THE EXCLUSION OF ILEGALLY ADMINISTERED EVIDENCE

Eliza Emanuela IONIŢĂ*

Abstract

Both judicial practice and specialized texts have brought up the problem of what the punishment for breaking the legal provisions in the activity of evidence administration is, if a matter of fact had been presented by means that are not legally specified or if a piece of evidence was administered by means that are legally specified, but with the violation of legal provisions.

Romania has adhered to the most important international juridical instruments adopted in the sphere of human rights by the adoption, modification or completion of internal legislation.

As such, for the first time in Romanian criminal procedural legislation, a sanction for the exclusion of evidence has been introduced, as a corollary for the principle of legality and of loyalty in administering evidence.

The New Criminal Procedure Code provides the sanction of exclusion as well, but this time the legislator didn't resume his or herself to a mere conceptual regulation of the sanction, providing both a specific invalidation procedure as well as procedural solutions. In the New Criminal Procedure Code it is shown that in the sphere of evidence-showing a set of rules has been introduced that establishes the principle of loyalty in the obtainment of evidence. These rules, that provide the sanction of excluding evidence obtained through illegal or unloyal means, will determined the growth of professionalism in the ranks of the judiciary bodies on the subject of obtaining evidence and, on the other hand, will guarantee the firm upholding of the parties rights to a fair trial.

"Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much…" Lord Justice Sir James Lewis Knight-Bruce

"It is a deeply ingrained value in our democratic system that the ends do not justify the means. In particular, evidence or convictions may, at times, be obtained at too high a price". – Antonio Lamer Former Chief Justice of the Supreme Court of Canada.

Keywords: *illegally administered evidence, the principle of loyalty, derivative evidence, torture, inhuman treatement.*

1. Introduction

Exclusion is a specific procedural sanction, applicable for evidence that had been administered with the violation of the principle of legality or loyalty. This sanction has a particular domain in which it is applied, thus setting itself apart from the sanction of nullification that is only applied to procedural papers.

The exclusion of evidence can be provided in the event a substantial and significant violation of a legal provision regarding the administration of the evidence which, in the specific circumstances of the case, determine the maintaining of the piece of evidence that had been thus administered to harm the equitable character of the criminal trial.

Art. 100 paragr. 3 of the New Criminal Procedure Code explicitly provides that evidence obtained by torture and inhuman or degrading treatement cannot be used in the criminal trial.

Through this, it is to be assumed on an absolute level that the equitable character of the criminal trial will always be harmed if the evidence is obtained by torture and inhuman or degrading tratement.

As such, in the situation provided in paragr. 3 of art. 100 of the New Criminal Procedure Code, the sanction of exclusion will be applied *de jure.*

Applying the institution of the exclusion of derivative evidence requires analyzing the possibility of excluding evidence that is legally administered, but that is derivative (closely connected) from illegally obtained evidence. As such, if the derivative, legally administered evidence is directly and necessarily obtained through the use of torture, inhuman or degrading treatment, the sanction of the exclusion of derivative evidence will be operated, as stated in art. 100 paragr. 4 from the New Criminal Procedure Code.

Similarly, the exception provided in paragr. 5 of art. 100 from the new criminal procedure Code project is not applicable since, as previously shown, the situation stated in paragr. 2 of the same article is not applicable to evidence obtained through torture, inhuman or degrading tratement.

2. Content

In the development of the criminal trial, transgressions from the instituted procedural setting are possible and in such situations certain procedural sanctions are available to interfere. In addition to inadmissibility, deterioration and nullification, the legislator has explicitly provided the exclusion of illegally obtained evidence as a distinct procedural sanction[1].

As a completion to the basic rule of respect towards human dignity as specified in art. 11 paragr. (1), the sanction of exclusion of evidence obtained

* PhD Candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **ionita333@yahoo.com**).

