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## **Explication of evidentiary prohibitions on the ground of the criminal (Article 168a CCrP) and administrative procedure**

### **Abstract**

Prohibition of using evidence obtained contrary to the law is defined in the views of legal scholars and commentators and in the literature as the doctrine of the fruits of the poisonous tree. The aim of the paper is to discuss the subject matter of limiting the freedom of proof both on the ground of criminal procedure, especially through the lens of Article 168a CCrP,<sup>1</sup> and administrative procedure. The author stays convinced that the above-mentioned theory should be applied in both these types of procedures, primarily due to the constitutional right afforded to everyone to a public, fair and lawful examination of a given case by public and investigative authorities.

### **Key words:**

evidence, prohibited act, principle of legality, trial, preparatory proceedings, administrative case

## **Introduction**

The Constitution of the Republic of Poland establishes a few principles of which, as undeniably seems, the right of everyone to a public, fair and lawful examination of a given case by public and investigative authorities was instituted, as well as the possibility to have a given case heard by an independent and impartial court. Thus, the question whether there is a possibility to obtain evidence by means contrary to norms of law, even for the needs of the proceedings, both criminal or administrative, may seem rhetorical.

In practice it is no longer so evident.

The prohibition of using evidence obtained illegally is defined in the legal thought and literature as the fruit-of-the-poisonous-tree doctrine. Just like a poisonous tree cannot bear good fruits, an investigation tainted by illegal actions should not result in charging a man while an administrative case cannot be duly resolved.

The aim of the paper is to discuss the issues of evidentiary prohibitions in a criminal and administrative procedure and to establish whether it was substantiated for the legislator to prohibit the use of evidence obtained by means contrary to the law in both these procedures.

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<sup>1</sup> Act of 6 June 1997 The Code of Criminal Procedure, consolidated text, Dz. U. (Journal of Laws) of 2018 item 1987 as amended.

## The theory of the fruit of the poisonous tree

The beginnings of the doctrine of the fruits of the poisonous tree need to be sought in the case law of the Supreme Court of the United States. In its 1920 judgment,<sup>2</sup> the court decided it inadmissible for government officials to use information obtained illegally as evidence in criminal proceedings. It was obtained by representatives of the Department of Justice (and staff of the US Marshals Service) by searching the premises and taking documents without an appropriate warrant, which, besides, constituted violation of the Fourth Amendment to the US Constitution.<sup>3</sup> The metaphor “fruit of the poisonous tree” itself which has entered into common use in the legal language also in European countries, was used in a 1939 judgement of the US Supreme Court.<sup>4</sup> It was in this ruling that the prohibition of basing the prosecution on evidence coming both directly and indirectly from activities or actions infringing the law was emphasized.

Evidence obtained on the basis of other evidence or directly illegal information (“indirectly illegal evidence”) is figuratively called fruit of the poisonous tree, while evidence coming directly (primarily) from activities or actions that are contrary to the law (“directly illegal evidence”) is the said poisonous tree.

The American criminal procedure excludes both the poisonous tree and its fruits, and thus also evidence most often discovered later, if obtained in a manner contrary to the law or on the basis of knowledge obtained from unlawful information.<sup>5</sup> The doctrine of the fruit of the poisonous tree is applied in federal and state courts.<sup>6</sup>

It needs to be noted that the above theory is an original solution of the American legal thought and practice, developed anyway on the ground of the exclusionary rule. According to it the court is obliged to exclude evidence obtained illegally from the proceedings. Moreover, the doctrine of the fruit of the poisonous tree applies primarily in criminal cases and concerns mostly public authorities or state bodies, since by assumption it is supposed to guarantee the citizen-individual who is a party in these proceedings a fair conduct of the trial, including obtaining legal evidence.

## The aim and character of evidentiary prohibition in the Polish criminal procedure – Article 168a CCrP

The Polish law regulating a criminal trial<sup>7</sup> is one of the most frequently amended acts of law. From the date it was published until the end of November 2019 it was amended 154 times, where there has been no single year for over 20 years now that no amendment has been made.

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2 Case *Silverthorne Lumber Co. Inc. v. United States*, 251 U.S. 385 (1920).

