RIGHT TO DEFENCE V. EVIDENCE PROCEDURES

ADMISSIBILITY OF EVIDENCE IN THE LIGHT OF EU LAW AND NATIONAL LEGAL STANDARDS

COUNTRY REPORT: POLAND

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1 EXECUTIVE SUMMARY

1 The rules on admissibility of evidence protect individuals' human rights, guarantee proportionality of state's interference in human rights and deprive the state the possibility to unfairly build additional advantage over individuals as well as preserve the moral integrity of the justice system.

2 The ECtHR's jurisprudence differently refers to the consequences of violating national regulation concerning evidence depending on the circumstances of the case.

3 Article 3 of the Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings[1] obliges the Member States to ensure that suspects and accused persons are presumed innocent until proved guilty according to law. The Access to a Lawyer Directive and the Presumption of Innocence Directive[2] obliges the Member States to provide an effective remedy in the event of a breach of the rights articulated in both of the directives. EU law does not define the form the effective remedy should take in criminal proceedings. Both the Access to a Lawyer Directive and the Presumption of Innocence Directive have not been fully implemented in the Polish legal system.

4 The Polish legislative arrangements on the admissibility of evidence are fragmented. These arrangements originate from provisions of the Constitution of the Republic of Poland, the European Convention on Human Rights, and the Code of Criminal Proceedings.

5 No provision of the Polish Constitution provides direct rules on the admissibility of evidence. However, the sources of a standard in this regard can be found in the constitutional principle of legality (Art. 7), as well as in the constitutional provisions that protect certain rights of individuals: freedom from torture (Art. 40), the right to a defense (Art. 42), the right to privacy (Art. 47; 49-51) or, finally, the right to a fair trial (Art. 45).

6 The doubts concerning unlawful composition of the Constitutional Court and its lack of independence results in a situation in which the burden of applying domestic provisions in compliance with the Constitution and international law rests on national court, especially the Supreme Court.

7 The criminal procedure established under the 1997 Code of Criminal Procedure (CCP) has features of an inquisitorial system with elements of an adversarial system. It is based on the principle of free evaluation of evidence. During criminal proceedings, it is generally permissible to carry out any evidence collecting, except for those that are expressly prohibited by law.

8 National courts have used the provisions of ECHR and the Polish Constitution to recognize certain evidence as unlawful, despite the lack of clear provisions in the Code of Criminal Proceedings.

9 The Code of Criminal Procedure does not provide the parties of the proceedings with an effective tools to defend themselves against the admission of questionable evidence into the proceedings.

10 The Art. 168a of the Code of Criminal Proceedings, in the meaning that came into force in 2016, established "reversed evidentiary prohibition" forcing the courts and prosecutors to admit evidence that has doubtful character, e.g. has been obtained by committing a crime.

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1 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings;.

2 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty;

11 In the jurisprudence of the national courts at least three interpretations of the Art. 168a has emerged. All of them aim at including human rights standards in the interpretation of Art. 168a. Despite that, the individuals still face the risk that the legislator's original interpretation of Article 168a CCP will be used in proceedings conducted against them.

12 The research revealed that a situation in which courts would have examined the inadmissibility of evidence is extremely rare. According to the interviewed lawyers, prosecutors and judges the doubts regarding admissibility of evidence concerned inter alia: questioning the actual suspect as a witness; searching suspect's premises, despite the fact that alleged offense did not concern possession of prohibited substances; taking samples of writing from the suspects without informing them about the lack of obligation to provide such samples; conducting informal questioning of a suspects and backdoor introduction of their results to the proceedings; wire-tapping without court's order.

2 PRELIMINARY ISSUES

2.1 INTRODUCTION

This report was prepared by the Helsinki Foundation for Human Rights as part of the Defence Rights in Evidence Procedures project coordinated by Fair Trials International. Report's authors examine the impact of European Union law on national rules of admissibility of evidence. The authors specifically address the question of whether the EU requires the creation of effective mechanisms to challenge the admissibility of specific evidence in criminal proceedings. Furthermore, they evaluate the effectiveness and accessibility of measures offered to suspects whose rights protected under the directives have been violated. Finally, they ask the reasonable question about the degree of compatibility of the relevant Polish laws with international standards and their efficiency in ensuring the protection of fundamental rights.

The report may prove to be particularly useful in bringing the topic closer to international audiences. Foreign readers of this report are given an opportunity to refer to the core Polish legal arrangements and the related controversies, including questions about their compliance with the Constitution and international law.

For domestic readers, the report presents a summary of key issues related to the admissibility of evidence, including references to the landmark decisions of courts of appeal and the Supreme Court, as well as an analysis of the discussed topic in the context of constitutional norms and standards resulting from the European Convention on Human Rights and EU directives.

2.2 METHODOLOGY

While drafting the report, the authors made use of the Polish legal literature on the admissibility of evidence in criminal proceedings, in particular the works of Jasiński[3], Skorupka[4] and Janusz-Pohl[5]. To understand how the provisions of the Code of Criminal Procedure on the admissibility of evidence are interpreted, we reviewed an extensive body of rulings of the Supreme Court and common courts.

The workshop organized in October 2020 involved both theorists and practitioners which allowed to confront two different perspectives on the problem of inadmissibility of evidence. It provided authors with important additional pieces of information concerning the admissibility of evidence in Polish legal system.

The outcomes of the initial research and workshop were confronted with the opinions of 15 practitioners dealing with criminal proceedings during semi-structured individual interviews. All of the interviewees had valuable experience in criminal proceedings. Vast majority of the interviewees were involved in criminal cases for more than 10 years. 4 of the interviewees were advocates conducting from 30 to even 250 criminal cases per year. One of the interviews was an advocate working in the Commissioner for Human Rights office in the department of criminal law. Three of the interviewed prosecutors was working in the regional prosecutors office and were responsible for conducting from 5 to 30 criminal cases per year. The other two were prosecutors of district prosecutors offices, and were recognizing even 300 cases per year. Finally, the authors have interviewed 5 judges from all levels of the judiciary system, including the Supreme Court, adjudicating in 15 up to 450 criminal cases per year.

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3 Jasiński Wojciech (2019) *Nielegalne uzyskanie dowodu a moralna integralność wymiaru sprawiedliwości* [w:] *Nielegalnie uzyskane dowody w procesie karnym. W poszukiwaniu optymalnego rozwiązania.*

4 J. Skorupka, *Eliminowanie z procesu karnego dowodu zebranego w sposób sprzeczny z ustawą*, PiP 2011, nr 3, s. 80-85; J. Skorupka, *Dowody nielegalne w procesie karnym. Glosa do uchwały SN z dnia 28 czerwca 2018 r.*, I KZP 4/18, OSP 2019, nr 1, s. 4; J. Skorupka (red.) *Dowody. Cz. I-IV* [w:] P. Hofmański (red.), *System Prawa Karnego Procesowego.*

5 B. Janusz-Pohl, *O konstrukcji niedopuszczalności czynności karnoprocesowej*, Ruch Prawniczy, Ekonomiczny i Socjologiczny, rok LXXVI, zeszyt 4, 2014.

The interviewees were asked questions regarding their experience in cases in which the issue of inadmissibility of evidence occurred, their assessment of Code of Criminal Proceedings provisions in that field, as well as courts' attitude towards this problem. Specific questions concerned inter alia:

- justification for establishing in criminal proceedings rules on admissibility of evidence;
- the consequences of breach of procedural guarantees for the admissibility of evidence;
- committing a crime during the collection of evidence;
- burden of proof in cases concerning inadmissibility of evidence;
- ability to challenge the admission of illegal evidence to the criminal proceedings.

The authors are grateful to all our interlocutors for their invaluable input. All the mistakes and errors remain authors' sole responsibility.

3 THE MEANING OF RULES ON ADMISSIBILITY OF EVIDENCE

The principle of free evaluation of evidence is a fundamental principle of criminal procedures of the EU Member States. However, the application of this principle does not mean unrestricted discretion in the assessment of admissibility of evidence. The effective functioning of the justice system and the protection of human rights and freedoms requires that these rules also take into account the constitutional and Convention background, introducing mechanisms protecting individuals against unjustified interferences with their fundamental rights.

During the interviews the authors asked the practitioners what values determine whether a given piece of evidence is found admissible. Most of the interviewees' replies went along the lines that the rules on admissibility of evidence are important to ensure the rights and freedoms of individuals, to guarantee their right to a fair trial, defendants' right to defense and the protection of the rule of law. The interviewees indicated also that such rules guarantee citizens trust to the state, the proportionality of state's interference in human rights, as well as the protection of right to privacy, especially in the context of professional secrecy and attorney-client privilege.

The absence of the rules on admissibility of evidence would, in fact, threaten the protection afforded by the Constitution and international law. It would clearly undermine the constitutional principle of legality. At the same time, it could encourage public authorities to take shortcuts, circumvent, bend or directly violate the rules that constitute a barrier for disproportionate interference with fundamental rights of individuals: freedom from torture, right to privacy, the inviolability of the home. On the one hand, should there be no consequences for law enforcement officers, they would not be deterred from breaking the law. Finally, the absence of admissibility rules would undermine the public's belief in the effectiveness of the legal protection system and thus in the effectiveness of the state itself.

> *While acting on behalf of the state, one should not be allowed to base decisions about the fate of a human being on such sources [of evidence] or the way in which it is obtained that defy the values on which the state is built.*

JUDGE OF THE SUPREME COURT[6]

At the same time, one of interviewees pointed out that the lack of rules of admissibility of evidence would lead to the unfair building of additional advantage over citizens, further worsening their procedural position. This would deprive the citizens of the ability to foresee the actions of the state and to anticipate how criminal justice authorities can obtain evidence. This would obviously interfere with the effectiveness of their right to a defence.

> *What annoys me about admitting all the evidence, without verifying its admissibility, is that the state, by definition, has a huge advantage over the citizen. Accordingly, the use of additional measures based on the principle that the end justifies the means is such an unequal struggle.*

ADVOCATE

> *The suspect has the right to build their defence on the predictability of actions taken by law enforcement authorities. In a situation where they can gather illegal evidence, this is unpredictable.*

ADVOCATE

Moreover, one of the arguments, aptly identified by Jasiński, is the issue of the moral integrity of the justice system. According to this author, "a conduct of law enforcement officer that is contrary to law undermines their moral standing to administer justice".[7] In another words, someone who breaks the law themselves is not entitled to stigmatise others for violating legal norms.

The admissibility of evidence can also be considered from the point of view of its credibility for establishing the facts of the case. Owing to the rules that exclude certain evidence in cases of violation of fundamental human rights one may avoid situations in which highly questionable evidence then becomes the basis for judicial action.

The last of the arguments that could be raised in this context is the issue of the effectiveness of judicial cooperation between judicial authorities of individual Member States of the European Union. It requires the adoption of a certain minimum standard regarding the rules of admissibility of evidence at the European Union level.

The latter argument speaks in favour of the need for further harmonisation of the basic rules of evidence at the European Union level. They also favour the necessity to guarantee the greater respect of the rules that prohibit obtaining evidence by means of torture, inhuman and degrading treatment or without respecting the right to a defence, or situations of unlawful interference with an individual's right to privacy.

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6 All quotes are from interviews conducted as part of the DREP project.

7 Jasiński Wojciech (2019) *Nielegalne uzyskanie dowodu a moralna integralność wymiaru sprawiedliwości* [w:] *Nielegalnie uzyskane dowody w procesie karnym. W poszukiwaniu optymalnego rozwiązania.*

4 THE INTERNATIONAL LEGAL FRAMEWORK

4.1 CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS AND ITS INFLUENCE ON THE NATIONAL JUDICIARY

The European Court of Human Rights under Art. 3, 6, and 8 of ECHR developed specific jurisprudence concerning the consequences of admission to the proceedings evidence obtained in a violation of national law. This includes inter alia evidence obtained in the violation of the prohibition of torture and inhuman treatment, individuals' right to privacy, or the rules concerning police provocation. The standards established in ECtHR's jurisprudence differ depending on the type of evidence, the method in which it has been obtained, and its influence on individuals' right to a fair trial.

The strictest rules of evidence handling have been formulated by the European Court of Human Rights (hereinafter: ECtHR) under Article 3 of the Convention, which prohibits torture, inhuman or degrading treatment or punishment. The key rules in this regard were established based on the judgments made in *Gafgen v. Germany*[8] and *Jalloh v. Germany*[9]. In *Gafgen*, the ECtHR declared inadmissible statements obtained in violation of the prohibitions under Article 3 of the Convention. The Court held that the introduction of such evidence to a criminal trial automatically renders the trial unfair.

This rule was extended by the ECtHR in its recent judgment of *Ćwik v. Poland*[10], where the Court applied it directly to the use in proceedings of personal evidence obtained as a result of torture and inhuman treatment of a third party by private individuals, without the involvement of state agents. When considering this issue in the course of domestic court proceedings, the Court of Appeal in Kraków[11] decided that a co-accused's statements obtained as a result of torture and recorded on a cassette tape, could constitute evidence in Polish criminal proceedings. In the Court of Appeal opinion, the prohibition on the use of testimonies and statements obtained in violation of freedom of expression as laid down in the Code of Criminal Procedure concerns exclusively law enforcement officers and courts. Consequently, it stated that this prohibition is irrelevant for the assessment of admissibility of evidence obtained *lawfully* by law enforcement officers, even the evidence concerned was originally obtained through torture but without the involvement of law enforcement officers. The ECtHR opposed this assessment and declared the evidence in question inadmissible. Its use resulted in the necessity to consider the entire proceedings unfair[12]. Consequently, the ECtHR held that the applicant's rights had been violated on account of a breach of Article 6 of the Convention.

As regards the admissibility of material evidence obtained in violation of Article 3 of the Convention, the ECtHR has developed a more flexible approach. According to the ECtHR, admission of such evidence into proceedings will automatically render the proceedings unfair only where the evidence has been obtained in violation of the prohibition of torture[13]. As for material evidence obtained in violation of the prohibition of inhuman or degrading treatment, the ECtHR finds that it may be introduced into the proceedings as long as it does not have a decisive impact on the outcome of the case. In such an event, the proceedings are still considered fair. Nevertheless, such a standard raises controversy, especially in the context of the absolute nature of the prohibition under Article 3 of the Convention.

