

COMPARATIVE LAW PERSPECTIVES ON THE EXCLUSION OF EVIDENCE
OBTAINED ILLEGALLY IN THE CRIMINAL PROCEEDINGS

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Abstract

Exclusion represents a sanction which the competent judiciary bodies apply in the cases when evidence has been obtained in illegal ways during criminal proceedings. It consists in the removal by the Court of that evidence which has been obtained illegally. By applying this sanction, the purpose is also to comply with the fundamental rights of the subjects from the criminal procedure.

The exclusion is an institution conceived by the common-law legal system, being taken over by the continental law system. In both law systems, it is applied differently, in some national legislations being applied as a mandatory rule in any infringement cases, in other being applied as stand-alone sanction, but only in certain conditions and when the competent courts of competent jurisdiction appreciate it is necessary for the proper course of justice and for keeping an unblemished image in relation to it.

A few comparative law perspectives related to the institution of excluding illegally obtained evidence in the criminal proceedings are presented in this study, according to the legislations of the different states of law which have embraced, as case maybe, common law or continental law legal system.

The author's conclusions and opinions regarding this institution of exclusion are presented at the end.

Keywords: exclusion, evidence, illegal modalities, rule

1. General aspects of exclusionary rule

In any law democratic system, be it the continental or common law system, criminal proceedings have the extremely important role of performing justice and achieving a balance between the interests of the individual and of the society, by finding the truth and by criminally sanctioning those proven guilty of committing offences. The criminal proceedings have to fulfill several functions, and among these we mention: the function of guaranteeing justice, that of correctness and that of preventing judicial errors. They can be understood as being wrong interpretations, beliefs and applications of sanctions, in good or bad faith, for those matters of fact and of law which occurred during the process of fulfilling justice (Butoi, 2014).

As it has been provided in the doctrine, the truth and its finding imposes the propriety of the way in which it is proved and the procedural correctness represents a guarantee – but not absolute – by itself, that the truth will be proved (Brants, 2009). In any law system, it is universally admitted the principle of finding the truth on the circumstances of an offence and the identity of the individual/individuals who committed the offence, only by gathering evidence to prove this truth. This is the reason why in any criminal law system, both the parties and the competent judicial

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bodies have the possibility to return to the collected evidence in order to sustain the accusation or the defense and to establish the extent of the eventual prejudices. The judicial bodies can obtain these pieces of evidence by reverting to some of them, respectively to those acknowledged and allowed by the law. One of the principles applicable in submitting the evidence domain is the principle of lawfulness and a fundamental principle of the criminal proceedings refers to its lawfulness. This principle of lawfulness of any criminal proceedings involves also the compulsoriness according to which the parties and their representatives, as well as the judicial authorities, should proceed only in the legal limits and in the procedural ways provided by law. This principle also imposes that the judicial authorities respect the procedural rights of the parties in the proceedings and guarantee their exercise, to contribute to legally and soundly solving the cases. In case these acknowledged rights of the parties are not respected, the invalidity of those acts abusively carried out will enter into force (Theodoru, 2013). The invalidity of the acts abusively carried out during the activity of gathering the evidence material in a criminal case will have as consequences, according to the legal provisions existing at each state level, the elimination of the evidence obtained through abusive or illegal means or declaring their invalidity or their exclusion based on the rule of exclusion and practically not using them during the criminal proceedings.

International law considers as abusive the following ways of obtaining evidence:

- manipulative and coercive hearing techniques which can have serious consequences in obtaining the statements, going up to obtaining false answers (Butoi, 2014);
- torture, as well as the usage of inhuman or cruel or degrading treatments, methods which violate the right of the individual to safety, and to the place of living and of belongings;
- as well as abusive search and arrest, etc.

At international level, the pacts and conventions on the human rights, as well as the International Covenant on Civil and Political Rights (ICCPR), the European Convention of Human Rights and Fundamental Freedoms (ECHR), the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, have stipulated the fundamental rights of the persons within criminal proceedings which have confining power, where a state can act legally for performing the criminal prosecution, judgment, conviction and sanctioning of the law-breakers and for ensuring the social security. A series of rights with fundamental character which are ensured by ICCPR and ECHR and by other conventions can produce effects also regarding the propriety of the procedures. In this sense, the right to keep silent and the presumption of innocence may be invalidated by the incorrect way the investigation bodies understand to respect the right to private life or by the use of a humiliating treatment against the suspect.

The international guarantees in the development of fair criminal proceedings are in close connection to the clear establishment of truth, without any doubts. The

defense against self-incrimination and preventing the usage of non-conventional persuasion methods during the interrogation periods, in connection to the right to keep silent, come both from the humanitarian concept that torture cannot be accepted, as well as from the reality that those declarations or confessions given by force are inconclusive and favor the production of a judicial error (Brants, 2009).

