Use of Administrative Evidence in Criminal Proceedings in Austria

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ABSTRACT

The admissibility of evidence from other proceedings in criminal proceedings is a challenge for the Austrian Code of Criminal Procedure. This is due to the fact that existing provisions first deal with the admissibility of evidence obtained according to the rules of the Austrian Code of Criminal Procedure but hardly regulate the admissibility of evidence collected in accordance with other procedural rules. This raises the question of whether evidence from administrative proceedings can be used in criminal proceedings. In this context, restrictions on the use of evi-dence could result from the concept of evidence in the Austrian Code of Criminal Procedure, from the prohibitions on the use of evidence in administrative and criminal proceedings, from fundamental rights, and from regulations on the transfer of evidence. This article examines different scenarios and analyses the legal situation in Austria on how administrative evidence is dealt with in criminal proceedings.

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I. Use of Lawfully Obtained Administrative Evidence in Criminal Proceedings

The Austrian Code of Criminal Procedure (*österreichische Strafprozessordnung*, öStPO) does not contain any regulations that explicitly deal with administrative evidence. Therefore, it needs to be examined whether administrative evidence is evidence in the sense of the Austrian Code of Criminal Procedure, even if it was lawfully obtained. If administrative evidence already fails to fulfil the concept of evidence under the Austrian Code of Criminal Procedure, then any such evidence would not be usable.

The concept of evidence must be derived from the Austrian Code of Criminal Procedure as there is no legal definition of evidence.[1] Different types of evidence are scattered throughout the law: statement of the accused (Sec. 164 öStPO) and witness (Sec. 160 öStPO), documentary evidence (Sec. 252 öStPO), expert evidence (Sec. 125 et seq. öStPO), and visual inspection (Sec. 149 öStPO). However, case law[2] und legal doctrine[3] assume that the types of evidence are not exhaustively listed in the law. Rather, in criminal proceedings, in principle, everything that is suitable according to logical rules of providing evidence and of investigating the truth can be used as evidence.[4] On the basis of the *ex officio* principle (Sec. 2 öStPO) and the principle of objectivity and exploration of truth (Sec. 3 öStPO), criminal investigation authorities, prosecution authorities, and criminal courts are obliged to acknowledge evidence that may be helpful in determining the truth in essential points.[5] For administrative evidence, it follows that it falls under the concept of evidence in the Austrian Code of Criminal Procedure and must therefore be used if it can assist in the search for the substantive truth.

II. Use of Unlawfully Obtained Administrative Evidence in Criminal Proceedings

1. Distinction between prohibition to collect evidence and prohibition to use evidence in Austria

In order to be able to assess whether illegally obtained administrative evidence may be used in criminal proceedings, it is first necessary to address the relationship between the collection and use of evidence and its prohibition in general. The collection of evidence refers to the gathering of information relevant to the proceedings. Conversely, prohibitions on collecting evidence ban authorities from collecting certain evidence. The Austrian law uses various regulatory techniques for this purpose. In some cases, explicit prohibitions are stipulated by the law and are intended to prevent the collection of certain evidence.[6] Much more often, however, the legislator has not chosen the path of explicit prohibitions but instead linked the taking of evidence to certain requirements that the authorities must comply with in their investigative activities. If the authorities wish to carry out a certain investigative measure, they must check in advance which formal and substantive requirements must be fulfilled so that the collection of evidence is lawful.[7]

The use of evidence is logically downstream from the collection of evidence. After the authorities have collected evidence that is important for the assessment of the facts, a decision must be made based on the evidence obtained. This decision-making process is referred to as utilisation of the evidence.[8] A prohibition on the use of evidence obliges the decision-making body to disregard the evidence in its decision. This can pose a significant problem for the decision-making body: Prohibitions on the use of evidence are merely legal constructs that prohibit the decision-making body from using the information obtained as evidence in the proceedings.[9] In fact, however, the evidence is usually still part of the file. The decision-making body will

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therefore also have knowledge of the information contained in the prohibited evidence. Nonetheless, it must then mentally block it out in the decision-making process and act as if it did not exist at all.[10]

