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DOI: 10.51204/Zbornik_UMKP_24104A
Originalni naučni rad

THE INFLUENCE OF THE ECTHR'S JURISPRUDENCE ON MODELS OF EVIDENCE ADMISSIBILITY IN NATIONAL CRIMINAL PROCEEDINGS – REMARKS ON THE ART. 3 OF THE ECHR

Abstract: The considerations presented in this study dealt with selected issues related to the interpretation of Article 3 ECHR. The center of work is a critically oriented review of two cases of similar gravity in which the Court referred Article 3 to evidentiary proceedings.

The study presents an analysis concerning ill treatments formulas. It consists of three parts. The introduction comments on the perception of the prohibition of torture and other ill-treatments formulas. The following part contains statistics on Western and Central Europe countries in terms of violations of Article 3 of the ECHR. Based on these, it is ascertained that the Court, with regard to Central and Central-Eastern Europe, derives the so-called deterrence principle by relying on empirical regularity of violations of the ECHR. A certain proxy for this optics is made apparent by the analysis of the Gäfgen and Ćwik cases, in which the court showed a great deal of scepticism about the standards of fairness in the functioning of Polish courts, tightening the paradigm for the elimination of evidence obtained under ill-treatment conditions and its influence for the evaluation of the whole procedure in question. The examination of these cases was based on the concept of constitutive rules by J. Searle

Keywords: prohibition of torture, ill treatments, constitutive rules, ECrHR, fundamental rights, evidence, fair trail.

1. INTRODUCTION

This work addresses the question of the relevance of ECHR jurisprudence to the interpretation of evidentiary issues. Given its most far-reaching implications,

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the interpretation regarding Article 3 of the ECHR,[1] is crucial in this regard. According to this provision: *No one shall be subjected to torture, inhuman or degrading treatment, or punishment.*[2] As a side note, it must be mentioned that this canonical formula is historically driven, one shall observe that at the international level, it was codified only in the 20th century, and was subsequently reproduced in many international conventions and domestic constitutions. Not entering deeper into the historical grounds of this institution, one must remind that internationally, this claim for the elimination of torture has been expressed primarily in the Universal Declaration of Human Rights (1948) and then proclaimed in 1975 by the UN Declaration against Torture, finally being codified in the United Nations Convention of 10 December 1984 against torture and other cruel, inhuman or degrading treatment or punishment (OJ of 2 December 1989).[3]

Additionally, it should be further emphasized the UN Convention is the only piece of international law to formulate a legal definition of torture. Consequently, the term "torture" means *any action by which severe pain or suffering, whether physical or mental, is intentionally inflicted on any person in order to obtain from him/her or a third person information or a confession to punish him/her for an act committed by him/her or a third person, or of which he/she is suspected, and to intimidate or to put pressure on him/her or a third person, or for any other purpose arising from any form of discrimination, where such pain or suffering is caused by a public official or other person acting in an official capacity or on their instructions or with their express or tacit consent. The term does not include pain or suffering arising only from lawful sanctions, inherent or associated with these sanctions or caused by them incidentally Art. 1(1).*

Researchers rightly note that while the axiological legitimacy and the "absolute dimension" of the ban on torture nowadays does not raise any doubts, the entire prohibition encompassing not only torture but also inhumane or degrading treatments or punishments require interpretation. Thus, it is beyond doubt that the entire collection of behaviours falling within the scope of the prohibition of other forms of ill-treatment is 'by its nature' incompatible with the essence of the punitive nature of the criminal justice and, particularly, with the use of a legally applicable system of coercive measures in criminal proceedings.[4] Without analysing the complexity

1 Council of Europe Convention on the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950 and hereafter referred to as "the Convention" or "ECHR".

2 Additionally, the European standard is supported by the mechanism based on the European Convention of 26 November 1987 for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and regarding the EU states by the Charter of Fundamental Rights that explicitly in art. 4 stipulates the ban of ill-treatments: *No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

3 Hereafter referred to as "the UN Convention". Access on Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment | OHCHR

4 See: S. Greer, "Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?", *Human Rights Law Review*, 2015, 1–37. Available at: https://www.corteidh.or.cr/tablas/r33346. pdf., Accessed on Sept. 1 2023; J. Mayerfeld, "In defense of the absolute prohibition of torture", *Public*

of the prohibition of other forms of ill-treatment, let us note that the universal standard arising from Articles 1 and 15 of the UN Convention is the one which should have **a limiting effect on the development of the European standard of a fair trial in terms of admission of evidence obtained as a result of all formulas of ill-treatment**. Thus, the interpretation of the art. 3 of the ECHR. In fact, the Strasbourg Court should interpret the ECHR with regard to universal standards due to the lack of a legal definition of torture in the conventions of the Council of Europe. Moreover, the ECtHR is entitled **to assume a higher level of protection against ill-treatment than the one set in the universal human rights protection system**. As already mentioned, even a basic analysis of the ECtHR's judgments in terms of the state's positive obligations to ensure protection against ill-treatment leads to a conclusion that the relevant Strasbourg standard is currently **more protective** and, in the specific circumstances, shall be directly applied to acts of private individuals what is excluded *expressis verbis* by cited art. 1 the UN Convention.[5]

Given that, this study is not of a descriptive nature and that the characteristic of the so-called European standard set by the ECtHR concerning the prohibition of torture and other ill-treatment formulas is well established - in subsequent section we will focus on statistics connected with the Art. 3 ECHR and then interpretation of two judgments by the ECrHR connected with the admissibility of evidence.[6] The interpretations at hand are particularly significant. Based on Article 3 in conjunction with Article 6 of the Convention, the Court argues in favor of the concept of elimination of unlawful pieces of evidence. As is known, the elimination of evidence in criminal proceedings, across national regulations, is not uniformly settled, moreover, very often it is not regulated at all. Thus, the Court's indications are of great importance for legal practice.