[1] Ion Neagu -Tratat de procedura penala. Partea generala. In lumina noului Cod de procedura penala, Universul Juridic, Bucharest, 2014, pg .105.

through torture, as well as derivative evidence, has been regulated through art. 102.

As far as the principle of respect towards human dignity is concerned, we signal Romania's adherence to the Convention against torture and other cruel, inhuman and degrading punishments and treatments[2], an initiative that has left its mark on criminal and criminal procedural legislation. As such, through Law 20/1990[3], the crime of torture was introduced in the criminal Code adopted in 1968 (art 282 New criminal code[4]).

On the subject of commiting to the right of freedom, we also find it necessary to bring into discussion the content of art. 1 of the European Union Charter of Fundamental Rights, which states that "Human dignity is inviolable. It must be respected and protected". In the same lines, art. 4 states that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

The current Constitution has established this principle in "Fundamental rights and liberties", stating in art. 22 paragr. (2) that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". This fundamental principle establishes the legal setting regarding the tratement that must be applied to the suspect or accused throughout the entire legal trial.

Similar provisions are to be found in the legislation of other states, as such in art. 191 of the Italian Criminal procedure code it is stated that evidence obtained by the violation of the legally established provisions cannot be utilized[5]. Similarly, in the German criminal procedure system[6], the freedom of an accused to decide and the freely express his or her will cannot be restricted through harmful treatement, through torture, deceit and hypnosis. Force can be used only within the limits of the law. Threatening the accused with unallowed measures or promising an advantage that is not stated in the law is forbidden. Measures that can affect the memory of the accused or her or his capacity to reason are forbidden. These interdictions stated in the German criminal procedure law are to be applied regardless of the existence of a possible consent on the part of the accused. Declarations that are obtained from the violation of these rules cannot be used even if the accused may agree upon it.

The Spanish criminal procedure legislation offers as well examples of juridical norms that serve the purpose of protecting the dignity of the accused from crimes that can be carried out during a criminal trial. As such, the questions that will be addressed to the accused will be direct so that under no circumstances can they be formulated in a suggestive or insidious manner. The accused cannot be subjected to any sort of constraint or threat[7]. Exclusion, through the perspective of comparative law, comes under a variety of shapes, all of them requiring the balancing of interests, first and foremost the establishing of truth in a criminal case determined according to the rights of the accused and, indirectly, of the entire population, rights that are considered so important by the legal order that they are provided in either conventions that regulate human rights, either in national constitutions[8].

During the development of a criminal trial, transgressions from the instituted procedural setting are possible and in such situations certain procedural sanctions are available to interfere. Inadmissibility, deterioration and nullification have been stated in the current Criminal procedure code. In addition, the legislator has provided the exclusion of illegally obtained evidence as a distinct procedural sanction. This distinct sanction intervenes in the area of evidence, in the event the principles of legality and loyalty in the administration of evidence are violated.

The exclusion of illegally obtained evidence is a new institution in our procedural system, as it was included in the doctrine along with the text of art. 64 paragr. (2) C.p.c. 1968, which states that "illegally obtained evidence cannot be used in the criminal trial". *The return of the sanction of nullification in the area of evidence handling is thus explained*, by the modification brought to the text of art. 102 of the New Criminal procedure code through the Law of application. As such, according to the current

[2] This convention has been adopted in New York, on the 10st of December 1980. Romania had adhered to this Convention through Law 19.1990, published in the Off.M.no.113 FROM THE 10TH OF OCTOBER 1990.

[3] Law nr 20/1990 for the modification and completion of a number of provisions from the Criminal code and the Criminal procedure code was published in the Off.M. no.112 from the 10th of October 1990.

