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ELIMINATION OF ILLEGALLY OBTAINED EVIDENCE AS A GUARANTEE OF COMPLIANCE OF THE POLISH CRIMINAL PROCESS WITH FAIR TRIAL REQUIREMENTS

One does not need to be very sagacious to see (to paraphrase the statement by Ch. Perelman, a Belgian philosopher, that "life is a continuous swing between justice and righteousness")[3] that the criminal process is a continuous swing between substantive justice and procedural justice. It should be added that procedural justice is a situation where the entities conducting a process act in accordance with the law, the conscience, and with the best intents to achieve substantive justice. The possibility of a conflict of "interest" between these two types of justice is self – evident, the same as setting in opposition to the principle of substantive justice the guarantee function of a criminal process, which is aimed to protect the fundamental values, i.e., for example, the human dignity and rights of an individual in the process and, in particular, the right to defence and the freedom from self – incrimination.

The principle of substantive truth, provided for in art. 2 § 2 of the Code of Criminal Procedure (CCP) established the requirement that all determinations must be based on true factual findings; consequently, the verdict must implement the principle of appropriate penal reaction. Consequently, this translates to the duty to search for and gather data,

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3 Ch. Perelman, O sprawiedliwości [On justice], Warsaw 1959, p. 23 ff.

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both by the entity conducting the process and by the parties involved in the process. After all, it is not permissible to strive to discover the truth at any price, by using information obtained in an illegal manner or by limiting the fundamental rights of individuals. One must not forget that the suspect's (defendant's) guarantees are mechanisms of defence of his or her subjective right in a criminal process.

It is obvious that evidence must be obtained legally; consequently, procedural activities performed in this regard by the entities conducting the proceedings should be based on law and performed within its limits. This requirement is derived not only from the respective code but, most importantly, from the principle of rule of law set forth in art. 7 of the Constitution of the Republic of Poland. As the literature on this subject emphasizes, while individuals are free to act in accordance with the principle that what is not expressly forbidden by the law is permitted, the public authorities may act only where and to the extent that the law authorizes them to do so.[4] Entities conducting the proceedings must take a better care of the honesty of their process activities than of the criminalistic tactics, which must also fit within the legal boundaries.[5]

Moreover, proper proceedings related to gathering of evidence are one of the determinants of a fair process, as the right to a fair process is a fundamental right of every person in democratic, law – abiding states, and observance of fair trial requirements guarantees the rule of law in a state and the protection of any and all rights and freedoms of individuals. This is confirmed by the verdicts by the European Court of Human Rights (ECtHR), e.g. the verdict of 5 February 2008 issued in the Romanauskas v. Lithuania case.[6] The Court stated that "while the use of undercover agents may be tolerated provided that it is subject to clear restrictions and safeguards, the public interest cannot justify the use of evidence obtained as a result of police incitement, as to do so

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4 W. Skrzydło, Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. A commentary], Zakamycze 2002, p. 252.

5 S. Waltoś, Proces karny. Zarys systemu [The criminal process. An outline of the system], Warsaw 2009, p. 335.

6 The judgment of 5 February, Ramanauskas v. Lithuania, no. 74420/01, § 54.

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would expose the accused to the risk of being definitively deprived of a fair trial from the outset."[7]

Of note is the verdict of the ECtHR of 10 February 2009 in the Iordachia and others v. Moldova (25198/02)[8] where the Court found that Moldova's government breached art. 8 of the Convention, among others by allowing for an excessively broad subjective scope of application of operational control. The complainants were members of the Lawyers for Human Rights organization which represented Moldovan citizens in proceedings before the ECtHR. In their complaint they claimed that because of the Moldova's laws that regulate wiretapping and control of mail (one of the shortcomings of the regulations was manifested in the fact that such measures could be used in proceedings against undefined groups of "very serious and exceptionally serious crimes" which, in the opinion of the complainants, resulted in the possibility to use wiretapping in proceedings against over a half of all crimes enumerated in the penal code) and because of the success the organization has experienced in proceedings against Moldova before the ECtHR, its members could be subject to control of correspondence and tapping of their telephones. The complainants presented statistical data they obtained from the Moldova's Supreme Court, which showed that the number of motions for use of surveillance measures that were approved by Moldovan courts had systematically increased since 2006, and amounted to 99.24% of all motions in 2007.

The Court shared these concerns. First, in the opinion of the ECtHR, the nature of the offenses against which the use of telephone tapping is allowed was not defined with sufficient precision in the Moldova's laws because over a half of the types of offenses enumerated in the Moldovan penal code could be used as a basis for the use of wiretapping.

Second, the Moldovan laws did not define precisely enough the categories of persons against whom wiretapping could be applied.[9] This

7 See: The judgment of 26 October 2006, Khudobin v. Russia, no. 59696/00, § 128; The judgment of 15 December 2005, Vanyan v. Russia, no. 53203/99, §§ 46–47.

8 The judgment of 10 February 2008, *Iordachi & Ors v. Moldova*, no. 25198/02.

9 The Court considered the concept of 'foreseeability' and referred to the earlier decision of *Weber v Serbia* (no. 54934/00, 29 June 2006, §39) in which the Court noted the risk of arbitrariness where a power vested in the executive is exercised in secret. They said: "It is … es-

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is because the laws provided that wiretapping could be used against a suspect, a defendant, or any other person involved in a criminal offense. However, it was not clearly defined who was covered by the last category. Consequently, the ECtHR expressed the opinion that a third party, against whom wiretapping has not been administered originally must enjoy the right to an effective protection by the court. In the opinion of the ECtHR, if the third party calls a number that is being monitored or uses the number, the person may become subject to monitoring. Therefore, in order to prevent violation of the third party's rights, he or she must enjoy the same protection of the domestic and European law as a person against whom wiretapping was originally ordered.

