Dimensions of Evidence in European Civil Procedure

Edited by

Vesna Rijavec
Tomaž Keresteš
Tjaša Ivanc

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Editors

Dr Tjaša Ivanc is assistant professor for Civil Procedure at the Faculty of Law, University of Maribor. Her areas of research are European Civil Procedure Law, Enforcement Law, Succession Law and Property Law. She is a guest lecturer at the Portucalense Institute for Legal Research, Porto, Universidade Portucalense Infante D. Henrique. Dr Tjaša Ivanc is author or co-author of several books and scientific articles in the fields of her interests. She participates in domestic and international scientific conferences and was an invited lecturer at the European Justice Training Network – Seminar on cross-border Inheritance Law, Academy of Justice and at the conference 'Europe for Notaries' from Austrian Chamber of Civil Law Notaries, Vienna. She cooperated in a number of successfully completed international and national projects (e.g., Dimensions of Evidence in European Civil Procedure, Simplification of debt collection in the EU; Reform of Non-Contentious Procedure in Slovenia; Medicine and Law). Dr Tjaša Ivanc is also an expert in the field of immovable cultural heritage on international and national levels. She cooperated with the Ministry for culture for drafting of amendments of the Cultural Heritage Protection Act and is author of the only scientific book available for this research area in Slovenia with the title 'Protection of Immovable Cultural Heritage – legal aspect'.

Prof Dr Tomaž Keresteš is associate professor of Philosophy and Theory of Law at the Faculty of Law of the University of Maribor (Slovenia). He is also head of the Institute for Economic Analysis of Law and head of the Department for Fundamental Juridical Science at the same institution. He is also a visiting associate professor at the Portucalense University (Portugal). Professor Keresteš studied Law at the University of Maribor and the Central European University in Budapest (Hungary). In 2003, he was awarded his doctorate (PhD) at the University of Maribor.

Prof Dr Vesna Rijavec is Dean of the Faculty of Law, University of Maribor, and head of the Institute of Civil, Comparative and Private International Law of the Faculty of Law, University of Maribor. Her areas of expertise are Civil Procedure, Succession, Family Law, Non-Contentious Civil Procedure and Law of Arbitration, which she teaches on graduate and post-graduate level. Prof Dr Vesna Rijavec obtained her PhD at the Faculty of Law, University of Ljubljana in 1997. She was a judge for civil matters

at the court of justice in Maribor and has worked at the Faculty of Law, University of Maribor since 1992. Since 2007, she holds a position of a Full Professor for Civil law. As a visiting professor she taught at the renowned foreign universities all around the world. She was a member of Judicial Council of Republic of Slovenia and she is a member of the Board of Ljubljana Arbitration Center at the Chamber of Commerce and Industry of Slovenia and she is the court appointed interpreter for German Language. Furthermore she is very active in research and international cooperation, and was a coordinator of a number of successfully implemented EU and national projects (e.g., Reform of Non-Contentious Procedure, Simplification of Debt Collection in the EU, Dimensions of Evidence in European Civil Procedure). She is an author of numerous scientific and expert discussions, articles and monographs in the area of civil procedural law in connection with different substantive areas and European law.

Contributors

Dr Philipp Anzenberger graduated from the Karl-Franzens-University in Graz (Austria) in Law (2010), Business (2011) and Geography (2011). He then worked as a junior researcher at the University in Graz and finished his Doctor's Degree in Law in 2014 (doctoral thesis: 'The insolvency-proof nature of tenancy and rental agreements'). After a research stay in Madrid (Spain) in spring 2015, Dr Philipp Anzenberger now works as an assistant professor at the Institute for Civil Procedure and Insolvency Law at the University in Graz.

Noemia Bessa Vilela obtained her Master of Law (LLM) at Universidade Portucalense Infante D. Henrique in 2014. From 2012 until 2014, she was research assistant at Instituto Jurídico Portucalense in Porto. She is currently a researcher at Instituto Jurídico Portucalense in Porto Area, Portugal, where she participates in various international projects on EU Law (e.g., Dimensions of Evidence in European Civil Procedure, Ius Commune Casebook, Simplification of Debt Collection in the EU).

Darius Bolzanas works at Civil Justice Department, Mykolas Romeris University and is also practising as advocate and arbitrator. His fields of research are European civil procedure, Insolvency law, Contract law. He holds lectures for judges (assistants), advocates, bailiffs, notaries, and lawyers in various institutions. From 2003, he worked at the Court of Appeal of the Republic of Lithuania, Klaipėda Regional Court and notary office.

Prof Dr José Caramelo Gomes obtained his Higher Doctorate – LLD in Law (European Competition Law) at the Universidade Lusíada do Porto. He is currently Full Professor (Professor Catedrático) at Universidade Portucalense Oporto, Portugal. He is a member of the Portugal/Brazil bilateral grants assessment panel 2014 FCT (Portuguese Foundation for Science and Technology), coordinator for doctorate and post-doctorate grants 2014 assessment panel for Law of FCT (Portuguese Foundation for Science and Technology), programme coordinator for Joint PhD in European and Comparative Law and Head of Research at the IJP - Portucalense Institute for Legal Research, director of the American Society of Comparative Law, editor of the American Journal of Comparative Law, evaluator for the COST Association, and evaluator for HERA. As a visiting professor, he taught at Faculdad de Derecho da la Universidad de Salamanca

(Spain –Erasmus), Faculty of Law, University of Maribor (Slovenia) and at University of Salford (UK) as a Doctoral research supervisor. Publications by Prof Dr José Caramelo Gomes include books, book chapters, articles and several conference papers.

Dr Matija Damjan is a research fellow at the Institute for Comparative Law and associate professor for civil and commercial law at the Faculty of Law, University of Ljubljana. After having worked as a judicial intern at the Higher Court in Ljubljana, he passed the State Legal Examination in 2005. He obtained his PhD at the Faculty of Law, University in Ljubljana in 2007. He primarily focuses on the areas of civil law and intellectual property law and has participated in several long-term research projects dealing with arbitration law, copyright, property law and consumer law. Dr Damjan is a co-author of draft proposals of Arbitration Act (2007) and Act on Mediation in Civil and Commercial Matters (2008) and author or co-author of several scientific and professional articles and monographs. He is actively involved in the organisation of conferences, symposia and seminars at the Institute for Comparative Law.

Katja Drnovšek graduated from the University of Maribor in Law (2010), Philosophy and Interlingual Studies – English (2015). She completed court internship at the Higher Court in Maribor and passed State Legal Exam in 2012. Since 2012, she has held a position of a research assistant at the Faculty of Law, University of Maribor, where she has assisted with implementation of various successful EU, international and national projects, including the EU project 'Dimensions of Evidence in European Civil Procedure'. At the moment, Katja Drnovšek is a teaching assistant and a PhD student at the University of Maribor.

Prof Dr Aleš Galič obtained his PhD in 1998 from Faculty of Law, University of Ljubljana, with the thesis '*Right to a Fair Trial in Civil Litigation - Research Emphasised on Case Law of European Court of Human Rights and Constitutional Courts of Germany and Slovenia*'. Since 1997, he is Legal Advisor to the Constitutional Court of Slovenia and associate professor for civil procedural law, at the Faculty of Law, University of Ljubljana. He was head of the Department for Civil Law, Faculty of Law in Ljubljana from 2007 to 2009. His fields of teaching are undergraduate and postgraduate courses in Civil Procedure, European Civil Procedure, International Civil Procedure, Law of Non-Contentious Procedures, Law of Enforcement of Judgements, Arbitration Law, and Alternative Dispute Resolution. Prof Dr Aleš Galič is also a member of various organizations – the Presidency of the Permanent Arbitration attached to the Slovenian Chamber of Commerce and Industry; the ICC International Court of Arbitration (2006–2009 and 2009–2012); the International Association of Procedural Law; the International Law Association committee on public interest litigation (since 2008); the National Board for Alternative Dispute Resolution.

Prof Dr Wolfgang Jelinek was appointed Full Professor of Civil Procedure at the University of Graz in 1978, and although he retired in 2010, he continues teaching and is very active in international research activities at the Institute for Civil Procedure and Insolvency Law, University of Graz. Prof Dr Wolfgang Jelinek obtained his PhD in 1964 and worked first as an assistant professor and later as a Full Professor in the field of Civil Procedure. In 1975, he was appointed a judge of at '*Evidenzbüro des Obersten*

Gerichtshofs'. Since 1982, he is a Director of the Institute for Austrian and International Civil Procedure, Insolvency Law and Agricultural Law at University of Graz. Prof Dr Wolfgang Jelinek's research focuses on Civil litigation and non-contentious proceedings, Arbitration, Legal enforcement, Insolvency law, Real estate law with special regard to international aspects, comparison of laws and relations to business law. He is participating in international projects on Comparative law and approximation of laws in the field of Procedural law with a focus on Germany and South-East Europe.

