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Violations in criminal proceedings concerning the right to privacy in view of European standards and the poisonous tree doctrine

1. Introduction – the right to privacy as one of the human rights.

We live in the world that is changing and that process is faster than ever before; many things are evolving before our eyes in various directions – good or bad. Traumatic experience of the 20th century brought us rapid development of human rights and their systematization – and that growth continues today but among new challenges and problems. Human rights are like a shield and guard created for protecting humanity basic needs and equity – so, undoubtedly, they need to respond to the current dangers and threats. Sometimes a technological progress and evolution leads us to new issues – previously unknown – and we have to face them with prudence and caution.

One of the most current problems is certainly the question of privacy in the world that increasingly moves to cyberspace. We can observe a new methods of processing the data, like cloud computing, ambient technology, chain of computerization and social networking[1] but the we rarely asking ourselves about regulation and laws that protects us from abuses and violations.

Right to privacy has been defined for a first time in the article written by two American lawyers (Samuel D. Warren and Louis Brandeis) as a "*right to be alone"*[2]. That publication laid the foundation for development of the idea of private life protection. Expanding in doctrine, conventions and judgment of courts - now, in 21th century, the right to privacy extremely significant part in the structure of human right (which is reflected in numerous publications and conferences devoted to it) – and this is a matter that should not even have to be discussed. However, the question arises – what can happen in the moment of a collision of this right with other rights and laws.

As we all know one of the tasks of the state is to safeguard public order and safety, and authorities have a lot of measures to do so. For example - when it comes to fighting with terrorism, one of the burning problems of today, our privacy is constantly restricted. But how wide should the competition of authorities in these limitations be? Can we be eavesdropped for the greater good? May the security services violate the secrecy of correspondence when the matter is urgent? And what about the legality of the evidence obtained in such a way?

In our work we would like to focus on those issues and analyze right to privacy and violations in criminal proceedings, as a sensitive topic, in view of European standards and

[1] J.C. Buitelarr, *Privacy: Back to the Roots. German Law Journal Volume 13 [No. 03]*, 2012, p. 1.
[2] Warrend and Brandeis, *The Right to privacy. 4 Harvard Law Review 193,* 1980.

the fruit of poisonous tree doctrine. We will present and discuss the cases related to that issue and in the end we wish to focus on the future of the right to privacy and the fruit of poisonous tree doctrine

2. European standards in criminal proceeding regarding the right to privacy – basic background.

2.1. Criminal proceedings in Europe

The international criminal law is a fresh conception and aims to connect the best features of international law, criminal law and criminal proceeding. It can be defined in two ways: horizontal (international cooperation between states in a matters like extradition and executing foreign criminal judgments) and vertical (cooperation between states in a matter of prosecution and penalising crimes of international law)[3].

Meaningful part in the process of creating the international criminal proceeding plays Council of Europe and regulations stated by that body - European Convention on the International Validity of Criminal Judgments (1970) pays attention to the questions of respecting human dignity and supporting reclamation. Also, on the European level, the actions of EU cannot be neglected; but in the opposite to Council of Europe they are concentrating on fighting against organised crimes.

Apart from international level, the most important are still the national regulation of criminal proceeding in European countries. For example German criminal procedure law does not aim to convict the accused at any cost, and sentence have to be based only on the *"procedural truth"*. Clarification can only be found in legal means and by following designated paths allowed by procedural law[4]. However in Poland the agencies responsible for the proceedings *shall make a decision on the basis of their own conviction, which shall be founded upon evidence taken and appraised at their own discretion, with due consideration to the principles of sound reasoning and personal experience*[5].

[3] Joanna Banach-*Gutiérrez, Europejska współpraca w zwalczaniu przestępczości*, p. 3.
[4] Folker Bittmann, *Dessau- Roßlau, Consensual Elements in German Criminal Procedural Law. German Law Journal Vol. 15 [No. 01],* 2014, p. 2.
[5] *Polish Code of Cirminal Proceeding,* article 7.

Other issues related to the criminal proceedings in the European countries, and their approach to the matter of the evidences importance, we will discuss on specific examples of juridical decisions.

2.2. Criminal law and proceeding in a view of privacy. Violations and exceptions from the right to privacy.

Criminal law and criminal proceedings inevitably interfere in our privacy. That happens in case of the collision of our personal rights with the public interest. Public monitoring can sometimes have positive impact on public safety and the telecommunication operators gather data to increase the quality of their bid. If so, the right to privacy is definitely not the absolute right and, as most of the public rights and civil liberties do, have to be considered, as the subject of numerous restrictions. However it does not mean that related to its issues should be neglected.