2. CENTRAL AND EASTERN EUROPE AND WESTERN EUROPE – STATISTICAL BIAS

The purpose of the above research is to describe the empirical tendencies of the ECtHR jurisprudence versus Central (and Eastern) European states and

Affairs Quarterly vol 22/2, 2008, 109–128; R. Pattenden, "Admissibility in criminal proceedings of third party and real evidence obtained by methods prohibited by UNCAT", *International Journal of Evidence and Proof*, 1/2006, 1–41, https://doi.org/10.1350/ijep.2006.10.1.1, Accessed on Sept. 1 2023; T. Thienel, "The admissibility of evidence obtained by torture under international law", *European Journal of International Law*, 2/2006, 349–367, https://doi.org/10.1093/ejil/chl001, Accessed on Sept. 1 2023.

5 M. Wąsek-Wiaderek, "Admissibility of Statements Obtained as a Result of "Private Torture" or "Private" Inhuman Treatment as Evidence in Criminal Proceedings: Emergence of a New European Standard?", *Revisto Brasileiro de Direito Processual Penal*, Vol. 7, 1/2021, 343–374.

6 See: M. A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka,* Warszawa, 2003, 98–135; U. Erdel, H. Bakirci, *Article 3 of the ECHR: A Practitionar's Handbook*, Gents, 2006, 207–229.

Western European states when it comes to the infringements of the Art. 3 of the ECHR. The analysis based on open data available on the website of the ECtHR. Two very insightful collections were identified. The first group covers national reports - available on www.echr.coe.int. European Court of Human Rights, March 2023.[7] These reports examine various aspects of the ECtHR jurisprudence during the whole 25-year perspective.

The second group contains the full statistical information about violations of the ECHR during the entire period of the functioning of the ECtHR (1959-2022), connected with 48 States under its jurisdiction (Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Rumania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom).

Based on the first collection of data (national reports), a few elements were selected: 1) the rate of judgments against a country, 2) the rate of violation of Article 3 of the ECHR, 3) the rate of violation of Article 6 of the ECHR and the nature of the violation under the fair trial standard. At the time of the analysis, data was available for the following Central and Eastern European countries: Hungary, Albania, Czech Republic, Georgia, Greece, Armenia, Croatia, and Western European countries: Germany, France, Italy, and Germany.

Regarding Hungary, in almost 94% of the judgments delivered in the described period**,** the Court has given judgment against the State, finding at least one violation of the Convention; over half of the findings of a violation concerned Article 6 (right to a fair trial), referring mainly to the length of the proceedings. Prohibition of torture and inhuman or degrading treatment amounted to7,42% of all types of ECHR violations.

In more than 80% of the judgments delivered concerning Albania, the Court has ruled against the State, finding at least one violation of the Convention. Almost half of the findings of a violation concerned Article 6 (right to a fair trial), relating mainly to the unfairness of the proceedings and failure to enforce final judicial decisions. The breaches of prohibition of torture and inhuman or degrading treatment were confirmed in 5.59% of cases.

Similarly, in about 81% of the judgments delivered by the ECtHR concerning the Czech Republic, judgments were given against the State by finding at least one violation of the Convention.Prohibition of torture and inhuman or degrading treatment (Art. 3) amounted to 2.42% of the cases. Over 61 % of the findings of a violation concerned Article 6. A further 13.22% concerned a violation of Article 5 (right to liberty and security).

7 The ECHR in facts & figures (coe.int) the ECtHR's series of documents provides a global overview of the Court's work and the extent to which its judgments have an impact in each member State.

In three-quarters of the judgments delivered concerning Georgia, the Court adjudicated against the State, finding at least one violation of the Convention. The right to a fair trial (Art. 6) was jeopardized in 25.87% of the cases, andthe prohibition of torture and inhuman or degrading treatment (Art. 3) in 24.88%.

In almost 90% of the judgments delivered concerning **Greece,** the Court has given judgment against the State, finding at least one violation of the Convention, including the right to a fair trial (Art. 6) in 50.32% of them and the prohibition of torture and inhuman or degrading treatment (Art. 3) in 9.70% of all cases. In over 90% of the judgments delivered concerning **Armenia**, the Court has ruled against the State, finding at least one violation of the Convention.Prohibition of torture and inhuman or degrading treatment (Art. 3) was found in 12.27% and the right to a fair trial (Art. 6) in 23.47% of all cases. In about 80% of the judgments delivered concerning **Croatia**, the Court has adjudicated against the State, finding at least one violation of the Convention, including the prohibition of torture and inhuman or degrading treatment (Art. 3) in 6.61% and violation of a right to a fair trial (Art. 6) in 49.22% of cases.