Riikka Koulu (LLM trained on the bench) graduated from University of Helsinki in Law (2010) and worked as a trainee judge in the district court of Helsinki in 2012. Currently, she is a doctoral candidate of procedural law at the University of Helsinki. In her theoretically oriented doctoral dissertation Dispute Resolution and Technology: Revisiting the Justification of Conflict Management, she focuses on the implications of implementing technology into dispute resolution and how this shift creates the need for new legal interpretations and concepts. In addition, her research interests include conflict management, crypto-currencies, Science and Technology Studies and critical systems theory. Her earlier publications concern, e.g., enforcement mechanisms and system design (2015), justification of ODR (2014), doctrines of dispute resolution and technology (2013), access to Internet (2012) and videoconferencing (2010, 2011).

Prof Dr Bettina Nunner-Krautgasser graduated from the Karl-Franzens-University of Graz (Austria) in law (1992) and worked as a junior researcher at the Institute for Civil Procedure and Insolvency Law. In 2006, she became a full-time associated professor (*venia docendi* for areas of Civil Procedure and Civil Law, title of her habilitation thesis being 'Obligation, Liability and Insolvency'). Prof Dr Bettina Nunner-Krautgasser is currently Full Professor and head of the Institute for Civil Procedure and Insolvency Law at the Karl-Franzens-University of Graz. She is author of numerous publications in all areas of civil procedure law and currently involved in several national and international research projects. Prof Dr Nunner-Krautgasser is also one of the editors of the German journal ZInsO ('Zeitschrift für das gesamte Insolvenzrecht'), member of the editorial board of the Austrian Law Journal and the Austrian journal ZIK ('Zeitschrift für Insolvenzrecht & Kreditschutz') and entrusted examiner for the Austrian judge examination.

Prof Dr Walter H. Rechberger is professor emeritus Civil Procedure Law at the Vienna University, Faculty of Law, and Head of the Institute of Legal Development. He held the position of Dean, of the head of the Department of Civil Procedure Law (*Institut für Zivilverfahrensrecht*) and member of the Council of the International Association of Procedural Law for many years. He received his J.D. from Vienna University and holds degrees of honorary doctor of the University of Pècs, Hungary and of the University of Athens, Greece. In 1989, he was a visiting professor at the Kansas University School of Law, Lawrence, US. From 1992 to 2007, Prof Dr Walter H. Rechberger was a member of the Faculty of European Studies, Department of European Integration, at Danube University Krems. He is also a member of several boards, such as the Vienna International Arbitral Center and the Institute for Danube Region and Central Europe. Publications of Prof Dr Rechberger comprise of more than 300 legal works, seven books

of which represent standard literature on Austrian Civil Procedural Law. He gave almost 100 lectures abroad (in Europe and worldwide, e.g., China, Cuba, Iran, Israel, Japan, Mongolia, Singapore, South Africa, and the US)

Prof Dr C.H. Van Rhee is Full Professor (Ordinarius) for Comparative Civil Procedure and European Legal History at Maastricht University (Netherlands). He is director of the research programme Principles and Foundations of Civil Procedure of the Ius Commune Research School. He serves as expert for the Council of Europe and the European Union in law reform projects, and is a Council Member of the International Association of Procedural law. He served for several years as head of the Metajuridica Department of the Maastricht University's Faculty of Law and as Academic Director of the Maastricht University's European Law School. He was a visiting professor at various universities around the world.

Marco Ribeiro Henriques is a Graduate Student at the University Portucalense Infante D. Henrique. Since 2014 he has been a trainee researcher at Portucalense Institute for Legal Research (IJP). He is involved in Human Rights associations both as a watcher for the 'Observatório dos Direitos Humanos' and a member in 'Amnistia internacional'.

Dr Jorg Sladič graduated at the Faculty of Law, University of Maribor in 1998. He continued his education at the University François Rabelais, Tours, France, where he became a Master of Law in the field of EU law. He obtained an LLM degree at the University of Trier in Germany in 2000. In 2007, he obtained PhD from the University of Saarland, Saarbrücken, Germany. He is currently an assistant professor at the Faculty of Law, University of Maribor, Slovenia, and attorney at law in a law firm Sladič-Zemljak. From 2004 to 2007, he worked at the European Court of Justice in Luxembourg (first as a legal secretary of a judge and latter of advocate general Trstenjak).

Egidija Tamošiūnienė works at Civil justice Departament, Mykolas Romeris University and holds the position of the Chairwoman of Civil cases division of The Court of Appeal of the Republic of Lithuania. She holds lectures for judges, advocates, bailiffs, notaries, and lawyers in the Judicial Training Centre, Lithuanian Bar Association, Lithuanian Chamber of Notaries, Judicial Assistant's Association, and various private institutions. She has actively participated in development of Civil Procedure Code, organised various conferences and projects. She was a practicing advocate since 2001, Director of Civil Justice Institute and Head of Civil Procedure Department (since 2010).

Prof Dr Robert Turner attended St Catharine's College Cambridge (1954–1957), and holds a BA (1957) and MA (1973) in History and Law. He was called to the Bar, Gray's Inn, in 1958 and was elected the Master of the Bench in 2000. From 1958 to 1967, he served in the Gloucestershire Regiment and was awarded GSM (South Arabia). Prof Dr Robert Turner practiced on the Midland and Oxford Circuit (1967–1984) and he was appointed the Master of the Supreme Court of England and Wales (Queen's Bench Div.) in 1984. With Lord Woolf, he participated in the Access to Justice Enquiry. From 1996 to 2007, he was appointed the Senior Master of the Supreme Court and The

Queen's Remembrancer, the Prescribed Officer for Election Petitions and the Central Authority for the Hague Convention. He was also advisor to the Law Commission in Malta (1993–1999) and a member and Deputy Chairman of the Archbishop of Canterbury's Board of Notaries (1999–2013). In his professional career, he was a fellow to the Institute of International Maritime Law, Malta (1998–1999) and visiting professor of Law to the Universities of Gloucestershire and Cambridge. He is also a president of the Institute of Credit Management and the High Court Enforcement Officers Association. His numerous publications include Chitty's Court Forms, Supreme Court Practice, The Annual Practice, The Office of Queen's Bench Masters, High Court Litigation Manual.

Prof Dr Lojze Ude is emeritus professor at the Faculty of Law, University of Ljubljana, where he has taught Civil Procedure Law, Insolvency Law and Arbitration Law. From 1989 to 1991, he held the position of Dean of the Faculty of Law. He is also a former judge of the Supreme Court (1973–1979) and the Constitutional Court of the Republic of Slovenia (1993–2002) and served as the President of Slovenian (1980–1986) and federal Yugoslav (1986–1988) Committees for Legislation. Dr Lojze Ude currently holds the position of director of the Institute for Comparative Law at the Faculty of Law in Ljubljana and is also the president of Slovenian Lawyers' Association. He has led several long-term research projects in the field of civil and commercial law. He published several books and over 300 academic and professional articles in renowned Slovenian and foreign legal journals on subjects of civil procedure law, arbitration law, insolvency law, civil and commercial law and constitutional law.

Prof Dr Alan Uzelac graduated from the University of Zagreb, Faculty of Philosophy (BA degrees in philosophy and comparative literature) and Faculty of Law (1988). He completed his postgraduate studies at the University of Zagreb (Masters of Law in 1992 and PhD in 1999), the University of Vienna (visiting fellow 1992 in 1995), and Harvard Law School (Fulbright Visiting Researcher, 1996). He is currently working as a professor of procedural law at the Faculty of Law, University of Zagreb, where he teaches Civil Procedure, Arbitration, ADR, Judiciary, Evidence and Protection of Human Rights in Europe. Prof Dr Alan Uzelac is involved in various activities of the European Commission for the Efficiency of Justice (CEPEJ) and of the Council of Europe, where he held different functions (Bureau member from 2003–2006, Member – national delegate 2003–2008; President of the Task Force on Timeframes of Proceedings of the CEPEJ 2005–2006); Member of the SATURN Group de pilotage 2007–2008). Since mid-1990s, Prof Dr Uzelac has also been engaged as a national delegate of Croatia in the work of UNCITRAL Working Group for Arbitration and Conciliation. He has published three books and a number of papers on topics of organisation of justice system; efficiency and fairness of justice; arbitration and alternative dispute resolution; legal professions; enforcement; law of evidence and comparative law.

Dr Stefaan Voet is an associate professor of law at the University of Leuven, a visiting professor at the University of Hasselt and a programme associate on the CMS/Swiss Research Programme on Civil Justice Systems at the Centre for Socio-Legal Studies at the University of Oxford. He obtained his PhD in law at the University of Ghent in 2011.

From 2005 till 2014 he was a research and teaching assistant and an assistant professor at the Institute for Procedural Law at the University of Ghent. He was a visiting scholar at the University of Houston and Stanford Law School. He was a visiting lecturer at the University of Houston, University of Tennessee, SMU Dedman School of Law, Syracuse University College of Law and Peking Law School. From 2001 till 2014, he worked as an attorney at the bar of Bruges. Since 2015 he is a substitute justice of the peace in Bruges. Prof Voet is the author of several national and international books, book chapters and articles about civil procedure, ADR, ODR, litigation costs and group litigation. He regularly speaks at national and international conferences, colloquia and seminars.

