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The use of video and audio recordings provided by victims of domestic violence as evidence

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Abstract. The relevance of the study lies in the urgent need to develop scientifically grounded and practically applicable criteria for the admissibility of using secret audio and video recordings made by victims in criminal proceedings regarding domestic violence. The purpose of the study is to establish whether the information contained in secret audio and video recordings made by victims can be used as evidence in criminal proceedings regarding domestic violence. The main research methods are systemic, analysis and synthesis, historical, heuristic, formal-legal methods. The issues of providing recordings by victims, witnesses, and other persons for criminal investigation purposes; general criteria for restricting the right to privacy in criminal proceedings regarding domestic violence; problems of evidence presentation by victims and applicants; issues of documenting domestic violence facts; the issue of admissibility of documentation are investigated. It is proved that aspects of the legality test for limiting the offender's right to privacy in cases of conducting criminal proceedings regarding domestic violence may involve inquiries concerning the importance of evidence gathered through covert recordings and the exclusivity of the necessity of such measures. It is argued that when considering the criterion of a secret operation, which is identified as a condition for recognising audio and video recordings as inadmissible evidence, it should be acknowledged that in criminal proceedings related to domestic violence, video and audio recordings provided by victims cannot meet this condition in the vast majority of cases. The practical value of the study lies in the possibility of unifying judicial practice in determining the admissibility of evidence contained in audio and video recordings made secretly by victims in criminal proceedings regarding domestic violence

Keywords: abusive behaviour; participants in criminal proceedings; pre-trial investigation; electronic evidence; admissibility of evidence; vulnerable victims

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Introduction

The issue of using video and audio recordings provided by victims in criminal proceedings related to domestic violence is problematic, given the general problematic approach to the use of video and audio recordings made by victims or witnesses. This problem arose due to the motivation of the Decision of the Constitutional Court of Ukraine (CCU) in the case upon the constitutional submission of the Security Service of Ukraine regarding the official interpretation of the provision of the third part of Article 62 of the Constitution of Ukraine, dated October 20, 2011 (Decision of the Constitutional Court of Ukraine No. 12-рп/2011, 2011). This decision interpreted that "accusations of committing" a crime cannot be founded on factual data acquired through operational search activities by an individual not authorised to do so, without adhering to constitutional provisions or in violation of the legally established procedure. This includes data obtained through purposeful actions for their collection and recording using methods outlined in the Law of Ukraine "On Operational Search Activity", by an unauthorised person. Furthermore, it was stated that "when evaluating the admissibility of evidence in a criminal case, which includes factual data containing information about the commission of a crime or preparation for it and submitted in accordance with the provisions of the second part of Article 66 of the Criminal Procedure Code, it is essential to consider the initiative or situational (accidental) nature of actions by individuals or legal entities, their purpose and intentionality in recording the specified data".

As of 2023, there is no stable understanding of what constitutes "purposeful actions" and what is meant by "initiative or situational (accidental) nature of actions" in this aspect. Therefore, considering this decision, there is an important practical problem regarding the admissibility of factual data contained in audio and video recordings. This issue is particularly relevant in criminal proceedings related to criminal offences associated with domestic violence, as due to the nature of the acts, they are latent and usually do not have witnesses who could confirm or refute information about the criminal offence and other elements of the subject of proof. The fact that witness testimony is rarely used in proving domestic violence is discussed in the publication by I. Hloviuk (2022).

The literature related to this study can be divided into several important groups. Firstly, there are studies on the criminal procedural aspects of domestic violence, particularly regarding evidence. S. Ablamskyi *et al.* (2023) conducted a study on re-evaluating views on preventing and combating domestic violence in light of the provisions of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) and on the interpretation of domestic violence in various areas of Ukrainian legislation.

Secondly, studies based on scientific concepts of electronic (digital) evidence. M.V. Hutsaliuk *et al.* (2020) provided definitions and formulated recommendations for working with electronic evidence. A. Skrypnyk and I. Titko (2021) considered the constitutional and legal aspects of the use of digital information as evidence. O. Hura (2020) disclosed the issue of video evidence. D. Golovin *et al.* (2022) investigated the features of using electronic evidence in criminal proceedings regarding criminal offences related to the circulation of narcotic and psychotropic substances. Ye. Murzo & V. Halchenko (2023) considered the use of electronic evidence in the context of marauding investigations.