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8 ECtHR (GC) judgment of 1.06.2010 in the case *Gäfgen v. Germany*, appliction no. 22978/05.
9 ECtHR (GC) judgment of 11.07.2006 in the case *Jalloh v. Germany*, appliction no. 54810/00.
10 ECtHR judgment of 5.11.2020 in the case *Ćwik v. Poland*, application no. 31454/10.
11 Poland, Court of Appeal in Kraków judgment of 8.10.2008, case. no. II AKa 92/08.
12 ECtHR judgment of 5.11.2020 in the case *Ćwik v. Poland*, application no. 31454/10.
13 ECtHR (GC) judgment of 1.06.2010 in the case *Gäfgen v. Germany*, appliction no. 22978/05.

In the practice of the Polish justice system, especially given the frequent use of covert investigative methods, a much more important role is played by the views adopted by the ECtHR on the grounds of Article 8 of the Convention. The Court examines alleged infringements of that Article on two levels. First, the ECtHR examines potential violations from the perspective of legality: it assesses whether the evidence (e.g. obtained through covert investigative methods) was obtained in breach of national law (resulting from the absence of appropriate consent, an appropriate request or on account of the methods being used to investigate an offence named as protected against a form of interference). Second, the ECtHR's assessment involves situations where national law is not of adequate quality. What makes the quality of national law inadequate is an absence of a judicial review or legislation that would provide a list of situations allowing for interference with an individual's right to privacy.

However, in its case law, the Court does not always link a violation of Article 8 of the Convention with the automatic assumption that the proceedings in the case in which such evidence was used were unfair. For example, in *Bykov v. Russia*[14] and *Dragoș Ioan Rusu v. Romania*[15], despite finding a violation of Article 8 of the Convention on account of the unlawful nature of the interference with the right to privacy, the Court did not find that the criminal proceedings conducted in the applicants' cases were unfair. The ECtHR assumed that its role was not to indicate which evidence could be used in the course of criminal proceedings but to ensure that the rights of individuals protected by the Convention are respected in (and by) a State Party.

At the same time, the Court has formulated in its case law criteria guiding the assessment of the impact of evidence obtained in breach of the right to privacy on the fairness of the proceedings. The criteria include those concerning the procedural aspect, i.e. whether a party has had an opportunity to question the legality of obtaining evidence during the proceedings and whether there has been other evidence pointing to the guilt of the accused. In addition, the ECtHR has ruled that such evidence may form a basis of a conviction provided that it is credible. In *Lisica v. Croatia*, the Court did not recognise as credible material evidence collected during the second search of a vehicle belonging to the suspects, to which law enforcement officers had unrecorded access prior to the search.

The effectiveness of such an approach by the Court is questionable. It does not fully protect individuals against violations of their rights under Article 8 and results in the protection afforded by this Article being incomplete.

In this context, it seems that the right to privacy of an individual receives stronger protection in the practice of operation of Polish courts. For example, the Court of Appeal in Poznań[16] challenged the admissibility of evidence obtained through covert investigative methods employed by the authorities of the Federal Republic of Germany against a Polish citizen residing in the territory of Poland. The Court noted that German authorities had failed to comply with the requirements laid down in Article 20 of the Convention on Mutual Assistance in Criminal Matters. Under that provision, they are required to notify a Member State of interception of telephone communications sent from a communication address located on its territory. Moreover, the Court of Appeal noted that in the discussed case the prosecuted offence (fraud against the property of the minor value) did not belong to the catalogue of offences whose prosecution warranted the use of covert investigative methods or the right to intercept telephone conversations under Polish law. As a result, the Court of Appeal held that "the evidence offered by the prosecutor was obtained in violation of the principles of the law applicable in the Republic of Poland". This meant that they could not be admitted during the proceedings.

National courts make also relatively extensive use of the ECtHR jurisprudence regarding police provocation. The ECtHR indicated certain threshold conditions of admissibility of a police provocation. Among them, it mentioned a passive role for police officers, the existence of substantiated and verifiable information indicating the necessity of resorting to provocation, as well as the requirement that the provocation be carried out in the manner prescribed by law, including based on approval of an independent authority.

These rules have been applied, for example, in the case examined by the Supreme Court that involved the acceptance of financial benefit.[17] The Supreme Court questioned the legality of making a controlled bribe in the absence of verification by police officers of previously obtained credible information about the offence. It considered that the sound recording made as part of a special investigative operation, as well as testimonies of the persons participating in it were "contaminated" and resulted in the inability to use them in the course of court proceedings. In the Supreme Court's view, the right to a fair trial, enshrined in the Constitution and the

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14 ECtHR judgment of 10.03.2009 in the case *Bykov v. Russia*, application no. 4378/02.

15 ECtHR judgment of 31.10.2017 in the case *Dragoș Ioan Rusu v. Romania*, application no. 22767/08.

16 Poland, Court of Appeal in Poznań judgment of 29.01.2020, case no. II AKz 613/19, LEX no 3027953.

17 Poland, Supreme Court judgment of 30.11.2010, case no. III KK 152/10

Convention, includes "the necessity of resolving each case on the basis of such evidence as, within the framework of a particular procedural system, is prescribed by law or is not contrary to it, and is therefore lawful".

However, most reservations regarding the Polish justice system can be raised in terms of the implementation of the ECtHR case-law regarding the principles of access to a defence lawyer at the first stages of criminal proceedings as well as the use of a suspect's testimony obtained without the presence of a defence lawyer during the trial.

Recent years have seen a progressive weakening by the ECtHR of the standard adopted in the *Salduz v. Turkey*[18] judgment. The ECtHR stated that a suspect should be given access to a lawyer before the first interrogation in the case unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. However, in *Ibrahim v. the United Kingdom*[19], *Simeonovi v. Bulgaria*[20] and *Beuze v. Belgium*[21], the ECtHR sanctioned the practice of accepting national rulings based on interrogations of a suspect, provided that the proceedings as a whole are fair. In the judgments entered in those cases, the ECtHR identified a set of circumstances that should be considered when assessing the fairness of the proceedings to a suspect who was not assisted by a defence lawyer at the initial procedural stages. Some of the circumstances listed by the ECtHR include the issue of a suspect being a member of a vulnerable group and the question of admissibility of such evidence in criminal proceedings.

At the same time, these issues are not always noticed by courts as a circumstance justifying the exclusion of the testimony so obtained from the body of evidence collected in the proceedings. For example, the Court of Appeal in Katowice pointed out[22] that it was impossible to conclude from judgments delivered by the European Court of Human Rights that it was the ECtHR's intention to impose a general requirement to ensure the presence of a defence lawyer during the questioning of every suspect or otherwise their testimonies being inadmissible for use during trial. The court stated that it appears from the ECtHR judgments cited above that the it is adamant about the presence of a defence lawyer in situations where a suspect is especially vulnerable, due to, e.g., their age or helplessness caused by social factors or the state of health (including drug or alcohol addiction).

4.2 EUROPEAN UNION LAW AND THE RULES OF ADMISSIBILITY OF EVIDENCE

The rules on the collection of evidence have a specific impact on the functioning of the European area of cooperation in criminal matters. This area is rapidly expanding to include instruments such as the transfer of a judgment for execution, the European Arrest Warrant or the European Investigation Order.

These solutions are based on the principle of mutual trust between the Member States. This trust was to be strengthened by the harmonization of procedural guarantees vested in participants of criminal proceedings carried out by means of individual criminal procedural directives. The directives built on existing procedural guarantees clarified their meaning and content and took an important step towards establishing a common European minimum standard in this area.

As part of this initiative, six directives[23] were adopted, establishing minimum rules concerning procedural rights in the course of criminal proceedings conducted by the Member States of the

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18 ECtHR (GC) judgment of 27.11.2008 in the case *Salduz v. Turkey*, case no. 36391/02.

19 ECtHR (GC) judgment of 13.09.2016 in the case *Ibrahim and other v. United Kingdom*, case no. 50541/08.

20 ECtHR (GC) judgment of 12.05.2017 in the case *Simeonovi v. Bulgaria*, case no. 21980/04.

21 ECtHR (GC) judgment of 9.11.2018 in the case *Beuze v. Belgium*, case no. 71409/10.

22 Poland, Court of Appeal in Katowice judgment of 6.04.2017, case no. II AKa 15/17.

23 Directive 2010/64/Eu of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedingsDirective 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty; Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings; Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings; Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

European Union. Only some of the directives' provisions indirectly refers to the problem of inadmissibility of evidence.

Article 3 of the Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings should be considered crucial in this respect. It obliges the Member States to ensure that suspects and accused persons are presumed innocent until proved guilty according to law. Accordingly, the provision, first and foremost, requires the presumption of innocence to be respected by the Member States. Second, Article 3 indicates the point in time when this presumption ceases to operate, which is the moment of proving guilt. Third, the article stresses that proving must be done in a lawful manner. This last element must not be treated *per non* est. In our view, it must be taken into account in the interpretation of provisions of the directive and during the identification of procedural rights the directive grants to individuals.

Consequently, we take the view that the directive requires the Member States to be guided by the principle of legality, to act within the limits of, and on the basis of, the law while conducting evidentiary proceedings. When determining national rules of admissibility of evidence Member States should also take into consideration the constitutional and Convention background of these rules.

This view is reinforced by Recital 47 of the Directive, which provides that the Directive upholds the fundamental rights and principles recognised by the ECHR, including the prohibition of torture and inhuman or degrading treatment, the right to liberty and security, respect for private and family life, the right to the integrity of the person, the rights of the child, the integration of persons with disabilities, the right to an effective remedy and the right to a fair trial, the presumption of innocence and the rights of the defence. The recital recalls Article 6 of the Treaty on European Union, according to which fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, are to constitute general principles of Union law.

At the same time, the Directive does not prescribe any particular way in which the taking of evidence should be organised, leaving the Member States free to do so in areas not covered by other instruments of EU law. However, the final outcome of proceedings must be based on lawfully obtained findings.

In practical terms, this requirement, in our opinion, forces the Member States to adopt at least measures that will prohibit admitting evidence obtained through a criminal act, in a violation of procedural rights, as well as evidence obtained in violation of ECHR standards.

The other argument suggesting that EU law is not ambivalent on evidentiary proceedings is that the Access to a Lawyer Directive and the Presumption of Innocence Directive oblige the Member States to provide an effective remedy in the event of a breach of the rights articulated in the directives.

Moreover, in the context of other directives, such a requirement can be inferred from the language of Article 47 of the Charter of Fundamental Rights. Article 47 provides that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal.

This provision is important in the context of procedural rights under EU directives. These include, *inter alia*, the right to access to a lawyer before the first questioning in the case, the right to be informed of one's procedural rights, the right to remain silent, the right against self-incrimination, and the right to interpretation and translation. All these rights require an effective remedy, either under the directives that established them or under the CFREU.

Apart from the issues discussed above, EU law does not address in detail the question of the rules of admissibility of evidence, which seems to be a significant mistake from the perspective of a system based on mutual trust between Member States.

Due to the absence of an EU minimum standard, the Member States have adopted a divergent approach to the question of whether to consider certain evidence inadmissible and failed to set out a uniform procedure and grounds relating to inadmissibility. As a result, some Member States, for example Sweden[24], make no reference in their criminal procedures to this issue. Others, such as Poland, may assume a reversed rule of admissibility of evidence, which "forces" justice authorities to take questionable evidence. Finally, national systems may adopt different criteria to assess the admissibility of evidence.

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24 Christopher Wong, Overview of Swedish Criminal Procedure, available: http://www.congreso.es/docu/docum/ddocum/dosieres/sleg/legislatura_10/spl_85/pdfs/24.pdf (26.06.2021).

4.3 THE CORE ELEMENTS OF EFFECTIVE REMEDY

EU law does not define what form the effective remedy should take in criminal proceedings. This is a simple consequence of the diverse nature of the rights protected by the directive and, consequently, of the different types of potential infringements.

In terms of the design of the remedy, however, we can find some interpretative guidance in the recitals of both directives directly addressing this issue. The recitals of Directive 2013/48 read that the remedy should be "adequate and effective". In turn, the recitals of the Presumption of Innocence Directive refer to more elements of such a remedy. They provide that, in the event of an infringement of a right protected by the Directive, the remedy should have the effect of placing the suspects or accused persons in the same position in which they would have found themselves had the breach not occurred[25].

Somewhat more extensive guidance is provided in the case law of the CJEU, which, on the one hand, links an effective remedy to the content of Articles 6 and 13 of the Convention and, on the other, identifies the remedy as a tool to embody the principle of effective judicial protection of individual rights formulated in EU law.26

In turn, a review of the ECtHR case law based on Article 13 allows to identify the basic features of an effective remedy under the Convention. They can be successfully used as a subsidiary means of finding the crux of the effective remedy enshrined in the Directives and Article 47 of the Charter of Fundamental Rights.

These features include:

- the remedy's availability for individuals seeking protection[27];
- its effectiveness understood as the capacity to remedy a situation contested by an individual[28], both in law and in fact[29];
- guarantees of the prompt consideration of allegations raised by the individual[30].

These features, although conceptualised in cases not addressing the issue of procedural rights protected by the directives, can be successfully applied in a subsidiary manner to define the core elements of the remedy under EU law.

It seems impossible to attempt to uniformly prescribe how such a remedy should operate in the context of all infringements of rights protected by the directives. Indeed, infringements relating to the provision of incomplete information on a suspect's rights cannot be compared to infringements relating to the failure to ensure that a suspect is represented by a defence lawyer during the first questioning. In this respect, much also depends on the nature of the infringement itself and the possibility of curing the infringement in the course of the proceedings by completing the missing elements of a procedural step or by opting for its repetition.

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25 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, recital 44.

26 CJEU (GC) judgment of 27 lutego 2018, case no. 64/16, § 35, ECLI:EU:C:2018:117

27 ECtHR judgment of 11.06.2009 in the case *Petkov and Others v. Bulgaria*, case no. 77568/01, § 82.

28 ECtHR judgment of 26.01.2001 in the case *Çelik and İmret v. Turkey*, application no. 44093/98, § 59

29 ECtHR judgment of 27.06.2000 in the case *İlhan v. Turkey*, application no. 22277/93. § 97.

30 ECtHR judgment in the case *Kadiķis v. Latvia* (no. 2), application no. 62393/00, § 62.

4.4 IMPLEMENTATION OF PROVISIONS OF THE DIRECTIVES ON THE EFFECTIVE REMEDIES

As already mentioned, the Access to a Lawyer Directive and the Presumption of Innocence Directive contain provisions requiring the Member States to introduce into their national law an effective remedy for breaches of the rights guaranteed by these Directives, including the right of access to a lawyer at all levels of the proceedings, the right to private communication with a lawyer, the right to remain silent and the right not to incriminate oneself, the right to be present during the proceedings, etc.

These Directives have not been fully implemented to the Polish legal system, despite Ombudsman requests in that field addressed to the Ministry of Justice.[31] The Ombudsman called, among other things, for the Polish legal system to guarantee that the determination of a suspect's guilt is carried out in a "lawful manner".