As for now, let's analyse the data on Western European countries. In more than 70% of the judgments delivered concerning **France,** the Court has ruled against the State, finding at least one violation of the Convention. Over 60% of violations found concerned Article 6 (right to a fair hearing), specifically the length or fairness of proceedings. Prohibition of torture and inhuman or degrading treatment(Art. 3) was found only in 1.20%of the cases. Out of the total number of judgments concerning **Germany**, in over half of the cases, the Court found at least one violation of the Convention and held the State responsible. About half of the violations concerned Article 6, mainly the length of proceedings, accounting for some 40% of the violations found by the Court. Prohibition of torture and inhuman or degrading treatment (Art. 3) amounted to 2.31%.In more than 70% of the judgments concerning **Italy**, the Court has ruled against the State, finding at least one violation of the Convention, including over 60% of violations of Article 6 (right to a fair hearing), specifically the length or fairness of proceedings; violation of the Art. 3 (prohibition of torture and inhuman or degrading treatment) were found in 2.36% of cases.

In over 30% of the cases concerning **Denmark**, the Court gave a judgment against the State, finding at least one violation of the Convention.Nearly 40% of the violations concerned Article 6, and almost all of those are related to the excessive length of proceedings.Breach of prohibition of torture and inhuman or degrading treatment (Art. 3) was established in 4% of cases.

In more than 62% of the judgments concerning **Ireland,** the Court has adjudicated against the State, finding at least one violation of the Convention. Prohibition of torture and inhuman or degrading treatment (Art. 3) remained at 2.50% of ECHR convention infringements. In almost three-quarters of all its judgments concerning **Finland**, the Court found against the State for at least one violation of the Convention. Virtually 60% of the findings of a violation concerned Article 6 (right to a fair trial), mainly with regard to length of proceedings. The

second most common violation of the Convention found by the Court concerned Article 8 (right to respect for private and family life; almost 15%).Violation of prohibition of torture and inhuman or degrading treatment (art. 3)remained at the level of 1.20%.

Referring to the second type of data titled "Violations by Articles and States", one may indicate that during the given period of 1958–2022, violations of the prohibition of torture were established 188 times, and the violations of the prohibition of other forms of ill-treatment occurred 3135 times. Data is presented in the table automatically generated based on HUDOC, the official database of the ECtHR.[8] Prohibition of torture was violated in cases versus Albania (1), Armenia (1), Austria (1), Azerbaijan (3), Belgium (1), Bosnia& Herzegovina (1), Bulgaria (4), France (2), Georgia (1), Italy (9), Republic of Moldova (9), Netherlands (1), North Macedonia (3), Poland (2), Romania (2), Russian Federation (89), Slovak Republic (1), Sweden (1), Turkey (31) Ukraine (22) and United Kingdom (2). However, the prohibition of another form of ill-treatment was found more often – in cases against Albania (4), Armenia (22), Austria (4), Azerbaijan (30), Belgium (29), Bosnia& Herzegovina (2), Bulgaria (91), Croatia (20), Cyprus (10), Czech Republic (2), Denmark (1), Estonia (8), Finland (2) France (47), Georgia (30), Germany (5), Greece (125), Hungary (46), Ireland (1), Italy (36), Latvia (19), Lithuania (33), Malta (4), Republic of Moldova (114), Montenegro (4), Netherlands (10), North Macedonia (6), Poland (67), Portugal (4), Romania (380), Russian Federation (1190), Serbia (7), Slovak Republic (6), Slovenia (21), Spain (1), Sweden (4), Switzerland (2), Turkey (348), Ukraine (383), United Kingdom (17).

Consequently, cases against the Russian Federation, Romania, Turkey and Ukraine constructed 2301 cases out of a total number of 3135 cases based on the violation of Article 3 when referring to the infringements of the prohibition of other forms of ill-treatment. When analysing the given data, it should be taken into account that the countries listed above accepted the jurisdiction of the Strasbourg Court at different periods of time, and with a certain simplification, it can be considered that the Western European countries ratified the ECHR earlier than the Central and Eastern European countries.

Analysing the figures, it is clear that the empirical data allows the conclusion of a quantitative trend as regards to violations of Article 3 of the ECHR. Based on the quantitative data, as indicated in the introduction, it should be pointed out that the Court, when adjudicating, considerably more often confirmed violations of Article 3 of the Convention in the case of Central and Eastern European States than in the case of Western European States. With a certain degree of caution, therefore, it may be concluded that this state of affairs results in a sort of **presumption of a higher level of threat to the rights and freedoms** protected by the ECHR when the Court rules on violations of the Convention regarding Central and Eastern European states. This could be observed as a symptom of

8 Violations by Article & by State (coe.int).

the deterrence principle and, at the same time, as a factual presumption based on a probabilistic factor, i.e. the frequency of previous violations[9].

It seems that the issue of the impact of the principle of deterrence also becomes apparent against the backdrop of the two rulings discussed below. In the case against Germany, despite the finding infringements of the Article 3 of the Convention in connection with the performance of procedural activities involving the accused, the Court held that there was no violation of the fair trial standard. Meanwhile, in the case against Poland, although the violation of Article 3 concerned the actions of private individuals, not the procedural authorities, it reached the opposite conclusion.

3. CASE STUDY: GÄFGEN[10] V. GERMANY AND ĆWIK V. POLAND[11]: ART. 3 OF THE ECHR AS A SOURCE OF CONSTITUTIVE RULES FOR EVIDENTIARY ACTIONS – DISCUSSION

As Lord Bingham observed in A and others v. United Kingdom [GC], 2009 no. 3455/05, § 52, torture evidence is excluded because it is "unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice."

