INTERCEPAÇÃO DE COMUNICAÇÕES SOB A LUZ DA CONVENÇÃO EUROPÉIA DE DIREITOS HUMANOS

INTERCEPTION OF COMMUNICATIONS IN THE LIGHT OF EUROPEAN CONVENTION OF HUMAN RIGHTS

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RESUMO: Este artigo trata dos limites da possibilidade de interpretação de comunicações com relação dos direitos humanos, já que essa prática implica em uma sensível limitação dos direitos fundamentais das pessoas. Analisando extensamente a jurisprudência do Tribunal Europeu dos Direitos Humanos, constatou-se que não é incomum a tanto as leis quanto as práticas dos países europeus violarem as garantias da Convenção Européia dos Direitos Humanos.

ABSTRACT: This article limits the possibility of interpreting communications regarding human rights, since this practice implies a significant limitation of fundamental rights of individuals. Extensively analyzing the European Court of Human Rights found that it is not uncommon to both the laws and the practices of European countries violate the guarantees of the European Convention of Human Rights.

PALAVRAS-CHAVE: interceptação de comunicações; Tribunal Europeu dos Direitos Humanos, Convenção Européia dos Direitos Humanos

KEYWORDS: interception of communications; European Court of Human Rights; European Convention of Human Rights.

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INTRODUCTION

The limits of interference in human rights by way of intercepting communications are one of the most controversial problems in criminal trial. Practice of investigative organs shows that there is still a battle between respect for human rights and the desire to effectively combat crime. There is no doubt that the use of these measures is necessary in many investigations, especially on organized crime or terrorism. Intercepting communications is a technique allowing for most efficient control over citizens. It is discreet and invaluable as a source of evidence against suspects. It allows for gathering evidence without persons knowing it. State organs cannot resist temptation to use tapes acquired this way as incriminating evidence during criminal proceedings. On the other hand these measures imply a sensitive limitation of fundamental rights, in particular privacy and the right to a fair trial. A reasonable balance should be achieved. It seems that in this battle the losing group presently are not criminals and terrorists but citizens and their rights.

Extensive jurisprudence of the European Court of Human Rights shows that in numerous cases the European states cross the line of reasonable balance and favour efficacy over respect for human rights. Analysis of this topic is especially important in view of introducing still new ways of monitoring everyday activities of citizens justified by the governments as the only way to fight terrorism and serious crime. The European Court of Human Rights evaluates the actions of state agents and finds that in many cases both law and practice violate the guarantees offered by the European Convention of Human Rights.[1] The Court underlines that intercepting communications may constitute a violation of the right to private life and the right to a fair trial expressed in Article 8 and Article 6 of the European Convention of Human Rights. Therefore it is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated.[2]

1. INTERCEPTION OF COMMUNICATIONS AS A VIOLATION OF PRIVATE LIFE

The mere fact of intercepting communications may constitute a violation of Article 8 of the European Convention of Human Rights. However, the right to privacy can be restricted if it is justified by important goals and only in the boundaries determined by the law. The first paragraph declares the right to private life while the second one sets out circumstances in which the right may justifiably be interfered with. Article 8 of the Convention provides:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public

[1] Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No.: 005.

[2] *Huvig v. France*, judgment of 24 April 1990, application no. 11105/84, § 32; also: D. Gajdus, B. Gronowska, *Stosowanie pods³uchu telefonicznego w ocenie Europejskiej Komisji i Europejskiego Trybuna³u Praw Cz³owieka*, Palestra 1994, no. 11, p. 113; B. Kurzêpa, *Podstêp w toku czynnoœci karnoprocesowych i operacyjnych*, Toruñ 2003, p. 167.

authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Court on numerous occasions examined the essence of such an interference in private life.

It is not disputed that mail, telephone and email communications are covered by the notions of "private life" and "correspondence" in Article 8 § 1. The Court adopted broad interpretation and accepted that the term "private life" must not be interpreted restrictively.[3] Moreover, there is no doubt that interception of communications is an "interference by a public authority" with the exercise of a guaranteed right which constitutes an interference with Article 8. Once the fact of interception of communications is established there is a need to examine whether in a given situation such an interference was justified in the light of paragraph 2.

1.1 Interference in accordance with the law

Any interference can only be justified under Article 8 § 2 if it is in accordance with the law, pursues one of more of the legitimate aims to which paragraph 2 refers and is necessary in a democratic society in order to achieve any such aim. The Court inspects each phrase used in the list of exceptions from paragraph 2. From one case to another these phrases acquire special meaning which becomes part of jurisprudence and is used in next cases. Thus the limits of interference by a public authority with the exercise of right to private life by way of interception of communications become strictly interpreted.