3 On the factual status and decisions in the discussed matter see more, in: P.M. Lech, *Owoce zatrutego drzewa w procesie karnym. Dowody zdobyte nielegalnie*, “Palestra” 2012, no. 3–4, pp. 36–37.

4 Case *Nardone. v. United States*, 308 U.S. 338 (1939).

5 *West's Encyclopedia of American Law*, 2nd Edition, Thomson & Gale 2005, Vol. 5, p. 9.

6 S. Potter, *The Road Map to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases*, in: “Columbia Law Review” 1983, Vol. 83, pp. 363ff.

7 Act of 6 June 1997 The Code of Criminal Procedure, consolidated text, Dz. U. (Journal of Laws) of 2018 item 1987 as amended.

The criminal procedure was subject to detailed remodelling in 2015/2016 due to the introduction and then “withdrawal” of the adversary nature of the criminal trial in place of the existing so-called relatively inquisitorial trial.<sup>8</sup> The amending act of 27 September 2013 on amending the act – The Code of Criminal Procedure and certain other acts,<sup>9</sup> with a very long *vacatio legis*, as the law entered into force on 1 July 2015, introduced a model of procedure based on the assumption that evidentiary procedure of preparatory proceedings is fundamentally supposed to prepare a basis for an indictment submitted by the prosecutor, as it is to be carried out for the prosecutor indeed, not for the court. In extraordinary circumstances – in so much as examining the evidence before a court is not possible – it will be used by the court as the basis for establishing facts of the case.<sup>10</sup>

In court proceedings the evidentiary initiative was given to the parties. The amended Article 167 CCrP sets it forth *expressis verbis*. Only in exceptional cases did it allow examining the evidence by the court who was in principle supposed to play the role of a passive arbitrator issuing a just ruling in the end, while the parties to the proceedings were to convince it to their reasons, among others by means of evidentiary motions. As a consequence, especially on the side of the accused, a broad possibility of bringing “private evidence” was created.<sup>11</sup> In order to prevent the certain arbitrary behaviour in participants to the proceedings’ searching for evidence “by all means”, the provision of Article 168a CCrP was introduced.<sup>12</sup>

It was the first general provision introduced to the Polish criminal procedure that regulated admissibility of use of evidence obtained unlawfully.<sup>13</sup>

As pointed out in the reasoning of the then draft amending act of 27 September 2013 “it is suggested that the possibility of introducing into the trial evidence that was obtained illegally be clearly restricted, save that it is suggested that the inadmissibility of its use be constituted only for the evidence that was obtained for the purpose of a criminal trial by means of a prohibited act (new draft Article 168a CCrP). It must exclude the possibility of installing wire-tapping at the request of the party to the trial or conducting a search”.

It was in this assumption among others, next to a broader use of consensual modes, that the Codification Commission saw a departure from an inquisitorial nature of jurisdictional proceedings in favour of their contradictory nature, which in turn was to serve best respecting the right of the participants to the proceedings.

The evidentiary prohibition introduced pursuant to Article 168a should be construed as an institution protecting the evidentiary system from infringements of the law and from the requirement to accept that evidence in evidentiary proceedings due to the expansion of the

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8 P. Kardas, *Mieszany, kontradiktoryjny czy inkwizycyjny proces karny? Rozważania o kierunku projektowanych zmian Kodeksu postępowania karnego*, in: *Czasopismo Prawa Karnego i Nauk Penalnych. Księga dedykowana dr Ewie Weigend*, S. Waltoś (ed.), Warsaw 2011, p. 181.

9 Dz. U. (Journal of Laws) of 2013 item 1247.

10 Statement of reasons for the draft act on amending the act – the Code of criminal procedure and certain other acts, the Sejm Paper no. 870, p. 4.

11 L. Mazowiecka, *Prokuratura w Polsce (1918–2014)*, Warsaw 2015, p. 173, see also A. Bojańczyk, *Dowód prywatny w postępowaniu karnym w perspektywie prawnoporównawczej*, Warsaw 2011, p. 21.