In the Ombudsman's view, this principle requires that all unlawful evidence must be disregarded. A Deputy Minister of Justice responded that the applicable rules of criminal procedure complied with the requirements of the Directive and that the existing instruments were sufficient to guarantee the rights of citizens protected by the Directive. Accordingly, as the Minister concluded, the Ministry of Justice was not planning to introduce any legislation on the subject.[32]

The situation with the implementation of the Access to Lawyers Directive is somewhat different. In theory, the directive was implemented into the national legal order by the Act of 27 September 2013 on the amendment to the Code of Criminal Procedure and certain other acts. Although the September Act has significantly changed the rules of access to legal aid provided by court-appointed defence lawyers, it has not modified in any way the procedural rules concerning the remedies available in the absence of access to professional legal representation. Furthermore, the quality of the national implementation of other Directive's provisions also leaves much to be desired[33].

5 NATIONAL LEGAL FRAMEWORK

5.1 THE CONSTITUTION

The notion of inadmissibility of evidence is rather loosely rooted in the Polish Constitution[34]. As opposed to the fundamental laws of certain other jurisdictions, the Constitution of the Republic of Poland does not contain a separate set of rules governing the exclusion of specific evidence.

This does not mean, however, that the subject does not find any constitutional point of reference. Certainly, the sources of a standard in this regard can be found in the constitutional principle of legality, as well as in the constitutional provisions that protect certain rights of individuals: freedom from torture (Art.

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31 Poland, The statement of the Commissioner for Human Rights concerning implementation of the directive on strengthening certain aspects of presumption of innocence, available: https://www.rpo.gov.pl/pl/content/nie-bedzie-zmian-polskiego-prawa-w-zwiazku-z-tzw-dyrektywa-niewinnosciowa-resort-sprawiedliwosci-odpowiedzial-RPO (6.05.2021).

32 Poland, The letter from the Minister of Justice to the Commissioner for Human Rights concerning implementation of the directive on strengthening certain aspects of presumption of innocence, available: https://www.rpo.gov.pl/sites/default/files/Odpowied%C5%BA%20MS%2018.10.2018_0.pdf (6.05.2021).

33 M. Kopczyński, K. Wiśniewska, *Jak informować w postępowaniu karnym. Polskie prawo i praktyka w prawie europejskim*, available: https://www.hfhr.pl/wp-content/uploads/2016/04/dyrektywa_ca%C5%82o%C5%9B%C4%871.pdf (6.06.2021).

34 The English translation of the Constitution of the Republic of Poland might be found here: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (7.06.2021).

40), the right to a defence (Art. 42), the right to privacy (Art. 47; 49-51) or, finally, the right to a fair trial (Art. 45). Likewise, Article 2 of the Constitution declaring Poland a democratic state ruled by law should be deemed to be a source of a relevant constitutional standard.

This is the provision from which the principle of citizens' trust in the state has been deduced from the case law of the Constitutional Tribunal. It guarantees that the law will not become a trap for individuals.[35] In another ruling, the Constitutional Court pointed out that the law must have certain features in order to guarantee legal protection of individuals. To be protected, individuals must have full opportunity to become acquainted, on the one hand, with the grounds for action by state bodies and, on the other hand, with the consequences of their actions. "[I]t is, therefore, possible to predict the actions of state authorities and also to forecast one's own actions."[36]

Finally, attention should be paid to the language of Article 45 of the Constitution, which guarantees individuals the right to a fair trial. The Constitutional Court has identified, as one of the elements of this right, the right of an individual to foresee the course of court proceedings in their case.

According to the Constitutional Court, this right will be afforded if the parties to the proceedings are given the opportunity to anticipate what such proceedings will look like. An element of this right is "the maintenance of the proper coherence and logic of the mechanisms governing the proceedings". "The relevant extent of foreseeability must be based on clear and predetermined procedural rules applicable from the beginning of proceedings until their conclusion."

When applying this view to the admissibility of evidence, one should note that an individual is entitled to expect that the legal system will be coherent and that his or her rights guaranteed by higher-ranking legal acts will be respected in criminal proceedings, even in the absence of relevant special provisions.

In a system that allows for the reliance of procedural decisions on evidence obtained unlawfully, an individual's ability to anticipate the actions of the State is significantly reduced, if not lost altogether. As individuals are surprised by actions deeply interfering with their rights and freedoms, they are unable to plan their own actions in the long term and predict state authorities' response to their actions.

Furthermore, this has to be also assessed from the perspective of Article 7 of the Constitution, which establishes the principle of the legality of actions of public authorities. Pursuant to this article, public authorities must act on the basis, and within the limits, of the law.

In accordance with views of legal scholars and commentators, this provision implies the obligation to determine, through universally applicable laws, the authority's competence to act, the prohibition of presumption of such competence and the prohibition of its arbitrary exercise.[37] In terms of evidence obtained in breach of the law, the view of Sokolewicz, who links the principle of legality with all forms of activity of public authorities, including the spheres of creating law, applying law, as well as enforcing it, should be regarded as particularly significant.[38] This view, when translated into the context of the problem under examination, implies a requirement on the part of the state to establish effective mechanisms to ensure the validity of the principle of legality in the process of applying the law, including the construction of institutions guaranteeing its practical observance.

Last but not least, the issue of unlawfully obtained evidence should be viewed from the point of view of certain rights and freedoms guaranteed by the Constitution. Securing these rights and freedoms as well as ensuring compliance with international law binding on Poland has been highlighted among the constitutional principles of the Republic of Poland. The most important rights and freedoms in this context include:

- human dignity and specifically freedom from torture, inhuman and degrading treatment (Articles 30 and 40 of the Constitution),
- right to a defence (Article 42(3)),
- right to privacy (Article 47),
- freedom of communication (Article 49),
- the right not to disclose personal information and to request the deletion of unlawfully obtained information (Article 51).

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35 Poland, Constitutional Tribunal judgment of 7.02.2001 r., case no. K 27/00, OTK 2001/2/29.

36 Poland, Constitutional Tribunal judgment of 14.06.2000 r., case no. P 3/00, OTK 2000/5/138.

37 Tuleja Piotr (2016), Komentarz do art. 7 Konstytucji [w:] M. Safjan, L. Bosek (red.), *Konstytucja RP*, TOM I, Komentarz do art. 1-86, str. 305.

38 Sokolewicz Wojciech (2007), Komentarz do art. 7 Konstytucji, [w:] L. Garlicki (red.), *Konstytucja Rzeczypospolitej Polskiej*. Komentarz, t. V, s. 11.

Nevertheless, it has to be emphasised that the constitutional guarantees of the fair trial have significantly weakened due to the constitutional crisis in Poland which started in 2015. Actions of the ruling majority resulted in the deterioration of the position of the Constitutional Tribunal, the only body established in the Polish Constitution to conduct the assessment of the constitutionality of laws.

By electing three additional judges to the Constitutional Court and establishing solutions that limited Constitutional Tribunal's independence, the ruling majority weakened the Tribunal's ability to independently assess the compliance with the Constitution of laws adopted by the Parliament. It resulted in several situations in which the Ombudsman was forced to repeal its motions to the Constitutional Tribunal. Some of them concerned the problem of criminal proceedings, and in particular evidence admissibility. Moreover, the actions of the ruling majority shifted the burden of applying domestic provisions in compliance with the Constitution and international law to the national courts, in particular to the Supreme Court.

5.2 THE CONSTITUTION OF POLAND IN THE JURISPRUDENCE OF POLISH COURTS REGARDING ADMISSIBILITY OF EVIDENCE

As far as the practice of operation of courts is concerned, it is the provisions of the Constitution that have been used as the strongest argument in favour of eliminating unlawfully obtained evidence. It happened particularly often in cases where covert investigative methods were employed, such as a non-procedural means for the interception of telephone conversations and correspondence between individuals. A ruling of the Court of Appeal in Białystok[39], which examined the case concerning the allegation of illegal abortion of pregnancy, can be used as an example of invoking the Constitution as the basis for the elimination of a specific piece of evidence. During proceedings conducted in that case, a law enforcement officer, while interviewing a witness (a woman who had an abortion), used a recording obtained by means of covert investigative methods applied in a case involving an offence which is not included in the list of offences capable of being investigated with the use of such methods. The results of the hearing were found to be inadmissible since the investigation methods were contrary to the freedom of expression. While hearing the prosecutor's appeal, the Court of Appeal directly referred to the language of the Constitution. The Court pointed out that "the values protected by Articles 5 [protection of freedoms and rights of persons and citizens] and 7 of the Constitution [the principle of legality] and in particular the obligation imposed by Article 9 of the Constitution that the Republic of Poland should respect international law binding on it, make it unacceptable for state authorities to use – in any form and for any purpose – information about citizens which is devoid of the attribute of legality. Compliance with these values is guaranteed by the prohibition on the use of such knowledge, even indirectly, for the purposes of having it sanctioned at a later stage of the proceedings."[40]

Another case involving courts reference to Constitutional standard concerned invigilation of the member of parliament and mayor of one of the cities by Central Anticorruption Bureau (hereinafter CAB). In the course of the appellate proceedings the invigilation was found by the Appellate Court in Warsaw to be illegal. In particular, the court recognized that the CAB did not have any grounds to initiate invigilation against one of the MPs. Furthermore, it pointed out that the Chief of CAB forgot to issue a decision allowing to initiate a controlled bribery of the MP. Thirdly, in the context of accused mayor of the city, the court indicated that the chief of CAB did not have grounds to initiate a controlled bribery, since the information indicating such behavior have not been verified. In the statement of reasons the court referred to the principle of a democratic state ruled by law. It found that "conducting a sting operation without observing basic statutory requirements is an unlawful and illegal act that cannot have any legal effects in the sphere of evidence."[41]

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39 Poland, Court of Appeal in Białystok ruling of 18 March 2010, case no. II AKa 18/10, OSAB 2010/1/32-39.

40 Poland, Court of Appeal in Białystok judgment of 18.03.2010, case no. II AKa 18/10, OSAB 2010/1/32-39.

41 Poland, Court of Appeal in Warsaw judgment of 26.04.2013, case no. II AKa 70/13, LEX nr 1322733.

Furthermore, the aforementioned case was latter assessed by the Supreme Court[42], which also found the evidence collected by CAB inadmissible. In the statement of reasons the Supreme Court pointed out that "[it] is not possible to accept a situation in which officials of a democratic state [...], could gather evidence with a violation of law, while under the law, on the basis of such evidence, citizens would be criminally liable. Each state is responsible for the unlawful activity of its secret service officers, and this responsibility cannot be excluded by invoking the public interest in combating crime".

5.3 POLISH CRIMINAL PROCEEDINGS

The Polish criminal procedure has so far been based on three codifications of criminal procedure (1928, 1969, 1997) modified by multiple amendments. Until 2015, the Polish rules of criminal procedure contained no provisions specifying the consequences of breaching the law during the taking of evidence.

The Codes of Criminal Procedure of 1928 and 1969 did not address the issue of unlawfully obtained evidence in any meaningful way, at best referring to it only in an incidental manner. In the 1928 Code of Criminal Procedure, the problem was not addressed at all. A slightly more developed standard was adopted in the 1969 Code of Criminal Procedure, which referred to the issue of obtaining a measure of evidence in violation of freedom of expression. In addition, it provided for the obligation to inform participants in proceedings about their obligations and rights, e.g. the right to remain silent or right to be assisted by a lawyer. A failure to provide such information or the provision of inaccurate information could not cause any adverse procedural consequences for the person concerned.

5.3.1 THE 1997 CODE OF CRIMINAL PROCEEDINGS

The criminal procedure established under the 1997 Code of Criminal Procedure (CCP) has features of an inquisitorial system with elements of an adversarial system. The amendments introduced in 2013 changed the balance between the two systems in favour of adversarial proceedings. They entered into force on 1st July 2015. However, since April 2016, the legislator has returned to the idea of a largely inquisitorial procedure. An additional characteristic of the most recently adopted procedural model is the extension of the powers of the prosecution service at the judicial stage, at the expense of the courts' independence.

Secondly, the objectives of the proceedings identified in the Code of Criminal Procedure include detecting the perpetrator of the offence and holding them criminally responsible as well as ensuring that an innocent person does not bear this responsibility.

Thirdly, the procedure is based on the principle of material truth, which means that all decisions should be based on true factual findings. The principle of presumption of innocence applies during proceedings, which means that the burden of proof must rest with the public prosecutor.

Furthermore, the 1997 Code of Criminal Procedure includes a clear division of criminal proceedings into two stages: the pre-trial (preparatory) proceedings and court (judicial) proceedings. Depending on the seriousness of the offence, pre-trial proceedings are conducted by the police (and sometimes other law enforcement agencies, e.g., the Internal Security Agency) or the prosecution service. In the case of proceedings conducted by law enforcement agencies, the role of the prosecutor is to supervise such proceedings.

Last, but not least the Polish criminal process is based on the principle of free evaluation of evidence. This means that law enforcement officers and courts evaluate all the evidence taken in the case. Their assessment is based on a body's internal conviction limited by the evidence revealed during proceedings, principles of sound reasoning, indications of knowledge, logic and life experience.

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42 Poland, Supreme Court judgment of 19 March 2014, case no. II KK 265/13, OSNKW 2014/9/71 .

5.3.2 THE ADMISSION OF EVIDENCE

During the pre-trial proceedings the evidence is collected ex officio by an investigating authority. Parties are not authorised to take evidence by themselves. However, they may independently collect pieces of information regarding potential evidence and submit it in support of their submissions of evidence. Nevertheless, the final decision on the admission of evidence during preparatory proceedings falls within the competence of an investigating authority.

The judicial stage begins with the lodging the indictment by the investigative authority to the court. The indictment should include the state of reasons identifying key facts and pieces of evidence. Moreover, the list of evidence that the prosecution requires to be examined in the main trial should be attached to the indictment.

Each of the evidence identified in the indictment, or proposed by other parties of the proceedings, should be formally admitted by the court. Moreover, the court may take the evidence also ex officio. A submission of evidence should designate the evidence to be taken and circumstances to be proven. It may also determine the manner in which the evidence is to be taken.

The Code of Criminal Procedure permits a situation where an evidentiary motion will be aimed at discovering other evidence or assessing evidence that has already been taken. What is important, the court's judgment should be based only on the basis of circumstances revealed at the main trial. The presiding judge have the ultimate authority to favorably decide upon a party's motion for evidence, unless it has been contested by another party. In such a situation the courts issues a ruling. The same applies whenever the court finds the evidence inadmissible.