According to the internal legislation of each state, the removal or un-usage of the evidence obtained – directly and indirectly - will become effective in case illegal pieces of evidence are used. For example, they will be excluded in Romania, i.e. they are not being used or in some cases, they are declared null and void, as it is expressly stated by the provisions of art. 102 of the Criminal Procedure Code, which is currently in force.

The exclusion of the evidence illegally obtained can become effective according to the type of criminal proceeding, as a rule, in any case of evidence illegally obtained or as a possibility given to the Court with competence to rule. Similarly, in states like the US, the exclusion of illegally obtained evidence within the criminal proceedings shall always operate as a rule, whereas in Canada and Australia, this rule operates only in certain cases to which we will refer later in this study. In other countries, such as Japan, Great Britain, Germany and Romania, the exclusion will become effective, not always with mandatory character, but only by taking into consideration certain aspects regarding the social need.

If we try to formulate a definition of this institution of exclusion and of its role, we might say that the exclusion is meant to establish the certainty that any evidence obtained in the criminal proceedings by breaking certain legal provisions – expressly stated by the internal law of the state – will be removed or taken out from the allowable evidence. Thus, this kind of evidence will not be taken into consideration in the solution of the investigated criminal case.

2. The ways in which the exclusionary rule is applied in different law systems and its purposes

As mentioned previously, the exclusionary rule is applied in different states with different law systems. It is obvious that in all states, by applying this rule, it is desired to protect the fundamental rights of any individual, but we underline the reality that its main application purpose is different from one state to another, as we are going to present hereinafter:

A. In the USA, the Supreme Court states that the exclusionary rule guarantees that any evidence which has been obtained by the state by violating the Fourth Amendment from the Constitution of the USA will not be allowed in the criminal proceedings for establishing the guilt of the individual (del Carmen, 2010). This Fourth Amendment provides “the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath

or affirmation and particularly describing the place to be searched and the persons or things to be seized". (Avramescu, 2010).

Based on this rule, the "exclusionary rule", these pieces of evidence which have been obtained illegally and the secondary evidence are not allowed in the criminal proceedings (Boţic, 2016).

There is evidence illegally obtained the illegal goods or the goods found illegally in the possession of the suspect or defendant, the goods obtained through the offence committed, the instruments and means with which the offence was committed and other pieces of evidence which might prove the existence of a connection between the individual and offence, in case they have been illegally obtained. They could not be used in the criminal proceedings for establishing the guilt of the one accused, due to the illegal way it was obtained.

The derivate evidence, "fruit of the poisonous tree", is also excepted from being used in the criminal proceedings considering that, as long as the primary evidence is illegally obtained, than all the other evidence coming from the main one is impossible to be used in the proceedings, being also poisoned, the "poisonous tree" being represented by the primary evidence illegally obtained.

The practice and the specialty literature in the U.S.A. have concluded that the exclusionary rule operates in three specific cases, namely:

- implicit privilege - as a consequence of the natural interpretation of the constitutional provisions of the Fourth Amendment, according to which both the individual's right to be protected against the searches and seizures performed abusively, and the exclusionary rule are mandatory for the Court;

- protecting the judicial integrity - this feature implies the protection of Court's honor against its "staining", which might occur by allowing a deformed evidence. This characteristic feature is a consequence of the concern for the integrity of the criminal investigation bodies, of prosecutors and courts of justice, concern which determines the exclusion of evidence obtained through "unclean" methods in the criminal proceedings (Crocker, 1993). It is considered that admitting certain evidence in the criminal proceedings that is known to be flawed, is equivalent to the right of state authorities to suspend the fundamental law provisions and act illegally.

- a fundamental sanction of discouragement, but also of determining the revision of the state authorities' behavior having acted barely legally. Therefore, it is considered necessary that the judicial body should be discouraged to violate the laws which they are, actually, due to defend.

In the USA criminal law system, the main purpose of the exclusionary rule is not to encourage violations of all criminal investigation bodies, being used at both state and federal levels. The exclusionary rule basically raises awareness among the criminal prosecutors on the fact that those pieces of evidence that have been gathered illegally will not be accepted and used in court and thus, their work would be pointless, discouraging them in resorting to such actions.