12 S. Pawelec, *Aktywność dowodowa obrońcy w zreformowanym procesie karnym*, in: *Prawo do obrony w postępowaniu penalnym*, M. Kolendowska-Matejczuk, K. Szwarz (eds.), Biuro Rzecznika Praw Obywatelskich, Warsaw 2014, p. 66.

13 W. Jasiński, *Zakaz przeprowadzenia i wykorzystania w procesie karnym dowodu uzyskanego do celów postępowania karnego za pomocą czynu zabronionego (art. 168a k.p.k.)*, in: *Obronca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach*, P. Wiliński (ed.), Warsaw 2015, pp. 360–361.

sphere of evidentiary activity of parties to the proceedings.<sup>14</sup> The established prohibition has a general, absolute but non-complete character.

Its absolute nature is expressed in the fact that a situation where an evidentiary prohibition could be waived has not been prescribed for.<sup>15</sup>

Its non-completeness results from the fact that the prohibition refers only to examining and using illegal evidence within the meaning of Article 1§ 1 of the Criminal Code<sup>16</sup> obtained for the purpose of criminal proceedings by means of a prohibited act. However, it is possible to use it through other means of evidence.<sup>17</sup> Referring *expressis verbis* to the unlawfulness of evidence in the meaning of Article 1 § 1 CC means exclusion of inadmissibility of given evidence if primarily it was obtained for a different purpose, e.g. in a divorce case, thus is a civil procedure, or even a prohibited act specified in the Act of 10 September 1999 Fiscal Criminal Code<sup>18</sup> or the Act of 20 May 1971 The Code of Minor Offences.<sup>19</sup> Therefore, the awareness and purposefulness of obtaining it is essential.

The discussed prohibition has a universal character since irrespective of the type of evidence that was to be introduced into the trial and of the person would like to introduce it, it will be impossible if it was obtained by means of a prohibited act for the needs of a given criminal case (the so-called directionality of prohibition).

The provision of Article 168a CCrP “survived” in an unchanged form for a mere ten months. The amending act of 11 March 2016 on amending the act – the Code of Criminal Procedure and certain other acts,<sup>20</sup> which in a way restored the model of a criminal procedure from before 1 July 2015 reemphasizing the superiority of substantive truth and the court’s active role in its course, in the first version (The Sejm Paper no. 207) repealed Article 168a CCrP, and then reinstated it (The Sejm Paper no. 276), though restricting its scope quite significantly. It was because the legislator believed that the board scope of the evidentiary prohibition, regardless of the circumstances of obtaining it, disqualifies the evidence not so much pursuant to the legal and procedural criteria specified by evidentiary prohibitions, but according to substantive legal and criminal criteria concerning offensive action of participants to the proceedings and persons not participating in the process (or even only action prohibited under criminal law – Article 1 § 1 CC).<sup>21</sup>

As a consequence, the undertone of Article 168a CCrP was completely changed, emphasizing the general possibility of using “the fruit of the poisonous tree” except for exclusions directly specified therein.

The limitation of the evidentiary prohibition involved disqualification of evidence obtained only as a result manslaughter, wilful commission of a grievous bodily injury or deprivation of freedom, and in the case of a public official if in connection with the performance of his duties

14 A. Lach, *Dopuszczalność dowodów uzyskanych z naruszeniem prawa w postępowaniu karnym*, “Państwo i Prawo” 2014, no. 10, pp. 43–44.

15 *Ibidem*, p. 43.

16 Act of 6 June 1997 The Criminal Code, consolidated text, Dz. U. (Journal of Laws) of 2019 item 1950 as amended; hereinafter: CC, criminal code.

17 W. Jasiński, *Zakaz przeprowadzenia...*, p. 364.

18 Consolidated text Dz. U. (Journal of Laws) of 2018, item 1958 as amended.

19 Consolidated text Dz. U. (Journal of Laws) of 2019, item 821 as amended.

20 Dz. U. (Journal of Laws) of 2016 item 437.

21 R. Kmiecik, *Kontrowersyjne unormowania w znowelizowanym kodeksie postępowania karnego*, “Prokuratura i Prawo” 2015, no. 1–2, p. 17.

he obtained the evidence in violation of procedural law or by commission of a prohibited act referred to in Article 1 § 1 CC.