The efficiency of privacy protection, without any doubts, depends on implementation of law, jurisdiction and procedural warranties. Significant role is played by the principle of proportionality of public right restrictions and the function of these restrictions.

P. Alldridge has named three aspects of privacy protection In criminal law: penalisation of some actions, crimes against privacy and its protection, and criminal procedure standards, which allows for breach of privacy[6].

The first area in which the state can enter our privacy is the mere fact of some behaviors penalisation with the material law. For listing deserve the issues like:

- incest,
- termination of pregnancy,
- the issue of gender change,
- cosmetic surgery, sterilization, castration
- the right to die[7].

Legislative solutions differ from each other, depending on state. But still it can be observe, that they always touch the most important and urgent matters like abortion or euthanasia. The question is looming: how wide can the scope of person's autonomy and

[6] Arkadiusz Lach, *Granice badań oskarżonego w celach dowodowych. Studium w świetle reguły „nemo Se ipsum accusare tenetur" i prawa do prywatności*, Toruń 2010, p. 83.

[7] Andrzej Sakowicz, *Prawnokarne gwarancje prywatności,* Kraków 2006., p. 196-315.

his right to privacy be interpreted. The role of the state, as guarantor of the public order and compromise between some particular values - between which the conflict cannot always be easily solve- seems to be necessary

Criminal law regulations also concerns positively our right to privacy, by protecting them from violations. Criminalization of the behaviors which protect widely understood individuals' can be illustrated in few categories:

-sexual life, as an element of privacy, protection,

-communication and private secrets protection,

-guarantees on home inviolability,

-personal data protection.[8]

However the most important matters in view of our paper are the one related to criminal proceeding itself; to its abuses and violations. Abuse of the law in frames presented by P. Rescigno[9] is detachment of law implementation from *ratio* legal protection. We will try to look more exactly at the abuses and violations connected with the concept of privacy.

Protection of the right to privacy in criminal proceeding is relatively new problem. It can be called, quoting P. Hofmański, the *out-of-proceeding right,* which remains of the edges of doctrinal concerns, but it does not mean at all that it stays free from violations and shouldn't be the object of attention.

No doubt, defendant retains the right to privacy, however in view of specific character of criminal proceeding, this entitlement can be more restricted than in case of others citizens. Functioning of criminal procedure (public hearing and temporary detention), inevitably results in restriction of the right to private life protection. Still possible restriction have to be an effect of law accounting earlier listed rules (proportionality principle and the principle of respecting the essence of the right to privacy).

The right to privacy usually does not give the defendant power to claim from process organs not to gatherthe information about him. The opinion of Canadian Supreme Court, that has decided, that defendant's agreement for collecting given up by him evidences is not necessary, if he remains at large, needs to be rejected[10].

[8] Ibidem, p. 319-379.
[9] P. Rescigno*, L'abuso del diritto*, Bologna 1998, p. 27.
[10] R. v. Stillman [1997] 1 S.C.R. 607.

Whereas privacy is strongly protected in the German Courts' jurisdiction, which does not let for admissibility of the evidence if it compels interference into someone's intimate sphere. Still this position carries the risks- taking private business over public interest seems to be highly doubtful, especially in case of the most serious crimes and when the gathered information have crucial meaning for the final sentence.

Creating the wide warranty system for privacy protection, appears to be reasonable solution for this conflict, used by such a polish institutions like exclusion of a public hearing because of the important private interest.

To fully understand the possible violations of the right to privacy in criminal proceeding, it's worth to consider the boundaries of examining the defendant for evidentiary purposes.

Examining the defendant is strictly related with interfering his privacy, which might pertain to violating informational autonomy or the integrity of his body. We can also investigate the admissibility of such an interference, European Court for Human Rights refers to article 8 paragraph 3 of CPHRFF, taking into account requirements which needs to be fulfilled:

-requirement of compliance with the law,

-requirement of justified objectives,

-requirement of necessity in democratic society.

Against these international regulations, it can be said about aggravated type of privacy violations, which have to be dealt in case of using tortures or inhuman or degrading treatment[11]. The Court distinguishes these three on the basis of the degree of discomfort, however there are no exceptions from prohibition of using these.

There are several interesting questions associated with these topics, in purpose of answering them, it's worth to reach for the judgements of ECHR.

Also meaningful are the issues with information coming from examination of defendant and there is a discourse in the doctrine: how to tell the difference between the sample and information about person. Recognition the sample from human body as personal data is rarely seen in Europe (for example Danish Data Protection Agency and, partially, Norwegian Data Protection Commissioner consider sample this way). However, that problem was met by European Court of Human Rights judgment in Marper case[12]

[11] Convention for the Protection of Human Rights and Fundamental Freedoms, article 3.

