PROCEDURAL IMPLICATIONS OF THE ILLEGAL ADMINISTRATION OF EVIDENCE DURING A CRIMINAL TRIAL

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Abstract
As the title suggests, the purpose of this study is to analyze the procedural implications of the illegal administration of evidence. The present paper begins with a short presentation of criminal trial probation, and continues with the analyses of the conditions with which a proof has to comply in order for it to be administered in the trial, as well as the analyses of the procedures of administration themselves. Another part of the study deals with the principles that should govern the administration of evidence during the criminal trial, respectively the principle of legality and loyalty (regulated in article 64 respectively 68 of the Criminal Procedure Code) as well as the European Court of Human Rights regulations. In spite of the weak criminal framework that exists regarding the illegal administration of evidence, the outcome of a trial can be radically changed based on how the evidence is administered. Therefore, this study also focuses on the consequences of the illegal administration of evidence in the criminal trial, which will be dealt with by analyzing which sanction should be applied, if any exists. The study will not be based solely on the normative guidelines, but also on the judicial practice contained in decisions, which exist in this criminal framework, given by various courts in the country. Last, but not least, this study shall present the legal changes which will occur once the new Criminal Procedure Code shall come into force.

Keywords: *administration of evidence, criminal trial probation, legality and loyalty principles, Criminal Procedure Code, criminal framework*

Introduction

One cannot imagine a criminal trial without evidence. In doctrine it has been defined as being the element with informative relevance over all aspects of the criminal cause.[1] Articles 62 to 135 of title III of the Criminal Procedure Code regulate the means of evidence. The outcome of a trial relies on the legality of illegality of the evidence administered.

According to article 62 of the Criminal Procedure Code in order to find out the truth, the criminal investigation body and the court must clarify the case under all its aspects, on the basis of evidence.

Article 63 states that any fact that leads to the acknowledgement of the existence or non-existence of an offence, to the identification of the person who committed it and to the discovery of the circumstances necessary for the fair resolution of the case is considered evidence.

The value of the evidence is not established in advance. The criminal investigation body and the court appreciate each piece of evidence according to their own convictions, formed after examining all the evidence administrated, and using their own conscience as guide.

The means of evidence are outlined in article 64, these are: the testimonies of the accused person or the defendant, the testimonies of the victim, of the civil party or of the party who bears the civil responsibility, the testimonies of the witnesses, the writings, the audio or video recordings, the photos, the probative material means, the technical-scientific findings, the forensic findings and the expertise.

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[1] Dongoroz I, „Explicații teoretice ale Codului de procedură penală român", ed II, C.H. Beck, 2003, București,p. 168.

Beginning with this article the illegality of evidence is brought into discussion and it is clearly stipulated that pieces of evidence that were illegally obtained may not be used in the course of the criminal trial.

Before regulating each mean of evidence individually, the Criminal Procedure Code regulates the problems of administrating the evidence, the right to prove the inconsistency of evidence, the conclusiveness and usefulness of evidence and the interdiction of means of constraint. The task of administrating the evidence during the criminal trial belongs to the criminal investigation body and to the court.

Upon request from the criminal investigation body or the court, any person who knows of a piece of evidence or holds a means of evidence must reveal or present it. The accused person or the defendant benefits from the presumption of evidence and is not obliged to prove his/her innocence.

In case there is evidence for his/her guilt, the accused person or the defendant has the right to prove their inconsistency.

During the criminal trial the parties may propose pieces of evidence and may request their administration. The request for administration of a piece of evidence cannot be rejected, if the respective piece of evidence is conclusive and useful.

Approval or rejection of requests shall be motivated. It is forbidden to use violence, threats or any other constraints, as well as promises or encouragement with the purpose of obtaining evidence. Also, it is forbidden to force a person to commit or to continue committing an offence with the purpose of obtaining evidence.

