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The Exclusionary Rule Under Foreign Law

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THE EXCLUSIONARY RULE UNDER FOREIGN LAW

A. Canada

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In Canada, the general rule is that evidence otherwise admissible is not rendered inadmissible by the fact that it was illegally obtained. This statement is, however, subject to the rules respecting the admissibility of confessions. Articles seized under an illegal search warrant or obtained by a trespass are admissible,[1] and evidence obtained by an illegal search of the person is also admissible.

In *Kuruma v. The Queen*, Lord Goddard, speaking for the Judicial Committee of the Privy Council, said:

> "In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained."[2]

In *A.G. of Quebec v. Begin*,[3] the accused was convicted of motor manslaughter. Section 285 (4d) of the Code (now sec. 224 (3)) provided that, on charges of driving a motor vehicle while intoxicated or while impaired by alcohol or a drug, the result of a chemical analysis of the blood, urine, breath or other bodily substance of a person may be admitted in evidence on the issue of whether that person was intoxicated or under the influence of a narcotic drug or whether his ability to drive was impaired by alcohol or a drug, notwithstanding that he was not, before he gave the sample, warned that he need not give the sample or that the results of the sample might be used in evidence. No warning was given to the accused, and it was argued that since the charge was not one of those referred to in the section, but one of manslaughter, a warning was required to render the result of the analysis of the accused's blood admissible. The Supreme Court held that no warning was necessary. The accused had in fact consented to the giving of the blood sample; the court stated, however, that the evidence of the analysis would have been admissible even if the sample had been taken without his consent, although section 285 (4e) (now sec. 224(4)) provided that no person was required to give such a sample.

In a subsequent case[4] the court clearly limited the confession rule to *self-criminating statements* and held that it did not embrace "the *incriminating conditions* of the body, features, fingerprints, clothing, or behaviour of the accused, that persons, other than himself, observe or detect and ultimately report as witnesses in judicial proceedings."[5]

In *Kuruma v. The Queen*, the Judicial Committee of the Privy Council indicated that the court had a discretion to exclude evidence which had been obtained by improper means if its admission would operate unfairly against the accused. Lord Goddard, speaking for the Judicial Committee of the Privy Council, said:

> "No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. This was emphasized in the case before this Board of *Noor Mohamed v. The King*, [1949] A.C. 182, and in the recent case in the House of Lords, *Harris v. Director of Public Prosecutions*, [1952] A.C. 694. If, for instance, some admission of some piece of paper, e.g. a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out."[6]

It is to be noted that the principle laid down in *Noor Mohamed v. The King*[7] and *Harris v. Director*

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[1] R. v. Lee Hai, 64 Can. C.C. 49 (1935); R. v. Honan, 20 Can. C.C. 10 (1912); R. v. Doyle, 12 O.R. 347 (1886).

[2] [1955] 2 W.L.R. 223, 226-27.

[3] 112 Can. C.C. 209 (1955).

[4] Reference under the Constitutional Questions Act re section 92(4) of The Vehicles Act, 1957 (Sask.) c. 93, 121 Can. C.C. 321 (1958).

[5] Per Fauteux, J., *id.* at 331. *Cf.* R. v. Barker, [1941] 2 K.B. 381, 28 C.A.R. 52, where the English Court of Criminal Appeal held that books and records produced by the accused to government investigators under a promise of immunity from prosecution stood on the same footing as any oral or written confession.

[6] [1955] 2 W.L.R. 223, 227.

[7] [1949] A.C. 182.

of Public Prosecutions[8] was an entirely different one, namely, that the trial judge has a discretion to exclude evidence of trifling weight having regard to the purpose for which it is professedly offered if its admission would unfairly prejudice the prisoner. The suggestion in the case of *Kuruma v. The Queen* that a court may in the exercise of its discretion exclude evidence of physical things discovered by unfair means is somewhat novel and runs counter to the long line of authorities holding that facts discovered as a result of a confession obtained by improper means are admissible.[9] Indeed it was recently held in Ontario that as much of an illegally obtained confession as is confirmed by facts discovered as a result of the confession may be admitted.[10] It is true that Lord Goddard did not purport to be dealing with material things obtained by illegal seizure, but instead with things obtained by a trick; still, it is difficult to see why the same principle should not apply in both cases.

If the courts consider that they have a discretion to exclude illegally obtained evidence, they do not appear to have exercised that discretion in favour of the accused. The problem of deliberate violation of the rights of the citizen by the police in their efforts to obtain evidence has not been as pressing in Canada as in some other countries. In the absence of constitutional restrictions, the powers of the police can be enlarged by legislation when required to cope with some particularly serious problem of law enforcement. In addition, the remedy in tort has proved reasonably effective; Canadian juries are quick to resent illegal activity on the part of the police and to express that resentment by a proportionate judgment for damages.

[8] [1952] A.C. 694.
[9] R. v. Warickshall, 1 Leach 263 (1783); R. v. Gould, 9 C. & P. 364 (1840); R. v. White, 15 Can. C.C. 30 (1908).
[10] R. v. St. Lawrence, 93 Can. C.C. 376 (1949).

B. England

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The English View: Rejection of the Exclusionary Rule

Under the prevailing English rule, the fact that evidence is obtained through a trespass or other illegal search or seizure does not exclude it from evidence. This rule was accepted during the nineteenth century in two cases of a somewhat low order of authority. In *Derrington*,[1] the prisoner gave a letter to the turnkey, who promised to post it, but who instead gave it to the prosecutor. The letter was received in evidence. In *Jones v. Owens*,[2] a constable illegally searched the defendant and found twenty-five young salmon in his pocket; it was held that the evidence was admissible on a charge of illegal fishing. Mellor, J., said: "I think it would be a dangerous obstacle to the administration of justice if we were to hold, because evidence was obtained by illegal means, it could not be used against a party charged with an offence."

The issue lay dormant in the criminal courts until it was revived before the Privy Council in *Kuruma* in 1955.[3] The defendant had been convicted of being in unlawful possession of ammunition, evidence having been given by police officers that they had searched him and found the ammunition on him. It was alleged for the defence that this search was unlawful. The Privy Council refused to allow an appeal against conviction, holding that even if the search was illegal, the evidence obtained by it did not become inadmissible. The judgment was delivered by Lord Goddard, C. J., who laid it down that the test to be applied in considering whether evidence is admissible is whether it is relevant to matters in issue. If it is, it is admissible, and the court is not concerned with how the evidence was obtained. However, the learned Chief Justice qualified this by saying: "No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused.... If, for instance, some admission of some piece of evidence, *e.g.* a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it

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[1] 2 C.&P. 418, 172 E.R. 189 (1826).
[2] 34 J.P. 759 (1870).
[3] [1955] A.C. 197.

out." It is not easy to see why evidence obtained by trickery should be ruled out, when evidence obtained by unlawful force is not; the latter would seem to be a more flagrant breach of the law than the former.

