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COMPARATIVE LAW ASPECT OF PROHIBITION OF USING ILLEGAL EVIDENCE IN CRIMINAL PROCEEDINGS

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Abstract. *Illegal evidence in criminal proceedings is one of the major problems in the modern law of evidence which gives rise to theoretical discussions and disputes. The complexity of this issue makes it one of the most difficult problems in criminal procedure. This complex criminal procedure concept is constantly developing and gradually evolving due to legal interventions but, above all, due to its practical value. Close examination of comparative law shows that the majority of legal systems do not apply absolute exclusion rules pertaining to illegal evidence in criminal proceedings. Quite the reverse, such a model is subject to criticism due to numerous lacks and negative consequences. The few legal systems that use the absolute exclusion of illegal evidence do not envisage a wide range of exclusionary rules and, thus, they apply various exceptions. The comparative law analysis confirms that it is necessary to focus not only on the existence of exclusionary rules but also on the scale of exclusion of illegal evidence in criminal proceedings.*

Key words: *evidence, criminal proceedings, exclusion of illegal evidence, Anglo-Saxon system, European-Continental system.*

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1. INTRODUCTORY REMARKS

The comparative law developments pertaining to illegal evidence in criminal proceedings show that the major legal systems are not prone to using absolute exclusion of illegal evidence, primarily using relevant exclusion and narrower scale of evidence. On the other hand, the legal systems that initially adopted the absolute exclusion as a primary rule have given it up or have started using a wide range of exceptions. Lately, even the American model, which was in many countries viewed as an ideal model, strongly limits the exclusion of illegal evidence.

The most common objections to the absolute exclusion model are that empirical studies do not show that exclusion of illegal evidence has any prevention effect to exclusion of illegal evidence, and that this exclusion redounds upon no person whose right has been violated. The model of relative exclusion has greater possibilities of adaptation to individual circumstances and may have more appropriate effects to criminal proceedings. In addition, many countries recognize the approach applied in the case-law of the European Court of Human Rights. Also, certain countries in transition have not introduced the right of exclusion, notwithstanding the fact they had greater difficulties with regularity of collection of evidence and credibility of power of evidence.

2. THE EXCLUSION OF ILLEGAL EVIDENCE IN THE ANGLO-SAXON SYSTEM

The most important difference concerning the manner and scope of exclusion of illegal evidence in criminal proceedings may be noticed by comparing the Anglo-Saxon (*common law*) system with the American model, considering that no other major legal system uses absolute exclusion and that the exclusion of material evidence is unorthodox (Luna, 2004:320). As for a very wide scope of material evidence, the American model of excluding illegal evidence has no similarities with any other applied in other countries (Damaška, 1972:507). The very fact that the USA is the only common law country using absolute exclusion speaks in favor of reviewers of the American rule on exclusion of illegal evidence, whereas England, Canada, Australia and New Zealand use relative exclusion, thus not having a wide scope of violations to which the exclusion applies (Perrin, 1999:792). England and Canada recognize a more practical exclusion approach based on the free judicial (discretionary) authority to decide on the merits of each specific case at issue, which is more favorable than the automatic rule (Glasser, 2003:195).

In English legislation, the principle of reliability is used for assessing illegal actions committed in the course of collecting real evidence, and the courts generally do not select such evidence (Delmas-Marty, Spencer, 2004:605). For example, English authors emphasize that the evidence collected by illegal search is, in principle, permissible (Stone, 1997:29). According to the court case-law, evidence should not be selected only due to irregularities in the way they were collected (Keane, 2008: 62, 63). Dissagreement with the way of collecting evidence may not be used as justification for exclusion (Harfield, 2012: 28).

The English legislation takes into account the fact that irregularities in collecting evidence in most cases have no effect on the credibility of material evidence. The focus towards verification of credibility is explicitely emphasized in the well-known case *Chalkley*, where the Court of Appeal found that exclusion of illegal evidence should be applied if

their quality was affected due to irregular way of collection.[1] This case was about tapes whose content or relevance was undisputed but they were obtained in unlawful manner, for which reason the court did not select them. Similarly, in the Canadian and the Australian system, the exercise of unfounded search does not lead to absolute exclusion of evidence (Roach, Friedland, 1996:341).