Firstly, in order to find that the national law allowing for interception of communications is in violation of Article 8 of the Convention the Court has to determine whether, under domestic law, the essential elements of the power to intercept communications were laid down with reasonable precision in accessible legal rules that sufficiently indicated the scope and manner of exercise of the discretion of the relevant authorities. In the case of *Liberty and Others v. the United Kingdom* the Court established a three-pronged test. First, the impugned measure must have some basis in domestic law. Second, the domestic law must be compatible with the rule of law and accessible to the person concerned. Third, the person affected must be able to foresee the consequences of the domestic law for him.[4]

In the case *Sunday Times v. United Kingdom* the Court established that the phrase "in accordance with the law" signifies that the interference in question must have some basis in domestic law.[5] The Court has always interpreted the term

[3] In particular, respect for private life comprises the right to establish and develop relationships with other human beings; furthermore, there is no reason of principle to justify excluding activities of a professional or business nature from the notion of "private life", see: *Amann v. Switzerland*, judgment of 16 February 2000, application no. 27798/95, § 65.

[4] *Liberty and Others v. the United Kingdom*, judgment of 1 July 2008, application no. 58243/00, § 59.

[5] *Sunday Times v. United Kingdom*, judgment of 26 April 1979, application no. 6538/74, § 49;

"law" in its "substantive" sense, not its "formal" one. It is thus understood that it includes also legislation of lower rank than statutes.[6] The principle of interpreting law in its "substantive" sense applies also to common-law countries. "Were it to overlook case-law, the Court would undermine the legal system of the continental states" and would "struck at the very roots of the United Kingdom's legal system if it had excluded the common law from the concept of 'law'".[7] The phrase also implies – and this follows from the object and purpose of Article 8 – that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights. Additionally in *Silver and Others* the Court held that "a law which confers a discretion must indicate the scope of that discretion". [8]

Secondly, this rule refers not merely to domestic law but also relates to the quality of law. The Court stated in *Sunday Times*, repeating its findings also in *Silver and Others v. United Kingdom*: "the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case"[9]. There is no sufficient legal certainty when procedural safeguards appear to be inferred either from general enactments or principles or else from an analogical interpretation of legislative provisions – or court decisions – concerning investigative measures different from telephone tapping, notably searches and seizure of property.[10] In *Huvig v. France* the Court found the the French legislation violated Article 8 as only some of safeguards against abuses of interception of communications were expressly provided for in legislation whereas others have been laid down gradually in judgments given over the years.

Third, a norm cannot be regarded as 'law' unless it is formulated with such a precision as to enable the citizen to regulate his conduct. The law must be sufficiently clear in its terms to give citizens an adequate indication as to "the circumstances in which, and the conditions on which, public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence".[11] He must be able to foresee, "to a degree that is reasonable in the circumstances", the consequences which a

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[6] *Huvig v. France*, cited above, § 28.
[7] In *Sunday Times*, cited above, § 47.
[8] In *Silver and Others v. United Kingdom*, judgment of 25 March 1983, application no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, §§ 86, 87 and 88.
[9] In *Silver and Others v. United Kingdom*, judgment of 25 March 1983, applications nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, §§ 86, 87 and 88.
[10] *Huvig v. France*, cited above, § 33.
[11] In *Malone v. The United Kingdom*, judgment of 2 August 1984, application no. 8691/79. In the opinion of the Court, in 1984 the law of England and Wales did not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities. To that extent, the minimum degree of legal protection to which citizens were entitled under the rule of law in a democratic society was lacking. The interferences with the applicant's right under Article 8 to respect for his private life and correspondence were not "in accordance with the law". As a result of this judgment the British Parliament adopted the Interception of Communication Act, which was supposed to introduce clear rules of interception of communications, see: R. Ward, A. Wragg, *English Legal System*, Oxford 2005, p. 186.

given action may entail. If he himself is not able to interpret legal provisions, this requirement is still complied with if he can do so with a need of legal advice. In *Amann v. Switzerland* the Court found that Swiss regulations were drafted in terms too general to satisfy the requirement of foreseeability in the field of telephone tapping.[12] They contained no indication as to the persons concerned by such measures, the circumstances in which they may be ordered, the means to be employed or the procedures to be observed. The Swiss legal provisions stipulated only that "personal data may be processed only for very specific purposes, but did not contain any appropriate indication as to the scope and conditions of exercise of the power conferred on authorities to gather, record and store information". They did not specify the procedures that have to be followed or the information which may be stored. That rule of foreseeability could not therefore be considered to be sufficiently clear and detailed. The Court stated that it did not afford appropriate protection against interference by the authorities with the applicant's right to respect for his private life and correspondence.[13] However, the Court pointed out that the absolute certainty in the framing of laws should not lead to excessive rigidity.[14] It would scarcely be possible to formulate a law to cover every eventuality. What is more, the requirement of foreseeability cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly.