Third, the Moldovan regulations did not establish a clear time limit for the use of wiretapping which, in the opinion of the ECtHR, was necessary as a part of the minimum standard of protection of the rights of individuals.

What is important is that the Court concluded that there have been police provocations where the officers involved (service members or persons acting upon their orders) did not stop at passively observing the criminal acts but exerted pressure on the person subject to their activities and provoked him or her to commit a criminal offense which the person would not have otherwise committed, in order to obtain evidence and initiate the proceedings.

In many cases, however, during search for evidence, observance of the requirement of loyalty to the prosecuted person by the entities involved in the proceedings becomes very difficult. Therefore, in parallel with the activities undertaken, norms are defined in order to protect citizens against illegal behavior on the part of the government, i.e. an effective system of legal protection.[10] In particular, the role of

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sential to have clear, detailed rules on interception of telephone conversations… The domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures." See also: *Malone v. the United Kingdom*, 2 August 1984, § 67, Series A no. 82; *Valenzuela Contreras v. Spain*, 30 July 1998, § 46 (iii), Reports 1998-V and *Bykov v. Russia* [GC], no. 4378/02, § 76, ECtHR 2009.

10 P. Hofmański, Ochrona praw człowieka [Protection of human rights], Białystok 1994, p. 19.

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the court in the wiretapping procedure should not be limited. In issuing a permission for a wiretap, the court has the right to become familiar with the results of the covert surveillance, which should be delivered to it.

An example is the regulations found in the Code of Criminal Procedure (CCP), referred to as evidential prohibitions, which are aimed to protect the fundamental human rights and freedoms and, consequently, the individual interests of persons holding important posts or performing important jobs, whose goods or interests are at least as important as the efforts to discover the objective truth.

Evidential prohibitions can be considered to be regulations that prohibit conducting an evidence gathering procedure in certain conditions or regulations that preclude the use in the trial of a specific source or evidential measure.[11]

The doctrine identifies several categories of evidential prohibitions. Those categories are[12]:

1. Prohibitions to use specific sources of evidence, to include:

– absolute prohibitions – applicable in any circumstances:

a) examination as a witness of the defence counsel or advocate who has made contact with the detained person (art. 245 § 1 of the CCP), as to the facts that he or she has learned when giving legal advice or running the case (art. 178 (1) of the CCP); it is also not permissible to use documents or letters connected with the performance of the function of the defence counsel (art. 225 § 3 in connection with art. 226, 1st sentence, of the CCP);

11 K. Marszał, Proces karny [The criminal process], Katowice 1998, p. 178.

12 J. Tylman, T. Grzegorczyk, Polskie postępowanie karne [The Polish criminal procedure], Warsaw 2010, p. 436 ff; see also: Z. Kwiatkowski, Zakazy dowodowe w procesie karnym [Evidential prohibitions in the criminal process], Kraków 2005; M. Rusinek, Tajemnica zawodowa i jej ochrona w polskim procesie karnym [Professional secret and its protection in the Polish criminal process], Warsaw 2007.

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b) examination of a priest as to the facts that he has learned during a confession (art. 178 (2) of the CCP);

c) examination of persons who have the duty to keep a secret concerning mental health (doctors, nurses, medical aid staff, etc.) with regards to the statements of a person who has been examined in connection with the commitment of a prohibited act by this person (art. 52 (1) of the Act of 19 August 1994 on mental health protection, Journal of Laws no. 111, item 535, as amended);

d) examination of a physician providing medical help as well as an expert concerning the statements made before the physician or expert by the defendant regarding the act that the defendant has been accused of (art. 199 of the CCP); this prohibition does not pertain to an expert who uses technical measures during the examination in order to control unconscious reaction of the defendant's body (art. 199a of the CCP);

e) examination as an expert and obtaining the opinion of a person who must not be appointed as an expert (art. 196 of the CCP);

– relative prohibitions – applicable under certain conditions:

a) examination of persons required to keep state secrets concerning circumstances whose secrecy must be maintained, unless they are exempted from this duty (art. 179 of the CCP); this prohibition also pertains to documents containing a state secret (art. 226 of the CCP);

b) examination of persons required to keep official secrets concerning circumstances whose secrecy must be maintained, unless they are exempted from this duty (art. 180 of the CCP); this prohibition also pertains to documents containing an official secret or a professional secret (art. 226 of the CCP);

c) examination of persons who have the right to refuse to testify or who have been exempted from this duty (art. 182, 185, 186, and 416 § 3 of the CCP);;

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d) requiring that a witness who is not the victim undergo bodily examinations or checks without his or her consent (art. 192 § 4 of the CCP);

e) examination, as witnesses, or appointment as experts or translators of persons enjoying diplomatic or consular immunity, without their consent (art. 581 and 582 of the CCP).