Lord Goddard went on to say: "It should be stated that the rule with regard to the admission of confessions [*i.e.*, the rule excluding induced confessions], whether it be regarded as an exception to the general rule [*i.e.*, the rule that relevant evidence is admissible] or not, is a rule of law which their Lordships are not qualifying in any degree whatsoever." This statement is satisfactory as far as it goes, but one would like to know the reason for not applying the general rule of admissibility to the special case of induced confessions. There must be some reason why an induced confession is excluded, though relevant, while evidence obtained by an illegal search is admitted. Some consideration other than that of relevancy must create this distinction. It would have been more satisfactory if we had been told what the consideration is. In the absence of an explanation, one does not know whether English law is fundamentally consistent with itself. For example, one possible reason for excluding induced confessions is that this is necessary in order to hold the police and prosecution to proper behaviour. But this reason would equally suggest the exclusion of evidence obtained by an illegal search.

There are other grounds for dissatisfaction with the decision in *Kuruma*. The American decisions which hold the contrary were not properly considered, and their basis was quite possibly misunderstood. Similarly the Scottish decisions, which are also to the contrary, were misinterpreted and misstated.[4] Since decisions of the Privy Council are not absolutely binding in future cases, even upon the Privy Council itself, this important question of public policy cannot be regarded as finally settled.

There are a few civil cases bearing on the issue. In *Calcraft v. Guest*,[5] the defendant came into posssession of certain of the plaintiff's documents which the defendant could not produce in evidence because they were privileged. The defendant returned the documents to the plaintiff, but not before he had made copies of them. It was held that the defendant could give secondary evidence of the contents of the documents. The court assumed that the way in which the defendant got his evidence was of no interest to justice, and it seems to have assumed that the evidence would have been admissible even if it had been stolen from the other side. The decision is an extraordinary one, for there can be little point in conferring privilege upon original documents if pirated copies of them are admissible.

In *Lord Ashburton v. Pape*,[6] a way was found to avoid this consequence. Pape was a bankrupt, whose discharge was opposed by the plaintiff. Pape, by a trick, obtained privileged letters written by the plaintiff to his solicitor. Pape had these letters copied and proposed to use them in the bankruptcy proceedings as secondary evidence of their contents. The plaintiff sought an injunction against Pape to restrain him from disclosing the letters or their copies. The injunction was granted. This outcome is satisfactory; however, it is vexatious to require separate proceedings to be brought in such circumstances, particularly against an undischarged bankrupt who will be unable to contribute to the costs. If a court of equity will enjoin the use of such documents, it would seem to follow under the Judicature Act that the view of equity should prevail in all courts; separate proceedings should not be required to give effect to it.

Yet even if this is so, there are difficulties in applying the rule in *Lord Ashburton v. Pape* to criminal proceedings. If the defendant to a criminal charge appealed to equity to suppress illegally obtained documentary evidence of his guilt, equity would quite possibly refuse to assist him. In any case, the rule in *Lord Ashburton* v. *Pape* can apply only to documentary evidence the use of which would be a breach of what may be called the accused's equitable copyright; the rule would not suppress evidence concerning other types of incriminating articles.

Rules of Other Common Law Jurisdictions

Other common law jurisdictions have almost invariably followed the traditional view and admitted evidence illegally obtained. Canada, as indicated by Mr. Martin in the preceding article,

[4] See the powerful criticism of *Kuruma* by Prof. Franck in 33 Can. B. Rev. 721, and subsequent correspondence in *id.* at 984, 1111. See also Cowen & Carter, Essays on the Law of Evidence c. 2 (Oxford 1956).

[5] [1898] 1 Q.B. 759 (C.A.). Compare Lloyd v. Mostyn, 10 M. & W. 478, 152 E.R. 558 (1842).

[6] [1913] 2 Ch. 469 (C.A.).

follows this approach. Another example is Ceylon.[7]

Irish courts seem to have undergone a change of attitude. In an 1887 case, evidence was admitted although illegally obtained;[8] but in 1955 a judge refused to admit evidence of fingerprints that had been taken with the consent of the accused when he was in custody on a different charge, since he had not been told of his right to refuse consent.[9]

The Scottish courts recognise that there are two important interests that are liable to come into conflict, (a) the interest of the citizen to be protected from illegal invasions of his liberty by the authorities, and (b) the interest of the state to ensure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from courts of law on any merely formal or technical ground. Neither of these objects, said Lord Justice-General Cooper in *Lawrie v. Muir*,[10] can be insisted upon to the uttermost, and the judge has a discretion to admit or exclude the evidence. "Irregularities require to be excused, and infringements of the formalities of the law are not lightly to be condoned." One question to ask is whether the departure from strict procedure has been adopted deliberately and by way of trick. Another is whether Parliament has prescribed a special procedure, departure from which is likely to be regarded as fatal.

The facts of *Lawrie v. Muir* were that the keeper of a dairy was convicted of violating a statutory order by selling her milk in bottles belonging to other persons. The evidence against her consisted of testimony by two inspectors of a limited company formed for the purpose of restoring milk bottles to their rightful owners. The inspectors had no right to enter the defendant's premises, because she had not contracted with the Milk Marketing Board; it was only the Board's contracts that gave the inspectors a right of entry. However, the defendant permitted the inspectors, who produced their warrants, to make a full inspection. It was held by a Full Bench of the High Court of Justiciary that the inspectors, though acting in good faith, had illegally entered the premises by misrepresentation, and that their evidence was inadmissible; a conviction was accordingly quashed. The reason why the court exercised its discretion to rule out the evidence was that the inspectors had only narrow powers, the limits of which they ought to know. The decision is all the more striking to an English lawyer because he would not regard the inspectors' entry, made with the defendant's consent, as wrongful. The misrepresentation as to the right to enter would not vitiate the consent in English law. However, it is an intelligible view that the entry, though not tortious, was sufficiently wrongful to exclude the evidence that came to light as a result of it.

In a later case, *Fairley v. Fishmongers of London*,[11] the inspector's departure from the strict procedure was a very narrow one. He was authorised to search for evidence relating to the contravention of food regulations and of an order dealing with salmon, but not concerning the Salmon Fisheries Act, under which the prosecution was taken. In the circumstances the court allowed the evidence to be given.

In *Turnbull*[12] a search was made upon the defendant's premises under warrant, but documents were taken which were not within the scope of the warrant. Lord Guthrie refused to admit the documents in evidence, because in the circumstances a contrary ruling would tend not only to nullify the protection afforded to a citizen by the requirement of a magistrate's warrant, but also to offer a positive inducement to the authorities to proceed by irregular methods. Lord Guthrie pointed out that there were no circumstances of urgency at the time of the seizure; nor were the documents taken plainly incriminating on their face. In *Kuruma*, Lord Goddard referred to this ruling with apparent approval;[13] but he did not explain why evidence obtained by trespass to property is more objectionable, or more unfair to the accused, than evidence obtained by an assault upon the person.

