

THE EXCLUSION OF EVIDENCE IN CRIMINAL PROCEEDINGS – A COMPARATIVE APPROACH

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Abstract

The present paper examines the exclusion of evidence within the criminal proceedings, as regulated in the Romanian legislation as well as in other legal systems, pertaining both to the common law and to the civil law major legal traditions. The focus shall be placed upon the configuration of this procedural institution in the two aforementioned categories of legislation, namely of the exclusionary rule specific to the former and the exclusion of evidence by means of the nullity sanction, which is likely to be encountered in the latter, while also revealing the elements of approximation between them, as presented especially in the national legal paradigm, including in the relevant case-law. Further consideration shall be given to the European standards having a bearing on the matters in question, provided both by the European Convention of Human Rights and the case-law of the European Court of Human Rights, and the European Union, with regard to the need to achieve a common set of principles in the application of the exclusionary mechanism.

Keywords: *common law and civil law legal traditions, criminal proceedings, the principle of legality, the exclusion of evidence, nullity.*

1. Introduction

The legal systems throughout the Western world are deeply rooted in a specific legal culture based on two major traditions, namely *the Romano-Germanic or civil law tradition* and *the Anglo-American or common law tradition*.

The aim of the present paper is to illustrate the specific traits of the two traditions as they are reflected in the evidence law within the criminal proceedings of several states belonging to both traditions, by placing a special focus upon the exclusion of evidence.

This outline becomes especially relevant for the analysis of the Romanian criminal procedure law, belonging to the civil law family of legal systems, as, in the process of reforming the criminal justice system carried out, among other measures, by the lawmakers' adopting new codes of substantial and procedural criminal law, in effect as of February 2014, the common-law legal institutions have served as a recurrent source of inspiration. Such is the case of the newly-introduced procedural sanction of excluding unlawfully or disloyally adduced evidence.

By building upon the Romanian and foreign literature and case-law, the underlining idea of the present study is that the provisions regulating the exclusion of evidence within the Romanian criminal proceedings represent in fact a synthesis of some apparently incompatible traits of the two traditions.

Consequently, the present study is anchored in the scholarly endeavour to further deepen the novel nature

of the exclusion of evidence procedural mechanism, which, in order to be fully understood and uniformly applied in practice, requires a proper knowledge of the origins, general configuration, and mutations of this institution, in the legal systems belonging to both aforementioned legal traditions as well as by considering the relevant European instruments.

1.1. The Criminal Proceedings as Developed in the Two Major Legal Traditions

One of the main traits of the civil law tradition is codification, which determines the proceedings to unfold under very strict rules, as opposed to the common-law tradition, based on judicial precedent, where the established case-law is the driving force of legal development¹. Also, it has been noted that while the former is "person-centered", the latter is "centered on adjudication"².

The structural differences that shape these two paradigms also become apparent in the configuration of the criminal proceedings.

For instance, there are several differences in the legal treatment of evidence law according to the two legal traditions. In general, in common-law jurisdictions, the judge rules on issues of law, controlling the procedural aspects and instructing the jury thereof, while the lay jury is in charge of determining the facts, whereas in civil law jurisdictions, the evidence gathered during the

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¹ "The Common Law and Civil Law Traditions", The Robbins Religious and Civil Law Collection, School of Law (Boalt Hall), University of California at Berkeley, <https://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html>.

² Mar Jimeno-Bulnes, "American Criminal Procedure in a European Context", *Cardozo Journal of International and Comparative Law* 21 (2013): 410, http://www.lawschool.cornell.edu/research/lay_participation_in_law/upload/MarJimeno-Bulnes.pdf.

prosecution phase is collected in a *dossier*, which forms the basis for the trial phase³.

Moreover, in the common-law systems, the review of the ruling rendered by the court of first instance tends to focus on issues of law, while, in the civil law systems, the appeal has a broader scope, also dealing with the findings on facts⁴.

1.2. The Inquisitorial and the Adversarial / Accusatorial Models of Criminal Proceedings

There are two models of criminal proceedings, largely corresponding to each of the two legal traditions: the inquisitorial model, representative of the civil law legal systems and the adversarial or accusatorial model, specific to the common-law legal systems.

Within the adversarial adjudication process, the parties play a central, active part by presenting their arguments and suggesting evidence in accordance with their position before a decision-maker who has no prior knowledge of the case; conversely, in the inquisitorial adjudication process, the judge's role is more prominent, not being a mere recipient of the information in a packaged form, but actively overseeing the unfolding of the proceedings⁵.

As the scholars rightly argue, there is no purely inquisitorial or purely adversarial criminal procedure⁶. What is more, the dichotomy is considered by a part of the literature as "limited or even outdated", considering the set of common values shared by both models⁷.