[4] The legal content of the crime is as follows: (1)The act of a public worker that fulfills a function that involves exercising state authority or of another person that acts towards instigation or with the expressed or tacit consent of this person to provoke strong physical or psychological suffering to an individual: a) for the purpose of obtaining information or declarations from the person or from a third party; b) for the purpose of punishment for an act that the person or a third party has commited or is suspected to have commited; c) for the purpose of intimidating or pressuring her or him or of intimidating or pressuring a third party; d) by reasons of any form of discrimination, it is punishable by 2 to 7 years in prison and the removal of a number of rights. (2) If the act stated in paragr. (1) resulted in bodily harm, the punishment is from 3 to 10 years in prison and the removal of a number of rights. (3) Torture that resulted in the death of the victim is punishable by 15 to 25 years in prison and the removal of a number of rights. (4) Attempting the crime as stated in paragr. (1) is punishable. (5) No exceptional circumstances, regardless of what they are, whether it is related to war or threat of war, to internal political instability or any other exceptional state cannot be invoked to justify torture. Similarly, acting on the order of a superior or of a public authority cannot be invoked. (6) It does not constitute as torture the pain and suffering that result exclusively from legal sanctions and are inherent to or provoked by these sanctions.

[5] P.Pajordi *et alli*, Codicele Penale e di Procedura penale, Editore, Pirola, Milano, 1991, p.745

[6] Art. 136a paragr. (2), strafproze b ordnung (StPO)

[7] Art 489 paragr. (2) and (3), Ley de Enjuiciamento Criminal, 1882

[8] Stephen C. Thaman, The Exclusionary Rule, General reports of the XVIIIth Congress of the International Academy of Comparative Law / Karen B. Brown, David V. Snyder eds , pages 657-704, year 2012, p. 662.

formulation of the text of art. 102 paragr. (3), the evidence can be excluded if the act by which the evidence has been set or authorized or by which it had been administered is affected by absolute or relative nullification, although in the latter case an infliction that cannot be otherwise removed must have been caused. As such, a contradiction of sorts has remained between the principle stated in art. 102 paragr. (2) of the New Criminal procedure code, which sets the rule that illegally obtained evidence cannot be used in the criminal trial, and the rule from paragr. (3) of the same article, which regulates the way in which the principle states in paragr. (2) will actually operate, which is only by means of the nullification sanction, absolute and relative. As such, in art. 101 of the NCPC the principle of loyalty in evidence administration is specified. The previous article states that: *1) It is forbidden to use violence, threats or any other constraining methods, such as promises or orders, for the purpose of obtaining evidence. (2) Interrogation methods or techniques that affect the person's capacity to consciously and voluntarily recall and relate the events that constitute as evidence cannot be used, this interdiction applies even if the interrogated person gives their consent for such methods or techniques to be utilized. (3) It is forbidden for criminal judiciary bodies or other persons that act on their behalf to provoke a person to commit or to continue the committing of criminal acts for the purposes of obtaining evidence.*

Art. 102 of the NCPC also provides the sanction for not respecting the principle of legality and loyalty in administering evidence, more specifically the exclusion of illegally obtained evidence. The article states that *(1) Evidence obtained through torture, as well as derivative evidence cannot be used in the criminal trial. (2) Illegally obtained evidence cannot be used in the criminal trial. (3) The nullity of the act by which the administration of evidence had been set or authorized or by which it had been administered determines the exclusion of the evidence. (4) Derivative evidence is excluded if it has been directly obtained through the illegally obtained evidence and could have not been obtained through any other way.*

The moment a piece of evidence has been obtained through the violation of legal provisions, two interests come into conflict: society's interest for the person which has committed a crime to be identified, judged, punished and for her or his sentence to be carried out and the individual interest of people that none of their rights is to be violated by the abusive behavior of the ones who are tasked with the criminal investigation. In many legal systems, the sanction of the exclusion of evidence has been found to be the most efficient way of "reconcile" these interests. The sanction of the exclusion of evidence has seen, especially in the common-law system, a long development, as it was not applied in the same manner throughout its existence, being constantly subjected to criticisms related to doctrine, regarding both the manner of use as well as the utility of its own existence.