At any time, the party of the proceedings may submit a motion for admitting evidence that was already rejected. However, such motion should not be examined if it is based on the same factual grounds. Court's decision regarding admitting or rejecting evidence might be challenge only during the appellate proceedings. The party of the proceedings have to prove that court's decision to admit or reject admission of evidence have influenced the judgment issued in the case.

During criminal proceedings, it is generally permissible to carry out any evidence collecting, except for those that are expressly prohibited by law. However, in relation to the majority of types of evidence, the Code of Criminal Procedure sets out detailed rules for the taking of evidence, specifying the entities entitled to conduct a given procedural step as well as the conditions for its performance.

The 1997 Code of Criminal Proceedings includes several provisions concerning admission of evidence. Among these provisions, the following play a special role: Article 16 CCP (describing the issue of the consequences of a failure to inform a person questioned of their rights and obligations), 168a CCP (obligation to admit evidence unlawfully obtained), 168b and 237a CCP (rules on the use of material obtained during special investigative operations) 170 CCP (admissibility of submissions of evidence), 171 CCP (requirement of maintaining freedom of expression of a person questioned).

In addition to these provisions, a relatively high number of statutory evidentiary prohibitions have been established. Some of them are absolute in nature and apply in all circumstances, while others apply only in certain circumstances. Such prohibitions may relate both to the deduction of specific facts from specific sources of evidence and to the prohibition of determination of specific facts[43].

What is important, key changes regarding the admissibility of evidence were introduced in 2013 and applied from July 2015 to April 2016. The then adopted amendment to the Code of Criminal Procedure fundamentally changed the admissibility rules, introducing solutions previously unknown to the legal systems of the EU Member States.

5.3.3 ASSESSMENT OF UNLAWFULLY OBTAINED EVIDENCE

As it was previously mentioned, the Polish criminal process is based on the principle of free evaluation of evidence.

According to judicial jurisprudence, the court's conviction that evidence is reliable or otherwise is protected by the principle of free evaluation of evidence provided that it is preceded, during the main hearing, by the revealing of all circumstances of the case in a manner dictated by the obligation to pursue the

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43 The examples of evidentiary prohibitions were indicated in chapter 5.3.5.

truth. In addition, the court's conviction concerning evidence must be the result of weighing all the facts in favour and against the accused. Finally, the court's reasoning must be comprehensive and logical.

The functioning of the principle of free evaluation of evidence means that the legislator has not introduced into the Polish criminal procedure any formal rules on how to assess specific evidence. The Code of Criminal Procedure does not contain regulations that give more (or less) value to a particular type of evidence. Nor does it require specific evidence to be gathered for specific procedural decisions.

Such rules are not to be found, in particular, in the context of admission of evidence which, on the one hand, evades the evidentiary prohibitions established in the Code of Criminal Procedure and, on the other, constitutes a profound and unlawful interference in the rights and freedoms of an individual protected by the Constitution and the Convention. Admission of such evidence to the proceedings and its disclosure in the course of the main trial creates the obligation to evaluate it and refer to it in the reasons of the ruling. However, the CCP does not include provisions establishing specific, sole and decisive rules or guidelines requiring corroborating such a piece of evidence or assess it from a specific perspective (e.g. from the perspective of its impact on individuals' right to a fair trial). Sometimes courts use the constitutional and Convention background to assess the method in which the evidence was obtained. However, such an outcome is far from being always guaranteed.

5.3.4 EFFECTIVE REMEDY IN THE CONTEXT OF EVIDENCE ADMISSIBILITY

Beside the possibility to raise the problem of inadmissible evidence in the appeal challenging court ruling, the Code of Criminal Procedure does not provide the parties of the proceedings with effective tools to defend themselves against the admission of questionable evidence. In particular, there is no incidental procedure in the Polish criminal process, either at the pre-trial or trial stage, which would allow a party to appeal against an unfavorable decision of a prosecutor or court to admit evidence to a superior prosecutor (during pre-trial proceedings) or the court of the second instance.

As a result, the issue of inadmissible evidence might be raised only in parties' appeal. However, the applicant in such a situation has to demonstrate that the admission of inadmissible evidence has impacted the final outcome of the proceedings. It does not concern absolute grounds for appeal, including situation in which the hearing of the case took part in the absence of the accused whose presence was mandatory or the situation in which the accused who was legally required to be represented did not have a defence lawyer in court proceedings or the defence lawyer did not participate in steps in which their participation was mandatory.

In practice, it might be extremely difficult to prove the impact of an inadmissible evidence on the final outcome of the proceedings. Especially where, the questionable evidence is supported by other evidence, that do not raise any legal doubts. The same applies to evidence unlawfully obtained during preparatory proceedings, e.g. without the presence of a lawyer. According to the jurisprudence, the absence of a defence lawyer during pre-trial proceedings may be cured at a later stage of criminal proceedings.

Thus, the chances of effectively challenging a breach of procedural guarantees such as the right of access to a defence lawyer in the course of the appeal proceedings must be regarded as relatively low.

5.3.5 THE RULES OF ADMISSIBILITY OF EVIDENCE UNDER THE CODE OF CRIMINAL PROCEDURE

In the Polish criminal procedure, the same set of rules of admissibility of evidence operates at the stage of pre-trial proceedings and court proceedings. At the pre-trial stage, the admission to a large extent remains within the remit of the authority conducting the proceedings. This authority is both responsible for admitting and taking evidence. It is only in certain situations that the Code of Criminal Procedure reserves this competence to the court, for example in cases of the questioning of a minor victim of a sexual offence. During the trial, the court has a general authority to admit and conduct evidence.

ARTICLE 168A OF THE CODE OF CRIMINAL PROCEDURE

Article 168a CCP was introduced into the Polish criminal process by a major amendment to the criminal procedure that was adopted in 2013 and entered into force on 1st July 2015.

According to the then-applicable wording of that provision, it was inadmissible to take and use evidence obtained for the purposes of criminal proceedings by means of a prohibited act referred to in Article 1 § 1 of the Criminal Code. The Art. 1 § 1 of the Criminal Code sets basic rules of criminal liablity. Pursuant to that provision only a person who committs an act prohibited under a penalty by a statute in force at the time of its commission might be subjected to criminal liability.

The introduction of Article 168a was explained as a conclusion of the procedural reforms aimed at increasing the adversarial character of court proceedings and increasing the parties' initiative in evidence-taking by, among other things, enabling them to submit "privately collected evidence", i.e. material evidence obtained independently by a party. The provision was thus intended as a wholesale prohibition on obtaining evidence illegally by the parties by breaching the secrecy of third-party communications or their domestic peace.

On the other hand, the proponents of the reform pointed out that the provision would limit the admissibility of evidence presented by the public prosecutor, restricting the use of evidence obtained during the proceedings by means of a prohibited act. It was noted that before the introduction of relevant legislative measures, this issue had raised serious doubts among the scholarship and in the literature.

However, mere months after the provision came into force, an amendment to the Code of Criminal Procedure adopted in 2016 significantly changed the article's wording, ultimately creating a provision that from the very beginning was known as the "reversed evidentiary prohibition". According to the "new" wording of Article 168a CCP, evidence cannot be considered inadmissible solely on the grounds that it was obtained in violation of procedural rules or by means of a prohibited act, unless the evidence was obtained in connection with a public official discharging their official duties in the consequence of manslaughter, intentionally committing bodily harm or unlawful detention.

During the legislative process, the Ministry of Justice rejected in advance any criticisms directed at this provision. The Ministry argued that the article merely clarified existing legal arrangements by eliminating a situation that had occurred before the amendment, namely the provision's failure to specify the acts leading to an evidentiary prohibition. The Ministry assumed that such a regulation would discourage state authorities from obtaining evidence at all costs.

The scope of the exception to the general principle of admissibility of evidence adopted in Article 168a CCP was also noted in the course of the legislative process. This exception applied only to situations in which a public official has committed manslaughter, intentionally inflicted bodily harm or deprived someone of liberty. Such an understanding of the provision by its drafters significantly limited the scope of inadmissible evidence, which no longer included e.g. situations in which a public official would commit the offence of making an unlawful threat. This clearly remained in conflict with the prohibition of torture, inhuman and degrading treatment enshrined in the Polish Constitution and the provisions of international law binding on Poland.

Doubts about the constitutionality of Article 168a CCP were also raised by the Ombudsman[44]. In his request to the Constitutional Court, the Ombudsman argued that the provision violated fundamental constitutional principles (the principles of legality, a democratic state ruled by law, proportionality in restricting human rights and freedoms), as well as certain rights and freedoms protected by the constitution, including the prohibition of torture and the right to a fair trial. However, the Ombudsman's request was withdrawn from the Court in view of the unlawful appointment of certain members of the adjudicating panel of the Constitutional Tribunal[45].

The understanding of the content of Article 168a CCP was then lively discussed in the legal literature and court decisions. For example, the Court of Appeal in Wrocław ruled that the constitutional and Convention context must be taken into account in the interpretation of Article 168a CCP. Using a literal interpretation (based on a creative construction of a comma placed in the wording of the provision), the Court of Appeal concluded that Article 168a CCP contains no directive to take evidence obtained unlawfully, but merely an evidentiary prohibition related to the following categories of evidence:

1 Evidence obtained in violation of rules of procedure in connection with the performance of official duties by a public official;

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44 Ombudsman's motion to the Constitutional Court, available: https://www.rpo.gov.pl/sites/default/files/Wniosek%20do%20TK%20owoce%20zatrutego%20drzewa%20art%20art.%20168a%20%20KPK%206.05.2016.pdf (26.06.2021).

45 Ombudsman's letter to the Constitutional Court, available: https://www.rpo.gov.pl/sites/default/files/Wycofanie%20wniosku%20RPO%20do%20Trybuna%C5%82u%20Konstytucyjnego.pdf (26.06.2021).

2 Evidence obtained by means of a prohibited act referred to in Article 1 § 1 CC in connection with the performance of official duties by a public official;

3 Evidence obtained by means of a prohibited act referred to in Article 1 § 1 CC and in violation of rules of procedure in connection with the performance of official duties by a public official;

4 Evidence obtained by means of a prohibited act referred to in Article 1 § 1 CC, as a result of manslaughter, intentionally committing bodily harm or unlawful detention.

In another ruling, another panel of the Court of Appeal in Wrocław invoked the adverb "solely" contained in Article 168a CCP to declare that evidence may be considered inadmissible if it was obtained in violation of procedural rules or by means of a prohibited act which was accompanied by a violation of provisions of the Constitution of the Republic of Poland (e.g. Articles 30, 47, 49 or 51)[46].

The Supreme Court has taken a different approach to this issue and emphasised the impact of a given piece of evidence on the overall fairness of the proceedings. The Court held that Article 168a CCP cannot constitute a legal basis for the admitting of evidence obtained in violation of the rules of procedure or by means of a prohibited act if the taking of such evidence would render the trial unfair within the meaning of Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms[47].

Accordingly, since Article 168a CCP became effective, apart from its originally legislated version, at least three other, not mutually exclusive, interpretations of this provision have emerged. What is important, however, is that none of the proposed interpretations prevails. Their authoritative force is only based on the persuasiveness of the arguments adopted and the authority of interpreting courts. This fact directly affects the legal situation of individuals who face the risk that the law enforcement officers and courts may adopt the legislator's original interpretation of Article 168a CCP in proceedings conducted against them.

This risk has clearly materialised in some of the reviewed court decisions. It can be observed that the risk is not always interpreted fully with reference to the constitutional and international background. It sometimes serves as a convenient argument for courts applying the law to trump litigants' objections concerning the admissibility of evidence introduced at trial.

For example, the Provincial Administrative Court in Gliwice[48], when hypothetically considering the procedural consequences of a violation of provisions of criminal procedure for the purposes of using evidence gathered in the course of tax proceedings, ruled that such violations were not relevant, invoking the wording of Article 168a CCP.

On the other hand, it is worth noting the ruling of the District Court in Legionowo[49] concerning the Code of Criminal Procedure, in which the court referred to Article 168a CCP, stating that, under the provision, discovered a violation of rules of procedure cannot result in the exclusion of evidence as they do not fall within any of the exceptional situations described in Article 168a CCP.

It is also necessary to consider whether the current form of Articles 168a, 168b and 237a CCP precludes the implementation of the requirements of the directives relating to the provision of an effective remedy to an individual in the event of a breach of their rights guaranteed under the directives: the right of access to a lawyer before the first questioning; the right to information, the right to remain silent, the right not to incriminate himself and the right to have the presumption of an individual's innocence rebutted in a lawful manner.

At first sight, Article 168a CCP obliges law enforcement officers and courts to use, in the course of proceedings, evidence obtained in violation of the rules of procedure. Although there are numerous voices in the literature and jurisprudence calling for a Constitution- and Convention-friendly interpretation of this provision, it cannot be guaranteed that such an interpretation will be recognised at every stage of the proceedings and before every law enforcement officer or court.

Norms extracted from this provision may therefore lead to a practice of using evidence obtained in breach of the guarantees laid down by the directives. The pre-trial phase, where judicial review is nearly non-existent, is the stage of proceedings most likely to affected by such practices.

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46 Poland, The judgment of the Appeal Court in Wrocław of 27.04.2017, case no. II AKa 213/16, LEX no. 2292416.
47 Poland, The judgment of the Supreme Court of 22.06.2019, case no. IV KK 328/18, OSNKW 2019, no. 8, pos. 46.
48 Poland, The judgment of the Administrative Court in Gliwice of 26.11.2020, case no. III SA/Gl 177/20, LEX no 3098074.
49 Poland, The judgment of the District Court in Legionowo of 8 March 2019, case no. II K 494/18, LEX no. 2667457.

At the pre-trial stage, Article 168a CCP, interpreted in accordance with the intentions of the legislator, can serve as a gateway for introducing into proceedings evidence of a doubtful nature, both from the point of view of national law and the guarantees stemming from directives or ECtHR standards. A similar risk can be observed in the context of Articles 168b and 237a CCP.

Evidence included in the proceedings on their basis may constitute grounds for a direct interference with the rights of an individual, for example by operating as a *prima facie* evidence that a suspect has committed a prohibited act, which is a basis for charging the suspect, conveying the suspect or applying non-custodial preventive measures against the suspect. In fact, all these procedural steps are subject to no judicial review. At the same time, it cannot be ruled out that there will be situations in which, despite the concerns over the compatibility with the Constitution and Convention, the courts will disregard the objections addressed in respect of these provisions and admit certain questionable evidence or accept the findings of the law enforcement authorities in full by issuing a penalty order or allowing the voluntary assumption of criminal liability.