2. The Exclusion of Evidence in the Common-Law Legal Traditions

2.1. The Exclusionary Rule in the Legal System of the United States of America

The exclusion of evidence in the North American proceedings is closely connected to the Fourth, Fifth, and Sixth Amendments to the U.S. Constitution, as a remedy against violations of the provisions regulating search and seizure, self-incriminatory statements, and the defendants' right to counsel, respectively⁸.

The scope of the *Fourth Amendment* is to safeguard a person's right to liberty and security as well

as the right to private life against arbitrary arrests and invalid searches or various forms of surveillance⁹.

The adoption of the USA PATRIOT Act (its full title being Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001), as a reaction to the 9/11 terrorist attacks, has represented a challenge for the issues pertaining to the exclusion of evidence in the context of the necessity to comply with the constitutional guarantees provided for under the Fourth Amendment. In this regard, it may seem paradoxical that the act allowed for significant restrictions placed upon the fundamental rights and freedoms with the exact purpose of protecting them (for example, by eliminating the probable cause standard required to legitimise the intrusive acts of the state authorities or the obligation to notify the person targeted by a search)¹⁰, which is liable to create an imbalance between the public interest of protecting the national security and the private interest of exercising the fundamental rights¹¹.

The application of the *Fifth Amendment* in criminal matters relates to the right to a grand jury, the interdiction of "double jeopardy" (an institution similar to the *ne bis in idem* principle in civil law systems), as well as to some guarantees regarding the fair nature of the proceedings (protection against self-incrimination, "due process of law")¹².

As far as the privilege against self-incrimination is concerned, the U.S. Supreme Court has ruled that the evidence obtained in violation of what has come to be commonly known as the "Miranda rights" or the "Miranda warning" are to be excluded. These legal concepts derive from the well-known decision rendered in the *Miranda v. Arizona* case, whereby, in 1966, the Supreme Court ruled on the exclusion of the statements provided by the defendant Ernesto Miranda before the police body, admitting to committing the offences he had been charged with, namely kidnapping and rape, without his being properly informed beforehand of the right to remain silent and the right to an attorney and without the judicial body ensuring that the accused has understood these rights and the consequences of waiving the exercise thereof¹³.

³ Howard L. Krongold, "A Comparative Perspective on the Exclusion of Relevant Evidence: Common Law and Civil Law Jurisdictions", *Dalhousie Journal of Legal Studies* 12 (2003): 100-102, <https://ojs.library.dal.ca/djls/article/download/4452/3970>.

⁴ Krongold, "A Comparative Perspective on the Exclusion of Relevant Evidence: Common Law and Civil Law Jurisdictions", 102.

⁵ Ellen E. Sward, "Values, Ideology, and the Evolution of the Adversary System", *Indiana Law Journal* 64 (1989): 312-314, <http://www.repository.law.indiana.edu/ilj/vol64/iss2/4>.

⁶ Jimeno-Bulnes, "American Criminal Procedure in a European Context", 423.

⁷ Andrea Ryan, *Towards a System of European Criminal Justice: The Problem of Admissibility of Evidence* (London: Routledge, 2014), 76.

⁸ "Exclusionary Rule", Cornell University Law School, Legal Information Institute, https://www.law.cornell.edu/wex/exclusionary_rule.

⁹ "Fourth Amendment", Cornell University Law School, Legal Information Institute, https://www.law.cornell.edu/constitution/fourth_amendment; "Fourth Amendment--Search and Seizure", Justia US Law, <http://law.justia.com/constitution/us/amendment-04/>.

¹⁰ Brian Duignan, "USA PATRIOT Act", *Encyclopædia Britannica*, January 25, 2017, <https://www.britannica.com/topic/USA-PATRIOT-Act#ref1123177>.

¹¹ Christian Halliburton, "Leveling the Playing Field: A New Theory of Exclusion for a Post-PATRIOT Act America", *Missouri Law Review* 70 (2005): 550, <http://digitalcommons.law.seattleu.edu/faculty/380>.

¹² "Fifth Amendment", Cornell University Law School, Legal Information Institute, https://www.law.cornell.edu/constitution/fifth_amendment.

¹³ Steve Mount, "The Miranda Warning", *U.S. Constitution Online*, January 8, 2010, <https://www.usconstitution.net/miranda.html>.

The literature¹⁴ also suggests an innovative interpretation of the “Miranda rights”, by arguing that the hearing of a suspect in custody raises issues including from the perspective of the Fourth Amendment, in the sense that the judicial body must obtain the voluntary consent of the accused before “searching” his mind and “seizing” his answers, the protection being applicable regardless of whether the statements have a self-incriminatory nature or not.

The *Sixth Amendment* comprises the following rights of defendants in criminal proceedings: the right to a public trial without undue delay, the right to a lawyer, the right to an impartial jury as well as the right to be informed of the accusers and the nature of the charges and evidence against the accused; the application of this legal text in practice includes cases of terrorism and issues of jury selection or witness protection¹⁵.