Prof Dr Christian Wolf graduated in law from Ludwig-Maximilians-University of Munich in 1985 and worked as a trainee lawyer at the Higher Regional Court in Munich. He also worked as a research associate at the Chair of Professor Dr B. Rimmelspacher. From 1989 until 1992, he served as a judge at the civil division of the Regional Court Munich I, before he became a prosecutor at the prosecution department of the Regional Court Munich I. In 1991, Prof Dr Christian Wolf completed his doctoral dissertation on Institutional Commercial Arbitration. In 1992, he became an assistant professor of the Faculty of Law of the Ludwig-Maximilians-University of Munich. Since 2000, he held the Chair for Civil Law, German, European and International Civil Procedure at the Faculty of Law of the Leibniz University of Hanover, and is a founding and chief executive director of the Institute for Procedural Law and Attorney Regulation (IPA). He has also been a judge at the Court of Appeal in Celle from 2001 until 2005. He is editor of several books and journals, among others the law journal 'Juristische Arbeitsblätter' (JA) and BeckOK ZPO (online commentary of German civil procedure code).

Nicola Zeibig graduated in law from Leibniz University Hannover in 2009 and started to work as a trainee lawyer at the Higher Regional Court in Celle. Her training included rotations at the District Court in Hannover as well as international law firms in Frankfurt and Sydney where she focused on Litigation and Arbitration. In 2012, she passed the Second State Examination ('Zweite Juristische Staatsprüfung'). Nicola Zeibig has been a research assistant at the Faculty of Law of Leibniz University Hannover since 2013. At first, she worked in the Dean's office as a student's counsellor before she started to work at the Chair for Civil Law, German, European and International Civil Procedure of Prof Dr Christian Wolf.

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CHAPTER 5

Inadmissible Evidence: Illegally Obtained Evidence and the Limits of the Judicial Establishment of the Truth

Bettina Nunner-Krautgasser & Philipp Anzenberger

§5.01 INTRODUCTION

The treatment of illegally obtained evidence has challenged lawyers for decades[1] and across all disciplines of adjective law. The question always remains the same: How far can parties go when trying to obtain evidence? Or, from the court's perspective: May the judge accept and use evidence even if it was obtained in breach of the law? This chapter will first highlight some **general aspects** of the conflict between establishing the truth and the boundaries set by substantive law; this includes the depiction of the role of material truth in civil procedural law, the idea of a unified legal system as well as an analysis of the impact of constitutional law on the court's actions. Subsequently, in discussing the **range of possible consequences of a breach of substantive law** we will consider another major issue related to inadmissible evidence. Thereafter we will try to give an overview of the treatment of illegally obtained evidence in Europe by evaluating twenty-two National Reports from various Member States of the European Union. Finally, a case study on illegally obtained tape recordings in Austrian civil litigation will give some insight into one particular aspect of this issue of topical interest. This chapter focuses on the Austrian perspective; however, where possible, various different viewpoints throughout of European Member States are considered in order to give a coherent depiction of the current scientific opinion as well as examples of practical solutions which have been devised in European legal systems.

1. Compare Kodek, *Rechtswidrig erlangte Beweismittel im Zivilprozeß*, 12.

§5.02 THE CONFLICT BETWEEN ESTABLISHING THE TRUTH AND THE BOUNDARIES SET BY SUBSTANTIVE LAW

Many European legal systems do not explicitly regulate the handling of illegally obtained evidence;[2] instead it is generally substantive law that prohibits undesirable behaviour and provides sanctions for any violation. In this context the question arises whether illegally obtained evidence may still be taken and used by the court as a basis for its judgment. The opinions vary from a complete rejection of the procedural use (such as the 'fruit of the poisonous tree'-doctrine in US criminal law[3]) to a generous support of the taking and using also of illegally obtained evidence (such as the legal situation in *Sweden* or *Finland*[4]). Since every national law has a different procedural and constitutional framework, we can of course not offer universal solutions for all the problems which arise. Instead, this chapter will highlight some important aspects and arguments of significance in this particular context.

[A] The Role of Material Truth in Civil Procedure Law

When assessing the legal framework of illegally obtained evidence, one of the core problems is the **role of the material truth in civil procedure law.**[5] One would instinctively say that judgments shall be as materially accurate as possible;[6] however, any material accuracy has a price: This price could purely consist of time and money (e.g., if additional evidence needs to be produced). It could also consist of the revelation of facts that both parties would prefer to keep secret (e.g., if the parties do not want to unveil business secrets). Yet, another price to pay could be the **breach of substantive law:** This could be the case when a party needs to perform a law-breaking act[7] in order to obtain or provide the evidence necessary to buttress his or her procedural position. It boils down to the question what price society is willing to pay for utmost material accuracy of the judgment.[8] This, of course, cannot be answered easily and is strongly related to the point of view of the purpose of civil proceedings as a whole (which again, naturally, diverges in different countries).[9] This point of view also depends on the respective historical period and ideological trends (e.g., there are libertarian theories, communist theories, or the theory of *Franz Klein*[10]): If civil

2. Compare Ch. 4.
3. Compare, for example, Bransdorfer, 'Miranda Right-to-Counsel Violations', 1067–1073.
4. Compare Ch. 4.
5. Compare Peters, 'Verwertbarkeit rechtswidrig erlangter Beweise und Beweismittel', 148; also cf. Kodek, 'Die Verwertung rechtswidriger Tonbandaufnahmen', 287.
6. Compare Roth, 'Die prozessuale Verwendbarkeit rechtswidrig erlangter Beweisurkunden', 715.
7. This is a big difference when compared to criminal law, where evidence is generally obtained within the proceedings and by a governmental body; cf. Kodek, 'Die Verwertung rechtswidriger Tonbandaufnahmen', 281.
8. Compare Habscheid, 'Beweisverbot bei illegal, insbesondere unter Verletzung des Persönlichkeitsrechts, erlangten Beweismitteln', 196.
9. Peters, 'Verwertbarkeit rechtswidrig erlangter Beweise und Beweismittel', 148.
10. Compare Konecny, 'Einleitung', pp. 12-17/1.

procedure is perceived as a social means to efficiently prevent or settle conflicts,[11] the material truth could possibly play a much weaker role than from a point of view where a civil procedure purely serves the enforcement of individual interests.[12] Extreme positions even value the establishment of the material truth as the utmost procedural goal, to which other values such as individual freedom or physical integrity have to be made subordinate.[13] As a consequence, the role of the material truth in civil procedural law can serve as a strong argument when it comes to the assessment of the admissibility of illegally obtained evidence in a civil procedure.

The more tangible side of this (rather political) issue is the question of the **judge's power to establish the truth.** Naturally, this also varies across different legal systems and depends on the goal of the respective civil procedure (e.g., the judge's power in family matters may be very different from the judge's power in commercial cases). The role assigned to a judge to be active and strong or passive and weak also results in a stronger or weaker realisation of important procedural principles, such as the principle of free disposition of the parties (versus the principle of ex officio proceedings), the adversarial principle (versus the inquisitorial principle) or the principle of ex officio conduct of the proceedings (versus the principle of party conduct of the proceedings).[14]

[B] A Unified Legal System?

Another major point of discussion in the context of illegally obtained evidence is the ideal concept of a **'unified legal system'.** The supporters of this concept argue that it would be inconsistent to prohibit and sanction the (substantively) illegal act of obtaining evidence while at the same time procedurally accepting the taking and using of that very evidence.[15] For example, whenever one party is in possession of a document the opposing party needs in order to prove his or her assertions, in many legal systems the possessing party has to provide the document to his opponent only under certain conditions.[16] Should those conditions not be met, there is no obligation to provide the document and the party without the document may lose the case. According to the theory of the unity of the legal system, it would be illogical if

11. Fasching, *Lehrbuch*, p. 45; also cf. Konecny, 'Einleitung', p. 12.
12. For example Sauer, *Allgemeine Prozessrechtslehre*, 1-3; cf. Fasching, *Lehrbuch*, p. 45; also cf. Konecny, 'Einleitung', p. 12.
13. Sauer, *Allgemeine Prozessrechtslehre*, 138; critically Dauster & Braun, 'Verwendung fremder Daten im Zivilprozess', 317 and 319; Störmer, 'Beweiserhebung, Ablehnung von Beweisanträgen und Beweisverwertungsverbote', 335.
14. For those principles see the Ch. 1 from C.H. van Rhee and Ch. 2 from Robert Turner in this book.
15. Compare, for example, Kellner, 'Verwendung rechtswidrig erlangter Briefe', 270-271; Habscheid, 'Beweisverbot bei illegal, insbesondere unter Verletzung des Persönlichkeitsrechts, erlangten Beweismitteln', 189 and 195; also cf. Leipold, '§ 284 ZPO', p. 87; Reichenbach, 'Zivilprozessuale Verwertbarkeit rechtswidrig erlangter Informationen', 618; critically Brinkmann, 'Verwertbarkeit rechtswidrig erlangter Beweismittel', 751; Dauster & Braun, 'Verwendung fremder Daten im Zivilprozess', 317.
16. Compare the national reports in Ch. 4.

procedural law tolerated the illegal obtaining of that very document (e.g., by the party breaking into the opposing party's house) by accepting its use.[17]

The opposite opinion is based on the so-called **theory of segregation.** The underlying idea is the general distinction between substantive and adjective law.[18] This idea is often supported by the argument that procedural law itself often violates 'the unity of the legal system': For example, in Austrian civil procedural law a witness can be **obliged** by civil law to refuse to testify (e.g., a doctor or a lawyer); however, procedurally those witnesses only have a **right** to refuse to testify (§ 321 of the Austrian Civil Procedure Code).[19] According to the (strict) theory of segregation, illegally obtained evidence can be used unless procedural law itself provides an exception.