Perhaps the most important of these Scottish cases is *McGovern*.[14] Here the police illegally took scrapings from the fingernails of a person who was at the police station under suspicion. Since this action was taken without his consent, it amounted to an assault. The court excluded the evidence of the scrapings. Lord Justice-General Cooper again laid down the principle upon which the Scottish courts act: "Irregularities of this kind always need to be 'excused' or condoned, if they can be excused

[7] Rajapakse v. Fernando, 52 N.R.L. 361 (1951); see [1955] CRIM. L. REV. 328.
[8] Dillon v. O'Brien, L. R. Ir. 300, 16 Cox C. C. 245 (1887).
[9] People v. Lawlor, [1955-6] Ir. Jur. Rep. 38, 21 J. CRIM. L. (Eng.) 263 (1957).
[10] [1950] Just. Cas. 19.
[11] [1951] Just. Cas. 14.
[12] [1951] Just. Cas. 96.
[13] [1955] A.C. 197, 204.
[14] [1950] Just. Cas. 33.

or condoned, whether by the existence of urgency, the relative triviality of the irregularity, or other circumstances. This is not a case where I feel disposed to 'excuse' the conduct of the police." This important decision was directly in point on the facts of *Kuruma*, because it involved a trespass to the person; it was not cited, however, in the judgment in *Kuruma*, which is misleading on the Scottish doctrine.

The latest in the series of Scottish cases is *Marsh v. Johnston*,[15] where policemen bought liquor out of hours in order to obtain evidence of an illegal sale. It was held that their evidence was admissible. The purchase, although technically an offence by the police themselves, was not a wrong as to the defendants.

[15] [1959] CRIM. L. REV. 444 (H.C. of Justiciary).

C. France

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In French criminal law, the fundamental rule concerning the burden of proof is the principle of presumption of innocence: it rests with the prosecution to present the proof, and any accused person is deemed innocent as long as his culpability has not been proved by the prosecution.

The second rule, concerning the administration of the proof, is what we call the principle of the deep-seated conviction. As the instruction used for the jury of the Assize Court says:

> "The law does not call upon the jurymen to account for the means through which they let themselves be persuaded, it does not lay down rules upon which they must particularly make the completeness and adequacy of a proof depend; it prescribes to them to interrogate themselves in silence and meditation, and to try to find, in the sincerity of their own conscience, what impression was made on their reason by the proofs reported against the accused and the means of his defence. This is the only question stated by the law, a question which encloses the whole measure of their duties: Do you have a deep-seated conviction?"[1]

Two consequences proceed from this principle of the deep-seated conviction. On the one hand, with certain exceptions stated by law, the proof may be made by any means. But on the other hand any proof, with certain exceptions, is dependent upon the judge's deep-seated conviction. All proofs can be received in France in a criminal trial, because any proof appreciated by the judge according to his deep-seated conviction is never conclusive in itself. So it is, for example, that the admissibility of hearsay evidence can be explained, this evidence which is so disgraceful in the eyes of the common law jurist.

Another rule, however, restricts the ability to prove by any means. Proofs are admissible in the criminal trial only if they have been legally secured and legally adduced. If the French law accepts all modes of proofs, it emphasizes, nevertheless, the way to proceed to get the proof, with the result that any proof illegally obtained must be dismissed from the judiciary proceedings. The principle of the legality of the proof should be comprehended not in view of the nature of the proof, but of the means used to obtain it. The proof must be legal, in France, in the sense that the judge can build his deep-seated conviction only on proofs obtained and introduced according to the law.

It is from this principle that the rules proceed concerning house searches, illegal seizures, and confessions obtained through illegal means or following an illegal search.

The invalidity of a house-search made without a search warrant from a judge does not annul the sentence which has followed, if the judgement of sentence makes it explicit that the illegal house-search has not been taken into account.[2] However, a sentence must be annuled if it has been delivered exclusively on the basis of an official report which is null and void for having resulted from an illegal house search.[3]

It is clear though that a search carried out without a warrant is legal if it is carried out with the consent of the master of the house. In this case, as a matter of fact, there is no violation of the

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[1] CODE OF PENAL PROCEDURE, art. 353.

[2] Cass. Crim., Bull. Crim. No. 394 (1924).

[3] Cass. Crim., Rec. de Dr. Pénal 231 (1948).

privacy of a person's house. The principle of the inviolacy of a person's house, described by art. 76, still in force, of the constitution of 22 Frimaire VIIIth year, must be then considered as respected.

But the concerned person's consent can validate the search carried out without a warrant only if the consent is given "with full knowledge of the facts, that is to say with the knowledge that the proceeding is illegal." The consent can validate the search only if it is given by a person who knows he has a right to refuse the search. The Supreme Court of Appeal rescinds all sentences based upon searches carried out without a warrant, if the sentences do not include the acknowledgement of a consent given "with full knowledge of the facts."[4]

The man on the street, the average Frenchman, is not always fully aware of the exact measure of his rights, and if he is guilty is apt to confess his culpability as the result of a search, even if the search is illegal.

The invalidity of a search does not necessarily lead to the invalidity of a procedure started or carried on thereafter.[5] The judge, as a general rule, must estimate the probative value of the preliminary investigation writs which will have followed. But what about a confession resulting from an illegal procedure?

In 1935, in the *Boutros* case, the "Chambre Criminelle" quashed a verdict of not guilty, judging that the nullity of search or seizure procedures "did not forbid the judge to take into consideration all the factors of the proof independently of illegal deeds; and particularly the accused's later confessions, if they could be regarded as made without restraint, could not be considered as non-existent, on the sole ground they had followed an illegal house search."[6]

However, in 1953, in the *Isnard* case, the same jurisdiction quashed a verdict of conviction for the reason that the "proceeding concerning Isnard ... reported altogether his arrest, his search and his statements; that the operations the police had carried out made a whole; that the confessions the judges of the Court of Appeal took into account could have been valid only if they had been made freely; that in the case in point, it was not so, considering the circumstances in which they had been obtained."[7]

These two judgments dealt with the same problem; the second one was careful to equate the "search of a person" with a house-search. But though one quashed a verdict of conviction and the other a verdict of not guilty, there is no contradiction between them. The *Boutros* judgment had laid upon the judges the obligation to find whether the confession consequent upon the illegal house-search might still have been free, and consequently admittable as proof. The *Isnard* judgement only added the affirmation of the right of supervision that the Supreme Court of Appeal grants itself upon the judges' official investigations, and from which it would procceed that a confession resulting from an illegal search might or might not have been free.

It may happen that confessions obtained by trickery or guile cannot be accepted in the preliminary judicial inquiry. The Supreme Court of Appeal declares, in the same way, that confessions which have been illegally obtained cannot be used as proofs.