Considering that the exclusionary rule has been shaped by the judiciary in the course of decades, especially by the case-law of the Supreme Court, which established, among other aspects, that the rule should not only be applied within the federal system but also at state level, the rationale of exclusion has gradually suffered a mutation, by shifting from being a remedy to becoming a means of deterrence, aiming at discouraging the improper conduct of the judicial body¹⁶.

This shift of perspective allowed for several exceptions to the exclusionary rule to be enshrined, as follows:

1. *the good faith exception*, preventing the exclusion of evidence if officers reasonably relied on a search warrant subsequently proven as invalid (this exception was addressed in cases such as *Arizona v. Evans*, 1995; *Herring v. U.S.*, 2009; *Davis v. U.S.*, 2011);
2. *the independent source doctrine*, which implies that initially unlawfully obtained evidence may still be admissible if it is subsequently obtained by means of a constitutionally valid search or seizure (addressed in *Maryland v. Macon*, 1985);
3. *the inevitable discovery doctrine*, allowing for evidence to be admissible if it would have been obtained irrespectively of the unlawful means;
4. *the attenuation doctrine*, implying the admissibility of evidence if its relationship with the

unlawful means of discovery is considerably attenuated;

5. *evidence admissible for impeachment*, aiming at questioning the credibility of defendants’ testimonies but which cannot be used in order to prove guilt; or
6. *qualified immunity*, protecting the officers from legal action if it is reasonably thought that they have acted in good faith¹⁷.

On June 20, 2016, the Supreme Court rendered its judgment in the *Utah v. Strieff* case, settling the issue of law consisting in determining whether the exclusionary rule applies when a police officer takes knowledge, during an unlawful taking into custody of a person, of the existence of an arrest warrant issued against that person, proceeds to enforcing the warrant, and discovers incriminatory evidence during the search relating to the arrest (in this case, there were drugs found in the person’s pockets). The court found the evidence thus obtained to be admissible, by noting the good faith of the judicial body as well as by stating that the causal link between the unconstitutional act consisting in the unlawful deprivation of liberty and the discovery of the evidence had been attenuated by the existence of a valid arrest warrant, which ultimately may be interpreted as yet another departure from the traditional view on the “fruit of the poisonous tree”¹⁸.

2.2. The Exclusionary Rule in the Legal System of the United Kingdom

With reference to the theoretical justification of the exclusion of evidence, the case-law of the British courts reflects various points of view¹⁹: thus, according to *the* – rather controversial – *reliability principle*, which is based on a clear-cut distinction between the judicial functions, the rationale of the exclusionary rule itself is under debate, the main argument being that the unlawfully obtained evidence (especially the material evidence) may be as reliable as the evidence obtained lawfully, the evidentiary value being the same, regardless of the manner in which they were adduced. According to *the deterrence principle*, the purpose of the exclusionary rule is to increase accountability among the criminal investigation body, preventing violations that may compromise the prosecution. From the perspective of *the protective principle*, the exclusionary rule is aimed at safeguarding the rights of the accused. *The judicial integrity principle*, taken from

¹⁴ Timothy P. O’Neill, “Rethinking *Miranda*: Custodial Interrogation as a Fourth Amendment Search and Seizure”, *UC Davis Law Review* 37 (2004): 1124, <http://ssrn.com/abstract=543502>.

¹⁵ “Sixth Amendment”, Cornell University Law School, Legal Information Institute, https://www.law.cornell.edu/constitution/sixth_amendment.

¹⁶ Halliburton, “Leveling the Playing Field: A New Theory of Exclusion for a Post-PATRIOT Act America”, 520-521.

¹⁷ “Exclusionary Rule”.

¹⁸ Orin Kerr, “Argument Preview: *Utah v. Strieff* and the Future of the Exclusionary Rule”, February 3, 2016, *SCOTUSblog*, <http://www.scotusblog.com/2016/02/argument-preview-utah-v-strieff-and-the-future-of-the-exclusionary-rule/>, and “Opinion Analysis: The Exclusionary Rule Is Weakened but It Still Lives”, June 20, 2016, *SCOTUSblog*, <http://www.scotusblog.com/2016/06/opinion-analysis-the-exclusionary-rule-is-weakened-but-it-still-lives/>. The full text of the decisions is available online at: http://www.supremecourt.gov/opinions/15pdf/14-1373_83i7.pdf.

¹⁹ David Anthony Brooke, *Confessions, Illegally/Improperly Obtained Evidence and Entrapment under the Police and Criminal Evidence Act 1984: Changing Judicial and Public Attitudes to the Police and Criminal Investigations* (London: University College, 1999), <http://discovery.ucl.ac.uk/1349807/1/367012.pdf>, 242-260.

the 1961 *Mapp v. Ohio* case pertaining to the application of the Fourth Amendment to the U.S. Constitution, rejects the absolute separation of the judicial functions, by means of the argument that the investigative and trial phases are connected both from the procedural point of view and in the public perception, so as the infringement of the rights occurring in the incipient phase of the proceedings may threaten the integrity of the justice dispensing mechanism.