European Dispositions Regarding the Illegality of Evidence

With the European Convention of Human Rights a series of problems regarding the legality of evidence have arisen. Illegally obtained evidence consists of evidence obtained in violation of a person's human rights guaranteed by the European Convention of Human Rights. It will usually be in breach of their right to respect for private life under article 8 ECHR or in violation of the prohibition on torture, inhuman or degrading treatment or punishment guaranteed by article 3 ECHR.

Article 6 European Convention of Human Rights requires a presumption of innocence on the accused. To prove its case, the prosecution must obtain evidence, and not only one piece of evidence, but as many as possible in order to be able to corroborate them.

The prosecution may resort to improper means to gather evidence in support of their position especially if obtaining evidence in conventional ways proves unfruitful. Evidence obtained in this matter cannot be accepted so that the right to a fair trial and the principle of finding out the truth.

The exercise of the courts discretion to exclude evidence has not been drastically altered as a result of the incorporation of the European Convention of Human Rights into domestic law by way of the Human Rights Act 1998.

The European Court of Human Rights confirmed that real evidence obtained in breach of the accused's right to private life guaranteed by article 8 ECHR such as through covertly obtained video or audio recordings remains admissible and does not violate the accused's right to a fair trial guaranteed by article 6 ECHR as the right to private life is not an absolute right.

The fact that their decisions are in accordance with article 3 ECHR is guaranteed by the courts which states that torture and inhuman or degrading treatment or punishment are strictly prohibited.

The guarantee is given due to the fact that the right against torture is an absolute right. It acts as a means to ensure conformity with the accused's fundamental right against self-incrimination and is also a means of deterrence, to ensure that torturers will never be rewarded for their improprieties.

According to article 148 of the Romanian Constitution, the European legislation has to be applied, thus the right to a fair trial, the right to respect of private life and article 3 against torture need to be upheld during a Romanian criminal trial.

Analysis of the Means of Evidence

In order to determine what the conditions for the legality of evidence are, an analysis of each means of evidence is required. The Criminal Procedure Code begins with article 69 with the statements of the accused person or the defendant.

According to this article the statements given by the accused person or defendant during the criminal trial may lead to the truth only to the extent to which they are corroborated with facts and circumstances resulted from all the evidence in the case.

Article 71 regulates the modality of hearing, thus every accused person or defendant is heard separately. During the criminal investigation, if there are several accused persons or defendants, each of them is heard without the others attending.

The accused person or defendant is first left to declare everything he/she knows in relation with the case. The hearing of the accused person or defendant cannot begin by reading or reminding the statements that the latter has previously given in relation with the case. The accused person or defendant cannot present or read a previously written statement, but he/ she may use notes for details that are difficult to remember.

Another means of evidence are the statements of the victim, the civil party and the party bearing the civil responsibility. The hearing of the victim, of the civil party and of the party bearing the civil responsibility is conducted according to the provisions regarding the hearing of the accused person or defendant, enforced accordingly. (article 77)

Witnesses' statements can prove to be a crucial means of evidence. When there are contradictions between the declarations of the persons heard in the same case, the respective persons are confronted, if this is necessary for the clarification of the case. These statements, despite being a crucial part in finding the truth need to be corroborated with other evidence.

According to article 89 documents may serve as means of evidence if they contain reference of deeds or circumstances that may contribute to revealing the truth. The forms in which any statement is to be recorded, at the stage of criminal prosecution, shall be recorded and numbered beforehand, as forms with a special status, and after filling in, will be introduced in the case file.

One of the most controversial means of evidence is audio or video interceptions and recordings. Article 91 regulates conditions and cases of interception and recording of conversations or communications, the bodies performing interception and recording, certification of recordings, image recordings and checking the means of evidence.

These means of evidence may be technically examined at the request of the prosecutor, of the parties or ex officio. The recordings presented by the parties, may serve as means of evidence, if they are not forbidden by the law.