Thirdly, research on the victim as a subject of evidence in criminal proceedings is essential. I. Mudrak *et al.* (2019a) examined the victim's right to procedural communication during criminal proceedings in the context of its correlation with the victim's physiological and psychological state in the aspect of evidence collection. I. Rakipova *et al.* (2023) investigated the protection of victims' rights under the Criminal Procedure Code of Ukraine, particularly in the context of representation. I. Mudrak *et al.* (2019b) analysed issues related to compensating damage to the victim in accordance with the provisions of the Criminal Procedure Code of Ukraine. S. Ablamskyi *et al.* (2022) conducted a comparative legal analysis of the status of victims in Ukraine and India.

These studies undoubtedly form the theoretical basis of this study in the context of understanding the legal and social nature of domestic violence and the specificity of the status of victims. However, despite their importance, the use of video and audio recordings provided by victims of domestic violence in evidence was not considered in these and other studies. Nevertheless, it is important in the context of the digitalisation of all spheres of life, as victims are vulnerable and limited in their ability to present factual data on domestic violence.

The purpose of this study is to assess the possibility of using video and audio recordings provided by victims in evidence in criminal proceedings regarding offences related to domestic violence based on the provisions of the Criminal Procedure Code of Ukraine, considering the decision of the Constitutional Court of Ukraine dated October 20, 2011.

Materials and methods

A complex of scientific approaches and methods was used to achieve the purpose of the study. The fundamental approach of the study is the axiological approach, applied considering its specificity in law. The study is based on an understanding of values such as respect for human beings and zero tolerance for violence, including gender-based and domestic violence. These values are enshrined in the Istanbul Convention and current Ukrainian criminal and criminal procedural legislation and constitute the human-centric approach of state policy in this area. This approach, using the methods outlined below, allowed for the justification of the value of documenting instances of domestic violence by victims for effective counteraction to this dangerous phenomenon. The hermeneutic approach allowed proposing solutions to complex issues of the admissibility of recordings in the presence of the 2011 decision of the Constitutional Court in such a way as to reveal the implicit meanings of both the decision itself and the implicit meanings of documenting domestic violence (considering its latent nature and the vulnerability of victims). Accordingly, situations of domestic violence were identified as sui generis situations for the purposes of documentation, and the position of the Constitutional Court was interpreted considering this identification and the digitalisation of life. This approach also influenced the interpretation of the initiative in documentation.

The use of the historical method allowed for the investigation of the development of scientific concepts and the dynamics of legislative transformations in the sphere of using electronic evidence for criminal justice purposes. The

systemic method allowed establishing the correlation between scientific concepts, doctrines, and normative prescriptions related to the use of electronic evidence. This method also allowed considering the proof of domestic violence in the context of the general concept of criminal procedural evidence and, ultimately, formulating a conclusion regarding the conditions for the admissibility of using audio and video recordings provided by victims in criminal proceedings regarding domestic violence. The methods of analysis and synthesis allowed for an analysis of relevant norms of current legislation and judicial practice. Using these methods, an in-depth examination of certain aspects of the use of audio and video recordings in criminal proceedings was conducted, and the findings were extrapolated to issues related to domestic violence. These methods also allowed for the argumentation of the author's approach regarding the fact that signs of operational search activities cannot apply to situations of domestic violence. The application of heuristic assessments allowed for the analysis of the main scientific positions regarding the procedural status of victims, the documentation of domestic violence, the admissibility of using electronic evidence in criminal proceedings, and the assessment of the decisions of the Constitutional Court and other courts. The formal legal method clarified the content of legislative provisions and legal interpretation acts related to the use of electronic evidence in criminal proceedings and the status of victims in pre-trial investigations. All methods were applied in correlation, ensuring the reliability and relevance of the formulated conclusions.

The normative basis of the study includes the Criminal Procedure Code of Ukraine (2012), the Law of Ukraine No. 2135-XII "On Operative and Investigative Activities" (1992); the empirical basis includes decisions of the Constitutional Court of Ukraine, court decisions in criminal and administrative offence proceedings, decisions of the European Court of Human Rights. The study was conducted according to a methodological scheme, starting from general issues of providing recordings by victims, witnesses, and other persons for criminal proceedings in terms of the admissibility of evidence. Further, the regulatory regulation of the rights of victims and applicants to submit evidence in criminal proceedings, including audio and video recordings, was considered. As a logical continuation of the study, the documentation of domestic violence was revealed in terms of the vulnerability of victims and the admissibility of documentation.

Results and discussion

General issues of providing records by victims, witnesses, and other persons for criminal proceedings. Consideration of this issue should begin with general issues of domestic violence, which significantly influence how it is proven. Firstly, there is a variety of manifestations and consequences of domestic violence, which are of practical importance in combating it, as rightly emphasised by N. Volkova *et al.* (2023). Secondly, domestic violence, as expected, has common legal characteristics of violence, primarily its social danger (Stepanenko *et al.*, 2023). Accordingly, this affects the evidence-gathering process, as the victim is the most knowledgeable about the fact of domestic violence and its consequences. Indeed, the victim is essentially the first person who can provide information, including items and documents, to substantiate the facts and consequences of domestic violence.