Apart from the aspect of lawful rebuttal of the presumption of innocence, the problem with the application of Article 168a CCP will most strongly concern the evidence from the suspect's own testimony obtained in violation of the right of access to a defence lawyer before the first questioning. Due to the existence of stand-alone rules of Article 16 CCP (the absence of negative consequences of no information or incorrect information being supplied to the suspect/accused) and Article 171 CCP (the evidentiary prohibition concerning the absence of freedom of expression), this issue will have a certain, albeit limited, impact on other rights of suspects under the directives.

This is all the more important as there is no provision in the rules of Polish criminal procedure prohibiting the use of testimony obtained without the presence of a defence lawyer. This, coupled with the lack of an effective system for providing state-funded legal representation for suspects during the first questioning, results in a significant number of proceedings in which suspects testify without communicating with a defence lawyer, even in those cases where the participation of a defence lawyer is mandatory. National legislative arrangements may also raise doubts regarding the design of the waiver of the right to the assistance of a defence lawyer. Under the current law, the waiver is expressed by a mere ticking of a box in the detention report, which does not guarantee that the waiver is explicit and informed.

As an aside to the main considerations, one may reasonably doubt whether this situation is in conformity with the standard established by the ECtHR in *Salduz v. Turkey*, and subsequently generally upheld in *Ibrahim v. the United Kingdom* or *Simeonovi v. Bulgaria*. As it was previously mentioned, the national courts indicate that it is impossible to conclude from the judgments delivered by the European Court of Human Rights that it was the ECtHR's intention to impose a general requirement to ensure the presence of a defence lawyer at the first questioning of all suspects or otherwise preclude their statements from being used during the trial[50]. The Supreme Court ruled inter alia that the lack of a defense counsel during the first questioning of the suspect in the preparatory does not constitute by itself an obstacle to use the statements of the suspect made in such conditions, as long as the suspect cannot be recognized as vulnerable.

However, such a standard is not uniformly applied in every situation by the courts, which specify further exceptions to the general rule that a defence lawyer must be present at the first questioning. In practice, this has the effect of restricting the rights under the directive to a minimum.

In a decision of 27 June 2016, the Supreme Court[51] emphasised that the absence of a defence lawyer in cases where circumstances exist that hinder the defence during the suspect's first questioning in pre-trial proceedings did not constitute an obstacle to the use of testimony given in such conditions in court, provided that there were no other circumstances excluding the freedom of expression or objectively existing vulnerability of the suspect. At the same time, the Supreme Court assumed that the accused's limited intellectual capacity was not such a circumstance, provided that the accused's capacity to participate in the proceedings had been confirmed by a psychiatric expert and that the offence charged was of an uncomplicated nature, comprehensible to an average person, including those with low intellect.

In another judgment, relating to double manslaughter allegedly committed by a man with a mild intellectual disability, the Supreme Court merely proposed a special, higher standard for assessing evidence obtained from the suspect's testimony on the basis of which his perpetration was presumed. Such a higher standard should specifically be followed when the alleged offence is manslaughter and there is no other evidence directly pointing to the suspect who additionally exhibits the characteristics of an intellectual disability (however slight) and where a defence lawyer did not participate in the procedural steps carried out

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50 Poland, Supreme Court judgment of 5.04.2013 r., case no. III KK 327/12, OSNKW 2013, nr 7, poz. 60.

51 Poland, Supreme Court judgment of 23.06.2016, case no. II KK 82/17, LEX nr 2338030.

in the pre-trial proceedings. The Court emphasized that "since the Code of Criminal Procedure currently in force does not exclude the possibility of making factual findings based on a suspect's testimony containing self-accusatory statements made in the above-described conditions, doubts may arise as to the compliance with the standards resulting from the *nemo se ipsum accusare tenetur* principle, which should thoroughly be considered by the [trial] court. A measure that would generally prohibit the making of such determinations remains in the realm of *de lege ferenda* proposals, which are perhaps worthy of consideration."[52]

Arguably, the introduction of Article 168a CCP aggravated this situation, giving another argument in favour of the rectification of procedural violations that would be otherwise deemed unlawful under the directives, including, above all, the admission of evidence from the suspect's testimony obtained without access to a defence lawyer.

The result of this state of affairs is that the Polish criminal procedure generally provides no effective remedy for violations of suspects' right to the assistance of a defence lawyer before the first questioning in the case. As far as proposals of legislative changes are concerned, one should consider introducing an obligation to audio and video record the course of first questioning. Relevant changes should also include the way in which suspects are informed about their rights in criminal proceedings (so that this information is more effectively delivered). The procedure for waiving the right to contact a defence lawyer should also be improved.

Finally, the system for appointing suspects' defence lawyers requires a major overhaul, which should include the limiting of the number of actors involved in the appointment process, the shortening of the time required to a minimum, and introduction of mechanisms for the prompt notification of individual defence lawyers of their appointments. Such solutions should be accompanied by a prohibition on the procedural use of testimonies given by a suspect without the presence of a defence lawyer in the course of proceedings that are not recorded.

ARTICLE 170 OF THE CODE OF CRIMINAL PROCEDURE

Article 170 § 1 (1) CCP, a provision that governs the dismissal of submissions of evidence, is a key rule describing the problem of inadmissibility of evidence. According to the article's wording, a submission of evidence must be dismissed if the taking of evidence is inadmissible according to the law.

This immanently links the regulation of Article 170 § 1 (1) CCP with evidentiary prohibitions, i.e. provisions excluding the possibility of taking evidence in a specific way or preventing the obtaining of a measure of evidence from specific sources of evidence or taking of evidence to prove specific facts. These prohibitions are sometimes relative in nature and can be overruled by a court decision and sometimes even by the prosecutor.

Notably, Article 170 CCP refers to primary unlawful evidence, i.e. evidence that has been obtained in a direct violation of an evidentiary prohibition. However, no provision of the Code of Criminal Procedure addresses the issue of indirectly unlawful evidence, or evidence obtained thanks to information obtained from primary unlawful evidence. As a result, it is possible, to establish new evidence basing on the information obtained from other evidence that was found inadmissible. For example, basing on the testimony of a suspect interrogated as witness, without appropriate information about its rights and duties.

Moreover, the Supreme Court[53] has noted in one of its judgments that it is impossible to broaden the interpretation of grounds for the exclusion of evidence referred to in Article 170 § 1 CCP. The Court argued that the broadening of this interpretation would restrict the parties' right to influence the nature of the evidence and limit the application of the principle of material truth. The Supreme Court went even further, indicating in the ruling of 30 March 2012 that the prohibition to conduct evidentiary proceedings must result from specific provisions[54].

The evidentiary prohibitions listed in the Code of Criminal Procedure include:

- the prohibition on the use of testimonies of suspects, accused persons and witnesses and other statements made in conditions excluding freedom of expression (Article 171 § 7 CCP);
- the prohibition on the use of testimonies of suspects, accused persons and witnesses and other statements made with the use of hypnosis, chemical or technical means influencing mental processes of the person

52 Poland, Supreme Court judgment of 23.06.2016, case no. II KK 39/16, LEX nr 2080524.
53 Poland, Supreme Court judgment of 5.03.1979, case no. II KR 30/79, LEX no. 17127.
54 Poland, Supreme Court judgment of 30.03.2012, case no. SNO 9/12, LEX no. 1215797.

questioned or aiming at controlling unconscious reactions of their system in connection with the questioning (Article 171 § 5 CCP);

- the prohibition on replacing the evidence from the accused's or witness' testimony with the content of written documents or official memos (Article 174 CCP);
- the prohibition on the questioning of a defence lawyer or an advocate as a witness as to the facts they have become aware of while providing legal advice, and as to documents related to the provision of legal advice (Article 178 CCP);
- the prohibition on the questioning of a clergyman as to the facts learned in confession (art. 178 CCP);
- the prohibition on the questioning of a mediator as to facts they have learnt from the accused or the aggrieved person while conducting mediation proceedings, with the exception of information on offences that must obligatorily be notified to law enforcement authorities under the law (Article 178a CCP);
- the prohibition on the questioning of a medical practitioner as to the accused's statements concerning the charged act (Article 199a CCP);
- the prohibition on the hearing of an expert witness as to the accused's statements concerning the charged act (not applicable to experts who examine the accused's unconscious bodily reactions) (Article 199 CCP read in conjunction with Article 199a CCP);

In addition to absolute prohibitions, there are many conditional evidentiary prohibitions such as the following:

- the prohibition on questioning persons obliged to keep state secrets or the use of documents containing such secrets unless the confidentiality obligation is lifted (Article 179 CCP read in conjunction with Article 226 CCP);
- the prohibition on the questioning of persons obliged to maintain professional or occupational secrecy as to the circumstances covered by such secrecy and the use of documents covered by such an obligation unless the confidentiality obligation is lifted (Article 180 CCP read in conjunction with Article 226 CCP);
- the prohibition on the questioning of persons who have exercised their right to refuse testimony or answer questions or have been exempted from the obligation to testify, e.g. closest relatives of the suspects or witnesses in the case, where the answer might exposed themselves or their relatives to criminal liability (Articles 182, 183, 185 and 186 CCP).

The above enumeration presents the key rules of admissibility of evidence, described by negation. Apart from those listed above, one can point to several other evidentiary prohibitions derived from provisions of the Code of Criminal Procedure or other laws. These include, inter alia, the prohibition of proving that a final criminal conviction is unfounded or unreasonable, the prohibition of proving the existence of a right or a legal relationship other than one determined by a final court ruling, the prohibition of proving the progress of deliberations on a court ruling or the prohibition of proving the existence of circumstances which would allow the determination of the new identity of a state witness.

In addition to evidentiary prohibitions, the courts have interpreted the implied prohibition of using the results of unlawfully conducted special investigative operations. In a ruling concerning the provision of a financial benefit without verification of the obtained information about the commission of an offence, the Supreme Court decided that the disqualification of the resultant evidence did not have to be prevented by the fact that neither the Code of Criminal Procedure nor any other law provides for the procedural disqualification of such evidence. In the Court's view[55], "[t]he legislator does not, after all, presume that its officers will engage in an unlawful conduct and need not determine, just in case, the consequences of such conduct in the field of the law of evidence".[56] In the opinion of the Supreme Court, such consequences should be

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55 Poland, Supreme Court judgment of 30.11.2010, case no. III KK 152/10, OSNKW 2011, no. 1, pos. 8.

56 *Ibidem*.

assessed from the perspective of the entire legal system and based on the provisions of the Constitution and the case law of the European Court of Human Rights. Such a solution partly opened a way to look for more evidentiary prohibitions than only those indicated in CCP.

In a similar case, the Court of Appeals in Warsaw indicated that "[i]n a democratic state ruled by law, conducting a police sting operation without complying with basic legal requirements is an unlawful and illegal activity that may not create any evidentiary effects"[57]. The Court of Appeals went on to say that a democratic state by its very nature precludes testing the honesty of its citizens or checking such honesty in a random and blind manner by using clandestine and deceitful methods. Such conduct, concluded the Court, is a feature and practice of a totalitarian state.

ARTICLE 171 OF THE CODE OF CRIMINAL PROCEDURE

The provision of Article 171 CCP sets out the rules for conducting a questioning. Article 171 prohibits asking suggestive questions, influencing the statements of the person subject to questioning by coercion or unlawful threats, as well as the use of hypnosis, chemical or technical measures influencing the mental processes of the person subject to questioning or aimed at controlling the unconscious responses of their body. Testimony given in such conditions or other conditions excluding freedom of expression may not constitute evidence.

The jurisprudence of the Supreme Court defines a state excluding freedom of expression as a situation in which "the person making a statement has their will paralyzed, completely or to such a significant extent that they are unable to say what they would like to say in connection with the subject matter of the procedural step performed".[58] As a result, the questioning of the same person repeatedly about the same facts (unless new facts come to light)[59], or the situation that involved administering alcohol to an interrogated person and questioning this person in the state of intoxication[60] were all considered situations that preclude freedom of expression. Interestingly, no such conclusion was reached in the case of questioning a person who had intoxicated themselves.[61] The presence of a police officer who had previously interrogated a suspect during the questioning by the prosecutor was also considered to exclude freedom of expression.[62]

A noteworthy aspect of Article 171 CCP is the placement of the burden of proof. In the literature, there is a view on the existing presumption of the correctness of taking a given piece of evidence[63]. As a result, the burden of proof in this respect is shifted to the party which raises the circumstances challenging the lawfulness of the evidence in question. However, it does not have to prove that such circumstances, but only show that they are plausible.[64]

ARTICLES 168B AND 237A OF THE CODE OF CRIMINAL PROCEDURE

In addition to the above-mentioned Article 168a CCP, the 2016 amendment introduced another provision of the Code, Article 168b and 237a, which relate to the use in criminal proceedings of materials obtained during special investigative operations. The Art. 168b states as follow.

> *Where, as a result of an operational control ordered at the request of an authorised authority pursuant to specific provisions, evidence has been obtained that a person against whom the operational control has been applied has committed a criminal offence prosecuted ex officio or a fiscal offence other than the criminal offence covered by the operational control order, or that a person not covered by the operational control order has committed a criminal offence prosecuted ex officio or a fiscal offence, the public prosecutor shall take a decision as to the use of such evidence in the criminal proceedings.*

Therefore, the provision stipulates that where a covert investigative method has produced evidence of an offence *other* than the offence covered by the order authorising the overt investigative method, the decision whether or not use of that evidence in criminal proceedings is taken by a prosecutor. Similar solutions are

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57 Poland, Court of Appeal in Warsaw judgment of 26.04.2013, case no. II Aka 70/13, LEX no. 1322733.
58 Poland, Supreme Court judgment of 8.02.1974, case no. V KR 42/74, OSNKW 1974/6/115.
59 Poland, Supreme Court judgment of 14.09.1981 r., case no. II KR 229/81, LEX no. 21918.
60 Poland, Court of Appeal in Lublin judgment of 9.06.2011 r., case no. II AKa 108/11, LEX no. 895932.
61 Poland, Supreme Court judgment of 5.03.2004, case no. V KK 314/03, OSNwSK 2004/1/501.
62 Poland, Supreme Court judgment of 28.08.1980 r., II KR 239/80, PiP 1981/4.
63 Kurowski Michał (2021), *Kodeks postępowania karnego. Tom I. Komentarz aktualizowany*, red. D. Świecki, LEX/el. 2021, art. 16.
64 Poland, Supreme Court judgment of 9.08.1976, case no. V KR 34/76, OSP 1979/41/8.

found in the simultaneously added Article 237a CCP concerning the interception of telephone conversations in the course of criminal proceedings.