As regards the procedure of applying these rules, we can note that in the USA, this sanction of exclusion will work only if it is requested by the subjects of procedural

law considering that one of their rights was violated. This request may occur at any time during the criminal proceedings, brought forward by the suspect or defendant, and even after a sentence has been pronounced, by the convict serving the sentence. The main procedure applicable for the exclusion of evidence by applying exclusion is that of a "pretrial motion to suppress" that evidence collected illegally (Boţic, 2016). Subsequently, if the preliminary application was rejected, it will be formulated again during the trial, at the moment of including the evidence which is the subject of request by resorting to a "contemporary objection" (Hall, 2009).

The proof of the unlawful way of obtaining evidence under the exclusionary rule lies, as appropriate, with the defendant or the prosecution, in relation to whether a valid search warrant exists or not. Hence, the obligation is with the defendant if the search was made based on a warrant, presumably that the warrant is valid. The task of the defendant will be to prove that the warrant was issued beyond any reasonable suspicion, in truth. On the contrary, the obligation to produce evidence will rest with the prosecution when the search is made without a valid warrant issued. They will have to prove the existence of reasonable suspicions or that the search was carried out in a situation exempted from the requirement of acquiring a prior mandate.

The exclusionary rule may be also relied upon when a conviction was already decided by way of using the special procedure "habeas corpus". It is a procedure aiming at releasing from prison a convicted person if his/her rights acknowledged by the constitution have been violated previously or during the trial.

As exceptions to the rule that illegally obtained evidence is excluded, the jurisprudence has accepted a series of cases when even illegally obtained evidence is accepted. The doctrine has divided these exceptions into four categories:

- a) the exception on good-faith, when the investigating body was reasonably mistaken;
- b) the case when the evidence was about to be discovered anyway, by legal ways;
- c) the case when the evidence is considered to be "laundered" off illegality by a willful act of the defendant;
- d) the case when the evidence could have been obtained from other independent sources, a proof to be made by the investigating authorities.

Legally speaking, the exclusionary rule, in the American legal system, is the result of the binding decision of the USA Supreme Court, not being though expressly provided in the Constitution of the United States.

B. In Canada, differently from the USA, in the Constitution, in the Charter of Rights and Freedoms, the exclusionary rule is expressly presented under art. 24 paragraph (2) according to which if in the trial referred to under paragraph (1) of this text of the law (i.e. a case filed by any person whose rights and freedoms provided in the Charter have been infringed or denied in order to remedy the situation by the legal court), the Court finds that the evidence has been obtained in a manner that violates or refuses to exercise any right or freedom guaranteed by the Charter, the evidence will be excluded

if it can be decided that in relation to all the circumstances, its admission would dishonor the course of justice (Božić, 2016).

When analyzing the admission of evidence or applying the exclusionary rule, the Court will have to analyze the following aspects imposed by the Supreme Court of Canada: the gravity of the illegal behavior of the State, the effect produced by not respecting the interests of the defendant protected by the Constitution, the interest of the society in solving the case judged only based on own actions and achievements.

In what concerns the “fruit of the poisonous tree” of paragraph 2 of art. 24 mentioned, it comprises a provision applicable both to main and to secondary pieces of evidence. Practically, the Courts will have to analyze the entire material situation where the evidence was obtained and in case a connection was identified, than the evidence is considered as being obtained in a way which violates the constitutional right in discussion and the Court will research the following essential aspect, respectively if by admitting the evidence, the image of justice achievement will be disadvantaged.

C. In Great Britain, another state with common-law regime, the application of the exclusionary rule is different from the modalities used in the U.S.A. and Canada. Here the rule is applicable in two different ways, namely: when there is the case of a statement which was given by force or imposed by force, the evidence obtained from it will be automatically and absolutely excluded by the Court of justice, considering that the evidence has lost the feature of plausibility. But when the evidence was obtained illegally, but following to using other modalities of taking the pieces of evidence than the statements, the Courts have the power to decide if they shall exclude the respective evidence or not. The rule practice has proved they are admitted (Božić, 2016). They shall apply the exclusion in these cases only if the admission of evidence shall have detrimental consequences towards the criminal proceedings’ fair character. In the cases regarding the evidence obtained incorrectly or illegally and during searches, it is not necessary to apply the exclusionary rule, the Courts having the freedom to decide if the admission of such evidence would bring prejudices to the act of justice and if the exclusion is necessary.

In other words, in Great Britain, the evidence exclusionary rule applies sometimes mandatorily - only in the case of the suspect or defendant’s declarations - and sometimes discretionary. There are norms of strict application regarding the individuals’ hearing procedure and in the situations when they are violated, drastic exclusionary sanctions are applied.