In 1888, the examining magistrate in charge of the *Wilson* case ventured to call on the phone a person whom he suspected of complicity, passing himself off as another person also suspected. This magistrate was censured by the Supreme Court of the Magistrature on January 31, 1888.[8]

In 1949 in the *Imbert* case, a police superintendent arranged a telephone conversation between two suspected persons and overheard it from another receiver. The sentence later pronounced was quashed by the "Chambre Criminelle" of the Supreme Court of Appeal on the ground that the police officer's intervention "had as an aim and a result to elude the legal dispositions and the general rules of procedure that the examining magistrate or his delegate should not fail to recognize without jeopardizing the rights of the Defence." This judgment is very important, because it states that the violation of the rights of the defence, even outside any violation of a written law, may lead to the annulment of the procedure.[9]

A short time later, another police superinten-

[4] Cass. Crim., Rec. Dalloz 1924.1.174 (1923); *id.*, Rec. Dalloz 1936.1.46 (1936); *id.* Rec. Dalloz 1954.110 (1953).

[5] Cass. Crim., Rec. Sirey 1937.1.73, note L. Hugueney (1936).

[6] Cass. Crim., Rec. Dalloz 1936.1.20, not minin. (1935).

[7] Cass. Crim., Rec. Dalloz 1953.533, note Lapp (1953); *cf.*, Vouin, *Illegally Obtained Evidence*, INTL. CRIM. POLICE REV. 241 (No. 91 1955).

[8] Rec. Sirey 1889.1.242; *cf.*, Rousselet, REV. DE SCIENCE CRIMINELLE 50 (1946).

[9] Cass. Crim., Sem. Jurid. 1952.11.7241, note J. Brouchot (1952); *cf.*, Vouin, CRIM. L. REV. 10 (1955).

dent, in the *Jolivot* case,[10] in order to identify the guilty person, had a recorder plugged into the receiver of the telephone of a couple who had complained of being insulted regularly over the telephone. The "Chambre Civile" of the Supreme Court of Appeal decided that the plaintiff's civil rights were violated by the installing of this recorder set, with the couple's consent, to detect the telephone call.

This decision has not been approved by everybody and is questionable law. But it clearly demonstrates the will of the Supreme Court of Appeal to disapprove, in the civil as well as penal law, police methods which might allow some persons to come upon confessions dishonestly.

As a conclusion, it is well established in the French penal law, without reference to the constitutional law or public liberties, that the conviction of a suspected or accused person cannot be based upon an illegal proof, because any proof illegally or irregularly obtained must be dismissed from the proceedings in court.

This solution guarantees the rights of the defence and the protection of all citizens.

[10] Cass. Civ., Gaz. Palais 1955.1.249 (2d sec. 1955).

D. Germany

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In the German law of procedure, the "rule of free evaluation of evidence" as laid down in section 261 of the Code of Criminal Procedure (hereinafter called CCP) prevails. This provision reads: "The Court shall evaluate the evidence according to its unlimited estimation and with due regard to the general course of the trial." Section 261 is closely related to Section 244(ii), CCP, which reads: "The Court shall ex officio expand the taking of the evidence to all facts and evidence relevant to the exploration of the truth." Such evidence includes that which has been obtained by the police.

Hence the principle of free evaluation of evidence permits the judge, and binds him at the same time, freely to weigh the evidence without any ties to strict rules. Thus, for instance, he may not be satisfied with the sworn statements of one or more police officers and instead credit the conflicting statement of the defendant. He may, on the other hand, disbelieve the defendant's confession if he has reasonable grounds to assume the defendant made it only to protect another person. He may also refrain from using evidence which appears dubious for other reasons, or which was obtained in a dubious way.

To some extent, however, the judge's right to an unlimited evaluation of evidence is curtailed by the law. In certain cases it prohibits the judge, expressly or by interpretation, from using certain evidence, especially evidence obtained in violation of legal commands or bans. But in the vast majority of cases the use of such evidence is admissible in principle.

Although it is the primary objective of this report to discuss the exclusion of illegally seized *physical* evidence, it appears advisable to extend the discussion to evidence other than physical, since only thus can the German system of the exclusionary rule be clearly represented.

Illegally Obtained Evidence The Use of Which Is Prohibited

(1) The most unambiguous prohibition against the use of illegally obtained evidence is laid down in Section 136a, CCP.[1] It prohibits certain immoral methods of interrogation and says that statements of the defendant obtained in violation of this provision shall not be used in evidence, regardless of his consent.

(2) Section 69(iii), CCP, provides that Section 136a, CCP, is applicable to the hearing of witnesses. Therefore, the judge is prohibited from using a witness's testimony obtained in violation of Section 136a, CCP.

(3) Section 252, CCP, says: "The statement of a witness heard prior to the trial who only in court takes advantage of his right to refuse to give evidence, shall not be read out." This provision

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[1] Regarding the text of this provision and further details, see Clemens, *Police Interrogation Privileges and Limitations (Germany)*, 52 J. Crim. L., C. & P.S. 59 (1961).

has been extensively interpreted by the courts and law professors to go far beyond its wording. It is regarded as a far-reaching ban on the use of evidence. The extent of this ban is a matter of argument.

Following the generally accepted opinion of the courts[2] and law teachers,[3] Section 252, which is considered to be supplementary to the provisions of the CCP regarding the privilege of the witness to refuse his testimony, prohibits the judge from using statements made by such witnesses as have taken advantage of their privilege only subsequent to their interrogation.

The privilege of silence is granted by the CCP to the near relations of the defendant;[4] to certain persons who are under an obligation of secrecy, *e.g.*, parsons, defense counsel, lawyers, doctors, members of the Bundestag and the Landtage, editors, etc., and their assistants (with the restriction that they have no right to refuse their testimony if they were already released from their obligation of secrecy);[5] and to every witness in regard to all questions an answer to which would expose him or his near relations to the danger of a criminal prosecution.[6]

Further, Section 252 bans the use of a statement made by a witness who, contrary to a command of the CCP, was not advised on his privilege of silence prior to his interrogation. This is generally accepted as far as regards the command to advise the near relations of the defendant.[7] There is controversy, however, with respect to the command to advise witnesses who by making a statement expose themselves or near relations to the risk of a criminal prosecution. While the Federal Supreme Court[8] denies a ban on the use of a statement taken in violation of this command, prominent law theorists[9] are right in affirming such ban.

[2] 2 Entscheidungen des Bundesgerichtshofs in Strafsachen 105 (Decisions of the Federal Supreme Court in Criminal Matters); 7 *id.* 195.

[3] KLEINKNECHT-MÜLLER, KOMMENTAR ZUR STRAFPROZESSORDNUNG (Commentary on the CCP) §48, preliminary note 2e I (4th ed.); EBERHARD SCHMIDT, LEHRKOMMENTAR ZUR STRAFPROZESSORDNUNG (Instructional Commentary of Criminal Procedure) pt. II, §252, n.1 (1957).

[4] CCP, §52, para. (i).

[5] CCP, §§52, 53(a).

[6] CCP, §55, para. (i).