The interceptions and recordings on magnetic tape or on any other type of material of certain conversations or communications shall be performed with motivated authorization from the court, upon prosecutor's request, in the cases and under the conditions stipulated by the law, if there are substantial data or indications regarding the preparation or commitment of an offence that is investigated ex officio, and the interception and recording are mandatory for revealing the truth.

The authorization is given by the president of the court that would be competent to judge the case at first instance, in the council room. The interception and recording of conversations are mandatory for revealing the truth, when the establishment of the situation de facto or the identification of the perpetrator cannot be accomplished on the basis of other evidence.

The authorization of interception and recording of conversations or communications is done through motivated closing, which shall comprise: concrete indications and facts that justify the measure; reasons why the measure is mandatory for discovering the truth; the person, the means of communication or the place subject to supervision; the period for which the interception and recording are authorized.

The Criminal Procedure Code contains regulations of material probative evidence. The objects that contain or bear a trace of the deed committed, as well as any other objects that may serve

to reveal the truth may serve as material means of evidence. The objects that were used or destined to be used for committing an offence, as well as objects that are the result of an offence are also material means of evidence. (article 94 and 95).

Technical – scientific and legal – medical acknowledgments and expertise are also considered to be means of evidence. Article 112 states that when there is the danger that some means of evidence might disappear or some states of facts might change, and the immediate clarification of deeds and circumstances related to the case is necessary, the criminal investigation body may resort to the knowledge of a specialist or technician, ordering ex officio or upon request a technical-scientific acknowledgment.

The technical-scientific acknowledgment is usually performed by specialists or technicians working for or affiliated to the institution to which the criminal investigation body belongs. It may also be performed by specialists or technicians working for other bodies.

Article 115 states that the operations and conclusions of the technical-scientific and forensic acknowledgment are written down in an official report. The criminal investigation body or the court, ex officio or at the request of any of the parties, if they consider that the technical-scientific or forensic report is not complete or that its conclusions are not accurate, has it redone or orders an expertise.

When redoing or completion of the technical-scientific or forensic acknowledgment is ordered by the court, the report is sent to the prosecutor, in order for the latter to take measures for its completion or redoing.

Articles 116 to 127 regulate expertise as a means of evidence. When, for the clarification of certain deeds and circumstances of the case, in order to find out the truth, the knowledge of an expert is necessary, the criminal investigation body or the court order, ex officio or upon request, an expertise.

When the criminal investigation body or the instance discover, ex officio or upon request, that the expertise is not complete, it orders an expertise supplement, either to the same expert or to another.

Also, when it is considered necessary, the expert is asked for supplementary written explanations or is called to give verbal explanations in relation with the expertise report. In this case, the hearing is conducted according to the provisions regarding the witnesses' hearing.

Supplementary written clarifications may also be requested from the forensic service, the criminological expertise laboratory or the specialized institute that completed the expertise. If the criminal investigation body or the court has doubts about the accuracy of the expertise report conclusions, they order a new expertise.

Field investigation and reconstruction play an important role in the criminal process. Article 129 stipulates that field investigation is done when it is necessary to establish the situation of the place where the offence was committed to find out and settle the traces of the offence, to establish the position and condition of the material means of evidence, and the circumstances of the offence.

The criminal investigation body performs the above mentioned investigation in the presence of assistant witnesses, except for the case when this is impossible. The investigation is performed in the presence of the parties, when this is necessary. The parties' failure to come after having been informed does not impede the investigation.

The accused person or defendant who is held or arrested, if he/she cannot be brought to the investigation place, is informed by the criminal investigation body that he/she has the right to be represented and is ensured, if he/she requires it, representation. The court performs the field investigation after summoning the parties, in the presence of the prosecutor, when the latter's attendance in the trial is obligatory.

The criminal investigation body or the court may forbid the persons who are present or come to the place of investigation to communicate between them or with other persons, or to leave before the investigation is over.