The principle in common-law legal systems is that every piece of relevant evidence is admitted, except in the cases where a legal disposition excludes the piece of evidence or if the piece of evidence is excluded by the judge as a consequence of exercising the liberty to exclude certain evidence. If the evidence is part of a category whose exclusion is expressively stated by the law then it is excluded regardless of other criteria that may be in the favor of using the respective piece of evidence (such as the public interest to obtain the sentencing of the person that is incriminated by the evidence), with the exception of the existence of exceptions from the exclusion of evidence.

Recently, common-law jurisdictions have elaborated discrete norms regarding the acceptance and the exclusion of illegal or unloyal evidence, provisions regarding human rights becoming the main set of reference for establishing admissibility[9].

As far as the motives that are behind evidence exclusion are concerned, common-law legal systems and the doctrine have identified more than one of these motives: discouraging the investigation bodies to commit illegal acts, protecting citizens' rights, protecting the integrity and the prestige of courts, respecting the state law. The idea of discouraging investigation bodies from committing illegal acts is that it will be realized if the evidence that is obtained through illegal or unloyal methods will lead to the impossibility of obtaining a sentence. Protecting individual rights is mainly focused on human rights, either by their substantial aspect or by their procedural aspect, as the sanction of exclusion protects the fundamental nature of these rights. Naturally, both the motive of discouraging investigation bodies in regards to potential abuses and the motive of protecting human rights are tightly connected, as the reason for which the violations of legal norms by the investigation bodies are sanctioned exactly because these norms protect individual rights. Motives related to the integrity of judiciary systems have their base exactly in the fact that courts are not supposed to tolerate illegal acts because, by having such behaviors, they could be able to affect public perception regarding the act of justice and the trust in the judiciary system. Otherwise, trials will be "tainted" by the admission of illegal evidence, and the role of courts is that of "supporting" the law and not of approving violations in law by supporting, even indirectly, illegal investigation activities that will lead to obtaining sentences (see footnote 9). In the legal systems where the judge has the liberty of

[9] William van Caenegem, New trends in illegal evidence in criminal procedure: general report – common law This Report was prepared for the World Congress of the International Association of Procedural Law, Salvador, Brazil, 2007., Bond University, Queensland, Australia, pg. 96, http://epublications.bond.edu.au/law_pubs/223.

excluding evidence, even if the main motive for excluding evidence is one of the previously shown ones, the judge can also refer to other motives for which the sanction will be applied, according to concrete circumstances.

In the Explanatory Memorandum of the NCPC it is shown that the Project explicitly regulates for the first time the principle of procedure loyalty in the administration of evidence, for the purpose of avoiding the use of any means that may be made with the purpose the wrongful administration of a piece of evidence or that might have the effect of provoking the carrying out of a crime, for the purpose of protecting the person's dignity, as well as his or her right to a fair trial and a private life. The institution of exclusion of illegally or unloyally administered pieces of evidence knows a detailed regulation, as the theory of legitimacy is utilized, which places the debate in a larger context that considers the functions of the criminal trial and of the juridical decisions with which these are ended in. Considering the nature of this institution (adopted in the continental legal system from common-law tradition) as well as the jurisprudence of the European Court of Human Rights, the evidence that is administered with the violation of legal provisions can be exceptionally used if they do not bring harm to the equitable character of the criminal trial as a whole. On the level of principles, even if the Explanatory Memorandum has no obligatory force, it can constitute an important element in interpreting the provisions of a normative act, since from this source important information regarding the object and the purpose of a normative act norm can be deduced.

The Explanatory Memorandum becomes even more important as we are getting close to the moment the normative act will be put into effect, and the ulterior interpretation of a normative act, as we get further away from its adoption, can be an evolutional one, capable of starting a discussion about the initial jurisprudence and even about the intent of the authors of the act, an intention that with the passing of time tends to become obscure, controversed and inaccessible to the larger audience.