## The consequences of establishing the prohibition

The addressees of the norm of Article 168a CCrP do not only comprise non-institutional parties (the accused or subsidiary prosecutor), but also investigative bodies and the public prosecutor.

In jurisdictional proceedings the court takes a decision to allow or dismiss the given evidence. Where an evidentiary motion was filed, even included in the indictment by the prosecutor and meeting the criteria of Article 168a CCrP, it should be dismissed pursuant to Article 170(1)(1) CCrP as inadmissible. If given evidence was already introduced to a pending criminal case and then it turns out that it was inadmissible in light of Article 168a CCrP, it should be eliminated since it cannot form the established facts in a given case.<sup>22</sup> Excluding it does not result in removing given information or document (or another form of evidence) from the case files, but only from the basis for a future ruling.<sup>23</sup> This is because it is a decision of a procedural body which, similar to others, is subject to assessment and verification of its validity e.g. in the course of appellate proceedings.<sup>24</sup>

It is worth looking in the discussed scope at the issues related to the constitutionality of the adopted regulations. The Court of Appeal in Wrocław in its judgment of 27 April 2017 (file no. II AKa 213/16) ruled that evidence obtained by officials with the infringement of the limits of provocation cannot be admitted in the case.<sup>25</sup> As a consequence, the evidence was obtained not only by means of a prohibited act, but also with the infringement of the provisions of the Constitution of the Republic of Poland as well as the European Charter of Human Rights. Giving reasons for its stance, the court stated that “evidence may be deemed inadmissible if it was obtained in violation of procedural law or by means of a prohibited act at the same time infringing the provisions of the Constitution of the Republic of Poland (e.g. Article 30, 47, 49 or 51). In such a situation the statutory limitation expressed in the phrase ‘exclusively due to the fact that it was gained in violation of procedural law or by commission of a prohibited act’ is not applicable since also norms of constitutional law were infringed here”. This ruling, though issued after amending Article 168a CCrP, quite clearly favours the applicability of the fruit-of-the-poisonous-tree doctrine.

By a request of 6 May 2016, the Commissioner for Human Rights filed a motion at the Constitutional Tribunal for declaring the amendment of the provision of Article 168a CCrP as unconstitutional (file no. K 27/16). Due to the changes in the functioning of the Tribunal itself, universal criticism towards it caused by legal and constitutional doubts as to the correct

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22 A. Lach, *Dopuszczalność...* pp. 50–51.

23 A. Seremet, *Prokuratura a kontradiktoryjny model postępowania sądowego. Wyzwania i możliwe zagrożenia*, “Prokuratura i Prawo” 2015, no. 1–2, pp. 171–172.

24 W. Jasiński, *Zakaz przeprowadzenia...*, p. 376.

25 By this ruling the court acquitted the defendants emphasizing that they had committed a prohibited act as a consequence of active provocation of a person working closely with the Central Anticorruption Bureau.

compositions of the Tribunal or even appointment of its judges,<sup>26</sup> the Commissioner for Human Rights withdrew his request in April 2018. Thus, in accordance with the principle of presumption of constitutionality, Article 168a CCRP needs to be seen as constitutional.

## Evidence contrary to the law in administrative procedure

As pointed out in the introduction to these reflections, the Constitution, shaping a number of principles, laws and civil liberties, provided its addressees with procedural guarantees, including by means of Article 7 where it orders that organs of public authority should function on the basis of, and within the limits of, the law. The act of 14 June 1960 The Code of Administrative Procedure<sup>27</sup> is the basic and at the same time most comprehensive legal act regulating administrative procedure. Among fundamental principles, the act names the principle of legality (Article 6 CAP), the principle of public interest and just interest of citizens (Article 7 CAP) or the principle of deepening trust in the public authorities (Article 8 CAP). The listed principles legitimize the adoption of the regulation of Article 75(1) sentence 1 CAP according to which anything that may contribute to clarifying the matter and that is not in violation of the law may be admitted as evidence.