2. Prohibitions concerning the use of evidence, covering:

a) explanations, testimony, and other statements made in conditions that preclude freedom of expression (art. 171 § 4 and § 6 in princ of the CCP);

b) explanations, testimony, and other statements made under hypnosis or the influence or chemical agents or technical measures that influence the mental processes of the person being interrogated or are intended to control the involuntary reactions of the person's body in connection with the examination (art. 171 § 5 (2) and (6) in fine of the CCP);

c) contents of letters, notes, or official notes in lieu of a defendant's explanations or a witness's testimony (art. 174 and 393 § 1, 2nd sentence, of the CCP);

d) testimony of persons who have the right to refuse or who are exempt from the duty to give testimony, if they have decided to take advantage of this right or exemption (art. 186 § 1 of the CCP);

e) opinions expressed by persons who may not be expert witnesses (art. 196 § 2 of the CCP);

f) contents of conversations or other information transfers obtained by way of a wiretap conducted in breach of the terms of permissibility of such activities (art. 237–238, and 241 of the CCP);

g) contents of documents or characteristics of items acquired in breach of the terms of their acquisition (art. 217–220 of the CCP);

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h) contents of testimony given by the defendant acting as a witness (art. 391 § 2 of the CCP);

i) contents of the parts of the defendant's explanations or the witness's testimony recorded in the report that may not be read out during the hearing (art. 389 § 1 and art. 391 § 1 of the CCP);

j) contents of private documents made during the criminal procedure and for purposes related to the criminal procedure (art. 393 § 3 of the CCP);

k) explanations given by the suspect who has requested to be given the status of an immunity witness but who has been denied it (art. 6 of the Act on immunity witness – hereinafter referred to as the AIW)[13].

3. Prohibitions to prove certain facts:

a) groundlessness or incorrectness of a valid convicting judgment (e.g. in connection with a process for a cumulative sentence; art. 569–577 of the CCP or art. 64 of the Penal Code);

b) existence of another right or legal relation than the one validly established by a constitutive court verdict (art. 8 § 2 of the CCP);

c) course of deliberations or a vote over the court's verdict, as these are covered by a secrecy that cannot be repealed (art. 108 § 1 of the CCP);

d) contents of testimony given by a witness who had the right to refuse to give testimony and who exercised this right, as well as a witness who has been exempted from the duty to give testimony after having given such testimony (art. 186 § 1 of the CCP);

e) information on the place of stay or employment and issue of documents that allow for using personal data other than one's

13 Act of 25 June 1997 on immunity witness, Journal of Laws of 2007, no. 36, item 232, consolidated text.

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own, concerning a person who has obtained the status of an immunity witness as well as his or her closest relatives (art. 14 (1) and (4) of the AIW).

It is true that practically each evidential prohibition is a kind of a process prohibition and including a specific source, evidence, proof, method of gathering evidence under this kind of process norm leads to its inadmissibility.

Unfortunately, despite the fact that the criminal procedure laws define certain rules for obtaining evidence and describe so broadly the evidential prohibitions, in the work of entities conducting the proceedings there are situations where the evidential prohibitions and the general conditions for obtaining evidence are breached and the evidence used in the proceedings has been obtained illegally.

The Code of Criminal Procedure does not use the term "illegally obtained evidence;" however, it comprises phrases such as "must not," "it is not permissible," and "cannot be used as evidence."

The term "illegally obtained evidence" has been devised for the needs of the doctrine, whose representatives distinguish between evidence that is directly illegal (directly tainted) and indirectly illegal (indirectly tainted, fruit of the poisonous tree), i.e. obtained after illegal taking of evidence.

The prohibition to use evidence obtained in the course of an illegal (conducted in breach of the statutory conditions) wiretap, search, control of correspondence, or police provocation, etc. is not derived directly from the Code of Criminal Procedure, either. There should be no major doubts concerning the above statement; consequently, it should be assumed a priori that such evidence should be admissible. However, the question arises whether this position is in conformance with the Constitution of the Republic of Poland, e.g. with art. 41 (1) pertaining to the search of a person, art. 49 pertaining to control of correspondence, art. 50 pertaining to search of premises, and art. 45 (1) of the Constitution which establishes, e.g., the right to a fair consideration of a case by a proper, independent, and impartial court, and the corresponding art. 6 (1) of the Convention on the Protection of

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Human Rights and Fundamental Freedoms, which guarantees the right to a fair trial.

Other questions that arise are: Is the use of illegally obtained evidence in a process in conformance to art. 2 of the Constitution, which establishes the principles of a democratic, law – abiding state, and the aforementioned principle that "public authorities act on the basis of and within limits of law" (art. 7 of the Constitution)?

Before we answer these questions, we should make the fairly self – evident statement, which is close to the dogma of criminal procedure and quite different from the actual actions of law enforcement agencies, and which considers substantive truth to be of utmost importance: Guarantees in the area of evidential law lead to the requirement to consider each case based on evidence that is provided for in a specific procedural system or does not violate this system, i.e. is legal. The doctrine of the criminal evidential law rightly emphasizes that "it is in the evidential sphere that the guarantees of individuals' rights in criminal processes are anchored; only based on respect of these guarantees can a criminal court's verdict be considered to be correct."[14] This allows for observing the procedural justice, which must not become defective or less important in the search for the substantive truth.

Even without studying the acquis constitutionel, one can conclude that it is wrong to accept situations where officials of the state, i.e. of public authorities, can collect evidence in breach of applicable laws and that citizens could be legally held criminally responsible based on such evidence. As the Supreme Court was right to emphasize in its verdict of 30 November 2010[15], the legislator does not assume that its officials will act illegally and does not need to define the consequences of such behavior in the area of evidential law when such consequences can clearly be derived by analyzing the whole legal system that forms the principles of criminal responsibility of all citizens.