The above provisions gave rise to serious doubts already at the stage of legislative works. They were described as a potential avenue for circumventing the requirements relating to the use of covert investigative methods and the interception of telephone conversations. It was feared, above all, that these solutions may be abused by secret services and law enforcement agencies to circumvent regulations guaranteeing that interferences with individual rights must remain proportionate.

In comparison with the old law, the addition of Articles 168b and 237a CCP was intended by the legislator as a means of sanctioning, through a prosecutor's after-the-fact consent, the use of materials related to criminal and tax offences that would otherwise be entirely incapable of being revealed through covert investigative methods.

Accordingly, the new provisions could effectively dismantle the legal guarantees of the proportionality of interferences with the right to privacy existing in the form of a list of offences "eligible" for revealing through such measures. Indeed, it would be sufficient to obtain an authorisation for covert investigative methods in a case involving an "eligible" offence and then use this authorisation to obtain evidence of a "protected" offence.

Another objection concerned the body authorising the use of materials in criminal proceedings. The authorisation was to be expressed not by the court, but by the prosecutor. This directly meant that the sanctioning of otherwise inadmissible materials obtained in the course of criminal proceedings could have been ordered by the Prosecutor General (Minister of Justice), an active politician. This state of affairs greatly increased the risk of arbitrary interference with individual rights and freedoms. Finally, the amendment in question did not provide any time limit for obtaining the after-the-fact consent.

This understanding of the discussed provision was challenged by the Ombudsman[65] before the Constitutional Court. The Ombudsman argued that the amendment directly interfered with an individual's right to privacy and allows for disproportionate and arbitrary restrictions of this right.

Ultimately, the Ombudsman withdrew[66] his constitutional review request, due to inappropriate composition of a Constitutional Tribunal[67]. This means that it is the courts, especially Supreme Court, applying Articles 168b and 237a CCP who currently bear the main burden of considering the constitutional and Convention background for the parliamentary legislation.

Such an approach was indicated by a resolution of the Supreme Court, in which Article 168b CCP was interpreted in a pro-constitutional manner[68]. The Supreme Court took the position that the mechanism of operation indicated in this provision applies only to offences listed as "eligible" for being investigated through covert investigative methods. According to the Supreme Court, it is therefore impossible to sanction evidence of "incidentally" uncovered offences not included in that list. As a result, the evidence of theft (which is an offence generally "protected" against being investigated by such methods) revealed through lawfully used covert investigative methods cannot be used in other criminal proceedings specifically concerning that theft.

However, the above approach does not fully address all constitutional concerns raised by the Ombudsman. In effect, it is still possible for the prosecutor in pre-trial proceedings to decide on the use of the obtained evidence of a "protected" offence for the purposes of the proceedings. However, the introduction of such materials to judicial criminal proceedings requires leave of the court, which is the body approving submissions of evidence presented by the prosecutor together with the indictment.

In any case, the Supreme Court's interpretation may still not stand as the Minister of Justice (Prosecutor General) asked the Constitutional Court to review the provision as understood by the Supreme Court. In the Minister's view, this provision in the meaning recognized by the Supreme Court violates the constitutional principle of the common good, the principle of trust in the state and its laws, the principle of fairness and the principle of legality. According to the Minister, Article 168a CCP also interferes with the protection of the right to a court and the citizen's obligation to obey the law described in Article 83 of the Constitution[69].

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65 The Ombudsman motion to the Constitutional Tribunal, available: https://www.rpo.gov.pl/sites/default/files/Do_TK_zgody_na_wykorzystanie_dowodow_uzyskanych_podczas_kontroli_operacyjnej.pdf (26.06.2021).

66 The Ombudsman letter to the Constitutional Tribunal, available: https://www.rpo.gov.pl/sites/default/files/Pismo%20procesowe%20RPO%20do%20Trybuna%C5%82u%20Konstytucyjnego%20w%20sprawie%20tzw.%20zgody%20nast%C4%99pczej.pdf (26.06.2021).

67 For further details concerning inappropriate composition of Constitutional Tribunal in Poland refer to ECHR judgment of 5 May 2021 concerning the case Xero Flor sp. z. o.o. v. Poland, case no.

68 Poland, the resolution of the composition of 7 judges of the Supreme Court of 28.06.2018, case no. I KZP 4/18.

69 The Public Prosecutor General motion to the Constitutional Tribunal, available: https://ipo.trybunal.gov.pl/ipo/dok?dok=F-1327066203%2FK_6_18_wns-pg_2018_07_31_ADO.pdf (26.06.2021).

ARTICLE 16 § 1 OF THE CODE OF CRIMINAL PROCEDURE

Article 16 § 1 of the Code of Criminal Procedure defines the general consequences of a failure to inform a participant in the proceedings (e.g. victim or defendant) about their rights. It indicates that:

> *If the body conducting the proceedings is under obligation to advise the parties to the proceedings of their rights and duties, and fails to do so or misadvises them, this shall not result in any adverse consequences in the course of the trial to a participant of the proceedings or other persons affected.*

In accordance with the literal wording of this article, the authority conducting the proceedings is obliged to inform participants in the proceedings about their rights and obligations. A failure to provide such information or the provision of inaccurate information may not cause any adverse procedural consequences for the participant or other person concerned.

Some legal commentators offer a narrow interpretation of this provision. Kurowski believes that it applies only where a law provides for certain consequences (e.g. refusal to reinstate the time limit for filing an appeal due to the fact that a person has been provided with incorrect information), but not in circumstances where it is difficult to directly find such an effect in other provisions. As an example, Kurowski mentions the inability to evade the effects of testifying despite the fact that a person has not been informed about their right to refuse to testify.[70] Grzegorczyk speaks in a similar vein stating that the suspect who testified cannot demand their testimony to be exccluded from the trial, as this is only possible in cases indicated in the act.[71] Jeż-Ludwikowska takes a different approach on this issue, indicating that a failure to inform a person who testifies of their right to refuse to testify or providing them with erroneous information in that respect should result in the disqualification of evidence.[72] The author links the discussed situation to the lack of freedom of expression on the part of the suspect. This standard should also be extended to situations where the suspect has not been informed about their right to access a defence lawyer or has been incorrectly informed about this right. Arguably, such a standard would be more in line with the requirements set out for Polish criminal proceedings by the Convention on Human Rights and Fundamental Freedoms, as well as EU directives.

6 INADMISSIBILITY OF EVIDENCE: A PERSPECTIVE OF PRACTITIONERS

One of the objectives of the project was to confront the legislation on the admissibility of evidence with the practice of its application. To this end, the HFHR staff interviewed a total of 15 lawyers, prosecutors and judges. Their perspectives provided a valuable insight into the realities of exercising the function of a defence lawyer, how a piece of inadmissible evidence is understood, what the defences against its introduction into the proceedings are, and how to contest such evidence in the course of proceedings.

The interviews were based on a standardized questionnaire adapted to the specificity of the roles that lawyers, prosecutors and judges play in criminal proceedings.

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70 Kurowski Michał (2021), *Kodeks postępowania karnego. Tom I. Komentarz aktualizowany*, red. D. Świecki, LEX/el. 2021, art. 16.

71 Grzegorczyk Tomasz (2014), *Kodeks postępowania karnego. Tom I. Artykuły 1-467. Komentarz.*

72 Jeż-Ludwichowska Maria (2003), *Wyjaśnienia oskarżonego a prawo do informacji*, Palestra 2003/3-4.

6.1 THE DEFINITION OF INADMISSIBLE EVIDENCE

The first group of questions addressed to all interviewed practitioners concerned the understanding of the notion of "inadmissible evidence". In this context, most interviewees linked inadmissible evidence to evidentiary prohibitions. Interviewed practitioners sometimes referred to the principle of freedom of evidence, which is based on the rules of criminal procedure, i.e. the possibility of using any measures that are not prohibited by law in the course of proceedings. As a result, they consider that inadmissible evidence is only the evidence that is explicitly prohibited by applicable laws.

Several interviewees additionally noted that it was necessary to expand the meaning of "inadmissible evidence" to include cases in which evidence was obtained in violation of procedural rules. In a few statements, interviewed legal practitioners emphasised the need to take into account constitutional and Convention standards, and thus human rights, in the assessment of the admissibility of evidence.

> *Most often, certain issues related to human rights protection are what determines that evidence is inadmissible.*
>
> **A REGIONAL COURT JUDGE**

A significant number of interviewees from all surveyed professional groups conclude that they have rarely come across a situation in which courts would have examined the inadmissibility of evidence. In their experience, evidence is rather assessed for its relevance to the proceedings and whether it is introduced to stall the proceedings.

> *It is not easy to come across a piece of evidence that is inadmissible because in Poland the principle of free evaluation of evidence applies and we don't use any formal criteria of assessment of evidence. Inadmissible evidence is most likely to appear in the context of wire-tapping.*
>
> **A REGIONAL COURT JUDGE**

However, one of the judges expressed a completely different opinion, pointing out that inadmissible evidence actually appeared in virtually all proceedings in the form of testimony given by defendants before they obtain the legal status of the suspect. The judge noted that transcripts of such testimony are being commonly attached to the case files even though they cannot legally be used in the proceedings. Sometimes they also become a basis for experts' opinions concerning evidence. However, the opinion of this interviewee was detached from what the rest of the interviewees said.

Speaking about examples of likely inadmissible evidence, one of the lawyers mentioned a search of a suspect's place of residence in the course of the proceedings, despite the fact that the offence the suspect was charged with did not concern the possession of narcotic drugs or other legally prohibited substances. He referred to a case reported by the media, namely that of a man arrested for voyeurism in a swimming pool, who was additionally charged with possession of narcotic drugs that were found at his place of residence as a result of the search.[73]

> *If there had been no such search, which had no connection with the case, no evidence of any other crime would have been revealed.*
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> **A LAWYER**

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73 Dziennikśledczy.pl, *Skandal na basenie. 34-latek podglądał i nagrywał nagie kobiety*, available: https://dzienniksledczy.pl/skandal-na-basenie-34-latek-podgladal-i-nagrywal-nagie-kobiety/ (accesed on: 14.06.2021).

The interviewees also pointed to other, potentially inadmissible, evidence. They mentioned, inter alia, the taking of samples of writing from suspects without informing them that they are not obliged to provide such samples, as well as the practice of conducting an (unofficial) initial questioning of suspects before their first officially recorded questioning in the case combined with backdoor attempts to introduce the findings of the unofficial questioning to the case, e.g. by the questioning of police officers as witnesses.

One of the judges recalled a case in which testimony of a police officer was the key piece of the prosecution's evidence. He considered such evidence inadmissible as he determined that at the time of the unofficial questioning the suspect had been under the influence of alcohol. Another interviewed practitioner gave a similar example:

> *I had a case in which the police talked to a person suspected of bank fraud, and this person, shocked and convinced that this was not an official interview, confessed to another four counts of fraud. This should not have happened as what was said wasn't the accused's testimony, but it still is information obtained by the police. That's a decision the court should make: should it consider the content of such a conversation to be inadmissible evidence? After all, it was clearly obtained in violation of the procedure.*
>
> **A DISTRICT COURT JUDGE**

Such practices lead to situations in which this information is introduced as evidence to the court proceedings through testimonies of police officers. In such a case, officers are asked about the circumstances indicated in their internal memoranda, including those related to the statements of suspects made during the informal questioning (during which suspects are not informed about the rights and obligations they have in criminal proceedings). A prosecutor explicitly admitted that he resorted to questioning police officers to obtain such information.

> *A memorandum is not evidence in judges' eyes but if such a police officer is questioned, then we have evidence from the witness testimony...; and yes, it may be concluded that this method is used to evade the prohibition of self-accusation.*
>
> **A REGIONAL COURT JUDGE**

Another problem highlighted by two interviewed lawyers was the judicial authorisation of wire-tapping of persons other than those originally targeted in the course of criminal proceedings. Moreover, interviewees indicated isolated cases of the questioning of suspects under the influence of alcohol, or a case of a police officer and an expert psychologist pressurising a witness to waive their right to refuse testimony.

A judge of the Supreme Court recalled a cassation appeal case he decided, which involved a drastic violation of the freedom of expression of the person questioned by law enforcement authorities, including the use of violence. In the judge's opinion, the case is an appropriate illustration of the psychological challenges that judges face while assessing the admissibility of evidence.

In that particular case, the judge was satisfied, based on the facts, that the defendant was the perpetrator of the alleged manslaughter. At the same time, as the judge noted, the complaint concerning the violation of freedom of expression raised in the cassation appeal proceedings was legitimate. The judge knew that a decision to admit the cassation appeal and set aside the conviction would lead to disqualification of the key and only evidence gathered in the case, namely the suspect's testimony received in conditions excluding its freedom of expression. As a result, it would not even be possible to apply pre-trial detention, which significantly increased the risk of the suspect absconding and committing a new offence. Finally, the judge took a legalistic approach to the matter and admitted to the cassation appeal. In effect, the suspect fled the country after their conviction was overturned.

6.2 VIOLATIONS OF PROCEDURAL GUARANTEES AS GROUNDS FOR DECLARING EVIDENCE INADMISSIBLE

The discussion of the inadmissibility of evidence was expanded by questions about whether a violation of procedural guarantees, that occurs during the acquisition of evidence constitutes, should constitute a reason to declare the evidence so obtained inadmissible.

A lawyer noted that the problem of violations of procedural guarantees in the course of proceedings had primarily a theoretical dimension.

> *There is no established jurisprudence of the [common] courts or the Supreme Court, and you may only refer to decisions of international courts, including the ECtHR, and provisions of, say, EU directives, which are, by the way, only partially implemented. In our country, however, these standards are severely undermined.*
>
> **A LAWYER**

Some of the lawyers proposed that a violation of procedural guarantees afforded to a suspect or witness should render that evidence obtained from the suspect or witness unusable in the course of proceedings. However, the question immediately arose as to whether every such violation should lead to such far-reaching consequences. According to a lawyer, it is necessary to take into account the principle of proportionality and the associated balancing of values: the proper administration of justice, under which the guilty party should be punished, and procedural guarantees, measured by the fairness of the proceedings.

> *If a violation of procedural guarantees of a suspect or witness is irrelevant to the outcome of the proceedings, because the facts would have been established anyway, then, despite the violation of the provisions establishing the guarantees, e.g. by performing a search in a manner incompatible with the rules set out in the Code of Criminal Procedure, it can hardly be argued that such evidence would render the proceedings unfair.*
>
> **A LAWYER**

The interviewed prosecutors expressed diverging opinions on the issue. However, the majority indicated that a violation of procedural guarantees may result in the inadmissibility of evidence. According to interviewees, an example of such a situation is when no information on procedural rights is given to a suspect.