From the Explanatory Memorandum we can observe that the legislator has understood to offer special attention to the way in which criminal trial evidence are obtained, as well as the way in which they are administered. As such the principle of loyalty in evidence administration is referred to, a principle expressly regulated in art. 10 of the NCPC and by the good faith that must govern the activity of evidence handling in the criminal trial. More so, it is expressly shown that the purpose of this principle is to protect human dignity as well as to protect a person's right to a fair trial and to a private life.

As a rule, the sanction of exclusion intervenes following the violation of the legality and loyalty principles in evidence handling, in the moment the evidence was obtained or administered. On the other hand, the principle of free assessment of the evidence appears during the criminal trial and after the evidence has been administered and after the loyalty and legality of their obtainment and subsequent administration had been verified. On the subject of evidence that is tainted as far as its credibility is concerned, during the criminal trial either the sanctioning of the respective piece of evidence can intervene, either the court can apply the principle of free assessment of the product and to declare that, in relation to the evidence ensemble, priority must be given to other evidence, but the reasonings are different. As such, if the sanction of exclusion will be used, it must be applied exclusively on considerations related to the way in which the evidence was obtained or administered (for example, a confession in which a certain person is identified as the culprit that was obtained through violence on the part of the investigation bodies must be first and foremost excluded because it is not credible evidence). If the evidence was legally obtained and administered, but the criminal prosecution body or the court deems that they cannot base their decision on the evidence as it is lacking credibility, they must not exclude the evidence, but apply the principle of free assessment on the evidence (for example, a confession by which a person is identified as the culprit, legally obtained and administered, but that contradicts other declarations from the file, which place the culprit in another location at the time of the committing of the crime).

In the literature, it has been shown that the illegal character of the evidence can result by the mere means the evidence was obtained (confession under torture) or by the circumstances in which the evidence was obtained and administered (listening to telephone conversations in circumstances not allowed by the law or if the evidence had not been subjected to contradictory debate)[10].

As part of the category of evidence that are inadmissible by their nature, the doctrine offers the examples of: confessions obtained through the use of violence, especially through torture, inhuman or degrading treatment, confessions obtained through the use of threats or other constraining methods (psychological violence), promises, orders, evidence obtained through the violation of the right to remain silent, the use of narco-analysis, hypnosis or resorting to a polygraf[11].

As part of the category of evidence that are inadmissible in connection to the circumstances in which they have been obtained, we offer as examples evidence obtained through police provocation, evidence obtained by the violation of professional

[10] C. De Valkeneer, La tromperie dans l'administration de la prevue penale, Lacier, Bruxelles, 2000, p. 81-91; F. Kuty, L'exigence de loyaute dans la recherché de prevue legale, note sous Cour mil. 18th of December 1997, Revue du droit penale et de criminologie, 1999, p.254-268, apud Gheorghiță Mateuț, op.cit., p. 85.

[11] Gh. Mateuț, op.cit. Tratat de procedura penala. Partea generala. Vol.I p. 85.

secrecy, those obtained by listening or intercepting private conversation and telephone conversation carried out with the violation of legal provisions, illegal searching ordered and executed with the violation of the house[12].

As part of the category of evidence that are inadmissible because of the circumstances of their administration, anonymous witness declarations have been given as examples, taking into account the fact that a witness's anonymity cannot be allowed unless he or she can offer pertinent and sufficient reasons (see footnote 12: Mateuț, *op.cit.*, p. 90-91). For anonymous testimonies to be utilized in a criminal trial, three conditions that results from the jurisprudence of the European Court of Human Rights must be met: it is necessary for the witness to be able to make use of pertinent and sufficient reasons while explaining her or his refusal, it is necessary for the defense to have had sufficient and adequate occasions to contest the anonymous testimony of the accusing, taking into account art. 6 paragr. 3 of the Convention, by which the accused can interrogate the witnesses of the accusing, in the spirit of the principle of contradictionality, it is necessary for the piece of evidence to not be the only one and not to be the one to determine culpability.

