RESTRICTIONS ON ADMISSIBILITY OF IMPROPERLY OBTAINED EVIDENCE IN CRIMINAL TRIAL

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

Protection of human rights during criminal investigation is a crucial issue for the criminal justice system, because serious human rights violations are committed by law enforcement officials during the process of obtaining evidence. In such circumstances shall a court refuse to accept improperly obtained evidence in order to avoid wrongful conviction and to preserve fair proceedings? The object of this thesis is improperly obtained evidence. The purpose of this dissertation is to analyze the criteria for admissibility of improperly obtained evidence, which in numerous cases plays a crucial role for determination of guilt or innocence of the accused.

For achievement of the purpose of the thesis a comparative analysis of jurisdictions of the United States, the United Kingdom together with the jurisprudence of the European Court of Human Rights is conducted by the author for determination of significant legal gaps in application of the exclusionary rule to improperly obtained evidence in cases of use of coercion and privacy violations. Based on the obtained results the author comes to the conclusion that the fact that European approach is different from American position on admissibility of unlawfully obtained evidence does not mean that the principle of integrity of the criminal justice system is breached. The research demonstrates that application of the exclusionary rule to improperly obtained evidence is significantly important for preservation of victims' interests and for establishing of deterrent effect for the police malpractice. The author concludes that combination of European and American approaches by applying the balancing test between the deterrent benefits of the exclusionary rule together with victim's interests and the relevance of improperly obtained evidence would best protect the fundamental rights of the suspect.

INTRODUCTION

Criminal justice as a vital institution of our society plays a significant role in protecting public order and maintaining security and justice. Law of evidence constitutes an integral part of the criminal justice system. It plays a crucial role in conviction or acquittal of the accused. In the common law doctrine the law of evidence is determined as the law, which regulates the generation, collection, organization, presentation and evaluation of information for the purpose of resolving disputes about past events in legal adjudication.[1] To make the definition short, the law of evidence governs the fact-finding procedure and the process of proof of guilt or innocence during the hearings in the court.

The proper application of the law of evidence in criminal cases is of crucial importance for preservation of integrity of the criminal justice system and protection of the rights of the accused, because there are serious human rights violations committed by law enforcement officials during the process of obtaining evidence at the stage of criminal investigation.[2] Usually the main topics of newspapers and TV news programmes are criminal issues, such as murder, rape, or mysterious disappearance, which usually mostly excite the public. Therefore, little attention is paid to the problem of human rights violations, committed during criminal investigations. As a rule the process of criminal investigation is kept in secrete and public remain unaware of the existence of these serious problems.[3] As a consequence, serious human rights violations, committed by law enforcement officials remain in the shadow.[4]

In numerous countries internationally forbidden methods of obtaining evidence, such as coercive interrogation, torture or other ways of inhuman and degrading treatment are still practiced by police officers despite being recognized as unlawful by international human

[1] Roberts, P. et al., *"Criminal evidence,"* Oxford University Press, New York, 2004, p. 2.
[2] Trechsel, S., *"Human rights in criminal proceedings,"* Oxford University Press, New York, 2005, p.556.
[3] Amos, G., *"Constitutional limits on coercive interrogation,"* Oxford University Press, New York, 2008, p. 25.
[4] Ibid.

rights documents and national constitutions.[5] The methods of collecting evidence by unreasonable searches and seizures are widely used by criminal agencies all over the world.[6] Therefore, it is difficult to provide effective protection of human rights during the process of criminal investigation, when a suspect is least protected and more vulnerable.[7] It is necessary to point out that while certain rights have an absolute character, prohibition of torture, for instance, other rights, such as respect for private life, might be derogated from by state authorities in cases, established by law.[8] In this regard, law enforcement officials, using such derogations, tend to commit human rights violations in the process of obtaining evidence.[9]

In such circumstances shall a court refuse to accept improperly obtained evidence in order to avoid wrongful conviction and to preserve fair proceedings? The object of this thesis is improperly obtained evidence. The purpose of this dissertation is to analyze the criteria for admissibility of improperly obtained evidence, which in numerous cases plays a crucial role for determination of guilt or innocence of the accused. Certain exclusionary rules should be applicable to evidence obtained in breach of human rights, in order to avoid a violation of the fair trial rights and to preserve the basic principles of the law of evidence. Otherwise, admissibility of improperly obtained evidence may undermine the main functions of the criminal justice system, which are to avoid wrongful conviction and to protect the fairness of the proceedings. In this regard application of the exclusionary rules in criminal trials becomes the only way to exclude unlawfully obtained evidence in order to vindicate the violated rights of the suspect, to improve the quality of justice and to preserve the integrity of the criminal justice system as such.

[5] Ibid.
[6] Ibid..
[7] Toney, R., *"English criminal procedure under article 6 of the European Convention on Human Rights: implications for custodial interrogations practices,"* Houston Journal of International Law, vol. 24, 2002, p.454.
[8] Trechsel, S., *"Human rights in criminal proceedings,"* Oxford University Press, New York, 2005, p 536.
[9] Ibid.

Methodology

For achievement of the purpose of this thesis it is necessary to analyze the legal nature of the exclusionary rule and the methods of it implementation. For this reason a comparative analysis of jurisdictions of the United States, the United Kingdom together with the jurisprudence of the European Court of Human Rights (hereinafter, the ECtHR) will be conducted for determination of significant legal gaps in application of the exclusionary rule to improperly obtained evidence. Based on the obtained results the compatibility of the courts' practice of exclusion of unlawfully obtained evidence with provisions of national legislation and international human rights documents will be evaluated, using the inductive method of the scientific research. International documents on human rights protection, national legislation on criminal procedure, case-law of the chosen jurisdictions and works of contemporary foreign and domestic specialists in the law of evidence will be analyzed in this dissertation for the accomplishment of the research.

Chapter 1: Exclusionary rules: general approach and statutory regulation

In the first chapter I will analyze the background of the problem of admissibility of unlawfully obtained evidence. The fundamental concepts of the law of evidence, such as relevance and admissibility, will be examined in order to define the basic principles on which the doctrine of exclusionary rule in criminal proceedings is based. The tests of relevance and admissibility will help to determine the general methods of assessment of evidence in criminal trial and to define the current tendencies in the application of the "fruit of poisonous tree doctrine".

The exclusionary rule will be analyzed as a main component of the law of evidence. This concept will be examined in the light of the right to fair trial, which is guaranteed by the numerous international documents on human rights and national legislation of the chosen jurisdictions. In order to define the main problematic aspects of unlawfully obtained evidence

it is necessary to analyze the application of the exclusionary rule doctrine in different jurisdictions. It will help to determine a common approach as well as differences in the practice of application of exclusionary rules in the United Kingdom, the United States, and in the jurisprudence of the ECtHR. Therefore, an overview of the methods for excluding unlawfully obtained evidence, which are established in the chosen jurisdictions, will be given in the first chapter. The analysis of the most important judicial precedents on general application of exclusionary rules will be conducted to determine the current tendencies in the application of the "fruits of poisonous tree" doctrine and the gaps of its statutory regulation.

Chapter 2: Admissibility of evidence obtained by torture or inhuman and degrading treatment

Admissibility of evidence, obtained by coercive methods, will be analyzed in the second chapter of the thesis. For this purpose legal regulation and interpretation of the concept of torture and inhuman or degrading treatment will be examined in the chosen jurisdictions. The issue of admissibility of fruits of coercion is of great importance, because methods, used by police officers to obtain confessions during interrogations, may cause serious miscarriage of justice and lead to grave human rights violations. Reliability of confession evidence shall be carefully examined in each case in order to avoid wrongful conviction. The distinction between different categories of coercive measures, depending on their severity, will be made when analyzing the question of fruits of unlawful confessions. National standards on admissibility of evidence obtained during confessions and the methods of police interrogations will be compared with the internationally established human rights standards. Compatibility of evidence obtained from unlawful confessions with the main principles of the law of evidence, analyzed in the first chapter, will be examined in order to define the main legal gaps and contradictions in domestic regulation of this issue. The issue of admissibility of confessions, made during police interrogations, is of significance importance especially

after proclamation of the "war on terror", when usage of torture and coercive measures towards suspected terrorists by law enforcement agencies have become a general practice.

Chapter 3: Admissibility of evidence obtained in violation of privacy

Admissibility of evidence obtained in violation of the right to privacy will be analyzed in the third chapter of the thesis. The analysis of the constitutional regulation of the right to privacy and statutory regulation of the law enforcement activities in criminal proceedings will be conducted in order to determine the main problematic issues: legal gaps in national and regional regulation of protection of the right to privacy during criminal investigations. The focus of this chapter is to examine two possible situation of violation of the right to privacy during criminal proceedings: intrusion into privacy of the accused by conducting searches and seizures and surveillance or interception of communications. The possible adverse effect of the criminal justice system on the right to privacy, guaranteed by international human rights documents and national legislation, will be assessed together with the right to fair trial. Application of the proportionality test in cases of interference with one's privacy rights will be examined in order to characterize the methods of judicial discretion to exclude evidence obtained with violation of the right to privacy and to evaluate possible remedies in such cases.

Therefore, the analysis of restrictions on admissibility of improperly obtained evidence will be conducted in order to determine the main problematic aspects of application of the exclusionary rule, to define the most frequent human rights violations during the process of obtaining evidence and to work out measures, aimed at improvement of human rights protection and reinforcement of the fundamental principles of criminal justice.

CHAPTER 1

EXCLUSIONARY RULES: GENERAL APPROACH AND STATUTORY REGULATION

The main principles of the law of evidence in the common law countries appeared from precedents, whereas in civil law countries the main sources of the law of evidence were statutory provisions, enacted by legislators.[10] Furthermore, common practice of law enforcement authorities, derived from "soft law" instruments, such as codes of practice, for instance, has played an important role in the process of formation of the law of evidence.[11] In this chapter I will examine the general application of the law of evidence to criminal proceedings. For the analysis of restrictions on admissibility of unlawfully obtained evidence it is necessary to define the main characteristics and principles of the law of evidence, which have to be considered when applying exclusionary rules in criminal trial.

1.1. Relevance and admissibility as the main characteristics of evidence

The concepts of relevance and admissibility are strongly interrelated with each other. Under the common law doctrine *"relevance"* is defined as a fundamental criterion for admissibility.[12] Roberts et al define *relevance* as a probative criterion for establishing the truth and rendering the judgment.[13] Therefore, *relevance* is one of the core components for admissibility of evidence in criminal proceedings.[14]

Before rendering a decision on admissibility of evidence, a judge must apply the "*relevance test".*[15] This test consists of the following formula: "relevant means that any two facts to which it is applied are so related to each other that according to the common course of events, one either taken by itself or in connection with other facts proves or renders

[10] Roberts, P. et al., *"Criminal evidence,"* Oxford University Press, New York, 2004, p. 4.
[11] Ibid.
[12] Dennis, I., *"The law of evidence,"* 3rd ed., Sweet and Maxwell, London, 2007, p.61.
[13] Supra at footnote 10, p. 98.
[14] Supra at footnote 12, p. 61.
[15] Dennis, I., *"The law of evidence,"* 3rd ed., Sweet and Maxwell, London, 200, p.5.

probable the past, present or future existence or non-existence of the other."[16] Therefore, the relevance of evidence can be assessed taking the evidence either by itself or in connection with other evidence, depending on the circumstances of the case. The test is based on logic, common sense and general experience of a judge.[17]

Relevance is the core component for admissibility, whereas *"admissibility"* is the key criterion, on which exclusionary rules is based. Roberts et al argue that *"admissibility"* should be understood broadly as determining whether particular evidence should be "received" or "admitted" into the trial.[18] In this regard *admissible evidence* may be defined as evidence, which may lawfully be admitted at trial.[19] As it has already been mentioned, *admissibility* and *relevance* are interrelated and interdependent concepts, which constitute the "golden rule" of the law of evidence, which states that "if evidence is relevant it is admissible."[20] When considering the issue of admissibility of evidence, a judge must answer 2 main questions: 1) "Is the evidence relevant?" 2) "Is the evidence subject to any applicable exclusionary rules?"[21] They compose the *"test of admissibility"* of evidence in criminal proceedings.

The basic principle of admissibility of improperly obtained evidence is that even highly probative and relevant evidence might be excluded if the means of obtaining were unfair.[22] When answering the second question on application of exclusionary rules, a judge shall achieve a balance between the probative value of evidence and so called "prejudice". [23] It means that "the probative value of admissible evidence must outweigh its prejudicial

[16] Stephen J.E. Digest of the Law of evidence, London: Macmillan, 1948, 12th. ed., art.1 in Dennis, I., *"The law of evidence,"* 3rd ed., Sweet and Maxwell, London, 200, p.5.
[17] Ibid.
[18] Roberts, P. et al., *"Criminal evidence,"* Oxford University Press, New York, 2004, p. 96.
[19] May R. et al., *"Criminal evidence,"* 5th ed., Sweet and Maxwell, London, 2004, p.8.
[20] Supra at footnote 15, p.60. See also Tapper, C., *"Cross and Tapper on Evidence,"* 9th ed., Butterworths, London, 1999, p. 55.
[21] Supra at footnote 18, p.97.
[22] Ibid., p.98.
[23] Ibid.

effect."[24] This formula can be simply used by a judge when assessing the evidence, presented by the parties. It explains the main principle of application of *"admissibility test"* at the second stage after establishment of relevance of the evidence in question.

1.2. Five fundamental principles of criminal evidence

The law of criminal evidence is based on the fundamental principles, which derived within the evolution of the law of evidence in criminal proceedings.[25] The first principle is the principle of *factual accuracy*.[26] Indeed, this principle is of crucial importance, since accurate and precise facts are the basic requirement for avoiding wrongful conviction of the accused. Therefore, the process of obtaining evidence shall be strictly compatible with the established legal regulations and shall not violate the rights of the defendant.

The second principle, on which criminal evidence is based, is the *protection of innocent from wrongful conviction*.[27] This principle derives from the first one, as it is the purpose of the accurate fact-finding procedure. Prevention of wrongful conviction is the main aim of the fair trial procedure. Therefore, this principle is the fundamental part of the right to fair trial. It is important to mention here that both these rights are recognized in the UK and the USA. The Human Rights Act of 1998 (hereinafter HRA)[28] incorporates the European Convention of Human Rights and Fundamental Freedoms[29] (hereinafter, ECHR) into English law. The HRA gives effect to art. 6 ECHR, which establishes the right to fair trial, and art. 5 and 7 ECHR, which implicitly recognize the right of the accused not to be wrongfully convicted.[30] In its turn, above mentioned rights derive from the 5th and 14th Amendments, which contain

[24] Ibid.
[25] Ibid, p.17.
[26] Ibid.
[27] Ibid, p. 19.
[28] Human Rights Act 1998, [last cited March 18, 2011], available at: http://www.legislation.gov.uk/ukpga/1998/42/contents.
[29] European Convention on Human Rights and Fundamental Freedoms, 1952, [last cited March 18, 2011], available at: http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf.
[30] Human Rights Act 1998, chapter 42, s.1.

the due process clause.[31] Accordingly, the exclusion of improperly obtained evidence, which might prejudice the suspect and violate his/her constitutional rights, is a logical implication of the second principle of criminal evidence.

The principle of *minimum intervention* is the third fundamental principle of evidence in criminal justice.[32] This principle is aimed at protection of the right to privacy of the accused in order to avoid unlawful intervention from the police officials during the investigative stage.[33] The main target of such protection is personal autonomy.[34] Therefore, such principle provides protection of the accused intimate sphere of life, and restricts the admissibility of evidence obtained in violation of the right to privacy, for instance evidence obtained by unauthorized searches and seizures. This principle constitutes one of the main rules of criminal proceedings according to which adjudicative decisions, which affect the rights of individuals, must be made in accordance with procedures that respect the autonomy of individuals.[35] Therefore, the principle of *minimum intervention* forms the basis for exclusionary rules in the law of evidence.

The fourth principle is *the principle of human treatment*, which is also directly related with the notion of personal autonomy.[36] This principle derives from the fundamental concept of human dignity, which can never be violated.[37] The aim of the principle is to protect the defendant from the coercive power of the State authorities and provide the welfare of the accused during the whole criminal proceedings.[38] During this stage the suspect is especially vulnerable, therefore, he/she needs to be protected from abuse of power by the State

[31] The United States Constitution, 1787, [last cited March 18, 2011], available at: http://www.usconstitution.net/const.html.
[32] Roberts, P. et al., *"Criminal evidence,"* Oxford University Press, New York, 2004, p.20.
[33] Ibid.
[34] Alldridge P. et al., "*Personal autonomy, the private sphere and criminal law: a comparative study*," Hart, Portland, 2001, p. 57.
[35] Ibid.
[36] Roberts, Paul et al., *"Criminal evidence,"* Oxford University Press, New York, 2004, p. 20.
[37] Ibid.
[38] Ibid.

authorities.[39] This principle is a core principle for prohibition of use of excessive power by the law enforcement officials, for example the use of torture for obtaining the confession from the suspect.[40] Therefore, such principle is of significant importance for criminal justice as a whole, because the accused, even if her guilt were proven, shall be treated as a human being, with respect to his dignity and other fundamental rights, enshrined in the constitutions and international human rights documents.

The principle of *maintaining the high standards of propriety in criminal proceedings* is the fifth principle of criminal evidence.[41] The main idea of the principle is that the final judgment shall be accurate and consistent with other fundamental moral and political values embedded in the legal system.[42] In fact this principle makes it legitimate for a judge to exclude improperly obtained evidence in order to preserve the fairness of the criminal proceedings.[43] If the principle is fulfilled, it provides legal and moral integrity for the final judgment of the court, because in this case the facts are properly investigated and, if necessary, exclusionary rules are appropriately applied.

Therefore, all the above mentioned principles are necessary to guarantee the accused the right to fair trial and the integrity of the criminal justice system. For better understanding of a crucial role of the exclusionary rule in criminal proceedings it is necessary to indicate that under the law of evidence the notion of fairness is aimed to: "1) provide reliability of evidence; 2) to eliminate prejudice; 3) to protect the rights of the accused; 4) to preserve the integrity of the criminal process." [44] Therefore, fulfillment of these 5 basic principles of the law of evidence provides proper functioning of the criminal justice system and, as a result,

[39] Ibid.
[40] Ibid, p. 21.
[41] Ibid., p. 22.
[42] Dennis, Ian, *"The law of evidence,"* 3rd ed., Sweet and Maxwell, London, 2007, p. 50.
[43] Ibid.
[44] Ibid., p.310.

leads to the growth of public trust in effectiveness and accuracy of the criminal justice system as such.

1.3. Exclusionary rules

As it has already been mentioned the two main characteristics of criminal evidence are relevance and admissibility.[45] These basic concepts are directly interrelated with each other. According to the general rule of the law of evidence, all relevant evidence is admissible.[46] However, there are exceptions to this general rule, which exclude even relevant evidence and make it inadmissible. These rules are used to exclude unlawfully obtained evidence from criminal proceedings.

