Abstract

This PhD thesis focuses on the legality of evidence in criminal proceedings in the light of the European Convention on Human Rights ("the Convention"). At first sight it might seem that this field is only remotely connected with the Convention. In fact, none of the provisions of the Convention expressly regulates issues of evidence and the European Court of Human Rights ("the ECtHR") traditionally refuses to rule on the legality and the admissibility of evidence having regard to its subsidiary role and the doctrine of fourth instance.

Yet the days when the question of the legality of evidence was exclusively a matter of domestic law are now long gone, as is evidenced by the relatively abundant jurisprudence of the ECtHR and the former European Commission of Human Rights (jointly "the Convention organs"). Moreover, Strasbourg case-law has been evolving dynamically in this area. It is thus one of the challenges currently facing both legal science and practice which stand before the difficult task to capture and influence these developments.

The gathering of evidence in criminal proceedings often conflicts with the fundamental rights of individuals. Consequently, it is not surprising that the jurisprudence of the Convention organs dealing with issues of evidence has developed particularly in the area of criminal proceedings. This thesis analyzes categories of evidence that have been dealt with by the Convention organs the most: evidence obtained by State entrapment; torture evidence and evidence obtained by other forms of ill-treatment; evidence gathered in breach of the right to privacy and finally testimonies of witnesses whom the defence had only a limited possibility to examine.

The thesis thus analyzes topical issues which raise a number of legal and ethical dilemmas such as the legitimacy of the use of so-called *agents provocateurs*, relativization of the prohibition of torture, interceptions, surveillance and other forms of restrictions on privacy, anonymous and co-accused witnesses. In all these areas, the Convention organs have struggled to find a balance between the conflict of the interest of the society to secure effective protection from the most serious forms of criminality and protection of fundamental rights. Accordingly, this thesis traces the boundaries which have to be respected by a State if it is to be regarded as based on the rule of law.

The issues analyzed in this thesis receive very diverging reactions even from the judges of the ECtHR. While some esteem that an international tribunal should not interfere with issues of evidence, others are of the view that criminal proceedings are not fair if the verdict is based on evidence obtained by a breach of the law and *a fortiori* of the fundamental rights guaranteed by the Convention.

While the majority of the judges have been reluctant to thwart the efficiency of prosecution, a relatively strongly represented minority have constantly called for a full and more effective protection of the fundamental rights guaranteed by the Convention. The field analyzed in this thesis is thus influenced not only by legal and value judgments but also by the pressure put on an international tribunal by 47 member states. As a result, it seems even more important to define precise criteria for the assessment of the legal issues discussed in this thesis.

The central issue analyzed by the author is whether there is a Strasbourg doctrine of legality of evidence in criminal proceedings. The author submits that such a doctrine does not exist yet. It is still in the process of formation on the basis of exceptions from the doctrine of fourth instance admitted by the Convention organs and, in particular, the ECtHR in the abovementioned categories of evidence. The case-law in each of these categories has been developing on a case by case basis without sufficient global reflection on legality of evidence as a whole and the legal consequences that should result from such unlawfulness. This is closely linked with the fact that the issue of evidence has been somewhat of a taboo as it constitutes, at least officially, a forbidden zone for the ECtHR.

At present, the ECtHR case-law is still in the phase of development where competing views are expressed regarding the principles on which the Strasbourg doctrine of legality of evidence should be based. Key judgments are thus often adopted by small majorities and strong dissenting opinions are frequently attached. The ECtHR approach in particular areas of evidence is unstable and constantly evolving. This necessarily decreases the legibility of the European standard in the area of evidence in criminal proceedings which places the uneasy task of faithfully applying the Convention in the light of the ECtHR judicial interpretation on domestic organs. It is thus the object and purpose of this thesis to contribute to better knowledge of the Strasbourg case-law in this area having regard to its importance at domestic level.

The thesis is structured into four chapters whose order endeavours to reflect the spectrum starting with evidence which is absolutely inadmissible and ending with evidence which is relatively inadmissible. Chapter one focuses on *agent provocateur* and State entrapment as a means for collecting evidence. In the judicial precedent adopted in the case of *Teixeira de Castro v. Portugal* the ECtHR derived from Article 6 of the Convention a prohibition of State entrapment and of the use of tainted evidence which it has since then consistently applied. The author analyzes the case-law in this area and defends the position of the ECtHR.

Chapter two deals with evidence obtained by breach of Article 3 of the Convention which prescribes an absolute prohibition on torture and on inhuman and degrading treatment. The author follows the distinction introduced by the ECtHR between gathering of evidence, which is analyzed under Article 3 of the Convention, and the subsequent use of evidence, which is analyzed from the perspective of the right to a fair trial. On the basis of a critical analysis of the Strasbourg case-law and, specifically, the judgment of the Grand Chamber in the case of *Gäfgen v. Germany*, the author agrees with the view of the dissenting minority that the current position is unsustainable. An alternative proposal of a solution is submitted which would secure a higher standard of protection from torture and other forms of ill-treatment as well as secure greater consistency and legibility of the Strasbourg case-law.

Chapter three focuses on evidence collected by breaches of the right to privacy guaranteed by Article 8 of the Convention. Having regard to the approach of the ECtHR, the chapter follows the structure of Chapter two. First, the criteria of assessment of the legality of collection of evidence are examined. Subsequently, their use in criminal proceedings is scrutinized. The author formulates the view that the protection of privacy has nowadays a comparable importance with the protection against ill-treatment. As a result, a different approach to both categories of evidence by the ECtHR is unjustified, as has been constantly stressed by dissenting judges, and the ECtHR should formulate an exclusionary rule in a way analogous to the suggestion submitted in Chapter two.

Finally, Chapter four of the thesis analyzes issues regarding incriminating witness testimonies obtained while the right of the accused to examine or have examined witnesses against him/her was limited, and investigates the use of those testimonies in criminal proceedings. The principles applied by the ECtHR in this area have undergone

a significant evolution during recent months and several decisions adopted by the time of submission suggest that this development has not yet come to an end. First, the chapter analyzes issues regarding hearsay evidence - testimonies of witnesses whom the defence did not receive any opportunity to examine. Further, it deals with testimonies of anonymous and co-accused witnesses. The author takes a critical stance towards the ECtHR tendency to relativize the right to examine witnesses against the accused, a right which according to the wording of Article 6 § 3 of the Convention represents one of the minimum safeguards of a fair criminal trial. Yet, the meaning of this right has been significantly reduced and, as the case-law currently stands, not much remains of it.

The thesis submitted by the author argues that whilst it is not possible to speak about a Strasbourg doctrine of legality of evidence yet, the ECtHR should deploy its efforts to formulate such a doctrine. Formulation of a doctrine of legality of evidence is of a crucial importance, should the Convention be a legible instrument at the domestic level and should the Strasbourg case-law become consistent, understandable and foreseeable.

The author further suggests that such a doctrine should be inspired by the principles of subsidiarity and the doctrine of fourth instance while respectful of the value orientation of the Convention. This means that the fundamental rights enshrined in the Convention must receive effective protection, otherwise, they would become merely “theoretical and illusory”. As a consequence, the focal point of the jurisprudence on admissibility of evidence should shift from an overall examination of the fairness of the proceedings taken as a whole to the provisions guaranteeing fundamental rights whose primary breach occurred due to the method by which evidence was collected. It is from these provisions that an exclusionary rule can, and should be derived in order to sanction the primary breach.