[7] See, *e.g.*, KLEINKNECHT-MÜLLER, *op. cit. supra* note 3, at §52, n.3f.

[8] 1 Entscheidungen des Bundesgerichtshofs in Strafsachen 40 (Decisions of the Federal Supreme Court in Criminal Matters).

[9] KLEINKNECHT-MÜLLER, *op. cit. supra* note 3, at §55, n.4; EBERHARD SCHMIDT, *op. cit. supra* note 3, at §55, n.9.

Finally, Section 252, which speaks only of the case of a genuine privilege of silence, is deemed applicable in cases where the CCP affords a protection which is rooted in such privilege. Section 81c, CCP, provides that persons other than the defendant may refuse a bodily examination or the taking of a blood test for the same reasons as they may refuse their testimony. According to the relevant court decisions[10] and law teachers[11] the result of such examination or blood test as was made in spite of a refusal shall not be used in evidence, in analogous application of Section 252, because "the duty to tolerate the bodily examination or the blood test is kind of an extended duty to give evidence."[12] Section 95, CCP, provides that everybody (with the exception of the defendant) who has in his custody objects which may be of importance as evidence or are subject to confiscation is under the obligation to produce and surrender them by request, but that the action which is provided by law for the enforcement of such obligation shall not be taken against persons who have the privilege of silence. The question is whether any objects which were obtained through the illegal use of force against a person thus privileged can be used in evidence. An explicit regulation to this effect is missing in the German law. Whether a ban on the use can be derived from the fact that the banning provision of Section 95, CCP, is in close connection with the provisions of Sections 52, 53, and 55, CCP,[13] should be answered in the affirmative.[14] Section 97 provides that written communications between the defendant and certain persons who are under the privilege of silence, or written material which is in the possession of such privileged persons, is not subject to impounding, unless these persons are suspected of being parties in the crime, accessories after the fact, or receivers. In the event that such documents are impounded contrary to the ban of Section 97, CCP, it is commonly held[15] that

[10] 1 Entscheidungen des Bundesgerichtshofs in Strafsachen 135 (Decisions of the Federal Supreme Court in Criminal Matters).

[11] KLEINKNECHT-MÜLLER, *op. cit. supra* note 3, at §81c, n.5b.

[12] 5 Entscheidungen des Bundesgerichtshofs in Strafsachen 133 (Decisions of the Federal Supreme Court in Criminal Matters).

[13] See text accompanying notes 4, 5, and 6 *supra*.

[14] Assenting, EBERHARD SCHMIDT, *op. cit. supra* note 3, at §95, n.10; dissenting, KLEINKNECHT-MÜLLER, *op. cit. supra* note 3, at §94, preliminary note 7b.

[15] KLEINKNECHT-MÜLLER, *op. cit. supra* note 3, at §94, preliminary note 7d; EBERHARD SCHMIDT, *op. cit. supra* note, 3 at §97, n.9.

they shall not be used in evidence, because they represent a kind of written memory of the privileged person and hence are barred from any use, exactly as would be his oral evidence pursuant to Section 252 in conjunction with the relevant provision of the CCP regarding the privilege of silence.

(4) Section 96, CCP, reads:

> "The submission or surrender of file-records or other documents in official custody by authorities or civil servants shall not be demanded if their supreme office declares that the divulgement of the contents of such files or documents would be detrimental to the weal of the Federal Republic or a German Land."

Whether this provision contains a prohibition against the use of evidence becomes acute in a case where such documents are submitted to the judge in spite of the above declaration of the supreme office, or where the supreme office makes out the declaration only subsequent to the receipt by the judge of the files and records. The prevailing opinion of the courts,[16] and the better legal theory,[17] is that in such case the judge is denied the use of the documents, although Section 96 does not provide for such consequence *expressis verbis*. It would appear intolerable that the judge by using such documents would contribute to the harming of the weal of the Federal Republic or a German Land.

The above prohibitions mainly exclude the use of evidence obtained in violation of statutory provisions, and this in principle both in favor and to the detriment of the accused.[18] An appeal on law lies in the event of their violation.

Another question is whether the above prohibitions cease to be effective if he whose protection the law has in view (mostly the defendant or a witness) gives his consent to the use of such evidence. Doubtless the answer is no, if the law forbids the use notwithstanding the consent of the protected person. This applies for instance to Section 136a, paragraph (iii), CCP, with regard to a statement of the defendant which came about through the application of immoral means. The question whether, in the absence of an explicit rule, the use is admissible with the consent of the protected person should as a rule be answered in the affirmative. Hence, for example, there should be no objection to the use of the statement of a witness who made it without being advised under Section 52(ii), CCP, on his privilege of silence, if he, on being advised subsequently, consents to the use of his former statement.

Some law theorists[19] hold that the statutory prohibitions against the use of evidence do not oppose its use in cases where such use will benefit predominant, legitimate interests. This opinion cannot be favored, because it has no sufficient foundation in the statute and might result in a dangerous undermining of the statutory prohibitions.

Illegally Obtained Evidence the Use Of Which Is Permitted

In two decisions[20] the Reichsgericht held unrestrictedly, without adducing reasons for its view, that the ban on a seizure in violation of the CCP excludes the use in evidence of the illegally seized object. Today the courts no longer adhere to this view, which is patently the application of the general principle that the use of each and every item of illegally seized evidence is prohibited. Rather it is the opinion of the Federal Supreme Court—the pertinent decision was rendered on November 13th, 1952[21]—and the apparently generally accepted opinion of the law teachers[22] that evidence which in itself is admissible may in principle be used although it was obtained in violation of legal provisions.

According to this opinion illegally obtained evidence may be used—in default of a legal provision to the contrary—in the following examples (which could be increased at choice):

(a) A weapon which contained the finger-prints of the defendant had been impounded by the police. The impounding proved to be faulty because the police officer effecting it was not a member of the Criminal Police and therefore not authorized to impound.[23]

[16] 72 Entscheidungen des Reichsgerichts in Strafsachen 271 (Decisions of the Reichsgericht in Criminal Matters).

[17] Kleinknecht-Müller, *op. cit. supra* note 3, at §96, nn.4b & c, and §94, preliminary note 7c.

[18] See Kleinknecht-Müller, *op. cit. supra* note 3, at §48, preliminary note 2b.

[19] *Id.* at §48, preliminary note 2h III.

[20] 20 Entscheidungen des Reichsgerichts in Strafsachen 92 (Decisions of the Reichsgericht in Criminal Matters); 47 *id.* 196.

[21] Not published, but quoted in Monatsschrift für Deutsches Recht (German Law Monthly) 148 (1953).

[22] Kleinknecht-Müller, *op. cit. supra* note 3, at §48, preliminary note 2c; Eberhard Schmidt, *op. cit. supra* note 3, at §94, n.14; Niese, Doppelfunktionelle Prozesshandlungen (Bifunctional Procedural Acts) 139 (1950).

[23] See CCP, §98.

