Removing samples taken illegally in the criminal trial

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Abstract: *As far as evidence in a criminal trial is concerned, Criminal Act no. 281/2003 has brought about a new procedural sanction in Romanian criminal procedure, completing article 64 in the Code of Criminal Procedure by a second para-graph, namely the exclusionary rule. The case-law of the European Court in Strasbourg is not very clear when it comes to the admissibility of illegally seized evidence against the defendant. As opposed to that, American and British common law and, following these standards, most of the traditional legal systems on the continent, acknowledge the practical use of this procedural sanction, although it is set out differently and gene-rates somewhat different effects. The said sanction is applied according to the particulars of each case, in order to achieve a just balance between the right to punish, which belongs to the state and the right to fair trial, which belongs to the suspect or the accused. In Romanian law, the unsubstantial legal provisions and the sparse case-law give no obvious answer to a series of fundamental questions related to the functioning and effects of this legal instrument: its relation to nullity, the "fruits of the poisonous tree" effect, its practical use depending on the "causes " of illegality, the trial stage when it may be used, the procedure that governs its application and the persons entitled to benefit from this right etc. Moreover, the New Code of Criminal Procedure, in spiţe of its more complex content, tends to complicate many of the problematic issues in the current criminal procedure.*

Keywords*:* exclusionary rule, criminal trial. Act no. 281/2003, illegally seized evidence, admissibility, fruits of the poisonous tree doctrine, the New Draft Code of Criminal Procedure

For situations where there is violation of laws governing matters of evidence, the challenge to be answered by the prosecution is in providing effective remedies, to ensure the principle of legality and the fundamental guarantees of criminal proceedings.

In this context, the art. I section 39 of Law no. 281/2003, the Romanian criminal

procedure and has emerged, second paragraph of Art. 64, which has succinctly: "evidence obtained illegally can not be used in criminal trials." The effects of this rule, expressed briefly, are sufficiently broad to not be considered in all their valences, in a study article.

As noted, the concept of illegal evidence includes not only evidence of Plano prohibited, by their very nature, but also to other evidence, allowed, in principle, but have been obtained or taken with disregard for the legal conditions of administration[1].

ECHR has, on the evidence obtained in violation of procedural rules, a consistent practice[2] of refusing to being declared inadmissible, preferring an overall examination of the procedure, examining the existence of that and other evidence and the defendant standing position and intervening only when the abuse of procedure is obvious and remedy[3]. Exceptions are only those cases in which evidence was obtained in violation of Art. 3 of the Convention, which enshrines the prohibition of torture and cruel, inhuman and degrading[4].

In American common law's solution was to exclude evidence obtained in violation of the laws, especially those in the field searching and the right to silence and non-autoincrimination, recognizing at the same time, that occurs when the violation of these rights is above that in which it tries to use evidence obtained in criminal proceedings, so that violation is whether or not you try drawing advantages from illegal[5] labor.

Justifications for the case-law to sanction exclusion were over time, multiple.

First, it turned to the argument that lack of reliable evidence obtained in violation of the law a whole. Thus, the exclusion was a penalty only intervene for those situations where it is found that the way they have done specifically state bodies is that no reliable evidence. Basically, the penalty was not so directly aimed at protecting the rights of the suspect or accused, as the integrity of the final result of truth.

But then, this argument for the exclusion of illegal evidence was rejected, considering that, although it is an undeniable fact that in violation of the laws to obtain evidence which does not inspire a high degree of confidence, without, however, that this premise to Always check should not be made confusion between two entirely different concepts: reliability test and its legality. Fund and the form should not be confused.

It was called, then the integrity of the justice argument, deeming that the sanction of excluding evidence obtained in violation of the rights of the suspect or the accused is required to protect the honor and credibility of justice and maintain public confidence in

[1] Gheorghe Matei, a Romanian news for the prosecution: the invalidation of evidence obtained illegally, the law no. 1 / 2005, p. 137-138.

[2] For example, the ECHR, because Khan v. the United Kingdom, decision of May 12, 2000, Schenk v. Switzerland, decision of July 12, 1988, etc..