1.2 Interference necessary in democratic society

As to the next element of the exception from Article 8 paragraph 2 – interferences must be shown to be "necessary in a democratic society". Therefore they should be strictly necessary for safeguarding democratic institutions. The values of a democratic society must be followed as faithfully as possible. Fulfilment of condition of "necessity in a democratic society" has to be reviewed in concrete terms, in the light of the particular circumstances of each case.[15] The assessment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to authorise, carry out and supervise them, and the kind of remedy provided by the national law.[16] Additionally, the Court has acknowledged that states enjoy a certain margin of appreciation in assessing the existence and extent of such necessity. Still, this margin is subject to supervision of the European Court of Human Rights.

In its case-law on secret measures of surveillance, the Court enumerated specific conditions which have to be fulfilled in order to consider the precise legislation to be in compliance with Article 8 paragraph 2. It has developed the

[12] *Amann v. Switzerland*, judgment of 16 February 2000, application no. 27798/95, § 58.
[13] *Amann v. Switzerland*, cited above, §§ 58 and 59.
[14] *Sunday Times v. United Kingdom* judgment of 26 April 1979, application no. 6538/74, § 49.
[15] See: *Huvig v. France*, cited above, § 30.
[16] *Klass and Others v. Germany*, judgment of 6 September 1978, application no. 5029/71, §§ 49 to 50.

following minimum safeguards that should be set out in order to avoid abuses of power. The legislation must describe the categories of persons who, in practice, may have their communications intercepted; the nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed.[17]

As to the nature of the offences, the Court emphasises that the condition of foreseeability does not require States to set out exhaustively by name the specific offences which may give rise to interception. Sufficient detail should only be provided of the nature of the offences in question. In *Kennedy v. the United Kingdom* the applicant criticised the terms "national security" and "serious crime", which constituted grounds for interception of communications, as being insufficiently clear. The Court disagreed. It observed that the term "national security" is frequently employed in both national and international legislation and constitutes one of the legitimate aims to which Article 8 § 2 itself refers.[18]

Also the warrant on interception of communication must itself comply with precise conditions. It cannot be general. Indiscriminate capturing of vast amounts of communications is not permitted.[19] It must clearly specify, either by name or by description, specific person, who is subjected to interception or a single set of premises as the premises in respect of which the warrant is ordered. Names, addresses, telephone numbers and other relevant information must be specified in the schedule to the warrant.

The rule of law implies that interference by the executive authorities with an individual's rights should be subject to supervision.[20] Supervision procedures must follow the values of a democratic society as faithfully as possible. In the Romanian case *Rotaru v. Romania* the Court observed that this system should not only exist but also must be compatible with Article 8 of the Convention (which it was not in this particular case). The Court must be satisfied that it is adequate and effective. To this means it must contain safeguards established by law which apply to the supervision of the relevant services' activities. It should also be carried out by the judiciary, at least in the last resort, since judicial control affords the best guarantees of independence, impartiality and a proper procedure.[21]

In a recent case *Kennedy v. United Kingdom* the Court analysed carefully the quality of English legislation constituting the foundation for interception of communications. Specifically it inspected the procedure for examining, using and

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[17] See, *inter alia*, *Huvig v. France*, cited above, § 34; *Amann v. Switzerland* , cited above, § 76.
[18] See: *Kennedy v. United Kingdom*, judgment of 18 May 2010, application no. 26839/05, § 159.
[19] *Liberty and Others v. the United Kingdom*, of 1 July 2008, application no. 58243/00, § 64.
[20] See: *Klass and Others* judgment cited above, §§ 49-50.
[21] *Rotaru v. Romania*, judgment of 4 May 2000, application no. 28341/95, § 69; *Klass and Others* judgment cited above, § 55.

storing the data and the destruction of intercepted material. On the basis of this case the Court established that the domestic law on interception of internal communications should indicate with sufficient clarity the procedures for the authorisation and processing of interception warrants as well as the processing, communicating and destruction of intercept material collected. The Court recalled that in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge.[22] The intercepted material must also be reviewed at appropriate intervals to confirm that the justification for its retention remains valid. All the captured data which are not necessary for any of the authorised purposes must be destroyed. In case if the surveillance body (in *Kennedy* – the Investigatory Powers Tribunal) finds the interception illegal, it should be able to quash any interception order, require destruction of intercepted material and order compensation to be paid. If all these conditions are complied with, even secret interception does not violate Article 8 of the Convention. In case of the United Kingdom a special body has been created tasked with overseeing the general functioning of the surveillance regime and the authorisation of interception warrants in specific cases. The body reports annually to the Prime Minister and its report is a public document which is laid before Parliament. In *Kennedy* the Court concluded that the provisions on control, duration, renewal and cancellation of secret surveillance are sufficiently clear and accordingly there has been no violation of Article 8.