The criminal investigation body or the court, if they find it necessary for checking on and clarification of some data, may perform a total or partial field reconstruction of the way and conditions in which the deed was committed.

If the procuring of evidence is proving to be difficult for the judicial body it has at his disposal the rogatory commission and delegation. When a criminal investigation body or the court cannot hear a witness, perform a field investigation, take away objects or perform any other procedural act, they may address another criminal investigation body or another court, who have the possibility to perform them.

Initiating the criminal action, taking preventive measures, approving the evidence gathering procedure, as well as ordering the other procedural acts or measures are not the object of the rogatory commission. The rogatory commission may only address a body or a court that are equal in rank. (article 132)

When the rogatory commission was ordered by the court, the parties may ask questions that will be communicated to the court which is to form the rogatory commission. At the same time, any of the parties may ask to be summoned when the rogatory commission is formed. When the defendant is under arrest, the court that will form the rogatory commission appoints an ex officio defender who will represent the defendant.

The criminal investigation body or the court may order, the performance of a procedural act by delegation as well. Only a hierarchically inferior body or court may be delegated. The dispositions regarding the rogatory commission are enforced accordingly in the case of delegation.

Analysis of Modifications in Romanian Legislation

With time the legislation in the matter of evidence has changed. Also the new Criminal Procedure Code brings about numerous modifications. The Law no. 202/2010 has modified article 91^6 regarding the verification of evidence.

If in the previous legislation these means of evidence could only be subject to a technical expertise, in the present, these can be the object of any kind of expertise destined to assure their conformity with reality.

Furthermore, by eliminating the restriction referring to the possibility of a technical expertise of the means of evidence and only this, the possibility of a complex evaluation of the information obtained through audio or video recordings arouse. [2]

The Law no. 135/2010 (the New Criminal Procedure Code) also introduces a few novelties in this domain.

The first novelty appears with the definition of means of evidence. This definition has not been changed much, but the necessity of the evidence contributing to the finding of the truth is outlined, as a general principle of the criminal trial.

Apart from the means of evidence regulated in the present Criminal Procedure Code, the legislator has introduced any other means of evidence which is not contrary to the law. Photographs have also been introduced as a specific means of evidence.

Article 98 of the New Criminal Procedural Code introduces a whole new topic, respectively the object of probation, this being the existence of a crime and it having been committed by the defendant; the deeds regarding civil responsibility, when a civil party exists; the facts and the factual circumstances on which the applicability of law is based; any circumstance necessary for the just solving of the cause.

The burden of proof is also modified. Unlike the present legislation which sets that the burden of proof pertains to the judicial body and the court in article 99 of the New C.P.C. it is clearly stated that the burden of proof pertains to the prosecutor, in a criminal case, and in a civil one to the civil

[2] Zarafiu Andrei, "Legea nr. 202/2010. Procedură penală. Comentarii şi soluţii.", ed. C.H. Beck, Bucharest, 2011, p.45.

part or to the prosecutor who exerts the civil action in the case when the injured party is without the capacity to exercise his/her rights of his capacity is diminished.

Also, it is stated that the suspect or the accused which is innocent until proven guilty, not being obliged to prove his innocence, also has the right not to contribute to his own prosecution. During the criminal trial the injured party, the suspect and the other parties have the right to propose to the judicial bodies the administration of evidence.

During the prosecution, the criminal investigation body gathers and administers evidence both in favor and against the suspect or accused, ex officio or at request. During the judgment, the court administers evidence at the request of the prosecutor, of the injured party or the other parties and, subsidiary, ex officio, when it considers it necessary for its own conviction.

The request regarding the administration of evidence formulated during the prosecution or during the judgment of the persons entitled is accepted or rejected by the judicial bodies.

The judicial bodies can reject such a request when: the means of evidence is not relevant; when the means of evidence already administered are considered sufficient; when the means of evidence is not necessary because the fact is notorious; the evidence is impossible to obtain, the request has been formulated by a person who is not entitled or the administration of evidence is contrary to the law.