Many **modern theories** find their place in-between those rather extreme positions. Usually they accept a general segregation between substantive and adjective law but create some exceptions for harsh violations of substantive law (especially when constitutionally protected values are concerned).[20] Many authors refer to the protective purpose of the rule which has been violated or to its place in the hierarchy of the legal system: Accordingly, the taking and using of illegally obtained evidence shall only be inadmissible if the rule which has been violated requires that very sanction or if a balance of interests goes in favour of the procedural admissibility.[21]

[C] The Court's Duty to Respect Constitutional Law

Another major issue is related to the **court's duty to respect constitutional law.** In this regard, it is important to distinguish between three relevant stages:[22]

(1) The obtaining of evidence.
(2) The taking of evidence.
(3) The using of evidence.

17. Kellner, 'Verwendung rechtswidrig erlangter Briefe', 270–271; Reichenbach, 'Zivilprozessuale Verwertbarkeit rechtswidrig erlangter Informationen', 618.
18. Compare Dauster & Braun, 'Verwendung fremder Daten im Zivilprozess', 317–318; Kaissis, *Verwertbarkeit materiell-rechtswidrig erlangter Beweismittel*, 30-37; Kodek, 'Die Verwertung rechtswidriger Tonbandaufnahmen', 288; Kodek, *Rechtswidrig erlangte Beweismittel im Zivilprozeß*, 97 and 127; Reichenbach, 'Zivilprozessuale Verwertbarkeit rechtswidrig erlangter Informationen', 618; Peters, 'Verwertbarkeit rechtswidrig erlangter Beweise und Beweismittel', 153; Werner, 'Verwertung rechtswidrig erlangter Beweismittel', 999.
19. Kodek, *Rechtswidrig erlangte Beweismittel im Zivilprozeß*, 97.
20. For example, Fasching, *Lehrbuch*, pp. 936–937; Rosenberg, Schwab & Gottwald, *Zivilprozessrecht*, section 110 pp. 23–25; Werner, 'Verwertung rechtswidrig erlangter Beweismittel', 998; Zeiss, 'Verwertung rechtswidrig erlangter Beweismittel', 395; critically Dauster & Braun, 'Verwendung fremder Daten im Zivilprozess', 317.
21. Compare Leipold, '§ 284 ZPO', p. 88; Prütting, '§ 284 ZPO', pp. 66–67; Werner, 'Verwertung rechtswidrig erlangter Beweismittel', 1000–1001; Störmer, 'Beweiserhebung, Ablehnung von Beweisanträgen und Beweisverwertungsverbote', 337.
22. Kodek, *Rechtswidrig erlangte Beweismittel im Zivilprozeß*, 127.

In civil procedure, the obtaining of evidence by the parties is an extra-procedural act,[23] which means that the parties are (usually)[24] not bound by constitutional law.[25] However, the taking and using of evidence by the court happens within proceedings and therefore in most legal systems needs to be carried out in accordance with constitutional law and the protection of fundamental rights.[26] One could argue that admitting illegally obtained evidence might be unconstitutional if the court (or the state) could not have carried out that very obtaining without breaching constitutional law. In other words: Can the act of introducing illegally obtained evidence into the proceedings, render the proceedings unconstitutional as a whole?[27] Again, there is a whole variety of opinions on this topic: Some authors state that any violation of fundamental rights when obtaining evidence will necessarily lead to a breach of constitutional law by using the evidence.[28] Many authors, however, propose a balance of interests when constitutionally protected rights could be affected.[29] The latter opinion also corresponds to the current legal situation in several Member States:[30] The Slovenian Constitutional Court, for example, developed a doctrine (the so-called proportionality principle) on the use of illegally obtained evidence.[31] According to this principle, the court has to carry out a balance of interests analysis (considering which of the constitutionally guaranteed rights has greater importance) when deciding whether to allow illegally obtained evidence.[32]

[D] Inadmissibility as an Incentive to Respect the Law?

Another issue is the question of whether the admissibility of illegally obtained evidence might create an **incentive** for the parties **to break the law.**[33] The underlying assumption is that the material sanction (e.g., a fine) alone might not be enough to scare a party from committing the substantively illegal act.[34] Therefore, for the sake of general prevention, the inadmissibility of illegally obtained evidence might be necessary.[35]

23. Kodek, 'Die Verwertung rechtswidriger Tonbandaufnahmen', 281.
24. However, some fundamental rights can have a 'third party effect', in which case also private persons may be bound by constitutional law.
25. Dauster & Braun, 'Verwendung fremder Daten im Zivilprozess', 318; Störmer, 'Beweiserhebung, Ablehnung von Beweisanträgen und Beweisverwertungsverbote', 335.
26. Brinkmann, 'Verwertbarkeit rechtswidrig erlangter Beweismittel', 753; Kiethe, 'Verwertung rechtswidrig erlangter Beweismittel', 968; Kodek, *Rechtswidrig erlangte Beweismittel im Zivilprozeß*, 129; Werner, 'Verwertung rechtswidrig erlangter Beweismittel', 1000–1001.
27. This question is also raised by Störmer, 'Beweiserhebung, Ablehnung von Beweisanträgen und Beweisverwertungsverbote', 335.
28. Gamp, 'Ablehnung von rechtswidrig erlangten Beweismitteln', 44.
29. Kodek, *Rechtswidrig erlangte Beweismittel im Zivilprozeß*, 130-134; cf. Leipold, '§ 284 ZPO', pp. 91–95.
30. Compare for more details Ch. 4.
31. Ivanc, *Evidence in Civil Law – Slovenia*, 72.
32. Ivanc, *Evidence in Civil Law – Slovenia*, 78.
33. Baumgärtel, 'Treu und Glauben, gute Sitten und Schikaneverbot', 103-104; Kaissis, *Verwertbarkeit materiell-rechtswidrig erlangter Beweismittel*, 52; Leipold, '§ 284 ZPO', p. 87.
34. Kaissis, *Verwertbarkeit materiell-rechtswidrig erlangter Beweismittel*, 52; Kodek, *Rechtswidrig erlangte Beweismittel im Zivilprozeß*, 106; Leipold, '§ 284 ZPO', p. 87.
35. Grünwald, 'Beweisverbote und Verwertungsverbote', 491.

Critics of that opinion state that it is not the purpose of procedural law but rather the purpose of substantive law to punish violations of substantive law.[36] Further, the 'sanction' of inadmissibility would often result in the dismissal of an action despite the fact that there is merit in the claim. This could be perceived as an 'additional punishment' for the offender.[37] Furthermore, the weight of this 'additional punishment' would not correlate with the severity of the offence but rather with the value of matter in dispute.[38] Critics also state that the material sanction would provide enough general prevention in the vast majority of practical cases (since things like 'private torture' almost never happen) so that there is no real need for an additional procedural sanction.[39]

[E] Admissibility as a Means to Accelerate Proceedings?

As a last argument **procedural economy** needs to be mentioned: According to some authors, the inadmissibility of illegally obtained evidence would considerably slow down the conduct of the proceedings.[40] Given the general admissibility of such evidence, the judge can simply take the questionable evidence without further investigation. If, by contrast, the fact that evidence was illegally obtained might lead to its rejection, the judge would have to evaluate the unlawfulness of the act of obtaining that evidence, which would require many further determinations.

Proponents of the opposite point of view argue that in many cases the unlawfulness of the act of obtaining the evidence is so obvious that a significant delay is generally not to be expected.[41] Further, civil procedural law does not strive for speedy conduct of the proceedings at any price, which is why a possible delay would have to be tolerated.[42]

36. Dauster & Braun, 'Verwendung fremder Daten im Zivilprozess', 317–318; Kodek, *Rechtswidrig erlangte Beweismittel im Zivilprozeß*, 107; Kodek, 'Die Verwertung rechtswidriger Tonbandaufnahmen', 289; Störmer, 'Beweiserhebung, Ablehnung von Beweisanträgen und Beweisverwertungsverbote', 335; Gamp, 'Verwertbarkeit materiell rechtswidrig erlangter Beweismittel', 116; Werner, 'Verwertung rechtswidrig erlangter Beweismittel', 1000.
37. Dauster & Braun, 'Verwendung fremder Daten im Zivilprozess', 318; Kodek, *Rechtswidrig erlangte Beweismittel im Zivilprozeß*, 107; Peters, 'Verwertbarkeit rechtswidrig erlangter Beweise und Beweismittel', 153; Werner, 'Verwertung rechtswidrig erlangter Beweismittel', 1000.
38. Kodek, *Rechtswidrig erlangte Beweismittel im Zivilprozeß*, 107; Kodek, 'Die Verwertung rechtswidriger Tonbandaufnahmen', 289.
39. Dauster & Braun, 'Verwendung fremder Daten im Zivilprozess', 318; Kodek, *Rechtswidrig erlangte Beweismittel im Zivilprozeß*, 107; Kodek, 'Die Verwertung rechtswidriger Tonbandaufnahmen', 289–290.
40. Roth, 'Die prozessuale Verwendbarkeit rechtswidrig erlangter Beweisurkunden', 715.
41. Kaissis, *Verwertbarkeit materiell-rechtswidrig erlangter Beweismittel*, 46; Kodek, *Rechtswidrig erlangte Beweismittel im Zivilprozeß*, 102; also cf. Konzen, *Rechtsverhältnisse zwischen Prozeßparteien*, 247–248.
42. Kodek, *Rechtswidrig erlangte Beweismittel im Zivilprozeß*, 102; cf. Zeiss, 'Verwertung rechtswidrig erlangter Beweismittel', 384.