However, reviewing the state legislation is not sufficient for the purposes of establishing a violation of Article 8. The Court has consistently held in its case-law that its task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied by the authorities to the applicant, or affected him in any other way, gave rise to a violation of Article 8 of the Convention.[23] In *Kennedy* the Court observed that even the best designed legislative system of control of conditions of interception of communications cannot be considered to be sufficient in the light of Article 8 if there are significant shortcomings in its application. Only in case when the surveillance regime functions correctly the safeguards system should be considered to be satisfactory.

1.3 Secrecy of surveillance

A significant problem arises when the applicant cannot provide evidence of existence of interception of communications. A national legislation may institute a system of surveillance under which all persons can potentially have their mail, post and telecommunications monitored, without knowing this. Where a State institutes secret surveillance the existence of which remains unknown to the persons

[22] See: *Kennedy v. the United Kingdom*, cited above § 167; *Klass and Others*, cited above, § 56.
[23] See, *inter alia*: *Klass and Others v. Germany*, judgment of 6 September 1978, application no. 5029/71, § 33.

being controlled the surveillance remains unchallengeable. The only way of realizing that their communications have been intercepted is by way of either some indiscretion or subsequent notification by the authorities. Without the above it is never possible for a person to provide evidence of existence of such an interference with his rights. In *Klass and Others v. Germany* the Court found that such a disputed legislation directly affects all users or potential users of the postal and telecommunication services in a given state.[24] Therefore, a right of recourse to the Court "for persons potentially affected by secret surveillance is to be derived from Article 25 since otherwise Article 8 runs the risk of being nullified". The mere existence of the legislation allowing for interception of communications becomes a menace of surveillance for all those to whom the legislation could be applied. This menace "necessarily strikes at freedom of communication between users of the postal and telecommunication services and thereby constitutes an 'interference by a public authority' with the exercise of the applicants' right to respect for private and family life and for correspondence".[25] However ambiguously, the Court concluded that where there is no possibility of challenging the alleged application of secret surveillance measures at domestic level, widespread suspicion and concern among the general public that secret surveillance powers are being abused cannot be said to be unjustified. In such cases, even where the actual risk of surveillance is low, there is a greater need for scrutiny by this Court. This finding may be interpreted as a warning for the authorities. The Court declares that a "reasonable likelihood" of application of secret surveillance must be showed by the applicant but still welcomes all the applications from persons alleging such interferences.

Following *Klass and Others* in a number of cases against the United Kingdom, where the applicants alleged interception of their communications, the Court emphasised that the test in *Klass and Others* could not be interpreted so broadly as to encompass every person in the United Kingdom who feared that the security services may have conducted surveillance of him. Accordingly, the Court required applicants to demonstrate each time that there was a "reasonable likelihood" that the measures had been applied to them.

For instance, in *Malone v. the United Kingdom*,[26] the Court came to a conclusion that when the legislation indicates a class of persons against whom application of telephone interception is very probable a person belonging to that class can successfully claim to have his or her rights violated. It noted that "the existence in England and Wales of laws and practices which permit and establish a system for effecting secret surveillance of communications amounted in itself to an 'interference with the exercise' of the applicant's rights under Article 8, apart from any measures actually taken" against the applicant. The Court came to such a conclusion taking into consideration a special character of a suspect in this case,

[24] *Klass and Others v. Germany*, cited above, § 33.
[25] *Klass and Others v. Germany*, § 41.
[26] See: *Malone v. The United Kingdom*, cited above, § 64.

who was a suspected receiver of stolen goods. Thus, he was a member of a class of persons against whom measures of postal and telephone interception were liable to be employed.

Also broad classes of persons subjected to intercepted communication may constitute a violation of Article 8. For instance in *Liberty and Others v. the United Kingdom* warrants covered very broad classes of communications, including "all commercial submarine cables having one terminal in the UK and carrying external commercial communications to Europe", and all communications falling within the specified category could be intercepted. In their observations to the Court, even the Government accepted that, "in principle, any person who sent or received any form of telecommunication outside the British Islands during the period in question could have had such a communication intercepted"[27]. In the eyes of the Court the legal discretion granted to the executive for the physical capture of external communications was, therefore, too broad. The Court differentiated this case to *Kennedy*.[28] In the last case it had no doubt that carefully designed legislation and efficient system of control over practical implementation of these norms – described above – causes that even secret interception of communications does not violate Article 8 of the Convention.