The relevant provisions regarding the exclusionary rule within the jurisdiction of the United Kingdom of Great Britain and Northern Ireland are to be found in the following acts: *the Police and Criminal Evidence Act 1984* (PACE), which comprises criminal procedure provisions regarding the powers of the police in England and Wales, as well as codes of practices relating to the exercise of those powers; similar provisions are encountered in the *Police and Criminal Evidence Order 1989* (PACE NI) applicable in Northern Ireland, and *the Criminal Procedure Act 1995*, applicable in Scotland²⁰.

Section 76 paragraph (2) of PACE 1984²¹ provides that the confessions made by an accused person that, as is represented to the court, have been or may have been obtained by oppression or in consequence of anything said or done which was likely, in the circumstances existing at the time, to render them unreliable are not allowed to be given in evidence against him except insofar as the prosecution proves to the court, in accordance with the probative standard *beyond reasonable doubt*, that the confession – notwithstanding that it may be true – was not obtained as aforesaid.

The circumstances determining a confession to be unreliable have been broadly interpreted by the Court of Appeal in the 1987 *R v. Fulling* case, to include the following: confessions obtained as the result of an inducement, such as a promise of bail or a promise that a prosecution would not arise from the confession; hostile and aggressive questioning; failure to accurately record the statement, to caution, to provide an appropriate adult where required, to comply with the Code of Practice in relation to the detention of the accused (for example, not allowing sufficient rest prior to an interview) or to act properly in the capacity of a defence solicitor or appropriate adult²².

According to paragraph (4) of Section 76 of PACE 1984, the exclusion of a confession, wholly or partly, shall not affect the admissibility in evidence of any facts discovered as a result of the confession or where the confession is relevant as showing the particularities of his way of speech, writing or

expression, of so much of the confession as is necessary to show such issues.

Section 78 of PACE 1984 is entitled “Exclusion of unfair evidence” and, in the two component paragraphs, this legal text provides for the general possibility of a court to refuse to allow evidence on which the prosecution proposes to rely to if it appears to the court that, having regard to all the circumstances, including the ones in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that it should not be admitted. It is further stated that nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

The fairness of the adduction of evidence has been successfully challenged so far as a result of invoking breaches of the European Convention of Human Rights, breaches of the Codes of Practice issued under PACE or bad faith on the part of the police²³.

3. The Exclusion of Evidence in the Civil Law Legal Traditions

3.1. The Exclusion of Evidence in the German Legal System

In the German legislation, the procedural institution of the exclusion of evidence dates from the 1950s, borrowing some elements from the American model, such as the exclusionary rule, the “fruit of the poisonous tree” doctrine or the attenuation doctrine²⁴.

The regulation pertaining to excluding evidence is not provided for at constitutional level and *does not operate with the notion of nullity*, the exclusionary rules provided by law being scarce and lacking general applicability. There are several *statutory exclusionary rules* (*gesetzliche Beweisverwertungs-verbote*) under the German Code of Criminal Procedure – one example of a statutory rule is the exclusion of evidence obtained following the judicial body’s failure to inform the suspect of the rights provided for under Section 136 paragraph (1) second sentence of the Code of Criminal Procedure²⁵, namely the right to respond to the charges or to remain silent, and the right, at any stage, even prior to his examination, to consult with his chosen defence counsel – but, in the majority of cases, the court shall decide in these matters based on *non-standardised exclusionary rules* (*nicht normierte*

²⁰ “Police and Criminal Evidence Act 1984”, Wikipedia, https://en.wikipedia.org/wiki/Police_and_Criminal_Evidence_Act_1984.

²¹ The full text of the act is available online at: <http://www.legislation.gov.uk/ukpga/1984/60/contents>.

²² “Confessions, Unfairly Obtained Evidence and Breaches of PACE”, the Crown Prosecution Service (CPS), http://www.cps.gov.uk/legal/a_to_c/confession_and_breaches_of_police_and_criminal_evidence_act/.

²³ “Confessions, Unfairly Obtained Evidence and Breaches of PACE”.

²⁴ Krongold, “A Comparative Perspective on the Exclusion of Relevant Evidence: Common Law and Civil Law Jurisdictions”, 128-129.

²⁵ The English translation of the 1987 German Code of Criminal Procedure, with subsequent amendments, is available online at: https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1117.

Beweisverwertungsverbote), especially in cases of a manifest violation of rights²⁶.