To be more specific, evidence can be considered as illegally obtained when:

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14 Z. Doda, A. Gaberle, Dowody w procesie karnym [Evidence in a criminal process], Warsaw 1995, p. 22.

15 Verdict of the Supreme Court of 30 November 2010, III KK 152/10, not published.

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1) it comes from an "illegal source," i.e. when the evidence was collected despite the prohibition to do so;
2) the evidence was obtained in breach of the statutory conditions;
3) the evidence was obtained in breach of the applicable criminal process regulations.[16]

As far as the first situation is concerned, it can be easily concluded that what is in question is a situation directly related to the evidential prohibitions, e.g. questioning of a defendant's defence counsel, which is not permissible due to the prohibition to use the evidence obtained in the course of such questioning, or the evidence consisting in a thesis which does not need to be proven, e.g. in the course of a deliberation and by voting. Of note is art. 171 § 5 (1) and (2), which provides that it is not permissible to influence the statements of the person being questioned by way of force or an illegal threat and to use hypnosis, chemical agents, or technical means to influence the mental processes of the person being interrogated or to control the unconscious reactions of the person's body in connection with the interrogation.

Evidence becomes illegal due to the way it was obtained when the statute defines the strict conditions for permissibility of such evidence and the evidence was obtained in breach of such conditions. Of note is the verdict of the Supreme Court of 30 November 2010, where the Court found that failure to observe the statutory conditions for permissibility of operational–reconnaissance activities defined in art. 19a of the Act on the Police prevents the use of the evidence obtained in the course of such activities, and the earlier verdict of the Supreme Court of 22 September 200917 where it concluded that "while the Police – in order to reconnoiter, prevent, and detect crimes and misdemeanors and to detect and determine the perpetrators – has the right to undertake operational–reconnaissance activities (especially those defined in art. 14 (1) and art. 19 (1) in principio of the Act of 6

16 Z. Kwiatkowski, Zakazy dowodowe... [Evidential prohibitions...], *op. cit.*, p. 358.
17 Verdict of the Supreme Court of 22 September 2009, III KK 58/09, OSNKW 2010, no. 3, *item* 28.

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April 1990 on the Police18, the necessary condition for considering the materials obtained in the course of such activities as evidence in criminal proceedings to be revealed under art. 393 § 1 of the CCP is the determination that the materials have been obtained and recorded in a way that conforms to the statutory requirements that are suitable for different categories of threats to the legal order in connection with which the activities have been undertaken."

With this in mind, one must not presume that a court's permission for a specific operational control legitimizes collecting any information obtained in the source of such a control. This is because the court's permission may cover only the scope of activities and information collected in their course that meet the conditions enumerated in art. 19 (1). One may not presume that the court's permission covers also "incidental" collection of materials pertaining to crimes other than those mentioned in art. 19 (1) of the Act on the Police. The court may not give such a permit and the recordings of the materials collected in the course of the operational control must not be used as evidence in a trial as such materials are inadmissible.[19]

The court may not collectively legalize all the actions taken "during" an operational control, as this would lead to situations where the means of protection of public security in the form of legally permissible operational control themselves constitute a threat to freedoms. This is especially true when any limits imposed are arbitrary and not commensurate with the potential threats and are excluded – either legally or factually – from the control exercised by courts.

Nevertheless, an operational control can result in obtaining evidence that simultaneously (in the sense of being recorded on one information carrier) constitutes a proof of perpetration of a criminal offense mentioned in art. 19 (1) of the Act on the Police and a proof of perpetration of another crime. In the first case, it is possible to use the subsequent permission, defined in art. 19 (15c) of the Act on the Police,

18 Act of 6 June 1990 on the Police, Journal of Laws of 2007, no. 43, *item* 277, consolidated text.

19 Cf: Verdict of the Supreme Court of 22 September 2009, II KK 58/09, OSNKW 2010, no. 3, *item* 2.

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which provides that if, as a result of an operational control, a proof was obtained of perpetration of a crime or a fiscal crime that can be subject to operational control, and if the crime was perpetrated by a person against whom operational control was used, and the operational control was ordered in connection with a different crime, or if the crime was perpetrated by another person, then the court which issued the order for the operational control or approved it in accordance with art. 19 (3) of the Act on the Police, decides on a permission to use such proof in criminal proceedings upon request of the public prosecutor mentioned in art. 19 (1) of the Act on the Police. The public prosecutor can file his or her request with the court within a month after he or she receives the materials obtained through the operational control from the Police or within two months after the control is completed (art. 19 (15d) of the Act on the Police).

In situations where legal wiretap resulted in obtaining information on other so – called non – catalogued crimes, such recordings should be immediately destroyed by an appointed committee, with the fact confirmed by a report (art. 19 (17) of the Act on the Police). This is due to the fact that, according to art. 19 (17) of the Act on the Police, the term „obtained evidence allowing for initiation of criminal proceedings or important to criminal proceedings in progress" is defined only as evidence demonstrating perpetration of criminal offenses enumerated in art. 19 (1) of the Act. The legislator did not provide for the possibility that courts issue a permission (even a subsequent one) for gathering or using information that pertains to other offenses than those enumerated in art. 19 (1) of the Act on the Police. Thus, in the event that information pertaining to other offenses than those enumerated in art. 19 (1) was collected and used in the course of an operational control, there are no control procedures as such information cannot be the subject of either prior or subsequent permission of the court. There are no reasons for interpreting this matter otherwise based on other operational – reconnaissance activities, whose use is connected with the formal condition taking the shape of the catalogue of criminal offenses.