2. INTERCEPTION OF COMMUNICATIONS AND THE RIGHT TO A FAIR TRIAL

Using interception of communications as a source of evidence and as evidence in criminal trials may lead to many different problems. The first problem arises in relation to admissibility of such evidence, if it has been acquired by the means of illegal interception of communications. The Convention does not provide for any rules of admissibility of evidence. However, evidence can be excluded from the criminal trial on the basis of the right to a fair trial. Article 6 paragraph 1 of the Convention provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of his civil rights and obligations or of any criminal charge against him.

2.1 Trial fair as a whole

The Court has stressed many times that while Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law.[29] It is not the role of the Court to determine whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible. The question which must be answered is whether the proceedings as a whole were fair. Therefore

[27] See: *Liberty and Others v. the United Kingdom*, judgment of 1 July 2008, application no. 58243/00, § 64.
[28] *Kennedy v. the United Kingdom*, cited above, § 167.
[29] See: *Schenk v. Switzerland*, judgment of 12 July 1988, application no. 10862/84, §§ 45-46; *Teixeira de Castro v. Portugal*, judgment of 9 June 1998, application no. 25829/94, § 34

it cannot be excluded as a matter of principle that unlawfully obtained evidence may be admissible.

The requirement of fairness of the whole trial was set out in the case of *Allan v. the United Kingdom*.[30] The Court presented there three elements that have to be taken into consideration in this regard: 1) the rights of the defence have to be respected, in particular the applicant should be given the opportunity of challenging the authenticity of the evidence and of opposing its use, as well as the opportunity of examining any relevant witnesses; 2) the admissions made by the applicant during the conversations should be made voluntarily, there being no entrapment and the applicant being under no inducement to make such admissions; 3) and the quality of the evidence, including whether the circumstances in which it was obtained, cast no doubts on its reliability or accuracy.

According to these findings, firstly, even if a piece of illegal evidence had been used, the trial as a whole may still be regarded as fair if the principle of equality of arms has been kept. The principle of equality of arms in criminal trial is the key element of the right to a fair trial. The Court stated in *Kennedy v. The United Kingdom* that according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent.[31] In its case-law the Court established a list of the applicant's rights in this regard. According to this principle the applicant must be given the opportunity of challenging the authenticity of the recording of his intercepted communications. He should as well have the opportunity of examining it. He should be able to summon e.g. the police inspector responsible for the making of the recording. What is more during the trial he should be given opportunity to oppose the use of illegally obtained interception of communications. Secondly, the way in which a party can present his case, should be fair. He should not be tricked onto making incriminating statements.

Secondly, the problem of fairness especially arises where the evidence obtained is unsupported by other material. Where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker. The relevance of the existence of evidence other than the contested matter depends on the circumstances of the case. In *Khan v. the United Kingdom* the Court noted that the contested material was the only evidence against the applicant and that the applicant's plea of guilty was tendered only on the basis of the judge's ruling that the evidence should be admitted.[32] Therefore the trail as a whole was unfair. On the other hand, in *Schenk v. Switzerland* the Court stressed that "the recording of the telephone conversation was not the only evidence on which the conviction was based".[33] In this case it also came to a conclusion that if

[30] *Allan v. the United Kingdom*, judgment of 5 November 2002, application no. 48539/99, § 43.
[31] *Kennedy v. The United Kingdom* , cited above. See also, for example: *Foucher v. France*, judgment of 18 March 1997, application no. 22209/93, § 34; *Bulut v. Austria*, judgment of 22 February 1996, application no. 17358/90, § 47.
[32] *Khan v. The United Kingdom*, judgment of 12 May 2000, application no. 35394/97, § 37.
[33] *Schenk v. Switzerland*, judgment of 12 July 1988, application no. 10862/84, §§ 45-46.

all the above mentioned safeguards to the accused had been guaranteed and the trial had to be considered fair. However, another view was expressed in a dissenting opinion to *Schenk* judgment. The dissenting judges stated that "no court can, without detriment to the proper administration of justice, rely on evidence which has been obtained not only by unfair means but, above all, unlawfully. If it does so, the trial cannot be fair within the meaning of the Convention".[34] Nonetheless, the Court has repeated its conclusion on may other occasions.

2.2 Doctrine of the fruit of the poisonous tree

On many occasions results of interception of communications may be considered to be illegal in the light of internal legislation. Such is the situation when investigation organs intercept communications in relation to a crime which is not listed in relevant legislation as constituting a basis for secret surveillance. As it is illegal to use such interception as evidence in trial, organs gather other, legally obtained, types of evidence, for instance in a way of interrogation of witnesses and accused. Later, they present such statements – legally obtained – as evidence in trial. As the Court cannot exclude as a matter of principle admissibility of certain types of unlawfully obtained evidence, once again it must answer the question whether the proceedings as a whole were fair.