Considering the subjects providing items and documents, as L.M. Hurtieva (2022) indicated, the voluntary provision of evidence (documents, items, etc.) by the prosecution should be considered as a separate method of evidence collection: voluntary provision of audio and video recordings can be discussed. In cases of voluntary provision of recordings, the relevant factual data are recognised in judicial practice as admissible or inadmissible. For example, when an audio recording of an offer and provision of money was provided, the Supreme Court (hereinafter – SC) recognised that "the said audio recording was conducted through purposeful actions using measures that have signs of search activities aimed at collecting and fixing evidence by a person not authorised to perform such activities. Furthermore, such actions are performed in violation of the procedure prescribed by the criminal procedural law and, most importantly, without judicial control, grossly violating human rights and fundamental freedoms. As can be seen from the criminal case materials, the mobile phone with the above-mentioned audio recording, which the witness herself copied onto a disk, was not seized. Information about which medium was used for this audio recording is absent from the case materials. The disk examination and the audio recording reproduction were done without witnesses. Therefore, the origin of the evidence is unknown. The phonotechnical examination was refused. Under such circumstances, the specified evidence cannot be considered admissible" (Resolution of the Supreme Court No. 715/1018/22, 2023). Therefore, the issue was not only the presence of signs of operational search activities due to covert recording but also the chain of evidence, as the phone was not seized, and the prosecution did not copy the disk. However, in the case of covertly recording a telephone conversation, there were no indications of extracting information from the telecommunications networks (Resolution of the Supreme Court No. 758/1780/17, 2022).

In a similar situation, the courts declared recordings from a dictaphone inadmissible, stating that the person deliberately, secretly, and without control recorded conversations, effectively conducting operational search activities using a technical recording device. Ambiguity arises due to the lack of clear data on the time and date when the person actually turned to law enforcement with a statement about possible extortion of a bribe and the presence of dubious information (Resolution of the Supreme Court No. 661/4683/13-к, 2020). Therefore, the courts justified the deliberate nature of the recording (although it is quite difficult to find a situation where a recording made to protect one's rights or legitimate interests is not deliberate since the purpose is to protect one's rights and legitimate interests) while discreetly leaving the possibility of interpreting such recording under other circumstances as situational. There was also a situation where a digital audio recording, which was obviously not situational (accidental), namely an audio recording from a dictaphone made by a private person "for personal use, including for protection of their interests from encroachments of officials of the State Tax Service in Volyn region, who demanded an unlawful benefit" (Skrypnyk & Titko, 2021), was admitted as evidence.

In contrast, in another situation where it was argued that a video recording was an improper piece of evidence (although, in reality, it was about the inadmissibility of evidence) as it was obtained outside the criminal proceedings

without permission from the persons depicted in the video, the Cassation Criminal Court as part of the Supreme Court (hereinafter – CCR of the SC) stated the following: "the victim shot the video on the street near the fence of the building, that is, in a public place, he made this recording openly, non-covertly, moreover, neither the convicted person nor witnesses and other participants depicted on it, expressed the demand not to shoot them, the purpose of this shooting was to record possible unlawful actions against the victim, which indicates its situational nature. These circumstances excluded the need for the convicted person's permission to conduct video recording. The reference of OSOBA_6 to the decision of the Constitutional Court of Ukraine No. 12-RP/2011 is irrelevant since this decision concerns the situation of obtaining factual data as a result of operational search activities, whereas in this case, as already noted, the shooting of victims was conducted openly" (Resolution of the Supreme Court No. 562/744/17, 2021). The important legal position here is the substantive emphasis on open recording, which excludes signs of operational search activities.

Given the prevalence of surveillance cameras, dashcams, and similar technical devices in the modern world, questions have repeatedly arisen regarding the provision of recordings from these devices. During the investigation, arguments arose that the witness personally created the recording by transferring the video from her dashcam to a disk, which was attached to the materials during her interrogation as a witness by the pre-trial investigation authority. However, the court rejected these arguments, noting that the defence unreasonably assumes that the video was obtained illegally, as criminal procedural norms establish a specific procedure for obtaining a disk with a video recording from a witness at the initiative and with the goodwill of the witness, which she provided at the investigator's written request (Resolution of the Supreme Court No. 333/1539/16-к, 2021).