The principle of loyalty of administration of evidence is also outlined in the New Criminal Procedure Code. Therefore, it is forbidden to use violence, threatening or other means of constraint as well as promises in the scope of obtaining evidence.

Tactics or methods of hearing the witnesses or parties which may affect a person's ability to remember or to consciously and voluntarily relate the facts, the interdiction applies even when the person gives his/her consent to be heard using such a method.

Also, it is forbidden for the judicial bodies or other persons who act on their behalf to provoke a person to commit or to continue to commit a criminal act in order to obtain new evidence.

The evidence which has been obtained through torture, as well as the evidence derived from this cannot be used during the criminal trial. Also, evidence which has been obtained illegally cannot be used in the criminal trial.

In exceptional cases, these dispositions do not apply if the means of evidence presents imperfections or procedural irregularities which do not produce a maleficence which cannot be removed without the exclusion of the evidence.

The derived evidence is excluded if it has been obtained directly from the illegal obtained evidence and could not be obtained in another way.

An article on the appreciation of evidence has also been introduced. The evidence does not a predefined value and is subject to the free appreciation of the judicial bodies after having evaluated all the evidence administered in the case.

In taking a decision regarding the existence of the crime and the guilt of the defendant the court decides with motivation, making references to all the evidence administered. A conviction is given only when the court is convinced beyond reasonable doubt. The decision of the court cannot be based solely on the testimony of the undercover agent or on the statements of the protected witnesses.

When a person gives statements his/her health should be taken into consideration. Concerning this aspect, the New Criminal Procedure Code stipulates that if during a hearing of a person, he/she accuses excessive tiredness or the symptoms of a disease which affects his/her physical or psychological capacity to participate at the hearing, then the judicial body must put a stop to the hearing and takes measures so that the person is consulted by a medic.

A series of incriminations are set in order to exclude the possibility of using of evidence obtained illegally. Thus, one can find in Title IV of the special part of the new Criminal Code the abusive investigation (the promise, threats or violence against a prosecuted or trailed person in a case made by a prosecuting body, a prosecutor or a judge in order to determine that person to make a statement or not, to make a false testimony or to withdraw his testimony), the inhuman treatment of

the person (forcing a person to execute a penalty, security or educative measure in any other way than the one stipulated by law, forcing a person to degrading or inhuman treatment during the arrest, detention or the execution of a safety or educative measure or imprisonment), or torture (the act of the public officer who has an office which implies the exercise of the state authority, or of any other person who acts upon the instigation of or with express or tacit consent of a person, causing serious mental or physical sufferings to someone.). The New Criminal Procedure Code introduces elements of novelty which concern each means of evidence regarded individually. For example, articles have been introduced regarding the use of undercover investigators, supervised delivery, the identification of the number holder, the owner or the user of a telecommunication system or of an access point to an informatics system, the obtaining the list of the phone calls.

A disposition which has never even been mentioned in previous codes is included in the New Criminal Procedure Code is the photographing and the taking of the fingerprints of the suspect, the defendant or of other persons.

The judicial bodies may decide, that the suspect of defendant and other persons be photographed or fingerprinted, even without their consent, if there exists a suspicion that they have committed a crime, if they were present at the scene of the crime.

The judicial investigation body can authorize that a photograph of a person be made public, when this measure is necessary in order to establish his/her identity or, in other cases in which the publication of the photograph is important for the continuance of the criminal investigation in optimal conditions.

If it is necessary to identify the fingerprints which have left at the scene of the crime on certain objects or of the persons who can be put at the scene or who have a relation to the crime, the criminal investigation body may take the fingerprints of the persons who are supposed to have been in contact with those objects, respectively photographing those who are believed to have any relation to the crime or who have been present at the scene of the crime.

