfully obtained means of proof *ipso facto* cannot be automatically ruled out. For example, legal doctrine explains a situation where an image recording made without the consent of the person concerned constitutes an unlawfully obtained means of evidence, but the content of this recording does not harm the person concerned and can, therefore, be procedurally admissible.

4. Structure of the proportionality test

The proportionality test is a legal method courts apply, especially constitutional ones, to resolve complicated cases where two or more rights collide [8]. In current legal and ethical practice, we often resort to sophisticated evaluation and assessment methods of various measures, decisions, or laws. One of such methodologically advanced procedures is the proportionality test. This analytical tool provides an objective and structured framework for balancing interests and values in situations with potential conflicts or constraints. Its basic structure lies in a three-step process widely recognised and implemented in many democratic systems. The first step in this process is the suitability assessment. This stage requires a thorough analysis of the proposed measure to determine whether this measure is suitable for achieving the set objective. Crucial in this assessment is the focus on the relationship between the measure and the expected outcome. The parties to the dispute must demonstrate that the measure has a logical basis and can contribute effectively to achieving the desired state. It is as if they are looking for an answer to the question: "Is this specific measure relevant and appropriate to address the issue?" After a successful suitability check, the second step is to assess the need. At this stage, it is assessed whether the measure is necessary, i.e., whether there are less intrusive alternatives that could lead to the same objective. This step requires thoroughly reassessing all available options and their potential impacts on individuals or society. It is a moment when we have to consider whether the path we have chosen is the least restrictive path to achieving our ambitions or whether there are alternative solutions that could be equally or even more effective. Finally, the third and final step is the adequacy assessment. At this stage, the task of the evaluators is to examine whether the measure's benefits are adequately related to the constraints or interventions that the measure brings. This is a critical moment where all 'for' and 'against' are weighed and where it is essential to ensure that the measure does not go beyond what is considered acceptable within social and legal norms. The adequacy assessment shall consider broader contexts and potential long-term consequences, considering the overall balance between the benefits achieved and the disadvantages or constraints caused. Thus, the proportionality test represents a complex and multidimensional process that requires analytical thinking, ethical consideration, and a sense of justice. It aims to ensure that measures taken at different levels of social life are not only effective but also fair and respectful of the fundamental rights and freedoms of the individual.

The issue was addressed by the Constitutional Court of the Slovak Republic in its decision-making practice within the framework of the appropriateness, necessity or necessity and proportionality of obtaining evidence concerning the objective, it follows that: *"The Constitutional Court normally applies the so-called proportionality test in its decision-making activities, which consists of the following three steps: 1. identification of the purpose of the interference with the fundamental right and the test of the appropriateness of this interference to achieve it, 2. the test of the necessity of this interference and 3. the proportionality test in the narrow sense. The first step is to identify the objective (purpose) that the interference with the fundamental right pursued and which must be legitimate and legal from the constitutional point of view, which means that the Constitution must allow a limitation of the*

fundamental right in question to achieve this objective (Art. 13 para. 4, second clause of the Constitution). Part of this step also examines the rational link between this means (intervention) and the objective pursued, i.e., whether it is possible to achieve this objective. In the second step, it was necessary to assess whether it was not possible to use a more protective means concerning the fundamental right in question to achieve the objective pursued. The third and final step is to assess proportionality in the narrow sense. Its essence is the balancing of two rights or values in a collision with each other and the subsequent preference of one of them in a particular case [9]." (similarly, the judgment of the Constitutional Court of the Slovak Republic, case ref. PL.ÚS 67/2007, finding of the Constitutional Court of the Slovak Republic, II. ÚS 152/2008, finding of the Constitutional Court of the Czech Republic, case ref. II. ÚS 1774/14).

When can we use, for example, a recording obtained without the consent of the person recorded? We can rely on three main reasons based on the above-mentioned case law. First, it is not an expression of a personal nature, so the recording does not interfere with the personality rights of the person at hand (see the case of discordant partners). Subsequently, the principle of proportionality, i.e., judging the proportion of the rights concerned and assessing which is to be preferred in a particular case and the protection of the weaker party. In conclusion, it is necessary to assess the necessity of evidence, i.e., whether it is a fundamental fact that cannot be proven otherwise [10].