1.3.1. Exclusionary rules in the common law countries

In the common law systems exclusionary rules serve for two main purposes: 1) to exclude evidence if it would be likely to have a prejudicial effect outweighing its probative value; 2) to exclude improperly obtained evidence.[47] Good examples, which illustrate evolution and practical application of the exclusionary rule in the common law systems are the United Kindom and the United States.

a) United Kingdom

In the UK s. 78 ("Exclusion of unfair evidence") of the Police and Criminal Evidence Act 1984 (hereinafter PACE) regulates application of exclusionary rules in criminal proceedings. The section states as follows:

"1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

[45] See s.1.1.
[46] Dennis, Ian, *"The law of evidence,"* 3rd ed., Sweet and Maxwell, London, 2007, p.7.
[47] May, R. et al., "*Criminal evidence,"* 5th ed., Sweet and Maxwell, London, 2004, p.283.

(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence."[48]

The scope of application of s. 78 is wide. It is applicable to any evidence, adduced by the prosecution.[49] Furthermore, s. 78 applies to trials of indictment and the magistrates' court.[50] This section explicitly establishes judicial discretion to exclude evidence obtained unlawfully, because their admission can undermine the fairness of the procedure. The section consolidates the common law doctrine of admissibility of evidence.[51]

A significant development in application of the exclusionary rules in the UK courts was made in the *R v. P*[52] case. The House of Lords ruled that application of s. 78 was not restricted to evidence obtained from the accused, but also applies to any evidence adduced by the prosecution, which might be obtained in violation of the rights, enshrined in the ECHR.[53] Therefore, the scope of application of this section was further extended.

Under s. 78 the evidence shall be immediately excluded from criminal proceedings when the violations, committed by law enforcement authorities while obtaining evidence, are significant and substantial.[54] This requirement, established by the UK case law, is rational. First of all, there are numerous legal provisions, which regulate police practices (PACE Codes of practice,[55] for instance). Therefore, hardly could it be accepted that any violation of such legal provisions would automatically exclude evidence by application of exclusionary rules, enshrined in s. 78 of PACE.[56] However, the concept of "significant and substantial" cannot be considered as a strict requirement. There is no any statutory provision, explaining

[48]Police and Criminal Evidence Act 1984, s. 78, [last visited March 17, 2011], available at: http://www.legislation.gov.uk/ukpga/1984/60/section/78.
[49] R. v. Mason, [1988] 86 Cr. App. R. 354.
[50] May, R. et al., *"Criminal evidence,"* 5th ed., Sweet and Maxwell, London, 2004, p.294.
[51]Dennis, I., *"The law of evidence,"* 3rd ed., Sweet and Maxwell, London, 2007, p. 310.
[52] Regina v P. and Others [2000] UKHL 69.
[53] Ibid., §58.
[54] R. v. Delaney, [*1988*] 88 Cr App R 338, §69.
[55]Home Office: PACE Codes of practice [last visited on March 18, 2011], available at: http://www.homeoffice.gov.uk/police/powers/pace-codes/.
[56]May, R. et al., *"Criminal evidence,"* 5th ed., Sweet and Maxwell, London, 2004, p.201.

its meaning. This concept has derived from the case-law and is applied using case-by-case approach.[57] It is important to mention here that the application of "significant and substantial" concept depends to a large extent on a judge. His duty is to apply properly the notion of "significant and substantial" to breaches, committed by the police or prosecution, in order to eliminate legal uncertainty, when applying exclusionary rules.[58]

Another important rule of application of s. 78 of PACE is that the exclusion of evidence is connected with its quality. According to Auld L.J. in *Chalkey* case, evidence should not be excluded unless its quality may have been affected by the way in which the evidence was obtained by the law enforcement authorities.[59] But there might be a serious contradiction, because evidence obtained by unlawful means may have good quality. Then the question arises: does this evidence have to be excluded from the criminal proceedings? In the subsequent case of *R. v. Khan*, the House of Lords ruled that such evidence may still be excluded under s.78, making an emphasis on the presence of bad faith in the actions of the law enforcement officials.[60]

It is also important to mention here that s. 78 of PACE was recognized by the ECtHR as a sufficient safeguard in order to preserve the fairness of the trial."[61] It means that s. 78 contains all necessary elements for appropriate protection of art. 6 of the ECHR, together with other articles, which might be violated during the process of obtaining evidence.

However, s. 78 of PACE is not the only section dealing with exclusion of improperly obtained evidence. The judicial discretion to exclude unlawful evidence from criminal proceedings is also established in S. 82 (3) of PACE, which states that: "Nothing in this Part of this Act shall prejudice any power of a court to exclude (whether by preventing questions

[57] Dennis, I., *"The law of evidence,"* 3rd ed., Sweet and Maxwell, London, 2007. p. 309.
[58] Ibid.
[59] R v Chalkley [1998] 2 Cr App *R* 79, §105-106.
[60] R v Khan (Sultan) [1996] UKHL 14, R v. Fulling [1987] EWCA Crim 4
[61] Khan v. United Kingdom, application № 35394/97, October 4, 2000, §21-22.

from being put or otherwise) at this discretion."[62] This section of PACE tends to preserve "any existing exclusionary discretion at common law".[63] However, in practice judicial discretion under s. 82(3) is rarely applied by the UK courts.[64] This section is applied where s. 78 of PACE cannot be invoked, i.e. in cases where a judge initially admits evidence presented by prosecution, but subsequently decides to exclude this evidence from the trial.[65]

Another section of PACE, which regulates admissibility of improperly obtained evidence is s.76 (2).[66] This section regulates exclusion of confessions, obtained by oppression.[67] It primary deals with procedural issues of admissibility of improperly obtained evidence. In other words when applying s.76(2) of PACE the courts have to analyze carefully the methods by which the evidence was obtained, whereas under s.78(2) of PACE a judge is primarily concentrated on substantial issues of relevance and reliability of improperly obtained evidence. Therefore, application of exclusionary rule, established in s.78 of PACE is aimed at deterring the misconduct of law enforcement officials and protection of integrity of the criminal justice system.

b) United States

Unlike the UK, the United States has the written Constitution, which incorporates the Bill of Rights.[68] The exclusionary rule is considered to be authorized by the Constitution.[69] The roots of the exclusionary rule derive from the Fourth Amendment to the US Constitution, which guarantees "the right of the people to be secure in their persons, houses, papers, and

[62] PACE, s. 82 (3) [last visited on March 10, 2011], available at: http://www.legislation.gov.uk/ukpga/1984/60/section/82.
[63] Dennis, H., "*The law of evidence,"* 3rd ed., Sweet and Maxwell, London, 2007.p.90.
[64] Ibid.
[65] R v Sat-Bhambra (1989) 88 Cr App R 55.
[66]PACE, s. 76(2) [last visited on March 10, 2011], available at: http://www.legislation.gov.uk/ukpga/1984/60/section/76.
[67] Ibid.
[68]The United States Constitution 1787, [last visited March 18, 2011], available at: http://www.usconstitution.net/const.html.
[69] Mapp v. Ohio 367 US 643 (1961).

effects, against unreasonable searches and seizures."[70] The text of the Fourth Amendment specifies neither the notion of unreasonable search and seizure nor the methods for providing the guarantees established in the Amendment. Therefore, the US Supreme Court has developed the protection of the rights, enshrined in the Fourth Amendment within its case-law. The evolutionary case for application of the exclusionary rule was *Weeks v. United States,* whereby by unanimous majority the Supreme Court held that the use of evidence obtained in the result of an unconstitutional search, is prohibited by the guarantees, established in the Fourth Amendment.[71] However, the scope of application of exclusionary rule was limited to the evidence obtained in violation of the constitutional rights, committed solely by the federal government.[72]

In the US legal system this exclusionary rule got the metaphorical name "fruits of poisonous tree", which first was proposed by Justice Frankfurter in *Nardone v. United States* case on admissibility of evidence obtained in breach of the federal statute.[73] Nowadays the "fruits of poisonous tree doctrine" demands the exclusion of "direct" or "primary" as well as "indirect" or "derivative" evidence, obtained as the result of unconstitutional conduct of state authorities.[74]

The application of the exclusionary rule to the Fourteenth Amendment[75] of the US Constitution, which establishes due process clause, was recognized by the Supreme Court in *Wolf v. Colorado* case.[76] It was stated that the right of citizens to be protected against arbitrary intrusion by police was implicitly recognized in the Fourteenth Amendment, therefore, it can be applicable to the states.[77] But the evidence did not have to be excluded

[70] The Constitution of the United States, 1787, Fourth Amendment.
[71] Weeks v. United States, 232 U.S. 383, 398 (1914), p.398.
[72] Ibid.
[73] Nardone v. United States, 308 U.S. 338 (1939).
[74] Wong Sun v. United States, 371 U.S. 471 (1963).
[75] The Constitution of the United States of 1787, the Fourteenth Amendment, §1[last visited March 18, 2011], available at: http://www.usconstitution.net/const.html.
[76] Wolf .v. Colorado, 338 U.S. 25 (1949).
[77] Ibid, p. 27-28.

automatically because it would have been excluded by the federal court according to the Fourth Amendment exclusionary rule.[78] However, this case was overruled by *Mapp v. Ohio,* which made the exclusionary rule under the Fourteenth Amendment automatically applicable to the states.[79]

When defining the scope of application of the exclusionary rule in the USA it is important to indicate that the exclusionary rule does not apply to evidence, presented in grand jury proceedings.[80] In the reasoning for the majority opinion, Justice Powell stated that "application of the exclusionary rule to evidence in a grand jury proceeding would have, at best, a minimal deterrent effect on police misconduct. Since that minimal deterrent effect could not justify the high cost to society of impeding the function of the grand jury, the Court created a categorical exception to applying the exclusionary rule in grand jury proceedings."[81]

Statutory regulation of the exclusionary rule is provided by s. 402 of the Federal Rules of Evidence, which states that "all relevant evidence is admissible, except as otherwise provided by the United States Constitution, by Act of Congress, or by applicable rule".[82] Therefore, rule 402 contains the list of the main legal sources for exclusion of evidence. It means that in order to exclude evidence from the proceedings it is necessary to justify the exceptions, explicitly mentioned in the rule. In this regard s. 401 of the Federal Rules gives a clear definition of the relevant evidence, which can be considered admissible. It establishes that the concept of 'relevant evidence' means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less

[78] Ibid, p. p.28.
[79] Mapp v. Ohaio, 367 U.S. 643 (1961), p.655.
[80] Calandra v. United States, 414 U.S. 338 (1974), p.351.
[81] Ibid, p.351-352.
[82]Federal Rule of Evidence, 1975, s. 402, [last visited March 17, 2011], available at: http://www.law.cornell.edu/rules/fre/rules.htm#Rule105.

probable than it would be without the evidence."[83] These sections reflect the position of common law doctrine on defining the main characteristics of relevant evidence and a general rule of admissibility of evidence.

Defining the scope of application of the exclusionary rules it is important to mention the opinion of Justice Roberts in the case of *Harring v. United States*, who stated that the exclusionary rule is not always applicable, even when it does have potential to deter police misconduct.[84] Further he referred to the rule of exclusion of evidence in the US legal system, which states that "the exclusionary rule is applicable only when the benefits of its deterrent effect outweigh the costs."[85] The rationale for such rule is that if applying the exclusionary rule without weighting deterrent effect and the costs of evidence, it would result in releasing dangerous criminals, and consequently, it would undermine the fundamental concepts of criminal justice.[86] Therefore, in order to apply the exclusionary rule in criminal trial there must be high probability of deterrent effect.

1.3.2. Common approach to application of exclusionary rules in the United Kingdom and the United States

Both, the US and the UK laws have a similar position on admissibility of relevant evidence. In the UK it is primarily based on the common law golden rule of admissibility that all relevant evidence is admissible, evidence, which is irrelevant, is inadmissible.[87]

a) Judicial discretion

In cases of admissibility of improperly obtained evidence a judge has discretion to "filter the evidence adduced by the parties in the trial".[88] The main idea of establishment of exclusionary rules is to restrict a broad concept of admissibility in order to preserve the

[83] Ibid, s. 401.
[84] Herring v. United States, 129 S. Ct., p. 699.
[85] Ibid, p.700.
[86] Ibid.
[87]. Dennis, I.,*" The law of evidence,"* 3rd ed., Sweet and Maxwell, London, 2007, p.60.
[88] Ibid, p. 96.

principle of fair trial.[89] Therefore, a court has to take into account all circumstances of the case and then to assess the consequences of admission of evidence in question, which might influence the fairness of the proceedings. On the other hand it would be a hard task for the court to take into account all circumstances of the case, when deciding on application of exclusionary rules, because it would overload the court and would make the procedure unduly long. Therefore, there are 2 main sets of circumstances, which have to be considered by the court when judges exercise their judicial discretion to exclude evidence in common law systems.[90] The first set of circumstances is that the principle of fair proceedings might be violated despite the fact of how the evidence was obtained.[91] In the second set of circumstances, the way in which the evidence was obtained becomes the main reason of violation of the principle of fair trial.[92] Such classification is reasonable, since it clearly defines the facts of the case, to which the court has to pay special attention in order to provide proper application of exclusionary rules. Moreover, this classification prevents the court from being overloaded with irrelevant facts and their subsequent examination.

Both PACE and the Federal Rules give a judge a broad discretion to exclude evidence in the process of adversarial litigation.[93] However, the judge's discretion is not unlimited. According to s. 403 of the Federal Rules, when a judge makes her decision to exclude or admit evidence, she has to assess the following factors: "the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[94] This set of factors corresponds to two aforementioned sets of circumstances, established in the common law practice and is

[89] Ibid, p.67.
[90] May, R. et al., *"Criminal evidence,"* 5th ed., Sweet and Maxwell, London, 2004, p.297.
[91] Ibid.
[92] Ibid.
[93] Federal Rule of Evidence, 1975, §104 [last visited on March 19, 2011], available at: http://www.law.cornell.edu/rules/fre/; PACE, s. 78 [last visited on October 3, 2011], available at: http://www.legislation.gov.uk/ukpga/1984/60/section/78.
[94] Ibid, §403.

widely used in the UK as well. Therefore, having analyzed the common law approach and the aforementioned legislation, it is possible to conclude that judges have a significant role to play in the process of admissibility of evidence.

However, it is interesting to mention here that the experiment, held by English law professors and psychologists, shows that most judges have difficulties with disregarding the evidence, which has previously been recognized as inadmissible.[95] It means that inadmissible evidence continues to influence the judge's assessment of facts during the process of criminal trial. In other words information, which is considered by the court to be irrelevant and therefore inadmissible, may indirectly influence the final verdict made by judge. This fact indicates to the danger that the objectiveness might be impaired by subjective considerations of the judge and the verdict might be not as accurate as it is supposed to be according to the principle of fair trial.

b) Defendant's motion to invoke the exclusionary rule

The UK and the USA have an adversarial system of litigation. It means that in both countries exclusionary rules are applicable to the evidence, adduced by the prosecution. [96] As a rule the burden of proof lies with the prosecution.[97] The scope of application is logical, since it is the accused, who is vulnerable and whose rights might be violated by law enforcement officials during the process of obtaining evidence. Therefore, usually it is the defendant, who claims to exclude the evidence, adduced by the prosecution in the trial.[98] However, the court may raise the application of the exclusionary rules on its own initiative if the evidence in question may negatively effect on the fairness of the proceedings.[99] But in

[95]Wistrich, A. et al., "*Can judges ignore inadmissible information? The difficulty of deliberating disregarding",* University of Pennsylvania Law Review, 2005, vol.68, p. 739.

[96]May, R., *"Criminal evidence,"* 5th ed., Sweet and Maxwell, London, 2004.p. 284.
[97] See Federal Rule of Evidence of 1975, s. 201 (g); PACE 1984, s. 78(2), s. 76 (2).
[98] Dennis, H., *"The law of evidence,"* 3rd ed., Sweet and Maxwell, London, 2007.
[99] Ibid; See also Mendez, M. "*Relevance: definitions and limitations – confronting the California evidence code to the Federal Rules of Evidence*," University of San Francisco School of Law, 2008, vol.42, p. 332.

both jurisdictions if the defendant requests to exclude the evidence from the criminal proceedings, both parties have to persuade the judge either to accept the evidence (would be argued by the prosecution) or to exclude it (would be argued by the defense counsel).[100]

c) Test of probative value of evidence

The discretion to exclude evidence, which prejudicial effect outweighs its probative value, derives from the law of evidence in common legal systems.[101] According to the law of evidence relevant evidence must "be probative of the proposition that it is offered to prove".[102] It means that evidence is considered to be relevant if it can even slightly prove likelihood of the other fact in the case. However, there is no strictly established degree of probability for relevant evidence.[103] In other words, the degree of relevance is not strictly fixed criterion and varies to the nature of evidence and particular circumstances of the case.[104].

The purpose of application of the "probative value test" is to provide realization of the basic principles of criminal justice despite the technical rules of the law of evidence if the strict operation of such rules would operate unfairly against the accused.[105] The UK case law explicitly sets out the probative value test when applying exclusionary rules.[106] The Federal Rules of Evidence establish the same test of probative value of evidence.[107] The US case law narrows down wide judicial discretion to exclude evidence and establishes that judges should be very careful when they exclude evidence with substantial probative value.[108]

[100] Ibid.
[101] See chapter s.1.3.1.
[102] Cammack, M., *"Admissibility of evidence to prove undisputed facts: a comparison of the California Evidence Code §210 and Federal Rule of Evidence §401,"* Southwestern University Law Review, 2008, vol. 36, p. 881.
[103] Roberts, P. et al.,*"Criminal evidence,"* Oxford University Press, New York, 2004.p. 105.
[104]Trapper, C.,*"Cross and Tapper on Evidence,"* 9th ed., Butterworths, London, 1999, p. 62.
[105] Harris v. DPP, 1952, A.C. 694, 707.
[106] R. v. King's Lynn Magistrates' Court, Ex p. Holland [1993], 1 WLR, 324.
[107] Federal Rules of Evidence, s. 401.
[108] United States v. Bartelho, 71 F.3d 436, (1st Cir. 1995).

d) Rationale for exclusion of evidence

The rationale for application of the exclusionary rule in the UK and the US law of evidence is the "deterrent" theory, which excludes evidence in order to deter law enforcement authorities from repeating their unlawful conduct in the future.[109] Therefore, when a judge excludes unlawfully obtained evidence from criminal proceedings, it should prevent the police officers from obtaining evidence by unlawful means, because it will be excluded under judicial discretion from the trial. Consequently, such theory should decrease numerous violations, committed by law enforcement authorities at the stage of gathering evidence. In the US law of evidence the deterrent doctrine is the main reason for exclusion of evidence. It was explicitly indicated in the case of *Elkins v. United States*, where the Supreme Court stated that "if police know illegally obtained evidence cannot be used in court, they will refrain from conduct that violates someone's Fourth Amendment rights."[110] Therefore, it enhances the protection of the rights of the accused for future cases.