§5.03 THE RANGE OF POSSIBLE CONSEQUENCES OF A BREACH OF SUBSTANTIVE LAW

Any doctrine (at least partially) claiming the inadmissibility of illegally obtained evidence has to offer solutions for another set of complex problems: What should the **procedural consequences** for the breach of substantive law when obtaining evidence be?

Most doctrines which propose a procedural sanction for the breach of substantive law agree upon the **inadmissibility of the taking** of illegally obtained evidence.[43] This is hardly problematic if the content of the evidence is never introduced into the proceedings. Nevertheless, such inadmissibility could be circumvented by introducing the evidence during the examination of the parties (e.g., if the parties read out the transcript of illegally obtained tape recordings).[44] In that case, the content of the evidence would still be introduced into the procedure (albeit on a lower level of immediacy) even though the evidence is never taken itself.[45] An option to avoid such a situation could be to **reject the introduction of the content** of the illegally obtained evidence; a determination which has already been reached once by the German Supreme Court.[46]

The more delicate question, however, is how to deal with illegally obtained evidence that **has already been introduced** into the proceedings (e.g., if the unlawfulness of the act of obtaining the evidence was revealed only after the taking of evidence). This leads to the often-discussed topic of the **inadmissibility of using** illegally obtained evidence.[47] The main problem here is that a judge would have to ignore the results of the taking of illegally obtained evidence and reach his or her decision as if this evidence did not exist.[48] In such cases, however, the judge might still let this (forbidden) knowledge slip into his or her assessment of evidence and thus into the judgment.[49] Therefore, many authors plead for a limitation of the inadmissibility of using evidence to some very exceptional cases (such as very harsh violations of substantive law).[50] One (quite costly) method to avoid this problem could be the **disqualification of a judge as biased** as soon as he or she gets to know the content of

43. Fasching, *Lehrbuch*, p. 936; Rosenberg, Schwab & Gottwald, *Zivilprozessrecht*, section 116 p. 11; Störmer, 'Beweiserhebung, Ablehnung von Beweisanträgen und Beweisverwertungsverbote', 335; also cf. Rechberger & Simotta, *Grundriss des österreichischen Zivilprozessrechts*, p. 773.
44. Roth, 'Die prozessuale Verwendbarkeit rechtswidrig erlangter Beweisurkunden', 715; also cf. Kodek, *Rechtswidrig erlangte Beweismittel im Zivilprozeß*, 134–136.
45. Compare Heinemann, 'Rechtswidrig erlangter Tatsachenvortrag im Zivilprozess', 138–142.
46. BGH 4 StR 519/63 NJW 1964, 1139.
47. Compare for example, Heinemann, 'Rechtswidrig erlangter Tatsachenvortrag im Zivilprozess', 141-142; Prütting, '§ 284 ZPO', pp. 64–67; Störmer, 'Beweiserhebung, Ablehnung von Beweisanträgen und Beweisverwertungsverbote', 335–337; also cf. Reichenbach, 'Zivilprozessuale Verwertbarkeit rechtswidrig erlangter Informationen', 605–622.
48. Kodek, *Rechtswidrig erlangte Beweismittel im Zivilprozeß*, 136.
49. Kodek, *Rechtswidrig erlangte Beweismittel im Zivilprozeß*, 136.
50. Fasching, *Lehrbuch*, pp. 936–937; Leipold, '§ 284 ZPO', p. 88; Rechberger & Simotta, *Grundriss des österreichischen Zivilprozessrechts*, p. 773.

illegally obtained evidence;[51] however, it is questionable if such a radical measure can be justified solely on the basis of a judge being unable to ignore a piece of evidence.

Finally, many procedural laws provide sanctions for a breach of the inadmissibility of taking or using illegally obtained evidence; this topic is treated very differently across Europe.[52] Sanctions for disregarding the **inadmissibility of taking** evidence could be the inadmissibility of using the evidence, a ground for an appeal or even the annulment of the proceedings.[53] Ignoring the **inadmissibility of using** evidence typically represents a ground for an appeal or even for the annulment of the proceedings.

§5.04 AN OVERVIEW ON THE TREATMENT OF ILLEGALLY OBTAINED EVIDENCE IN EUROPE

Illegally obtained evidence is dealt with quite differently across European Member States. We will give an overview on the most important aspects of this topic in the respective legal systems. This overview is based on twenty-two National Reports from different Member States[54] of the European Union.

First of all, it is noteworthy that **explicit rules** on the treatment of illegally obtained evidence are generally scarce. Some countries, such as Croatia or Greece, have limitations on the admission of illegally obtained evidence laid down in their constitution (compare Article 29 paragraph 4 of the Croatian Constitution; Article 19 paragraph 3 of the Greek Constitution);[55] other countries like *Estonia*, *France* or *Spain* have some explicit regulations laid down in their civil or civil procedure codes (e.g., section 238 paragraph 3 of the Estonian Civil Procedure Code; Article 259-1 of the French Civil Code; Article 287 of the Spanish Civil Procedure Code). Most Member States which have been considered, however, have hardly any or no explicit rules regarding illegally obtained evidence. Nevertheless, normative solutions can be found in almost every country since this topic has been heavily discussed in scientific literature and repeatedly addressed in respective legal systems.

The solutions among the investigated countries can be divided into three main categories:

(1) The **general inadmissibility** of illegally obtained evidence.
(2) The **general admissibility** of illegally obtained evidence.
(3) A **balancing of interests analysis** when evaluating the **admissibility** of illegally obtained evidence.

51. Kodek, *Rechtswidrig erlangte Beweismittel im Zivilprozeß*, 136.
52. Compare Ch. 4.
53. Compare Fasching, *Lehrbuch*, p. 933.
54. These include National Reports from Austria, Bulgaria, Croatia, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Rumania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.
55. Compare Aras Kramar, *Evidence in Civil Law – Croatia*, 38; Katiforis, *Evidence in Civil Law – Greece*, 23.

Some of the countries considered have a very restrictive approach towards illegally obtained evidence: In Croatia and Slovakia, any illegal obtaining of evidence will lead to its **procedural inadmissibility.**[56] This is explicitly laid down in the Croatian Constitution, where Article 29 paragraph 4 states: 'Evidence obtained illegally may not be admitted in court proceedings.' However, in Croatian scientific literature there is a debate on whether this rule should be restricted to criminal law or also apply in civil cases;[57] and this will eventually have to be decided by the Croatian Constitutional Court.[58] In Slovakia, illegally obtained evidence must not be used at all and proceedings can even be reopened if the illegality comes up after the closing.[59] This result is deduced from the court's duty not to act *contra legem*.[60] A different but still rather strict approach prevails in French civil procedure law: According to the 'principle of fairness of proof' (*'loyauté de la preuve'*), a means of evidence is inadmissible in court if it was obtained or provided unfairly.[61] While there are few explicit rules on when evidence is obtained unfairly (e.g., Article 259-1 of the French Civil Code, according to which in divorce proceedings a spouse cannot produce evidence obtained 'by violence or fraud'), this legal system tends to be strict when evaluating the 'fairness' of the obtaining of evidence: The *cour de cassation*, for instance, decided in a leading case that recording phone calls illegally is 'an unfair practice that makes the evidence obtained this way inadmissible before court'.[62]

At the other extreme are countries in which illegally obtained evidence is **generally admissible:** One example would be the Netherlands, where the judge – as a general rule – may use any means of evidence in civil litigation, such as a secretly recorded conversation or a secretly produced video tape or camera observations.[63] In legal literature, however, some authors state that the illegal obtaining of evidence may result in the exclusion of this material in civil litigation.[64] In any case, the opposing party may bring in an action in tort if illegally obtained evidence was used.[65] In British civil procedure law, the judge previously had no power to exclude evidence simply because it was obtained illegally.[66] However, the Civil Procedure Rules have recently been amended (Rule 32.2(3)) by the following rule, giving the judge some tools to exclude (also illegally obtained) evidence: *(1) The court may control the evidence by giving directions as to: (a) Identifying or limiting the issues to which factual evidence may be directed; (b) Identifying the witnesses who may be called or whose evidence may be read; or (c) Limiting the length or format of witness statements.* Nevertheless, when