Other classifications of the exclusionary rules distinguish between, on the one hand, independent exclusionary rules (*selbständige Beweisverwertungsverbote*) and dependent exclusionary rules (*unselbständige Beweisverwertungsverbote*) and, on the other hand, between obligatory exclusionary rules (*absolute Verwertungsverbote*), implying a strict exclusion of evidence, and relative exclusionary rules (*relative Verwertungsverbote*), which are left to the discretion of the judge. The two categories are intertwined, as independent exclusionary rules are generally obligatory, while dependent exclusionary rules, based on serious violations of evidence adduction rules may be either obligatory or relative²⁷.

The exclusion of evidence is closely connected to some of the principles applicable in the German criminal proceedings, as indicated in the literature²⁸: the case-law acknowledges a certain margin of discretion in assessing whether *the principle of proportionality (Grundsatz der Verhältnismässigkeit)* should apply, aiming at removing any arbitrariness concerning the investigation and balancing the individual's interest of exercising the constitutional right to privacy with the public interest of fighting crime. Under Section 244 paragraph (2) of the German Code of Criminal Procedure, *the principle of establishing the truth* is enshrined, allowing the court to extend the taking of evidence, *proprio motu*, to all facts and means of proof relevant to the decision; however, as noted by the Federal Court of Justice, this principle is not absolute, being limited by the necessity to comply with the standards of protecting human rights. At the same time, *the principle of the free assessing of evidence (freie Beweiswürdigung)* is acknowledged, requiring that the judge eliminates, within his evaluation, the factual elements derived from excluded evidence.

According to Section 244 paragraph (3) of the same Code, an application to adduce evidence shall be rejected if the adduction of such evidence is inadmissible, so the court must dismiss such an application if the evidence was obtained unlawfully²⁹.

3.2. The Exclusion of Evidence in the French Legal System

Although the regulation pertaining to the exclusion of evidence in France has undergone a long history (its apparition may be identified around 1910),

it has been observed that it has not been accompanied by a consistent case-law in the course of time, the cases whereby the exclusion of unlawfully obtained evidence is registered to having been ordered being quite rare³⁰.

According to the French legislation in force, similarly to the Romanian law, *the invalidation of unlawful evidence takes place through the nullity sanction*, the relevant provisions being set out under articles 170-174 of the French Code of Criminal Procedure³¹, entitled "*Des nullités de l'information*", representing the equivalent of the exclusionary rules in the Anglo-Saxon law³².

Thus, according to article 170 of the French Code of Criminal Procedure, throughout the investigation, the investigation chamber may be referred for the annulment of a procedure act by the investigating judge, by the prosecutor, by the parties or by an assisted witness.

Under article 171 of the same Code it is provided that the nullity sanction intervenes when the breach of an essential procedural condition has interfered with the parties' interests it concerns. The party in respect of whom the breach of an essential procedural condition has occurred may waive the invoking thereof and, consequently, cover the irregularity; the waiver must be explicit and made in the presence of an attorney or where the latter has been duly summoned (art. 172).

In accordance with the provisions set out under article 173 paragraph 5 of the French Criminal Procedure Code, one of the rulings that may be rendered within the investigating chamber is to find the application inadmissible, by an unappealable order, for the reasons pursuant to this legal text or for the lack of providing reasoning thereof, in which case the file is returned to the investigating judge, and, in other cases, it is transmitted to the general prosecutor.

Article 174 of the French Criminal Procedure Code states that, when the investigating chamber is referred, pursuant to the provisions set out under the previous article, all grounds for nullity transmitted to it must be invoked, without prejudice to the possibility of their being invoked *ex officio*. Should the parties fail to comply with this condition, they will no longer be able to invoke them, except for the case when these grounds could not have been known. The investigating chamber shall decide whether the annulment must aim all vitiated procedural acts, be limited to a part thereof or extend to all or part of the subsequent proceedings. The annulled acts are withdrawn from the investigation file and kept with the registrar of the court of appeal (by contrast, in the Romanian proceedings, the annulled

²⁶ Sabine Gless, "Truth or Due Process? The Use of Illegally Gathered Evidence in the Criminal Trial – Germany" (January 19, 2010): 2-3, <http://ssrn.com/abstract=1743530>.

²⁷ Gless, "Truth or Due Process? The Use of Illegally Gathered Evidence in the Criminal Trial – Germany", 3-4.

²⁸ Gless, "Truth or Due Process? The Use of Illegally Gathered Evidence in the Criminal Trial – Germany", 4-6.

²⁹ "Exclusionary Rule", IJBI Criminal Defense Wiki, http://defensewiki.ibj.org/index.php/Exclusionary_Rule#Germany.

³⁰ Krongold, "A Comparative Perspective on the Exclusion of Relevant Evidence: Common Law and Civil Law Jurisdictions", 131-132.

³¹ The full text of the French Code of Criminal Procedure (consolidated version until March 2, 2017) is available online at: <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071154&dateTexte=20170320>.