The New Zealand system, which gives preference to *prima facie* rule of exclusion, is important because, used to apply the American Model until 1992 but abandoned it in less than ten years and returned to the classical Anglo-Saxon model of discretionary exclusion.The change was put into effect in 2002, in *Shaheed* case, where the police arrested a male for threatening a girl on her way to school and illegally took his sample for DNA analysis.[2] Thus, ten years after introducing the strict rule on automatic exclusion of material evidence, the rule was replaced by the former discretion assessment of admissibility (Mahoney, 2004: 170). The Court emphasized that automatic exclusion supported no desire of the society to punish the perpetrator and that it may seem that the protection of the law was disproportional to the circumstances of violation.

The US Supreme Court had a key role in establishing rules in American criminal proceedings in the 1960s, when it passed an entire set of revolutionary rules on numerous legal issues.[3] At that time, the American rule on exclusion of illegal evidence was considered as part of modernization of criminal proceedings (Kahan, Meares, 1998:1153), and those liberal attempts were stopped only later (Klarman, et al. 2012:4). The exclusionary rules were not expanded later on; quite the reverse, they were limited by numerous exceptions, including further extension of police authorizations (Arenella, 1983:221). Such activities were justified by the thesis that the exclusion rule in modern criminal proceedings lacks a coherent foundation since conditions for liberal reforms were specific, whereas modern times imply quite different needs. (Bracey, 2000:691).

Alhough the American system seems to offer great possibilities for exclusion of material evidence, its scope has been significantly narrowed by numerous emerging exceptions and police authorizations (Karas, Jukić, 2009:613). For example, one of the exceptions is that illegal evidence may be used to to challenge the grounds of defendant's defence, because a perpetrator may not be protected from untruths. According to the rule presented in *Harris v. New York Decision*,[4] it is more important to protect the truth in criminal proceedings, and the Government cannot use unlawfully obtained evidence for established facts (affirmative use), which does not mean that the defendant was provided with a shield against untruths: thus, the unlawfully obtained evidence may be used for contradiction (negative use), (LaFave et al., 2000: 510).

The exclusion rule is not applicable in the proceedings before the Grand Jury (Milles, 2002:1276) which may have jurisdiction in severe criminal offences (such as organized crime or corruption). In the proceedings before the Grand Jury, the defendant has no right to attorney, no right to silence (no contest), and he may not be subject to any rule on exclusion of unlawful evidence. In American legislation, evidence may only be excluded

[1] Court of Appeal, United Kingdom (*R. v Chalkley and Jeffries* [1998] 2 All ER 155).
[2] *R v Shaheed* [2002] 2 NZLR 377.
[3] See: Decision of the US Supreme Court in *Mapp v Ohio* (367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)). However, this rule had been set out much earlier by the Supreme Court of California, in its decision in *People v Martin* (45 Cal.2d 755, 290 P.2d 855 (1955)). See: LaFave et al., 501 i 502.
[4] 401 U.S. 222 (1971).

if it pertains to a person whose rights have been violated, whilst the same evidence may be used in relation to others whose rights have not been directly involved, as set out in *Alderman v. United States Decision*.[5]

The American exclusionary rule was created to prevent unlawful actions and, therefore, it cannot be applied in cases where it may have preventive effects (Choo, 2012:185). However, there is a good faith exception based on decision in *United States v. Leon*, 468 U.S. 897 (1984), (Kamisar, 1987:6). The *poisonous tree* doctrine also includes numerous exceptions. The *purged taint* doctrine may also be used if the link between new evidence and the original violation is distinct. *Inevitable discovery* is also an exception if other legal means would surely reveal the information.[6]