[12] Arkadiusz Lach, *Granice badań oskarżonego w celach dowodowych. Studium w świetle reguły „nemo Se ipsum accusare tenetur" i prawa do prywatności*, Toruń 2010, p. 106-107.

when court stated that samples are personal data in meaning defined by Council of Europe. That point of view - if it will be consequent - can brought a change of perspective in seeing problems with collecting and storage of the samples.

Regarding aggravated type of privacy violations we must refer to the case Jalloh v. German. The accused was observed by police, and plainclothes officers came to conclusion that he's taking the white little bags from his mouth - most likely drugs – and selling them to people. Called by the public prosecutor doctor applied the emetics to the Jalloh with the probe, which resulted in the return of one package of cocaine. Tribunal, after analysing admissibility of evidence, rejected the judgements of national courts and sentenced him not only for the violation of privacy but also for violation of article 3 of the Convention. Tribunal also accused the national proceedings of lack of fairness, due to the bad valuation of public interest in that case.[13]

In the case-law of European Court of Human Rights, regarding privacy, important are also subjects like: illegally searches and seizures, listening devices and video surveillance.

The first case, worth analysing, is a case Miailhe v. France. Mr Miailhe was honorary consul of the Philippines in Bordeaux and also looked after that country's consulate in Toulouse. He have had the double citizenship. Custom officers seized almost 15 thousand at the Mr Miailhe residence – it was part of an investigation about legality of his residence in France and alleging unlawful accumulation and holding of assets abroad. That case ended with the judgment of the Criminal Court in 1992 in which the court ruled that the public prosecution and the proceedings for imposition of customs penalties in respect of Mr Miailhe were barred as a result of changes in the criminal law and ordered the return of the seized documents. Meanwhile, Mr Miailhe challenged before the Strasbourg institutions the lawfulness of the customs seizures. The European Court of Human rights adjudicated that there had been a breach of Article 8 of the Convention – that the house searches and seizures, without judicial warrant, were in fact illegal and interfered the right to private life. Mr Miailhe first accused of a breach of the principle of equality of arms during the administrative phase of the proceedings, and secondly of a breach rights of the defense during the trial – but Court, in conclusion, stated that the

[13] Case of Jaloh v. Germany (Application no. 54810/00).

proceedings, taken as a whole were fair, and there has therefore been no breach of Article 6 paragraph 1[14].

When it comes to using of listening devices we must look on the sentence of ECHR in case Byrkov v. Russia. It will give us the good view for the human's right's situation in Russia, which also is a part of European Continent.

Mr Bykov, Russian businessman, was accused of killing two people. He have delegated the murder to a person from his entourage- V. V reported the incitement to the Federal Security Service. After police had have found two bodies V was asked to go to Bykov's house with recording device. Then Bykov's house was searched and he himself, was charged with conspiracy to commit murder and conspiracy to acquire, possess and handle firearms, and arrested. Next he was kept in detention for over one year an eight month. All his attempts to apply for relief were rejected. The court have found Bykov guilty of conspiracy to murder and punished him with 6.5 years of imprisonment. Supreme court have changed the qualification of an act into incitement to commit a crime involving a murder. In European Court for Human Rights Bykov have complained about: excessively long detention without sufficient reasons; unlawful searching, that brought intrusions to his home, interception and recording of his conversation with Mr V, amounted to interference with his private life and his correspondence, in breach of article 8, and that the trap was created for him to incriminate himself in conversation with V. He claimed that his right to fair trial was violated, and that the evidence should not have been admitted at all.

European Court for Human Rights have decided that long detention was in case of applicant unlawful, as there was no specific reason to prolong applicants' arrest. Court have however dismissed the accusation of unfairness in the trial, claiming that applicant have had many chances to challenge the methods used in the proceeding. About the violation of article 8th the Court have agreed with applicant that his right to private life has been abused, as the risk of arbitrariness was inconsistent with the requirements of lawfulness.[15]

In the matter of listening devices also relevant is case Khal v. United Kingdom. Sultan Kahn was convicted of drug-dealing on the basis of evidence improperly obtained by a secret listening device installed by the police. He complained that his trial was unfair, in

[14] Case of Mialihe v. France (Application no. 12661/87).
[15] Case of Bykov v. Russia (Application no. 4378/02).

breach of article 6 paragraph 1, on the violations of his right to respect for his private life and 13 ECHR (right to an effective remedy – not important regarding the privacy). Court stated in sentence a few important things. Noticed that in the time of case, there was no statutory system regulation of the using of listening devices and ruled that there was no violation of fairness guaranteed by article 6 of Convention. Therefore the Court found that the interference with the applicant's right to respect for his private life and his correspondence was not "in accordance with the law", as required by article 8 paragraph 2 ECHR and there was a violation of that provision[16].