There is a contrasting example, for instance, in a situation related to a laser compact disc and a protocol of inspection of the object – a disc with the recording of a surveillance camera in a cafe-bar. The court decision noted that the origin of the laser compact disc is unknown, and there is no information in the materials about its acquisition (seizure) by the pre-trial investigation authorities in the manner established by the Criminal Procedure Code. The victim handed over this disc, that is, obtained by the pre-trial investigation authority without a ruling of the investigating judge (Resolution of the Supreme Court No. 366/1400/15-к, 2018). In this case, it is important that the first argument listed was that the origin of the disc is unknown, and attention was drawn to the unclear procedural process of its appearance in the materials of the criminal case.

In addition, the factual data from the video disc with recordings from surveillance cameras were deemed inadmissible evidence, as they were handed over to an operational worker before being entered into the Unified Register of Pre-Trial Investigations (hereinafter – URPI) (Resolution of the Supreme Court No. 607/14707/17, 2019). Therefore, it is important who receives such recordings and at what moment. Similar questions arise regarding recording an audio conversation, as the person being recorded is unaware of it. However, there are cases where the factual data from such recordings were deemed admissible evidence, even without voice analysis expertise (Resolution of the Supreme Court No. 182/523/16-к, 2021). An important argument for admissibility was that the suspect handed over the phone; the witness confirmed both the fact of the phone call and that the suspect informed her during the call that he had killed the victim.

General criteria for restricting the right to privacy in criminal proceedings regarding domestic violence. The issue of providing victims with video and audio recordings, especially in cases of alleged domestic violence, is directly related to infringing on the potential perpetrator's right to privacy and to intervening in private communication. It is worth noting that interference in private communication is rightly associated with the context of protecting communication from others, in connection with which V. Teremetskyi *et al.,* (2021) proposed developing an interdepartmental regulation to overcome the problems of legal governance of interference in private communication during covert investigative (search) activities, which would define the basic principles of conducting various types of covert investigative (search) activities and the principles of their implementation mechanism.

The practice of the European Court of Human Rights (ECtHR) established the position that the criteria for lawful restriction of the right to respect for private and family life, guaranteed by Article 8 of the European Convention on Human Rights (1950), are: 1) its implementation in accordance with the law; 2) pursuit of a legitimate aim of interference; 3) necessity of such interference in a democratic society (Judgment of the European Court of Human Rights, No. 41604/98..., 2005). Furthermore, one cannot completely equate situations of the state restricting the right to privacy with private-law relations between individuals when one of them hypothetically commits a criminal offence. However, these aspects are somewhat related to each other, as the relevant evidence in cases of conducting proceedings regarding domestic violence, although provided by a non-governmental participant, is still used by the state conducting the criminal proceedings and has a certain catalogue of positive obligations regarding each person under its jurisdiction.

ECtHR has previously considered cases where applicants raised issues regarding violations of their right to privacy by private individuals rather than the state. This includes cases concerning surveillance in the workplace. One of the key cases in this category is Lopes Ribalda and Others v. Spain (Judgment of the European Court of Human Rights No. 1874/13 and 8567/13, 2019). In this case, the applicants argued that their dismissal by their employer was based on video surveillance that infringed on their right to respect for private life guaranteed by Article 8 of the European Convention on Human Rights (1950) and that national courts failed to protect this right effectively. The employer implemented video surveillance due to suspicion of theft by several company employees and discontinued it once individuals were caught. The ECtHR, finding no violation of Article 8 of the Convention in this case, formulated a test to be applied when determining the justification of such measures, proposing to consider the following criteria: 1) the employee's notification of the possibility of video surveillance; 2) the degree of monitoring and the level of confidentiality; 3) the existence of lawful reasons for monitoring; 4) the possibility of creating monitoring systems based on less intrusive measures; 5) the consequences of monitoring for employees.

It is not possible to fully extrapolate these criteria to situations involving victims providing audio and video

recordings in cases of domestic violence, considering the conceptually different context of these cases. However, certain elements of the described test are partially relevant, considering a similar mechanism of intrusion, namely the collection of video evidence by a private individual and its subsequent use by state agents. Elements of such a test regarding the legality of restricting the right to privacy of the perpetrator in cases of criminal proceedings regarding domestic violence could at least include questions related to the weight of the evidence obtained through covert recordings and whether such measures were strictly necessary. Considering the specific nature of this category of cases, one should also consider the presence of danger to the victim attempting to gather evidence of violence against themselves. For example, it would be unreasonable to argue that upon learning of the victim's collection of evidence, the potential perpetrator could have inflicted even greater harm. If the victim were to act openly, gathering evidence of the criminal offence against themselves without risking their own life and health would be impossible.