Notwithstanding the fact that many exceptions were made after the American rule on exclusion of unlawful evidence was adopted, limitation was intensified when Chief Justice Roberts became president of the US Supreme Court (Karas, Jukić, 2009:614). At the beginning of his term of office, the decision in *Hudson v Michigan Decision*[7] had already been made as one of the most important decision for prospective developments. It was a landmark case of unlawful search of an apartment; according to previous case-law, such search was considered to be unlawful beyond any doubt. During the unlawful search, the police found loaded guns and significant amount of drugs. The Supreme Court adopted the rule under which the Court concluded that the evidence would have been found anyway, regardless of whether the entry was legal or not; thus, contrary to previous positions, the Court emphasized that irregularities in the discovery of material evidence had no special effect on the credibility of evidence. According to the rule set out in *Hudson*, exclusion would not be necessary if the action was substantively justified, regardless of whether the formalities (e.g. obtaining a court warrant) were complied with. Many objections against the exclusion rule were stated as a justification for shifting from exclusion rule.[8]

Under the new case-law, the Court has extended the impact of good faith conduct. The latest case in that context is *Davis v. United States*[9], where police officers applied a quashed rule in the process of searching a companion in a car; yet, the Court established that they were acting in good-faith and did not exclude the evidence on the gun found in man's possession. Such changes were pointed out in the case *Herring v. United States*[10] where a police officer searched the vehicle and found drugs and gun, wrongly assuming there was an arrest warrant for that person. In that case, the Court held that the exclusionary rule does not apply to errors.

3. THE EXCLUSION OF EVIDENCE IN THE EUROPEAN-CONTINENTAL SYSTEM

Absolute exclusion of illegal material evidence is not represented in major European countries as a means applicable in terms of violations in obtaining of evidence. This issue was investigated by hosts of experts in the Justice and Home Affairs Department of the European Commission who concluded that seven European countries essentially do not

[5] 394 U.S. 165 (1969).
[6] *Nix v Williams*, 467 U.S. 431 (1984).
[7] 547 U.S. 586 (2006).
[8] See: Yackley, 2007: 409-447.
[9] 131 S. Ct. 2419 (2011).
[10] 129 S. Ct. 695 (2009).

exclude illegal evidence (England, France, Germany, Austria, Sweeden, Danmark, Finland). On the other hand, there is a group of states which essentially exclude evidence (Spain, Greece, Italy, Cyprus, Malta and others) but they do not exclude illegal evidence in an absolute manner; instead, they allow such evidence in combination with some kind of proportionality or consideration of individual case circumstances (so-called-balancing).[11] There is also a huge difference in relation to illegal personal and material evidence.[12]

The Austrian system (based on legislative order and court interpretations) essentially allows the use of material evidence obtained by illegal actions (Seiler, 2000:115). Comparison theory, taking into consideration the circumstances of individual cases and their influence on the balance of social aspirations, is applicable in the assessment of evidence ban (prohibition). Other German dogma accomplishments are accepted in theory as well; so, they also apply the distribution of rights (based on the German theory on legal circles), (Pilnacek, 1999:114).

There is a similar situation in Switzerland, which applies an old Walder's opinion stating that it is not necessary to exclude every single piece of illegal evidence obtained by inobservance of the law or by a criminal offence but, rather, to consider the facts of each individual case and establish whether the illegality is such that it calls for a ban to be imposed. The case-law accepts no ban on presentation of illegal evidence as an obligation that should be applied to formal ommissions.[13] The substantiation is found in the case-law of the European Court of Human Rights, referring to the *Khan* decision, which holds that absolute evidence ban (prohibition) is not necessary in criminal proceedings.

French legislation does not apply exclusion of evidence for failure to comply with legality in the course of executing an activity, but it places such violations under the application of nullity. Thus, the law provides explicitly determined nullity (*nullités textuelles*) for cases of violation in which an action will be null and void. The application is not absolute but the annullment may be applied if substantial violations are at issue, especially the rights of defense, in which case damage for the interests of the defendant have to be substantitated, by proving that it has violated the parity interest (Renucci, 2005:1256).