For issues related to video surveillance, the Court referred in decision in case Perry v The United Kingdom. The accuser had been arrested for series of armed robberies and later temporary released. He failed to attend several identification parades, and police requested permission to video him secretly. He was taken to the police station and filmed by the custody camera – the pictures were complicated and used for identification purposes (Mr Perry wasn't informed about that). The two witnesses pointed him as a violator and later Mr Perry was convicted of robbery and sentenced for five years of the imprisonment. The Court claimed that police interfered with the applicant's right to respect for his private life and the officers not complied with the procedures (they didn't obtained Mr Perry consent or informed him about making the tape). The Court decided that despite of the apparent guilt of the Mr Perry, which appeared from other evidence and despite of the fact that he missed a few identification parades. But also stated that using at trail of material obtained without proper legal basis or through unlawful means will not generally offend the standard of fairness imposed by article 6, paragraph 1 of Convention.[17]

In the end, to the question of admissibility of evidence, case Uzun v. Germany can be applied. Nowadays, authorities invigilates us by new technology more and more and this case affects the urgent problems associated with GPS (Global Positioning System)[18]. The main question of the proceeding in ECHR was, whether it's legal for the police to install GPS in suspect's car. Uzun was suspected of attempting the bombing attack and killing people. Other methods, but GPS, weren't effective enough, as he has found video recorder and he's phone calls could be called restrained. In his proceeding in Germany one of the evidences were the tracks recorded by GPS. In Strasburg Uzun have been

[16] Case of Khal v. UK (Application no. 35394/97).
[17] Case of Perry v. The United Kingdom (Application no. 63737/00).
[18] Uzun vs Germany case (Application no. 35623/05).

complaining about abuses of his privacy (art. 8) and his right to fair trial (art.6) . Judges have decided that non of the articles was violated, as methods used by the police was consistent to the German law, which protect right to privacy sufficiently (only allows for using this kinds of methods when someone is suspected of the most serious crimes). EHCR has also drawn attention to the facts, that GPS gather less information than eardrops.

The other question is: would it also be admitted to be legal if it was polish police who used the GPS. There is no simple answer for that question: On the one hand few years ago Dr Adam Bodnar, quoting prof. Widacki: *I spoke with prof. Widacki. In his opinion, there is no legal basis in Poland to use GPS tracking. The concept of operational control can not be interpreted broadly. It is true that eg Police Act and the Act on the ABW speaks of "the use of technical measures enabling to secretly obtain information and evidences and their consolidating, in particular the content of telephone conversations and other information transmitted via telecommunications networks"*[19]*. However, this is a much broader concept than the German "detecting the perpetrator's whereabouts*[20]*"*

On the other hand cited above part of *Act on the ABW* can be interpreted differently . GPS devices could easily be classified as mentioned in act *technical measures enabling to secretly obtain information.*

Also art. 19 ust.6 of Act on the police [21] does not say anything directly about using GPS to operating activities. The problem is that ordinance which describes allowed forms more peculiarly is secret. There is no easy way to solve this problem, especially as police has refused revealing, if they use these method. The problem is definitely very urgent and followed by the question: if using GPS by police in case of suspicion of serious crimes was a common practice, wouldn't it lead after a few years to the absurd situation, when the GPS device would be install in every car, not only to detect serious crimes, but also to control the traffic violations.

In the further analyzes we would like to focus on the most complicated and controversial, because related to the Fruits of the Poisonous Tree Doctrine, kind of cases.

3. The Fruits of the Poisonous Tree Doctrine

[19] Act on ABW of 24.05.2002.
[20] http://prawo.vagla.pl/node/9193
[21] Act on Police of 6.04.1990.

3.1. .Historical background

During the years the view for obtaining the evidences in criminal cases have came a long way. Till the XIX centaury the answer for the question: "Does the evidences used in the process have to be gained in compliance to applicable law?" was usually "Yes".

The situation changed in 1886 with the Boyd v US case[22]. Boyd was suspected of bringing to USA 35 window glasses with violating the customs regulations. During the proceeding he was forced to show the invoice for the previous transaction, which was against the 5th amendment which says: *No person(...) nor shall be compelled in any criminal case to be a witness against himself(...)*[23]. However in the judgment of Supreme Court in this case many defects can be found (e.g. nothing has been mentioned about searching without warranty) it was the first step towards the Poisonous Tree Doctrine. The court have decided that even when the warranty for searching is given to the entitled organs, they are still only allowed to look for the evidences in the physical meanings and not search the books or private documents.[24]

Another significant event in US jurisdiction's was Olly's Week's case from 1914. This time Supreme Court has decided that securing, holding and searching private property without a warranty is a clear violation of the 4th amendment.