[3] S. Bario, B. Conforti, G. Raimondi, Commentario alia conventional europea dei diritti dell'uomo per la guardianship e delle Liberta fondamentali, give in, Padova, 2001, p. 199

[4] D. Bogdan, M. Selegean, rights and freedoms in the European Court of Human Rights, IIA Ed Beck, Bucharest, 2005, p. 273

[5] S.J. Winger, denying Fifih Amendment Protections to witnesses Facing Foreign Prosecutions: Self-Incrimination Discrimination?, The Journal of Criminal Law and Criminology, vol. 89, no. 3 / 1999, p. 1134. Basically, this element is important for understanding the legal nature of exclusion, as a penalty and not as a remedy

the justice act[6], otherwise claiming even that justice would become accomplice of illegal actions of police[7].

Currently, the S.U.A. main argument for exclusion of evidence, including those obtained by disregarding the right to silence and non-autoincrimination, stems from the need to combat misconduct of state bodies[8]. This system is a direct consequence of the fact that if state agencies acted in that manner in good faith, the evidence will be admissible, even if the suspect or defendant's rights were not respected.

The question of admissibility or inadmissibility of evidence obtained in violation of the laws being discussed at an early stage prior to actual costs. This feature is particularly important in its effects: the separation of time discussing the admissibility of evidence of review and resolve the question of guilt or innocence of the accused is very real, as long as the governor body on matters of substance of the case is not in any way influenced by inadmissible evidence in the previous procedure. *(Likewise is the art. 174. (3) C.proc. pen. France, which provides that documents and samples are removed from the file void track and filed at the Registry of the court of appeal, and drawing conclusions about the adverse parties of documents or evidence canceled case is prohibited, on pain of disciplinary liability of lawyers and magistrates.)*

National system, and legal systems of European countries **France** *(If, in general, regulations totalitarian states do not contain rules to allow invalidation of illegal evidence in the legal systems of democratic European inquisitorial tradition, specific sanction of invalidity is, without legally fulfill act contrary to mandatory rules, even when the game is a fundamental right. For example, Art. 171 C.proc.pen. French has: "There revocation that the violation of a substantial formalities provided for in this code or any other provision of Criminal Procedure, brought to the interests of the covered".)* ,**Spain** *(In Spain distinguishing the breach of a "simple" rules of procedure and violation of a fundamental right, the consequences are different: the former is allowed to use another evidence to prove the circumstances which can not be proved by evidence tainted and In the second case, the effect is total disablement process both probation and the sample itself, in accordance with art. 11.1 of the Ley Organica del Poder Judicial, that "can not be given effect of evidence obtained directly or indirectly in violation rights and fundamental freedoms".)*, **Italy** *(Article 191 C.proc.pen. Italian states: "Evidence obtained in violation of the prohibitions established by law can not be used. Exclusion is invoked even in office at any stage and grade of the procedure.)*, **Germany** *(In Germany, in the absence of regulatory texts governing the legal consequences of illegal evidence, the German Supreme Court intervened, establishing standard proportionality test. Thus, according to his need to be weighed on the one hand, the state's interest in pursuing and punishing offenders, reported*

[6] Likewise is the regulation of Art. 24 para. (2) of the Canadian Charter of Rights and Freedoms: „In cases where the court concludes that evidence was obtained in a manner that infringed or denied any of the rights and freedoms guaranteed by this Charter, the evidence will be excluded if it is established that reported in all the circumstances, the admission of evidence in the case would discredit the administration of justice „.

[7] This is the predominant justification for excluding statements obtained unlawfully in the criminal justice system in Argentina - CM Bradley, Criminal Procedure, A Worldwide Study, Carolina Academic Press, Durham, 2007, p. 32.

[8] Y. Kamisar ș.a., Criminal Procedure and the Constitution, Thomson West, St. Paul, 2005, p. 313.

the gravity of the crime committed and, on the other, the importance of the right of the suspect or the accused has been violated - SC Thaman, Comparative Criminal Procedure, A Casebook Approach, Carolina Academic Press, Durham, 2008, p. 112 ff.), **England** *(Article 76 para. (2) of the Police and Criminal Evidence Act 1984 provides: "If, in any case in which the prosecution proposes to administer a confession as evidence of an accused person, is raised before the court that the confession was or could have been obtained:*

a. by coercing the person who did it;