Regardless of the pertinence of this statement, yet the mere recognition of the inadmissibility of such evidence does not prejudge the question of the fairness of the entire proceedings, as a rule, the key in this regard is the response to the question of what are implications of evidence obtained in violation of Article 3 ECHR on the fairness of the trial. The ECtHR addressed the very same question in both cases: Gäfgen v. Germany and Ćwik v. Poland. These cases differed significantly from each other, both in terms of the facts and the rulings made. In Gäfgen v. Germany, a violation of Article 3 occurred by the trial authorities in connection with the act of interrogating the suspect. Still, the ECtHR found that this defective illegal procedural act was convalidated in the subsequent course of the proceedings and the proceedings as a whole met the standard of fairness. Meanwhile, in Ćwik v. Poland, the violation of Article 3 concerned the conduct of private individuals, and took place outside of the criminal proceedings and not for its purposes. Nevertheless, in this second case, the Court found that there was a violation of the right to a fair trial.

In cases at hand - two issues are essential: a) verification of the legality (admissibility) of evidence gathered in violation of the law (prohibition of torture *sensu largo*), and b) the impact of such evidence on the question of the procedural fairness and, consequently, the outcome of the entire case.

9 Zob. B. Janusz-Pohl, "Uwagi o doniosłości koncepcji domniemań relewantnych prawnokarnie", *Prawo w Działaniu*, SPRAWY KARNE, 43/2020, 37 et seq.

10 No. 22978/05/ 1 June 2010.

11 No. 31454/10, 5 Nov. 2020.

As in both cases, the Court found a violation of Article 3 ECHR and stated that this had an effect on the legality of evidence; therefore, consequently it shall be challenged if the Article 3ECHR is to be considered as a source for constitutive rules determining the validity of evidence.

As mentioned before, the first attempt in legal sciences to use the concept of constitutive rules for the interpretation of art. 3 ECHR was made on the example of the case Gäfgen v. Germany. M. Mittag has performed an in-depth study in this regard. Hence, it must be emphasis that, this Author has operated on the basic version of the constitutive rules concept by J. Searle. His conclusions have shown the potential of the indicated concept but also its certain shortcomings. Meanwhile, in the last 30.years, especially from 1996 onwards, the idea of constitutive rules has been interpreted by Polish scholars. However, the purpose of this interpretation was to adapt the idea of constitutive rules to the demands of legal thinking. Thus, S. Czepita[12] - a Polish legal theoretician, formulated additional assumptions that enabled its application to privet law considerations. In turn, B. Janusz-Pohl has used this transformed concept for the interpretation of legal actions in the criminal proceedings[13]. These new optics allow us to return to the considerations carried out by M. Mittag. Of course, a comprehensive presentation of this issue goes beyond the scope of this study. At the same time, in order to - at least in a tentative way - provide an outline of the conclusions, it is necessary to bring the foundations of the concept of constitutive rules closer, briefly reporting on its evolution. What must be emphasised at this point is a core assumption for this concept, which states: undoubtedly, legal action is a pure example of conventional legal acts (actions). At the same time, criminal procedure shall be perceived as **a sequence of legal actions**. Consequently, **the constitutive rules shall be attributed to each legal action in the sequence.**

3.1. Constitutive rules concept – evolution

Let us put the spotlight on the core acknowledgements.[14] Outlining Searle's approach, it must be remembered that it refers to the conception of performative utterances developed by Austin, specifically to locutionary, illocutionary and perlocutionary acts.[15] An illocutionary act is an intentional act performed by an

12 Cf. S. Czepita, „O koncepcji czynności konwencjonalnych w prawie", *Wykładnia konstytucji. Aktualne problemy i tendencje* (ed. M. Smolak), Warsaw, 2016, 138–139; S. Czepita, *Reguły konstytutywne a zagadnienia prawoznawstwa*, Uniwersytet Szczeciński, Studia i Rozprawy, vol. 223 (CCXCVII), Szczecin, 1996 146 *et seq*.

13 B. Janusz-Pohl, *Definitions and Typologies of Lega Acts: Perspective of Conventionalisation and Formalisation,* Poznań, 2017a, 23–24 and the literature referred therein; B. Janusz-Pohl, *Formalizacja i konwencjonalizacja jako instrumenty analizy czynności karnoprocesowych w prawie polskim*, Poznań, 2017b, *passim*.

14 Description based on my previous work: B. Janusz-Pohl (2017a), *op. cit.,* 23–24 and the literature referred therein; B. Janusz-Pohl (2017b), *passim*.

15 J. L. Austin, *How to Do Things with Words*, Oxford: Clarendon Press, 1962, 311 *et seq*.

individual uttering a performative sentence (locutionary act), the purpose of which is to create a new state of affairs unattainable in any other way[16]. Legal actions are an example of illocutionary acts. In the general law theory, legal actions are also denominated as formalised conventional acts (actions). It means that one could distinguish the set of specific rules attached to the given types of legal action.[17] These rules are divided by scholars into two groups: 1. a) constitutive rules and b) regulative rules (i.e. Searle); or 2. a) rules of conventionalisation and b) rules of formalisation (i.e. Czepita).