However, even before the violations of privacy during the investigation were condemn by the US Supreme court, in 1897 the French Parliament has stated the law which prevented courts from using evidences obtained with particularly strong violations.

Over the time the right to privacy during the investigation has started to be respected also in other territories. But before the Fruit of Poisonous Tree Doctrine was fully formulated another Mile Stone have had to appear. *Silverthorne Lumber Co. v. United States*[25] proceeding have caused the real storm. Silverthorne Lumber Co. was accused of evasion. To prove their fault the taxes books of the Company were illegally sized and copied. This way of collecting the evidences was qualified as the violation of 4th amendment and the derivatives of illegally gained evidences have started to be considered

[22] Stanisław Walteś, *Owoce zatrutego drzewa,* Kraków 1978, p.197.
[23] The Constitution of the United States, 5th amendment: *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation*
[24] Stanisław Walteś, *Owoce zatrutego drzewa,* Kraków 1978, p.198.
[25] Silverthorne Lumber Co., Inc. v. United States - 251 U.S. 385 (1920).

as tainted and inadmissible. After the few years the proceeding was known as the Fruit of The Poisonous Tree Doctrine.[26]

Nowadays Doctrine has a common application in USA jurisprudence, but is not regulated in any European Country expect from Germany[27]. According to some authors such a regulations are not a necessity in Europe because of the free assessment of evidences[28].

3.2. Theoretical Introduction

There is however the big dispute concerning the Doctrine. Nowadays no one dares to deny exclusionary rule. Still there is a majority scholars who deny excluding the entire *Tree* from the cases. So not only the illegally obtained evidences but also its derivatives. [29] This is definitely not an easy matter. For example, can the witnesses statements be included to the evidences if they have been forced to the confession by an illegal wiretap or entrapment?[30] Practically this kind of evidences are often admissible in US. Sabine Gless claims also, that in Germany common practice is looking for the way to turn the tainted evidence into legal. In this purpose exceptions are usually used.

Proves from tainted source are allowed to be used in the proceedings especially if they were collected at least as a part of a untainted source or if they would be discovered anyway (even without illegal measures). They are also two others situations when the evidences can be exploited, however the definitions are here blurred- first of all- the chain of causation between an illegal action and collecting the evidence can be proved to be not strong enough. The second situation is when the warranties of organs for searching are not valid, but they are taking an action in the good faith[31].

However many years have passed since the doctrine has been first formulated and the standards in both European Union and America have become more exact, they are still

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[26] Stanisław Walteś, *Owoce zatrutego drzewa,* Kraków 1978, p.232.
[27] Katarzyna Wencel, *Owoc zatrutego drzewa?,* Warszawa 2010, p.20.
[28] A. Laskowska*, Dowody w postępowaniu cywilnym uzyskane w sposób sprzeczny z prawem,* w: *Państwo i Prawo*, nr 12/2003, s. 90.
[29] Sabine Gless, *Truth or due process? The use of illegally gathered evidence in criminal trial,* University of Basel, 2010,p.692.
[30] Ibidem, p.693.

[31] Humphrey Humberto Pachecker, *Nafa's Blue Book: Legal Terminology, Commentaries, Tables and Useful Legal Information*, Xlibris Corporation, 2010,p.353.

many ways in which Fruit of the Poisonous Tree Doctrine could be violated and interpreted. Especially with the developing technology there are now much more measures than ever, which make it easier for the organs to infringe it.

3.3. Practical application

Question when the privacy infringement is strong enough to exclude the source and all its evidences from the trial is definitely one of the most important questions, worth reflection. Sabine Gless [32]tries to answer this, introducing three-spheres-approach for personal data collecting. First sphere concerns public and social context- so the speeches and conversations which are conducted in the official situation- according to the author evidences which came from this sphere (e.g. recordings) are legal to be used. Then the sphere of dispute appears- so the conversations which have the private context but have been accidently exposed to public. Sabine Glass claims, that in such a cases allowance for using an evidence depends on weights of both- private and public interest. And in the end there is sacrosanct private sphere- *the diaries never meant for other eyes*[33]. Under no circumstances this kind of registers might be used against the defendant, as it would be an attack on his dignity. View presented by Mrs. Glass is however highly criticised, as the boarders between the spheres cannot be determined clearly, and each case demand individual approach.