However, deterrence is not the only rationale for application of exclusionary rules. It has to be assessed together with lawfulness of the proceedings. As Justice Ginsburg stated in *Herring* case that besides the fact that the main purpose of the exclusionary rule is deterrence, "it also has value by enabling the judiciary to avoid the taint of the original lawlessness and by ensuring the public that the government does not benefit from such lawlessness."[111] Therefore, the purpose of the exclusionary rule is not only to deter the law enforcement authorities from abuse of power in future case, but also to preserve fairness of criminal proceedings and to avoid wrongful conviction.

The third rationale, shared by both the US and the UK legislation, is so called "remedial" theory, under which evidence has to be excluded for vindication of the violated rights of the

[109] Roberts, P. et al., *"Criminal evidence,"* Oxford University Press, New York, 2004, p. 151; Webb J., "*Curbing police misconduct through the exclusionary rule: United States v. Jonson, 380 F.3D 1013 (7TH CIR. 2004),"* Southern Illinois University Law Journal, 2006, vol.61, p. 663.
[110] Elkins v. United States, 364 U.S. 206, 217 (1960).
[111] Herring v. United States, 129 S. Ct. 695 (2009), at 707.

accused.[112] However, the US approach to the remedial theory differs from that of the UK. In the US law of evidence the role of the exclusionary rule is defined as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." [113] Therefore, in the United States the remedial theory forms part of the deterrent doctrine. Both the UK and the US have statutory provisions, which regulate the right to remedy. In the USA the Civil Rights Act provides different types of remedies for those, whose constitutional rights have been violated.[114] In the UK s. 8 of the Human Rights Act establishes similar approach to granting remedies in the case of unlawful actions of public authorities.

Despite the importance of such rationale for protection of the defendant's rights, it raises quite a controversial issue: shall the remedy of exclusion of unlawfully obtained evidence be applicable disregarding the nature and severity of the violation itself and the crime committed? This question will be analyzed in the next two chapters.

1.3.3. The ECtHR approach

The ECtHR general approach to application of the exclusionary rule is considered separately in this section, because despite certain common features in application of the "relevance test," it differs from the common law approach and has its own specific characteristics. The ECHR does not contain any guidelines on admissibility of improperly obtained evidence in criminal proceedings. However, in a number of cases the Court has clearly defined its position on this issue. The Court indicates to its subsidiary role in questions of admissibility of improperly obtained evidence and underlines that a judicial

[112] Roberts, P.et al., *"Criminal evidence,"* Oxford University Press, New York, 2004, p. 151.
[113] United States v. Calandra, 414 U.S. 338, 348 (1974).
[114] US Civil Rights Act of 1964, [last cited on March 19, 2011], available at: http://finduslaw.com/civil_rights_act_of_1964_cra_title_vii_equal_employment_opportunities_42_us_code_chapter_21.

discretion to exclude unlawfully obtained evidence is primarily entrusted to national judges.[115]

When deciding on application of the exclusionary rule, the Court besides relevance and probative values of the evidence in question evaluates the fairness of the proceedings as a whole: "It must nevertheless satisfy itself that the proceedings as a whole were fair, having regard to any possibly irregularities before case was brought before the courts of trial and appeal and checking that those courts had been able to remedy them if there were any."[116] Also the Court pays special attention to the fact whether improperly obtained evidence is "the sole basis for conviction, or it is corroborated by other conclusive evidence".[117] In other words, when deciding whether the proceedings comply with the fairness requirements, established in art. 6 of the ECHR, it is important for the Court to determine whether the conviction was or was not solely based on improperly obtained evidence. In this regard it is important to keep in mind that "the guarantee of a fair trial is 'only' a procedural guarantee, designed to secure so called 'procedural justice' rather than 'result-oriented justice', based on the true fact and the correct application of the law."[118]

Therefore, unlike the common law approach on admissibility of evidence, the Strasbourg approach is based on the fact that relevance and reliability of evidence are not sufficient criteria for its admissibility in trial. According to the ECtHR position the combination of substantial factors and procedural requirements constitute the basis for application of exclusionary rules to unlawfully obtained evidence.

[115] Mialhe v. France, application № 18978/91, September 26, 1996, §43. See also Schenk v. Switzerland, application №10862/84, July 12, 1988, §46.
[116] Ibid., §44.
[117] Bykov v. Russia, application №4378/02, March 10, 2009, §98.
[118] Trechsel, S., *"Human rights in criminal proceedings,"* Oxford University Press, New York, 2005, p. 83.

Conclusion

Having analyzed the main concepts of the law of evidence and its application in the chosen jurisdictions, it is possible to conclude that the tests of relevance and admissibility together with the procedural requirements of fairness are applied under judicial discretion for exclusion of evidence in criminal proceedings. The exclusionary rule in the United States is enshrined in the Amendments to the US Constitution, whereas the UK courts use statutory provisions to exclude unlawfully obtained evidence from a trial. In its turn, the ECHR does not have any provisions, regulating admissibility of improperly obtained evidence. Therefore, the ECtHR uses case-by-case approach to resolve such issue. The further examination of admissibility of unlawfully obtained evidence will be based on the relevance and admissibility tests, taking into account the legal gaps in the theory of their application. The courts' practice of application of the exclusionary rule and its compliance with the integrity of the criminal justice system will be analyzed in the next two chapters.

CHAPTER 2

ADMISSIBILITY OF EVIDENCE OBTAINED BY TORTURE OR INHUMAN AND DEGRADING TREATMENT

During the process of criminal investigation detainees are most vulnerable and law enforcement officials may abuse this state to obtain necessary information or confession by torture or inhuman or degrading treatment. As a result, they obtain evidence in violation of the fundamental right, prohibiting use of torture or inhuman and degrading treatment, recognized in numerous international human rights documents.[119] The involuntariness of statements is a logical consequence of use of torture or inhuman and degrading treatment by police officers during criminal interrogation.[120] Involuntariness makes the confession unreliable and the police officers conduct questionable.[121] Use of torture or inhuman and degrading treatment for extracting information from the suspect violates the principle of respect for her autonomy, her will and her self-consciousness.[122] In case of use of coercive measures the suspect's free choice is significantly restricted, because she can only choose either to confess or to be tortured.[123] Such restriction of freedom of choice has direct negative impact on voluntariness of information obtained from the suspect during investigation.[124]

The threshold for breaching the concept of voluntariness is very low, even "implied" or

[119] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, Art.2 [last visited September 20, 2011], available at: http://www2.ohchr.org/english/law/cat.htm.
See also: International Covenant on Civil and Political Rights, December 16, 1966, Art. 7 [last visited September 20, 2011], available at: http://www2.ohchr.org/english/law/ccpr.htm.
Universal Declaration of Human Rights, December 10, 1948, Art. 5 [last visited September 20, 2011], available at: http://www.un.org/en/documents/udhr/.
[120] Chiesa, L., *"Beyond torture: the nemo tenetur principle in borderline cases,"* Boston College Third World Law Journal, vol. 30, 2010, p. 37.
[121] Ibid.
[122] Arizona v. Fulminante, 499 U.S. 279 (1991), at 285-288.
[123] Supra at footnote 120, p.44.
[124] Ibid.

"subtle" coercion makes the confession involuntary.[125] In this regard a serious question arises when a judge evaluates the concept of voluntariness in cases of confessions, obtained in exchange of less severe punishment perspective, because it is very difficult to determine to what extent such actions undermine the voluntariness principle and render the confession inadmissible. [126]

Usually information, obtained through means that renders its voluntariness questionable, is not admissible in the criminal trials.[127] However, what if the life of a kidnapped child or the interests of national security are at stake? Should coercive measures be applicable in order to receive information in such cases? It also might be morally acceptable to restrict the will of the suspect in order to prevent a terrorist attack, for example. But to what extent may it be legitimate from the point of view of the constitutional rights of the suspect? The answers to these questions, given by the ECtHR, UK and US courts will be analyzed in this chapter. Both material and non- material evidence, obtained by torture or inhuman and degrading treatment will be considered in cases of admissibility of fruits of coercion.

2.1. The concept of torture and inhuman or degrading treatment

2.1.1. The ECtHR interpretation and regulation

Prohibition of torture or inhuman and degrading treatment or punishment is established in art. 3 of the Convention.[128] The Court defines article 3 as "one of the most fundamental values of democratic societies" and underlines that there is no possible derogations from it.[129] However, the ECHR does not contain any definitions of torture or inhuman or degrading treatment, mentioned in art.3. Nevertheless, the Strasbourg Court's jurisprudence determines

[125] Schneckloth *v*. Bustamonte (1973), 412 U.S. 218, at 227-228.
[126] Ibid., p.42.
[127] Thaman, S., *"Fruits of the poisonous tree in comparative law,"* Southwestern Journal of International Law Vol. 16, 2010, p. 354.
[128] European Convention on Human Rights and Fundamental Freedoms, November 4, 1950, article 3: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." [last visited September 23, 2011], available at: http://www.hrcr.org/docs/Eur_Convention/euroconv3.html.
[129] Chahal v. the United Kingdom, application № 22414/93, November 5, 1996, §76.

characteristics to these concepts. In the case of *Ireland v. United Kingdom*, the Court defined that there must be "a minimum level of severity in punishment or treatment of the detainee, taking into consideration their duration and effect on physical and mental state of the accused, as well as his/her sex, age and health condition, in order to apply art.3 of the Convention."[130]

Furthermore, the Court determined the approach, which it uses for distinction between torture and inhuman or degrading treatment.[131] The main criterion for such distinction is "the intensity of the suffering inflicted" on the suspect.[132] Taking into consideration this factor, the Court determined 5 techniques, applied to suspects during interrogation, which should be considered as inhuman and degrading treatment: wall-standing, hooding, "white noise" method, and deprivation of sleep, food and drink.[133] In addition, the acts, committed by the police officers, must "arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance."[134]

The threshold for application of art.3 of the ECHR is very low, because not only intentional suffering inflicted on the accused for obtaining necessary information,[135] but also the absence of any positive intention from the police officers to humiliate the detainee may result in violation of art. 3 of the Convention.[136] Moreover, even threat of torture, if it is "sufficiently real and immediate" may be enough for application of art. 3 provisions.[137] It is important to mention here that when considering the question of application of art. 3 of the ECHR, the Court carefully analyses "the whole range of circumstances" of the case and then

[130] Ireland v. the United Kingdom, application № 5310/71, January 18, 1978, §162.
[131] Ibid, §167.
[132] Ibid.
[133] Ibid.
[134] Selmouni v France, application № 2583/94, July 28, 1999, §99.
[135] Menesheva v. Russia, application №59261, March 9, 2006, §60.
[136] Peers v. Greece, application № 28524/95, April 19, 2001, §74.
[137] Campbell and Cosans v. the United Kingdom, application № 7511/76 , February 25, 1982, §26.

decides whether the threshold for torture or inhuman and degrading treatment has been reached.[138] In other words, the Court uses a case-by-case approach.

Therefore, in cases of allegation of torture or inhuman or degrading treatment, when deciding on application of art. 3 of the ECHR, the Court first of all makes an assessment of the level of suffering of the accused/victim and severity of police actions. Then if the threshold is reached, the Court classifies the treatment, i.e. whether it can be considered as torture or inhuman and degrading treatment.

2.1.2. Legal interpretation and regulation in the United Kingdom

The United Kingdom is a party to the following international documents, which prohibit torture or inhuman and degrading treatment: ECHR, International Covenant on Civil and Political Rights (hereinafter ICCPR),[139] UN Convention against Torture and other Cruel of Inhuman, Degrading Treatment or Punishment (hereinafter CAT).[140] It is necessary to mention here that art. 3 of the ECHR has been incorporated in the UK legislation by the Human Rights Act of 1998.[141] Furthermore, it is necessary to add here that the nowadays absolute prohibition of torture is considered to be customary law and constitute *jus cogens* norms, obligatory for all States.[142]

At the domestic level torture or inhuman and degrading treatment are outlawed in the Bill of Rights of 1689, which prohibits "cruel and unusual punishment."[143] Furthermore, torture, which is defined as "intentional infliction …of severe physical or mental pain and suffering" constitutes an offence according to s. 134 of the Criminal Justice Act of 1988, if it is

[138] Murdoch, J., *"The treatment of prisoners: European Standards,"* Council of Europe publishing, London, 2006, p. 116.
[139] International Covenant on Civil and Political Rights, March 23, 1976 [last visited October 1, 2011], available at: http://www2.ohchr.org/english/law/ccpr.htm.
[140] UN Convention against Torture and other Cruel of Inhuman, Degrading Treatment or Punishment. 1984 [last visited on October 2, 2011], available at: http://www.un.org/millennium/law/iv-9.htm.
[141] Human Rights Act 1998, s.1 [last visited October 2, 2011], available at http://www.legislation.gov.uk/ukpga/1998/42/contents.
[142] Nowak M., et al., *"The United Nations Convention Against Torture: A Commentary,"* Oxford University Press, New York, 2008. p. 117.
[143] English Bill of Rights of 1689 [last visited October 2, 2011], available at: http://avalon.law.yale.edu/17th_century/england.asp.

undertaken by the public officials despite the territorial scope (i.e. on or out of the territory of the UK).[144] In addition, for interpretation of the concepts of torture or inhuman and degrading treatment UK courts refer to the jurisprudence of the ECtHR.[145]

The concept used by UK courts in cases of evidence obtained with the use of violence is "oppression", established in s. 76(8) of the PACE, which includes "torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture)."[146] This list is non-exhaustive, therefore when applying the threshold for oppression, UK courts use case-by-case approach and carefully examine all the circumstances of the case.

2.1.3. Legal interpretation and regulation in the United States

In the United States torture or inhuman and degrading treatment is constitutionally prohibited by the Fifth, Eighth and Fourteenth Amendments to the Constitution.[147] The Fifth and Fourteenth Amendments contain due process clauses, which protect citizens from the abuse of power by the government and guarantee their fair trial rights.[148] The Eighth Amendment prohibits "cruel and unusual punishments," applicable to torture violations.[149]

Furthermore, a number of legislative provisions deal with torture violations at federal level: the Torture Statute,[150] the Torture Victim Protection Act of 1991,[151] the Detainee Treatment Act of 2005,[152] the Military Commissions Act of 2009, which prohibits the use of torture or inhuman and degrading treatment measures for obtaining information or a

[144] Criminal Justice Act of 1988, s. 134 [last visited October 2, 2011], available at: http://www.legislation.gov.uk/ukpga/1988/33/part/XI/crossheading/torture.
[145] Dennis,.I., *"The law of evidence"*, 3rd ed., Sweet and Maxwell, London, 2007, p. 224.
[146] PACE, S. 76(8) [last visited on October 3, 2011], available at: http://www.legislation.gov.uk/ukpga/1984/60/section/76.
[147] Constitution of the United States of 1787, Fifth, Eighth, Fourteenth Amendments [last visited on October 10, 2011], available at: http://www.usconstitution.net/const.html.
[148] Ibid.
[149] Ibid.
[150] Foreign Relations Authorization Act of 1995, 18 U.S.C. §§ 2340-2340B (2006) [last visited on October 10, 2011], available at: http://www.law.cornell.edu/uscode/18/usc_sup_01_18_10_I_20_113C.html.
[151] Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 [last visited October 10, 2011], available at: http://codes.lp.findlaw.com/uscode/28/IV/85/1350.
[152] Detainee Treatment Act of 2005, 42 U.S.C § 2000dd (2006) [last visited October 10, 2011], available at: http://uscode.house.gov/download/pls/42C21D.txt

confession.[153] Also the United States must fulfill their obligations under ratified international documents, prohibiting torture and inhuman or degrading treatment and punishment, such as the ICCPR,[154] CAT,[155] Geneva Conventions Relative to the Treatment of Prisoners of War.[156]

2.2. Fruits of violation of law against prohibition of torture and inhuman or degrading treatment

2.2.1. The ECtHR position on admissibility of fruits of art. 3 violation

a) General approach

In cases of admissibility of fruits of art. 3 violations, the ECtHR holds the position, according to which the court has a subsidiary role in the assessment of admissibility of evidence as such.[157] The Court also emphasizes that this question shall be carefully considered by domestic courts.[158] The Court pays special attention to the necessity to hold a preliminary investigation on allegations of use of torture or inhuman and degrading treatment, organized by national courts before examination of the merits of the case.[159] The results of such investigation would give domestic courts an opportunity to exclude evidence, obtained in breach of prohibition of torture and inhuman or degrading treatment.[160]

In cases of application of exclusionary rule to fruits of coercion, the Court evaluates the involuntariness of confessions, made under torture.[161] Together with involuntariness the Court carefully analyzes the issue of credibility of confessions, made under coercion, and

[153] Military Commissions Act of 2009, 10 U.S.C. § 950t(11) [last visited October 10, 2011], available at: http://law.onecle.com/uscode/10/950t.html.
[154] International Covenant on Civil and Political Rights, December 16, 1966, Art. 7 [last visited September 20, 2011], available at: http://www2.ohchr.org/english/law/ccpr.htm.
[155] UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, Art.2 [last visited September 20, 2011], available at: http://www2.ohchr.org/english/law/cat.htm.
[156] Geneva Conventions Relative to the Treatment of Prisoners of War of 1949, art.3 [last visited October 10, 2011], available at http:// http://www.icrc.org/ihl.nsf/WebART/375-590006.
[157] Hulki Gunes v. Turkey, application № 2849/95, June 19, 2003, §91.
[158] Ibid.
[159] Ibid.
[160] Ibid.
[161] Harutyunyan v. Armenia, application № 36549/03, June 28, 2007, §65.

compares them with subsequent statements, made by the accused during the trial.[162] These concepts are assessed by the Court in the light of fairness of the proceedings under art. 6 of the ECHR.[163]

The usual Court's position on admissibility of statements, obtained in violation of art. 3 is that evidence, obtained in breach of art. 3 of the Convention, which is admitted in a criminal trial, constitutes a breach of Article 6 of the ECHR, regardless of whether it has been obtained by torture or lesser forms of coercion and despite the fact of whether the evidence in question is decisive for the defendant's conviction.[164]

The position of Strasbourg Court on admissibility of evidence obtained by torture or inhuman and degrading treatment is clearly reflected in the recent case of *Jalloh v. Germany.*[165] In this case two undercover police agents applied emetic to the suspect in order to force him to regurgitate a small bag of cocaine, which he swallowed when they arrested him.[166] The applicant was subsequently convicted of drug trafficking.[167] In its reasoning, the Grand Chamber stated that "incriminating evidence-whether in the form of confession or real evidence-obtained as a result of acts of violence or brutality or other forms of treatment which can be characterized as torture should never be relied on as proof of the victim's guilt, irrespective of its probative value."[168] Furthermore, the Grand Chamber strictly indicated that "any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct with the authors of art. 3 of the Convention sought to proscribe."[169]

[162] Ibid..
[163] Ibid, §61.
[164] Örs v. Turkey, application № 46213/99, June 20, 2006, Levinta v. Moldova, application №17332/03, December 16, 2008.
[165] Jalloh v. Germany, application № 54810/00, July 11, 2006.
[166] Ibid., §12.
[167] Ibid, §121.
[168] Ibid, §105.
[169] Ibid.