On the example of different types of illegally obtained evidence the Court has invoked the so-called doctrine of the fruit of the poisonous tree. It observed that the prohibition on using, in a manner prejudicial to the accused, information derived from facts learned as a result of the unlawful acts of state organs is firmly rooted *inter alia* in the legal tradition of the United States of America. In the United States of America the obligatory exclusion of evidence relates not only to evidence obtained as a direct result of a constitutional rights violation but also to evidence indirectly derived from a constitutional rights violation.[35] In *Gäfgen v. Germany* the Court related this prohibition to information obtained from coerced confessions.[36] If the illegally obtained confession leads to additional evidence, such evidence is also inadmissible in court in addition to the confession itself. The Court decided that the evidence will be excluded if it can be shown that "but for" the illegal conduct it would not have been found. The "but for" test obliges a court to ask, if "but for the unconstitutional police conduct, would the evidence have been obtained regardless"?[37] If the answer is no, then the evidence will be excluded. In the case-law of the Court, it has not yet settled the question whether the use of such evidence will always render a trial unfair, irrespective of other circumstances of the case. The Court noted that there is no clear consensus among the European States, the courts of other states and other human-rights monitoring institutions

[34] *Schenk v. Switzerland*, cited above, Joint Dissenting Opinion of Judges Pettiti, Spielmann, de Meyer and Carrillo Salcedo; Joint Dissenting Opinion of Judges Pettiti and de Meyer, Dissenting Opinion of Judge de Meyer.
[35] See, for instance, *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Nardone v. United States*, 308 U.S. 338 (1939); see: J. Worrall, *Criminal Procedure. From First Contact to Appeal*, Texas 2007, p. 62-63.
[36] *Gäfgen v. Germany*, judgment of the Grand Chamber of 1 June 2010, application no. 22978/05.
[37] J. Worrall, *Criminal Procedure. From First Contact to Appeal*, Texas 2007, p. 62.

about the exact scope of application of the exclusionary rule. It has, however, found that both the use in criminal proceedings of statements obtained as a result of a person's treatment in breach of Article 3 – irrespective of the classification of that treatment as torture, inhuman or degrading treatment – and the use of real evidence obtained as a direct result of acts of torture made the proceedings as a whole automatically unfair, in breach of Article 6.

Such problem appeared in the case law of the Court on the grounds of a German case, *Gäfgen v. Germany*, where the applicant alleged that the treatment to which he had been subjected during police interrogation concerning the whereabouts of a missing boy, constituted torture prohibited by Article 3 of the Convention. Therefore the evidence which had been obtained during the illegally performed interrogation of the accused was in violation of Article 3 and in consequence also of Article 6.[38] The German court had excluded the use at trial of all pre-trial statements made by the applicant to the investigation authorities because of the prohibited methods of interrogation in the investigation proceedings. There was a strong presumption that the use of items of evidence obtained as the fruit of a confession extracted by means contrary to Article 3 rendered a trial as a whole unfair in the same way as the use of the extracted confession itself. However, in the particular circumstances of the case, it had been the applicant's new confession at the trial which had been the essential basis for his conviction.[39] The Court considered that using these pieces of evidence in trial was not in violation of Article 6. The applicant appealed to the Grand Chamber.

When the Grand Chamber ruled on the problem it stressed again that it cannot decide whether evidence obtained unlawfully in terms of domestic law should be considered inadmissible. It can only answer the question whether the proceedings as a whole were fair. The Court observed that incriminating evidence obtained as a result of acts of violence, at least if those acts had to be characterised as torture, should never be relied on as a proof of guilt, irrespective of its probative value. It agreed with the applicant that the effective protection of individuals from the use of investigation methods that breach Article 3 may require the exclusion from use at trial of real evidence which has been obtained as the result of any violation of Article 3. Any other conclusion would only serve to legitimise, indirectly, the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, in other words, it would "afford brutality under the cloak of law".[40] The Court noted that in the proceedings before the domestic courts, the impugned evidence was classified as evidence which had become known to the investigation authorities as a consequence of the statements extracted forcefully from the applicant. Thus this evidence may have become "the fruits of the poisonous tree". In a Solomon judgment the Grand Chamber decided that "a criminal trial's fairness and the effective protection of the absolute

[38] *Gäfgen v. Germany*, judgment of the Grand Chamber of 1 June 2010, application no. 22978/05.
[39] Gäfgen v. Germany, judgment of 30/06/2008
[40] See i.e. *Jalloh v. Germany*, judgment of 11 June 2006, application no. 54810/00, § 105.