The illegality of evidence may also result from the way it was obtained, i.e. from formal standards. A good example is art. 171 § 7 of the CCP which provides that explanations, testimony, and statements

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obtained in violation of the prohibitions enumerated in art. 171 § 5 (1) and (2) may not be used as evidence. In its verdict of 17 April 2003[20] the Court of Appeals in Katowice found that questioning of a victim immediately after a medical procedure performed under narcosis leads to obtaining of evidence in conditions that exclude freedom of expression. According to art. 171 § 6 of the CCP, such testimony cannot be considered as evidence and its use in a trial is inadmissible.

In the context of illegally obtained evidence there is a problem related to evidence that is indirectly illegal, which in practice is much more controversial. It is possible that in the course of procedural activities the absolute or relative evidential prohibitions are breached and that the information obtained as a result of such activities indicate another evidence, which was obtained in a correct way. The question here is whether and to what extent indirectly illegal evidence can be used. This is a very complex matter, as the Polish laws do not include provisions concerning the so – called fruit of a poisonous tree. Even though the doctrine is not unanimous about this issue, generally speaking in most cases when making various proposals representatives of the doctrine reject the concept of fruit of a poisonous tree and propose, among other things, rehabilitation of an indirectly illegal action, for example a defendant's admission of guilt obtained under duress, which was later offered voluntarily, or use of only material evidence obtained this way, if it constitutes an autonomous evidence, and even, in extreme cases, observance of the principle of substantial truth as the most important value in the process and use of indirectly illegal evidence without any limitations, thus giving it the status that allows it to be used as a basis for making factual findings.

Nevertheless, some judicial decisions categorically reject the possibility to use the fruit of a poisonous tree. An example is the verdict of the Court of Appeals in Białystok of 18 March 201021 where the court clearly finds that the use in a trial of evidence that constitutes the so – called "fruit of poisonous tree" is inadmissible, as it does not

20 Verdict of the Court of Appeals in Katowice of 17 April 2004, II AKa 75/03, OSA 2003, no. 10, item 97.

21 Verdict of the Court of Appeals in Białystok of 18 March 2010, II AKa 18/10, http://bialystok.sa.gov.pl/pliki/orzecznictwo/2010/II_AKa_18_10.pdf.

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meet the fundamental constitutional standards and violates civil rights. The court remarked that "the values protected by art. 5 and art. 7 of the Constitution (protection of human and civil freedoms and rights and the principle of Law – Abiding State), and in particular the requirement imposed in art. 9 of the Constitution that the Republic of Poland must observe international laws that are binding upon it, make inadmissible the use by state authorities – in any form and for any purpose – of information about citizens which does not have the attribute of legality. The observance of such requirements is guaranteed by the prohibition to use such information, even indirectly, in further proceedings."

It must be emphasized that the situation in this case was that the Border Guard, who conducted a legal wiretap, obtained information on illegal abortion and then transferred this material to the Police. Because the aforementioned criminal offense is not included in the catalogue of operational control of either the Act on Border Guard or the Act on Police, gathering information concerning this offense through operational control is not permissible and such information cannot be used as evidence in a trial. Consequently, the issues considered by the Court were whether such information can be used by the entities to initiate and gather evidence that is formally legal and whether evidence collected in this manner can constitute grounds for indictment. Can the knowledge gained by the entities conducting the proceedings by way of operational activities, which cannot be used directly as evidence, be a means to achieve the objective of obtaining evidence to be used in a trial? The opinion of the Court of Appeals in this case was clear: it found that using evidence that constitutes the so – called "fruit of a poisonous tree" in a trial is not permissible as it does not meet the fundamental constitutional requirements, violates civil rights, and is in conflict with international conventions to which Poland is a party.

While it is reasonable to agree with the Court of Appeals' conclusion concerning inadmissibility of materials from operational control to be used as a basis for indictment and including them in the files of the proceedings, even though at the stage of the court proceedings the public prosecutor did not ask for revealing them and including them as evidence, there are doubts as to the prohibition concerning the use of these materials (considered to be fruit of a poisonous tree) as a source of

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information about a criminal offense. To follow the court's reasoning, if the fiscal intelligence agency, which also is authorized to conduct operational control under art. 36c of the Act on fiscal control[22], obtains information about homicide (which is not listed in the catalogue in art. 36c of the Act on fiscal control), it must not pass this information to the Police, and if it does so, the Police must not initiate proceedings based on this information and continue with procedural steps , because this information has been obtained illegally.

The opinion, expressed by the Court of Appeals in Lublin, that "even a public interest of great importance may not justify breaking laws that regulate the search for and obtaining evidence by wiretapping (operational control – the Authors' comment), as this would frustrate the constitutional protection of civil rights and the court's control of interference with the rights' essence" deserves full support.[23] Nevertheless, this thesis should be broadened cautiously to include initiation of proceedings on the basis of own information, in particular in observance of the principle of legalism (art. 10 § 1 of the CCP) which requires of the entity to initiate and conduct proceedings with regards to acts that are prosecuted ex officio. Thus, the verdict in question provides an innovative approach to the matter in question, which will largely limit initiation of proceedings on the basis of own information obtained by law enforcement agencies.