Searle relied on performative utterances (i.e. illocutionary acts, distinguished by Austin), formulating an independent conception of constitutive and regulative rules. Searle's conception distinguishes speech acts as uttering (muscle movements), propositional, and illocutionary acts. Its crux is the distinction of the so-called elementary illocutionary act[18]. This Author stressed that: ‚In our analysis of illocutionary acts, we must capture both the intentional and the conventional aspects, especially the relationship between them. In the performance of an illocutionary act in the literal utterance of a sentence, the speaker intends to produce a certain effect by getting the hearer to recognise his intention to produce that effect'[19]. Furthermore, component acts can be distinguished in any act, not only intentional. A component of a given act is held to mean an act, the performance of which is a necessary albeit insufficient condition of performing a given act. A component of a given act is renowned based on another theoretical conception as the material substrate of a conventional act. In Searle's conception, it is crucial to observe that illocutionary acts are interpreted by opposing constitutive rules for given speech acts to regulative rules.[20] As the latter, Searle considered such rules regulate antecedently or independently existing forms of behaviour. In turn, **constitutive rules not merely regulate but, above all, create or define new forms of actions (we could say conventional forms**); they thus create new beings, also in term of legal beings. Searle introduced a pattern of the constitutive rule. The pattern ran as follows: X counts as Y in the context C. He emphasised that constitutive rules were thus rules of conventionalisation. It is worth mentioning that Searle analysed regulative rules on the example of the rules of etiquette, finding that their observation did not undermine the existence of specific acts but determined their form.[21]

16 See more B. Janusz-Pohl (2017a), *op. cit.,* 25.

17 See *ibid*., 26 *et seq*.; B. Janusz-Pohl (2017b), *passim*.

18 J. R. Searle, *Speech Acts: An Essay in the Philosophy of Language*, London 1967 *passim*; J. R. Searle, *Czynnościmowy. Rozważania z filozofii języka*, Warsaw 1987, *passim*.

19 J. R. Searle (1967), *op. cit.,* 45.

20 This constructed foundation for the M. Mittag interpretation: "A Legal Theoretical Approach to Criminal Procedure Law: The Structure of Rules in the German Code of Criminal Procedure", *German Law Journal*, Vol. 7, 8/2006, 637–645.

21 J. R. Searle (1967), *op. cit.,* 36. Disavowing the approach to regulative rules as second types of rules helped Searle discern a new approach to illocutionary acts. It inspired scholars to search for such conventional act rules, the breaking of which would not undermine the validity (existence) of a given act. In this sense, it appears that regulative

Let us note that Searle's concept was drafted in very general terms without going into detail about all the complexities, but at the same time, Searle has inspired many scholars to follow up his steps, one of them was the Polish legal philosopher Stanisław Czepita.[22] This Author has developed the concept of constitutive and regulative rules by denominating them as constitutive rules (rules of conventionalisation) and formalisation rules. Both types have been divided into two other groups: constructive rules and consequential rules. The constructive rules (rules of construction) indicate how to perform a conventional act validly (constitutive rules) and effectively (formalisation rules).[23] Thus, consequential rules show the consequences of the infringements of constitutive rules or the infringements of the formalisation rules. Through this approach, B. Janusz-Pohl has analysed the defectiveness of legal actions, starting with the sanction of 'non-existent legal action' and nullity *ex tunc* (in case of breach of constitutive rules) through inadmissibility (in case of breach of some constitutive rules) to nullity *ex nunc* and the non-futility (in case of breach of formalisation rules).[24] Besides, it is to be observed that many formalisation rules remain only the rules of construction and are not linked with consequential rules, the so-called *lex imperfectae*. It means that any legal consequence is not connected with the breach of formalisation rules of this type. The indicated forms of defects apply to all types of procedural actions, but they are most fully exemplified by defects in evidentiary actions.

Therefore, one could ask, what is the main contribution of the referenced concept to legal sciences? The separation of constitutive rules (rules of conventionalisation) and rules of formalisation indicates that the rules for the performance of legal acts are diversified. Only a few of them have the status of constitutive rules, and most are rules of formalisation, the violation of which – sometimes – does not cause any negative legal consequences. The referenced concept also has two other important features relevant to the interpretation of legal actions; namely, it allows for imposing the sanction of nullity and non-existence (in the legal sense) – *negotia nulla, nogotia non existens* - when it comes to legal systems that do not provide statutory sanction of nullity. It is critical, as the recognition that a rule has a constitutive status and a primary meaning enables the declaration of nullity (*nullity ex tunc*) of an act performed in violation of a constitutive rule, **even when at the level of statutory regulation, such a sanction does not exist.**

Of course, the discussion on how to determine that a rule has the status of a constitutive rule for a legal (procedural) act of a given type is beyond the scope

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rules inspired Czepita to distinguish the rules of formalisation of conventional acts and devise a related mechanism of formalisation See: B. Janusz-Pohl (2017a), *op. cit.,* 25 *et seq*.

22 Cf. S. Czepita (2016), *op. cit*., 138–139; S. Czepita (1996), *op. cit*., 146 *et seq*.

23 **Effectiveness has been understood in a specific way and was linked with the typical purpose (result) for the given legal action. So from this perspective, effective legal action is valid action performed under formalisation rules for the given type, and its effect is described by law**.

24 This approach given by B. Janusz-Pohl (2017b), *passim*.

of this discussion. Other studies have been devoted to this issue[25]. At this point, we can point out that constitutive rules, as rules of validity, refer to what on the background of the concept at hand is called the material substrate for a given conventional action (legal action), so-called primary constitutive rules. In addition, constitutive rules concern the existence of competence in the legal system to perform an action of a given type; in some cases, these rules may have the status of temporal rules. For further consideration, the two types of constitutive rules, i.e. rules on the material substrate and rules on the competence to perform a conventional act (legal action) of a given type, are pivotal.