The collection and use of evidence describe different procedural steps and must be considered separately from each other. Nevertheless, they are not unrelated to each other. The collection of evidence forms the basis for the use of evidence, because only evidence that has been collected can be taken into account in subsequent proceedings. In this respect, there is a close relationship between the gathering of evidence and the use of evidence, which naturally also extends to the relationship between the prohibition on gathering evidence and the prohibition on using evidence.[11] Therefore, on the one hand, errors in the collection of evidence can, under certain conditions, also lead to prohibition on subsequently using the evidence. These cases are called dependent prohibitions on the use of evidence.[12] On the other hand, however, there are also prohibitions on the use of evidence that exist independently of whether evidence has been collected in conformity with the law. These are called independent prohibitions on the use of evidence.[13]

2. Prohibitions on the use of evidence in administrative proceedings and their relevance for criminal proceedings

The fact that administrative evidence is also generally admissible as evidence in criminal proceedings does not necessarily mean that such evidence can be used in criminal proceedings in every individual case. The reason for this is because restrictions could arise from administrative procedural law that may render evidence inadmissible if its rules on the collection of evidence have not been complied with. In Austria, administrative procedural law is not uniformly regulated but different procedural laws are instead applied, which makes it difficult to make general statements about which prohibitions on the use of evidence exist.[14] Prohibitions on the use of evidence are structured very differently in the specific procedural laws. For tax procedures, for example, the Austrian Federal Fiscal Code (öBAO) applies, which does not contain any explicit prohibitions on the use of evidence. Anything that is suitable for establishing the relevant facts and is useful in the individual case may be considered as evidence in tax proceedings. Accordingly, the Supreme Administrative Court[15] has consistently ruled that the usability of evidence is not excluded by the fact that it came under the possession of the tax authority as a result of a violation of the law. The situation is different for proceedings in which the provisions of the Austrian General Administrative Procedures Act (öAVG) are applied, because prohibitions on the use of evidence exist for this type of procedure.[16] It is, e.g., argued that evidence must not be used in administrative proceedings if witnesses are questioned about circumstances that are subject to official confidentiality but they have not been released from this obligation.[17]

Notwithstanding, the existence of the prohibition on the use of evidence in the respective administrative procedural law does not indicate whether this evidence can also be used in criminal proceedings. Especially in the case of dependent prohibitions on the utilisation of evidence, it is inferred from the prohibition on collection to the prohibition on utilisation. This connection generally only exists for those cases in which the use of evidence also takes place under the procedural laws pursuant to which the evidence was collected. Normally, a prohibition on the use of evidence only states that the evidence must not be used in the respective proceedings and not that the prohibition on the use of evidence also applies to other proceedings. If evidence is unlawfully collected in administrative proceedings and then used in criminal proceedings, this probably means that existing, dependent prohibitions on the use of evidence in administrative procedural law will often no longer apply. Accordingly, explicit regulations that only prohibit the usability of evidence in administrative proceedings have no influence on criminal proceedings. The prohibition to be interrogated on matters protected by official confidentiality in the öAVG cannot therefore prevent the utilisation of evidence in criminal proceedings, because it only refers to the utilisation process in administrative proceedings.[18]

3. Prohibitions on the use of evidence in criminal proceedings and their relevance for administrative evidence

a) Prohibitions on the use of evidence in criminal proceedings in general

In Austria, dependent prohibitions on the use of evidence are accepted very restrictively in criminal procedure.[19] A prohibition on the use of evidence does not necessarily follow from every violation of a collection rule.[20] If it were assumed that prohibitions on the collection and use of evidence fully overlapped, the principle of substantive truth would be significantly limited, because every procedural error, no matter how small, would have an impact on the facts to be established by the court. Rather, the principle of substantive truth, which requires the actual historical facts to be established, must be carefully weighed and balanced with other procedural principles.[21] Tensions can arise in particular with principles that guarantee the fairness of criminal proceedings.[22] On the one hand, it would probably be difficult for a state under the rule of law to accept that a defendant is convicted solely based on evidence obtained unlawfully by law enforcement agencies. On the other hand, it is equally problematic if a defendant who is guilty in reality cannot be convicted only because prohibitions on the use of evidence are overly generously embodied in the law.[23] This conflict of interest is solved by limiting dependent prohibitions on the use of evidence so that only certain violations of the law in the collection of evidence result in a prohibition on the use of evidence.[24]