> *If no notice of rights has been given, such evidence may not be admitted.*
>
> **A PROSECUTOR OF A DISTRICT PROSECUTOR'S OFFICE**

An interviewed lawyer told the story of her client, who was informed about his rights while being under the influence of alcohol and without access to corrective glasses, despite suffering from a very severe visual impairment. In the lawyer's opinion, in those circumstances, the client was prevented from effectively familiarizing himself with the content of the received transcript of the hearing and notice of rights. In the course of the proceedings, the lawyer argued that the client's testimony should be excluded from evidence collected in the case. In doing so, she invoked the case of *Płonka v. Poland*[74]. However, the court admitted the testimo-

74 ECtHR judgment of 31.03.2009 in the case Płonka v. Poland, application no. 20310/02.

ny, giving credit to a prosecutor's statement in which the prosecutor recalled lending his spare glasses to the suspect so that the latter could read the notice of rights.

Speaking about the notice of rights, another lawyer drew attention to the manner in which the notice is phrased. In his opinion, information about rights is communicated in legalese, which most suspects do not understand at all. The courts are somehow unable to consider this factor, the lawyer noted. In his opinion, the courts assume that suspects know their rights because they formally received a notice of rights and obligations.

A judge pointed to the problematic form in which suspects are informed about the right to have a defence lawyer appointed. In his experience, arrested persons are in shock and do not understand the information about the right to a defence lawyer. As a result, they are unable to exercise their right to a lawyer.

In the context of violations of procedural guarantees for suspects, some interviewees noted the absence of a defence lawyer during the first questioning. However, not all interviewees agreed that such a deficiency automatically renders inadmissible the evidence obtained in the absence of a defence lawyer. A judge pointed to additional circumstances that should be assessed in this regard, i.e. the personal characteristics of the suspect, as well as whether the suspect could effectively follow the course of the proceedings.

In this context, another judge drew attention to the inconsistent and constantly evolving ECtHR's jurisprudence on the questioning of a suspect without the presence of a defence lawyer. He noted that the standard initially adopted by the ECtHR was impractical as it did not recognise the types of cases where the questioning had to be conducted immediately. However, the judge stressed that the absence of a defence lawyer in such situations should always be compensated by other guarantees, such as audio-video recordings of the questioning. Another judge also noted a similar aspect, emphasising that it is extremely difficult to assess the course of events and establish how a procedural step was taken based only on a transcript.

> *To be honest, I have no confidence in the way the police interview suspects and I think prosecutors are more reliable in this respect, I find it hard to believe that a prosecutor would commit any abuse, but as far as the police procedures are concerned, I believe they should be recorded. And police interventions, too.*

A DISTRICT COURT JUDGE

6.3 A VIOLATION OF THE CONDITIONS FOR TAKING EVIDENCE AND THE INADMISSIBILITY OF EVIDENCE

Apart from the problem of procedural guarantees, the interviewees were also asked whether the inadmissibility of evidence should be determined by law enforcement officers' violations of the legal conditions for the taking of evidence, e.g. by conducting an identity parade in violation of the law.

The interviewees have no uniform view on this issue, in particular as to whether such deficiencies should always automatically render the evidence inadmissible.

A lawyer suggested that this aspect should be assessed from the perspective of procedural fairness. In his opinion, if a given violation of the rules of procedure would lead to the proceedings being generally unfair, such evidence should be declared inadmissible.

Two judges were strongly in favour of the possibility of declaring evidence inadmissible if the legal conditions for its taking have been breached. One of them clarified that in cases where it is apparent from the transcript that the legal conditions for a given evidentiary procedure have not been met, the evidence obtained through the procedure should be declared inadmissible. He added that where the transcript did not suffice to establish what had really happened, the court had to assess the credibility of the evidence taken in that way.

However, the majority of interviewed prosecutors and judges were against embracing any kind of automation in this area. According to a prosecutor, in any event, the decision on the admissibility of such evidence should depend on the circumstances of the case at hand.

> *There are too many plausible scenarios to be covered by the rules of procedure that would arbitrarily determine that any violation of a given kind should always result in the inadmissibility of evidence.*

A PROSECUTOR OF A DISTRICT PROSECUTOR'S OFFICE

In effect, in the prosecutor's view, violations such as police officers appearing as stand-ins during an identity parade should not lead to a finding of inadmissibility of evidence but only be assessed in terms of the credibility of evidence. Another prosecutor added:

> *This is a procedural error and certainly must be avoided. There is no automatic inadmissibility of evidence taken in this way, but it will be very weak.*

A PROSECUTOR OF A CIRCUIT PROSECUTOR'S OFFICE

In this context, a lawyer noted the persistent problem of searches being carried out upon the presentation of a police ID card rather than a court or prosecutor's order. As a result, the basic form of the search under the Code of Criminal Procedure, which is based on the authorisation given by the court or prosecutor expressed in an order, becomes a de-facto exception. Conversely, it has become a rule that police officers conduct a search based on the grounds of "urgency" and only then apply to the court or prosecutor for post-factum authorisation, which is usually given. According to the lawyer, such violations should be contested by the defence by means of an interlocutory appeal. She added that it was only recently judges had started to more often accept the defence lawyers' arguments in this regard.

> *For years, these interlocutory appeals have been fiction.... Things that are currently happening in the judiciary have changed the approach of judges, and the courts are becoming increasingly more sensitive to the deficiencies of preparatory proceedings because they have noted that these proceedings often serve a purpose other than finding the perpetrators of crimes.*

A LAWYER

The interviewed lawyers expressed doubts about the chances that evidence obtained in this way would be considered inadmissible under the current Code of Criminal Procedure. As a result, according to an interviewee, raising objections based on gross deficiencies in procedural steps is a pointless exercise. In his criminal defence practice, the interviewee has repeatedly submitted evidence in the form of the testimonies of witnesses participating in identity parades to demonstrate that these persons were not at all similar in appearance to the suspect.

> *Putting someone wearing a red shirt behind a two-way mirror in a line of people wearing black shirts is not uncommon.*

A LAWYER

In his opinion, such practices usually did not make any difference to anyone, even if an identity parade was carried out in complete contravention with the regulation. As indicated above, in such a situation, a defence lawyer may challenge the admission of such evidence on appeal. However, they must demonstrate the impact of the alleged infringement on the outcome of the proceedings, which is not always easy, or even possible. Passing this hurdle is especially difficult if an inappropriate identity parade has led to the obtaining of other evidence incriminating the suspect.

6.4 FRUITS OF THE POISONOUS TREE

Interviewees noted different approaches to indirectly illegal evidence (known as "fruits of the poisonous tree") hence to situations in which the evidence was derived from procedurally relevant information obtained directly from illegal evidence.

The vast majority of interviewed lawyers saw the need to adopt rules excluding such evidence. A lawyer justified this proposal by referring to the necessity of preventing abuses of the state's advantage over the accused. The majority of prosecutors took a different position, generally arguing that such evidence should be admissible.

One of the interviewed judges pointed out that such evidence is legal under the rules of Polish criminal procedure. However, the use of "fruits of the poisonous tree" in given proceedings may cause some difficulties for judges presiding over the proceedings.

> *If a judge handling a serious case is presented with unlawfully obtained evidence which is the only evidence of guilt of a very dangerous criminal, then, for psychological reasons, the judge will take measures to assess the evidence in a way that allows him to consider the evidence admissible. If this evidence is followed by other proof, the judge will be able to afford to declare the originally illegal evidence inadmissible. I couldn't condemn a judge for that attitude.*
>
> **A SUPREME COURT JUDGE**

6.5 COMMISSION OF A PROHIBITED ACT WHEN OBTAINING EVIDENCE

Another interview question concerned the procedural consequences of a situation in which evidence is obtained through a prohibited act (an offence) and whether the law should employ any kind of automatism in addressing such situations.

Speaking about evidence obtained through a prohibited act, some of the interviewees strongly supported the concept that such evidence should be prevented from being used in the course of proceedings.

> *Any possibility, however narrow, would give room for abuse.*
>
> **A DISTRICT COURT JUDGE**

Several interviewees called for a more in-depth examination of the circumstances of the prohibited act itself. In their view, it is necessary to take into account such factors as the type and nature of the offence in question, as well as the fact whether the perpetrator acted with or without intent. Some interviewees drew attention to the need to distinguish between situations in which evidence would be obtained by means of an offence committed by a public official and those in which the evidence is obtained "incidentally" to the offence. According to a lawyer, making such a distinction would require recourse to the principle of proportionality and an assessment of the circumstances of a given case. In this context, another interviewee noted that the assessment of evidence obtained in a fraudulent should take into account the gravity of the offence which is to be proven by means of such evidence.

A lawyer argued that these issues would be of little relevance, as prosecutors and the court would seek to find such evidence admissible at all costs.

> *Such evidence would be used without the slightest problem, and what is more, this would be explained by invoking the greater good argument.*
>
> **A LAWYER**

Another lawyer pointed to a similar problem, adding that a critical systemic approach to such evidence would require a change in the entire sentencing philosophy. At the moment, however, there is no room for such a shift.

> *[E]veryone, from the police to the courts, will know that the evidence is obtained illegally, but they will come up with the justification for it, claiming that it's a good thing that the evidence has been found after all. A long time will pass before a rule is introduced to prevent such evidence from being invoked, and that rule will be very much opposed.*
>
> **A LAWYER**

6.6 ASSESSING THE OPERATION OF ARTICLE 168A OF THE CODE OF CRIMINAL PROCEDURE

The majority of the interviewees were very critical of the content of Article 168a CCP, which introduces the requirement to take evidence obtained in violation of the law (see Chapter 5.3.5.). However, they had no recollection of cases in which the possibility or necessity of invoking this provision would arise.

Statements made by an interviewed lawyer suggest that the provision creates the possibility of "turning a blind eye" to procedural doubts concerning certain evidence.

Some of the interviewees made it clear that a lot depends on the judge assessing the evidence obtained in this way. One of the judges pointed to the possibility of a creative interpretation of Article 168a CCP that would narrow down the scope of its application. As already mentioned, under Article 168a CCP evidence cannot be considered inadmissible solely on the grounds that it was obtained in violation of procedural rules or by means of a prohibited act, unless the evidence was obtained in connection with a public official discharging their official duties, as a result of manslaughter, intentionally causing bodily harm or unlawful detention.

According to interviewees, according to a certain interpretation based on the placement of a comma used in that provision, the article does not establish a directive to take evidence but rather creates several evidentiary prohibitions. These prohibitions refer to, on the one hand, evidence obtained by means of an offence committed by a public official in connection with them discharging their official duties. On the other hand, they also refer to the prohibition on the use of evidence obtained as a result of manslaughter, intentionally causing bodily harm or unlawful detention. Another judge noted that it would be up to the judge to either take advantage of the possibilities offered by Article 168a CCP or to go in the opposite direction contesting the provision from the perspective of the Constitution and the Convention.

One of the advocates expressed a similar sentiment. He pointed out that even a pro-constitutional interpretation of this provision by the courts was insufficient to eliminate the problem related to the article, specifically given that the Polish legal system is not based on judicial precedents. At the same time, the lawyer added that threats related to changes in the judiciary, resulting in a decline in the level of judicial independence, may affect the application of Article 168a CCP. In the lawyer's opinion, judges may be concerned that challenging the constitutionality of this provision may affect their situation and expose them to professional liability, e.g., disciplinary proceedings.

> *I have doubts whether courts have been able to deal with Article 168a. The article has endured as a legal basis for the legalisation of inadmissible evidence. Not all judges will want to sacrifice their careers. As a result, such an evidence will be sometimes used. This problem will persist as long as this provision remains in the Code.*
>
> **A LAWYER**

6.7 ASSESSING THE OPERATION OF ARTICLES 168B AND 237B

As it was the case with Article 168a, the majority of the interviewees have had no experience with the application of Articles 168b and 237b CCP, i.e. the provisions that allow the prosecutor to decide on the use in criminal proceedings of evidence "incidentally" obtained by the means of covert investigative methods (or wire-tapping), namely the evidence of another crime or a crime committed by another person, which was not covered by the original decision authorising the use of covert investigative methods or wire-tapping.

Two interviewed prosecutors have other experiences with the application of Article 168b CCP. One of them declared that prosecutors relatively often make use of this option. The other recalled having applied that provision by issuing an order permitting the use of all the materials collected against all the defendants in the case and in respect of all the offences they have been charged with. Another prosecutor pointed out that Article 168b CCP is much less ambiguous than Article 168a CCP, which definitely facilitates the former's application.

Interviewed judges criticised the wording of Article 168b CCP, pointing out that it should be the role of the court, not the prosecutor, to authorise the use of any materials obtained by means of covert investigative methods. As one of the judges argued, if the lawmakers consider that the list of offences that may be investigated with the use of covert investigative methods is too narrow, they should change the list and not introduce any substitute measures.

According to another judge, even the current wording of Article 168b CCP interpreted in the manner proposed in a landmark resolution of the Supreme Court[75], does not allow the prosecutor to use materials authorised in this way.

> *The provision may not be understood as it is construed by some courts, namely as one allowing the prosecutor to decide how the evidence is going to be used. If it's illegal, there's nothing one can do about it.*
>
> **A JUDGE OF A COURT OF APPEAL**

He added that since the Polish criminal law system did not implement the doctrine of fruits of the poisonous tree, a prosecutor can legally become acquainted with such information and take advantage of the knowledge so obtained. It may results in a need to perform additional procedural steps in the case conducted or supervised by the prosecutor, e.g. ordering a search in a shed mentioned in illegal wire-tapped conversation. However, according to interviewees, the prosecutor may not rely on such primary illegal evidence to establish facts in the proceedings.

6.8 THE PROCEDURE FOR DECLARING EVIDENCE INADMISSIBLE

The interviewees expressed equally divergent views concerning the judicial practice related to the timing of exclusion of evidence. Sometimes, evidence is excluded during the formal assessment of evidence, sometimes this does not happen until the sentencing stage. Most interviewees did not see any reasons to create a dedicated appeal procedure for reviewing the admissibility of evidence. However, a judge emphasised that parties' attention should be drawn to the issue:

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75 Resolution of the Supreme Court (a seven-judge panel) of 28 June 2018, case no. I KZP 4/18, published in OSNKW 2018, no. 8, item 53.