The judicial approach to evaluating the individual steps of the proportionality test is, under the principle of the free evaluation of evidence, subject to its discretion. Although the issue of (in)admissibility of unlawful evidence is a relatively difficult issue that requires individual assessment both in theory and practice, the proportionality test is the tool that allows the court to come closer to an ideal ruling. This includes a simultaneously legal, factually correct, and fair ruling. To support the above, we present the Judgment of the Supreme Court of the Czech Republic, of August 14, 2018, case ref. 21 Cdo 1267/2018-113. In this judgment, the Court reached the following conclusions. *"A sound or image recording that relates to a person or their expressions of themselves personal in nature and that was made by a private person without the knowledge of the recorded person may be used as evidence in civil proceedings only where it is intended to prove a fact that cannot be proved otherwise (using evidence that does not interfere with the absolute personality rights of the person concerned), and where other circumstances of the case lead to the conclusion that the right to protection of the personality of the person concerned cannot be preferred to the right to a fair trial of the person to whom the use of evidence by a sound or image recording relating to that person or their expressions of themselves of a personal nature is beneficial [11]."*

Situations where to succeed in court proceedings, a litigating party submits evidence that has not been obtained under the law and violates the rights or interests of the other litigating party are increasingly more common in practice. In such a case, the court faces a difficult question as to which of the conflicting rights of the litigating parties it should prioritise. It can thus subject unlawful evidence to the proportionality test of conflicting constitutional rights, which means that it shall assess such evidence in terms of its suitability, necessity and adequacy. The result of this three-step test is the conclusion of whether the court would take the unlawfully obtained evidence in civil proceedings. However, it can only be admitted if the unlawful evidence passes the proportionality test in all three points [11], [12], [13].

5. Conclusion

If we were to summarise the above, unlawfully obtained evidence, such as a recording or a photo, is, in principle, inadmissible. However, suppose a situation occurs where the litigating party does not have other evidence to protect their rights and achieve justice effectively. In that case, the court may also take such evidence into account. In such cases, the court must assess which constitutional law is stronger and prevails in the event of a conflict. In particular, such evidence will be admitted if submitted by the so-called weaker party, i.e., the consumer, employee, person who has been discriminated against, etc. In this case, too, the court must assess whether the interference with the person's privacy was justified and necessary and whether the weaker party did not have other evidence available. I believe that, due to the diversity of cases that may occur in practice, it cannot be assumed that this issue can be comprehensively

resolved in the future, and a unified solution for each specific situation can be proposed. It is, therefore, most appropriate to apply the proportionality test as a solution when using unlawful evidence in proving. Judicial institutions should bear in mind that each case is unique and individual and should, therefore, treat it with due care and consider its specificities. In my opinion, for the necessity to apply the proportionality test, it is necessary to distinguish whether the subject of unlawful evidence is the documentation for illegal conduct or conduct that does not show elements of unlawfulness. I believe the proportionality test cannot be done in all cases, so it is necessary to approach it restrictively based on private law principles and rational argumentation. To seek the truth (at least the formal one) in court proceedings, the interest in ascertaining the facts should be elevated above the protection of the other party's personality to proceedings. It must be assumed that the plaintiff does not interfere with the substantive legal position of the defendant entirely aimlessly but to ensure a probative situation that allows it to apply the means of procedural attack in court proceedings successfully. Nor can it be overlooked that such "unlawful" evidence documents the other party's-unlawful conduct that infringes or threatens the plaintiff's rights. In this case, the theory of elimination of unlawfulness (illegality) on the part of the plaintiff should be applied, according to which evidence (even obtained unlawfully) capturing unlawful behaviour is not considered unlawful evidence to prove. When it comes to the defendant, the principle that no one can benefit from their unlawful conduct (*nemo turpitudinem suam allegare potest*) should be considered. In other words, the defendant cannot benefit in terms of success in the proceedings because they refuse to consent to the taking of evidence proving their wrongful conduct. On the other hand, if it is a matter of capturing conduct that complies with the law (e.g., proving that an oral contract has been concluded, etc.), by the current substantive regulation, as well as the prevailing doctrinal and jurisprudential consensus, it will be evidence obtained in violation of the law, but admissible under procedural law if it passes the proportionality test. The finding of facts in court proceedings to prove a claim, on the one hand, as well as protection of a violated right by unlawful evidence, on the other hand, is thus limited by the intensity and strength of the interest in protecting that right through the constitutional balancing of the two. Without this balancing, not a single right can be denied, or absolute a priori protection can be granted to either of these rights.

From *de lege ferenda* point of view, in connection with the regulation of the admissibility of unlawfully obtained evidence in civil court proceedings, it is necessary to further unify judicial practice, compile established case law also in the legal environment of the Slovak Republic, as the admissibility of unlawfully obtained evidence is always assessed differently due to the circumstances of the case, but so far it is usually based on the case law of the Czech Republic, where the key arguments come from

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