Writing about theoretical assumptions of Doctrine it is impossible not to mention about another important problem connected with the topic- how far the evidence can be from its illegal source to be admissible? Can the verbal statement made as a result of officers' illegal activity still treated as the derivative of illegal action? This question can be well illustrated by the Wong San v. USA trial from 1969[34]. In 1959 in San Francisco federal agents have entered the Laundry of James Toy, who, on the basis of the tip, was suspected of selling the heroine. The officers haven't owned neither the search or arrest warrant. However after revealing their identity, they have made Toy condemn Johny Yee as a drug dealer. During Johny's Yee's hearing agents have found out, that heroine was given too Yee by earlier suspected Toy and another man Wong San. Judge in the District Court of California have decided to allow all gathered evidences. During the appeal

[32] Sabine Gless, *Truth or due process? The use of illegally gathered evidence in criminal trial,* University of Basel, 2010,p.685.
[33] Ibidem, p.686.
[34] Wong Sun v. United States, 371 U.S. 471 (1963)

proceeding Supreme Court of USA has however excluded Toy's oral statement made during illegal entry and derivative Yee's statement, alleging that 4th amendment has been violated.

This case shows how wide the interpretation of Poisonous Tree Doctrine can be, and that not only material evidences can be included into its scope. In the further part of our papers we would like to present and analyse the cases in which violation of the right to privacy during obtaining evidences took place, the cases in which Fruit of the Poisonous Tree was applicable, and cases which connect both this issues. If so, we will be considering cases in which searches, wiretappings or private dates and correspondence have been used illegally to proved defendant's guilt. In some cases also the self-incrimination's and the physical invasion appear. Of course it does not mean that doctrine cannot be violated in many others ways.

4. Jurisprudence of European courts and tribunals - the matter of evidence obtained with the violation of right to privacy and poisonous tree doctrine.

However there are numbers of judgments concerning Poisonous Tree Doctrine in the jurisdiction of US, only few of these can be found in European Court for Human Rights cases[35], as the doctrine is not regulated in most countries laws'. Though that we would like to present them in our work anyway hoping that they will lead us to the conclusions. We will also present one Polish case which have not been considered in ECHR, but have relatively strong meaning for further development of the doctrine implementation.

4.1. Welke and Białek v. Poland[36]

First case we would like to focus on is *Welke and Białek v. Poland*. Dorota Welke and Paweł Białek were accused of smuggling drugs to Brasil. The package addressed for the name of their friend and picked up by them was captured by the police on the border. Officers have changed the substance into similar looking one and put the wiretapping into

[35] hudoc.echr.coe.int

[36] Case of Welke and Białek v. Poland, (Application no. 15924/05)

the package without the allowance. Then they have let Welke and Białek pick up the shipment and arrested them, recording their conversations earlier. Polish Court decided for exclusion of the public from the hearing. Also the telephone conversations recorded by the wiretapping were excluded from evidences. The court have found defendants guilty of participating in smuggling and punished them with one year of imprisonment and fine. They have however appealed to the second instance. The court of appeal also have excluded of the public from the hearing and have changed the legal qualification of the action from the participating in the smuggling into unsuccessful attempt.

Welke and Białek have decided to appeal to the ECHR, claiming that however the evidence of wiretapping was excluded from the hearing the judges have been familiar with them, so their judgment could not be objective and other evidences were not sufficient to find the defendants guilty. They have also accused Polish court of misconduct, as the hearing was excluded from the public, and all the act related to the case were only available for the defendants and their attorneys in special room, from which any notes could not have been carried out. They stated that it has significantly influenced their chances to defend. Considering the second accusation ECHR have agreed with Polish courts claiming that: *The Court does not find that the authorities' decision to maintain the confidentiality of the evidence obtained by means of secret police methods of investigation may be considered arbitrary or otherwise unjustified in the present case. Here, in contrast to Polish lustration proceedings which concerned materials classified as confidential under the former regime (see, Matyjek, cited above, § 56), there exists for the Court an actual public interest in maintaining the confidentiality of the evidence obtained by secret police methods of investigation related to the prosecution of drug-related offences*[37]

However, I would like to focus mostly on the first accusation, as it it's strongly connected to the Fruits of Poisonous Tree Doctrine and violation of the right to privacy. ECHR have decided that admissibility of evidences shall not be left to the decision of tribunal as its major tasks is to be the guardian of compliance with obligations created under the Convention. The Tribunal judges as follow: *57. The Court reiterates that its duty, pursuant to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the*

[37] Case of Welke and Białek v. Poland, (Application no. 15924/05), point 63.

Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (…).