prohibition under Article 3 in that context are only at stake if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, had an impact on his or her conviction or sentence". However, in this case, it was only the applicant's second confession at the trial which formed the basis of his conviction for murder and kidnapping with extortion and his sentence. Therefore, the impugned evidence was not necessary, and was not used to prove him guilty or to determine his sentence. It can thus be said that there was a break in the causal chain leading from the prohibited methods of investigation to the applicant's conviction. The failure to exclude the impugned evidence, secured following a statement extracted by means of inhuman treatment, did not have a bearing on the applicant's conviction and sentence. As the applicant's defence rights and his right not to incriminate himself have likewise been respected, his trial as a whole was considered to have been fair.[41] Reasoning of the Court reminded the *Wong Sun* case from the United States.[42] The Supreme Court of the United States determined in this case that statements provided by a defendant who was illegally arrested and released but later returned to the police station on his own initiative were admissible because the statements did not result from the illegal arrest. The Supreme Court noted that his later statement "dissipated the taint of the initial unconstitutional act".[43]

On numerous occasions the Court indicated that evidence obtained illegally at the preparatory stage of proceedings and used during the trial prejudice the fairness. For instance, the absence of a lawyer at the time the applicant was questioned by the police can irretrievably prejudice the fairness of the criminal proceedings.[44] In *Panovits v. Cyprus* an applicant made an incriminating statement in the absence of his guardian and without sufficient information about his right to receive legal representation or of his right to remain silent. The Court noted that the applicant's confession obtained in the above circumstances constituted a decisive element of the prosecution's case against him that substantially inhibited the prospects of his defence at trial and which was not remedied by the subsequent proceedings. Therefore it constituted "the fruit of the poisonous tree". As it was admitted in the proceedings it contaminated the trial as a whole.

The above mentioned judgments indicate an established line in jurisprudence of the Court to examine if a trial as a whole does not deny the very essence of the applicant's right to a fair trial. It is a different approach than in the American concept of "the fruits of the poisonous tree". Firstly, the Court consequently denies to construct guidelines as to what type of evidence is in

[41] However, it cannot be said that the Court is unanimous in this matter. In joint partly dissenting opinion of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power the judges expressed a view that there was a breach of Article 6 because real evidence which had been secured as a direct result of a violation of Article 3 was admitted into the applicant's criminal trial. Partly dissenting opinion has been also presented by Judges Casadevall joined by Judges Kovler, Mijoviã, Jaeger, Joèienë and López Guerra.

[42] *Wong Sun v. United States*, 371 U.S. 471 (1963); also see: *Segura v. United States*, 468 U.S. 796 (1984).

[43] J. Worrall, *Criminal Procedure. From First Contact to Appeal*, Texas 2007, p. 63.

[44] See: *Panovits v. Cyprus*, judgment of 11 December 2008, application no. 4268/04.

violation of the Convention.[45] The compliance with each of the elements of the right to a fair trial as provided in Article 6 is always considered taking into consideration the general fairness of the proceedings.[46] Secondly, it stresses that the mere use of the doctrine of "the fruits of the poisonous tree" does not automatically render the whole trial unfair.

2.3 Secrecy of surveillance

Another problem arises when the fact of interception of communications is kept secret, similarly to the situation under Article 8. Secret interception of communications is usually not disclosed to another party. Even if a legal remedy is available to a party, it is difficult then to challenge in national courts such infringement of rights that is not known to a party. Moreover, it may affect both disclosure of evidence and justification of reasons of a decision. In respect to the rules limiting disclosure of evidence the Court stated that the entitlement to disclosure of relevant evidence is not an absolute right. In cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them. The interests of national security or the need to keep secret methods of investigation of crime must be weighed against the general right to adversarial proceedings, equality of arms and incorporated adequate safeguards to protect the interests of the accused .[47] In *Kennedy v. The United Kingdom* the Court emphasised that the proceedings related to secret surveillance measures and therefore there was a need to keep secret sensitive and confidential information.[48] In the Court's view, this consideration justifies restrictions in the national laws. The question is whether the restrictions, taken as a whole, were disproportionate or impaired the very essence of the applicant's right to a fair trial. Accordingly the Court noted that it is clear from the terms of Article 6 § 1 itself that national security may also justify the exclusion of the public from the proceedings in regards to the fact of secret surveillance.