Referring to the first type of constitutive rules, the initial assumption states that for any conventional act of a given individual (even though the conventional act may be attributed to many individuals when it comes to collective actions), a necessary condition for this individual to perform a given conventional act is performing a specific person(s) behaviour in a specific way. This behaviour is called 'material substrate' for the given conventional action (here: legal action).[26] Just to mention, one should indicate that material substrate, in initial Searle's conception, has been denominated as an elementary act. Moreover, material substrates of conventional acts may vary (different behaviours, i.e. expression of knowledge and expression of intent, shall be distinguished). In our case, the material substrates consisting of the expression of knowledge are of core importance. As in both cases (Gafgen and Ćwik), the alleged pieces of evidence were in some connection with the expression of knowledge of the defendant.

Yet, let us recall that following the findings of the concept of conventional acts in law applied as an instrument for interpreting the criminal process, it is established that the subject performing a conventional action must carry out the material substrate of this act in a conscious manner. Exogenous coercive factors must not limit the will of such a subject. In my previous research, I established that the consciousness of the person performing the legal action in criminal proceedings must extend to the execution of the behaviour (being the material substrate of the given action). At the same time, it's (behaviour) freedom means that the person's will, unfettered by any exogenous factors, necessarily prompts it.[27] At this point, it can also be mentioned that the impact of the use of deception has already been discussed.[28]

Assumptions on how to perceive the material substrate for a conventional act directly correspond with the ill-treatment *sensu largo* formulas. After all, it is not difficult to see that regardless of whether the legal system employs the sanction of nullity, the performance of a legal act, including an act of interrogation in violation of Article 3, and therefore in violation of freedom of expression,

25 *Ibidem*.

26 Cf. S. Czepita (2016), *op. cit*., 138–139; S. Czepita (1996), *op. cit.,* 146 *et seq*.

27 See B. Janusz-Pohl (2017a), *op. cit*., 70.

28 *Ibid*., 80 *et seq*. and the literature referred therein. Although such practices are incorrect, it seems that their application in Polish law does not allow to invalidate in an unambiguous way the defendant's deceptive statement of intent.

determines its invalidity. However, as indicated earlier, the criminal process from the point of view of the concept at hand represents a certain sequence; the nullity of a legal act from this perspective is seen as an empty chain of this sequence. Subsequently, it is necessary to assess how this empty cell affects the entire process and, consequently, the judgment that was passed. In previous studies, it had been established that, as a principle, constitutive rules for legal (procedural) actions do not assume the automatism that can be observed in the case of constitutive rules for games (e.g., chess games). In the case of the latter, after all, a violation of a constitutive rule and thereby making an invalid move nullifies the entire game. The issue of constitutive rules linked to the material substrate for a legal act will be relevant to the analysis of the Gäfgen v. Germany case.

The second case of a constitutive rule relevant for further discussion involves a constitutive rule that determines the competence (power, entitlement) of a given entity to perform a certain legal action. In light of the concept at hand, the existence of such competence in the legal system is a condition for the validity of the legal action. Previous studies have shown that the issue of establishing competence (entitlement) is, however, very complex; for example, in the case of enforcement authorities in criminal proceedings, the competence does not always address specific actions but has the status of general competence, what is covert by ex officio principle and take all necessary investigative actions necessary to determine whether a crime has been committed. Meanwhile, in the case of private players, as a rule, the performance of a legal (procedural) act requires an individualised competence (to file an appeal, take evidence, and attend a hearing). When analysing the entitlement to perform an act, it is also necessary to consider the assumption that a valid and effective procedural act can only be performed in a criminal trial. So that it cannot be performed outside the criminal proceedings, this finding will be relevant to the Ćwik v. Poland case analysis.

3.2. Case of Gäfgen – discussion

In an attempt to relate the indicated assumptions to the two cases examined by the ECtHR, let us begin the analysis with the case of Gäfgen v. Germany. Briefly highlighting the facts, it should be pointed out that on 27 September 2002, Magnus Gäfgen (G.), a student in Frankfurt am Main, lured Jakob von Metzler (J.) into his flat, killed the eleven-year-old boy, and hid his dead body. Subsequently, he extorted the parents for a ransom. When G. picked up the ransom, he was under police surveillance. G. indicated that two kidnappers held the boy hidden in a hut by a lake. Concerned about the life of J., D., deputy chief of the Frankfurt police, ordered E., an officer, to threaten G. with considerable physical pain and, if necessary, to subject him to such pain to make him reveal the boy´s whereabouts. Because of E.´s threat, G. disclosed the whereabouts of J.´s corpse.

The applicant, in this case, alleged that the treatment to which he had been subjected during police interrogation concerning the whereabouts of a boy,

J., constituted torture prohibited by Article 3. He further alleged that his right to a fair trial as guaranteed by Article 6, comprising a right to defend himself effectively and a right not to incriminate himself, had been violated in that evidence obtained in violation of Article 3 had been admitted at his criminal trial.