In the context of the above – mentioned verdict, one may also consider a situation where materials from an operational control are read during a hearing, the information included in the materials is confirmed by the defendant in his explanations, and the defendant admits guilt; later it turns out that the evidence obtained by way of operational control was illegal because the so – called subsequent permission of the court was not obtained for the evidence. It is certain that such material will not be a basis for a verdict and will not be included as evidence. This is because the judicature emphasizes that the finding of illegality of a wiretap causes the evidence to become invalid and inadmissible

22 Act of 28 September 1991 on fiscal intelligence, Journal of Laws of 2011, no. 41, item 214, consolidated text.

23 Verdict of the Court of Appeals in Lublin of 18 May 2009, II Aka 122/08, not published.

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in a process, i.e. considered for the purpose of making a verdict, even though the recorded calls are played during the hearing. It must also be mentioned that the subjective – objective boundaries drawn by the legislator, intended to define the conditions for permissibility of an order to use a wiretap, give the wiretap guarantee characteristics and preclude any deviation from this legal principle.[24]

What about the explanations obtained in this way and the admission of guilt, which confirmed the information included in the materials from the operational control that was obtained without the court's subsequent permission? Can they be used as evidence? If we definitely reject the evidence that is indirectly illegal, then issuing a verdict based on such evidence is not permissible; if a verdict is issued based on such evidence, the verdict can be contested under art. 438 (2) of the CCP by demonstrating that the breach of the procedural regulations did influence the content of the verdict.

One may suspect that the legislator did not regulate this matter on purpose in order to leave it to be considered by the entities involved in the process under art. 7 of the CCP, i.e. in accordance with the principle of free examination of evidence. However, it appears that the problem has become more serious and it would be good if the Codification Committee considered introducing in the Code a regulation that would establishes the inadmissibility of indirectly illegal evidence; if such a prohibition is introduced, it should pertain to every piece of evidence obtained in such a manner.

The Codification Committee should also work on the issue of elimination of illegally obtained evidence from criminal proceedings. The current laws do not provide for a procedure of exclusion of illegally obtained evidence, even though the possibility to disqualify it can be derived from some provisions of the Code of Criminal Procedure, namely art. 170 § 1 and 171 § 7 of the CPC.

The judicial decisions emphasize that the entity conducting the proceedings has the duty to eliminate evidence that has been obtained illegally even before it is presented, in accordance with art. 170 § 1 of

24 *Ibid*

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the CCP[25], i.e. when presentation of the evidence is not permissible. Of course, this term includes the evidential prohibitions discussed earlier. Thus, if an activity included among evidential prohibitions has been conducted, e.g. interrogation of a priest, then such an activity must be considered as non – permissible. It must be emphasized that this provision becomes applicable even before presentation of illegally obtained evidence, which means that evidence that is illegal must not appear in the proceedings. Thus, if any of the parties makes a motion for presentation of legally inadmissible evidence at the stage of the preparatory proceedings, the evidence should be eliminated by the public prosecutor; if the evidence is allowed, it should be disqualified by the court.

Elimination or disqualification of evidence can also be based on the aforementioned art. 171 § 7 of the CCP which provides that explanations, testimony, and statements made in conditions that preclude freedom of expression may not be used as evidence. This means that it may not be revealed in any manner, i.e. read, included as evidence without reading[26], may not constitute a basis for the verdict in the case, or be considered by the court in the substantiation, to include written substantiation, except for making the finding and conducting the evaluation that the statements have been obtained in conditions defined in art. 171 § 6 of the CCP.[27]

In its verdict of 1 December 198028, the Supreme Court stated that "in the event of a claim, made before a court of first instance, that explanations or testimony of persons who were interrogated in the course of preparatory proceedings were given by such persons in conditions that precluded their free expression, the court must first determine if such conditions did in fact occur and only then, if the court has found that this was the case, it must determine if the evidence is credible." This leads to the question of who bears the burden of proof

25 Verdict of the Supreme Court of 24 October 2000, WA 37/00, not published.
26 Verdict of the Supreme Court of 22 February 1978, I KR 12/78, OSPiKA 1979, book 7–8, item 142.
27 Verdict of the Supreme Court of 20 January 1975, SN II KR 243/74, PiP 1978, book 8–9, p. 168.
28 Verdict of the Supreme Court of 1 December 1980, II KR 328/80, OSNPG 1981, No. 6, item 73.

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or of demonstrating the high probability that the evidence was obtained in violation of freedom of expression provided for in art. 171 § 5 of the CCP. In this verdict, the court concluded that "to apply the procedure defined in art. 171 § 7, it suffices to demonstrate high probability."

One may wonder what happens in situations where the public prosecutors, at the preparatory proceedings stage, illegally obtains a piece of evidence or do not notice its illegality. It appears that various solutions can be recommended for such situations. The initiative in this matter could be taken by the parties who could request the public prosecutor to verify the legality of the evidence and, if the evidence is found to be illegal, to disqualify it.

If it is the public prosecutor who introduces illegally obtained evidence into the proceedings, the best solution would be a possibility to make a motion to verify the evidence in the proper court for trying the case. Of course, this would require expanding the scope of activities performed by the court in the course of preparatory proceedings.