In *Jalloh* case the Grand Chamber applied the severity threshold test to establish whether the act of violence can be considered as a torture.[170] The Court found that when the applicant was administrated with emetics, he was subjected to the minimum level of severity, which did not constitute acts of torture.[171] However, such a grave interference with the applicant's physical and mental integrity against his will constituted the acts of inhuman and degrading treatment.[172]Therefore, according to the ECtHR position fruits of torture or inhuman and degrading treatment must be excluded from the trial.

If in cases of fruits of privacy violations the Court pays special attention to the probative value of evidence,[173] in case of evidence obtained in breach of art. 3, the freedom from torture or inhuman and degrading treatment or punishment is the main decisive factor for exclusion of evidence. In other words, the Court applies personal rights approach. It can be explained by the fact that the right, established in art. 3 of the Convention, is a non-derogable right in its nature and no exceptions to this right are possible under art. 15 of the ECHR.[174]

b) Fairness of the proceedings as a factor for application of the exclusionary rule

When the Grand Chamber analyzed the fairness of the proceedings under art. 6 of the ECHR, the main factor for rendering the trial unfair was "the use of evidence obtained by intentional acts of ill-treatment."[175] Therefore, in the present case it was enough to take into account the fact that the police used the evidence obtained in breach of art. 3 of the ECHR, which was the decisive element in the applicant's conviction in order to make the trial as a whole unfair. In the case of the fruits of art. 3 violations, the Court gives very small weight to the seriousness of the offence, the probative value of evidence, "the public interest in securing the applicant's conviction" and the opportunities, with which the applicant could

[170] Jalloh v. Germany, application № 54810/00, July 11, 2006, §106.
[171] Ibid.
[172] Ibid, §104.
[173] See chapter 3, s.3.2.1.
[174] European Convention on Human Rights, November 4, 1950, Art. 15[last visited September 23, 2011], available at: http://www.hrcr.org/docs/Eur_Convention/euroconv3.html.
[175] Ibid, §107.

challenge the admissibility of such evidence in trial.[176] As it has already been mentioned in s. 2.1.1 of this chapter, art. 3 of the ECHR protects one of the core fundamental rights of the absolute nature,[177] therefore, any other position of the Court on admissibility of fruits of art. 3 violations would undermine the whole system of human rights protection, established by the Convention.

An interesting conclusion was made in the dissenting opinion of judges Wildhaber and Calfisch, who stated that since the intention of using the forcible method was not to punish the defendant or to make him confess to the crime, there was no violation of art. 3 of the Convention.[178] Such an approach to the concept of torture or inhuman and degrading treatment makes the evidence obtained by the acts of violence, aimed at preservation of evidence from subsequent destruction, admissible in trial. It is a controversial position, because it seriously questions not only the fairness of the proceedings, but also the protection of the fundamental right of the suspect, guaranteed by art. 3 of the Convention.

c) Admissibility of subsequent statements and derivative material evidence

It is important to indicate here that according to the ECtHR confessions, made under the acts of coercion, and later confirmed by the defendant in her subsequent statements given to the authorities, who were not responsible for the previous acts of violence, should not automatically be admissible in trial.[179] In such cases the Court carefully examines the credibility of the subsequent statements, which shall not be "relied upon to justify the credibility" of the previous statements, made under torture.[180] By this approach the Court reiterates its strict position concerning the fruits of art. 3 violations and indicates the necessity of the inquiry of the circumstances in which the confession was obtained.

[176] Ibid.
[177] See s. 3.1.1.
[178] Jalloh v. Germany, dissenting opinion of judges Wildhaber and Calfisch, §2.
[179] Harutyunyan v. Armenia, application №36549/03б June 28, 2007, §65.
[180] Ibid.

However, the aforementioned cases are silent about the admissibility of derivative material evidence, i.e. "real evidence found as a direct consequence of statements made during an interrogation that was conducted using methods prohibited by Article 3."[181] The answer was given in the case of *Gafgen v. Germany.*[182]

It is the latest case, in which the Grand Chamber took quite a contradictory approach to the fruits of article 3 violations. In this case the police officers during interrogation threatened the applicant with torture if he did not reveal the place, where he kept the young kidnapped boy, who the police thought was alive.[183] As a result, the accused disclosed where the body of the young boy could be found.[184]

In its reasoning the Court referred to the "absolute nature of art. 3 of the Convention" and indicated that "the prohibition on ill-treatment of a person in order to extract information from him applies irrespective of the reasons for which the authorities wish to extract a statement, be it to save a person's life or to further criminal investigations."[185] Therefore, the absolute nature of art.3 overweighs any reasons for application of torture or other prohibited coercive measures during investigation. The Court concluded that threatening an applicant with torture constitutes at least inhuman treatment, prohibited by art.3 of the ECHR.[186] In this regard, the Court considered that exclusion of improperly obtained confession constitutes a sufficient remedy for art. 3 violation.[187]

In its previous case-law, the Court established that in cases of admission of evidence obtained in violation of art.3 in domestic courts rendered the whole trial to be automatically unfair, despite the importance of such evidence for the conviction of the suspect.[188] However,

[181] *"Admissibility of evidence deriving from the interrogation of the defendant by methods prohibited by Article 3: European Court of Human Rights,"* International Journal of Evidence and Proof, vol. 14(4), 2010, p. 367.
[182] Gafgen v. Germany, application №22978/05, June 1, 2010.
[183] Ibid, §15.
[184] Ibid,§ 16.
[185] Ibid, §69.
[186] Ibid, §89.
[187] Ibid, §114, 128.
[188] See Jalloh v. Germany, Örs and Others v Turkey, application №.46213/99, June 20, 2006.

in the present case the Court took different approach. One explanation, given by professor Spurrier, indicates that the Court makes "distinction between the consequences for a fair trial resulted from use of torture, and the consequences from inhuman and degrading treatment."[189] This explanation shows that such distinction does not automatically exclude fruits of lesser forms of coercion from criminal trial. Indeed, the Court reaffirmed the non-admissibility of evidence obtained by torture, and at the same time made the terms of exclusion of evidence obtained from inhuman and degrading treatment less clear and non-automatically rendering the trial unfair.

In *Gafgen* according to the Court the main ground for the applicant's conviction in domestic courts was not the confession obtained during interrogation by the threat of torture, but the subsequent confession made by the applicant during the trial.[190] The Court added that other evidence, such as the corpse of the young boy, was found as a result of the confession and had secondary importance for the conviction of the applicant and may be admissible in the trial.[191] Therefore, the trial as a whole was recognized to be fair.[192] In this regard the Court considered that "both a criminal trial's fairness and the effective protection of the absolute prohibition under Article 3 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."[193]

Therefore, admissibility of the derivative material evidence discovered from the confession obtained by torture or inhuman and degrading treatment does not render the whole trial automatically unfair. However if the main basis for the defendant's conviction was such derivative material evidence, the requirement of the fairness of the proceedings under art. 6 of the ECHR would be violated.

[189] Spurrier M., *"Gafgen v Germany: fruit of the poisonous tree,"* European Human Rights Law Review, vol.5, 2010, p.514.
[190] Gafgen v. Germany, application №22978/05, June 1, 2010.,§179.
[191] Ibid.
[192] Ibid, §188.
[193] Ibid, §179.

The division of the criminal proceedings into several parts and their separate analysis by the majority of the Grand Chamber caused disagreement of the minority, which was expressed in the jointly dissenting opinion. The dissenting judges argued that any evidence obtained in violation of art. 3 should automatically render the trial unfair.[194]

Therefore the Court also makes a distinction between exclusion of confessions, obtained in breach of art. 3 and real evidence, obtained in the result of such confessions. In other words, real evidence, which is indirectly obtained in violation of art. 3 of the ECHR, might be admissible in trial, if it is not the decisive factor for conviction of the suspect.

It is possible to conclude that such approach seriously questions the absolute nature of prohibition, established in art. 3 of the ECHR, making it possible to admit the material fruits of confessions, obtained by inhuman and degrading treatment, which does not automatically render the trial unfair. Such position weakens the deterrent effect of the exclusionary rule for the police officers as well, since they would be able to obtain evidence in breach of art. 3, using the distinctions, made by the Court in *Gafgen* case, without fear of being punished.

It is necessary to indicate here that the issue of admissibility of evidence obtained in violation of art. 3 of the Convention is strongly connected with the protection of the right against self-incrimination, guaranteed by art. 6 of the Convention.[195] However, the analysis of this issue is not included in the area of the research of this work.

[194] Ibid, jointly dissenting opinion, judges Rozakis, Tukkens, Jebens, Ziemele, Bianku, §2.

[195] For the ruling of the Court on fruits of art. 3 violations and the right against self-incrimination, see the case of Murray v. the United Kingdom, application№18731/91, Februry 8, 1996.
For more cases on fruits of art. 3 violations and the right to silence, see Jalloh v. Germany, application № 54810/00, July 11, 2006, Van Vondel v. the Netherlands, application №3825/03, March 23, 2006.

2.2.2. The UK position on admissibility of fruits of oppression

a) "Voluntariness test"

According to the common law of evidence, all involuntary confessions must be excluded from the trial.[196] This position was reflected in the case of *Rex v. Warickshall*, in which the court applied the voluntariness test and held that involuntary confession was inadmissible due to its unreliability.[197] The court makes a direct connection between voluntariness of the statement and its reliability.[198] However, what is interesting in this case is that the court admitted the property, information about which was extracted by the police officers from the confession.[199] In other words, despite the exclusion of the confession obtained by oppression, the court admitted the derivative fruits, discovered from such confession. Therefore, involuntariness of confessions, obtained by oppression, does not influence the admissibility of derivative material evidence, discovered from the confessions made under oppression. The current position of the UK courts on this issue will be analyzed in section (c) of this chapter.

b) Exclusion of fruits of coercion under s. 76 (2) of PACE

Subsequently the "voluntariness test" was replaced by the "oppression" and "hypothetical" tests, established in S. 76 (2) of PACE.[200] Under this section, a confession shall not be "admitted as evidence" if it was/might be obtained by

1) "oppression of the person, who made it";

2) "in consequence of anything said or done which was likely, in the circumstances

[196]Skinneder, E., *"The art of confessions: a comparative look at the law of confessions – Canada, England, the United States and Australia,"* International centre for criminal justice reform and criminal justice policy, December, 2005 [last visited Noember 5, 2011], available at: http://www.icclr.law.ubc.ca/Publications/Reports/ES%20PAPER%20CONFESSIONS%20REVISED.pdf.
[197] Rex v. Warickshall (1783), 1 Leach 263.
[198] Ibid.
[199] Ibid, at 264.
[200]PACE, s.76(2) [last visited on October 3, 2011], available at: http://www.legislation.gov.uk/ukpga/1984/60/section/76.

existing at the time, to render unreliable any confession which might be made in consequence thereof."[201]

The burden of proof lies with the prosecution, who has "to prove to the court beyond reasonable doubt that the confession (notwithstanding that it may be true)" was not obtained by oppression.[202] The concept of oppression "includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture).[203]"

Under the "oppression test", established in s. 76(2a) of PACE, the reliability of a confession is irrelevant for the question of admissibility, because the confession obtained by oppression shall be automatically excluded from the trial without even consideration of other issues.[204] In the recent case of *A v. Secretary of State for the Home Department (№2)* the Court of Appeal reaffirmed the position, reflected in s. 76 (2) of PACE, that evidence obtained by torture had to be excluded from the trial.[205] In addition the court stated that "conviction based on a confession obtained by torture undermines moral authority and contradicts the functions of the criminal verdict."[206]

It is necessary to mention the statement of Lord Neuberger in the abovementioned case, who stated that in case of admissibility of "the fruits of torture", a democratic State acts "similar to a terrorist by adopting their methods, thereby losing the moral high ground an open democratic society enjoys".[207] This statement clearly expresses the position of the UK courts on admissibility of involuntary confessions, obtained by torture.[208]

In the resent case of *R. v. Ahmed & Anor* the Court of Appeal reaffirmed the position of the UK court on the automatic exclusion of fruits of torture, but indicated that if there is a

[201] Ibid.
[202] Ibid.
[203] PACE, S. 76(8) [last visited on October 3, 2011], available at: http://www.legislation.gov.uk/ukpga/1984/60/section/76.
[204] Fenwick, H., *"Civil Liberties and Human Rights,"* 4th ed., Routledge Cavendish, Oxon , 2007, p. 1270.
[205] A v. Secretary of State for the Home Department (№2) [2005] UKHL 71.
[206] Ibid.
[207] Ibid, §50.
[208] For more cases, see R v Mushtaq [2005] UKHL 25, [2005] 1 WLR 1513.

reasonable belief that a suspect presents risk to national security, the Home Secretary is entitled to use information extracted from him/her during the unlawful confessions.[209] This case shows that the Court adheres to its position of exclusion of involuntary confessions from criminal trial, but for the protection of national security allows non-judicial authorities to use information obtained during unlawful confessions. In this regard the question arises: what if the use of such information by Home Secretary would lead to subsequent prosecution of the suspect, who had made an involuntary confession? Is it possible to say that his rights are violated? It is quite a controversial issue, which goes beyond the scope of the research in the present dissertation.

Under s. 76(2b) of PACE the UK courts analyze the issue of reliability of statements obtained by coercive measures and exclude unreliable confessions.[210] This section contains a "hypothetical test",[211] because when evaluating reliability of a confession, a judge tries to answer the question of whether the confession would likely be unreliable, considering all the circumstances in which it was obtained. One of the important factors, which the court takes into account when applying s. 76(2) is a vulnerable state of the suspect.[212] In *Delaney* case the defendant made a confession after having been interrogated for 90 minutes.[213] The defendant possessed the subnormal IQ of 80.[214] Also there was psychological evidence that he could quickly reach emotional arousal.[215] The police officers promised the suspect psychiatric help in case of his confession.[216] The Court of Appeal ruled that due to vulnerability of the defendant, the actions of police officers might induce him to make a false

[209] R. v. Ahmed & Anor, [2011] EWCA Crim 184.
[210] See S. 76(2b) of PACE [last visited October 12, 2011], available at: http://www.legislation.gov.uk/ukpga/1984/60/section/76.
[211] Fenwick, H., *"Civil Liberties and Human Rights,"* 4th ed., Routledge Cavendish, Oxon , 2007, p.1273.
[212] R. v. Delaney [1988] 88 Cr.App.R. 338, CA.
[213] Ibid.
[214] Ibid.
[215] Ibid.
[216] Ibid.

confession.[217] As a result, the confession was excluded under s. 76 (2b) PACE.[218] Therefore, section 76 (2) of PACE is applied by courts in cases of improper behavior of the police, which induces the suspect to confess. It is necessary to mention here that when s. 76(2a) is applicable, there is no need for the courts to consider s. 76(2b).[219]

Having analyzed the jurisprudence of the UK courts on s. 76(2) (a) and (b), it is possible to conclude that the difference between the two sections is that the decisive factor for exclusion of confessions in section (a) is the lawfulness of the methods, by which a confession was obtained. In its turn the subject of section (b) is the reliability of the confession itself. Applying s. 76 (2), the court tends to protect "moral authority" in section (a) and "the accuracy of the verdict" in section (b). [220]

c) Exclusion of fruits of oppression under S. 78 of PACE

When deciding on admissibility of physical evidence, discovered from the unlawful confession, under s. 76 (4-6) of PACE the court shall not automatically exclude any material evidence discovered by using information from non-admissible confessions.[221] The admissibility of such material evidence is considered by the court under s. 78 of PACE.[222] In this case, a judge uses her discretion to exclude evidence under the fairness requirements, established in s. 78 of PACE. When considering such cases, the court analyses adherence to

[217] Ibid, at 340.
[218] Ibid. For more cases, see R. v. Goldenberg [1988] 88 Cr.App.R.285; R. v. Wahab {2003} 1 Cr App R 15.
[219] Fenwick, H., *"Civil Liberties and Human Rights,"* 4th ed., Routledge Cavendish, Oxon , 2007, p. 1277.
[220] Dennis,.I., *"The law of evidence"*, 3rd ed., Sweet and Maxwell, London, 2007, p. 231.
[221] S. 76(4-6) of PACE: "4)The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence—(a)of any facts discovered as a result of the confession; or(b)where the confession is relevant as showing that the accused speaks, writes or expresses himself in a particular way, of so much of the confession as is necessary to show that he does so.
5)Evidence that a fact to which this subsection applies was discovered as a result of a statement made by an accused person shall not be admissible unless evidence of how it was discovered is given by him or on his behalf.
6)Subsection (5) above applies—(a)to any fact discovered as a result of a confession which is wholly excluded in pursuance of this section; and(b)to any fact discovered as a result of a confession which is partly so excluded, if the fact is discovered as a result of the excluded part of the confession."
[222] Thaman, S., *"Fruits of the poisonous tree in comparative law,"* Southwestern Journal of International Law vol. 16, 2010, p. 361.

the rules of interrogation, for instance, the recording requirement,[223] and protection of fair trial rights, for instance, the right to legal advice.[224]

d) The HRA impact on admissibility of fruits of coercion

When deciding on admissibility of fruits of torture or inhuman and degrading treatment, the UK courts make references to the provisions of the ECHR, especially after the enactment of the HRA. In the case of *Othman v Secretary of State for the Home Department,*[225] the defendant claimed the independence and impartiality of the court would be undermined because he would be convicted on the basis of evidence that had been obtained by torture.[226] In its ruling on non-admissibility of evidence obtained by torture, besides the provisions of national legislation, the Court of Appeal referred to the "fundamental nature in Convention law of prohibition against the use of evidence obtained by torture",[227] and stated that the admission of such evidence would also "constitute a breach of art. 6 of the Convention."[228] Therefore, the UK courts decisions on fruits of torture and other coercive methods are based not only on the national legislation, but also on the international human rights standards, established in the international legal documents, ratified by the UK.

Therefore, the position of the UK courts on exclusion of fruits of oppression from criminal trial is based on the ground that the police officers are prohibited from using oppressive methods in order to extract information from the suspect. This exclusionary rule, established in S. 76(2) has a deterrent effect on the police behavior and excludes unreliable confessions, which might lead to wrongful convictions.

[223] R. v. Joseph [1993] Crim. LR 206, CA; DPP v. Billington [1988] CR App R 68; R. v. Dunn [1990] 91 CR App R 237.
[224] R v. Doolan [1988] Crim.L.R. 747; R. v. Samuel [1988] 2 All ER 135.
[225] Othman v Secretary of State for the Home Department [2008] EWCA Civ 290.
[226] Ibid, §27.
[227] Ibid, §45.
[228] Ibid, §49.