The sole act regulating the administrative procedure does not define the notion of evidence. With regard to the above-mentioned provision of Article 75(1) CAP, this term should be understood as all sources of true information that allows providing proof.<sup>28</sup> In particular, this provision lists evidence such as documents, witness testimony, expert opinions and inspections. However, this is not *numerus clausus* of evidence admissible in administrative procedure but only an open enumeration of means of proof identified by the statute.<sup>29</sup> Therefore, the so-called innominate evidence is admissible if it can contribute to discovering the objective truth and if it is not contrary to the law, e.g. opinions of research centres, plans, maps, films, tapes.<sup>30</sup> Moreover, the open construct of the catalogue of evidence is in fact necessary and only in this way can the principle of the objective truth be carried out which any way imposes on the public authority the obligation of detailed explanation of the established facts of the case.

Evidence in administrative procedure though seems to be subject to one essential restriction. Namely, lawfulness is the limit of its admissibility. Regulations of detailed statutes might also be another limitation. In accordance with conflict-of-laws rules, they aim to eliminate contradictions of rules in the system of the law. In this case it would be *lex specialis derogat legi generali* and *lex posterior generali non derogat legi priori speciali*.<sup>31</sup>

On the basis of judicial decisions of the Supreme Administrative Court it needs to be concluded that admissibility of evidence from the point of view of its legality – *sensu largo* lawfulness – requires interpretation in the light of regulation in the provisions of substan-

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26 See supplementary Commission Recommendations regarding the rule of law in Poland (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520.

27 Consolidated text Dz. U. (Journal of Laws) of 2018 item 2096 as amended, hereinafter: CAP.

28 W. Dawidowicz, *Zarys procesu administracyjnego*, Warsaw 1989, pp. 109–110.

29 B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz*, Warsaw 2012, p. 160.

30 W. Siedlecki, *Postępowanie cywilne w zarysie*, Warsaw 1972, pp. 316, 351.

31 See resolution of the Supreme Administrative Court of 26 February, 2018 I OPS 5/16 (CBOSA).



tive law, taking into account the whole of this regulation outlining the hypothetical status of facts.<sup>32</sup> Nevertheless, evidence, apart from being contrary to substantive law, cannot be contrary to certain evidentiary restrictions under procedural law. A vivid example of such a situation would involve admitting or recognizing as proof testimony given by a person who under Article 82 CAP would be deprived of the capacity to act as a witness e.g. due to inability to perceive or communicate their observations. Deeming evidence as unlawful is done by an order of a public administration authority. This order cannot be challenged by way of a complaint (Article 77 § 2 CAP). However, the public administration authority is not bound by the content of the evidentiary order, which means that in the course of the proceedings an order may be squashed or amended *ex officio* or at the request of the party if the circumstances of the case dictate so.

It also needs to be taken into account that under Article 61 § 1 CAP administrative proceedings shall be initiated upon the demand of a party or *ex officio* and under Article 77 § 1 CAP even in the case of proceedings instituted upon the demand of the party, it is the public administration authority that is obliged to exhaustively collect and evaluate all evidence. Implementing the principle of substantive truth on the basis of the presented provisions under the code of administrative procedure makes it actually impossible to conduct evidentiary proceedings based on unlawful evidence. It would lead to erroneous establishment of facts.

In view of the above, the theory of fruit of the poisonous tree will be applicable in administrative procedure. It is because the evidentiary prohibition is construed in a different way than under criminal law. Article 75 § 1 CAP clearly states that anything that may contribute to clarifying the matter and that is not in violation of the law may be admitted as evidence in proceedings before public administration authorities. This reference is quite broad but at the same time there are no grounds to narrow this regulation.

It is worth noting that for tax proceedings the legislator literally repeated the CAP provision addressing evidence. Article 180 § 1 of the act of 29 August 1997 The Tax Ordinance Act<sup>33</sup> provides that anything that may contribute to clarifying the matter and that is not in violation of the law may be admitted as evidence in tax proceedings. Another provision – Article 181 TO – specifies the definition of evidence in tax proceedings indicating that it may include tax books, declarations made by the party, witness testimony, expert opinions, materials and information gathered in inspections, tax information and other documents gathered in the course of the analytical activity of the National Revenue Administration, checks, tax inspection or taxes and duties inspection as well as material collected in the course of a criminal case or proceedings in cases of fiscal crimes or fiscal minor offences.