Also, as an element of novelty, exhumation is introduced as a means of evidence, in the category of expertise. Exhumation can be disposed by the prosecutor or by the court in order to establish the cause of death, to help identify the body or any other elements which are needed for solving the case. The exhumation is done in the presence of the judicial investigation body.

The New Procedural Code outlines the special surveillance techniques. These are: the interception of communications and discussions; the access to an informatics system; audio, video surveillance or photographing; location and tracking through technical means; obtaining the list of telephone conversations; retaining and searching of the mail; solicitation and obtaining of data regarding financial transactions; the use of undercover investigators; supervised delivery, the identification of the number holder, the owner or the user of a telecommunication system or of an access point to an informatics system, the obtaining the list of the phone calls.

As jurisprudence, there is the Decision of the High Court, no. 199 from the 18th of February 2010. In this decision the court ascertained that from the time when the biological evidence had been taken and upon their analyses three days had passed. Thus, the legal dispositions had been breached (art. 6 (a) of the Order no. 376 of 10 April 2006 of the Minister of Health and article 14 (3) of the Order no. 376 of 10 April 2006 of the Minister of Health).

These dispositions state that biological samples taken must be submitted for processing immediately, being accepted that, in exceptional cases, it is carried out in maximum 3 days and only on condition of being kept in a refrigerator at a temperature between 0 and 4 degrees Celsius.

The Court also noted that the prosecution had failed to prove the alleged emergency situations that had caused delays in the transportation and deposition of the biological samples, thus exceeding the time allowed by the legal norm which guarantees the keeping of the biological samples unaltered and which ensures the correct outcome of the final report. Furthermore, it was not proven by any evidence, that the biological samples collected from the accused were kept under conditions imposed by the said legal disposition.

Conclusions

The outcome of a criminal relies mainly on the relevance of the evidence administered. It is not sufficient to administer only one piece of evidence, no matter if it consists of a statement, writing or surveillance, but it has to be corroborated with other means. Only the admission of guilt of the defendant can be sufficient in a criminal trial.

Administration of evidence which has been obtained through a method which is contrary to the law is considered to be a breach of national as well as European law. As regards to European law article 3, 6 and 8 ECHR that guarantee the right to a fair trial, to one's private life and the right to be protected against torture.

In the present, but especially in the New Criminal Procedure Code, there are articles which contain regulations against the use of illegal obtained evidence. This kind of evidence cannot be used during a criminal trial, nor can any other evidence derived from those obtained illegally, if it cannot be proved that the respective evidence could be obtained by other method which is legal.

The prosecutor must administer evidence both in favor and against the accused, without prejudice. The defendant does not have the obligation to prove his own innocence, the burden of proof falls upon the judicial bodies.

There are two principles which should be taken into consideration when the judicial bodies want to administer evidence. The principle of legality presupposes only the administration of the means of evidence provided by law, under the conditions set by the Criminal Procedure Code, specialized legislation and the case law of the European Court of Human Rights.

The second principle is that of loyality which stipulates that use of violence, promising an illegal benefit, threatening with an unjust prejudice or using any other illegal constraining means for the purpose of gathering evidence are forbidden.

Also, any hearing methods or techniques that affect one's ability to remember or tell consciously and voluntarily the deeds that represent the object of the evidence shall not be used. Apart from respecting these two principles, general conditions of evidence cannot be drawn up due to the fact that every piece of evidence is unique both in content and in the method of how it is obtained. Therefore, the judicial bodies, in order to avoid any illegality, must, very attentively, analyze the conditions specific to each means of evidence.

To conclude, the illegal administration of evidence is and will continue to be severely sanctioned by the legislator. Excluding the evidence is a specific procedural sanction, applicable to the evidence administered by breaching the two principle presented above. A difference shall be made between this sanction and the annulment applied to most of the trial or procedural acts.

Excluding the evidence can be ordered if there is a substantial and significant infringement of a legal provision on administering the whole evidence which affects the whole outcome of the criminal trial.

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