2.2.3. The US position on admissibility of evidence obtained by coercive measures

a) General approach

The US approach to exclusion of confessions, obtained by coercive measures, was formed by the common law of evidence doctrine, under which any involuntary confessions shall be excluded due to their unreliability.[229] Then in case of *Bram v. United States*, for the first time the US Supreme Court applied the rule of exclusion of confessions obtained by oppressive means under the due process clause, established in the Fifth Amendment of the US Constitution.[230]

Before the US Supreme Court decision on applicability of the Fifth Amendment to the states officials,[231] in *Brown v. Mississippi* the Supreme Court ruled that the admissibility of confessions obtained by torture violates the due process clause of the Fourteenth Amendment, applicable to states.[232] In this case the Court underlined that admissibility of fruits of torture would undermine "the fundamental principles of liberty and justice" and cannot be considered as "a basis for conviction." [233]

When the US courts decide on admissibility of fruits of torture or inhuman and degrading treatment, they have to determine whether the treatment can be considered to be coercive.[234] Answering this question, the court needs to evaluate "the length of detention, the repeated and prolonged nature of the questioning and the use of physical punishment."[235] Moreover, the court carefully analyses the reliability of the facts in which the confession was obtained.[236]

[229] Hopt v. Utah, 110 U.S. 574 (1884).
[230] Bram v. United States, 168 U.S. 532 (1897).
[231] Malloy v. Hogan, 378 U.S. 1 (1964).
[232] Brown v. Mississippi, 297 U.S. 278 (1936).
[233] Ibid, at 286.
[234] Schneckloth v. Bustamonte, 412 U.S. 218 (1973).
[235] Ibid., at 226.
[236] Ibid..

It is also important to mention here that in order to exclude the fruits of coercion, the acts coercion do not necessarily need to consist of actual physical violence.[237] For instance, psychological torture and the conditions of imprisonment (deprivation of food and sleep) were recognized by the Supreme Court as acts of coercion.[238] Moreover, confessions, obtained by threats of violence without its actual application, are considered to be involuntary and must be excluded from trial, because their admissibility would violate the due process clause.[239]

b) "Voluntariness test"

In order to apply exclusionary rule to confessions, obtained by coercive methods, the courts usually apply a special test to determine the involuntariness of such confessions.[240] The first case, in which the involuntary confession was excluded from the criminal trial, was *Commonwealth v John Chabbock*.[241] The Court held that the confession obtained from the defendant "under a promise of favor" shall not be admissible in trial due to its involuntariness.[242] In this case the voluntariness test was aimed at reduction of wrongful convictions and establishing of integrity of the criminal justice system.[243]

In *Bram v. United States,* the Supreme Court introduced the "voluntariness test" under the Fifth Amendment clause.[244] The Court stated that "a confession in order to be admissible must be free and voluntary: that is, must not be extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."[245]

[237] Weissbrodt, D. et al., *"Defining torture and cruel, inhuman and degrading treatment,"* Law and Inequality: A Journal of Theory and Practice, vol. 29, 2011, p.367.
[238] Kozminski v. United States, 487 U.S. 931, 955 (1988).
[239] Arizona v. Fulminate, 499 U.S. 279 (1991).
[240] Spano v. New York, 360 U.S. 315 (1959).
[241] Commonwealth v John Chabbock (1804) 1 Mass. 143.
[242] Ibid, at 144.
[243] Penney, S., *"Theories of Confession Admissibility: A Historical View,"* American Journal of Criminal Law, vol. 25, 1998, p.336.
[244] Bram v. United States, 168 U.S. 532 (1897).
[245] Ibid, at 542-543 (quoting 3 Sir Wm. Oldnell Russel, A Treatise on Crimes and Misdemenors 478).

Subsequently the Supreme Court has further developed application of the voluntariness test. The position of the Supreme Court on application of the due process voluntariness test is reflected in the case of *Lisenba v. California.*[246] The police officers detained the man, suspected of murder, slapped him once and interrogated for forty-two hours.[247] However, they did not obtain any information from him, and continued questioning the suspect two weeks later, confronting him with a codefendant, who accused him of committing the murder.[248] After all, the defendant finally agreed to confess in exchange to some food.[249] For exclusion of confession, obtained by coercive methods the Court applied the "due process voluntariness test".[250] The Court indicated that unlike the "common law voluntariness test", which aim was " to exclude false evidence", "the due process voluntariness test" applied "not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."[251]

Therefore, the Court underlined the prior importance of the fairness requirement for application of the exclusionary rule, whereas reliability of the confession was of secondary importance. The Court also carefully analyzed the concept of free will of the defendant and held that the confession was voluntary, because the defendant obtained legal advice from the counsel during the first interrogation, and was not subjected to any kinds of "inducements, promises, threats, violence, or any form of coercion" during the second interrogation.[252]

Therefore, it is possible to conclude that when excluding confessions, obtained by coercive measures, the Supreme Court applies the "due process voluntariness test", based primarily on the requirements of fairness of the proceedings and the concept of free will of the suspect. In its subsequent cases the Supreme Court has strengthened the link between the

[246]Lisenba v. California, 314 U.S. 219 (1941).
[247] Ibid, at 229-230.
[248] Ibid, at 231.
[249] Ibid, at 232.
[250] Ibid, at 236.
[251] Ibid, at 231-232.
[252] Ibid, at 240.

free will of the suspect and voluntariness of the confession and ruled that the free will shall not be "overborne" by coercion: "If a statement is the product of sustained pressure by the police it does not issue from a free choice."[253]

c) Exclusion of subsequent confessions and derivative material evidence

In the US courts the use of torture or inhuman and degrading treatment does not automatically exclude any subsequent confessions, made by the suspect.[254] In such cases there must be "immediate coercive causation" for a confession, which shows whether the suspect was able to choose to confess independently from the coercive acts of violence.[255] If there is no causation between the coercive methods and subsequent confessions, the effects of the act of coercion might be considered to be "dissipated".[256] In this case the subsequent confession would be found voluntary and admissible.[257]

When considering the attenuation link between a coerced confession and subsequent statements the court evaluates the "totality of the circumstances", which is defined as "the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators."[258] It is also important to mention here that in the practice of the US courts it is generally assumed that material evidence obtained indirectly from involuntary confession shall be excluded under the fruits of poisonous tree doctrine, "developed in the Fourth Amendment context" and the due process clause of the Fifth Amendment.[259]

d) Exclusion of fruits of coercion in "war on terror" cases

A number of recent cases of Guantanamo Bay litigation in the context of the "war on terror" concerned the admissibility of fruits of torture violations. In case of *Ahmed Khalfan*

[253] Watts v. Indiana, 338 U.S. 49, 53 (1949).
[254] Bayer v. United States, 331 U.S. 532 (1947).
[255] Stroble v. California, 343 U.S. 181 (1952), at 191.
[256] Oregon v. Elstad, 470 U.S. 298 (1985), at 309.
[257] Ibid.
[258] Ibid. at 310. See also Karake v. United States, 443 F.Supp.2d 8, 86 (D.D.C.2006), at 87; Al Rabiah v. United States, 658 F.Supp.2d 11, 36-37 (D.D.C. 2009).
[259] Cammack, Mark, *"Admissibility of evidence to prove undisputed facts: a comparison of the California Evidence Code §210 and Federal Rule of Evidence §401,"* Southwestern University Law Review, 2008, vol. 36, p. 649.

Ghailani v. United States, the defendant Mr. Ghailani was suspected of the 1998 bombings of the U.S. embassies in Kenya and Tanzania and charged with murder and other serious offenses occurred as a result of the bombings.[260] The defendant alleged that he was deprived of a speedy trial and that while being in custody he was tortured by the Central Intelligence Agency.[261] He also claimed that the testimony given by Hussein Abebe as a witness of the government should be excluded from the trial because it would be the product of confessions made by the defendant under torture.[262]

Lewis A. Kaplan, a judge of the United States District Court, held that the testimony of the witness for the government had to be excluded from the trial because it is very closely related to confessions made by Ghailani during coerced interrogation when he was in CIA custody.[263] The judge added that according to the Constitution the burden of proof lies with the government, which has to prove that the connection between the suspect's coerced confession and the witness' testimony is "sufficiently remote or attenuated," or to demonstrate that there is another ground based on which the witness can give testimony in trial.[264]

Therefore, the judge excluded the evidence, which was not directly extracted from the defendant as a result of torture, but indirect derivative evidence, which is the product of the statements, made by the defendant while being tortured during interrogations. Similarly to cases of subsequent confessions, in this case the court analyzes the connection between the statements, made by the defendant under coercion and the subsequent testimony, given by the witness. The logic of the court in this case can be explained by the fact that since the reliability of confessions obtained by torture shall be carefully examined, the testimony of a witness, based on such confession, cannot be admitted due to the lack of credibility either.

[260] Ahmed Khalfan Ghailani v. United States, 2010 U.S. Dist. LEXIS 109690, at*1.
[261] Ibid.
[262] Ibid.
[263] Ibid, at *4-5.
[264] Ibid.

In this section it is necessary to examine the jurisprudence of military commissions, which try the suspects captured during the "War on Terror",[265] because such trials raise numerous controversial issues of admissibility of fruits of torture or inhuman and degrading treatment. Unlike criminal courts, military commissions may admit "involuntary" statements if "the interests of justice would best be served by admission of the statement into evidence" and the statement in question was taken at the time of capture of the suspect.[266]

The case of *Omar Khadr*[267] clearly demonstrates the position of military commissions on the cases of admissibility of fruits of torture and the violation of the principle of non-admissibility of statements obtained by torture in criminal proceedings, established in art. 15 of CAT.[268] Mr. Khadr was held at Guantánamo Bay since he had been caught in Afghanistan by U.S. solders for throwing a grenade which killed one and injured another US solder.[269] He was fifteen years old at that time.[270] The defendant claimed that he was tortured during his capture.[271] He asserted that he had made several self-incriminating statements while being tortured by interrogators.[272] However, in the pre-trial ruling, the military judge did not exclude self-incriminating statements obtained under torture from the proceedings.[273] In this case the interests of national security overweighed the fundamental rights of the accused, which violates the international standards, established by CAT and Geneva Conventions Relative to the Treatment of Prisoners of War.

[265] Boswell B.A., *"True Terror: Life after Guantanamo,"* University of Missouri-Kansas City Law Review, vol.77, 2009, p. 1095.
[266] 10 U.S.C. § 948r(c) [last visited October 11, 2011], available at: http://codes.lp.findlaw.com/uscode/10/A/II/47A/III/948r.
[267] Nowack, M. et al., *"The Obama administration and obligations under the conventions against torture,"* Transnational Law and Contemporary Problems, vol. 20, 2011, p.60.
[268] UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, art. 15: "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." [last visited October 12, 2011], available at: http://www.hrweb.org/legal/cat.html.
[269] Nowack M. et al., *"The Obama administration and obligations under the conventions against torture,"* Transnational Law and Contemporary Problems, vol. 20, 2011, p.60.
[270] Ibid.
[271] Ibid.
[272] Ibid.
[273] Ibid.

It is necessary to indicate here that because of fear of life imprisonment, during a plea bargaining stage, Khadr subsequently admitted his guilt and was sentenced for eight years.[274] Therefore, not only international obligations of the US under the CAT and Geneva Convention, but also the due process guarantees were violated in this case. Moreover, the burden of proof was shifted from the prosecution to the defendant, which must be the other way round in these types of cases.

Another case, which demonstrates the tendency of the US government to rely on evidence obtained by torture when prosecuting suspected terrorists is the case of *United States v. Mohammed Jawad.*[275] The defendant was about 12 years old when he was caught by Afghan police and subsequently taken to the U.S. base in Kabul, where he was severely tortured.[276] The defendant was accused of throwing a grenade into a U.S. military vehicle and injuring two US servicemen and an interpreter.[277] The main grounds for his conviction were his self-incriminating statement obtained by torture.[278] Despite the fact that the US have recognized that the minors are entitled to special rights and protection under the Optional Protocol on the Involvement of Children in Armed Conflict,[279] Mohammed Jawad was deprived of these rights and was treated as an adult.[280] The US government did not provide any reason for failure to treat the defendant as a minor.[281] When defining the "degree of coercion" in order to decide whether to apply exclusionary rule to self-incriminating statements made by the defendant, the judge applied the "totality of circumstances" test.[282] The judge also examined

[274] Ibid.
[275] United States v. Mohammed Jawad 1 M.C. 334, 336 (Military Commission, Guantanamo Bay, Cuba filed Oct. 9, 2007).
[276] Ibid.
[277] Ibid.
[278] Ibid.
[279] Optional Protocol on the Involvement of Children in Armed Conflict, May 25, 2000 [last visited November 10, 2011], available at: http://www2.ohchr.org/english/law/crc-conflict.htm.
[280] United States v. Mohammed Jawad 1 M.C. 334, 336 (Defense motion to suppress all out-of-courts statements by the accused made while in the US custody, September 18, 2008).
[281] Ibid.
[282] Ibid, at 338.

the question of reliability of the statement and tried to defined to which extend the admissibility of the confessions would serve "the interests of justice".[283]

In his decision the judge rejected the government's position to shift the burden of proof to the defence in order to prove that the confession, made by the defendant, was the product of torture.[284] In this regard the judge stated that "the actual infliction of physical or mental injury is not required."[285] Therefore, the military judge held that the s. 304(a)(3) of the Military Commissions Rule of Evidence, which does not automatically exclude the statements obtained by coercion, was not applicable in this case.[286] It was found that the confession was made under torture, which also influenced the subsequent confessions, made by the defendant.[287] As a result, self-incriminating statements obtained by torture, including subsequent confessions, were found to be unreliable and were dismissed by the judge.[288] In this case preservation of the due process clause by exclusion of the fruits of torture helped the defendant to avoid the wrongful conviction, which might have led to life imprisonment. Therefore, by excluding the subsequent statements, which were not enough attenuated from the coerced confession, the military judge preserved the interests of justice, i.e. to find the truth and to avoid wrongful conviction.

Having analyzed the US jurisprudence on admissibility of evidence obtained by torture or inhuman and degrading treatment, it is possible to conclude that the US courts' approach is based on the fruits of poisonous tree doctrine, applicable to the Fifth Amendment, according to which evidence obtained by torture or other coercive methods must be excluded from the trial. The Military Commission rules of evidence constitute an exception, because they do not

[283] Ibid. See also U.S. Manual for Military Commissions pt. III, 8-9 [last visited on October 15, 2011], available at: http://www.defense.gov/news/d2010manual.pdf.
[284] Ibid. (the ruling of judge Henley on defense motion to suppress self-incriminating statements of the defendant).
[285] Ibid.
[286] Ibid.
[287] Ibid.
[288] Ibid. For more cases on admissibility of fruits of torture see also Mohammed v. Obama, 704 F.Supp.2d 1 (2009).

automatically exclude statements obtained by coercion. However, in every case of coercion a judge carefully examines the "totality of circumstances", reliability of evidence and the voluntariness of statements, made by the defendant. The question of admissibility of subsequent confessions is analyzed by courts in the context of attenuation doctrine, i.e. their link with the confession obtained by torture. The indirect material evidence obtained through torture shall be analyzed under the context of the fruits of poisonous tree doctrine as well. However, it follows from the aforementioned cases, that the US courts are not always attached to this doctrine, justifying such derogation by preservation of the interests of national security, especially in "war on terror" cases.

Conclusion

Having analyzed the admissibility of fruits of torture or inhuman and degrading treatment violations in the chosen jurisdiction, it is possible to conclude that due to the absolute nature of prohibition of torture or inhuman and degrading treatment, the ECtHR, UK and US courts have a common strict position on automatic exclusion of evidence obtained by coercive methods. The questions of voluntariness and reliability of statements as well as fairness of the proceedings are carefully examined by courts in cases of fruits of coercion. However, unlike the UK courts and the ECtHR, when analyzing the issue of voluntariness of statements, the US courts apply the "due process voluntariness test", based primarily on the requirements of fairness of the proceedings and the concept of free will of the suspect, whereas reliability of such statements is of secondary importance. However, such difference does not breach the integrity of the criminal justice system in the United States and Europe, because in both cases the truth-finding functions of the criminal justice system and the fundamental rights protection are preserved by courts during criminal proceedings.

Subsequent statements and derivative evidence are considered by courts in the light of the effect of the coerced confession and the fair trial rights. However, the recent position, taken

by the ECtHR in the case of *Gafgen v. Germany*, questions the non-derogable nature of prohibition, established in art. 3 of the ECHR, making it possible to admit the derivative material fruits of coerced confessions. Such position weakens the deterrent effect of the exclusionary rule for the police officers, because they would be able to use evidence, obtained in breach of art. 3, referring to the findings, made by the Court in *Gafgen* case, without fear of being punished. It might have a negative effect on the accuracy of verdicts and as a result would breach the integrity of the criminal justice system.

Therefore, it is possible to conclude that evidence obtained by torture or inhuman and degrading treatment shall automatically be excluded from the trial due to the absolute nature of prohibition of these coercive measures. However, derivative evidence of coerced confessions is not automatically excluded by the court and shall be considered under the requirements of reliability and fairness of the proceedings.

It is necessary to add here that the absolute prohibition of torture or inhuman and degrading treatment does not usually prevails over the interests of criminal investigation, especially in cases on the "war on terror" in the US courts, which seriously undermines the absolute nature of the fundamental right of freedom from torture or inhuman and degrading treatment, guaranteed by constitutions and international documents. Furthermore, such approach may increase the number of wrongful convictions, which would undermine the quality of justice delivering and would undermine the deterrent effect of the exclusionary rule.

CHAPTER 3

ADMISSIBILITY OF EVIDENCE OBTAINED IN VIOLATION OF PRIVACY

The concept of privacy has become a controversial issue of legal concern in criminal proceedings, especially during the investigatory stage. For the purpose of the analysis of fruits of privacy violations it is necessary to define the concept of privacy. The right to privacy includes the right to identity, personal development, the right to establish and develop relationships with other human beings and the outside world, including activities of professional nature.[289] Privacy is not just an inalienable human right, but also "a valuable social interest that ought to be protected by judges."[290]

Various intrusive forms of investigation are used by police and intelligence services for obtaining evidence for criminal trial. Wiretapping, surveillance, searches and seizures are the most frequently used investigative techniques.[291] Conversations of the suspect may be intercepted, her home may be searched, her interactions may be subject to secrete surveillance, her correspondence may be checked, etc. Within the development of new technologies the methods of intrusion have become more advanced. As a rule these investigatory methods are used for legitimate aims, such as preventing or detecting crimes and preserving public security.[292]

However, in certain cases intrusion into one's privacy might be arbitrary and might constitute a violation of the constitutional (and human) rights. At this point it is necessary to take into account that the main aims of law enforcement officials are to establish the truth and

[289]Trechsel, S., *"Human rights in criminal proceedings,"* Oxford University Press, New York, 2005, p. 545.
[290] Ruiz, B., *"Privacy in Telecommunications: a European and an American approach,"* Kluwer Law International, the Hague, 1997, p.23.
[291] Supra at footnote 290, p.534.
[292]Fenwick, Helen, *"Civil Liberties and Human Rights,"* 4th ed., Routledge Cavendish, Oxon , 2007, p. 993.

to comply with its crime control obligation.[293] Whereas the main aim of a defendant is to protect her rights and interests.[294] Therefore, a judge has to balance these interests and make a decision on admissibility of evidence, obtained in violation of the right to privacy.[295] In order to analyze the admissibility of fruits of violations of privacy during criminal investigations in the jurisprudence of the ECtHR, UK and US courts, it is necessary to examine how the concept of privacy is defined in the chosen jurisdictions and then to analyze courts' practice in cases concerning two main forms of intrusion: unlawful searches and seizures and unauthorized surveillance and wiretapping.