As far as the conditions that must be met in order for the exclusion to be functional are concerned, they are mainly three. The first condition is given by the existence of a violation in the rights and liberties of the accused, rights and liberties than can be of a procedural as well as a substantial nature. The 2nd condition is tied with the existence of a violation of legal provisions in the activity of obtaining or administering the evidence that is able to harm the principle of legality and loyalty in the activity of evidence handling. The 3rd condition is for a connection between the violation of legal provisions and the harm to exist. The first two conditions demand a clarifying analysis, but the 3rd condition is one that in jurisprudence and in foreign literature has generated controversy regarding the concrete manner in which it can be established.

As far as the connection between the harm brought to the accused and the violation of legal provisions is concerned, in foreign jurisprudence there have been some diverging opinions in attempts to establish if this connection must or must not be one of causality. As such, in some situation, in Canadian jurisprudence it has been established that there must be a causality between the violation of legal provisions and the produced harm[13].

In other situations it was considered that the connection needn't be one of causality, a temporal connection being sufficient, in the sense that the violation of legal provisions had taken place before or during the obtainment of evidence[14]. In the support of this point of view it has been shown that the existence of the causality relation is a condition that is too narrow and difficult to apply, which is why the entire event chain in which a violation of legal provisions has occurred must be analyzed. More so, it has been shown that in practice the situation in which a temporal connection between the illegal act and the harm is searched can, as well, generate difficulties as it can be very distant, which is why a connection between the illegal act and the harm must be established according to the particular case. In Dutch literature it has been considered that a temporal connection is not necessarily a causal connection, and the connection must necessarily be one of causality. This point of view has also been shared by the jurisprudence of this country's supreme court[15].

In relation to this last condition it is extremely difficult to establish, on a theoretical level, what are the minimum criteria that must be met in order to establish that there has been a connection between the violation of the legal provisions and the harm, also priority cannot be given neither to the interpretation according to which the connection must necessarily be one of causality nor to the interpretation that deems a temporal connection as sufficient, as such, the interpretation should be made according to the particular case, excluding neither of the two interpretations. Evidently, this interpretation can harm to a certain degree the predictability.

If the evidence is obtained by torture only one condition must be met, and that is that it will be established that the evidence had been obtained in this matter and for it to be automatically excluded. The solution is identical in both the case of the initial evidence as well as the derivative evidence.

As far as the persons that can solicit exclusions are concerned, the previously mentioned legal provisions state that it can be any person whose legitimate interest have been harmed. As such, the exclusion can be invoked by the main procedural subject, more precisely the suspect and the harmed person, as well as those who have been deemed as part of the trial, more precisely the defendant, the civil part and the civilly responsible part. But all these persons must justify an interest, an interest that can be harmed if the exclusion of illegally obtained evidence will not be carried out. More so, the exclusion can also be invoked by default by the prosecutor, in this case the

[12] Gh. Mateuț, op.cit., p. 86-90.

[13] R. v. Upton, [1988] 1 S.C.R. 1083., apud Gerard Mitchell, THE SUPREME COURT OF CANADA On S-s. 24(2) OF THE CHARTER, 2007, p. 34.

[14] R. v. Strachan, [1988] 2 S.C.R. 980 apud Gerard Mitchell, op.cit. p. 34.

[15] M.J. Borgers & L. Stevens, The Use of Illegally Gathered Evidence in the Dutch Criminal Trial vol 14.3 ELECTRONIC JOURNAL OF COMPARATIVE LAW (December 2010), p. 6 <http://www.ejcl.org/143/art143-4.pdf>.

interest is presumed, as it is acting for the purpose of defending society's general interests. As the interest belongs first and foremost to the accused, the suspect or the defendant, she or he will be the one that will formulate the request for the exclusion of the evidence, other cases existing more or less in theory.