However, unlike the classic test of the legality of restricting the right to respect for private and family life, in the context under consideration, the necessity of such interference in a democratic society is less significant, as Ukrainian national legislation does not classify criminal offences related to domestic violence as serious or particularly serious. Similarly, the issue of preventing further criminal offences and ensuring state interests is somewhat secondary in this situation, as the prevailing interest in this category of cases is mostly private.

Presentation of evidence by victims and applicants: incorrect wording. The presentation of evidence by victims should be considered primarily in the aspect of reporting to the police. Studies have shown that the balance of evidence indicates that with an increase in the frequency of abusive behaviour, the likelihood of reporting to the police increases, and most often, such reports are related to abusive behaviour towards children by individuals under the influence of alcohol (Voce & Boxall, 2018). A separate issue, as demonstrated by M. Iliadis' study (2020), is plaintiffs' participation and testimony in court, which is related to their vulnerability and right to privacy.

The Criminal Procedure Code of Ukraine refers to the victim as a subject of proof, directly indicating them as the one who collects evidence in Article 93 and the one responsible for proving in Article 92 (Criminal Procedure Code of Ukraine, 2012). However, the victim's actual possibilities of collecting evidence are limited, although formally restricted only by the provisions of Article 93 of the Criminal Procedure Code of Ukraine. Therewith, the victim is not limited in the right to submit evidence to support their statement during the pre-trial investigation. The right to submit evidence for this participant in criminal proceedings is characterised by its attachment to the pre-trial investigation stage.

Instead, from an unclear logic for the applicant who cannot be a victim, it is directly provided that they have the right to submit items and documents to support their statement (Article 60 of the Criminal Procedure Code of Ukraine). The fact that evidence is not mentioned can be explained from the perspective that at the time of application, there is no criminal proceeding yet, and therefore, it cannot be argued that there is evidence in it. However, it is difficult to understand why a victim, who has their own private interest, formally cannot submit items and documents to support their statement. Moreover, in practice, various situations of submitting statements by victims are possible, not only when information has not yet been entered into the URPI. This is recognised by the legislator, as a person who has suffered from a criminal offence can submit a statement of being a victim for the investigation. There may also be a situation where the investigation is already underway, but the victim is unaware and files a statement of a criminal offence against them. In all these cases, if the CPC of Ukraine is interpreted, nothing can be added to the statement for its confirmation (for example, documents on the value of the stolen property), although it is in the interest of the victim for the statement to be justified, as the opposite carries the risk of not entering information into the URPI.

On the other hand, it seems that a person who has suffered from a crime must contact the investigator or detective at least twice: with a statement under Article 55 of the CPC of Ukraine and with a motion regarding the acceptance and attachment of items and documents to the materials of the criminal proceedings (Criminal Procedure Code of Ukraine, 2012). Moreover, the victim usually has psychological trauma from the commission of a criminal offence (and in some cases, also physical) and does not always have legal assistance, so there is a risk of re-traumatisation. This is especially true now for victims of war crimes.

A separate issue arises in terms of procedural speed and promptness in establishing circumstances, as additional applications to the investigator or detective are required from the person. The situation is further complicated in case of a change of the victim's location, which is especially relevant in conditions of martial law. Although electronic means of communication and electronic digital signatures can be used, this can be a problem for certain groups of victims, such as those who do not have such a signature, are outside Ukraine, and cannot obtain it.

It is worth noting that there are contradictory positions in the doctrine regarding the possibility of victims submitting items and documents along with their statement (Krushynskyi, 2017). The Supreme Court's judicial practice confirms the literal interpretation of the right of the victim to submit only evidence (Resolution of the Supreme Court No. 607/14707/17, 2019). Therefore, according to the current norms of the CPC of Ukraine, however controversial it may seem, it is procedurally more appropriate for the victim not to submit the statement themselves but for another person to do so on their behalf. This approach allows for the immediate submission of items and documents for confirmation and ensures procedural efficiency for the victim. Nevertheless, this is not possible under private prosecution, and Article 126-1 of the CC of Ukraine, which relates to domestic violence, falls under this category of proceedings.

Thus, such a regulatory framework likely does not reflect the victim-oriented approach in the EU and the provisions of the Istanbul Convention, which stipulates the investigation without undue delay and considering the rights of the victim at all stages of criminal proceedings (Article 49) (Council of Europe Convention on preventing and combating violence..., 2011). However, the mechanism for resolving the issue of whether temporary access to items and documents belonging to the victim is mandatory fits within the framework of this approach. CCR of the SC has recognised that if the participant in the criminal proceedings

voluntarily provides documents in their possession, there are no grounds or conditions to apply to the investigating judge for temporary access to documents and items (Resolution of the Supreme Court No. 333/1539/16-к, 2021). Therefore, the key issue in this matter is the voluntary provision of items and documents, and it does not matter whose initiative it is for assessing the legality of the procedural action.