³² Karim. A. A. Khan, Caroline Buisman, Christopher Gosnell, eds., *Principles of Evidence in International Criminal Justice* (New York: Oxford University Press, 2010): 73.

acts or excluded evidence are not physically removed from the file). As regards the partially annulled acts, prior to the annulment, a certified true copy thereof is drawn-up and kept with the registrar of the court of appeal. Any drawing of information against the parties of the annulled instruments or procedural documents or parts thereof is prohibited, under penalty of disciplinary action brought against the attorneys or magistrates.

4. Milestones for Interpreting Evidence Law as Set Out in the Relevant Case-Law of the European Court of Human Rights

The case-law of the European Court of Human Rights in matters of evidence law is extremely vast, the decisions rendered thereby addressing various issues relating to the exclusion of evidence, such as evidence obtained in the following circumstances: by applying torture or by way of inhuman or degrading treatment, as a result of entrapment, deception or constraint exercised by state authorities, by means of wiretapping and other technical covert surveillance methods, by a *de facto* hearing of suspects not in the custody of the judicial body, or by using undercover investigators or informers³³.

As highlighted by the European Court of Human Rights, although the provisions of the European Convention of Human Rights guarantees the right to a fair trial in article 6, it does not cover the admissibility of evidence as such, which is a matter that first and foremost belongs to the national law, so the Court shall not be able to exclude the admissibility of evidence adduced in breach of the national law³⁴. This interpretation reflects *the principle of subsidiarity*, preventing the Court from acting as a “court of fourth instance”³⁵.

Therefore, the role of the Court is to determine whether the proceedings as a whole, including the way in which the evidence was obtained, were fair and, in this process, special consideration must be given to the manner in which the rights of the defence were respected, particularly to assess whether the applicant was given the opportunity to challenge the authenticity of the evidence and to oppose its use. Another relevant factor is the quality of the evidence, by determining whether the circumstances in which it was obtained cast any doubt on its reliability or accuracy³⁶.

If a conviction ruling rendered in the national law is mostly based upon evidence obtained in breach of the principles enclosed in article 6, it results that the

proceedings as a whole are considered unfair. Nevertheless, as a rule, the national courts’ taking into consideration of evidence obtained by breach of another article of the Convention (e.g. article 8) does not automatically hinder the fair nature of the proceedings as per article 6 of the Convention³⁷, except for the evidence obtained in serious violation of one of the absolute rights, such as article 3, which shall raise issues of fairness at all times, even if that piece of evidence was not decisive in the rendering of the conviction³⁸.

5. The Treatment of Evidence in the Context of EU Judicial and Police Cooperation in Criminal Matters

As reported in the literature, the cultural differences between the adversarial and inquisitorial models constitute a major impediment to the development of the criminal law of the European Union, both from the substantial and from the procedural perspective. In the Euro-skeptical circles, especially in the British environment, there have been fears that a uniform system of criminal justice based on the inquisitorial tradition may be imposed, which would prove significantly flawed as far as the guarantees of ensuring a fair trial acknowledged under the adversarial model are concerned, by ignoring that, within the Union, the modern criminal proceedings of each Member State encompass elements belonging to both legal traditions. Although it is relatively premature to speak of a European criminal procedure, it cannot be denied that the EU law has a deep influence on the regulations of the national legal systems, including over the evidence law³⁹.

According to Article 82 paragraph 1 of the Treaty on the Functioning of the European Union (TFEU)⁴⁰, judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 of Article 82 – mutual admissibility of evidence between Member States, the rights of individuals in criminal procedure, the rights of victims of crime, and any other specific aspects of criminal procedure which the Council has identified in advance by a decision – as well as in Article 83, referring to minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with

³³ John. D. Jackson and Sarah J. Summers, *The Internationalisation of Criminal Evidence. Beyond the Common Law and Civil Law Traditions* (Cambridge: Cambridge University Press, 2012): 158 et seq.

³⁴ ECHR, *Dumitru Popescu v. Romania no. 2*, decision of April 26, 2007, paragraph 106, published in the Official Journal of Romania no. 830 of December 5, 2007.

³⁵ Dovydas Vitkauskas and Grigoriy Dikov, *Protecting the Right to a Fair Trial under the European Convention on Human Rights* (Strasbourg: Council of Europe, 2012): 72, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007#57>.

³⁶ ECHR, *Beraru c. Romania*, decision of March 18, 2014, paragraphs 74-75, available at: <http://hudoc.echr.coe.int>.

³⁷ Dovydas Vitkauskas and Grigoriy Dikov, *Protecting the Right to a Fair Trial under the European Convention on Human Rights*, 71-72.

³⁸ ECHR, *Cēsnieks c. Latvia*, decision of February 11, 2014, paragraph 65, available at: <http://hudoc.echr.coe.int>.