Past case law[25] and legal doctrine[26] largely agreed that prohibitions on the use of evidence are an evaluative decision by the legislature. They were only allowed to restrict the judge's independent evaluation of evidence to the extent that the legislature's intention to exclude individual pieces of evidence was clearly manifested in the law. The judge should be able to form his or her own comprehensive opinion on the evidence presented and subsequently also be able to decide on the basis of his or her conviction gained in the proceedings when passing sentence. Consequently, prohibitions on the use of evidence would only exist in Austrian criminal proceedings if the law explicitly provided them.[27] In the Austrian Code of Criminal Procedure, dependent prohibitions on the use of evidence are explicitly mentioned wherever evidence is declared "void"[28] due to a lack of lawful action by the prosecuting authorities. Declaring evidence void is not only the decisive factor for a dependent prohibition on the use of evidence but also enables the defendant to assert the violation by means of an appeal for nullity.[29]

A few years ago, the Austrian Supreme Court[30] changed its case law and considered the enumeration of the prohibitions on the use of evidence in the Austrian Code of Criminal Procedure not to be exhaustive. Today, in Austria, the protective purpose of the norm is the decisive criterion as to whether the prohibitions to collect and use evidence are linked.[31] Certain prohibitions on the collection of evidence pursue the purpose of reducing or completely avoiding the detriment associated with the collection process. In these cases, there is no connection between the prohibition on the collection of evidence and the prohibition on the use of evidence, because the protective purpose of the provision on the collection of evidence does not extend into the sphere of the use of the evidence.[32] A mere prohibition on the collection of evidence therefore exists, for example, in the case of searches of persons (Sec. 121 öStPO). If the naked body of a person is to be inspected, a person of the same sex or a doctor must perform this act. The purpose of this provision is to protect the sense of shame of the unclothed person.[33] If a person of a different sex searches this person, this is a violation of the collection provision. However, the resulting detriment has already occurred and can no longer be eliminated by prohibiting the use of evidence in subsequent proceedings.[34]

If the protective purpose of the prohibition on the collection of evidence is that certain evidence should not be presented in criminal proceedings, then the prohibition to collect and use evidence regularly go hand in hand. The violation of the collection rule has an effect beyond the mere evidence collection process, because the utilisation of the unlawfully obtained evidence would lead to a further violation of the protective purpose

of the norm.[35] Prohibitions on obtaining evidence, which were included in the law to protect a certain area of secrecy, are therefore usually linked to a prohibition on using the evidence.[36] The area of secrecy would not only be disclosed when the law enforcement agencies collect the evidence but also when these secret facts are used in the judgement.[37]

The protective purpose of the provision on the collection of evidence is of particular importance if the connection between the prohibition on the collection of evidence and the prohibition on the use of evidence is not stated in the law. In other words, evidence that stems from unlawful acts on the part of the investigating authorities is not explicitly declared void by the law. In these cases, the protective purpose of the collection provision must be interpreted to determine whether there is a corresponding prohibition on the use of evidence. When assessing which interests appear to be so worthy of protection in individual cases that they must be protected by a prohibition on the use of evidence, the Austrian Supreme Court avails itself of a comparison with prohibitions on the use of evidence explicitly stated in the law. The Austrian Supreme Court therefore only recognises prohibitions on the use of evidence not mentioned by law if they are approximately equivalent to those that have been expressly laid down.[38]

b) Applicability of prohibitions on the use of evidence in criminal proceedings to administrative evidence

In order to apply dependent prohibitions on the use of evidence in the Austrian Code of Criminal Procedure to evidence from administrative proceedings, similar hurdles arise as those in the application of prohibitions on the use of evidence from administrative proceedings. Due to the interdependence of the prohibition on the collection of evidence and the prohibition on the utilisation of evidence, it follows that existing prohibitions on the utilisation of evidence can only be applied in a limited manner if the procedural rules in the collection and utilisation process diverge. Particularly explicit prohibitions on the use of evidence in criminal proceedings refer to the fact that the collection of evidence is declared void.[39] However, evidence that is subject to nullity is usually only found in the Austrian Code of Criminal Procedure and not in other types of proceedings such as administrative proceedings. According to case law,[40] analogous application is also ruled out because the list of void evidence in the Austrian Code of Criminal Procedure is to be seen as strictly exhaustive.