Recording domestic violence: vulnerability of victims and specificity of situations. For criminal proceedings related to criminal offences involving domestic violence, the issue of recording is of great importance, considering that such situations typically occur in the home and in the absence of witnesses. Moreover, in such situations, one of the parties belongs to a vulnerable group and/or is in a vulnerable situation, as rightly noted in the study by O. Stepanenko *et al.* (2023). Strengthening accountability is said to be the main method of combating such violence. However, without theoretical and methodological elaboration of the issues of proving the fact of violence in such conditions, strengthening accountability will not have the necessary effect, as it is vital to ensure the right to a fair trial for the person who is alleged to have committed the offence. Therefore, the question of admissibility is crucial for protecting victims and establishing the offender's guilt. It is worth agreeing with the opinion about the importance of these sources of evidence for understanding the context of the incident and the possibility of their investigation through expert examination (Srinivasa Murth & Nagalakshmi, 2023). This became particularly important during the pandemic, as the indicators of domestic violence, as comparative studies by A.R. Piquero *et al.* (2021) indicate, have increased. Still, the exact nature and context of the increase remain unknown.

It is important to note that there is a position of the CCR of the SC regarding Article 390-1 of the Criminal Code of Ukraine (Criminal Code of Ukraine, 2001) when the convicted person considered the video made by the victim inadmissible because, by recording such a video on her phone, the victim was conducting operational search activities, which is directly prohibited by law (Resolution of the Supreme Court No. 643/8875/21, 2023). The CCR of SC stated that the victim acted situationally, aiming to protect her rights and freedoms in the future, as the convicted person disregarded the restraining order. Therefore, such actions do not fall under the concept of "operational search activities". This situation can be analysed within the concept of digital necessary defence, which includes two aspects:

- Digital self-defence, which involves using any legal means to protect one's rights and freedoms from violations and illegal encroachments. This approach is closely related to the use of other constitutional powers, such as the right to freely collect, store, use, and disseminate information in any way one chooses.
- Digital protection of another person, representing a legally permissible way to protect against unlawful encroachments on the person who has waived the right to correspondence secrecy and non-interference in personal and family life (Skrypnyk, 2021).

Unlike the situation described above, in proceedings under Part 1 of Article 173-2 of the Code of Ukraine on Administrative Offenses (1984), the court formally referred to the Decision of the Constitutional Court, using an analogy of law and stating that "the court has not been presented with any evidence indicating the accidental nature of the victim's receipt of a video recording of the event for which the protocol was drawn up" (Resolution of the Ternopil Court No. 607/15858/21, 2022). It is difficult to agree with this approach since, as can be seen from the analysis of the practice of the CCR of the SC, it subjects the circumstances of obtaining the video recording to substantive analysis, evaluating the situational nature of the actions and the presence/absence of signs of operational search activities.

The discussion on the admissibility of recording: *quo vadis*? The analysis of practice shows that, firstly, it is not consistent (precisely because of the interpretation of the Constitutional Court's decision), and secondly, much attention is paid to the specificity of the situation (the source of the recordings, the method of obtaining them, the situation recorded, the nature of the relationship between the persons, the purpose, etc.). Moreover, as rightly noted by O.P. Hura (2020), although not in the context of criminal proceedings regarding domestic violence, the Supreme Court now pays attention to the origin of the video evidence and the method of obtaining such evidence by investigation. This approach is in line with the opinion of K. Kryvenko (2021), who states that the court may accept a video recording in a witness's possession as admissible evidence if the pre-trial investigation authority properly documents its acquisition through the procedure defined by the Criminal Procedure Code of Ukraine.

Furthermore, it is quite difficult to identify criteria for differentiating between the initiative and situational nature of the victim/witness's actions, especially for the submission of evidence by victims, given that the criteria for differentiating between the initiative and situational nature of the victim/witness's actions are not clear. If victims and witnesses are not forced to record video, surveillance cameras continuously record regardless of the wishes of those in/near the premises. The analysis conducted by A.V. Skrypnyk and I.A. Titko (2021) demonstrates that the recording by surveillance cameras, car video recorders, or body cameras (video recorders) of police officers; situational audio recording of conversations made initially for another purpose; photo and video materials captured by a large number of citizens, journalists, who accidentally became witnesses to events; video recording from a phone whose camera turned on automatically were was recognised situational (accidental).