³⁹ Catherine Barnard and Steve Peers, eds., *European Union Law* (Oxford: Oxford University Press, 2014): 754-755.

⁴⁰ Published in the Official Journal of the European Union no. C 202 of June 7, 2016.

a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

Regarding the provisions set out under Article 82 paragraph 2 of the TFEU, it is mentioned that, to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules with respect to the aforementioned areas and that such rules shall take into account the differences between the legal traditions and systems of the Member States. Moreover, the adoption of these minimum rules shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

The provisions pertaining to police cooperation set out under article 87 et seq. TFEU, which involve all the Member States' competent authorities, including the police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences imply, among other aspects, the establishing of measures concerning the collection, storage, processing, analysis and exchange of relevant information as well as common investigative techniques in relation to the detection of serious forms of organised crime.

6. The Exclusion of Evidence according to the Romanian Criminal Procedure Law

In Romania, the relevant provisions that regulate the exclusion of evidence are essentially contained in article 102 of the New Criminal Procedure Code, in force as of February 2014, consisting of four paragraphs, with the following content:

Firstly, as a reflection of the absolute right enshrined under article 3 of the European Convention of Human Rights and the standards of protection developed by the Court in Strasbourg⁴¹, it is stated in an unconditional manner that the evidence obtained by way of torture as well as the evidence deriving therefrom cannot be used within the criminal proceedings.

Secondly, the legal text further states that the evidence obtained unlawfully cannot be used within the criminal proceedings.

In this context, one of the most visible and controversial issues of law has been determined by a decision rendered by the Constitutional Court⁴² relating to the covert surveillance techniques, whereby it has been found that the phrase allowing the enforcement of

such techniques by "other specialised body" was unconstitutional. The legal text concerned thereby – article 142 paragraph (1) of the Criminal Procedure Code – has been since amended. But, as of this decision, the courts have witnessed a wave of pleas, submitted throughout all stages of the proceedings, requesting the exclusion of evidence thus obtained, the vast majority of them being dismissed either in first instance or before the review courts on different grounds, starting from the inadmissibility of exclusion in the stages of the proceedings exceeding the preliminary chamber to the inability to prove any procedural harm caused by such potential violation that would justify the application of the relative nullity rules, etc.

The concept of *unlawfully* obtained evidence, by means of a broader interpretation⁴³, also comprises the evidence adduced in breach of *the principle of loyalty* governing the evidence law, enshrined under article 101 of the Criminal Procedure Code, forbidding the use of coercive means or incentives, of hearing methods or techniques affecting a person's capacity of remembering and consciously and voluntarily recounting the facts, or of provocation in order to obtain evidence. As shown in the relevant national case-law⁴⁴, the loyalty principle, deriving from the right to a fair trial, implies a form of "judicial morality" of the criminal prosecution body in the activity of evidence adduction, there existing *a presumption in favour of the good-faith of the judicial body* (similar to the common-law view on the matter), which can only be overturned by indicating some elements of proof regarding the application of one of the situations falling within the scope of article 101 of the Criminal Procedure Code.

Thirdly, the nullity of the act whereby the adduction of evidence was ordered or authorised or whereby the evidence has been adduced determines the exclusion of the evidence. By explicitly referring to the nullity sanction, this provision shows that the legal design of regulating the exclusion of evidence cannot be separated from that of nullities. Although, initially, some scholars or even legal practitioners were tempted to promote the theory of a clear-cut dividing line between the two sanctions, this controversy has been put to rest by the Constitutional Court of Romania. Thus, by Decision no. 383/2015⁴⁵, the Court has established that the sanction provided for under paragraph (3) of article 102 mandatorily requires the application of the nullity rules, either absolute or relative, as the case may be, pursuant to articles 280-282 of the Criminal Procedure Code.

Finally, as explained in the Memorandum accompanying the Project of the New Criminal Procedure Code, the last paragraph of article 102

⁴¹ "Guide on Article 6 of the European Convention on Human Rights. Right to a Fair Trial (Criminal Limb)", Council of Europe, the European Court of Human Rights (2014): 26, http://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf.

⁴² Decision no. 51/2016, published in the Official Journal of Romania no. 190 of March 14, 2016.

⁴³ Nicolae Volonciu and Andreea Simona Uzlău, coord., *Noul Cod de procedură penală comentat* (București: Hamangiu, 2014): 238.

⁴⁴ The Cluj Court of Appeal, the Criminal and Minor-Related Division, rulings no. 86 and no. 88 of April 12, 2016, available at: www.rolii.ro.