56. Compare Aras Kramar, *Evidence in Civil Law – Croatia*, 38; Vnukova, *Evidence in Civil Law – Slovakia*, 37.
57. Uzelac, 'Kroatien', 348.
58. Aras Kramar, *Evidence in Civil Law – Croatia*, 38.
59. Vnukova, *Evidence in Civil Law – Slovakia*, 37.
60. Vnukova, *Evidence in Civil Law – Slovakia*, 37.
61. Oudin, *Evidence in Civil Law – France*, 44 et seq.
62. Cass. 2e civ., 7 Oct. 2004: Bull. civ. 2004, II, no. 447; cf. Oudin, *Evidence in Civil Law – France*, 45.
63. Van Rhee, *Evidence in Civil Law – the Netherlands*, 13.
64. Compare for example Granow & Bervoets, 'Niederlande', 398; van Rhee, *Evidence in Civil Law – the Netherlands*, 14.
65. Van Rhee, *Evidence in Civil Law – the Netherlands*, 14.
66. Turner, *Evidence in Civil Law – the United Kingdom*, 14.

exercising this power the judge has to keep in mind the 'overriding objective' of ensuring that the case is dealt with justly.[67] In Bulgaria, the material truth has to be fully revealed; there are apparently few practical problems with illegally obtained evidence.[68] In Sweden, there is a far reaching principle of free production of evidence and a principle of free assessment of evidence. Therefore all means of evidence are allowed if they have significant evidentiary value; limitations come from Article 6 ECHR and its implementation in the Swedish Instrument of Government.[69] In Finnish Civil Procedure Law, due to the principle of free assessment of evidence, the main rule is that all evidence is accepted but the illegal obtaining of evidence can have an effect on its evidentiary value.[70] However, a reform just passed the Finnish Parliament, according to which evidence obtained by torture or by other illegal means is will be excluded from the accepted evidence.[71]

Most of the countries considered, however, fall into the third category, where illegally obtained evidence may or may not be admissible depending on a **balance of interests** analysis. Such a balance of interests analysis is of course a rather tricky business to determine; thus the solutions in each of the legal systems vary considerably. Generally it can be said that the admissibility of illegally obtained evidence depends on the respective legal values to be protected. In Spain, according to Article 11 of the Law 1/1985, evidence that was obtained under violation of any fundamental right will have no effect in the proceedings. The Spanish Civil Procedure Act (LEC) defines illegal evidence as 'evidence that has violated any fundamental right when it was obtained or in the origin of evidence'.[72] However, this only concerns the violation of material fundamental rights; the infraction of procedural fundamental rights renders the evidence only 'irregular'.[73] If the illegality is revealed before the evidence is taken, the court will refuse to take the evidence, if the illegality is revealed afterwards, the court has to make sure that the evidence will have no effect in the proceedings.[74] Austrian Civil Procedure Law contains no explicit rules on the treatment of illegally obtained evidence.[75] The prevailing opinion recognises inadmissibility of evidence that was obtained through violations of the core area of constitutionally granted fundamental rights, such as the prohibition of torture (Article 3 ECHR) or the right to liberty and security of person (Article 5 ECHR); this could be the case if evidence was gained from compulsory action or torture.[76] However, the definition of those 'core values' is rather difficult, and has been criticised in scientific literature.[77] The Austrian legal system has

67. Turner, *Evidence in Civil Law – the United Kingdom*, 14.
68. Bonchovski, *Evidence in Civil Law – Bulgaria*, 26.
69. Bylander, *Evidence in Civil Law – Sweden*, 32.
70. Koulu, *Evidence in Civil Law – Finland*, 35.
71. Koulu, *Evidence in Civil Law – Finland*, 34 et seq.
72. Mallandrich Miret, *Evidence in Civil Law – Spain*, 9.
73. Mallandrich Miret, *Evidence in Civil Law – Spain*, 10.
74. Mallandrich Miret, *Evidence in Civil Law – Spain*, 10.
75. Nunner-Krautgasser & Anzenberger, *Evidence in Civil Law – Austria*, 44.
76. Compare Fasching, *Lehrbuch*, p. 933; Rechberger, 'Vor § 266 ZPO', p. 73; Rechberger & Simotta, *Grundriss des österreichischen Zivilprozessrechts*, p. 773; Kodek, 'Die Verwertung rechtswidriger Tonbandaufnahmen', 286.
77. Rechberger, 'Vor § 266 ZPO', p. 73.

not yet formulated an overall solution either; however, recent jurisdiction tends to favour a balance of interests analysis when using illegally obtained evidence.[78] In Slovenia, the Constitutional Court has developed a doctrine regarding restrictions on illegally obtained evidence on the basis of a balance of interests analysis. When deciding on whether to allow such evidence, the court needs to consider which of the constitutionally guaranteed rights has greater importance (so-called proportionality principle).[79] When assessing proportionality, the court evaluates whether a restriction on the right has a legitimate purpose, whether it is necessary and appropriate to ensure the party's rights and whether the protection of one right outweighs the loss of another.[80] Similar solutions can be found in many other European countries: In Denmark, depending on the circumstances, the court may decide on whether or not to allow illegally obtained evidence.[81] In Ireland, any evidence obtained in 'deliberate and conscious'[82] breach of constitutional rights is inadmissible, unless there were extraordinary excusing circumstances to justify such obtaining of evidence or that the act constituting the breach of constitutional rights was committed unintentionally or accidentally.[83] If the obtaining is 'only' illegal but not unconstitutional, it is at the judge's discretion to decide whether to accept the evidence.[84] In Estonia, according to section 238 paragraph 3 of the Estonian Civil Procedure Code, the court may refuse evidence if it was obtained by the commission of a criminal offence or an unlawful violation of a fundamental right.[85] In Portuguese Civil Procedure Law, all means of collecting evidence that imply the denial of essential human rights (e.g., through physical harassment) as well as an abuse of power (e.g., by the judge) will lead to the inadmissibility of evidence.[86]

To summarise, the national reports show that explicit rules on the treatment of illegally obtained evidence are rare in the European Member States. However, legal systems in many of the countries considered have found a way to deal with these difficulties. In some legal systems (e.g., in the Netherlands, Great Britain or Sweden) illegally obtained evidence is generally admissible, others (e.g., France or Croatia) refuse its acquisition and use. Most Member States considered, however, have

78. OGH 3 Ob 131/00m; also cf. Ch. 5.
79. Ivanc, *Evidence in Civil Law – Slovenia*, 72.
80. Ivanc, *Evidence in Civil Law – Slovenia*, 72.
81. Waage & Herborn, *Evidence in Civil Law – Denmark*, 25.
82. Compare the recent decision *D.P.P. v. J.C.* [2015] IESC 31 (available at www.supremecourt.ie), where the Supreme Court applied a nuanced exclusionary rule: The Supreme Court *per* Clarke J. at paragraph 5.10 determined that 'deliberate and conscious' referred to knowledge of the unconstitutionality of the obtaining of the relevant evidence rather than applying to the acts concerned (i.e., the act of obtaining the evidence). The Supreme Court *per* Clarke J. at paragraph 5.11 also determined that where evidence was obtained in circumstances of unconstitutionality, but where the prosecution established that obtaining the evidence was not deliberate and conscious in the sense identified, the evidence should be admissible if the prosecution can also establish that the unconstitutionality concerned arose out of circumstances of inadvertence or by reason of developments in the law which occurred after the time when the relevant evidence was gathered.
83. Moriarty, *Evidence in Civil Law – Ireland*, 108.
84. Moriarty, *Evidence in Civil Law – Ireland*, 109.
85. Poola, *Evidence in Civil Law – Estonia*, 52.
86. Mimoso, Sousa & Meireles, *Evidence in Civil Law – Portugal*, 62 et seq.

established systems of balancing interests when evaluating the admissibility of illegally obtained evidence.

While legal systems try to find solutions for the lack of provisions in the respective European Member States, practitioners continue to face many legal uncertainties. It will therefore be necessary for national legislators to **create explicit legal rules** on the treatment of illegally obtained evidence. From an **international perspective** that includes problems on different substantive classifications of 'illegal' obtaining of evidence, for example when obtaining the evidence was **lawful** in the country where it was obtained, but not in the country where it shall be used, or when the act of obtaining the evidence was **illegal** in the country where it was obtained but not in the country using the evidence. In the long run, it would be desirable to **overcome the variety of different solutions** across the European judicial area. However, the treatment of illegally obtained evidence touches some fundamental principles of civil procedure law as well as constitutional law;[87] therefore any attempt of unification on a European level will need to be embedded into a larger concept of harmonising national civil procedure laws.