In the context of identifying signs of operational search activities, as seen from the judicial practice, the key factor is the covert/overt nature of obtaining information. However, this is not deterministic, and attention should also be paid to the targeted nature of the activity. Operational search activities aim to identify and document facts of unlawful actions by individuals or groups for which liability is provided under the Criminal Code of Ukraine. It is also aimed at identifying and preventing intelligence subversive activities of foreign special services and organisations aimed at violating laws to ensure law and order and obtain information in the interests of the security of citizens, society, and the state (Article 1) (Law of Ukraine No. 2135-XII…, 1992). In situations where, in the opinion of the victim, unlawful actions are being taken against them, it cannot be argued that there is a search for factual data, as no search measures (which are an element of the legal definition of operational search activities) are being performed. It is worth noting that this does not agree with O. Stepanenko *et al.* (2023) regarding domestic violence being committed based on the specific role of the

person, as the importance of committing domestic violence is not the "role" of the perpetrator, especially within the family, but the influence they have on the victims. That is, the variations of family roles "perpetrator – victim" are very different, as seen from court decisions (father/mother – child, husband – wife, wife – husband, son – mother, daughter – father, etc.). What matters is the ability to commit domestic violence, that is, the presence of a resource of strong influence (power) and the inability (or complexity) of the victims to resist, and this applies to all forms of domestic violence, although the ability to resist will depend on the specific form.

Continuing the idea that in situations of domestic violence, there is no such thing as searching for factual data or signs of operational search activities, provide arguments to support this position. Suppose the use of technology, including any mobile phone, is considered an operational search activity. In that case, its boundaries are blurred, and ordinary activity using technical means cannot be distinguished from the special direction of state activity, which cannot be the legislator's intention.

Furthermore, there is no general prohibition on private individuals conducting audio and video recordings or photography, provided that the provisions of the Constitution of Ukraine (1996), Criminal Code of Ukraine (2001), and Civil Code of Ukraine (2003) are observed. The Criminal Procedure Code of Ukraine (CPC) does not regulate the issue of collecting factual data by victims and witnesses outside of criminal proceedings, meaning there is no prohibition on the use of technical means either. This interpretation is fully relevant to the new article of the CPC of Ukraine – Article 245-1, which allows obtaining electronic evidence, including from private individuals. It is, therefore reasonable to agree with the view that the most appropriate criterion for the admissibility of factual data obtained by private individuals seems to be "generally permissible", the content of which is revealed through the prism of established prohibitions (rather than permissions), including criminal law ones (Articles 162, 163, 182) (Criminal Procedure Code of Ukraine, 2012). As noted by A.V. Skrypnyk and I.A. Titko (2021), what is obtained without their violation should be considered lawful.

When the purpose is to expose a specific individual, the situation appears to be more complex. The Supreme Court justified in its ruling that a witness who recorded a conversation with others on a dictaphone initiated operational search activities on their initiative (Resolution of the Supreme Court No. 305/2022/14-к, 2021). There are other examples of identifying purposefulness as a sign of operational search activities (Resolution of the Supreme Court No. 661/4683/13-к, 2020; Resolution of the Supreme Court No. 715/1018/22б, 2023). However, not every purpose of exposure can indicate the presence of signs of operational search activities (hereinafter – OSA); for example, documenting unlawful actions in a public place, recording on a surveillance camera, and dashcam does not indicate the presence of OSA signs, and the CCR of the SC confirmed this. The purpose and purposefulness should be interpreted in conjunction with other signs to determine whether there are signs of OSA in a particular case.

Given the digitalisation of social relations, the modern interpretation of the decision of the Supreme Court of Ukraine dated October 20, 2011, should be substantial. The decision of the Supreme Court formally touches upon two situations: 1) operational search activities of an authorised person without compliance with constitutional provisions or in violation of the procedure established by law, and 2) purposeful actions to collect and record using measures provided for by the Law of Ukraine "On Operative and Investigative Activities" (1992), by a person not authorised to engage in such activities. When examining the decision of the SCU in substance, it is clear that it addresses the prohibition of conducting OSA with violations of procedure by an authorised person and by an unauthorised individual. However, it refers to operational search activity by its nature, regardless of the subject. Examining solely the normative aspects of OSA and their objectives makes it clear that using only technical means is inadequate for categorising specific activities as OSA. The proactive nature cannot be assessed without considering other characteristics, as surveillance cameras, for example, are placed purposefully to document possible criminal offences, but this does not constitute OSA. Recording can also be done to ensure that important sources of evidence are not lost, such as in the case of a road traffic accident.

Therefore, for audio and video recordings to be deemed inadmissible evidence, all the elements of OSA must be present: secrecy, the search for and documentation of factual data on unlawful acts (as a whole, not just documentation), conducted in the interest of criminal proceedings. Initiative behaviour cannot currently be perceived as a characteristic of OSA, considering the changed practices regarding documentation in public places and vehicles. Such characteristics can be established when such documentation is part of a covert operation within OSA or covert investigative actions.