Belgium is also amongst rare developed countries that introduced an absolute exclusion of illegal material evidence in 1990. In 2003, the Constitutional Court of Belgium abandoned such a model considering that the absolute exclusion yielded disproportional results, and that case-law even earlier showed certain signs of giving up absolute exclusion. The ruling in *Antigoon* case[14] is a landmark decision which contributed to the changes in the Belgian system. In his case, the Court found that the exclusion of illegal evidence is necessary in extraordinary circumstances, referring to exclusion of an important part of proceeding leading to nullity, i.e. if reliability of evidence has been disturbed or if it refers to disturbance of fairness of the whole trial.[15]

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[11] EU Network of Independent Experts on Fundamental Rights, Opinion on the status of illegally obtained evidence in criminal procedures in the Member States of the European Union, CFR-CDF, (2003), 7.
[12] See: Bradley (2010), 211-238.
[13] BGE 96 I 437 of 4th November1970.
[14] Cour de cassation de Belgique, P.03.0762.N/1 of 14th October 2003.
[15] The case refers to police action in which the suspect was subject to illegal search. In the pocket of his jacket, the officers found a key with which they opened the vehicle and found a gun. The Cassation Court found that irregularities in the search procedure had no effect on the credibility of discovered evidence (gun), and that it was not intentional and severe disturbance of the defendant's interest.

In German system, evidence prohibitions in the course of hearings and similar proceedings for obtaining material evidence are very narrow and may only be used in cases of severe failures or disturbances of most sensitive rights, and not in terms of bare action formalities (Cramer, Bürgle, 2004:299). The German system does not use the theory of legal circles (*Rechtskreistheorie*), established in 1964 (by a Decision of the Federal Supreme Court BGHSt 19, 325), dividing the rights into three spheres (circles). The biggest protection is enabled in the sphere of personal life and dignity, that is, the sphere of intimacy (*Intimsphäre*), (Cramer, Bürgle, 2004:193), which may not be subjected to actions of state authorities (Köhler, 1995:31). An example of that group is intimate married life (Beulke, 2000: 230) or private conversation of spouses conducted in their room (Schroeder, 2001:74). The second group includes the rights of privacy (*Privatsphäre*); in case of illegal evidence referring to those rights, it is necessary to establish proportionality by using a theory of comparison or weighing (*Abwägungslehre*). Weighing is conducted by using the circumstances substantiating conflicting aims of criminal pursuit or protection of citizens' rights (Rogall, 1979:11). The Geman system does not apply exclusion, not even when applying evidence prohibition; such evidence is left in the case file and may not be used in the reasoning of the judgement.

The Supreme Court of the Republic of Croatia, in the reasoning of its Decision, also gave its definition of the so-called *the fruit of the poisonous tree* doctrine: "According to so-called the fruit of the poisonous tree doctrine, any other evidence obtained from illegal evidence is illegal as well. For application of this doctrine it is necessary to have original illegal evidence (*poisonous tree*) which is followed by new evidence which would otherwise be legal but, considering the fact the new evidence is a fruit of illegal evidence, it follows that new evidence is also illegal. In other words, if original evidence is illegal, then the evidence following out of it is also illegal (by analogy, a fruit from a poisonous tree is poisonous)".[16]

4. SYSTEMS USING ABSOLUTE EXCLUSION OF EVIDENCE *SENSU STRICTO*

It is difficult to discuss the comparative law systems using absolute exclusion of illegal evidence *sensu stricto* without a deeper observation of scope of this rule, primarily because in some cases it may be difficult to determine which violations it refers to and how it may be used. After New Zealand had abandoned absolute exclusion and after the USA had introduced numerous exceptions thereto, some Greek experts consider that the Greek system is the only one consistently using automatic exclusion (Giannoulopoulos, 2007:191). On the other hand, although Greece (in principle) automatically excludes evidence and has envisaged violations related to the right to privacy, the case-law has introduced an exception for severe criminal offences.

The Greek Criminal Procedure Act seeks only for exclusion of evidence obtained on the basis of criminal offences committed by an official; but, even in that case, evidence should not be excluded if the case involves the most severe criminal offences or if a court evaluates the use of evidence as justified. The exclusion includes procedural privileges rather than violations in the way of obtaining the evidence (Giannoulopoulos, 2007:191).

[16] The Supreme Court of the Republic of Croatia, I Kž 926/2008-3 of 9th September 2009.