(b) An important exhibit, impounded by a Criminal Police officer as the result of a search, was produced before the court. The search was defective, because in the absence of imminent danger prevailing it should have been made only by order of the judge.[24]

(c) The weapon which the defendant had allegedly used in committing a murder had been seized during a search effected during the nighttime, in violation of Section 104, CCP.[25]

(d) The bodily examination of a witness had been effected upon orders received by the police, in spite of the fact that contrary to Section 81c, CCP, the examination had failed to serve the purpose of ascertaining a certain trail or a consequence of the criminal act, the examination could not be expected to be tolerated, detrimental effects on the health of the witness had been envisaged or taken place, or the police—in bad or good faith—had erroneously taken the view that imminent danger was prevailing.[26]

(e) A suspect had justly been preliminarily arrested, but contrary to Section 128, CCP, and Article 104(iii), Basic Law,[27] had not been brought before the judge during the day following his preliminary arrest. He made a confession before the police on the second day following his arrest. This confession may be used unless the interrogation took place in violation of Section 136a, paragraphs (i) and (ii), CCP.

Although, as mentioned, the use of illegally obtained evidence is *in principle* admissible in the absence of a statutory ban, yet there is an exception to the rule which has been ably elaborated by the notable CCP commentators Kleinknecht-Müller:[28]

> "The statutory provisions governing procedure are based on a balance of the public interest in the enforcement of the State's prosecuting claims and the public interest in ensuring that the State's measures which appear necessary to accomplish this objective encroach only to a tolerable extent upon the individual. The numerous reservations as regards the admissibility of public constraint are the result of such compromise between either interest. No Code of Procedure will be able, though, to cram this counterbalance into rules fitting the thousandfold phenomena of life. While as a guarantee for the necessary continuity some rigor must be endured, yet in an individual case the rigor can reach such unbearable dimensions that a deviation from the statutory law appears adequate. This tacit general clause of the law justifies the judge to found the inadmissibility of the evidence upon a heavy procedural infringement, even though such consequence is not expressly laid down by the law. The judge in arriving at his decision will consider the public interest in the prosecution. An irreparable procedural blunder which might be ignored in the interest of the public claim to a prosecution for murder, can in petty larceny cases ensue the inadmissibility of the evidence."

The legal basis of the right of the judge thus established to refrain in a single case from using evidence the use of which is not prohibited by the statute and therefore permitted *in principle* is to be found in Section 261, CCP, quoted at the beginning of this report.

Evaluation

In accordance with most constitutions of the western civilized countries, the Basic Law for the German Federal Republic, dated May 23, 1949, establishes certain basic rights. To these belong in particular the inviolability of human dignity (Article 1), the right to free personal development, the right to life and bodily integrity, and further the inviolability of the freedom of the person (Articles 2 and 104), the inviolability of the abode (Article 13), and the safeguarding of property (Article 14). These rights, however, are subject to certain restrictions; otherwise public order could not be maintained. The Basic Law pays regard to that by providing, for instance, in Article 2 that infringements upon the right to life and bodily integrity and upon the inviolability of the freedom of a person can be made only on the basis of a statute. Further, Article 13 provides that searches can in principle be ordered only by the judge and can be effected only in the forms prescribed by statute. And Article 14 says that the limits of property are drawn only by statute.

Such legal restrictions of the basic rights are to be found in the CCP in great number: the

[24] See CCP, §105(i).

[25] For the wording of this section, see Clemens, *Police Detention and Arrest Privileges (Germany)*, 51 J. Crim. L., C. & P.S. 421, n.12 (1960).

[26] Kleinknecht-Müller, *op. cit. supra* note 3, at §81c, n.7, justly holds that in these cases the result of the examination may be used.

[27] For the wording of these provisions, see Clemens, *Police Interrogation Privileges and Limitations (Germany)*, 52 J. Crim. L., C. & P.S. 59, nn. 2 & 3 (1961).

[28] See Kleinknecht-Müller, *op. cit. supra* note 3, at §94, preliminary note 7.

blood-test confines the right to bodily integrity, the duty of a witness to appear before the court and to make a statement infringes upon his liberty, the search of an abode violates its inviolability, the confiscation of an object entrenches upon property, etc. The CCP makes these infringements with as much consideration as is possible by providing, for instance, that certain witnesses shall be advised of their privilege of silence, that the taking of a blood-test can be effected only by a doctor, that the order for especially serious encroachments is reserved to the judge, that normally the search of an abode during the hours of night is prohibited, and that the detention by the police of a preliminarily arrested suspect is temporary. Infractions of these commands and prohibitions will as a rule also constitute infractions of a basic right, because the Basic Law prescribes that an encroachment upon a basic right shall be allowed *only* on the basis of a statute, and therefore only with due regard to the precautions contained therein. Such infractions could, of course, easily be counteracted, in that the statute could prohibit the use of all evidence obtained in violation of constitutionally protected basic rights.

The German law has not laid down such rule, obviously because this was deemed incompatible with the "principle of the exploration of the truth which for the sake of the public weal demands the investigation, prosecution and just punishment of crimes through the use of all evidence available."[29]

On behalf of this principle the German law has rather refrained from a general ban on the use of such evidence as was obtained in violation of basic rights. The CCP has laid down bans on the use of evidence only in respect of such evidence as was obtained in violation of human dignity or of the privilege of silence in its broadest meaning, and where the use would result in detriments to the weal of the Federal Republic or a German Land. By doing this, the law indicates that it gives priority to these rights and interests alone over the principle of the free exploration of the truth.

Conclusion

In light of the foregoing observations, the three questions posed for discussion in connection with this topic[30] can be answered as follows:

(1 & 2) A statutory ban on the use, in criminal proceedings, of evidence obtained in violation of basic rights could aim at (a) the "punishment" of the individual responsible for such violation, (b) the protection of the basic rights, or (c) the protection of the suspect.

The "punishment" of the responsible individual—usually an official—cannot be achieved with the help of such ban, because the ban would have no consequences to his disadvantage. The disadvantages would be on the side of the state or the public alone; because the ban would place restrictions on the evidence available for the exploration of the truth and thus hamper or defeat the revenge on crimes which is in the state or public interest.

An effective punishment of the responsible person can be achieved only by holding him responsible under the Criminal Code,[31] by suing him for damages under the Civil Code, or by taking disciplinary action against him under the appropriate disciplinary statutes.[32]

Doubtless, the ban in question affords a far-reaching protection of the basic rights. But in view of its hampering effect on the exploration of the truth, the question remains if this protection is proper and worth being advocated in *every* case of violation of basic rights. An injury to human dignity—the interrogation of the suspect or a witness in violation of Section 136a paragraphs (i) and (ii), CCP—will by all means be worthy of protection, particularly since a statement thus effected fails to have the slightest evidential value in trial anyway. On the other hand, if only a small violation of basic rights occurs—a search was ordered by a police officer contrary to Section 105, CCP, although there was no imminent danger prevailing—the protection of the basic rights will have to make way for the higher-valued interest in the exploration of the truth.