D. The same practice of Great Britain through which the Judge is actually given the possibility to decide on admitting or rejecting the illegally obtained evidence, has been taken over by Australia. Here, the Judge must analyze certain aspects, such as: whether the law infringement was done with intent or not, whether the illegality committed produced consequences in regard to the evidence plausibility, how simply the evidence could have been collected with compliance of the legal provision, the type of the offence investigated, if the procedures dealing with limiting the law enforcement

bodies have been violated, the existence of the emergency character in protecting the fragile evidence, the existence of some alternate evidences equally conclusive (Nuț, 2014). In continental law states the exclusionary rule has also been applied.

E. In Germany, there is no constitutional provision to interdict the usage of the illegally obtained evidence, but there are some legal provisions dealing expressly with the exclusion of such evidence. The exclusionary rule is put to application here only by reverting to the principle of proportionality which deals with the ratio between the individual's right to private life and the social need to prevent criminality (Nuț, 2014). In other words, applying this rule has not always had a mandatory character. It is applied mandatorily only in the domain of taking the statements of the suspect or defendant, but, in what concerns these procedural wrongs during the process of obtaining the evidence, they can generate the exclusion of evidence, but not mandatorily (Gless, 2010). In practice and in the existing doctrine, just due to the non-existence of some legal concrete provisions of exclusion of evidence obtained by the procedure which violates German legal provisions in the domain various interpretations and opinions have been highlighted. For example, the recent jurisprudence imposed for the possibility to exclude the evidence the necessity to formulate by the person whose rights have not been respected some express opposition to using the evidence obtained with infringement of its rights, formulation which can take place up to a certain phase during the proceedings, an aspect which has been criticized in the specialty literature. Mention must be made about the fact that in the jurisprudence it is allowed the use of the evidence directly obtained through illegal pieces of evidence from errors of procedure, when it was possible to be obtained by legal means. Secondary evidence is also not excluded.

All these practical perspectives are criticized in the legal literature, along with the provision according to which the Judge deciding upon the exclusion, having the competence to solve the matter of the criminal case, must also not take into consideration the conviction already formulated in his mind (Nuț, 2014).

F. In Romania, the new Criminal Procedure Code has entered into force on February 1st, 2014; by Law no. 135/2010, the legislator has had to fulfill the requests of the actual society to speed up and to reduce the duration of the criminal procedures and to form a unitary practice in harmony with the European Court's jurisprudence on Human Rights, as it expressly provided in the Substantiation report of the Law project on the Criminal Procedure Code in the form sent to the Parliament. A novelty brought by the Criminal Procedure Code in force, as compared to the previous one, is the mention that the evidence will have to help to discover the truth, fact which, according to what was discussed in the doctrine (Crișu, 2014), might be considered as a criterion for its admissibility.

The principles which stay at the basis of obtaining the evidence in the criminal proceedings, as it results from the provisions of the actual Procedure Code, are the principle of freedom of evidence and the principle of unlimited admissibility of the

pieces of evidence, as long as they highlight evidence which might help the person supporting it.

Another novelty brought by the Code in force is represented by the express provision, in article 101, of the principle of loyalty in taking the evidence, based on which, according to paragraph (1) of art. 101 Criminal Procedure Code, “it is not allowed to use violence, threats or any means of pressure, as well as promises or advice with the purpose of obtaining evidence”. At the same time, paragraph (2) of the same text of law emphasizes that “there cannot be used listening methods or techniques which affect the capacity of the person to remember and to recount consciously and voluntarily the facts which constitute the object of the evidence and that the interdiction applies, even if the listened person gives its consent to using such listening method or technique”. Also, according to paragraph (3) of art. 101, it is prohibited to the criminal judicial bodies or other persons who act for them to provoke a person to commit or to continue to commit some criminal deeds with the purpose of obtaining evidence.

The series of novelties continues with the introduction in the Code of an article (art. 102) named “the exclusion of evidence obtained illegally”, where the sanctions brought by obtaining the evidence by torture and by illegal ways are provided. Accordingly, in paragraphs (1), (2), (3) and (4) of art. 102 it is mentioned that “the evidence obtained by torture, as well as the evidence derived from it cannot be used within the criminal proceedings; the nullity of the act through which it was decided or authorized the admission of evidence or through which it was admitted determines the exclusion of the evidence”. At the same time, the secondary evidence is excluded if it was obtained directly from the evidence obtained illegally and cannot be obtained otherwise.

All these provisions of art. 102 of the new Criminal Procedure Code highlight the legislator’s intent to include in the evidence admissibility subject a new, specific procedure sanction, applicable in the case of obtaining evidence by not complying with the principle of loyalty and lawfulness and this specific sanction is “the exclusion of the evidence illegally obtained”. Besides this new sanction, there is another in operation, namely the nullity sanction. It deals with procedure and procedural acts which are performed with the violation of the legal norms.