3.1. The concept of privacy and fruits of its violation

3.1.1. The ECtHR interpretation and regulation

For the purpose of the detailed analysis of Strasbourg jurisprudence on surveillance and wiretapping cases, first of all it is necessary to indicate the main findings of the Court concerning the notion of "private life" and "correspondence." In *Liberty v UK*, the Court clearly indicated that telephony, facsimile and e-mail are covered by notions of "private life" and "correspondence" pursuant to art.8, despite the absence of any indication as to the means of communication in the ECHR itself.[296]

As regards the protection of "correspondence" in criminal proceedings, from the numerous judgments of Strasbourg Court it is possible to define the areas of "correspondence," which shall primarily be protected by national legislation: any conversations by technical means, telephone, radio, pager must be protected.[297] Therefore, any interaction with other people (verbal or not) must be protected due to the legitimate expectation of privacy, even outside home.[298]

[293] Trechsel, S., *"Human rights in criminal proceedings,"* Oxford University Press, New York, 2005, p. 550.
[294] Ibid.
[295] Ibid.
[296] Liberty and others v. UK, application № 58243/00, July 1, 2008, §56.
[297] Trechsel, S., *"Human rights in criminal proceedings,"* Oxford University Press, New York, 2005, p. 546.
[298] PG an JH v. United Kingdom, application № 44787/98, September 25, 2001, §52.

In determining whether there was violation of the ECHR right to privacy, it is enough to establish that there was an interference within the right and then the Court usually applies its standard three steps test: 1) whether the interference was according with law; 2) whether it pursued one of the legitimate aims concerned; 3) whether it was necessary in a democratic society (proportionality requirement).[299]

As it was indicated in the first chapter, the Strasbourg approach is based on the balancing test, which in the context of art. 8 of the ECHR, means that the Court has to determine whether a failure to exclude evidence, obtained in violation of the right to privacy, would result in a denial of the right to fair trial, guaranteed by art. 6 of the Convention.[300]

3.1.2. Legal interpretation and regulation in the United Kingdom

The right to privacy is not explicitly recognized in the UK legislation.[301] In the common law tradition the right to privacy is understood as "the right to be let alone."[302] There are no legal provisions on the right to privacy, which contain its explicit definition.[303] In the UK legislation the right to privacy is protected "incidentally" to the main right in question.[304] For example, the right to privacy is protected in the light of the right to property.[305] Therefore, in the UK the right to privacy has so called "incidental character" and is protected by laws against trespass to land, confidence, defamation.[306]

However, within the enactment of the HRA, which incorporates the ECHR into the UK legal system, the right to privacy was introduced in the UK law as well and has become

[299] Leander v. Sweden, application № 9248/81, March 26, 1987, §50.
[300] See chapter 1, s.1.3.3.
[301] Krotoszynski R., *"Autonomy, community, and traditions of liberty: the contrast of British and American privacy law,"* Duke Law Journal, December 1990, p.1400.
[302] Cardonsky, L.,*"Towards a meaningful right to privacy in the United Kingdom,"* Boston University International Law Journal, vol.20, 2002, p.395.
[303] Morris, J., *"Big success or "Big Brother": Great Britain's national identification scheme before the European Court of Human Rights,"* Georgia Journal of International and Comparative Law, vol. 36, p.447.
[304] Ibid, p. 445.
[305] Ibid.
[306]Haenggi, S., "*The right to privacy is coming to the United Kingdom: balancing the individuals' right to privacy from the press and the media's right to freedom of expression,"* Houston Journal of International Law, Houston Journal of International Law, vol.21, p. 533.

directly enforceable.[307] It means that the right to privacy shall not be considered by the UK courts as an incidental issue, and effective remedies shall be guaranteed in cases of its violation. After the enactment of the HRA, in case of *Douglas v. Hello* the Court of Appeal stated that the UK "has reached a point at which it can be said with confidence that the law recognizes and will appropriately protect a right of personal privacy."[308] Moreover, the UK has recently adopted legislation, which regulates privacy issues in different fields of public life, for example, Data Protection Act[309] and Regulation of Investigatory Powers Act (hereinafter RIPA),[310] which regulate the process of collection, use and storage of personal data by public authorities and governmental agencies. These legal provisions are carefully examined by courts in cases of fruits of privacy violations.[311]

3.1.3. Legal interpretation and regulation in the United States

The concept of privacy in the United States has a contextual character, i.e. it is defined by the "reasonable expectation of privacy" test and depends on the circumstances of the case under consideration.[312] The main legal sources for the right to privacy in the United States are common law doctrine, constitutional law and federal statutes.[313] Nevertheless, the US concept of privacy can be determined by the following approach: a) the home is mostly protected; b) there might be "reasonable expectation" of privacy in cases of unreasonable intrusion.[314]

The right to privacy is not explicitly mentioned in the US Constitution, however, it finds

[307] Human Rigts Act 1998, s.1, s.8 [last visited on September 19, 2011], available at: http://www.legislation.gov.uk/ukpga/1998/42/section/1.
[308] Douglas v. Hello Ltd [2001] Q.B. 967, 997.
[309] Data Protection Act 1998 [last visited on September 15, 2011, available at: http://www.legislation.gov.uk/ukpga/1998/29/contents.
[310] Regulation of Investigatory Powers Act 2000 [last visited on September 15, 2011], available at: http://www.legislation.gov.uk/ukpga/2000/23/contents.
[311] See s.3.2.2.
[312] Couch v. U.S. 409 U.S. 322, 336 (1973).
[313] Sprague, R., *"Orwell was an optimist: evolution of privacy in the United States and its de-evolution for American employees,"* John Marshall Law Review, vol.42, 2008, p.85.
[314] Ibid.

its protection in the Fourth Amendment.[315] The Fourth Amendment protects a person from unreasonable search and seizure.[316] It prevents government from unlawful intrusion into private life. In *Katz v. United States* the Supreme Court defined the scope of application of the Fourth Amendment and indicated that "the Fourth Amendment protects people, not places."[317] The Court used its reasonable expectation test, under which the right to privacy is breached if "the government intrudes upon person's reasonable expectation of privacy."[318] The test means that "1) a person must have an actual, subjective expectation of privacy; 2) expectation must be one that society is prepared to accept as reasonable."[319] The Court also determined what is protected by the Constitution under the right to privacy: "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[320] In other words, if a person does not have intention to expose certain things to public, it means that he has "reasonable expectation of privacy" over them and is entitled to constitutional protection under the Fourth Amendment.

3.2. Admissibility of fruits of interception of communications

3.2.1. The ECtHR position

a) Fairness of the proceedings

One of the leading cases of Strasbourg jurisprudence, concerning the interception of communications, is *Schenk v. Switzerland.*[321] In this case the applicant claimed that the domestic court based his conviction for attempted incitement to murder on a telephone

[315] Fourth Amendment of the US Constitution of 1787:
"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." [last visited September 11, 2011], available at: http://constitutionus.com/
[316] Ibid.
[317] Katz v. United States, 389 U.S. 347, 351 (1967).
[318] Ibid.
[319] Ibid, at 361 (Harlan, J., concurring).
[320] Ibid at 351-352.
[321] Schenk v. Switzerland, application № 10862/84, July 12, 1988.

conversation between himself and the person he allegedly intended to incite, which violated art. 6.1 of the ECHR.[322] Upon the request of the police, the conversation had been recorded by the person, whom Mr. Schenk wanted to hire to kill his wife, without the applicant's knowledge that his conversation was being intercepted.[323] He also claimed violation of art. 8 of the ECHR, however, the Commission considered this part of the claim inadmissible due to non-exhaustion of domestic remedies.[324] But it was not necessary to consider this issue separately, since it was dealt with when the Court considered the question of fairness of the proceedings under art. 6 of the ECHR.[325]

When deciding whether there was a violation of art. 6.1 of the Convention, the Court used its standard approach and made an assessment of fairness of the procedure as such. The Court stated that the applicant's right to fair trial was respected, and paid particular attention to the fact that the recording was not the only evidence on which the conviction was based, but there was other evidence beyond the recording, which proved the guilt of the suspect.[326] Furthermore, the defendant had a possibility to argue the authenticity and the credibility of the taped conversation, which indicates to preservation of his right to defence.[327] Therefore, the Court did not find a violation of art. 6 (1) of the ECHR.[328]

Despite the fact that the Court did not consider separately the claim under art. 8,[329] it did not prevent the Court from deciding upon the admissibility of the recordings, made during criminal investigations. Since the fairness requirements under art. 6 of the Convention were complied with, the evidence was admissible.[330]

b) Relevance of evidence

[322] Ibid, §39.
[323] Ibid, §10.
[324] Ibid, §40.
[325] Ibid, §40.
[326] Ibid, §48.
[327] Ibid.
[328] Ibid, §49. See also Turquin v. France, application № 43467/98, January 24, 2002.
[329] Ibid, §40.
[330] Ibid, §49.

Another important case, in which the Court ruled on admissibility of evidence, obtained by using a listening device is *Khan v. the United Kingdom*.[331] Mr. Khan suspected of involvement in the importation of prohibited drugs.[332] A listening device was secretly placed on the outside of the house, which the applicant was visiting.[333] The recordings obtained through interception clearly proved his involvement.[334] The conviction based wholly on the recordings, obtained from the listening device.[335]

Unlike in *Schenk* case, in *Khan* the fixing of listening device was in accordance with domestic criminal law.[336] The tape recording was the only evidence on which the conviction was based. [337] If the Court followed the approach, used in *Schenk*, this tape recording should have been excluded from the trial. However, the Court used different approach in this case. The Court analyzed the relevance of other possible evidence. The Court indicated that due to the fact that the tape recording was considered to be very strong evidence, and due to its un-doubtful reliability, there is a very week need to present other evidence for the applicant's conviction.[338] It means that if the unlawfully obtained evidence is the only evidence, on which the conviction is based, it does not necessarily lead to unlawfulness of the proceedings and automatic exclusion of such evidence. It depends on the circumstances of the particular case and the relevance of the evidence in question. Therefore, the Court uses case-by-case approach.

The central question remains the same: whether the proceedings as a whole were fair. In the present case, as well as in *Schenk* case, the applicant had an opportunity to contest the authenticity and the admissibility of the tape recordings, made through wiretapping.[339] He

[331] Khan v. the United Kingdom, application №35394/97, May 12, 2000.
[332] Ibid, §9.
[333] Ibid.
[334] Ibid.
[335] Ibid.
[336] Ibid, §36.
[337] Ibid.
[338] Ibid.
[339] Ibid, §38.

challenged the use of recording in criminal proceedings but domestic courts, referring to the provisions of national legislation on exclusionary rules, dismissed his claims.[340] In this case the Court found no violation of art. 6.1 of the ECHR, since the use of the recordings, obtained through interception, were not in contradiction with the principle of fairness of criminal proceedings.[341]

Having analyzed the abovementioned case, it is possible to conclude that when considering the question of admissibility of evidence, obtained in violation of privacy, fairness of the proceedings and relevance of evidence are the main factors for application of the exclusionary rule by Strasbourg Court.

c) Secondary role of the right to privacy

One of the latest cases on admissibility of evidence obtained in breach of art. 8, is *Bykov v. Russia.*[342] Mr. Bykov argued that the police violated his right to privacy by secretly recording his conversation with V., who followed the instructions, given by the police.[343] He also claimed that the evidence for his conviction was obtained through unlawful interception, which is incompatible with art. 6 of the Convention.[344]

The Court, following its standard approach to the question of admissibility of evidence, examined the fairness of the whole proceedings. In the present case, the applicant had the opportunity to challenge the lawfulness of admissibility of the recordings in adversarial proceedings before domestic courts of different instances.[345] However, the applicant alleged only the procedural aspects of obtaining the evidence by police, but did not make any complaints on the procedure under which the courts reached their decision concerning the

[340] Ibid.
[341] Ibid, §40.
[342] Bykov v. Russia, application № 4378/02, March 10, 2009.
[343] Ibid, §99.
[344] Ibid.
[345] Ibid.

admissibility of evidence.[346] Moreover, the evidence, obtained through interception, was not the only evidence, on which the conviction based, there was other supporting evidence as well.[347] Therefore, taking into account all abovementioned factors, the Court concluded that there was no violation of art. 6 of the ECHR because evaluation of evidence by national courts was not arbitrary. [348]

However, what is interesting in this case is the fact that despite the fairness of the whole proceedings the Court found a violation of art. 8 of the Convention.[349] Due to the absence of specific and detailed regulations on the legal discretion of authorities to order the interception and the absence of provisions, defining the scope and the manner of the use of interception techniques, the Court found that there was no adequate legal safeguard against possible abuses.[350] As a result, the Court concluded that "the interference with the applicant's right to privacy was not "in accordance with law", as required by art. 8.2 of the ECHR."[351] Therefore, arbitrariness of legal provisions was contrary to the requirement of lawfulness of interference by the State, which resulted in violation of art. 8 of the Convention. However, this fact did not influence the decision of the Court on admissibility of the recordings.

Having analyzed the abovementioned cases, it is possible to conclude that in cases of admissibility of evidence, obtained through wiretapping in violation of art. 8 of the Convention, the priority is given to the question of fairness of the proceedings, whereas substantial right to privacy plays a secondary role. It means that even if there is a violation of the right to respect for private life, but the whole proceedings are considered to be fair, evidence, obtained in breach of the right to privacy, will be admitted by the Court.[352]

[346] Ibid.
[347] Ibid, §98.
[348] Ibid.
[349] Ibid, §82.
[350] Ibid,§81.
[351] Ibid, §82.
[352] For more cases, see Heglas v. Czech Republic, application № 5935/02, March 1, 2007; Perry v. the United Kingdom, application № 63737/00, September 26, 2002.

3.2.2. UK courts' approach

UK courts use an approach based on the common law of evidence. As it has been mentioned in the first chapter, the common law has its particular approach to the issue of admissibility of evidence.[353] It is not important for the UK judges how the evidence was obtained, because the decision on admissibility of evidence is based mainly on relevance and probative value of the evidence in question.[354]

a) Legal regulation

The main legal source, which regulates the exclusion of non-confession evidence, is section 78 of PACE.[355] Under this section improperly obtained non-confession evidence is admissible in a criminal trial subject to discretion to exclude it.[356] This position was further developed in *R v. Quinn*[357] case, where the court ruled that evidence shall be excluded only if it is obtained deliberately by unlawful means.[358]

As it has been mentioned in the first chapter, the HRA has a certain impact on the "fruits of poisonous tree" doctrine.[359] Under s. 6 of the HRA, the court shall guarantee the redress to the defendant for the violation of art. 8 of the ECHR.[360] It is up to the authority to provide the remedy sought.[361] Under the UK law, when the police officers conduct unlawful wiretapping, searches and seizures, tortuous liability is applicable to them.[362] According to the HRA the defendant may claim that when obtaining evidence, the police officers committed a trespass and/or violated art. 8 of the ECHR. Therefore, the defendant is entitled to claim exclusion of improperly obtained evidence under s. 78 of the PACE, because it was

[353] See chapter 1, s.1.1.
[354] Ibid.
[355] See chapter 1, section 1.3.1 (a).
[356] Fenwick, H., *"Civil Liberties and Human Rights,"* 4th ed., Routledge Cavendish, Oxon, 2007, p. 1287.
[357] R. v. Quin [1990] Crim LR 581.
[358] Ibid.
[359] See chapter 1, s.1.2.
[360] HRA of 1998, s. 6 [last visited on October 10, 2011], available at: http://www.legislation.gov.uk/ukpga/1998/42/section/6.
[361] Choo, A. et al., *"Improperly obtained evidence in the Commonwealth: lessons for England and Wales?"*, International Journal of Law and proof, vol.11(2), 2007, p. 91.
[362] Fenwick, H., *"Civil Liberties and Human Rights,"* 4th ed., Routledge Cavendish, Oxon, 2007, p. 1076.

obtained by unlawful means, i.e. in breach of art. 8 of the ECHR, incorporated into the UK legislation by the HRA.

Besides s. 78 of PACE, there are a number of legislative acts, also regulating the issue of admissibility of evidence, obtained in breach of privacy. One of the main legal provisions, which regulates the police practice of using surveillance and wiretapping techniques, is the Regulation of Investigatory Powers Act 2000 (hereinafter, RIPA).[363] Before enactment of RIPA, the process of interception was regulated by Interception of Communications Act 1985.[364] S. 9 of the 1985 Act regulates the issue of exclusion of evidence obtained by interception. According to s. 9 the information gained by interception, whether authorized or not, would be inadmissible in evidence. This provision applies to any kind of interception, regulated by the 1985 Act.

Nevertheless, the scope of application of this rule was essentially narrowed after the enactment of RIPA. S. 17(1-2) of RIPA in fact excludes the possibility of raising the issue of compatibility of interceptions with art. 8 of the ECHR and contesting admissibility of evidence obtained by interception, because the interceptions shall not be disclosed in criminal proceedings.[365]

[363] Regulation of Investigatory Powers Act 2000 (RIPA) [last visited September 10, 2011], available at: http://www.legislation.gov.uk/ukpga/2000/23/contents.

[364] Interception of communications Act 1985(hereinafter the 1985 Act) [last visited September 10, 2011], available at: http://www.legislation.gov.uk/ukpga/1985/56/contents.

[365] Secion 17(1-2) of the RIPA:
"1)Subject to section 18, "no evidence shall be adduced, question asked, assertion or disclosure made or other thing done in, for the purposes of or in connection with any legal proceedings which (in any manner)
(a)discloses, in circumstances from which its origin in anything falling within subsection (2) may be inferred, any of the contents of an intercepted communication or any related communications data; or(b)tends (apart from any such disclosure) to suggest that anything falling within subsection (2) has or may have occurred or be going to occur.
(2)The following fall within this subsection—(a)conduct by a person falling within subsection (3) that was or would be an offence under section 1(1) or (2) of this Act or under section 1 of the M1Interception of Communications Act 1985;(b)a breach by the Secretary of State of his duty under section 1(4) of this Act;(c)the issue of an interception warrant or of a warrant under the M2Interception of Communications Act 1985;(d)the making of an application by any person for an interception warrant, or for a warrant under that Act;(e)the imposition of any requirement on any person to provide assistance with giving effect to an interception warrant."