⁴⁵ Published in the Official Journal of Romania no. 535 of July 17, 2015.

transposes the “fruit of the poisonous tree” doctrine, providing that the derived evidence is excluded should it be directly obtained from the unlawfully obtained evidence and if it could not have been gained otherwise. For instance, in a case put forward in the literature⁴⁶, the preliminary chamber judge ruled on the exclusion of a witness statement made by a person that has later been turned into a defendant in the same file, and, by finding that all other evidence – with the exception of a couple of witness statements – were directly connected to this statement excluded as a result of it being deemed a disloyal practice, they have also been invalidated due to the extensive effect of nullities (it must be mentioned, though, that this view is not unitary among the judicial body).

Diachronically speaking, prior to the regulation currently in force, there has been no well-established tradition of excluding evidence in the Romanian legislation, as the previous national regulation of criminal proceedings, pursuant to article 64 paragraph (2) of the 1968 Criminal Procedure Code, inserted by Law no. 281/2003, provided solely for a broad principle of exclusion, namely that the evidentiary means obtained unlawfully cannot be used within the criminal proceedings. At the time, some commentators⁴⁷ criticised this legislative solution, arguing that this input, inspired from the common-law tradition, had been poorly integrated into the Romanian regulation, in an oversimplified manner, lacking an adequate procedural mechanism of invalidating evidentiary means which were unlawfully or disloyally adduced. This is exactly what the new legislation brought forth.

The Government Decision no. 829/2007 for the approval of the preliminary theses of the Criminal Procedure Code project provided that, with respect to the general rules of evidence, the following proposal is addressed: to consolidate the regulation of excluding unlawful evidence, a specific sanction in matters of evidence law whereby the most powerful guarantee of complying with the legal provisions is ensured. With this aim in view, a clear regulation of the exclusionary mechanism was being pursued, having a twofold preoccupation, namely the establishment of the application conditions and the application procedure in each phase of the criminal proceedings. There is also mention made to the exclusion of evidence deriving from the unlawfully obtained evidence, when they are closely dependent on the main pieces of evidence.

Subsequently, in the Explanatory Memorandum accompanying the Project of the New Criminal Procedure Code, the exclusion of evidence has been described as being taken over from the common-law

tradition as well as by considering the relevant case-law of the European Court of Human Rights.

Furthermore, the Memorandum mentioned the appropriation into national law of *the theory of legitimacy*, which places the focus on the long-term public impact of the judicial decision-making process or on the moral value of the judicial rulings, which implies that a possible conviction judgment based on unlawfully obtained evidence would undermine the status of the court as this would mean that it simultaneously tolerated and sanctioned the breach of law – a certain balance being necessary in this respect, considering that not all violations of the legal provisions determine the exclusion of evidence⁴⁸.

In the course of the three years run as of implementing the reforming provisions regarding the criminal justice system, the judicial body has addressed the issues pertaining to the exclusionary rules in a variety of cases, especially within the preliminary chamber phase.

7. Conclusions

By adopting the New Romanian Criminal Procedure Code, numerous adversarial elements, representative of the Anglo-American legal paradigm, have been inserted in the national legislation, including with respect to evidence law, but, as far as the exclusion of evidence is concerned, the lawmakers' preference for a mixed procedural design can be clearly observed, as it is not completely separated from the classical regulation of nullities, which generally applies to the continental legal systems. Although this latter approach lacks, in some respects, the flexibility and dynamism of the adversarial proceedings, it has the merit of conferring certain coherence to the regulation, thus avoiding the inadequate impact of these proceedings in practice. All things considered, the exclusion of evidence under the national legislation is undoubtedly a living and evolving procedural institution.

At the same time, it is appropriate to emphasise that, beyond any shadow of a doubt, the exclusion of evidence cannot be conceived outside the framework of the guarantees enshrined in the relevant case-law of the European Court of Human Rights and, at the EU level, the principle of mutual recognition and the harmonisation of the legislation with regard to judicial and police cooperation in criminal matters imply common procedural standards by progressively attenuating the legal and jurisprudential differences among the national legal systems.

⁴⁶ Cătălin Lungănașu, “Din nou despre camera preliminară: posibila neconstituționalitate a dispozițiilor art. 346 alin. (4) CPP”, July 4, 2016, <https://www.juridice.ro/453425/din-nou-despre-camera-preliminara-posibila-neconstituionalitate-a-dispozitiilor-art-346-alin-4-cpp.html>.

⁴⁷ Gheorghită Mateuț and Diana Ionescu, “Inadmisibilitatea utilizării ca mijloc de probă în procesul penal a proceselor verbale și a actelor de constatare obținute în procedurile administrative de control”, *Caiete de drept penal* 1 (2005): 23, quoted in Mihail Udrioiu and Ovidiu Predescu, *Protecția europeană a drepturilor omului și procesul penal român. Tratat* (București: C.H. Beck, 2008): 792.

⁴⁸ Andrew Ashworth and Mike Redmayne, *The Criminal Process*, 4th Ed., (New York: Oxford University Press, 2010): 346.

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