Whether the protection of the suspect calls for a statutory ban on the use of evidence obtained in violation of basic rights should be considered from a similar angle. Certainly, he has in principle the

[29] 2 Entscheidungen des Bundesgerichtshofs in Strafsachen 105 (Decisions of the Federal Supreme Court in Criminal Matters).

[30] The three questions are set forth in the introduction to this symposium.

[31] In the case of an official, §341, Criminal Code, comes into question, which penalizes the official who wilfully and without being entitled to do so effects, or causes or allows to be effected, an arrest or a preliminary apprehension and detention; also applicable is §343, which penalizes an official who during an investigation uses or causes or allows to be used means of coercion to extort confessions or statements.

[32] This is possible under German Law.

right of seeing the proceedings against him performed lawfully. But this right will have to stand back if only a negligible violation of a basic right has occurred.

(3) As was mentioned above, the use of evidence obtained in violation of basic rights is not generally prohibited under German law. Rather, the law has decided on a compromise. It lays a ban on the use of such evidence only in the few cases where it deems the violation of basic rights or state interests to be an especially serious one; in all other cases it permits the use of illegally or even unconstitutionally obtained evidence, only reserving to the judge a dissenting ruling in the scope of his free evaluation of evidence.

Naturally, it is open to argument whether the German law has drawn a just border-line between admissible and inadmissible evidence. In principle, the regulation of the law appears satisfactory and convincing. Technically, however, it is not satisfactory. It would be desirable that in all cases where the CCP wants to prohibit the use of illegally obtained evidence, such prohibitions were enunciated *expressis verbis* and just as clearly as was done in Section 136a, paragraph (iii). And it would further be desirable that the law said with all distinction that in the absence of an explicit ban any evidence obtained inviolation of statutory provisions may be used unless the judge rules otherwise under Section 261, CCP. This would considerably decrease the differences of opinion in the interpretation of the law.

E. Israel

HAIM H. COHN*

The rule prevailing in Israel is the common law rule that, for the purpose of deciding whether certain evidence is or is not admissible, the court will not enquire into the methods by which that evidence was obtained.[1] The only exception to the rule is that the court will enquire into the circumstances under which a confession was made, so as to ascertain whether it was made freely and voluntarily.

It is submitted that both the rule and the exception stand in need of revision.

The sound principle underlying the rule is that direct evidence which is relevant to the issue and not privileged from disclosure should be available to the trier of fact; the sanction for any criminal offence and the remedy for any civil wrong which may have been committed in obtaining that evidence are matters not for the law of evidence, but for the criminal law or the law of torts, as the case may be. Cases are known in which persons have been restrained by injunction from producing evidence wrongfully obtained[2]; such an injunction is, of course, a remedy in tort, and implies no ruling one way or the other on the evidential issue.

In defence of the exclusion of illegally obtained evidence, it might—apart from purely ethical grounds—be argued that there is another instance in which the law of evidence is made subservient to extraneous considerations of public policy, namely, the privilege attaching to state secrets. In the one case the public interest is to discourage illegal practices on the part of the police and other evidence-collecting agencies; in the other case the public interest is to encourage and safeguard the proper and efficient administration of government. But the common law privilege in favour of state secrets has remained in full force and vigour only in England, and even there it time and again arouses vehement public and professional reactions. It has never, in its absolute form, been part of the law of Scotland, nor is it recognized as an absolute privilege by "what some commentators regard as the better decisions in the United States."[3] The Supreme Court of Israel, following Scots, Canadian, and the "better" American precedents, has recently laid down that there is no absolute privilege from the disclosure of state secrets in Israel, but that the trial judge has to satisfy himself, each time such privilege is claimed, that the harm which is likely to be caused to the

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[1] 8 WIGMORE, EVIDENCE §2183 (3d ed. 1940).

[2] *E.g.*, Ashburton v. Pape, [1913] 2 Ch. 469 (C.A.).

[3] MODEL CODE OF EVIDENCE, comment to rule 228, at 167.

state by the production of the evidence outweighs the public interest in a full disclosure to the court of all evidentiary material relevant to the issue.[4]

It thus appears that where the common law has provided an exclusionary rule of evidence in the public interest and for reasons of public policy, the modern tendency is to divest that rule of general and unrestricted application, and to vest in the trial judge a discretion as to whether or not, and to what extent, to apply the rule in the particular case before him. And there seems to be no valid reason why the development which has marked the exclusionary rule in respect of state secrets should not be brought to bear, *mutatis mutandis*, on an exclusionary rule in respect of illegally seized evidence. In both cases, there is a conflict of public interests and that conflict cannot justly and equitably be solved by an inflexible rule of general application, but rather should be solved in each individual case according to the best judgment of the trial judge.

These considerations apply no less to the rule that all illegally seized evidence is admissible than to the rule that all such evidence is inadmissible. There might well be instances in which it would be unconscionable to allow a party to establish his claim by unlawful means. Actions in equity, for instance, have always been defeated where the claimant has come to court with "unclean hands," and in any civil or criminal case there may be circumstances which require or justify the exclusion of illegally obtained evidence which, in other circumstances, might be held admissible in the interest of justice or in the general public interest.

Moreover, while it might in many cases be eminently just and legitimate to penalize a person for illegally seizing evidence by excluding that evidence in a suit to which he himself is a party or in the outcome of which he is beneficially interested, it is not by any means just or legitimate to penalize the state for the illegal seizure of evidence by one of its officers. That officer is not a party to the suit, nor has he normally any personal interest in its outcome. The exclusion of such evidence amounts to a penalization of the general public for the wrong of one individual—surely a violation of fundamental principles. While it may be maintained that a sanction should cause a wrongdoer to suffer, it can hardly be maintained that a sanction should not only fail to affect the wrongdoer, but also permit a different wrongdoer to escape punishment for a totally unrelated transgression.

The Israeli Draft Code of Evidence[5] provides that the court may refuse to admit in evidence any document (including any form of record of anything said, written, printed, or photographed) which the party producing it has stolen or obtained by any other illegal means, or in making or circulating which the party producing it committed a criminal offence.[6] A provision to this effect enables the trial judge, in his discretion, to exclude illegally seized evidence, where such evidence is sought to be produced by a party to the litigation before him; it does not enable him in a criminal case to exclude evidence obtained by the illegal act of some police officer who is, of course, a stranger to the action (unless it is a private prosecution for an offence by which the private prosecutor himself was personally injured[7]).