Since explicit prohibitions on the use of evidence in criminal proceedings regularly have no effect on evidence from administrative proceedings, the question emerges as to whether non-explicit prohibitions on the use of evidence can be applied because the protective purpose of the violated collection provision is roughly equivalent to an explicit prohibition on the use of evidence in the Austrian Code of Criminal Procedure. In particular, those dependent prohibitions on the use of evidence that are linked to the violation of human rights could be of interest here. The legislator has so far expressly recognised this protective purpose in criminal proceedings in the case of torture and other inadmissible methods of interrogation.[41] In this context, the severity of the interrogation misconduct determines whether it results in a prohibition on the use of evidence.[42] If, for example, law enforcement agencies torture the accused in the course of an interrogation, the results of the evidence obtained are in any case void.[43] This legal view is also in line with the case law of the ECtHR,[44] according to which a prohibition on the use of evidence exists if that evidence was obtained in violation of the prohibition of torture (Art. 3 ECHR). The violation of Art. 3 ECHR when collecting evidence in administrative proceedings arguably implies for criminal proceedings that the use of this evidence makes the criminal proceedings appear unfair as a whole and thus violates the right to a fair trial (Art. 6 ECHR).[45]

In the case of violations of human rights, however, it will often not be possible to make generally valid statements as to whether a prohibition on the use of evidence results from such a violation. This can be explained by the fact that the ECtHR[46] derives prohibitions on the use of evidence exclusively from the viola-

tion of the right to a fair trial and always examines the criminal proceedings as a whole. The Court determines the fairness of criminal proceedings on the basis of several criteria in an overall assessment of each individual case, which includes, among other criteria, the unlawfulness of the collection of evidence, the protection of the accused's rights of defence, and the significance of the evidence for the outcome of the proceedings.[47] The possibility of deriving prohibitions on the use of evidence beyond the individual case is rendered particularly difficult by the fact that the ECtHR usually answers the question of the existence of prohibitions on the use of evidence on an individual basis and always allows for the compensation of procedural violations in its overall assessment.[48]

Particularly relevant in this context is the problem of how to deal with evidence that was obtained under firm obligations to cooperate in administrative proceedings but that is subsequently used in criminal proceedings. In contrast to criminal proceedings, where the accused can, but does not have to, cooperate in obtaining evidence, the parties to administrative proceedings are partially obliged to cooperate.[49] Obligations to cooperate can have different reasons: In tax proceedings, for example, the state can only achieve equal taxation if the taxpayer is obligated to cooperate through notification and disclosure obligations.[50] In asylum proceedings, obligations to cooperate are intended to accelerate the proceedings.[51] It seems questionable whether these obligations to cooperate are compatible with the principle of *nemo tenetur*, especially since it prohibits the accused from being forced to incriminate himself. If evidence obtained in this way is not in accordance with the *nemo tenetur* principle, it could be subject to a prohibition on the use of evidence.[52]

In Austria, the *nemo tenetur* principle is based on Art. 6 ECHR as well as Art. 90 para. 2 of the Federal Constitutional Law (*Bundes-Verfassungsgesetz*, öB-VG), both of which are applied in parallel.[53] Art. 6 ECHR often does not apply to administrative proceedings because the so-called *Engel* criteria[54] developed in ECtHR case law will not be fulfilled.[55] It is true that a violation of the *nemo tenetur* principle can also occur if the evidence was obtained in proceedings to which Art. 6 ECHR does not apply but the use of evidence subsequently takes place in criminal proceedings.[56] However, the ECtHR[57] considers obligations to cooperate to be compatible with the *nemo tenetur* principle, provided that they are proportionate to the purpose pursued and do not eliminate the essence of the right. The scope of application of the *nemo tenetur* principle, which is derived from Art. 90 para. 2 öB-VG is broader, however, because it also covers proceedings that precede criminal proceedings, provided that, in these proceedings, the party concerned can be forced by legal sanctions to provide evidence against himself.[58] Yet, the Austrian Constitutional Court[59] also considers these duties to cooperate to be basically compatible with the *nemo tenetur* principle, insofar as they do not serve the purpose of criminal prosecution.

c) Mitigation through principles of criminal procedure?

Although prohibitions on the use of evidence from administrative proceedings apply only to a very limited extent, principles of criminal procedure could partially offset the lack of applicability of the prohibitions on the use of evidence. First and foremost, the principle of immediacy (Sec. 13 öStPO) and the principle of independent evaluation of evidence (Sec. 14 öStPO) should be considered.