b. because of something that was said or done which was likely, in the circumstances existing at that time to the unreliability of any confession which might be taken as a result of those words or deeds court will not allow testimony as evidence against that person unless the prosecution proves the court, beyond reasonable doubt that the confession (whether true being) was not obtained in the manner described above. This text is supplied by art. 78 of that Act, which provides that the court not to accept a proposed prosecution evidence if "taking into account all the circumstances in which evidence was obtained, the admission of evidence would have an adverse effect on the equity so that court proceedings should not admission".), **Belgium** *(If by 2003, the Court of Cassation considered that evidence obtained in breach of the right to silence was illegal and is absolutely invalid, following the two decisions in 2003 and 2005, she shifted in meaning to consider valid evidence even illegal, but not obtained in violation of rules sanctioned by invalidity or the right to a fair trial, provided that the sample should not be deprived of reliable and its admission is not in itself contrary to fair trial rights - F. Kuty, Justice et criminal trial Equitable, vol H, Larcier, Brussels, 2006, p. 327-328.)*, **Russia** *(Article 50 para. (2) of the Russian Constitution states: "the administration of justice, any evidence obtained in violation of federal law will not be accepted." Also, Art. 75 para. (1) C.proc. pen.: "The sample obtained in violation of requirements this code should be regarded as inadmissible. evidence inadmissible are without legal force and can not serve as the basis of prosecution or be used to prove any of the circumstances covered by the sample, according to art. 73 ".)* are faced with finding a fair solution to the situation in which attempts to use evidence obtained in violation of procedural rules, the solutions given by these systems are non-unitary, the void, the conditional exclusion of an examination of proportionality and the importance of law to the exclusion violated and unconditional proof unlawful.

At the present regulations, we believe, with most authors, that the main effect of the procedural violation in the taking of evidence is to exclude matters such use evidence obtained in violation of law *(Where the infringement relates to subject the suspect or accused to torture, cruel, inhuman or degrading treatment, the penalty of exclusion is justified by the express requirement of Art. 15 of the Convention against Torture and Other Cruel or cruel, inhuman or degrading (adopted in New York on December 10, 1984, ratified by Romania by Law no. 19/1990, published in Official Gazette no. 112 of October 10, 1990): „Each State Party shall ensure that no statement established to have been obtained by torture can not be invoked as evidence in any proceedings if it is not is against the person accused of torture, in order to be establish that the statement was made")*, through the rigorous application *(A rigorous application of this rule remains, so far, more than one goal a reality because the Romanian courts, formed on an inquisitorial system type, the declarations and the rest of the samples obtained from the suspect or accused enjoys a presumption of validity, the the defense has to dismantle, refused to oblige, as a natural corollary of the right to silence and non-autoincrimination, the owner and the prosecution to prove the legality of obtaining such evidence, as in systems*

accusers - an analysis at length in D. Ionescu, warning procedure. Consequences for the validity of the statements of the defendant matters in the criminal, criminal law in the contract no. 2 / 2006, p. 51.) of art. 64 para. (2) C.proc.pen., That "evidence obtained illegally can not be used in criminal trials".

At the present regulations[9], we believe, with most authors, that the main effect of the procedural violation in the taking of evidence is to exclude matters such use evidence obtained in violation of law, through the rigorous application of art. 64 para. (2) C.proc. pen., That "evidence obtained illegally can not be used in criminal trials.

The doctrine was formulated and our view that the penalty should intervene in such cases would be invalid *(If the sanction of the continental law system is specific, aimed at maintaining behavior state bodies within certain limits of loyalty, the sanction of excluding evidence, the common law tradition, has a totally different purpose, namely to protect their right to free choice of the suspect or defendant - SC Thaman, op. cit, p. 105.),* which would have to draw the appropriate adjustment to the Water Framework text nullity, art. 197 C.proc.pen. To include the situation obtaining evidence illegally.

One such proposal is not safe from criticism. First, the sanction of procedure is another legal *(Nullity, to punish corrupt act, it requires restoration, may be, in some cases covered [art. 197 para. (1) C.proc.pen. refers to „harm that can be removed, and in par. (2) the automatic nullity, para. (4) establish specific deadlines in which to raise the relative nullity, with the result, in the event of infringement, to cover the defect] , while excluding evidence does not allow recovery of the document, it automatically making inadmissible evidence (of course subject to be invoked automatically or stakeholders). From this apparent inequity that would occur if the sanction would be to invalid relative (because not listed among the absolute nullities), which would reduce the possibility of sanctioning illegal evidence if the parties do not have specialized legal assistance, nor have the legal knowledge required - E. Anthony, Ensuring objectivity in the administration of evidence in the criminal law no. 10/2000, p. 114.)* regime than that of exclusion, the latter being perfectly adapted to situations of this kind, which is why she knows and an extensive international dedication in this matter. On the other, with other authors[10], believe that by entering text in art. 64 para. (2), we have the emergence in the field of new sanctions procedure designed to remove the probation field evidence to those obtained in breach of regulatory provisions are flawed and can not be the basis of a solution under the guarantee fair trial. Or that the sanction is exclusion and not affect the invalidity of great importance and on another level: she comes to give evidence on the basis of serious and penalize illegal evidence, which may not be that of their lack of reliability of specific penalty invalid relative[11].