However, s. 18 of RIPA provides certain exceptions to s. 17. It states that s. 17 is not applicable to the proceedings before the tribunal, for an offence under RIPA, s. 1 of the 1985 Act[366] and for some other provisions on secrecy of interceptions.[367] S. 18 (7) allows to disclose intercepts to a judge in the trial.[368] However, a judge shall order such disclosure only if "the exceptional circumstances of the case make the disclosure essential in the interest of justice."[369] Therefore, due to the exceptions provided by s. 18 of the RIPA, the defendant has a possibility to raise art. 8 issue and contest the admissibility of improperly obtained evidence.

b) Judicial discretion and fairness of the proceedings

One of the leading cases on application of s. 78 of PACE is *Khan (Sultan)*[370] case. The defendant claimed that the recording was inadmissible, because the police had no statutory authorization to place the bugging device in the Mr. Khan's house, i.e. to place the device on his private property.[371] The defence argued that the police had committed a trespass, and that the admission of the recording would constitute a violation of art. 8 of the Convention.[372] Furthermore, the defendant claimed that according to s. 78 of the PACE, the tape recording should be excluded from the trial because its admission would breach the fairness of the criminal proceedings.[373]

The House of Lords held that even if there was a violation of art. 8 of the ECHR, the trial judge had discretion to evaluate the circumstances in which the evidence was obtained and to

[366]The Interception of communications Act 1985 [last visited September 10, 2011], available at: http://www.legislation.gov.uk/ukpga/1985/56/contents.
[367]S. 18.1 of RIPA [last visited September 10, 2011], available at: http://www.legislation.gov.uk/ukpga/2000/23/section/18.
[368]S. 18(7) of the RIPA [last visited September 10, 2011], available at: http://www.legislation.gov.uk/ukpga/2000/23/section/18.
[369]S. 18(8) of the RIPA [last visited September 10, 2011], available at: http://www.legislation.gov.uk/ukpga/2000/23/section/18.
[370] R v Khan (Sultan) [1996] UKHL 14.
[371] Ibid.
[372] Ibid.
[373] Ibid.

hold that it did not require exclusion from the trial.[374] Therefore, since the circumstances were of slight importance and the offences were serious, the judge lawfully admitted the recordings.[375] As it has been mentioned before, Strasbourg Court upheld the decision of the House of Lords on admissibility of tape recording obtained in breach of privacy.[376] The UK court's decision indicates to the major significance of fairness of proceedings when deciding on admissibility of improperly obtained evidence. Therefore, it indicates that the same criteria are applicable by the UK courts and the ECtHR in cases of fruits of privacy violations.

c) Wiretapping conducted by a trap

The deviation from the traditional approach was used by the UK courts in *R v H* case, where the wiretapping was conducted by a trap, without placing the listening device on the private property of the defendant.[377] The defendant was charged with rape.[378] During the interview at the police station, the accused admitted the fact of sexual intercourse, but alleged that it was done by the mutual consent.[379] He was released for the period of investigation. For the purpose of obtaining the evidence the police installed recording equipment on the victim's telephone, previously having obtained her consent.[380] The complainant incited conversations with the accused, which were regularly tapped.[381] The Court ruled that the tape recording with conversations had been obtained by a trap and, therefore, should be excluded under s. 78 of PACE.[382] In this case the circumstances in which the evidence was obtained led to its exclusion from the trial, despite its relevance.

However, this approach of the UK court to the evidence obtained by wiretapping conducted by a trap was not consistent. A different decision was taken in the case of *R v.*

[374] Ibid, at 16.
[375] Ibid.
[376] See Khan v. the United Kingdom, application №35394/97, May 12, 2000.
[377] R. v. H [1987] Crim. L. R. 47.
[378] Ibid.
[379] Ibid.
[380] Ibid., at 48.
[381] Ibid.
[382] Ibid, at 51.

Jelen and Katz,[383] in which the police arrested and subsequently interviewed D.[384] After that they organized a conversation between D and J, who was not arrested by that time.[385] The Court ruled that despite the fact of using wiretapping, conducted by a trap, the tape recording should be admissible in the trial.[386]

There is an important difference between *H and Jelen and Katz* cases. In *Jelen and Katz*, the recording was made without the consent of J, whereas in *H* case, the consent had previously been given by the defendant. Therefore, the consent of at least one of the parties of the conversation taped is important criterion, taken into account by the courts, when deciding on admissibility of evidence obtained by a trap.

3.2.3. US courts' position

a) Exclusionary rule under the Fourth Amendment

In its early decisions the question of admissibility of evidence obtained through unlawful interceptions was not considered by the Supreme Court in the light of the Fourth Amendment.[387] In *Olmstead v. United States,* the Court ruled that the interception of the defendant telephone conversations, conducted by the government, could not be considered to constitute "search or seizure" under the Fourth Amendment, because state agents did not physically intervene in the defendant's home or office.[388]

However, in its subsequent decisions the Court has changed its position on application of the Fourth Amendment to the fruits of interception. In *Silverman v. United States,* police officers attached the listening device to the heating duct of the defendant house and were wiretapping defendant's conversations inside the house.[389] The Court held that there was a

[383] R v Jelen and Katz (1989) 90 Cr App Rep 456.
[384] Ibid.
[385] Ibid.
[386] Ibid., at 460.
[387] Olmstead v. United States, 277 U.S. 438 (1928).
[388] Ibid, at 464-466.
[389] Silverman v. United States, 365 U.S. 505 (1961).

violation of the Fourth Amendment rights.[390] This position was reaffirmed and clarified in *Katz v. United States,* where the Court held that "the Fourth Amendment protects people not places."[391] Moreover, in its subsequent cases the Supreme Court held that evidence obtained through unlawful interception of communications shall be inadmissible in trial.[392]

b) Exclusionary rule under the Wiretap Act

The position of the US courts on fruits of interceptions is also based on Title III of The Omnibus Crime Control and Safe Streets Act of 1968 (Wiretap Act), which regulates the process of disclosure and use of evidence obtained through interception by individuals and investigative and law enforcement officials.[393] In *Gelbard v. United States,* the Court, analyzing Title III of the Wiretap Act, concluded that "the perpetrator must be denied the fruits of his unlawful action in civil and criminal proceedings."[394] In other words, the Court applied its judicial discretion to exclude the fruits of unlawful interceptions under Title III of the Wiretap Act. It is important to mention here that the Wiretap Act contains the provision on admissibility of evidence, obtained through unlawful interceptions, which states as follows: "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial… if the disclosure of that information would be in violation of [Title III]."[395] Therefore, the Wiretap Act contains the provision on non-admissibility of fruits of interceptions, which are not authorized under the Wiretap Act.

It is necessary to mention here that the abovementioned §2515 prohibits all interceptions, obtained in breach of Title III, which means that such prohibition may include evidence,

[390] Ibid, at 511.
[391] Katz v. United States, 389 U.S. 347 (1967).
[392] Lee v. Florida, 392 U.S. 378 (1968).
[393]The Omnibus Crime Control and Safe Streets Act of 1968, Title III, codified in 18 U.S.C. § 2510-2520 (2006) [last visited on October 15, 2011], available at: http://it.ojp.gov/default.aspx?area=privacy&page=1284.
[394] Gelbard v. United States, 408 U.S. 41, 48 (1972), at 50.
[395]The Omnibus Crime Control and Safe Streets Act of 1968, Title III, codified in 18 U.S.C. §2515 [last visited on October 15, 2011], available at: http://it.ojp.gov/default.aspx?area=privacy&page=1284.

admissible under the Fourth Amendment. Therefore, this provision might conflict with the Fourth Amendment exclusionary rule. As a result, the scope of application of §2515 has become an issue in the US courts.[396] In such cases the US courts give priority to the US Constitution as the supreme law of the United States and may admit the intercepted conversations under the Fourth Amendment clause, despite the fact that they would be suppressed under § 2515.[397]

It is interesting to mention here that in *Murdock v. United States* the US Court of Appeals for the Sixth Circuit developed the exception called "a clean hands exception" for the governmental use of unlawful intercepted communications in criminal trials when a state prosecutor is so called "an innocent recipient" of such communications.[398] In other words, the court ruled that because a private party, who is not connected to the prosecuting authority, conducted the illegal interception, the prosecutors have "clean hands" as being the "innocent recipients" of the intercepted conversation and can legitimately use it against the suspect.[399] This exclusion allows the courts to avoid application of the blank prohibition of fruits of illegal interceptions, established by the Wiretap Act. In this regard the question of application of the exclusionary rule under the Fourth Amendment and the question of fairness of the proceedings under the due process clause of the Fifth Amendment shall be carefully analyzed by courts before the application of this exception.

3.3. Admissibility of fruits of search and seizure

Another method, which is usually used by the police for obtaining evidence during criminal investigation, is search and seizure, when police officers enter the suspect's home in order to find evidence, which might be presented in trial.[400] The home is first of all the sphere

[396] Gelbard v. United States, 408 U.S. 41, 47 (1972).
[397] United States v. Underhill, 813 F.2d 105, 107 (6th Cir. 1987), at 112.
[398] Murdock v. United States, 63 F.3d 1391, 1404 (6th Cir. 1995).
[399] Ibid., at 1404.
[400] Trechsel, S., "*Human rights in criminal proceedings,"* Oxford University Press, New York, 2005, p. 556.

where an individual conduct his private life, develops his personal relations.[401] Unauthorized intrusion in this sphere constitutes a criminal offence and seriously violates the right to privacy.[402]

3.3.1. The ECtHR position

a) The notion of "home"

In *Funke v. France*, the ECtHR acknowledged the necessity "to have recourse to measures such as house searches and seizure in order to obtain physical evidence."[403] However, when conducting search for gathering evidence, "the relevant legislation and practice must afford adequate and effective safeguards against abuse."[404] Therefore, according to the ECtHR approach, national legislation shall be compatible with requirement of lawfulness of searches and seizures, conducted for the purpose of gathering evidence, in order to protect the constitutional rights of people, whose home is searched and whose property is seized.

The notion of "home" primarily includes "physical sphere, in which the individual develops his private life, the place of his family and other relationships."[405] It is important to mention here that according to Strasbourg jurisprudence, a "home" is not just a dwelling place, but also includes the working place, which is important centre of human relations, and sometimes it is hardly possible to distinguish between individual and business activities."[406] Using this inclusive approach, the Court has significantly broadened the notion of "home". The Court defined that the space, which must be protected is that, which is "actually used by a person, where this person has a legitimate expectation of not being disturbed by authorities or other intruders".[407]

[401] Ibid.
[402] Ibid.
[403] Funke v. France, application № 10828/84, February 25, 1993, §56.
[404] Ibid.
[405] Trechsel S., "*Human rights in criminal proceedings,"* Oxford University Press, New York, 2005, p. 556.
[406] Niemetz v. Germany, application № 13710/88, December 16 1992, §29.
[407] Trechsel S,*"Human rights in criminal proceedings,"* Oxford University Press, New York, 2005, p. 557.

b) Relevance of evidence and fairness of the proceedings

The case, which shows the Court's approach to admissibility of evidence obtained through search and seizure is *Miailhe v. France.*[408] Customs officers seized nearly 15,000 documents at the applicant's residence, on premises housing the head offices of companies he managed and the consulate of the Republic of the Philippines.[409] This operation was part of an investigation organized to determine, among other things, whether the applicant was to be considered as being resident in France.[410]

In its judgment in *Miailhe v. France (no1)* the Court found a violation of art.8 of the ECHR, on the ground that the house searches and seizures conducted by customs officers without a judicial warrant constituted an unlawful interference into the private life of the applicant.[411] Using the findings of the previous judgment, in *Miailhe v. France (no2)* Mr. Miailhe claimed that he was not only the victim of violation of the right to privacy, but also his criminal conviction was unfair, due to the fact that it was based almost exclusively on the unlawfully seized documents.[412]

In this case the Court underlined the primary role of domestic courts in questions of admissibility of evidence and strengthened its subsidiary function.[413] The Court found that the proceedings as a whole were fair.[414] The Court explained its decision by the fact that it was clear from the decisions of the domestic courts that "they based their judgments solely on documentation in the case file, on which both parties had presented arguments at hearings before the national courts", which means that the applicant had access to the indicated documents.[415] Therefore, despite the fact that the documents seized in breach of art. 8 of the

[408] Miailhe v. France, application (№2), application №18978/91, September 26, 1996.
[409] Ibid, §7.
[410] Ibid.
[411] Mialhe v. France (№1), application № 12661/87, February 25, 1993, §38-40.
[412] Miailhe v. France, application (№2), §38.
[413] Ibid., §43.
[414] Ibid, §46.
[415] Ibid, §46.

Convention were admissible in trial, because their usage did not undermine the fairness of the proceedings, due to their high relevance and the fact that the principle of equality of arms and respect for the right of defense were preserved.

Having analyzed the ECtHR jurisprudence on fruits of searches and seizures, it is possible to conclude that the Court uses it standard approach to the question of admissibility of evidence, i.e. if the proceedings as whole were fair, the Court will admit the evidence obtained through search and seizures, even if there was a violation of the right to privacy of the applicant during the process of criminal investigation. In such a case an applicant is entitled to get a compensation for the violated right to privacy.[416]

3.3.2. Position of the UK courts

a) Relevance and probative value of evidence

In cases of admissibility of evidence, obtained by illegal search and seizure the UK courts follow its traditional approach and use relevance and probative value of evidence as the main criteria for application of the exclusionary rule. In the *Kuruma* case the defendant had been previously accused of possession of ammunition in Kenya.[417] Under the existing legislation, the police did not have the authority to conduct the search.[418] However, the Privy Council held that the evidence, obtained by the unlawful search, should be admitted due to its relevance, despite the circumstances in which it had been obtained.[419] Therefore, the test of relevance was the main decisive factor for admissibility of evidence obtained by unlawful search and seizure.

The same approach to evidence obtained by unlawful search and seizure was followed in the subsequent case of *Jeffrey v. Black.*[420] The police officers conducted a search of the

[416] Mialhe v. France (article 50), application № 12661/87, November 29, 1993.
[417] Kuruma v. The Queen, [1955] A.C. 197 (P.C.).
[418] Ibid.
[419] Ibid.
[420] Jeffrey v Black [1978] QB 490.

defendant's room after he had been arrested for a theft of a sandwich in a public house.[421] The search was recognized to be illegal, since the police officers did not get a warrant for it.[422] During the search they found drugs. The Court ruled that due to the high relevance of the evidence in question it had to be admitted on a charge of possessing the drugs, despite the fact of illegality of the search.[423] Therefore, relevance of evidence in question is the decisive factor for its admissibility and may overweight unlawfulness of searches and seizures.

b) Truth-finding function of the UK courts

There is a very narrow discretion to exclude material evidence obtained in breach of the right to privacy. Unlike the ECtHR and the US courts, the UK courts are not attached to so called "activist approach" to the interpretation of fairness, according to which when excluding evidence the courts shall not only inquire into the truth of the charges, but also take into consideration preservation of standards of criminal proceedings, deter the police malpractice and guarantee the due process requirement during criminal investigations.[424] This position is significantly differs from the US approach, under which the deterrent effect is one of the main factors for application of the exclusionary rule.[425]

The truth-finding approach of the UK courts to application of exclusionary rules was clearly reflected in the case of *Jones v. Owen,* in which the court refused to exclude evince obtained through unlawful search, arguing that such exclusion "would be a dangerous obstacle to the administration of justice".[426] This position was reaffirmed in the subsequent case of *Fox v. Chief Constable of Gwent*, in which Lord Fraser stated that "the duty of the

[421] Ibid.
[422] Ibid.
[423] Ibid.
[424] Fenwick, H., *"Civil Liberties and Human Rights,"* 4th ed., Routledge Cavendish, Oxon, 2007. p. 1293.
[425] See chapter 1, s.1.3.1 (b).
[426] Jones v. Owen (1870) 34 J.P.759, 760.

court is to decide whether the appellant has committed the offence with which he is charged and not to discipline the police for exceeding their powers."[427]

Having analyzed the abovementioned cases, it is possible to conclude that evidence, obtained in breach of the right to privacy, is rarely excluded by UK courts, due to the narrow interpretation of s. 78 of PACE and despite the fact of whether unlawful methods, used by the police, resulted in violation of the right to privacy. However, it is possible to get a redress for such violations under s. 6 of the HRA by arguing for exclusion of improperly obtained evidence in order to avoid unfairness of the trial.[428]

Therefore, the jurisprudence of the UK courts on exclusion of fruits of searches and seizure shows that in most cases the rights of the accused are disregarded and the courts primarily follow their truth-findings functions. Relevance is the main criterion for admissibility of evidence, whereas the questions of interference into the fundamental right to privacy and the deterrent effect for the police officers misconduct are of secondary importance.

3.3.3. US court's approach

a) The Fourth Amendment exclusionary rule

As it has already been mentioned in s. 3.1.3 of this chapter the Fourth Amendment protects a person from unreasonable search and seizure.[429] One of the most important requirements for the "reasonableness clause" of the Fourth Amendment is that a valid warrant for conducting legal searches and seizures must be issued upon probable cause.[430]

When analyzing the US approach to fruits of search and seizure, it is necessary to indicate that in this context the Fourth Amendment protects citizens only from unreasonable searches

[427] Fox v. Chief Constable of Gwent [1985] 3 All E.R. 392, 397.
[428] See ch.2, s.3.2.2 (a).
[429] See chapter 3, s.3.1.3.
[430] Fourth Amendment to the US Constitution of 1787 [last visited September 11, 2011], available at: http://constitutionus.com/.

and seizures conducted by government officials.[431] Moreover, the Fourth Amendment is applicable only to criminal proceedings, where it is necessary to examine whether the evidence in question was obtained by legal manner.[432] What is also important here is the fact the Fourth Amendment does not guarantee any protection in case of searches or seizures conducted by foreign officials, even if they violate the US Constitution.[433]

In *Weeks v United States* the Supreme Court ruled on exclusion of fruits of search and seizure and defined application of the exclusionary rule under the Fourth Amendment as the matter, regulated by federal law.[434] In this case the accused was arrested by police officers without a warrant, when they entered his home and conducted search there.[435] During the search, the police found certain materials, which indicated that the defendant used the fraud mails to promote a lottery.[436] When deciding upon the question of admissibility of evidence, obtained during the illegal search, the Court ruled that evidence obtained in violation of the Fourth Amendment should be excluded from the criminal trial.[437] According to the Supreme Court, such evidence should not be admissible in federal courts.[438] Furthermore, the Supreme Court held that the prohibition to admit evidence obtained by unreasonable search and seizure prevented the abuse of power by government officials when they exercised their duties.[439] However, according to this case, the exclusionary rule was applicable only to violations, committed by the federal officials.[440]

It is important to mention here that an attempt to extend the scope of application of exclusion of fruits of searches and seizures violations to the state level was made by the Supreme Court in *Wolf v. Colorado*, where the Court stated that due process guarantee,

[431] Burdeau v. McDowell, 256 U.S. 465 (1921)., at 256.
[432] United States v. Janis, 428 U.S. 433 (1976), at 428.
[433] Jordan v. United States, 1 M.J. 334 (C.M.A. 1976).
[434] Weeks v. United States, 232 U.S. 383 (1914).
[435] Ibid.
[436] Ibid.
[437] Ibid, at 393.
[438] Ibid.
[439] Ibid, at 392.
[440] Ibid.

established in the Fourteenth Amendment, contains the same prohibition of unreasonable search and seizure, as it is established in the Fourth Amendment.[441] In this case the Supreme Court used the due process clause of the Fourteenth Amendment, because it is applicable to both federal and state governments.