A similar situation occurs for entities who carry out an economic activity. Pursuant to Article 46(3) of the act of 6 March 2018 Entrepreneurs Law,<sup>34</sup> evidence which in the course of a review carried out by a reviewing authority was examined in violation of the statute or in violation of other regulations in terms of reviewing the undertaking's business activity,

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32 See judgement of the Supreme Administrative Court of 7 March 2013, II OSK 2119/11 (Legalis) and Judgement of the Supreme Administrative Court of 26 July 2016, II GSK 299/15 (Legalis).

33 Consolidated text Dz. U. (Journal of Laws) of 2019 item 900 as amended, hereinafter TO.

34 Consolidated text Dz. U. (Journal of Laws) of 2019 item 1292 as amended: before the entry into force of this act, the act of 2 July 2004 on the freedom of economic activity (Dz. U. 2004 no. 173 item 1807) was applicable, whose Article 77(6) was identified with Article 46(3) of the current act.

which had significant impact on the result of the review cannot be evidence in administrative, tax, criminal or fiscal criminal procedure concerning the undertaking. In order for given evidence not to be admitted in the course of the review of carrying out a business activity another condition must be met apart from unlawfulness alone; namely such evidence must have essential impact on the result of the review.

Nevertheless, if one were to look closer at the presented types of administrative procedure it is clearly noticeable that anything may be used as evidence in these proceedings provided that it is not in violation of the law (in the case of limitation of the freedom to carry out a business activity such evidence must have an essential impact on the result of the review of the undertaking). This in turn leads to a conclusion that different to the criminal procedure, the fruit-of-the-poisonous-tree doctrine will apply to administrative proceedings.

In proceedings before administrative courts there no longer occurs a direct limitation of the restriction of evidence in violation of the law. Article 106 § 3–5 of the act of 30 August 2002 Law on proceedings before administrative courts<sup>35</sup> indicates that the court may, *ex officio* or upon the request of the party, examine supplementary evidence in the form of documents, if it is necessary to clarify essential doubts and will not cause excessive extension of the proceedings in the case; universally known facts will be taken into consideration by the court even without the parties invoking them, but what is of utmost importance, regulation of the act of 17 November 1964 the Code of Civil Procedure<sup>36</sup> is applied accordingly to evidentiary proceedings in proceedings before an administrative court. However, it needs to be emphasized that judicial and administrative proceedings in collecting and examining evidence have a markedly different character to the regulation of evidentiary proceedings in civil or criminal cases. This results primarily from the purpose for which the proceedings before administrative courts are being conducted. These courts, as a rule, examine complaints for administrative decisions which are final in the administrative course of the instance or for other rulings (Article 3 PBAC). Therefore, the aim of any evidentiary proceedings before administrative courts is not to establish facts of the administrative case, but to assess whether administration authorities established this factual status to be compliant with the rules applicable in administrative procedure.<sup>37</sup>

As indicated above, the regulation of the CCP is applied accordingly in proceedings before an administrative court. The code of civil procedure does not contain any regulation addressing the issue of admissibility of evidence or definition of this matter. Article 227 CCP prescribes only that facts that are relevant to the determination of a case are the subject-matter of evidence. However, it is worth noting that pursuant to Article 5 of the act of 23 April 1964 the Civil Code<sup>38</sup> one cannot exercise one's right in a manner contradictory to its social and economic purpose or the principles of community life. Thus, collecting evidence in proceedings and presenting it by the parties should not be done in violation of principles of community life.<sup>39</sup> Admissibility of "tainted" evidence is alone another issue. Then, due to the absence of regula-

35 Consolidated text Dz. U. (Journal of Laws) of 2019 item 2325 as amended, hereinafter PBAC.

36 Consolidated text Dz. U. (Journal of Laws) of 2019 item 1460 as amended, hereinafter CCP.

37 See judgement of the Supreme Administrative Court of 21 March 2014, II OSK 2589/12, judgment of the Voivodship Administrative Court in Poznań of 5 June 2014, II SA/Po 66/14, judgement of the Supreme Administrative Court of 3 December 2013, I OSK 3082/12.