In Italy, the exclusion of evidence taken within the framework of illegal search is not considered as part of police action but as an action of an individual whose justification is evaluated independently, notwithstanding whether the search was unconstitutional. The Italian system allows for initiating some legal actions on the basis of information obtained in prior illegal action (Thaman 2011:375).

The Spanish system provides for the exclusion of illegal evidence but, in practice, this rule applies only in case of violation of fundamental constitutional rights, and not in cases involving lawful formalities which make evidence irregular (not necessarily illegal), (Bradely, 2001:397). However, possibilities for violation of constitutional rights are limited because the provisions give wide powers to police authorities (who may search cars and persons even without any probable cause. The principle of material truth prevails if fundamental constitutional rights have not been violated, and evidence is allowed regardless of the way it was obtained (Thaman, 2011:606).

In addition to the USA, Ireland is the only common law country which partly uses absolute exclusion but only in terms of constitutional violations and if the case is about intentional and conscious actions.[17] The exclusion rule is not applied if an official was not aware of the violation, if he made a mistake, or if he generally acted in good faith.[18]

5. European Convention for the Protection of Human Rights and Fundamental Freedoms and Case-law of the European Court of Human Rights

The Convention does not regulate the field of admissibility of evidence but considers illegal material evidence within the framework of assesment of fairness in trial proceedings.[19] According to fundamental position of the European Court of Human Rights, if material evidence, obtained by violation of domestic legal rules or violation of the Convention provisions regulating the fundamental rights within the frame of obtaining material evidence, (Stone, 2012:145) is used in criminal proceedings, it neither disrupts fairness of the proceedings nor it is necessary to mandatory exclude evidence.[20] The European Court of Human Rights takes into account any circumstance of the case and considers whether the credibility of evidence was disrupted by the way it was obtained and whether it was checked in criminal proceedings. If the defendant had adequate possibility to examine the reliability of material evidence using the right to defence, the violation shall not cause unfair proceedings (Keane, McKeown, 2012:75). Hence, in assessing whether certain evidence has effect on the fairness of the proceedings, the European Court of Human Rights does not use an absolute approach but analyses all the circumstances of the case.

The first decision of the European Court of Human Rights dealing with the impact of illegally obtained evidence on trial proceedings was the decision in case *Schenk v. Switzerland*,[21] which involved illegal taping of a conversation on ordering murder. In its decision, the Court pointed out that a court is generally and fundamentally not prohibited to use the evidence obtained in unlawful actions. The Court had the same position in all

[17] *People v. O'Brien* [1965] I.R. 142 (Ir. 1964).
[18] *People (DPP) v Kenny* [1990].
[19] See: Karas, 2006:113-125.
[20] *Schenk v. Switzerland*, No. 10862/84, of 12th July 1988.
[21] No. 10862/84 of 12th July 1988.

the cases where requests were filed due to use of illegal evidence. Yet, there is another standing in relation to violations of non-derogative rights, such as prohibition of torture,[22] in terms of which the European Court of Human Rights found that it violates the principle of fairness (just like in cases involving provocation by the agent provocator).[23] The difference arises from different status, considering that it is impossible to impose a conventional limitation upon the right to privacy for justified reasons, wheras there is no similar limitation for prohibition of torture. Under Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, a violation of the right to prohibition of torture, inhuman and degrating treatment raises serious issues concerning the fairness of proceedings, no matter if personal or material evidence is involved.

Therefore, majority of such cases before the European Court of Human Rights pertain to the issue of obtaining a statement, but there are also cases on the issue of obtaining material evidence. In the case *Jalloh v. Germany,* the investigators forced the accused person to use medication necessary to provoke vomiting in order to obtain the swallowed package of drugs.[24] Upon analysing all the circumstances of actions taken, the European Court of Human Rights decided that the public interest for criminal prosecution in this case was not prevailing because the suspect was street re-seller with small amounts of drugs, even though, in principle, it is not forbidden to forcibly exclude individual samples from the suspect (White et al., 2010:287), In the case *Gäfgen v. Germany,* the European Court of Human Rights found that material evidence obtained by abuse and violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Rights on protection from torture, inhuman and degrading treatment should not be the basis for judgement.[25] In the dissenting opinion, some judges stated that this Convention makes unnecessary difference between the statement and material evidence obtained by violation of Article 3, because the issue is about an absolute right (Mowbray, 2012:423). The application of inhuman or degrading treatment does not mean direct violation of fairness but it implies that all the circumstances of the case should be considered.