The principle of immediacy is divided into a formal and a substantive component.[60] Formal immediacy refers to the fact that the court itself must take all evidence in the main proceedings that it needs for its decision. Therefore, only such evidence may be considered in the judgement that was featured in the main trial.[61] If, for example, evidence from an unlawful examination of a witness from administrative proceedings is to be introduced into criminal proceedings, this could basically be done in two different ways: The judge could either question the witness again in the main hearing or have the unlawfully obtained transcript from the administrative proceedings read out loud. This decision is influenced by the substantive component of the principle of immediacy. Substantive immediacy regulates how the court must take evidence. The court must always try to reach its decision from evidence that is as original as possible. If a piece of evidence can be

obtained from several sources, the one that allows the most direct inference to the historical facts must be used.[62] This is also apparent from the provisions on the reading out loud of transcripts and protocols in Sec. 252 öStPO. The reading out loud of transcripts of the questioning of witnesses instead of their direct examination may only be carried out under very limited circumstances.[63]

It is unclear whether this restrictive requirement to read out loud the transcripts of the questioning of witnesses only applies to those examinations of witnesses that took place according to the rules of the Austrian Code of Criminal Procedure or whether it also applies to examinations of witnesses in administrative proceedings. Whether the testimony is to be read out loud or whether the witness is to be questioned directly makes a significant difference: If the court can read out loud the unlawful transcript of the questioning of the witness, it is included in the main hearing and – in the absence of applicable prohibitions on the use of evidence – it must also be evaluated.[64]

If the court has to re-interrogate the witness in the main hearing, it must inform him or her about the rights granted to witnesses. If the witness has the right, for example, to be exempted from the duty to testify against the accused because of his/her status as a relative and decides not to testify, the unlawful transcript of the questioning of the witness cannot be read out loud in the main hearing as none of the exceptions foreseen by law regularly apply. The unlawful transcript of the questioning of the witness is therefore not taken into account in the decision.[65] Further, if the court has not properly informed the witness about the right to be exempted from the duty to answer questions and the witness therefore does not expressly relinquish this duty, the entirety of his or her answers is void.[66]

The decision as to whether or not unlawful transcripts of the questioning of witnesses in administrative proceedings may be read out loud in criminal proceedings is to be determined by how these transcripts are qualified according to the provisions of the Austrian Code of Criminal Procedure. If they are classified as official documents, there is a general prohibition to read them out loud.[67] If they are classified as documents of another type, there is a general requirement that they be read out loud.[68] Since official documents require that statements of witnesses are made in the presence and under the direction of a judge or another official authority, transcripts of the questioning of witnesses in administrative proceedings are to be qualified as such.[69] As a result, the witnesses must be heard again and the prohibitions on the use of evidence of the Austrian Code of Criminal Procedure apply to this hearing.

Nevertheless, evidence obtained unlawfully in administrative proceedings may be used in criminal proceedings. An example of this would be if an accused person has made a statement in administrative proceedings, which is then to be used in criminal proceedings. These statements are qualified by the Austrian Supreme Court as documents of another type, which is why the statement – regardless of whether it was produced unlawfully in the administrative proceedings or not – must be read out loud.[70] The evidence can then be used, but this does not mean that a decision has been taken on how it will affect the criminal proceedings. The reason for this is because criminal proceedings are based on the principle of the independent evaluation of evidence. This requires the court to assess the credibility and probative value of evidence, not according to statutory rules of evidence but on the basis of the free and firm opinions of the judges. In doing so, the court must test the evidence thoroughly and diligently, both individually and in the intrinsic context.[71] Especially in cases in which inadmissible methods of questioning other than torture have been used in administrative proceedings, the evidence may be admissible, but the probative value of the evidence obtained will probably be diminished, if not lost.[72]

IV. Prohibitions on the Use of Evidence through Evidence Transfer Regulations

Further restrictions on the usability of administrative evidence in criminal proceedings may arise in connection with regulations regarding the transfer of evidence. In the aforementioned scenarios, it was examined whether prohibitions on the use of evidence in administrative or criminal proceedings can be applied to evidence that is collected in administrative proceedings but subsequently used in criminal proceedings, even though these prohibitions on the use of evidence are generally aimed at collecting and using evidence according to the same procedural provisions. In addition, there could also exist provisions in administrative or criminal proceedings that explicitly limit the cross-procedural use of evidence. Such restrictions are linked to different criteria and may apply, regardless of whether the collection of evidence in the administrative proceedings was lawful or unlawful. Basically, two types of restrictions are conceivable in evidence transfer regulations:

On the one hand, evidence export restrictions could be stipulated in one procedure. In this instance, provisions of administrative procedural law would stipulate that administrative evidence may only be used in another proceeding under certain conditions. However, these cases are largely restricted by provisions in the Austrian Code of Criminal Procedure. In order to exercise their functions under this Code, investigation authorities, prosecution authorities, and the courts are entitled to draw on the support of all authorities.[73] These requests may only be refused with reference to existing legal obligations of secrecy if either the obligation of secrecy expressly extends to criminal courts or if predominant public interests bar the reply. These predominant public interests, however, are to be stated in detail and with reasons.[74] As a result, restrictions on the export of evidence have only a very limited significance in Austrian criminal proceedings, especially since the legislator gives priority to the public interest of solving a criminal offence over other obligations to maintain secrecy.[75]

On the other hand, restrictions on the import of evidence may also be stipulated. In these cases, the use of evidence from other proceedings is prohibited by provisions of the Austrian Code of Criminal Procedure. Such prohibitions are rarely stipulated in the Austrian Code of Criminal Procedure and exist, as an example, for the results of a physical examination. Results of physical examinations carried out for reasons other than criminal procedure may only be used as evidence in criminal proceedings if this is necessary to prove a criminal offence for which orders for a physical examination could have been given.[76] An example of this is the taking of a blood sample from a drunk driver. If blood is taken from this person in accordance with the provisions of the Road Traffic Act (öStVO), then the obtained results may only be used in criminal proceedings to investigate offences that would also have been covered by the physical examination. Therefore, they may be used, for example, for the investigation of assaults but not for damage to property.[77]

V. Conclusion

In principle, evidence from administrative proceedings may also be used in criminal proceedings in Austria, because criminal proceedings follow a procedural concept of evidence, meaning that everything that is suitable according to logical rules to provide evidence and to investigate the truth can be used as evidence. Unlawfully obtained evidence from administrative proceedings is often not affected by existing prohibitions on the utilisation of evidence in administrative or criminal proceedings, because these prohibitions generally only apply if the collection and utilisation of evidence are carried out according to one type of procedure. It appears difficult to derive general conclusions from ECtHR case law on the prohibition on the use of evidence, due to its premise of the overall assessment and consideration of individual cases. For example,

the firm obligation to cooperate, which regularly occurs in administrative proceedings, does not *per se* lead to a violation of the principle of *nemo tenetur*. The lack of applicability of prohibitions on the use of evidence from administrative proceedings can, however, be partially compensated for by criminal procedure principles, in particular the principles of immediacy and the principle of independent evaluation of evidence. Explicit restrictions on the transfer of evidence from administrative proceedings to criminal proceedings are rare and limited to certain investigative measures.

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13. W. Platzgummer, "Gesetzliche Beweisverbote im österreichischen Strafverfahren", in: H. Haller et al. (eds.), *Staat und Recht: Festschrift für Günther Winkler*, 1997, p. 797, 798; K. Schmoller, (2002) *JRP*, *op. cit.* (n. 8), 251, 259.↩
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17. J. Frieberger, *op. cit.* (n. 8), p. 161; J. Hengstschläger and D. Leeb, *Kommentar zum Allgemeinen Verwaltungsverfahrengesetz*, 2005, Art. 46, mn. 14.↩
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21. K. Schmoller, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2016, Art. 3, mn. 59.↩
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23. M. Burgstaller, "Wohin geht unser Strafprozess?", (2002) *Juristische Blätter (JBl)*, 273, 280.↩
24. A list of grounds for exclusion of evidence can be found in K. Schmoller, (2002) *JRP*, *op. cit.* (n. 8), 251, 260 et seq.↩
25. Oberster Gerichtshof (OGH) [Austrian Supreme Court] 15 Os 3/92 RS0093532.↩
26. W. Platzgummer, *Grundzüge des österreichischen Strafverfahrens*, 8th ed., 1997, p. 20; P. Schick, "Opferschutzrechte als Schutzrechte des Beschuldigten (Teil I)", (1994) *Österreichische Richterzeitung (RZ)*, 208, 212; contrary to V. Murschetz, *Verwertungsverbote bei Zwangsmassnahmen gegen den Beschuldigten*, 1999, p. 121.↩
27. K. Schmoller, "Heimliche Tonbandaufnahmen als Beweismittel im Strafprozeß?", (1994) *Juristische Blätter (JBl)*, 153, 153.↩
28. E.g. Sec. 166 para. 2 öStPO.↩
29. W. Platzgummer, *op. cit.* (n. 13), p. 797, 799; K. Schmoller, "Beweisverwertungsverbote im Diskussionsentwurf zur Reform des strafprozessualen Vorverfahrens", (2000) *Österreichische Richterzeitung (RZ)*, 154, 154 et seq.↩
30. Oberster Gerichtshof (OGH) [Austrian Supreme Court] 14 Os 26/12y RS0124168 = EvBl 2012, 518.↩
31. K. Dangl, *Unternehmensinterne Untersuchungen*, 2019, p. 193.↩