Also a problem arises if the secrecy does not allow for full justification of reasons of a judgment, contrary to the obligation under Article 6. Concerning the provision of reasons, the Court emphasised that the extent of the duty of a national court to give reasons of its judgment may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. On the example of British cases the Court decided that according to the "neither confirm nor deny" policy it is sufficient that an applicant be advised that no determination

[45] I. Sepio³o, , *Nieobowi¹zywanie doktryny "owoców zatrutego drzewa" a wytyczne ETPCz,* Palestra 2010, no. 9-10, p. 234.
[46] See: I. Sepio³o, *Nieobowi¹zywanie doktryny "owoców zatrutego drzewa" a wytyczne ETPCz,* Palestra 2010, no. 9-10, p. 226-235.
[47] See: *Edwards and Lewis v. the United Kingdom*, Grand Chamber judgment of 27 October 2004, applications nos. 39647/98 and 40461/98, p. 16.
[48] *Kennedy v. The United Kingdom*, cited above.

has been in his favour. However, in the event when a complaint is successful, the applicant is entitled to get information regarding the fact of secret surveillance. Consequently, the Court observed if the restrictions on the applicant's rights concerning secrecy of proceedings and disclosure of evidence are both necessary and proportionate – they do not impair the very essence of the applicant's rights expressed in Article 6.

CONCLUSIONS

There is no doubt that interception of communications is going to be used in everyday practice of investigation organs. Moreover, there is still danger that it will be used in further situations as it has proved to be very efficient as means of obtaining evidence in criminal cases. We have seen that state authorities will not hesitate to monitor still new areas of our lives and even change the legislative basis to be able to do so. Desire of investigation organs to use such evidence in trial is understandable. It is not against human rights to secretly intercept communications. However, it can be done only under certain conditions. In its case-law the European Court of Human Rights has set out conditions under which interception of communications is allowed. In order to be in compliance with Article 8 of the Convention the secret measures must have basis in domestic law, which is accessible to the person concerned and this person must be able to foresee the consequences of the domestic law for him. Also compliance with Article 6 of the Convention can be guaranteed only if certain requirements are fulfilled. Intercepted communications can be used during trial only when the rights of the defence and principle of equality of arms are respected, in particular when the applicant is given the opportunity to challenge the evidence. The quality of the evidence should cast no doubts on its reliability or accuracy and should not lead to violation of the doctrine of the fruit of the poisonous tree. The conditions relate also to existence of control system and the content of a warrant.

Internal legislation of Poland allows for tapes from intercepted communications to be used in criminal trail. Such communications not only provide information about crimes and their perpetrators but also can be used as incriminating evidence in trial. There is no need to transform such evidence in form of depositions of witnesses or confession of a perpetrator.[49] The basis for such possibility is usually set down in legal provisions (such as i.e. the Polish Act on the Police of 6 April 1990, Article 19). As to the doctrine of "the fruit of the poisonous tree", the Polish courts has had no doubts that information acquired in an illegal manner and not in compliance with the legal provisions on intercepted communications cannot be used in trial as evidence.[50] Violation of legal conditions allowing for intercepting of communications makes it impossible to use such evidence in trial. Situation can become even more complicated when on the basis of such evidence, which is

[49] M. Klejnowska, Pods³uch operacyjny i prowokacja operacyjna, Prokuratura i Prawo 2004, nr 3, s. 94.
[50] Supreme Court, Criminal Chamber, judgments: of 30 November 2010, case no. III KK 152/10, of 22 September 2010, case no. III KK 58/09, of 26 April 2007, case no. I KZP 6/07.

not used in trial, a person is forced to make an incriminating statement. Investigative organs can trick him into making such a statement claiming that they have evidence proving that he committed a crime. Then it would seem that such a statement cannot be excluded from trial. However, in the Polish criminal procedure there is no rule excluding such evidence from trial as the doctrine of fruits of poisonous tree does not apply. The "indirectly illegal" evidence cannot be eliminated.[51] Polish courts make decisions on the basis of their own conviction, which shall be founded upon evidence taken and appraised at their own discretion, with due consideration to the principles of sound reasoning and personal experience (Article 7 of Code of Criminal Procedure). Therefore they can also make decisions on the basis of statements obtained in result of obtaining illegal evidence. Moreover, the case-law of the Court should influence the practice of investigative organs in all the Contracting States. On the basis of the jurisprudence of the European Court of Human Rights, we could expect that a trial, where such incriminating evidence is used, should be considered not to be fair as a whole. No court should ignore the opinion of a human rights organ. The Convention is binding for all the states that have ratified it and "potentially more powerful" than internal legislation, since it takes priority over domestic law.[52] The state organs have to take into consideration the jurisprudence of the Court. Otherwise, they risk judgments pronouncing violation of the Convention followed by financial responsibility.

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[51] Kurzêpa, Podstêp w toku czynnoœci karnoprocesowych i operacyjnych, Toruñ 2003, p. 176-177.
[52] See: A. Ashworth, Principles of Criminal Law, Oxford, 2003, p. 62.