In the case *Ireland v. United Kingdom* (1980), the European Court of Human Rights analysed five techniques which Great Britain applied when hearing members of the Irish Republican Army: (1) wall-standing: forcing the detainees to remain for periods of some hours spreadeagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers; (2) hooding: putting a dark coloured bag over the detainees' heads all the time except during interrogation; (3) subjection to noise: holding the detainees in a room where there was a continuous loud and hissing noise; (4) depriving the detainees of sleep; (5) subjecting the detainees to a reduced diet during their stay at the detention unit. The Court did not state how long they were deprived of sleep or how much their diet was modified. In any case, the European Court of Human Rigths concluded that "those techniques applied in combination represented inhuman and degrading treatment", partly because "they arouse in their victims feeling of fear, anguish and inferiority, capable of humiliating and debasing them and possibly breaking their physical or moral resistance".

[22] *Göcmen v. Turkey*, No. 72000/01, of 17th October 2006.
[23] *Teixeira De Castro v. Portugal*, No. 25829/94, of 9th June 1998.
[24] *Jalloh v. Germany*, No. 54810/00, of 11th July 2006, § 107.
[25] *Gäfgen V. Germany*, No. 22978/05, of 1st June 2010, § 99.

The credibility of illegal evidence has a great impact in the European Court case-law. In the case *Lisica v. Croatia*,[26] a request was filed with a statement that police officers entered into the suspect's vehicle in the period between two searches and, thereby, violated credibility of later found evidence. Disputed entry into the vehicle was carried out as investigation action involving criminal and technical examination aimed at taking samples from the seat. The European Court found that officials were in the car without the presence of the applicant or his representative, even though there was no special reason not to inform the applicant about that action; therefore, the credibility of the evidence found by later investigation was considered as disputable. The European Court first analysed the influence of the right to defence against the credibility of evidence, and not the issue whether the entry into the vehicle was legal or not; secondly, it examined if the information which should have been provided to the applicant was a condition for legality of such actions in accordance with Croatian legislation.

6. INTERNATIONAL CRIMINAL TRIBUNAL

The Roman Statute of the International Criminal Tribunal (ICT) in Article 69 paragraph 7 provides for the possibility to exclude evidence in case of violation of provisions of the Statute or internationally recognized fundamental rights. Some of the states asked for a wide exclusion of evidence while preparing the draft Statute but the authors tried to narrow this rule and proposed, as way of exclusion, discretion approach enabling appropriate balance in accordance with the circumstance of each individual case (The International Criminal Court, 1999:246).

The issue of illegal evidence arose in the very first case *Lubanga*, where the defendant asked for exclusion of material evidence claiming that the search of the apartment in his state was unconstitutional. The ICT claimed that his fundamental right to privacy was violated but that the final decision had to seek for an appropriate balance since the evidence are not excluded automatically.[27] The ICT noted that those were material evidence and statements that may be under the influence of illegality and it, finally, concluded that the violation did not affect the integrity of the proceedings. In this decision, the ICT referred to the case-law and interpretation of the European Court of Human Rights and, in the sphere of different influences of illegality to credibility of material and personal evidences, it accepted the position took by *Triffterer* (Triffterer, 1999:914, 1334). The ICT did not even exclude evidence in the *Katanga* case, where it based its reasoning on the case-law of the European Court of Human Rights (Schabas, 2010:849 et al). Also, the evidence was not excluded in the *Mbarushimana* case on illegal search and dispossession, as related to secret taping of phone conversation by German and French services.[28]

In the sphere of illegal evidence, the Roman Statute took over the theory of integrity, just like the International Criminal Tribunal for the Former Yugoslavia (ICTY) which found in *Delalić* case that: if credible evidence would have been excluded for procedural