32. K. Schmoller, (2002) *JRP*, *op. cit.* (n. 8), 251, 258; K. Schmoller, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2016, Art. 3, mn. 64.↩
33. K. Schmoller, (2002) *JRP*, *op. cit.* (n. 8), 251, 258 et seq.↩
34. K. Schmoller, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2016, Art. 3, mn. 64.↩
35. K. Schmoller, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2016, Art. 3, mn. Rz 71/1.↩
36. These include, inter alia, the secrecy of confessions (Sec. 155 para. 1 fig. 1 öStPO), official confidentiality (Sec. 155 para. 1 fig. 2, 3 öStPO), certain professional secrets (Sec. 157 para. 1 fig. 2-4 öStPO) and election secrecy (Sec. 157 para. 1 fig. 5 öStPO).↩
37. K. Schmoller, *op. cit.* (n. 11), p. 105, 141.↩
38. Oberster Gerichtshof (OGH) [Austrian Supreme Court] 14 Os 26/12y RS0124168 = EvBl 2012, 518.↩
39. H. Hinterhofer and B. Oshidari, *op. cit.* (n. 3), mn 9.69 et seq, 9.79.↩
40. Oberster Gerichtshof (OGH) [Austrian Supreme Court] 11 Os 14/89 RS0099118; Oberster Gerichtshof (OGH) [Austrian Supreme Court] 9 Os 79/80 RS0099088.↩
41. Bericht des Justizausschusses (JAB) [Report of the Committee on Justice], 406 BlgNR 22. GP, p. 20.↩
42. JAB, 406 BlgNR 22. GP, *op. cit.* (n. 41), p. 20.↩
43. See Sec. 166 para. 1 fig. 1, para. 2 öStPO.↩
44. ECtHR, 11 July 2006, *Jalloh v Germany*, Appl. no. 54810/00, para. 99; ECtHR, 28 June 2007, *Harutyunyan v Armenia*, Appl. no. 36549/03, para. 66.↩
45. This connection is confirmed if evidence is collected and used in criminal proceedings; V. Warnking, *Strafprozessuale Beweisverbote in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte und ihre Auswirkungen auf das deutsche Recht*, 2009, p. 60. Nothing else can apply to evidence obtained under torture in administrative proceedings, since Art 3 ECHR is also applicable to this type of proceedings; C. Grabenwarter and K. Pabel, *Europäische Menschenrechtskonvention*, 7th ed., 2021, p. 200.↩
46. ECtHR, 5 November 2002, *Allan v United Kingdom*, Appl. no. 48539/99, para. 42; R. Esser, "Mindestanforderungen der Europäischen Menschenrechtskonvoention (EMRK) an den strafprozessualen Beweis", in: T. Marauhn (ed.), *Bausteine eines europäischen Beweisrechts*, 2007, p. 39, 50 et seq.↩
47. ECtHR, *Allan v United Kingdom*, *op. cit*. (n. 46), para. 43; ECtHR, 12 May 2000, *Khan v United Kingdom*, Appl. no. 35394/97, para. 35; see also V. Warnking, *op. cit.* (n. 45), p. 51 et seq.↩
48. ECtHR, 15 June 1992, *Lüdi v Switzerland,* Appl. no. 12433/86, para. 49; R. Esser, *op. cit.* (n. 46), p. 39, 59.↩
49. On the freedom to cooperate in criminal proceedings, see T. Haslwanter, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2022, Art. 7, mn. 35 et seq.↩
50. H. Ebenthaler, "Strafbare Handlungen und der Nemo-tenetur-Grundsatz", (2018) *Journal für Strafrecht (JSt)*, 209, 209.↩
51. Erläuterungen zur Regierungsvorlage (ErlRV) [Explanatory Remarks to the Government Bill], 952 BlgNr 22. GP, p. 5; H. Grill, "Der Zugang zu Information im Asylverfahren – aktuelle Entwicklungen", (2019) *Zeitschrift für Fremden- und Minderheitenrecht (migraLex)*, 34, 37 et seq.↩
52. Violations of the *nemo tenetur* principle have already resulted in prohibitions on the use of evidence in case law; see e.g. ECtHR, 17 December 1996, *Saunders v United Kingdom*, Appl. no. 19187/91, para. 68 et seq.↩
53. C. Grabenwarter, in: K. Korinek, M. Holoubek et al. (eds.), *Österreichisches Bundesverfassungsrecht Kommentar*, 2003, Art 6 ECHR, mn. 225.↩