> *In my opinion [the fact that the evidence was declared inadmissible – editor's note] should be reflected in the trial transcript. If I heard a case in which I conclude that wire-tapping was used without the court's consent, I would certainly, in accordance with the general rules governing the trial, made it known to the party and have it on the record, so that the parties could take a position on the matter.*
>
> **A REGIONAL COURT JUDGE**

According to two interviewees, decisions on the admissibility of evidence should be taken before the proceedings start and before the evidence is revealed. In their view, this may take place during the substantive assessment of the indictment or during a preliminary hearing. As a result, defective evidence would not be introduced into the proceedings. Otherwise, the interviewees argued, an irreversible situation is created.

As one of the judges pointed out, it is not always possible to do so. He added that the court sometimes finds inadmissible evidence only after confronting it with other evidence gathered in the case. In such an event, the evidence in question may be excluded in the final decision.

6.9 BURDEN OF PROOF

The interviewees were also asked about the distribution of the burden of proof in a situation where the defence raises the issue of the inadmissibility of evidence, especially in the case of evidence collected during pre-trial proceedings.

One of the judges noted that the principle of presumption of the correctness of official steps is applicable in the course of proceedings. The burden of proving that a step has been wrongfully carried out rests therefore with the party that raises such allegations, usually the defence lawyer and the accused.

However, according to another judge, it is not that a party must take complete, credible evidence. According to him, the party's role is to make a plausible allegation. At the same time, the interviewee pointed out that the prosecutor should not be completely passive.

> *The initiative rests with the party initiating examination. It's an inverted application of the in dubio pro reo principle.*
>
> **A SUPREME COURT JUDGE**

Two other judges pointed out that the court cannot remain passive when such an objection is raised. In their view, the court must be ready to review the admissibility of the evidence throughout the entire proceedings. One of the judges stated that if he had found in the evidence a recording obtained by means of a covert investigative method applied after the period during which the use of such methods was authorised, he would have asked a prosecutor whether they uphold the submission of evidence. If the prosecutor had upheld it, then the judge would have dismissed the submission.

Nevertheless, some of the interviewed defence lawyers noted that the parties did not have the opportunity to effectively verify how a given evidentiary procedure had been carried out at the stage of pre-trial proceedings. Therefore, the parties are sometimes unable to make a plausible allegation in support of their challenge. Some of the interviewees indicated that it would be a good practice to record steps conducted during pre-trial proceedings.

> *"If you had it on tape, you would be able to say, 'look, that's when they made an error.' But based on the paper records alone, that's harder to prove – the text doesn't show the body language, a sound, a tone of voice. All that should be recorded – after all, these are the actions taken by state officials."*
>
> **A LAWYER**

Some prosecutors and judges expressed a similar perspective, pointing to the need to adopt solutions that would require that procedural steps taken at the stage of pre-trial proceedings must be recorded. An interviewee noted that this should be the norm in cases of serious crimes.

6.10 CHALLENGING THE ADMISSIBILITY OF EVIDENCE

Furthermore, the interviews addressed also a question on remedies the parties may use to challenge the admissibility of evidence in the course of proceedings.

Among the available remedies, interviewed defence lawyers primarily indicated challenges to evidence at the stage of its admission, submitting statements for the record and raising objections to expert opinions. However, these remedies are not always advisable.

> *You should make submissions. But in practice, we, defence lawyers, don't do this – I don't see this happening too often, because it annoys judges.... [S]ome judges don't want to have it recorded and that's the question of our know-how, knowing how to do it without antagonising the court.*
>
> **A LAWYER**

One of the lawyers pointed to the possibility of challenging the admissibility of evidence by skillfully asking questions while the disputed evidence or other evidence gathered in the case is being taken. According to the interviewee, such skillful questions may cause the court to have doubts as to the admissibility of the evidence contested by the defence.

According to another interviewee, in some cases, it is only during closing arguments that some of such objections can be raised.

> *I'm reading the files, and I can see that a witness was informally questioned earlier and their answers were recorded in a police memo, so I can't help but wonder if this was a situation involving a restriction of the freedom of expression, so I'm going to make a point in my closing argument because I don't have an opportunity to do that before. I can request a re-examination but that won't invalidate the memo.*
>
> **A LAWYER**

According to another lawyer, the appeal is the only weapon on their disposal. However, the interviewee made a point that it was extremely difficult to demonstrate that the deficiencies in the pre-trial proceedings had an impact on the final outcome of the proceedings.

This statement agreed with the opinion of one of the interviewed judges, who argued though that doubts about specific evidence rarely reach the stage of appellate proceedings. In his view, an appellate court may address these issues almost exclusively in a situation where the defence raises the relevant complaint. However, this is not always effective, as another lawyer mentioned that

> *If I argue a violation of procedural guarantees on appeal, the court, who couldn't care less, will ridicule me and give me a pitying smile.*
>
> **A LAWYER**

6.11 CONSEQUENCES OF DECLARING EVIDENCE INADMISSIBLE

Finally, the interviewees were also asked about the consequences of a declaration of inadmissibility of evidence. One of the judges drew attention to the impact of inadmissible evidence on judges; he claimed that such evidence creates a specific attitude among the judge towards the proceedings. The interviewee stressed that pieces of evidence that are manifestly defective should be removed from the case file. They should not be destroyed and kept separately for appellate review.

> *As long as a given piece of evidence is on the case file, it affects the judge.*
>
> **A SUPREME COURT JUDGE**

6.12 "FOREIGN" EVIDENCE AND ISSUES OF INADMISSIBILITY OF EVIDENCE

The growing role of cross-border judicial cooperation contributes to an increasing number of situations in which Polish judicial authorities face the need to assess the admissibility of evidence taken or secured in other jurisdictions. For this reason, one of the topics discussed concerned the interviewees' experience related to evidence originating from foreign countries.

Most of the interviewed lawyers have no experience with evidence secured abroad. The situation is different with the prosecutors and judges, some of whom claim to have relatively rich experience in the field.

> *This is the norm nowadays, Poles travel across the world, they commit offences in different places and such evidence must be taken.*
>
> **A PROSECUTOR OF A DISTRICT PROSECUTOR'S OFFICE**

Among the likely difficulties in obtaining evidence through international cooperation, the interviewees listed, among other things, language barriers, inadequate quality of translations and delays in obtaining evidence. As an additional obstacle to obtaining evidence collected outside the EU, interviews named the lack of knowledge of local legal systems, which may make it difficult for litigants to recognise potential violations and to raise appropriate defences. For some interviewees, the problem is the quality of evidence obtained in other jurisdictions as well as the inability to easily transpose foreign evidence into Polish proceedings. In this context, certain interviewees referred to situations of foreign authorities not allowing representatives of the Polish prosecution service or courts to participate in the evidentiary procedures conducted abroad.

Another difficulty mentioned by interviewees was foreign requirements to present an additional authorisation of procedural steps, e.g., a court order, in a situation where the Polish law requires only a prosecutor's order.

According to a prosecutor, a significant obstacle in relations between Poland and certain countries is the principle of opportunity of prosecution that applies in some foreign jurisdictions. Based on this principle, foreign authorities refuse to provide legal assistance in cases they find to be too trivial to become involved.

One of the judges noted that in international proceedings there are fewer options for declaring evidence inadmissible. The courts dealing with such proceedings seem to employ a more flexible approach.

> *In such extradition proceedings, I've considered admissible evidence taken in a form provided for by American law, unknown in Poland, for example, from affidavits [a written statement made under oath – author's note] and this was admitted by appellate courts, no one challenged that....*
>
> **A REGIONAL COURT JUDGE**

In another case, the judge ordered the extradition of a Polish citizen accused of manslaughter to another country. He was questioned by local law enforcement officers in a completely informal way (the questioning took place in a hotel outside the framework of international legal assistance). The recording of the questioning, which was presented for the assessment of the Polish court, shows that the suspect has not been informed about their rights before the commencement of the questioning. However, given the fact that all evidence collected in the case indicated that it was likely that a crime had been committed, the interviewee asked the agents of the foreign state to give an assurance that they would not use the information obtained from the questioning in further proceedings.

Another interviewed judge recalled having admitted foreign evidence from questioning recorded in an official memorandum signed by a police officer, despite the fact that this type of document may not serve as a source of admissible evidence in accordance with the rules of the Polish criminal procedure.

> *I felt that it was pointless to challenge this since this form was legal in that country.*
>
> **A DISTRICT COURT JUDGE**

7 CONCLUSIONS

The Polish Criminal Code is based on the principle of free evaluation of evidence. The court and the prosecution have to evaluate all the evidence admitted to the proceedings. Their assessment is based on a body's internal conviction limited by the evidence revealed during proceedings, principles of sound reasoning, indications of knowledge, logic and life experience.

The rules on admissibility of evidence are mainly interpreted from the provisions of Code of Criminal Proceedings. They exclude the possibility to admit to the proceedings evidence taken in a specific way, taken from specific source, or taken to prove specific facts.

In the last years there might be observed a tendency of courts to establish new types of evidentiary prohibitions, basing on the provisions of the Constitution of Poland and European Convention of Human Rights. Thanks to this process, the catalog of inadmissible evidence was gradually expanding, which was best visible in the case of evidence constituting the results of unlawful covert investigative methods. This process have been supported by a 2013 reform of Code of Criminal Proceedings which entered into force on 1 July 2015 and established Art. 168a prohibiting to use evidence obtained through prohibited act.

The reform of criminal proceedings that entered into force in April 2016 was aimed to stop that process and connect evidentiary prohibitions only to situations directly indicated in the Code of Criminal Proceedings. The new meaning of Art. 168a established reversed evidentiary prohibition aimed at obliging the court to take evidence that may raise doubts regarding its legality, especially in the context of Constitution and international law.

Contrary to legislator intention, the introduction of the new meaning of Art. 168a motivated some of the courts to emphasize in their jurisprudence the necessity to take into account the constitutional and convention standard when deciding on the admissibility of evidence.

This does not mean, however, that the problem of the functioning of Art. 168a of the Code of Criminal Procedure has ceased to apply. There is still a risk that the prosecution or some of the courts will read the provisions of Art. 168a in accordance with the original intentions of the legislator. This could to a situations where the results of the criminal proceedings were to be based on evidence obtained in violation of individuals' rights and freedoms.

Poland's experience with the introduction of the new meaning of Article 168a, connected with the systemic inability to independently assess the constitutionality of this provision should act as cautionary tale to all other EU-countries. It should contribute to initiating a debate on putting a stronger emphasis on the common EU standards on the principles of admissibility of evidence in EU law. It is obvious, that the existence of such standards in the EU law would significantly facilitate actions aimed at contesting the provisions of Art. 168a, creating national courts to challenge them by making requests for preliminary rulings to CJEU.

In the context of national regulation concerning admissibility of evidence, one should emphasise the lack of effective implementation of the EU directives concerning access to lawyers assistance and presumption of innocence. This have led to a situation in which both those directives, have been only theoretically implemented and have nearly no impact on the shape of criminal proceedings in Poland. It is particularly visible in the context of individuals right to effective remedy, guaranteed under both of the directives and under Art. 47 of the Charter of Fundamental Rights of the European Union. As a result the suspects in Polish criminal proceedings, have limited options to expect that they will be presumed innocent until their guilt will be proved according to the law.

Nearly all interviewed advocates complained on the procedural aspects concerning the admission of questionable evidence into criminal proceedings. The interviewees indicated that the decision of the court of the first instance regarding the admissibility of evidence might be challenged only in the appeal procedure concerning judgment issued in the case. In such a case, the rules concerning the appeal procedure require parties of the proceedings to demonstrate the impact of the alleged breach of procedural law (the admission of evidence) on the final result of the proceedings.

Although the study did not provide clear indications on how, according to the interviewees, the target mechanism of the admissibility of evidence should look like, it proved the need to boost current regulations by establishing provisions that would force courts and prosecutors to physically remove from the case files evidence that was found to be inadmissible.

One should also consider, reevaluating national rules concerning admissibility of evidence. The shape of such a legislative arrangement will undoubtedly be difficult to grasp. It seems natural to link it with the protection of individual rights and freedoms enshrined in instruments of international law or national constitutional laws.

However, it remains an open question whether this protection should be afforded to the same extent and with the same strength for each of the rights concerned. Another question is whether a breach of these rights should be assessed on a stand-alone basis or based on its impact on the ultimate fairness of the proceedings. The case law of the ECtHR on this issue is not uniform and does not provide clear answers.

Among other questions that arise, those relating to the question of committing offences in obtaining evidence, including whether the offender's conduct in obtaining the evidence should be relevant, come naturally to mind. It is also unclear whether the direction of evidence (i.e. its positive or negative impact on the suspect's procedural situation) should affect the rules on the admission of evidence. Finally, it would be necessary to decide how the inadmissibility of primary (direct) evidence affects the admissibility of indirect evidence obtained solely based on information obtained from the originally "contaminated" evidence.

Moreover, one should consider whether the mechanism for suppressing evidence should be absolute, leaving no discretion to the bodies applying the law, or whether it should contain references to evaluative expressions, leaving a significant margin of appreciation to such bodies.

Finally, a question that needs direct answers concerns the procedural consequences of an absence of a defense lawyer during the initial interrogation of a suspect. Although, the EU law nor the ECtHR do not require to find the results of such procedural actions inadmissible, one should consider doing so, especially in the context of suspect belonging to vulnerable groups.

8 RECOMMENDATIONS

The European Union institutions should consider:

- developing a legislation setting the standards for the admissibility of evidence that would include the establishment of a common minimum standard for admissibility of evidence in criminal proceedings;

The Polish Parliament should consider:

- undertaking actions to guarantee effective implementation of EU directives concerning criminal proceedings including the Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings and the Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty;

- adopting amendments to Article 168a off CCP and re-guarantying that the evidence obtained for criminal proceedings by a prohibited act will be found by the courts to be inadmissible.

- adopting amendments to CCP that would immediately abolish Articles 168b and 237a.

- adopting amendments to CCP that would force the criminal justice authorities to physically remove from the case-files evidence that is inadmissible.

- adopting amendments to CCP ordering to audio-video record all interrogations of the suspects made without the presence of a lawyer.

- adopting the system of appointing state-funded legal assistance by reducing the number of bodies involved in the state-funded lawyer appointment, and by shortening the time required to appoint the lawyer to a minimum.

- establishing a specific procedure for suspects to waive their right to be assisted by a lawyer and guarantying that the suspect's decision to waive the right to legal assistance will have explicit and conscious character. This includes inter alia amending the form of information on rights provided to suspect before the questioning.

- establishing evidentiary prohibition concerning the use of statements made during the interrogation, that was not audio-video recorded and was conducted in the absence of a lawyer, whose assistance had mandatory character.

The Polish criminal justice system authorities should:

- continue to directly apply the Constitution and the ECHR when interpreting the wording of Articles 168a, 168b, and 237a CCP.