Finally, for consideration and provisions of the new Criminal Procedure Code,

[9] Gheorghe Matei, Code of Criminal Procedure, the general part in a European perspective, the Review of Penal Law no. 1 / 2004, p. 67.

[10] O. Predescu, M. Udroiu European Convention on Human Rights and Romanian criminal procedural law, Ed CH Beck, Bucharest, 2007, p. 378, G. Theodoru Treaty of criminal procedural law, Ed Hamangiu, Bucharest, 2007, p. 348, D. Ionescu, op. cit., p. 16, 48, I. Grig, M. Ungureanu, right to silence of the accused and the accused, the Criminal Law Review no. 1 / 2005, p. 41.

[11] We must not forget that Relative nullity may be considered by the court only when „the cancellation is necessary to ascertain the truth and just settlement of the case" - art. 194 para. (4) C.proc. pen.

which outlines a more comprehensive manner the legal institution.

Finally, for consideration and provisions of the new Criminal Procedure Code, which outlines a more comprehensive manner the legal institution.

Initially, as published by the Ministry of Justice, rules sanction such exclusion was to provide a clear response to breaches of procedural rules. In the field trials, the exclusion was imposed as a sanction in its own right, being provided within each article that contains the fundamental rights of the suspect or defendant, disregard their response to the situation[12]. This optic was consistent with the regulation of exclusion of evidence obtained unlawfully, former art. 102 by referring not only to breach substantial fairness of criminal proceedings, but also the rights of the suspect or accused.

As an example, the solution was provided expressly excluded evidence obtained through violence, threat, promise an unfair advantage, or any other form of coercion prohibited by law, methods or techniques that affect the ability of the person listening to remember and to is consciously and voluntarily reported the facts, even used with the consent of the person concerned, statements obtained from the suspect or accused again its notice on the deed of which is suspected or accused and the legal status of it, the right not to make statements and the consequences of refusal or acceptance of or the right to a defender and autoincrimination statements obtained from persons called as a witness, without specific warnings. Unfortunately, the text sent to Parliament debate has changed substantially. Thus, there shall be no exclusion sanction the articles regulating the essential guarantees of fair trial rights. The sanction of exclusion is governed only by the text frame, art. 100, which provides:

- Evidence obtained unlawfully can not be used in criminal proceedings.
- In exceptional circumstances, evidence obtained unlawfully may be used when it is not infringed by the fairness of criminal proceedings.
- Evidence obtained by torture, inhuman or degrading treatment can not be used in criminal proceedings.
- samples derived from the evidence provided in par. (l) and (3) are excluded if they were obtained directly from the evidence obtained unlawfully and could not be obtained otherwise.
- samples derived from the evidence provided in par. (l) and (3) do not exclude that evidence obtained unlawfully used under par. (2) .

The new text without a significant setback to the previous form, subject to debate. Illegality of the evidence is viewed with more leniency. It will produce legal consequences only when prejudice to the fairness of criminal proceedings, the notion is, at least in our system of law, still rather vague.

Towards the fundamental value of the principle of legality in criminal proceedings, but also guarantees the right to a fair trial, we can not accept criticism without such a regulatory option such as that expressed by the new code. State bodies are first called to respect and ensure the correct and just ensure the provisions of law, infringement is not divided into irrelevant, mild, medium, serious and very serious when there is an obligation of

[12] In this regard, expressing that the Code „shall be punished with exclusion of" [art. 108 para. (4)] was above all a polemic.

professional knowledge and enforcement to ensure the prestige of justice.

On the other hand, may be accepted unlawfully obtained evidence in criminal trials will generate default, susceptibility to abuse of state bodies, putting the burden on the shoulders of courts to intervene where equity proceedings - enough concept outlined in doctrine, legal practice and even new legislation that is projected - is broken.