In assessing the treatment to which the applicant was subjected, the Court notes that it is uncontested between the parties that during the interrogation that morning, the applicant was threatened by detective Officer E., on the instructions of the deputy chief of the Frankfurt am Main police, D., with intolerable pain if he refused to disclose J.'s whereabouts. The process, which would not leave any traces, was to be carried out by a police officer specially trained for that purpose, who was already on his way to the police station by helicopter. It was to be conducted under medical supervision. Indeed, this was established by the Frankfurt am Main Regional Court both in the criminal proceedings against the applicant and the criminal proceedings against the police officers. Furthermore, it is clear both from D.'s note for the police file and from the Regional Court's finding in the criminal proceedings against D. that D. intended, if necessary, to carry out that threat with the help of a "truth serum" and that the applicant had been warned that the execution of the threat was imminent. Having regard to the relevant factors, the Court reiterated that according to its own case-law, a threat of torture could amount to torture. In particular, the fear of physical torture may itself constitute mental torture. However, the Court considered that the method of interrogation to which the applicant was subjected in the circumstances of this case amounted to inhuman treatment prohibited but that it did not reach the level of cruelty required to attain the threshold of torture. Nevertheless, in the given case, treatment was considered to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering. The Chamber considered that Detective Officer E. had threatened the applicant on the instructions of the deputy chief of the Frankfurt am Main police, D., with physical violence, causing considerable pain to make him disclose J.'s whereabouts. It found that further threats alleged by the applicant or alleged physical injuries inflicted during the interrogation had not been proved beyond reasonable doubt.

Moreover, the Court has concluded that in the particular circumstances of the applicant's case, the failure to exclude the impugned real evidence, secured following a statement extracted by means of inhuman treatment, did not have a bearing on the applicant's conviction and sentence. As the applicant's defence rights and his right not to incriminate himself have likewise been respected, the whole trial must be considered fair. The Court has stated that a criminal trial's fairness is only at stake if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings. In the case at hand, the conviction was based exclusively on the new, full confession by the defendant. The Court thus held that the causal link between the threat of torture and the conviction had been broken as the breach of Article 3 in the investigation proceedings had no bearing on the applicant's confession at the trial, andthe trial as a whole was fair

in terms of Article 6. At the beginning of the proceeding, G. confessed voluntarily that he had murdered J.,and the court instructed him on his rights.The judgment was primarily based on this confession. The impugned items of real evidence only were used to test their veracity. The ECHR concludes: "It can thus be said that there was a break in the causal chain leading from the prohibited methods of investigation to the applicant´s conviction and sentence in respect of the impugned real evidence." A single "unfair" procedural act is able to make the whole trial unfair but does not do so necessarily. The unfairness of the trial is not a matter of necessity or causation but of an assessment of the trial as a whole.

Interpreting the Gäfgen case in accordance with the concept of constitutive rules, it can, therefore be recognised that the ECtHR confirmed the constitutive nature of the interrogation rule, which has its source in the wording of Article 3 ECHR. Let us further note that even if there had not been any legal source for this rule (as art. 3 ECHR is), we would have adopted such a constitutive rule based on a general assumption for this concept in relation to the material substrate for a conventional act (the primary constitutive rule). Due to the fact that for a given behaviour to be considered a material substrate, its performance must be conscious and voluntary and therefore unfettered by external factors of a coercive nature. At the same time, the interrogation of a suspect as a procedural act performed in violation of the indicated rule must be qualified as void. In addition, such qualification obtains under the applied concept regardless of whether the legal system in question operates the sanction of nullity ex-lege. In the present case, this sanction arises due to the violation of a constitutive rule (primary rule) concerning the substantive substrate of a conventional act (interrogation act). However, as indicated previously, the nullity of such an action is only an empty chain in the sequence, and it depends on the assessment of its impact on the judgment handed down as to whether the entire process is considered defective. In conclusion, it should therefore be considered that in the Gäfgen case, the ECtHR applied an interpretation that coincides with the concept of constitutive rules.

3.3. Case Ćwik – discussion

Meanwhile, the second case, Ćwik v. Poland, differed significantly from the case of Gäfgen v. Germany (no. 22978/05, ECHR 2010). In contrast to Gäfgen, in the present case, the violence had been used by private individuals and not towards the applicant but a third person outside of the criminal trial. The Court has reiterated that the use in criminal proceedings of evidence obtained as a result of a person's treatment in violation of Article 3 - irrespective of whether that treatment is classified as torture, inhumane or degrading - made the whole proceedings automatically unfair, in violation of Article 6. This is irrespective of the evidence's probative value and whether its use was decisive in securing the defendant's conviction. Thus, in this judgment, the Court held that the sanction of nullity relating to one piece of evidence extends to the entire proceedings.