[26] *Lisica v. Croatia*, No. 20100/06, of 25th February 2010, § 60.
[27] *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1981, Decision on the admission of material from the bar table, of 24th June 2009, § 21 et al.
[28] *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-465, of 16th December 2011, §§ 61 and 71.

violations, it would represent a huge obstacle for the court decision-making processes.[29] In accordance with such a position, the ICTY accepted illegal evidence, such as secret tapes in *Brđanin* case, [30] where it also referred to the judgments of the European Court of Human Rights according to which a violation of a right to privacy requires no automatic exclusion of evidences.[31] Similar issues about violations of privacy by illegal secret tapping also arose in cases *Karadžić*, *Milošević*, *Krajišnik,* and others.

7. EUROPEAN UNION

Relative exclusion of illegal evidence is accepted in some acts of the European Union. Thereby, in the principles for the protection of financial interest of European Union (*Corpus juris*), Article 33 provides that evidence must be excluded if their application constitutes a violation of fair proceedings. In that case, it has to be checked whether irregularities may affect legally protected interests, which suggests the relative assesment and not the automatic exclusion of evidence.[32]

The provisions in Article 32 of *Corpus Juris* define evidence which may be admitted even if they may be in coalision with domestic law; these provisions should be regarded as *lex specialis* derrogating provisions of *lex generalis*.

However, at the same time, there is a wide space for possible application of provisions of domestic law, even in relation to illegal evidence. It is provided for under Article 33 of *Corpus Juris*, regulating actions of the court in relation to exclusion of illegally obtained evidence. Although *Corpus Juris* may be considered only as "a professor's rule" (for now), given the intensive integration processes, we may expect its norms to be part of internal legislation and we should be prepared for its possible application (Kos, 2004: 9).

8. INSTEAD OF CONCLUSION

In many states, the system governing the prohibition of illegal evidence has always been regulated through court case-law. However, given the fact that this complex and controversial issue is closely related to the fundamental human rights, the legislature could not cede the issue of deciding on the use of illegal evidence to court discretion only. Thus, different legal systems have laid down more or less firm boundaries. Minimal standards governing the use or prohibition to use illegal evidence in criminal proceedings have been prescribed on a supranational level through international documents on human rights.

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[29] *The Prosecutor v Delalić et al.*, IT-96-21, Decision on the Motion of the Prosecution for the Admissibility of Evidence, of 19th January 1998.
[30] *The Prosecutor v. Radoslav Brđanin*, IT-99-36-T, Decision on the Defence Objection to Intercept Evidence, of 3rd October 2003, § 61.
[31] ICTY concluded the same in *The Prosecutor v Kordić and Čerkez*, IT-95-14/2-T.
[32] *Corpus juris* (2003), pp. 84, 85.

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UPOREDNOPRAVNI ASPEKTI ZABRANE UPOTREBE NEDOZVOLJENIH DOKAZA U KRIVIČNOM POSTUPKU

Pojam nezakonitih dokaza u krivičnom postupku izaziva mnoge teorijske rasprave i sporove i jedan je od središnjih problema savremenog dokaznog prva. Kompleksnost tog problema spada u najteža pitanja krivičnog procesnog prava. Radi se o složenom krivičnoprocesnom pojmu čiji je sadržaj u stalnoj evoluciji i razvoju, i to u manjoj mjeri zbog zakonskih intervencija, a primarno zbog njegove praktične vrijednosti

Kad se posmatra stanje u uporednom pravu, vidljivo je da se većina pravnih sistema ne koristi apsolutnim izdvajanjem nezakonitih dokaza u krivičnom postupku. Upravo suprotno, takav je model predmet kritika zbog brojnih nedostataka i negativnih posljedica. Rijetki sistemi koji se koriste apsolutnim načinom izdvajanja nezakonitih dokaza nemaju širok obim pravila i primjenjuju razne izuzetke. Analiza potvrđuje da je pri analizi uporednog prava pažnju potrebno usmjeriti ne samo na postojanje pravila nego i na obim izdvajanja.

Ključne riječi: *dokazi, krivični postupak, izdvajanje nezakonitih dokaza, anglosaksonski sistem, evropsko-kontinentalni sistem.*