58. It is, therefore, not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible. The question which must be answered is whether the proceedings as a whole, including the way in the evidence was obtained, were fair. [38]

Major point that should be noticed, talking about the Fruits of Poisonous Tree Doctrine is the fact that Tribunal does not consider the rule formulated in the doctrine as the superior. And that should not be surprising, as the Principle is not the part of any official European Legal Acts or Conventions. However a bit unexpected might be the fact, that entire matter of evidences' admissibility have been left for consideration only to the domestic law.

4.2. Gäfgen v. Germany

Second case we would like to analyze is the best known case related to the Fruit of the Poisonous Tree Doctrine one. *Gäfgen v. Germany*[39] used to be a famous case, as it highlights the issue of the Doctrine extremely well. Before presenting the case we wish to make an assumption that torturing, inhuman and degrading treatments and also other interferences in someone's psychological sphere, like manipulating or exerting a pressure should also be qualified as violation of the right to privacy.

In 2005 the law student Magnus Gäfgen have kidnapped a child of a bank clerk demanding 1 million euro ransom for returning a child. Before the ransom was given to him he have killed his victim. Still, as no one have known about the murder he have received the money. But since then he was observed by police and got arrested by them. During the interrogation he was beaten by the officers, as they wanted to know where the victim is. The officers have also been threatening defendant, claiming that more sophisticated forms of violence could be used against him. Under that pressure Gäfgen

[38] Ibidem, points 57-58.

[39] Case of Gäfgen v. Germany , *(Application no. 22978/05)*

have self-incriminated himself, admitted to killing kidnapped child and indicated the place where body was hidden, so it could have been examined.

In the Court Gäfgen demanded the exclusion of the evidences derivative to using the violence (so his admission to killing the victim, and the results of body examine), as it was the Fruits of the Poisson Tree. He has also admitted to the murder again. The Court in Frankfurt have dismissed his application and sentenced him to the life imprisonment. During the appellation Supreme Court have confirmed this judgment.

In Strasburg Gäfgen has accused German Courts of tortures (3rd article of the convention)[40] and violation during the proceeding. claiming that evidences should be excluded (6th article of the Convention[41]). ECHR have judged that conditions to sue for the 3 article of the Convention have been fulfilled, as the consequences incurred by the officers were disproportionate to the offense. It has however decided that Gäfgen wasn't tortured but Inhumanly and degradingly treated.

About the admissibility of evidences the court has judged that admitting to the murder in the court Gäfgen have broken the chain of causation between gathering and using the evidences. The Tribunal predicated also that 6th article of the Convention wasn't violated and that even without admitting to the crime in the police office verdict would be the same and evidences claimed to be the Fruits of the Poisonous Tree were of little importance for the finale verdict. In the substantiation of the judgment the ECHR also concludes that in unlikely to the article 3rd of the Convention, the right to fair process does not have the absolute character. Usually illegally gained defendant's explanations and other evidences gathered thanks to this explanations should be excluded, otherwise the whole proceeding can be classified as unfair. However it is possible to use the evidences obtained illegally if they are not crucial for the case[42].

Some of the judges have severely criticised this substantiation, reproaching that this case was the great occasion to assume an consistent attitude about the Fruit of Poisonous Tree Doctrine. Common European approach to these doctrine still does not exist. Worth noticing is also the fact that ECHR have condemned using tainted evidences in general but allowed for using them in some cases. Leaving this kind of freedom in interpretation, leads to the conclusion, that the matter of Doctrine still remains totally unregulated.

[40] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.09.1950, art 3.
[41] Ibidem, art.6.
[42] Małgorzata Wąsek-Wiaderek, *Przegląd orzecznictwa Europejskiego dotyczącego spraw karnych*, Zeszyt nr 1-2/2010, p.21.

4.3. Criminal Trial against Beata Sawicka[43]

Beata Sawicka was accused of obtaining the financial benefits by attempting to set up the public tender. Main evidences in her case were the testimonies of witnesses from Central Anti-corruption office (CBA), sound transmissions and visual recordings gather by illegally installed cameras and wire tapes. The attempting of setting up the public tender, accepting a bribe, and also incitement to further briberies were the results of CBA provocation. The whole provocation were registered and then Beata Sawicka and Mirosław Wądołowski (the Major of Hel, who have also been participating in procedure) sued. However CBA had no reason to induce Ms. Sawicka at first District Court in Warsaw have found Ms. Sawicka guilty of obtaining the financial benefits and punished her with three years of imprisonment and fine.