After the court has been notified, the legality of the evidence is verified by the preliminary hearing judge, and he or she has the ability to check the legality of the administration of evidence and of the elaboration of the procedural papers towards the criminal prosecution bodies, as well as the legality of the arraignment made by the prosecutor.

As such, the object of the procedure in the initial hearing is carried out, by verifying, after the arraignment has been made, of the competence and the legality of the initial court notification, as well as verifying the legality of the administration of evidence and the carrying out of the papers by the criminal prosecution bodies. Verifying the legality of the arraignment or lack thereof comes as a distinct judiciary function, the principle of separation of judiciary functions finding their legally expressed mention in art. 3 of the NCPC. In the doctrine it has been shown that this judiciary function comes as a *sui generis* institution, an independent institution that is not a part of either the prosecution phase or the trial phase, this being a result of the systematization of the subject, as the preliminary hearing judge does not elaborate prosecution papers but also does not carry out the judgment [194]. By carrying out this procedural function, the preliminary hearing judge does not have the power of initiative in matters of evidence, but is the guarantor of rights for the phase which precedes the criminal trial, as his or her attributes are expressly and exhaustively stated in the law. Despite all this, through Law no. 255/2013, art. 3 of the new has been modified since, although the rule remains that carrying out a judicial function is incompatible with carrying out another judicial function, by exception, the function of verifying the legality of the arraignment or lack thereof is compatible with the function of carrying out judgment. The legislator went even further and has modified art. 346, paragr. 7 so that there is no possibility for the judge that verifies the legal court notification and commences the judgment to also proceed to judge the case, more specifically the preliminary hearing judge that commences the judgment also carries out the function of judging the case, so that on a practical level, when the judgment is commenced, the two judiciary functions are reunited. From the point of view of the impact these modifications have over the administration and evaluation of evidence in the judgment phase, the modification is to be criticized[16].

According to the jurisprudence of the European Court, in theory it is not forbidden to use in a criminal trial a piece of evidence that has been illegally obtained, if the procedure as a whole is equitable and the defendant has had the possibility of contesting it. In such cases it is considered sufficient to remedy the violation of the rights of the accused by declaring the violation in the internal law and the offering of compensations, without it being necessary to exclude the obtained evidence. From this perspective, introducing in the internal law the procedural sanction of excluding illegally obtained evidence regardless of the reason of illegality might appear as excessive in front of the European Court jurisprudence. In the jurisprudence of the Court a more just meeting is made between the general interest of society, to find the truth so that the ones who have committed crimes will be punished, and the personal interest of the accused persons, which demands the respecting of all their material and procedural rights.

It is a different situation when the obtainment of evidence is realized *with the violation of the person's right to not be subjected to torture or to inhuman or degrading treatment.* In this case, not only *the principle of legality of the criminal trial* is being violated, but also *the respect for human dignity* and, because of this, the approach must be different. If the use of evidence obtained by violating this right would be used in court, it would also affect *the finding of the truth*, as the reliability of the procedure would be placed in discussion. More so, by using this evidence, the moral justification of the calling to account of persons who have committed crimes would be lost. In these conditions, the European Court has drawn some principles regarding the use in trial of evidence obtained through torture, inhuman and degrading treatment, through a famous decision which has gone through intense debate in the literature, pronounced in the Grand Chamber on the 1st of June 2010 in the Gäfgen vs. Germany case.

As a principle, *direct evidence* obtained through these means must be excluded.

In the internal practice it has been stated that the use of violence in order to obtain a declaration in the criminal trial by the prosecution bodies has consequences not only upon the declaration, which cannot be used in trial, as it is a illegally obtained evidence, but also anticipates the existence of elements that constitute the crime of abusive investigation[17].