More will be affected including trust and respect in the act of justice, because justice that supports law breaking by their own bodies called upon to give law to target defendants conviction can not draw any sympathy or respect.

In addition, such legislation is at risk of being born the idea that a purpose of criminal proceedings - conviction of the accused - is more important than another - maintain law and fundamental procedural safeguards, in the same sense, I think we can talk just about a breach of guarantee equality of arms in criminal proceedings, as long as the dispensation of penalty functions clearly benefit only the accuser (guarantees fair trial rights are essentially the suspect and the accused).

May be said that the new Criminal Procedure Code also brings another new, very important, inspired by the common law system: preliminary Room judge assigned jurisdiction to rule on the legality of evidence on which the notice of referral[13], so will avoid confusion of roles currently existing, the same judge examines evidence and legality, but their merits, because resolving the issue of guilt or innocence of the accused.

With this change beneficial to the judge the case will be absolved of the burden of analyzing the legality of evidence and, importantly, in this way will see better protected impartiality for the benefit of a complete respect for the presumption of innocence and the right to a fair trial.

A problem that arises with the sanction of exclusion is whether this is implications for all parties in the criminal trial, both defense and the prosecution[14], or whether the prosecution would only be affected by this penalty[15]. Compared to the wording of the text of the law firm ("can not be used in criminal trials"), which makes no distinction, the only conclusion is valid in the sense that neither party can rely on illegal evidence. In this way we achieved and equality of arms between the parties in criminal proceedings, none of them unable to secure an advantage in breach of the law. Furthermore, it raises the question as to when that may be invoked by this sanction: is it a legal regime similar to the invalidity Absolute Relative nullity? May be invoked at any time or only up to a procedural point[16], with the consequent forfeiture of the right to invoke it? We express our agreement with the view expressed in our doctrine, under which the penalty may be invoked at any time, both the prosecution phase - a request or statement, or even

[13] According to art. 2. (6): „On the legality of the act of arraignment, the evidence on which it is based and the legality solutions netrimitere trial judge acted preliminary view in the law." Solution is similar to French. Thus, training room is the competent body during prosecution, which will decide on the termination of a document or evidence (art. 170 C.proc.pen. French).

[14] In this respect, G. Theodoru, op. cit., p. 348.

[15] For this view, Gheorghe Matei, A new ..., accurate., P. 142. The author brings the main argument for his opinion, the reason the introduction of this text, which would be an additional guarantee of the right of defense.

[16] Idem, p. 140.

a complaint, under Art. 275-278 C.proc.pen. - And in the court - by exception.

If this penalty proceedings was cited in phase trial, we believe that the court before which was raised to proceed with the discussion of this exception, Ruling is the conclusion of the meeting, with the consequence that, if admitted her evidence that be removed from the probation on bearing conduct subsequent to the process and debate[17] conclusion as an interlocutory, on they can return only if there new evidence of the apparent legality of the sample excluded.

The persons who may apply this sanction, the lack of regulatory limits, either party to criminal proceedings (including attorney) may customary for the instrument, if it proves an interest. Also, court proceedings can apply this penalty after a challenge from office[18].

But evidence obtained in violation of laws that can not be used in the process may, however, provide very useful information and data indictment for prosecution of the person concerned.

In this regard, the effects of "cascade" of an illegally obtained evidence and excluded from the probation, our criminal law is silent. Missing any regulations about what happens to the data of such a declaration.

A solution is very simple to foresee as often adopt extreme positions, the exclusion of all evidence obtained directly or indirectly from evidence provided in violation of the laws, would result in blocking the investigation and the quasi-impossibility of proving the crime. Moreover, excluding only the declaration or other evidence obtained illegally would demonetazion defense rights, the principle of legality and acceptance of abuse.

The American system of common law, the doctrine operates fruit-of-IHE-poisoneous-tree[19], under which any evidence that comes from a flawed source is also flawed[20]. Only that this exclusion is not automatic, but it operates only after careful consideration of the link between the two samples.

On the mainland, are quite different positions. In France[21], it allows the Chamber of instruction that when an act or invalidate evidence obtained in violation of legal interests of a person to be totally or partially after the procedure, but this effect is left to the discretion of the court.

[17] In our doctrine was made and the view that recovery of this exception will be achieved only when the debates, the court having on them by deliberation and decision making - Gheorghe Matei, A new ..., accurate., P. 143. This view may be, however, criticized, in that the text of art. 356 C. proc.pen., Showing what to include judicial decision refers to evidence „that have been removed, so that this text makes no evidence that removing the opportunity to deal only with deliberation.