§5.05 CASE STUDY: ILLEGALLY OBTAINED TAPE RECORDINGS IN AUSTRIAN CIVIL PROCEDURE LAW

Finally, as an 'in-depth example' of how illegally obtained evidence is treated, we would like to present a case study on the most recent Austrian developments regarding illegally obtained tape recordings. Such tape recordings are very important practically,[88] and since there are no explicit rules on illegally obtained evidence in Austria,[89] the Austrian Supreme Court has had to determine how they are to be treated in civil litigation. These findings, however, are not entirely consistent, as the following chapter will show.

The first relevant judgment (OGH 8 ObA 297/95) dates back to 1995: The facts concerned the dismissal of an employee; the employer wanted to use an **audiotape** that had been **legally recorded in a previous criminal procedure** against a third person. According to the Austrian Supreme Court, a criminal court's legally issued resolution to monitor and record a conversation is a permissible way of interfering with the private sphere of the defendant and of his or her partner in the conversation. The evidence (here: the tape recording) was therefore obtained lawfully also with regard to the partner in the conversation, so that the question of treatment of illegally obtained evidence did not arise. Thus, such tape recordings can be used without any restrictions in civil litigation.[90]

Shortly thereafter, in 1997, the Supreme Court (OGH 2 Ob 272/97g) ruled that **disregarding the inadmissibility of using evidence** does **not represent a ground for**

87. Compare Ch. 2.
88. Kodek, 'Die Verwertung rechtswidriger Tonbandaufnahmen', 282.
89. Compare above Ch. 4; also cf. Kodek, 'Die Verwertung rechtswidriger Tonbandaufnahmen', 285.
90. OGH 8 ObA 297/95 SZ 69/14; RIS-Justiz RS0087643.

an annulment of the proceedings or a procedural violation according to § 503 paragraph 2 ZPO[91] i.e., any procedural shortcoming that, without being a ground for an annulment, may lead to an insufficient discussion or evaluation of the matter in dispute).[92] Therefore, the question of whether the evidence (in this case: a tape recording) was illegally obtained or if this illegal obtaining would lead to inadmissibility did not require to be answered in this case.

In 1999, the Supreme Court when **deciding on the admissibility of using an illegally obtained audiotape** in civil litigation considered the issues in more depth (OGH 4 Ob 247/99y). However, in this case, the fourth senate did not comment on the actual legal conditions for using such illegally obtained evidence, for example if it was admissible under any conditions or if a balance of interests analysis (taking into account the level of confidentiality of the conversation, the area of life it belongs to, the interest in proving the facts, etc.) was necessary. It only stated that in the case at issue, procedural fraud could 'not be completely excluded'. Therefore, the presenting party would be acting in **self-defence:** Since there were no other ways to prove the asserted facts, the presenting party was facing a lack of evidence. According to the Supreme Court, even if a balance of interest was generally thought to be necessary (which was not stated explicitly), in this case it would go in favour of the presenting party.[93]

In 2000, another (rather short) judgment was issued:[94] Here, the Supreme Court – extensively referring to the previous decision 4 Ob 247/99y – stated in an obiter dictum that in civil proceedings illegally obtained tape recordings may only be used **after a balance of interests analysis and only under exceptional circumstances** (e.g., self-defence or the pursuit of superior interests).[95]

The interesting decision in OGH 6 Ob 190/01m in 2001 was far more extensive:[96] This judgment was issued on the basis of a claim seeking surrender of illegally obtained tape recordings and to prevent any further use of that recording (the defendant had intercepted his wife's phone calls in order to prove her misconduct during marriage). The defendant objected and stated that he needed the audio tape for the divorce proceedings since he would face a lack of evidence. In accordance with German case law as well as the case law of the Austrian Administrative Court, the sixth Senate of the Supreme Court deemed a **balance of interests** analysis necessary: In considering the balance of interest, the court has to weigh up one party's right to 'private and family life, his home and his correspondence' against the right asserted by the party who intercepted the communication. This is necessary, if – like in the instant case – both rights in question are of equal value, for example if both are constitutionally protected. Nevertheless, according to the sixth senate, the mere interest in having a convincing piece of evidence does not suffice to establish a lack of evidence. Instead, the party also has to prove that **without this very evidence** he would not be able to enforce the right in question. Interestingly, according to the sixth senate this was not the case here, since

91. ZPO (Zivilprozessordnung) = Austrian Civil Procedure Code.
92. OGH 2 Ob 272/97g SZ 70/239; RIS-Justiz RS0108908.
93. OGH 4 Ob 247/99y SZ 72/147; RIS-Justiz RS0112710.
94. OGH 3 Ob 131/00m.
95. OGH 3 Ob 131/00m.
96. OGH 6 Ob 190/01m SZ 74/168.

the producing party still had (amongst other means of proof) the **transcript of the phone call** at his disposal; the objection was therefore dismissed.

In its next – rather short – decision[97] dating from 2005, the ninth senate seemed to underline the necessity of a balance of interests analysis when using illegally produced audiotapes. It also insinuated a possible **equality between audio tape and its transcript.**

In 2008, however, the Supreme Court came to a different and **rather differentiated solution regarding transcripts.**[98] Certain differences between the audiotape itself and the transcript, of course, cannot be denied: First, unlike the use of a secretly recorded tape, the use of a transcript of itself does not constitute a criminal act according to § 120 StGB.[99] Also, a transcript is treated procedurally as documentary evidence, whereas the tape itself is (generally) treated as evidence by inspection. Furthermore, according to the first senate, a transcript cannot have the same evidential value as the recording since it does not provide the authenticity of a recording (as no one knows whether the transcript is complete or not). In this decision, the Supreme Court also set some **limits to the right to one's own word:** Within a legal system (in which contracts can be concluded orally), citizens are expected to keep their word rather than to rely on its volatility (in other words: the inability to prove the spoken word). This, according to the first senate, is also in accordance with Article 8 ECHR, which does not prohibit the use of transcripts as a piece of evidence within civil proceedings. For all these reasons, the Supreme Court came to the conclusion that **a balance of interest is not necessary when using transcripts** of audio recordings in the proceedings. Nevertheless, the question whether the **taking of illegally obtained tape recordings** requires a balance of interests was explicitly left open.[100] The core content of this decision was upheld in 2010.[101]

In 2010, the Supreme Court issued another two (more or less identical) decisions in a divorce and maintenance dispute.[102] In these decisions the seventh senate confirmed the legal view of the Court of Appeal, according to which the use of illegally obtained tape recordings may be admissible after a **balance of interests analysis** if the party otherwise faces a **lack of evidence.** Furthermore, it stated again that the use of a transcript is not prohibited under § 120 StGB.[103]

The most recent relevant decision was issued in 2011 and considered an injunction seeking to prevent of the publication of transcripts of illegally obtained tape recordings:[104] Again, the fourth senate deduced from § 16 ABGB[105] and § 77 UrhG[106] (in accordance with 6 Ob 190/01m – however, without mentioning that decision) the necessity for a **balance of interests analysis.** The owner of the transcript has to assert

97. OGH 9 ObA 77/05x.
98. OGH 1 Ob 172/07m.
99. StGB (Strafgesetzbuch) = Austrian Criminal Code.
100. OGH 1 Ob 172/07m SZ 2008/15; RIS-Justiz RS0112710 (T 3).
101. OGH 3 Ob 16/10i ecolex 2010/277 = Zak 2010/343.
102. OGH 7 Ob 105/10g; 7 Ob 92/10w.
103. OGH 7 Ob 105/10g; 7 Ob 92/10w.
104. OGH 4 Ob 160/11z.
105. ABGB (Allgemeines bürgerliches Gesetzbuch) = Austrian Civil Code.
106. UrhG (Urheberrechtsgesetz) = Austrian Copyright Law.

and prove that 'higher-ranked interests entitle him to use the transcripts'. In this case, the Supreme Court eventually granted the injunction because the defendant could not show any predominant interest in keeping the transcript.[107]

In summary: In the last twenty years, the Austrian Supreme Court has considered illegally recorded audio tapes and transcripts of the illegal recordings on a number of occasions. When the dispute concerned the **surrendering of an illegally obtained recording** (OGH 6 Ob 190/01m) or **transcript** (OGH 4 Ob 160/11z) or the **omission of its use**, the Supreme Court considered a **balance of interest** necessary. As far as the **using of transcripts as evidence in other proceedings** goes, the Supreme Court saw no need to carry out a balance of interest (OGH 1 Ob 172/07m; 3 Ob 16/10i). The **using of the recording itself as evidence** may represent an act of self-defence (OGH 4 Ob 247/99y); the question whether the procedural taking of illegally obtained tape recordings requires a balance of interests analysis was partly left unanswered (1 Ob 172/07m) and partly approved (OGH 3 Ob 131/00m). Overall, however, the Austrian jurisprudence is still rather far from a clear line on the treatment of illegally obtained tape recordings and transcripts of those recordings – let alone from an overall concept on the taking and using of illegally obtained evidence more generally.

§5.06 CONCLUSION

The problem of handling illegally obtained evidence has led to a multitude of scientific opinions as well as case law across Europe. Although the scientific arguments are 'on the table', most European legislators have not (yet) found the courage to create explicit provisions on the topic. The practice of civil litigation is therefore often afflicted with uncertainties, and different legal systems have to find their own solutions: Whereas in some legal systems illegally obtained evidence is generally admissible, others completely refuse its taking and its use. Most countries, however, use some form of **balancing the interests analysis** when evaluating the admissibility of illegally obtained evidence. An attempt to overcome this fragmentation on a European level is generally desirable but will need to be embedded in a bigger concept of harmonising national civil procedural laws.