38 Consolidated text Dz. U. (Journal of Laws) of 2019 item 1145 as amended.

39 See judgement of the Supreme Court of 22 April 2016, II CSK 478/15; judgment of the Administrative Court in Warsaw of 6 July 1999, I ACa 380/99.



tion concerning admissibility of this type of evidence there is no reason to disqualify it entirely, especially where a party to the proceedings does not deny its authenticity (e.g. a recording to which the party had not consented).<sup>40</sup> In such situations the court should carefully and diligently explain the reasons and circumstances of the emergence of such evidence.<sup>41</sup> This in turn leads to a conclusion that in the course of proceedings before administrative courts there is no formal prohibition to admit evidence which constitutes fruit of the poisonous tree, but the absence of its automatic disqualification does not relieve the court from careful examination of the legitimacy of its emergence and usefulness in hearing a given case, especially that Article 106 § 3 PBAC talks only about an extraordinary situation involving admissibility of supplementary evidence. It is because these courts only carry out judicial reviews public administration authorities in terms of legality of administrative cases conducted by these authorities.

## Conclusions

The interpretation of Article 168a CCrP leads to a conclusion that the rule of the fruit of the poisonous tree is not applicable in the Polish criminal procedure. Besides, it has been the same since the very beginning of it being in force, i.e. 1 July 2015. In the author's opinion this results from the fact that the legislator used an expression of obtaining (before: examining and using) evidence "by commission" of a prohibited act. This expression indicated the directness of source of illegal evidence and cannot be interpreted in an expanding manner.<sup>42</sup> The evidentiary prohibition typified in Article 168a CCrP is indeed of direct nature. Therefore, it is possible to admit evidence obtained indirectly illegally, thus in connection with or as a result of a prohibited act.<sup>43</sup>

Each time, according to the rule of the free assessment of evidence, the court is obliged to take a decision about which evidence it deems admissible and on this evidence bases its establishment of facts of the matter pursuant to Article 410 CCrP.

The introduction of Article 168a CCrP alone constituted in fact the rule of general admissibility of tainted evidence. Its wording in the state of the law of 15 April 2016 provides for two exceptions to this rule.

The first one concerns public officials who obtained evidence in connection to conducting official tasks – a broader evidentiary prohibition.

The second one concerns non-institutional entities (who are not public officials) who obtained evidence as a result of manslaughter, wilful commission of a grievous bodily injury or deprivation of freedom – a narrower evidentiary prohibition.

The above reflections substantiate the belief that in the current model of a criminal case evidence obtained both indirectly and directly illegally (evidence as a fruit of the poisonous tree and from the tree itself) is admissible unless one of the two exceptions pointed to in Article 168a CCrP occur.

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40 See judgement of the Supreme Court of 25 April 2003, IV CKN 94/01.

41 See judgment of the Voivodship Administrative Court in Szczecin of 9 October 2014, I ACa 432/14.

42 P. Kardas, *Podstawy i ograniczenia przeprowadzania oraz wykorzystywania w procesie karnym tzw. dowodów prywatnych*, "Palestra" 2015, no. 1–2, p. 9–10.

43 D. Świecki, *Czynności procesowe obrońcy i pełnomocnika w sprawach karnych*, Warsaw 2016, p. 190.

The aim of a criminal case is to discover the offender and to hold them liable, to combat crime *sensu largo* by general and specific prevention, including by apt application of measures prescribed for in criminal law, to protect the injured party and meet all identified circumstances within a reasonable time. With goals of a criminal case defined so in 2 § 1 CCRP it is difficult to admit evidence which was obtained contrary to the law as a tool for pursuing these goals. After all, actual established facts should be the basis of all decisions – the principle of substantive truth (Article 2 § 2 CCRP).

Therefore, a return to the solution applicable between 1 July 2015 and 14 April 2016 should be postulated for.

It is different in administrative proceedings. The CAP, the TO and the Entrepreneurs Law point to inadmissibility of evidence that is contrary to the law, which is a clear basis to conclude that on the ground of an administrative procedure the fruit-of-the-poisonous-tree doctrine is applicable, though excluding cases subject to review by an administrative court and with the possibility to admit supplementary evidence at this stage.

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