[18] Id. o. 141.

[19] In free translation, doctrine poisoned tree fruit.

[20] Do not fall into this category, of course, the evidence derived from those considered to be obtained legally, as a result of public policy exception, established in New York v. Quarles, accurate. But the American system has a particularity: it is considered that although the declaration of the person concerned can not in any way used, the same can be said about using the new statement to check the reliability of the statements in question, which would be admissible. For example, making an incriminating statement without reading the Miranda rights that person is in principle the declaration itself useless in court, but the statement will be used to prove that the person in mind when declaring later that he was in a place other than arising from the first statement invalid.

[21] Article 174 related to art. 206 para. (2) C.proc. pen. French.

Spain took the theories of common law's U.S. Supreme Court[22] interpreting the existing rules of evidence as to impose the exclusion and exclusion of evidence derived therefrom, unless it can prove the existence of a failure of causality between evidence illegally obtained and the the conviction was based solution.

And the system adopted in Germany, following the Supreme Court case law [23], not much different than the U.S., enabling the exclusion of evidence derived from evidence obtained unlawfully[24], while a poisoned fruit doctrine is not established.

[22] Case June 5, 1995, in s.c. Thaman, op. cit., p. 118-119.

[23] Thus, this court was faced with a case in which they were used entries made under the law, but that it appeared and the perpetration of crimes that making records was not allowed to determine the person suspected to recognize their commission. Not only that the court considered illegal entries on those facts, but it labeled the same way and obtained recognition statements, even if administered after the warning had been legal, but subsequent statements of the accused, which he found to be was influenced by records and previous statements - SC Thaman, op. cit., p. 119 ff. in another case, the same court held illegal evidence obtained by performing a search that led to the discovery of weapons and explosives, if information about their existence and location of the queries came from illegal - SC Thaman, Miranda in Comparative Law, Saint Louis University Law Journal vol 45, no. 2 / 2001, p. 611.

[24] Instead, the evidence materials, the supreme court does not show the same strict standards, assuming such use evidence obtained as a result of a search without a warrant if there was a legitimate justification for the search and whether a magistrate would be authorized one if he would be asked - SC Thaman, Comparative ..., accurate, p.124.

In England, the exclusion of evidence derived from illegal evidence was admitted to the practice courts in matters of self incriminating statements establishing the standard firm to exclude unconditional subsequent declarations of the crime committed is recognized and which were obtained in violation of laws[25].

Argentina allows the use of the benefits of statements obtained illegally[26], in exchange for a ban in Egypt work in this respect, subject to establish a causal link between the primary source of illicit and subsequent statements[27].

In our current legislation believe that without any express rules, which is not only necessary but mandatory adopted in the immediate future[28], the most fair solution is to

[25] Regina v. McGovern, decision of the Court of Appeal, Criminal Division, in 1990, in SC Thaman, Comparative ..., accurate., P. 121-122. concerned, the defendant had been heard without being allowed to be assisted by a lawyer, she showing signs of emotional imbalance. After recognition of the crime committed, the next day held a second interrogation, that date in compliance with legal requirements, but without notice to the lawyer about 1 infringement previous day. According to the Court, „when an accused has made a series of recognition of its participation in a criminal offense to a first hearing, the very fact that these recognitions were Jacute are likely to have an effect on the person during the second interrogation, therefore, if it decides how to decide this case, the first hearing was held in violation of legal rules (...) The Court considers that the subsequent query must be similarly flawed.

[26] C.M. Bradley, Criminal Procedure, A Worldwide Study, Carolina Academic Press, Durham, 2007, p. 32-33.

[27] Idem, p. 127

[28] Unfortunately, neither our doctrine on the matter not proper space.

eliminate all samples that are direct or indirect[29] consequence of illegally obtained evidence, based Legal Art. 64 para. (2) noted, which makes no distinction between illegal evidence probably used due to process or result of the other evidence derived from illegal. We can not agree with the doctrinal[30] proposal to distinguish between samples obtained direct evidence obtained indirectly supporting the subsequent test to be admissible, because it would open the door to possible abuses in the idea of having just a starting point, clearing content and efficiency are considered rights[31].