BIBLIOGRAPHY

Aras Kramar, S. *Evidence in Civil Law – Croatia*. Maribor: Institute for Local Self-Government and Public Procurement Maribor, 2015.

Baumgärtel, G. 'Treu und Glauben, gute Sitten und Schikaneverbot im Erkenntnisverfahren'. *Zeitschrift für den Zivilprozeß* (1956): 89–131.

Bonchovski, P. *Evidence in Civil Law – Bulgaria*. www.acj.si, 15 July 2015.

Bransdorfer, M.S. 'Miranda Right-to-Counsel Violations and the Fruit of the Poisonous Tree Doctrine'. *Indiana Law Journal* 62 (1987): 1061–1100.

107. OGH 4 Ob 160/11z ecolex 2012/183 (*Barnhouse*) = jusIT 2012/24 (*Thiele*).

Brinkmann, M. 'Die Verwertbarkeit rechtswidrig erlangter Beweismittel im Zivilprozess aus der Perspektive des Schadensrechts'. *Archiv für die civilistische Praxis* 206 (2006): 746–767.

Bylander, E. *Evidence in Civil Law – Sweden*. Maribor: Institute for Local Self-Government and Public Procurement Maribor, 2015.

Dauster, M. & F. Braun. 'Verwendung fremder Daten im Zivilprozess und zivilprozessuale Beweisverbote'. *Neue Juristische Wochenschrift* (2000): 313–319.

Fasching, H. W. *Lehrbuch des österreichischen Zivilprozeßrechts*. 2nd ed. Vienna: Manz 1990.

Gamp, L. 'Die Ablehnung von rechtswidrig erlangten Beweismitteln im Zivilprozeß'. *Deutsche Richterzeitung* (1981): 41–48.

Gamp, L. 'Zur Verwertbarkeit materiell rechtswidrig erlangter Beweismittel'. *Zeitschrift für Zivilprozeß* 96 (1983): 113–118.

Granow, H. M. & C. M. Bervoets. 'Niederlande'. In *Beweis – Preuve – Evidence: Grundzüge des zivilprozessualen Beweisrechts in Europa*, edited by H. Nagel & E.-M. Bajons. Baden-Baden: Nomos, 2003, 387–417.

Grünwald, G. 'Beweisverbote und Verwertungsverbote im Strafverfahren'. *Juristenzeitung* (1966): 489–501.

Habscheid, W. 'Beweisverbot bei illegal, insbesondere unter Verletzung des Persönlichkeitsrechts, erlangten Beweismitteln'. In *Gedächtnisschrift für Peter Arens*, edited by D. Leipold, W. Lüke & Y. Shozaburo. Munich: C.H. Beck, 1993, 187–199.

Heinemann, J. 'Rechtswidrig erlangter Tatsachenvortrag im Zivilprozess'. *Monatsschrift für Deutsches Recht* (2001): 137–142.

Ivanc, T. *Evidence in Civil Law – Slovenia*. Maribor: Institute for Local Self-Government and Public Procurement Maribor, 2015.

Kaissis, A. *Die Verwertbarkeit materiell-rechtswidrig erlangter Beweismittel im Zivilprozess*. Frankfurt am Main: Verlag Peter Lang, 1978.

Katiforis, N. *Evidence in Civil Law – Greece*. Maribor: Institute for Local Self-Government and Public Procurement Maribor, 2015.

Kellner, H. 'Verwendung rechtswidrig erlangter Briefe als Beweisurkunden in Ehesachen'. *Juristische Rundschau* (1950): 270–271.

Kiethe, K. 'Verwertung rechtswidrig erlangter Beweismittel im Zivilprozess'. *Monatsschrift für Deutsches Recht* (2005): 965–970.

Kodek, G. E. *Rechtswidrig erlangte Beweismittel im Zivilprozeß – Eine Untersuchung der österreichischen, deutschen und amerikanischen Rechtslage*. Wien: Manz 1987.

Kodek, G. E. 'Die Verwertung rechtswidriger Tonbandaufnahmen und Abhörergebnisse im Zivilverfahren – Zugleich ein Beitrag zur Verwertbarkeit rechtswidrig erlangter Beweismittel (1. Teil)'. *Österreichische Juristen-Zeitung* (2001): 281–299.

Konecny, A. 'Einleitung'. In *Kommentar zu den Zivilprozessgesetzen*. Vol I, 3rd ed., edited by H. W. Fasching & A. Konecny. Vienna: Manz, 2013.

Konzen H. *Rechtsverhältnisse zwischen Prozeßparteien – Studien zur Wechselwirkung von Zivil- und Prozeßrecht bei der Bewertung und den Rechtsfolgen prozeßerheblichen Parteiverhaltens*. Berlin: Duncker & Humblot, 1976.

Koulu, R. *Evidence in Civil Law – Finland*. Maribor: Institute for Local Self-Government and Public Procurement Maribor, 2015.

Leipold, D. '§ 284 ZPO'. In *Kommentar zur Zivilprozessordnung*, vol IV, 22nd ed., edited by F. Stein & M. Jonas. Tübingen: Mohr Siebeck, 2008.

Mallandrich Miret, N. *Evidence in Civil Law – Spain*. Maribor: Institute for Local Self-Government and Public Procurement Maribor, 2015.

Mimoso, M., S. Sousa & V. Meireles. *Evidence in Civil Law – Portugal*. Maribor: Institute for Local Self-Government and Public Procurement Maribor, 2015.

Moriarty, B. *Evidence in Civil Law – Ireland*. Maribor: Institute for Local Self-Government and Public Procurement Maribor, 2015.

Nunner-Krautgasser, B. & P. Anzenberger. *Evidence in Civil Law – Austria*. Maribor: Institute for Local Self-Government and Public Procurement Maribor, 2015.

Oudin, M. *Evidence in Civil Law – France*. Maribor: Institute for Local Self-Government and Public Procurement Maribor, 2015.

Peters, E. Die Verwertbarkeit rechtswidrig erlangter Beweise und Beweismittel im Zivilprozeß. *Zeitschrift für Zivilprozeß* 76 (1963): 145–165.

Poola, M. *Evidence in Civil Law – Estonia*. Maribor: Institute for Local Self-Government and Public Procurement Maribor, 2015.

Prütting, H. '§ 284 ZPO'. In *Münchener Kommentar zur Zivilprozessordnung*, vol I, 4th ed., edited by W. Krüger & T. Rauscher. Munich: C.H. Beck, 2013.

Rechberger, W. H. 'Vor § 266 ZPO'. In *Kommentar zu den Zivilprozessgesetzen*, vol III, 2nd ed., edited by H. W. Fasching & A. Konecny. Vienna: Manz, 2004.

Rechberger, W. H. & D.-A. Simotta. *Grundriss des österreichischen Zivilprozessrechts*. 8th ed. Vienna: Manz, 2010.

Reichenbach, S. B. 'Zivilprozessuale Verwertbarkeit rechtswidrig erlangter Informationen am Beispiel heimlicher Vaterschaftstests'. *Archiv für die civilistische Praxis* 206 (2006): 598–623.

Van Rhee, C. H. *Evidence in Civil Law – the Netherlands*. www.acj.si, 15 July 2015.

Rosenberg, L., K. H. Schwab & P. Gottwald. *Zivilprozessrecht*. 17th ed. Munich: C.H. Beck, 2010.

Roth, A. 'Die prozessuale Verwendbarkeit rechtswidrig erlangter Beweisurkunden'. *Juristische Rundschau* (1950): 715.

Sauer, W. *Allgemeine Prozessrechtslehre*. Berlin: Carl Heymanns, 1951.

Störmer, R. 'Beweiserhebung, Ablehnung von Beweisanträgen und Beweisverwertungsverbote im Zivilprozeß'. *Juristische Schulung* (1994): 334–338.

Turner, R. *Evidence in Civil Law – the United Kingdom*. www.acj.si, 15 July 2015.

Uzelac, A. 'Kroatien'. In *Beweis – Preuve – Evidence: Grundzüge des zivilprozessualen Beweisrechts in Europa*, edited by H. Nagel & E.-M. Bajons. Baden-Baden: Nomos, 2003, 335–357.

Vnukova, J. *Evidence in Civil Law – Slovakia*. Maribor: Institute for Local Self-Government and Public Procurement Maribor, 2015.

Waage, F. & M. Herborn, *Evidence in Civil Law – Denmark*. Maribor: Institute for Local Self-Government and Public Procurement Maribor, 2015.

Werner, O. ‘Verwertung rechtswidrig erlangter Beweismittel’. *Neue Juristische Wochenschrift* (1988): 993–1002.

Zeiss, W. ‘Die Verwertung rechtswidrig erlangter Beweismittel’. *Zeitschrift für Zivilprozeß* 89 (1976): 377–405.