Due to numerous formal deficiencies, both sides- Mrs Sawicka and the prosecutor have appealed. Mrs Sawicka claimed that during the proceeding a few acts were violated: The Act of 9th June 2006 about CBA, Polish Code of Civil Procedure and two most important acts: The Constitution of the Republic of Poland of 2nd April 1997 (art. 2 , art. 7, art. 30 and 45), and European Convention of Human Rights(art. 6 – the right to fair trial). The violations concerns the evidences obtained in the illegal way by abusing the frames of competences foreseen for operations of CBA. The procurement on the other hand demanded aggravation of the penalty because of the offense of the provisions of the Criminal Procedure. According for the procurement e.g. some of the evidences have not been taken into account.

After reconsideration of the judgment the court of appeal have acquitted Mrs. Sawicka, explaining the judgement as follows :*As CBA did not own any clues that could indicate for criminal attempting of Mrs. Sawicka, all operational activities carried to her were unlawful and illegal. Gathered thanks to these operations materials cannot be evidences of the defendant's guilt*(...) *It's also obvious that illegal (because beyond the competences) activities can not be a source of legal evidences in the fair trial criminal procedure(...) All the operational notes, audio and video records, and testimonies of witnesses engaged in provocation are tainted evidences, as all the operations against Mrs. Sawicka were against the law.*

[43] Judgment of Second Penal Department of the Court of appeal in Warsaw, II AKa 70/13.

In democratic state of law conducting the operational provocation, without compatibility with basic statutory requirements, cannot be have a effects in evidences sphere..[44]

As the basis of judgment art 7. of polish constitution is cited: *The organs of public authority shall function on the basis of, and within the limits of, the law.*[45]

After this judgement the procurement has submitted the cassation to supreme court, but the judgement of supreme court have sustained courts' of appeal judgement.

Case in the whole can be acknowledged as ground breaking. The judgment is in accordance with all the respect for human right to privacy and applicable standards of Polish and European Law. Also Polish Courts have never before agreed with the Fruits of The Poisonous Tree Doctrine (like they haven't in Welke and Białek Case). Is this the new tendency in polish jurisprudence, or just one time hazard? As the case is very recent this question cannot be yet answered. One thing is for sure- Fruit of the poisonous tree doctrine is not and has never been regulated in polish law. This judgment might be an optimistic forecast of the changes that are coming.

5. Summary

We hope we have shown in our work, that protection of privacy is a worldwide issue especially in case of the conflict of privacy and public interest. On the one hand- it appears everyone should have unlimited right to keep some things only for himself, and each state's interference would be its violation. Too flexible approach to protecting the right to privacy, as the history has shown could also lead to emerging of authoritarian regimes.

On the other hand the point of criminal proceedings is their effectiveness. Creating the state of law, in which all the crimes are prevented, or detected, proved and fairly punished, is no doubt a public interest. The main question is however, where the boundaries of legal interference should be?

Similar problems appear, when considering the Fruits of Poisonous Tree Doctrine: should we adopt the American proceeding's model of formal truth and pretend that the crime wasn't committed, because the evidences were obtained with violations of some fundamental right? First of all this kind of solution would prevent at least some of the further violations regarded to gathering the evidences and would be indisputable guarantee

[44] Ibidem, p.52-53.

[45] The Constitution of the republic of Poland of 2nd April, 1997, art.7: *The organs of public authority shall function on the basis of, and within the limits of, the law.*

of human dignity and his fundamental rights (in view of our work especially of the right to privacy). On the other side, sometimes (as it was in case of Gäfgen, where the life of the child was thought to be in the jeopardy) the higher values require abusing the privacy in order to prevent something even more important.

Fortunately ECHR, as the highest instance in cases concerning human rights, discerns this kinds of the conflicts of interests. It is an effective way to assert human's rights and provides a remedy for frequent impunity of the state. This international body shall make an objective assessment of how the state organs came into possession of evidence against the accused, highlighting the importance of national regulations in this matter. However the even Jurisdiction of EHCR shows, that even the illegal source of evidences is usually not a sufficient argument for courts to exclude the evidences.

From the judgements we have analysed, the picture of ECHR's jurisdictional pattern is emerging. ERHR protects the right to privacy and indicates its illegal violations, but not always connects this violation with abusing the law to fair trial. According to ECHR it depends mostly on the law of considered country; on the existence of appropriate regulations and procedures. Blurred regulation of these issues can lead to undesirable situation, when the surveillance of citizens will remain out of control and out of the constitutional order and then invasion of personal privacy could not be way justified in any way – even with the importance and significance of the criminal proceedings.

Most broad conclusion from our work may be the statement, that the principle of the proportionality should be the one taken into account while deciding about the admissibility of some using the instruments, which could limit the right to privacy by the state organs. In the end this principle enables to draw the lines, between the unlawful invasion of privacy and that, which can be justified by the law.

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