Conclusions

The study explored the issue of using video and audio recordings provided by victims of domestic violence as evidence. It examined the general problems of submitting such recordings in criminal proceedings and notes that this mechanism is used in practice but evaluated differently in court decisions. The study also discussed the general criteria for limiting the right to privacy in criminal proceedings regarding domestic violence and proved that extrapolating the practice of the ECtHR is not possible due to different contexts. However, based on the previous ECtHR practice in cases related to covert video surveillance, the elements of the test of the lawfulness of restricting the perpetrator's right to privacy in criminal proceedings regarding domestic violence may include aspects such as: 1) the weight of evidence obtained through the use of secret recordings; 2) the exceptional necessity of secret video surveillance measures; 3) the danger to the victim trying to gather evidence of violence against them. Based on an analysis of the CPC of Ukraine, the study demonstrated the inconsistency in the regulation of evidence submission by victims and applicants. Considering the vulnerability of victims and the specificity of situations, the need for video and audio recordings of domestic violence was justified.

New arguments on the admissibility of recording were presented in the discussion. Emphasis is placed on the importance of the criterion of a secret operation, which is distinguished as a condition for considering audio and video recordings as inadmissible evidence. Considering this, in the evidence in criminal proceedings regarding criminal offences related to domestic violence, this condition cannot be fulfilled in the vast majority of situations, although exceptions

may exist, for example, regarding Article 115 of the CC of Ukraine. This is because for such criminal proceedings, personal recording is the only way to obtain relevant sources of evidence, as domestic violence usually occurs in private; for the victim, such recording is primarily a way to prove that domestic violence occurred and there is a risk of its recurrence, i.e., a certain way of protection. In this situation, the restriction of the perpetrator's right to privacy is justified by the weight of the evidence and the impossibility of obtaining it by other means. The secrecy of the recording is driven by the fear of further harm to the victim, not by the intent to violate the rights of the perpetrator, who, by committing a criminal offence, should understand that criminal liability is incurred for this. In such circumstances, there is no basis to speak of a "secret operation". Therefore, in criminal proceedings concerning domestic violence offences, video and audio recordings should be considered admissible unless there are specific grounds outlined in the CPC of Ukraine for deeming them inadmissible, as they do not possess the characteristics mentioned in the decision of the SCU.

Further research areas may include analysing the effectiveness of using video and audio recordings provided by victims of domestic violence as evidence, which will require content analysis of verdicts and conducting surveys.

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Conflict of interest

None.

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Використання в доказуванні відеозаписів та аудіозаписів, які надали потерпілі від домашнього насильства

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Анотація. Актуальність дослідження полягає у нагальній потребі вироблення науково обґрунтованих та практично застосовних критеріїв допустимості використання таємних аудіо- та відеозаписів, здійснених потерпілими у кримінальному провадженні щодо домашнього насильства. Мета дослідження полягає у встановленні того, чи можна використовувати як докази у кримінальному провадженні щодо домашнього насильства відомості, що містяться на аудіо- та відеозаписах, які потерпілі здійснили таємно. Основні методи дослідження – системний, аналізу та синтезу, історичний, евристичний, формально-юридичний метод. Досліджено питання надання записів потерпілими, свідками, іншими особами для цілей кримінального провадження; загальні критерії обмеження права на приватність у кримінальному провадженні щодо домашнього насильства; проблеми подання доказів потерпілими та заявниками; питання фіксування фактів домашнього насильства; питання допустимості фіксування. Доведено, що елементами тесту правомірності обмеження права на приватність кривдника у випадку здійснення кримінального провадження щодо домашнього насильства можуть бути питання пов'язані із тим, наскільки вагомими є докази, отримані шляхом застосування таємних записів, а також чи були такі заходи винятково необхідними. Аргументовано, що з урахуванням критерію таємної операції, який виокремлено як умову для визнання аудіо- та відеозаписів недопустимими доказами, слід визнати, що у доказуванні у кримінальному провадженні щодо кримінальних правопорушень, пов'язаних з домашнім насильством, відеозаписів та аудіозаписів, наданих потерпілими, ця умова у переважній більшості ситуацій не може бути реалізована. Практична цінність дослідження полягає у можливості уніфікації правозастосовної практики в частини визначення допустимості як доказів відомостей, що містяться на аудіо- та відеозаписах, здійснених таємно потерпілими у кримінальному провадженні щодо домашнього насильства

Ключові слова: аб'юзивна поведінка; учасники кримінального провадження; досудове розслідування; електронні докази; допустимість доказів; вразливі потерпілі