One could also consider contesting the public prosecutor's actions by filing a complaint with the court, which would require expanding the list of prosecutor's actions that are subject to a complaint.

The third proposal, the introduction of a judge to deal with issues related to preparatory proceedings, is connected with the works of the Codification Committee. The judge should not act ex officio, but rather react to requests of the parties (the public prosecutor, the suspect, and the victim). The judge would be authorized to perform the following actions[29]:

1) approval of seizure of objects, search, wiretap, psychiatric observation, and other actions interfering with constitutional freedoms and rights;
2) discharge from the duty to keep an official, professional, doctor's, and journalist's secret;

29 Opinion of Professor Jerzy Skorupka of the Wrocław University for the Criminal Law Codification Committee of 17 March 2010, titled "Model postępowania przygotowawczego i sądowego" [The model of preparatory and court proceedings], http://bip.ms.gov.pl/pl/dzialalnosc/komisje–kodyfikacyjne/komisja–kodyfikacyjna–prawa–karnego/konferencje/rok–2010/.

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3) questioning of a suspect or witness, if required by the court (if there is a concern that it will not be possible to examine the witness during a hearing);
4) elimination from the process of information (evidence) that has been obtained in violence of a statute.

One could go even further and assume that a non–permissible act is more than formally invalid because it is forbidden and, to follow S. Śliwiński's argument[30], to consider that invalid acts should be considered as null and void and having no legal consequences from the moment of their commission and, as such, not requiring confirmation of their deficiency.

The thesis proposed by Z. Sobolewski[31], who makes consideration of elimination of evidence dependent on whether this evidence incriminates or exonerates the defendant (suspect), cannot be considered to be right. This is because he concluded that the decision concerning exclusion of incriminating evidence obtained in the course of preparatory proceedings is made by the public prosecutor and, if it is necessary to eliminate exonerating evidence, the public prosecutor must file a request with the court, provided that the public prosecutor will also file an indictment act. In the author's opinion, this "would make it possible (...) for the other party to express its opinion regarding permissibility of a piece of evidence that is important to it, and to avoid suspicions that the public prosecutor eliminated a piece of evidence that is "inconvenient" to the indictment."

It appears that, regardless of whether the statement obtained contrary to the prohibition established in art. 171 § 7 of the CCP (which cannot be used as evidence) is advantageous or disadvantageous to the defendant, considering such statement from the point of view of its impact on the defendant's interests, is not permissible because all findings in a criminal process, both advantageous and disadvantageous

30 S. Śliwiński, Polski proces karny przed sądem powszechnym. Zasady ogólne [The Polish criminal process before common courts of law], Warsaw 1948, pp. 423–425.

31 Z. Sobolewski, Samooskarżenie w świetle prawa karnego (nemo se ipsum accusare tenetur) [Self–incrimination in the light of criminal law], Warsaw 1982, p. 123.

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to the defendant, may be made solely (with the exception of art. 168 of the CCP) on the basis of evidence.

It must be emphasized that as of today there is no separate procedure to exclude illegally obtained evidence in the course of proceedings. Also, no form is anticipated for elimination of illegally obtained evidence. Of course, it is possible to support one of the opinions expressed in the doctrine. Z. Sobolewski[32] believes that the form should be a decision, while Z. Świda–Łagiewska[33] supports the form of a separate decision or a remark in the part of the substantiation of the verdict ending the process (a decision to discontinue the process, or the sentence) or the part of the substantiation of the procedural act that ends a stage of the process (the indictment act). On the other hand, A. Czapigo[34] is of the opinion that if, during the preparatory proceedings, it turns out that the explanations or testimony have been obtained in violation of art. 171 § 1–4 of the CCP, then, when filing the indictment act with the court, the public prosecutor must omit the reports from the interrogation of the suspect or interview of a witness. On the other hand, if the breach of art. 171 § 1–4 of the CCP is discovered in the course of the main hearing, then the court, in the substantiation of the verdict, must indicate the reasons for not considering the explanations or testimony obtained in this fashion as evidence in the trial.

The issue of elimination of illegally obtained evidence is of particular importance in consensual forms of ending of criminal proceedings, in particular to "conviction without a trial" (art. 335 in connection with art. 343 of the CCP) and voluntary submission to a penalty (art. 387 of the CCP). This is due to the nature of these institutions and the potential danger is connected with the lack of hearing of evidence, as according to art. 335 in connection with art. 343 § 4 of the CCP a hearing of evidence is not held. In the case of voluntary submission to a penalty, a hearing of evidence is not held if the court accepts the defendant's

32 *Ibid.*, p. 123.

33 Z. Świda–Łagiewska, Dyskwalifikacja dowodu w trybie art. 157 §2 k.p.k. [Disqualification of evidence in accordance with art. 157 § 2 of the CCP], Nowe Prawo 1984, p. 54.

34 A. Czapigo, Dowody w nowym kodeksie postępowania karnego [Evidence in the new code of criminal procedure], in: P. Kruszyński, ed., Nowe uregulowania prawne w kodeksie postępowania karnego z 1997 r. [New regulations in the 1997 code of criminal procedure], Warsaw 1999, p. 183.