As far as the *evidence* that are *derivative* from the direct evidence obtained by the violation of art. 3 from the European Convention is concerned, the Court has adopted the rule according to which, it must mainly be excluded if there is a connection of causality between the evidence which was obtained through harmful treatment and the derivative evidence (the "fruit of the

[16] Noul Cod de procedura penala-Nicolae Volonciu,Andreea Simona Uzlau,Corina Voicu,.. Bucharest, Editura Hamangiu, 2014, p.242.

[17] HCCJI crim. s. Dec no. 6218 from the 26th of October 2006, in I. Ciocla, Probele in procesul penal.Practica judiciara, Editura Hamangiu, Bucharest. 2006, p.294-296.

poisonous tree" theory)[18].

As far as the evidence which is derivative from evidence administered by torture is concerned, these will always be excluded, regardless if they were obtained directly or indirectly from the evidence administered by torture. More so, it does not matter if this derivative evidence could have been obtained through other means. These conclusions are to be imposed taking into account the formulation of art. 102 paragr. (4), where the necessary conditions are stated only as far the exclusion of evidence derived from illegal evidence is concerned.

3. Conclusions

In conclusion, in light of these principles resulted from the ECHR, the text of art. 102 from the New Criminal procedure code must be interpreted, more precisely the article which regulates in paragr. (1) the conditions of evidence directly obtained through torture and derivative evidence, and that in paragr. (4) talks about evidence that derives from the ones which had been illegally obtained and that couldn't have been obtained through any other way. But the jurisprudence of the Court refers to evidence obtained through inhuman or degrading treatment and its derivative evidence, while the text of the internal law talk about illegal evidence, regardless of the cause of illegality. In the case of other illegalities, such as the ones in art. 8 of the Convention, the Court applies other rules, allowing their use in court, under certain conditions. For this reason it is necessary to ultimately turn to the rules of the sanction of relative nullity, meaning the exclusion of evidence only if it has produced a harm that cannot be removed in any other way. This harm would be judged by the judiciary bodies according to rules elaborated in the jurisprudence of the European Court, thus reconciling in an equitable manner both the individual interest of the defendant as well as society's general interest. In the case of evidence obtained through torture or inhuman or degrading treatment the sanction of nullity cannot be applied, as we have shown before that that their rules are much stricter.

The way in which exclusion is regulated in the Criminal procedure code offers the judge relatively large space for appreciation when a piece of evidence demands analysis in relation to a concrete situation. The situation is no different in other juridical systems. And that is why the role of the judge is even bigger in the carrying out of this right.

If before the NCPC was placed into effect the jurisprudence was able to avoid the sanction of exclusion, since the old CPC only mentioned it expressly once, after it was put into effect it cannot be considered a sui-generis sanction anymore. What remains to be seen is how it will be applied in the jurisprudence, more precisely the reasons stated by the courts for which it shall be applied and how will judges manage to find a balance between these rights and liberties and the need for criminal punishment. Using the vision of the English philosopher Betrand Russell about the way in which other philosophies must be perceived, we could say that the analysis of methods of regulation or interpretation of legal provisions in various legal systems cannot but made with either an attitude of veneration nor with one of desconsideration. For starters we must try to understand why those legal systems have achieved a certain regulation or why have they ended up expressing their opinions in a certain direction. Afterwards it is required of us to see these regulations and interpretations with a critical eye, and if some of the aspect may seem absurd we should try to see if this sensation is or isn't a result of our prejudice, as we use as reference the legal system that we are "used to" and in the case they are truly absurd, how could they have seemed for someone else, in another era, as being fair. Desconsideration is an obstacle in trying to relate to another legal system, veneration prevents us in perceiving it with a critical eye.

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[18] In the English language doctrine we often encounter this problematic under the name of "fruits of the poisonous tree". This theory was generated by the Silverthorneb Lumber v. The United States of America case. In this case, in the year 1920, the Supreme Court of the United States of America had states that federal agents, by the use of illegally confiscated financial documents, have accused a person of committing crimes towards the tax regime, in the end the derivative evidence from these illegally obtained documents were excluded from the case.

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