54. ECtHR, 23 November 1976, *Engel and others v Netherlands*, Appl. no. 5100/71 et al., para. 80 et seq. The ECtHR looks at the classification of the provision in national law, the nature of the offence, and the nature and severity of the sanction.↩
55. E.g., for the tax procedure, H. Ebenthaler, (2018) *JSt*, *op. cit.* (n. 50), 209, 210.↩
56. ECtHR, *Saunders v United Kingdom*, *op. cit*. (n. 52), para. 67; see also V. Warnking, *op. cit.* (n. 45), p. 90.↩
57. ECtHR, 21 April 2009, *Marttinen v Finland*, Appl. no. 19235/03, para. 75; see also C. Grabenwarter and K. Pabel, *op. cit.* (n. 45), p. 571.↩
58. Verfassungsgerichtshof (VfGH) [Austrian Constitutional Court] VfGH B 795/90 VfSlg 12454.↩
59. Verfassungsgerichtshof (VfGH) [Austrian Constitutional Court] VfGH B 367/87 VfSlg 11549; see also C. Grabenwarter, "Grundrechtsfragen des Finanzstrafrechts", in: R. Leitner (ed.), *Finanzstrafrecht 1996–2002*, 2006, p. 583, 593.↩
60. K. Schmoller, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2012, Art. 13, mn. 5.↩
61. Sec. 258 para. 1 öStPO.↩
62. E. Fabrizy and K. Kirchbacher, *StPO Kurzkommentar*, 14th ed., 2020, Art. 13, mn. 2; K. Schmoller, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2012, Art. 13, mn. 5.↩
63. Transcripts of the questioning of witnesses may be read out loud, for example, if the witness has passed away in the meantime, if he or she deviates from the prior testimony in essential points, or if the plaintiff and the defendant agree on the reading out loud, see Sec. 252 para. 1 fig. 1–4 öStPO.↩
64. Secs. 14, 258 para. 1 öStPO.↩
65. The only exception to be considered is Sec. 252 para. 1 fig. 4 öStPO, which allows the reading out loud of the unlawful transcript of the questioning of witnesses from the administrative proceedings if the plaintiff and the defendant agree on this matter.↩
66. K. Kirchbacher and K. Keglevic, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2021, Art. 159, mn. 16.↩
67. Sec. 252 para. 1 öStPO.↩
68. Sec. 252 para. 2 öStPO.↩
69. Oberster Gerichtshof (OGH) [Austrian Supreme Court] 6 December 2001, 12 Os 88/01; E. Ratz, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2020, Art. 281, mn. 228.↩
70. Oberster Gerichtshof (OGH) [Austrian Supreme Court] 14 Os 65/18t RS0132342 = EvBl 2019, 326 = SSt 2018/72 = JBl 2019,463 (*Venier*).↩
71. Sec. 258 para. 2 öStPO.↩
72. Oberster Gerichtshof (OGH) [Austrian Supreme Court] 14 Os 65/18t RS0132343 = EvBl 2019, 326 = SSt 2018/72 = JBl 2019,463 (*Venier*); K. Kirchbacher and A. Sadoghi, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2020, Art. 246, mn. 10.↩
73. Sec. 76 para. 1 öStPO.↩
74. Sec. 76 para. 2 öStPO.↩

75. F. Lendl, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2022, Art. 76, mn. 30.↩
76. Sec. 123 para. 7 öStPO.↩
77. G. Muzak, "Die Blutabnahme nach Verkehrsunfällen zwischen der StPO und Verfassungsbestimmungen in der StVO", in: Bernat et al. (eds.), *Festschrift Christian Kopetzki*, 2019, p. 399, 407. In criminal proceedings, a blood sample may only be taken without the consent of the person concerned if the person is suspected of having committed certain criminal offences (Sec. 123 para. 4 öStPO). These include offences against life and limb by engaging in dangerous conduct in an intoxicated state (Sec. 123 para. 4 fig. 1 lit. b öStPO) as well as offences punishable by more than five years of imprisonment (Sec. 123 para. 4 fig. 2 öStPO). Because even serious property damage has a maximum penalty of six months to five years (Sec. 126 para. 2 öStGB), this offence does not meet the substantive requirements for a blood draw.↩

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