Solution New Criminal Procedure Code is the purpose of excluding only direct evidence, from evidence obtained illegally, not those obtained indirectly from them. Also on the exclusion of evidence, is operating with a distinction between specific cases where the penalty is imposed and other cases where, in the absence of explicit legal terms, the exclusion of such evidence could only work conditioning. Thus, art. 100 makes the exclusion of illegal evidence derived from meeting several conditions:

a) samples were obtained directly from the evidence obtained illegally;

b) could not be obtained otherwise than on evidence obtained illegally;

c) samples are not derived from evidence that, although illegal, are allowed to be used in criminal trials by virtue of the fact that it is not harmed fairness of criminal proceedings.

The text you proposed new code is capable of criticism. It unduly restricts the exclusion of illegal evidence and the evidence derived from unlawful, allowing them to be used only as an exception. The rule is, therefore, that the evidence derived from the illegal are admissible in the criminal! And not only is the entire category of evidence obtained indirectly from illegal evidence, but will be in the same position, and samples obtained directly from them, they could be obtained otherwise than on evidence obtained unlawfully or the illegality is not such gravity as to affect the fairness of criminal proceedings.

Does not define who must prove that the derived sample can be obtained otherwise. We believe that the sample belongs to prosecution and can not be an easy test, but must be evaluated with maximum vigor. From this perspective, the proposed legislative text that is objectionable is, by formulating it, too lenient to a particularly thorny problem of criminal probation[32].

In terms of final conditions, appears to be deeply objectionable can use in criminal proceedings of evidence derived from evidence because of illegal use of torture and

[29] The doctrine (O. Predescu, M. Udroiu, cit.., P. 380) was referred to the notion that sine qua non for the subsequent illegal sample. It seems to be the most appropriate test.

[30] R, rent, right to silence and privilege against autoincrimination, the specification of Penal Law no. 4 / 2006, p. 66.

[31] This reality can not be challenged: those who support the need for methods of investigation contrary to the silence and non-autoincrimination the suspect or defendant insisted on taking advantage of as much detail, information that may be subsequently recovered and developed - S. Gîfei , November tactics used in criminal investigation work in the United States of America: strategies for interviewing by analyzing returns in righteous no. 2 / 2008, p. 250.

[32] In S.U.A. This problem was solved with requirements more stringent and clearer solution to be embraced in our new regulations - see infra.

cruel, inhuman or degrading. Although these latter samples are excluded from compulsory criminal process when primary evidence, their derivatives do not have a legal regime so strict in meeting those conditions and may be used in criminal proceedings.

In terms of final conditions, appears to be deeply objectionable can use in criminal proceedings of evidence derived from evidence because of illegal use of torture and cruel, inhuman or degrading. Although these latter samples are excluded from compulsory criminal process when primary evidence, their derivatives do not have a legal regime so strict in meeting those conditions and may be used in criminal proceedings.

Text analysis is incomplete and because he absolutely miserable implement theories of evidence obtained from independent sources *(In S.U.A. case-law were allowed two exceptions to the rule of excluding evidence derived from illegal evidence. The first concerns the situation where, although there is an initial activity unlawful procedure subsequent evidence unrelated to the activity, or the link is so attenuated that it removes the illegality. According to this theory, will be excluded statements that relate to information obtained through illegal activities by state bodies (eg, illegal searches, illegal interception, etc..) - Murray v. United States, 487 U.S. 53: Supreme Court decision June 27, 1988. The second exception is closely related to the first and concerns the situation where subsequent samples were inevitably found by other means, legal-in this case Nix v. Williams, 467 U.S. 431, the Supreme Court of June 11, 1984 the supreme court ruled the evidence admissible on the body of a girl, identified as a result of evidence obtained unlawfully from the suspect, considering that anyway its body was identified by thorough searches conducted by police. Importantly, however, in both cases of exception, the sample belongs to the accusation.)* on our right. This theory the only evidence on which there is a causal withheld from evidence obtained. Illegally, and not those on which there may have been a causality other than the actual set. A substitute form such an examination of the concrete conditions of those with one hypothetical, abstract, imperfect, and therefore potentially abusive interpretation.

In conclusion, we can say that the institution of criminal proceedings unlawful exclusion of evidence, recently brought into our law and is projected to suffer a deep resizing, generates large problems that were not yet fully systematized the initiator of the New Criminal Procedure Code, the current form nascent project not only serious risk of incoherence and abuse, but just as serious, the Romanian state conviction by the European Court of Human Rights.

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