In case Ćwik v. Poland the domestic court determined the facts of the case, inter alia, on the basis of a recorded "interrogation" of K.G. who, together with the applicant (Ćwik), participated in the unlawful practice of smuggling cocaine from the USA to Poland. Both K.G. and the applicant (Ćwik)came into conflict with other members of the organised group. Consequently, K.G. was abducted and tortured by the other members of the group. During the "private interrogation" K.G. disclosed information on the location of the smuggled cocaine and cash. K.G. was later released from the abductors by the police, who also entered into possession of the recording of "private interrogation". What was crucial was that the recording was then used as a piece of evidence in the criminal proceedings against the applicant (Ćwik), who refused to give explanations during the trial and pleaded not guilty. In its judgment in Ćwik v. Poland, the Court pointed out that the prohibition outlined in Article 3 ECHR had previously been referred in the case law not only to public officials but also to private individuals. Particularly, in cases concerning extradition or expulsion, the Court examines whether transferring a person to another jurisdiction may expose him or her to a real risk of maltreatment by private persons. But it was only in the case Ćwik v. Poland that the Court linked the prohibition expressed in art. 3 to the behaviours of individuals seen as pieces of evidence. The Court had already held in a series of cases that admission of statements obtained as a result of torture or of other ill-treatment in breach of Article 3 into evidence in criminal proceedings renders the proceedings as a whole unfair. A common thread of all those cases had been the involvement of State agents in obtaining impugned statements from the accused or from a third partyThe question before the Court, which had not arisen before, was whether the rule mentioned above might be applicable to the instant case in which information had been obtained from a third party as a result of ill-treatment inflicted by private individuals, even where there had been no evidence of involvement or acquiescence of State actors. The Court finds that it is equally applicable to the admission of evidence obtained from a third party due to ill-treatment proscribed by Article 3 when such ill-treatment was inflicted by private individuals, irrespective of the classification of that treatment. In the opinion of the Court, the domestic court failed to consider the fact that the evidence had been obtained in violation of the absolute prohibition. In the judgment, the Court emphasised that the protection against conduct proscribed under Article 3 ECHR is the state's positive obligation, also when inflicted by private individuals. This assertion was supported by reference to multiple rulings on the state's positive obligations, including procedural ones, arising from Article 3 ECHR[29].

In the Court's view, the very admission of the impugned transcript into evidence in the criminal proceedings against the applicant rendered the proceedings as a whole unfair, in breach of Article 6 para. 1 ECHR.In the context of the case law at hand, a question arises of whether the use of evidence obtained outside criminal proceedings (prior to their instigating) by private individuals

29 See more: M. Wąsek-Wiaderek, *op. cit.,* 343–374.

as a result of ill-treatment may be perceived as the establishment by the state of a legal framework for tolerating the collection of evidence by private individuals in violation of Article 3 ECHR, and thus for tolerating such conduct in general. In Ćwik case, evidence (recording of statements) was produced outside the criminal proceedings, before its initiation and, more importantly, for other purposes. As Wąsek-Wiaderek rightly observed, it had been secured in the course of lawful action of the Police (search), and its use in the criminal trial could not in any way reduce K.G.'s protection against torture or inhuman treatment.[30]

Applying the assumptions of the concept of constitutive rules to the case of Ćwik v. Poland, one shall observe that so-called private interrogation was not a legal action in the trial, and from this perspective, the use of ill-treatment methods must be observed separately as a criminal offence of individuals. Thus, from the perspective of the criminal process, private interrogation cannot be qualified from the angle of validity (nullity) and therefore, from the point of view of a violation of a constitutive rule is excluded. Nor is there any question of private actors' competence (legitimacy) to conduct interrogations. This private interrogation, in violation of Article 3 in the legal sphere, can only be assessed as another crime and consequently concerns the question of whether evidence in a criminal trial can be derived from a separate crime (disconnected with the given procedure). In addition, it may be pointed out that the issue here is only the content of statements made under ill-treatment, not any material evidence obtained as a result of this private interrogation. Thus, only a possible exclusionary rule in the frame of the statements' content comes into play.

It should be mentioned that the question of the admissibility of such evidence is most often the subject of national regulations within the framework of the issue of so-called evidentiary bans. The Polish system does not provide for an exclusion rule concerning evidence derived from a separate crime (not connected to the ongoing proceeding and not for the purposes of such proceedings). Therefore, in the analysed case, there were no grounds for excluding this evidence as inadmissible in criminal proceedings conducted in Poland.

From the perspective of the concept of constitutive rules - thus, with the assumption that in the absence of clear indications of statutory sanctions of invalidity (nullity) of proceedings *ex lege*, the assessment of evidence derived from a crime in the plane of its reliability is still permissible, especially taking into account the circumstances of the case and the incriminating nature of this evidence for the accused.

Meanwhile, as indicated at the outset, the Court reiterated that the use in criminal proceedings of evidence obtained as a result of a person's treatment in violation of Article 3 - irrespective of whether that treatment is classified as torture, inhuman or degrading treatment - made the proceedings as a whole automatically unfair, in violation of Article 6. This is irrespective of the probative value of the evidence and irrespective of whether its use was decisive in securing

30 *Ibidem*.

the defendant's conviction. Yet applying the constitutive rules concept argues in favour of a less automatic rule of weighing the relevance of criminal evidence to the factual findings that form the basis of the decision in a given case. Given this state of affairs, the court's stance should be critically assessed. Additionally, one shall observe that, in the case against Poland, a Central European country, the Court invoked a strong version of the deterrence principle by extending the effects of a violation of Article 3 ECHR to the extra-procedural actions of private individuals.

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The considerations presented in this study dealt with selected issues related to the interpretation of Article 3 ECHR. The centre of work is a critically oriented review of two cases of similar gravity in which the Court referred Article 3 to evidentiary proceedings.

The article seeks to bring out the perspective of Central Europe, noting that the Court has grounds for the adoption of probabilistically oriented factual presumption based on the one hand on frequency and intensity of violations and, on the other hand, on the level of guarantees of the law enforcement process in Central Europe. A certain proxy for this optics is made apparent by the analysis of the Gäfgen and Ćwik cases, in which the court showed a great deal of scepticism about the standards of fairness in the functioning of Polish courts, tightening the paradigm for the elimination of evidence obtained under ill-treatment conditions and its influence for the evaluation of the whole procedure in question. Of course, the analysis presented here does not contain any hard conclusions but only outlines some hypotheses that require follow-up research.

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