However, only in *Mapp v. Ohio* case, the Supreme Court finally extended application of exclusionary rule of the Fourth Amendment to violations, committed by the state agents.[442] In this case the Court characterized the exclusionary rule as "an essential part of both Fourth and Fourteenth Amendments."[443] Therefore, the scope of application of the exclusionary rule to fruits of searches and seizures was further extended and from that moment included violations of the Fourth Amendment committed not only at a federal, but also at a state level.

However, the subsequent jurisprudence of the US Supreme Court made the "fruits of poisonous tree" doctrine non-absolute. It means that there are certain exceptions to the exclusionary rule under the Fourth Amendment.

b) Exceptions to the exclusionary rule

1) The Standing doctrine

The standing doctrine has been developed by the US Supreme Court to determine who is entitled to claim violations of his/her constitutional rights under the Fourth Amendment.[444] Freedom from unreasonable search and seizure, regulated by the Fourth Amendment, is personal by its nature.[445] It means that a person, who claims exclusion of evidence obtained through search and seizure, must be a victim of the Fourth Amendment violation. The standing doctrine for application of the exclusionary rule was established by the Supreme Court in *Jones v. United States* case, in which the court ruled that in order to exclude

[441] Wolf v. Colorado, 338 U.S. 25 (1949).
[442] Mapp v. Ohio, 367 U.S. 643, 657 (1961).
[443] Ibid.
[444] Jones v. United States, 362 U.S. 257, 261 (1960).
[445] Slobogin, C., *"Criminal Procedure: regulation of police investigation*," 2nd ed., Lexis law Publishing, Charlottesville, 1998, p. 593.

evidence from the criminal trial a person, who claims application of the exclusionary rule "must have been a victim of a search and seizure…as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else."[446] Therefore, the US Supreme Court applies personal rights approach in cases of application of the exclusionary rule, which is used as a remedy to compensate for violation of the Fourth Amendment rights.

However, the Supreme Court established one more condition, which must be fulfilled in order to claim exclusion of evidence under the Fourth Amendment exclusionary rule. Besides the requirement to be a victim of the Fourth Amendment violation, a person, who argues application of the exclusionary rule under the 4th Amendment, must have reasonable expectation of privacy in the place, which is searched, or over the evidence, which is seized by the police officers.[447]

Having analyzed the standing doctrine, it is necessary to indicate that the application of this doctrine to certain extent contravene the deterrent effect of the exclusionary rule itself. In such case the police may conduct illegal searches and seizures, knowing in advance that the person, whose premises they search, does not have standing to claim exclusion of evidence seized during the unlawful search.

2) The Good Faith exception

The Supreme Court has established another quite a controversial exception to the exclusionary rule – the good faith exception. According to this exception, if the police acted with reasonable reliance on the search warrant, that later was declared to be invalid, the evidence obtained during the search, based on an invalid warrant, shall not be excluded from the trial.[448] It is necessary to mention here that when defining the good faith exception, the court determined the exclusionary rule as a judicial remedy with deterrent effect, rather than

[446] Jones v. United States, 362 U.S. 257, 261 (1960).
[447] Minnesota v. Carter, 525 U.S. 83, 91 (1998).
[448] United States v. Leon, 468 U.S. 897 (1984).

an individual constitutional right.[449] Therefore, individual rights approach, used in the standing doctrine, is replaced by the judicial remedy point. Moreover, the deterrent effect is minimal in such cases, because the police officers act with reasonable assumption that their conduct is legal and do not violate the Fourth Amendment rights.[450]

The risk of application of the good faith exception is that exclusion of evidence, obtained from subsequently invalidated search and seizures, may have negative impact on the truth-finding function of the criminal proceedings.[451] Having analyzed the cases of this section, it is possible to conclude that in order to avoid such a negative impact in cases of the good faith exception courts try to apply the balancing test between the deterrent benefits of exclusionary rule and the relevance of the evidence obtained from the search, based on unlawful warrant.

3) The Independent Source doctrine

The independent source doctrine extends the application of fruits of poisonous tree doctrine under the Fourth Amendment. In *Murray v. United States* two federal agents forced entry into the warehouse without a warrant.[452] They found marijuana there, but left the place because they did not have a warrant.[453] The agents kept watching the warehouse and subsequently returned with a warrant.[454] The Supreme Court ruled that "the knowledge that the marijuana was in the warehouse was assuredly acquired at the time of the unlawful entry, however it was also acquired at the time of entry pursuant to the warrant, and since the later acquisition was not the result of the earlier entry, there is no reason why the independent source doctrine should not apply."[455]

Therefore, the Court concluded that even if police officers were engaged in the unlawful investigatory activities, evidence would be admissible if it was discovered through a source

[449] Ibid., at 906.
[450] Ibid, at 920.
[451] Ibid., at 907.
[452] Murray v. United States, 487 U.S. 533 (1988).
[453] Ibid.
[454] Ibid, .
[455] Ibid, at 534.

independent from the illegal conduct.[456] In other words, if the police found the evidence during the search without warrant, but subsequently re-discovered it through a lawful search, the evidence seized in these circumstances will be admissible in trial, because it was discovered by independent legal means. It means that a violation of the constitutional rights under the Fourth Amendment during the first illegal entry does not have any negative impact on the fruits of subsequent lawful search and seizure.

4) The Inevitable discovery doctrine

The inevitable discovery doctrine logically is similar to the independent source doctrine. According to the inevitable discovery doctrine evidence, obtained through illegal search, shall be admissible in trial, if it can be proven that this evidence would have been discovered by legal means.[457]

The difference between the independent source doctrine and the inevitable discovery exception is that a court would admit the evidence which was not discovered during the subsequent legal search, but which anyway would have been found if an independent lawful search was conducted by the police officers. Therefore, there is a hypothetical element in rationale of the inevitable discovery doctrine.

The inevitable discovery doctrine was firstly established in *Nix v. Williams* case, in which the Supreme Court held that the evidence about the location of a murder victim's body was admissible despite the fact that the police officers obtained it in violation of the Sixth Amendment right to counsel.[458] The Court held that the search that was already being conducted at the time when the police unlawfully obtained information would have inevitably resulted in the discovery of the body.[459] It is necessary to indicate here that despite the fact

[456] Ibid, at 542.
[457] Cammack, M., *"The rise and fall of the constitutional exclusionary rule in the United States*," American Journal of Comparative Law, vol. 58, 2010, p. 644.
[458] Nix v. Williams, 467 U.S. 431 (1984).
[459] Ibid, at 447.

that the case of *Nix v. Williams* was about Sixth Amendment rights' violation, the inevitable discovery doctrine

is applicable to the Fourth Amendment violations as well.[460] Despite the fact, that there are no cases of inevitable discovery doctrine applied to the Fourth Amendment violations in the Supreme Court jurisprudence, courts of lower instances have widely applied inevitable discovery exception to the Fourth Amendment context.[461]

5) The Attenuation doctrine

Another exception to the Fourth Amendment exclusionary rule is the attenuation doctrine. The rationale for the attenuation doctrine is that despite the illegal methods used in order to obtain evidence, it might be admissible in criminal trial, if the connection between the evidence in question and the unlawful conduct of police officers is sufficiently remote. [462] In such cases the deterrent effect of the exclusionary rule is outweighed by the relevance of evidence and the social interests in admitting it in trial.[463] As a rule the attenuation doctrine is indirectly applicable to the fruits of searches and seizures through ***the knock- and-announce exception.***[464]

The knock-and-announce exception was developed by the Supreme Court in the recent case of *Hundson v. Michigan,* in which the Court took an extraordinary approach and fully rejected application of the exclusionary rule for the whole types of violations of the Fourth Amendment rights.[465] In this case the police officers came to the defendant's house with a search warrant for drug and firearms.[466] Without waiting for appropriate period of time,

[460] Thaman S.C*." Fruits of the poisonous tree in comparative law,"* Southwestern Journal of International Law vol. 16, 2010, p. 377.
[461] See United States v. Tejada, 524 F.3d 809 (7th Cir. 2008).; United States v. Johnson, 528 F.3d 575, 580 (8th Cir. 2008), United States v. Almeida, 434 F.3d 25 (1st Cir. 2006).
[462] Brown v. Illinois, 422 U.S. 590 (1975).
[463] Hansen, V., *"Use and misuse of evidence obtained during extraordinary renditions: how do we avoid diluting fundamental protections?"*, Nova Law Review, vol. 35, 2011, p. 285.
[464] Cammack, M., *"The rise and fall of the constitutional exclusionary rule in the United States*," American Journal of Comparative Law, vol. 58, p.645.
[465] Hundson v. Michigan, 547 U.S. 586 (2006).
[466] Ibid.

established by law, after they had knocked and announced, they entered the defendant's residence.[467] The defendant claim exclusion of evidence from the trial because of violation of the Fourth Amendment rights.[468]

In his opinion, Justice Scalia indicated three reasons of non-application of the exclusionary rule to the knock-and-announce cases.[469] First of all, "the constitutional violation of the illegal manner of entry was not a but-for cause of obtaining the evidence."[470] It means that the evidence in question would have been discovered anyway despite the fact of violation of knock-and-announce requirement, which leads to denial of its exclusion. Secondly, since the connection between disclosure of evidence and the constitutional violation was missing, the Court held that the attenuation doctrine was applicable in this case and the evidence had to be admitted. [471] It is explained by the fact that application of the exclusionary rule in this case would have an over-deterrent effect on the police and would result in destruction of evidence, because police officers would have "to wait longer than the law requires" in order to avoid "massive consequences" of a violation of the rule.[472]

Conclusion

Having analyzed the ECtHR, UK and US courts' positions it is possible to conclude that different factors are taken into account by the courts in cases of admissibility of fruits of privacy violations. The courts of the indicated jurisdictions use case-by-case approach to application of exclusionary rules to evidence obtained in violation of the right to privacy. In general, it is possible to conclude that evidence, obtained in violation of the right to privacy may be admitted in criminal trial, if it is highly relevant for establishing the truth and its admissibility would not undermine the principle of fairness of the proceedings.

[467] Ibid.
[468] Ibid.
[469] Ibid, at 592.
[470] Ibid.
[471] Ibid, at 593.
[472] Ibid, at 595.

According to the UK courts' position methods of obtaining evidence are not important, because the decisive factor for admissibility is relevance of evidence and its probative value. Relevance of evidence is also one of the decisive factors for the ECtHR together with the requirement of fairness of the proceedings for application of exclusionary rule to fruits of privacy violations.

The aforementioned approaches differ from the US courts' position, according to which if evidence was obtained in violation of the Fourth Amendment, it must be automatically excluded from the trial, despite its relevance or probative value. However, the exception doctrines have restricted the scope of application of the exclusionary rule under the Fourth Amendment.

It is necessary to add here that unlike in the United Kingdom and the ECtHR, in the US courts the deterrent effect of the exclusionary rule is the most important factor for its application, whereas relevance of evidence and seriousness of the offence are less important for decision on admissibility of evidence obtained in violation of privacy.

CONCLUSIONS

Application of the exclusionary rule to improperly obtained evidence is significantly important for preservation of victims' interests and establishing of deterrent effect for the police malpractice. The "fruits of poisonous tree doctrine" helps to avoid wrongful convictions, which provides the integrity of the criminal justice system and does not hinder its truth-finding functions.

The exclusionary rule in the United States is enshrined in the Amendments to the US Constitution, which is the supreme law of the State. In its turn the UK courts use statutory provisions to exclude unlawfully obtained evidence from the trial, whereas the jurisprudence of the ECtHR is based on the case-by-case approach, since the ECHR does not have any provisions, regulating admissibility of improperly obtained evidence. However, the common feature for the courts in all three jurisdictions is that when deciding on admissibility of unlawfully obtained evidence the courts in the US and the UK as well as the ECtHR use case by case approach and carefully analyze the circumstances of the case

In cases of admissibility of fruits of human rights violations the ECtHR indicates to its subsidiary role and uses the criteria of fairness of the proceedings and relevance of evidence in order to decide whether improperly obtained evidence shall be excluded from the trial. The same criteria are used by the UK courts, which mainly take into consideration relevance and probative value of the evidence in question and the fairness of the proceedings as such. When assessing the fairness of the proceedings the UK and the ECtHR analyze the character of evidence, its reliability and the nature of the right violated. The courts also take into account whether the improperly obtained evidence was a decisive factor for the conviction of the defendant. However, even if improperly obtained evidence is the only basis for conviction of the suspect, it will not be automatically excluded. Relevance and fairness of the proceedings

will be carefully considered by courts before application of the exclusionary rule in such cases.

Nevertheless for the UK courts it does not matter how the evidence was obtained, but what is important is that how this evidence may contribute to establishing the truth in criminal trial. It means that only if relevance of evidence is seriously affected by the methods through which it was obtained, the UK courts would carefully examine them before application of the exclusionary rule. According to the common law tradition the UK courts, similarly to the ECtHR, but unlike the US courts, consider application of the exclusionary rule to be the discretionary power of a judge rather than a statutory established duty.

Having analyzed the jurisprudence of three jurisdiction on cases of fruits of torture and other forms of coercion, it is possible to conclude that due to the absolute prohibition of torture or inhuman and degrading treatment, evidence obtain by these coercive measures is automatically excluded from the trial regardless of the criteria of fairness of the proceedings and relevance of evidence. In cases of fruits of coercion the UK, the US courts and the ECtHR take into consideration all the circumstances of the case in order to classify the police actions as acts of coercion. In such cases the courts in all three jurisdictions analyze the questions of voluntariness and reliability of statements as well as fairness of the proceedings. However, it is necessary to add here that in cases of fruits of torture or lesser forms of coercion the US courts apply the "due process voluntariness test", based primarily on the requirements of fairness of the proceedings and the concept of free will of the suspect, whereas reliability of such statements is of secondary importance. This approach differs from the one of the UK courts and the ECtHR, for which the reliability of statements is one the main components of the voluntariness test applicable to the fruits of coercion.

However, the courts in all three jurisdictions have deviated from the absolute exclusion of all the fruits of coercion. The US, UK courts and the ECtHR do not automatically exclude

material evidence indirectly obtained from the coerced confession. Such derivative evidence shall be considered under the requirements of reliability and fairness of the proceedings and shall not be the decisive factor for conviction of the suspect. It is possible to conclude that such approach seriously questions the absolute nature of prohibition of torture and inhuman or degrading treatment, making it possible to admit the material fruits of confessions, obtained by inhuman and degrading treatment, which does not automatically render the trial unfair. Moreover, such approach weakens the deterrent effect of the exclusionary rule itself, which might have a negative impact on the criminal justice integrity as such.

Comparing with the UK courts and the ECtHR, the US jurisprudence indicates to the strictly determined position of the US courts on indirect evidence obtained through a coercive confession. Analyzing the "totality of circumstances", the derivative material evidence obtained through torture shall be analyzed by a judge in the context of the exclusionary rule under the Fourth Amendment and the due process clause of the Fifth Amendment. However, the US courts tend to deviate from this approach in order to protect the interests of national security, especially in "war on terror" cases, which seriously undermines the fundamental rights protection, guaranteed by the Constitution and international human rights documents. In its turn such practice of the US courts may increase the number of wrongful convictions, which will undermine the quality of justice delivering and decrease the deterrent effect of the exclusionary rule.

Having analyzed the cases of admissibility of fruits of privacy violations, it is possible to conclude that for both the UK courts and the ECtHR the substantial right to privacy has secondary importance. In other words, even if the right to privacy has been violated, the evidence may be admitted in trial if it is highly relevant and the requirements for fairness of the proceeding are fulfilled. It cannot be said that the respect for human rights is not preserved under this approach, because in case of privacy violation, the defendant is entitled

for compensation for the violated right. Furthermore, such approach does not breach the integrity of the criminal justice system, because it allows to increase the accuracy of the verdict, preserves fairness of the proceedings and improve the quality of delivering justice by accomplishing its truth-finding functions.

Unlike the UK courts and the ECtHR, the US courts have a strictly defined position on admissibility of evidence, obtained in violation of privacy. In other words, if evidence was obtained in breach of the Fourth Amendment of the US Constitution, it must be automatically excluded from the trial. Moreover, contrary to the UK courts approach, the US Supreme Court carefully examines the methods of obtaining evidence, which are one of the decisive factors for exclusion of evidence from the criminal proceedings.

However, the exception doctrines restrict the scope of application of the exclusionary rule under the Fourth Amendment. Furthermore, recent US Supreme Court's jurisprudence shows that there has been certain reconsideration of application of the exclusionary rule, under which in cases of admissibility of improperly obtained evidence the Supreme Court uses the reasonableness criterion together with the assessment of the culpability of police actions. It is also necessary to add here that unlike in the UK and the ECHR jurisdictions, in the US courts the deterrent effect of the exclusionary rule is the most important factor for its application, whereas relevance of evidence and gravity of the case are less important for decision on admissibility of improperly obtained evidence. Therefore, it is possible to conclude that the US approach is primarily aimed at deterring misconduct of law enforcement officials, enhancing respect for constitutional rights and increasing the public credibility in criminal justice system.

Having analyzed application of exclusionary rules to improperly obtained evidence in the US, the UK courts and the ECtHR, it is possible to conclude that the US courts have stricter rules for application of "fruits of poisonous tree doctrine" than the UK courts and the ECtHR.

The US jurisprudence shows that when excluding improperly obtained evidence the US courts primarily try to protect constitutionally guaranteed rights, rather than to fully accomplish the truth-finding functions of criminal justice. In its turn the UK courts and the ECtHR consider application of the exclusionary rule as a discretionary power of a judge, whose aim is to establish the truth and to issue an accurate verdict.

However, despite the fact that European approach is different from American position on admissibility of unlawfully obtained evidence, it does not mean that the principle of integrity of the criminal justice system is breached. It can be explained by the fact that the US courts make a stronger emphasis on protection of constitutional rights and strengthening the deterrent effect for the police officers' misconduct, whereas the UK courts and the ECtHR primary tend to preserve fairness of the proceedings and accuracy of the verdict in order to accomplish the truth-finding functions of the criminal justice system.

In my view combination of these approaches by applying the balancing test between the deterrent benefits of the exclusionary rule together with victim's interests and the relevance of improperly obtained evidence would best protect the fundamental rights of the suspect and would allow to fulfill the truth-finding functions of the criminal justice system. Furthermore, it would help to improve the quality of justice, to increase effectiveness of the criminal justice system and to enhance public trust in it.

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