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motion to issue a convicting verdict without a hearing of evidence and to impose on the defendant specific penalties or penal measures. Moreover, according to art. 394 § 2 of the CCP, which is referred to in art. 343 § 4 of the CCP, the reports and documents that are to be read during a hearing may be considered as released in full or in part without being read. However, they must be read if any of the parties requests it. The situation is similar with regards to art. 387 of the CCP which provides that, in accepting a motion for voluntary submission to a penalty, the court may considered as revealed the evidence enumerated in the indictment act or documents submitted by the party.

The judicial control of legality of evidence in accordance with art. 335 in connection with art. 343 of the CCP and art. 387 of the CCP is illusory, and so is the procedure for eliminating illegally obtained evidence from the proceedings. Nevertheless, the judicature emphasizes that the court considering a motion made in accordance art. 335 of the CCP should analyze the content of the agreement reached between the public prosecutor and the defendant and check if it is in line with the factual and legal findings made based on the evidence gathered in the case. The institution of conviction without trial requires a detailed analysis of the defendant's explanations, as it may turn out that his or her admission of perpetration of an act and guilt is not confirmed by the evidence. In such a case, after the discrepancies between the defendant's explanations and the gathered evidence are discovered, the court considering the motion must strive to verify the motion and change it, as well as to amend it by way of a repeated agreement of the parties. If such an agreement is not possible, then under art. 343 § 7 of the CCP, the court should state the lack of grounds for accepting the motion and should try the case in accordance with the general principles[35].

An analysis of the above – mentioned regulations leads to the conclusion that they highly limit the possibility to verify evidence. After all, only a comprehensive evaluation of all evidence and the resulting circumstances may lead to discovery of substantive truth and actual facts.

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35 Verdict of the Court of Appeals in Katowice of 21 January 2010, II AKa 379/09, OSProk. i Pr. 2010, No. 7–8, *item* 38.

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In conclusion, the entity conducting the process that breaches the conditions for legal implementation of a wiretap, a search, a correspondence control or, for example, a provocation, rules out the possibility to use the results of its actions as evidence. Moreover, such an entity should bear the legal consequences of breaching the law, e.g. in situations where the incorrect presentation of the factual circumstances that justified the issue of an order for a "police provocation" and made it possible to obtain the court's permission to conduct it was the only reason why such actions were conducted and why any evidence was gathered.

In ending these remarks on the prohibition to use evidence obtained in violation of the statutory conditions, on the ways to discover the substantive truth, and the risks connected with imposing limits on the right to defence, one must be aware of the differences between the lex (positive law) and the ius (law applicable due to its internal value). Speaking more generally, the former term refers to law that is based on the legislator's fiat. The latter term refers to law whose validity is justified by its internal equity. It is ius that is founded on norms of higher order which define the scope of the legislator's competences.[36] The content of law does not influence its application, at least as long as the law does not violate the constitutional principles protecting personal freedoms. When evaluating the application of ius what is of key importance is not its formal validity but rather, as the Germans say, Geltung[37]. The existence of a law is determined by way of a formal check of its validity, while the possibility of its application is determined by its pertinence. A search for such absolute values as the ius, justice, and inalienable human rights, always requires a religious pilgrimage. However, it is worthwhile to look for the exiological bases of the lex, not only the one manifested in the Code of Criminal Procedure, as is in the case of the subject matter of this article, but the lex manifested in the Constitution and in the international law pertaining to the protection of

36 I do not intend to refer here to the interesting considerations of the contents of the ius, on whether it would be the "internal equity," "the law of reason," "an autonomous value," or perhaps "universal justice," or "protection of human rights." J.W. Montgomery, Rozważania nad „Ius et Les" [Deliberations over "Ius et Lex", Ius et Lex 2002, No. 1, pp. 31–34.

37 The distinction between formal validity and material pertinence is suggested by the sub – heading of the book by Jürgen Habermas; Jürgen Habermas, Zwischen Faktizität und Geltung, Frankfurt a. M., 1992.

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fundamental rights. By doing so we can quickly discover that achieving the objective (discovery of the material truth or prosecution of the perpetrator and liberation of the innocent person) is not the only value and that what also matters is how this objective is achieved. A balance between substantive justice and procedural justice is a self – evident requirement.

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STRESZCZENIE

Przedmiotem rozważań Autorzy uczynili zagadnienie eliminacji dowodów nielegalnych w polskim postępowaniu karnym. Jest to tematyka bardzo istotna z punktu rzetelności procesu bowiem prawidłowe procedowanie w zakresie gromadzenia dowodów jest jednym z jego determinantów. Zagadnienie eliminacji dowodów nielegalnych ważne jest także dla konsensualnych form zakończenia postępowania karnego, a szczególnie dla „skazania bez rozprawy" (art. 335 w zw. z art. 343 kpk.) oraz dobrowolnego poddania się karze (art. 387 kpk.). Co ciekawe w polskim procesie karnym nie ma konkretnej regulacji w zakresie eliminacji dowodów nielegalnych, dlatego też w opracowaniu zaproponowano różne rozwiązania w tym zakresie.

Autorzy wskazują także na kontrowersje związane z zakazem wykorzystania owoców zatrutego drzewa, który choć nie ma swego miejsca w przepisach kodeksu postępowania karnego zaczyna być realnie widoczny w orzecznictwie. W związku z powyższym Autorzy stanęli na stanowisku, że organ procesowy naruszający warunki legalności dokonania podsłuchu, przeszukania, lub kontroli korespondencji czy też np. prowokacji, przekreśla dopuszczalność dowodowego wykorzystania wyników swojego działania.

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