The provisions of art. 102 of the new Criminal Procedure Code have brought confusions and different opinions in the specialty legal literature; some specialists have interpreted the law test in the sense that the sanction of exclusion will operate as effect of the nullity of the act through which the admissibility of evidence has been decided or authorized or through which the evidence was obtained (Crișu, 2014). In our opinion, others justly consider that the exclusion of the illegal evidence can actually be decided not through the institution of nullity, but as a procedural sanction which will operate automatically, autonomously. Rightly so, if its application was just a consequence of declaring the nullity, than, this sanction of exclusion should not have purpose, but we do not believe this was the legislator’s intention. Our firm belief is based upon the fact that the legislator has expressly included in the new Criminal

Procedure Code other provisions regarding the exclusion of evidence obtained with violation of the legal provisions. An example in this sense is given by art. 89 of the Criminal Procedure Code on the legal assistance of the suspect or defendant: in the latter thesis of paragraph (2), it is provided that the evidence obtained without complying with the right of the retained or arrested person to get in contact with a lawyer and to have confidential communications with a lawyer, will be excluded. Other examples are given in art. 190, paragraph (5) of the new Criminal Procedure Code, where the legislator refers to the “exclusion” of the evidence obtained by physical examination, and art. 345, paragraph (2) of the new Criminal Procedure Code, which deals with the procedure from the preliminary chamber, and where the “evidence exclusion” sanction is clearly delimited. For that matter, even art. 102 of the new Criminal Procedure Code has the marginal name “Exclusion of evidence obtained illegally”.

Other specialists appreciate that this exclusion sanction operates following to not complying with the legality and loyalty at the date of obtaining the evidence or its admittance, so that it can operate following to its nullity, but also as unique sanction (Novac, 2016).

As a conclusion regarding the application of the exclusionary rule in the Romanian criminal proceedings, the current preoccupations of the Romanian state in this domain are aligned with the ECHR judiciary practice. In this context, analyzing the institution of exclusion taken over from the common-law system and the continental system, first of all, the legislator has had in view to protect the individual’s rights and freedoms. This is the main reason for instituting the principle of loyalty of evidence. By this principle, we believe that the legislator wanted to place the focus on the way the evidence is obtained and how it is used in the criminal proceedings, in order to achieve its main objective, respectively to protect the individual, by ensuring the respect of his dignity and his right to a fair trial.

3. Conclusions

The exclusionary rule appeared in the common-law system and was taken over by other states with law continental system. It was used for the first time in the United States of America in the year 1886. In both systems, through its application, it is intended to protect the fundamental rights and freedoms of each individual, but it can be observed that in its application, the states have as main purposes different aspects. To this sense, we can mention that in the USA, for example, its application is achieved with the intent to discourage the deviations of the criminal investigation bodies. When the error in obtaining evidence is committed by a magistrate or by an employee of the Court, it is considered to be an exception from the rule, not existing the fault of a criminal investigation body (Boțic, 2016).

In what concerns the way the exclusion sanction is applied, differences have been identified. For certain, in the American legal system of criminal law, the exclusion operates as rule and mandatorily only in the cases of evidence illegally obtained with

the help of declarations given by the suspect or by the defendant; in the other situations, the Courts have the practical possibility to decide if it is necessary to exclude the illegally obtained evidence or not. This rule is also not applied identically in the states of continental law. In Germany, it is applied following to putting to practice the principle of proportionality, respectively after the effects against the individual's rights to private life, guaranteed by the Constitution and by the society's interest in fighting against criminality are put in balance.

In Romania, the new criminal procedure provisions have included as sanction the exclusion of the evidence illegally obtained but here also the Judge has the competence to decide if it is necessary to exclude such evidence, putting to balance the concrete situations from every case. In other words, we believe, that it cannot be said that an exclusionary rule applicable in any situation operates in the Romanian criminal procedure, but the competent Court can decide upon a sanction, which may be a special sanction, different from the nullity one.

In our opinion, the exclusion of the illegally obtained evidence must be applied, either as a mandatory rule, or as a distinct sanction in the matter of evidence admittance in the criminal trial. This way, the fundamental rights and freedoms of persons are protected, usually by stating and acknowledging them in the fundamental law of a state. At the same time these rights and freedoms are protected against abusive and arbitrary ways of action of the investigation bodies during the criminal proceedings.

As a result of the research carried out, we have observed that the exclusion is not applied as a rule in all legal systems, but on contrary, both in states with common law legal system and in the continental law states, the exclusion operates frequently as sanction, this decision being left up to the Courts; they have to decide according to the concrete situations they are confronted with.

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