It is submitted that there is no difference in principle between a confession wrongfully extorted and other evidence illegally seized; the misconduct of the police is as reprehensible in wrongfully extorting the one as in illegally seizing the other. With regard to confessions, the law as it stands is that, however wrongful the manner in which they were obtained, they are admissible in evidence if (notwithstanding the manner of their extortion) they were in fact free and voluntary; the reason is that if they were free and voluntary, they may be taken to be true. The *ratio excludendi*, then, is not that they were wrongfully obtained, but that they may be false. This *ratio* cannot apply to evidence the contents of which is normally unaffected by the manner in which it was obtained, and as to which such attributes as free and voluntary can have no meaning. If the reprehensibility of police misconduct in wrongfully extorting a confession does not, of itself, warrant the exclusion of the confession, there is no valid reason why the reprehensibility of police misconduct in illegally seizing other evidence should, of itself, warrant the exclusion of that evidence.

From the point of view of the law of evidence, exclusionary rules appear to be justified only where the evidence sought to be adduced is either

[4] Ha'etzni v. Ben Gurion, 11 Piskei Din 403 (1947).

[5] DRAFT CODE OF EVIDENCE (1952) (English translation by Harvard Law School—Israel Cooperative Research, 1953).

[6] *Id.*, §75.

[7] Private prosecutions are permissible in Israel for assault, defamation, trespass, and the violation of trademarks and copyrights. MAGISTRATES' COURT JURISDICTION (AMENDMENT) ACT 5714-1954.

irrelevant or inherently unreliable. (The various recognized privileges from disclosure do not really affect the admissibility of the privileged evidence and are, therefore, not to be classified as exclusionary rules.) Where available evidence is both relevant and manifestly true, the requirement of justice that it should be produced and admitted is paramount, and no desire to penalize any individual wrongdoer should be allowed to stand in the way.

The same result is reached when the problem is looked at from the point of view of practical efficiency. In the United States where the exclusionary rule in respect of illegally seized evidence has for many years and by many courts been rigorously applied, abuses by the police always were and still are notoriously widespread; the best experts have expressed doubts whether these exclusionary rules even tend to remedy the abuses.[8] The fact is, the exclusion of such evidence has failed so far, both in the United States and elsewhere, to deter the police from resorting to illegal means to procure evidence. Maybe the reason for this deprecable state of affairs lies in the knowledge of police officers that the only sanction likely to follow upon the illegal procuration of evidence is its exclusion and rejection, a sanction which may lead to acquittal of the accused, but which does not entail any punishment of the police officer.

There may be police forces in which an officer using illegal means to procure evidence is disciplined; there may be others in which such an officer is looked upon with approval and gratitude, having spared no effort and shown no qualms in executing his assignment. In the former, instances of illegal seizure of evidence will be rare; in the latter, they will be frequent. But in neither does it matter much whether the illegally seized evidence is eventually admitted or excluded.

The use by police of illegal means to procure evidence is not, however, a matter which may be left to the domestic disciplinary jurisdiction of the police force itself. It directly and vitally affects not only the fundamental (or constitutional) liberties of the citizen but also the administration of justice by the courts. It is an eminently criminal matter, calling for criminal sanctions to be administered in as effective and deterrent a manner as is compatible with the rule of law.

The Israeli legislature now has before it a bill[9] which provides that where a court is satisfied that a confession sought to be produced in evidence was unlawfully obtained—whether or not it was admitted in evidence—the court may commit the person who has so obtained it to trial in the competent court, or, with his consent, may try him summarily then and there for the offence he has committed in extorting the confession.[10] Where a committal order is made to another court, the finding of the committing court that the confession was unlawfully extorted is *prima facie* evidence against the extorter in the other court.

The same provision can and should be made in respect of any illegally seized evidence other than confessions. Such procedural provisions coupled with substantial increases in the punishment for criminal trespass and other abuses of office when committed by a police officer, should be all that is needed, and at any rate appears to be all that is possible, to curb illegal practices on the part of the police. Exclusionary rules in the law of evidence are neither useful nor justified.

[8] MODEL CODE OF EVIDENCE, comment to rule 505, at 243.

[9] Law of Evidence Revision (Privileged Evidence) Bill 5718-1958.

[10] The offence is punishable with three years' imprisonment. CRIMINAL CODE ORDINANCE §109B (Palestine 1936).

F. Japan*

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THE TRADITIONAL VIEW

Should illegally seized evidence be admissible to convict an accused? In Japan this question has been answered in the affirmative for many years.

Back in 1899 the Supreme Court of Japan held,

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in a case under the Code of Criminal Procedure of 1890, that the defendant's pocket notebook, illegally seized by a policeman, was lawfully received in evidence.[1] In 1949 the Supreme Court held, in a case under the Code of Criminal Procedure of 1922, that it was lawful for the trial court to convict the accused by receiving a piece of physical evidence which had been seized with illegal procedure.[2] In this case the Court amplified the justifications for the traditional rule concerning the admissibility of illegally seized evidence. It clarified among others the following two points: (1) The illegality of search and seizure procedure does not change the nature, condition, or shape, and therefore the evidential value, of the thing which has been illegally seized; (2) The problem concerning the admissibility of a statement obtained by illegal interrogation procedure should be distinguished from the problem of the admissibility of illegally seized evidence; in the former the illegality of the procedure may affect the substantive probative value of the statement, whereas in the latter the illegality of the procedure has nothing to do with the evidential value of the thing seized.

Present Law and Practice

Under the new Code of Criminal Procedure of 1948 there have been no Supreme Court decisions precisely on point, but there are some high court decisions which follow the traditional rule.[3]

Majority opinion among judges and realistic-minded lawyers appears to favor the traditional position as established by judicial precedents.[4] The most important arguments supporting the traditional rule are those pointed out by the Supreme Court decision of December 13, 1949.[5] Beside those, however, the following two reasons have been maintained by the followers of the traditional rule: (1) It would be useless to deny admission to illegally seized evidence, because the prosecution may easily evade the strict rule by repeating the seizure in compliance with law: (2) It would be better to remedy the unfairness of an illegal seizure of evidence by punishing the officer who made the illegal seizure or by giving the accused some recourse such as the right to compensation by the state.

Progressive Views

Most scholars and progressive lawyers,[6] influenced or encouraged by such American experience as the development of the "federal exclusionary rule,"[7] have expressed various views counter to the traditional.[8]

The grounds for their contentions are not exactly the same, but their views are unanimous on the point that it will be impossible to stop police practices of collecting evidence with filthy hands without squashing the very object (*i.e.*, the conviction of the accused) toward which the over-zealous police are desperately struggling.[9] The threat of punishment is not effective enough to intimidate a police officer who attempts to be a "hero" by sacrificing himself for illegally seized

[1] Vol. 5, No. 1. Sup. Ct. Crim. Rep. 38 (1899).

[2] Decision of the Supreme Court (3rd Petty Bench, Dec. 31, 1949) (unpublished).

[3] *E.g.*, Supp. No. 16 High Courts Crim. Rep. 41 (Tokyo High Court 1950), holding an illegally seized receipt admissible.

[4] *E.g.*, The Supreme Court, Secretariat General, Summary Record of the National Conference of Criminal Judges on Criminal Procedure (Materials on Criminal Justice, No. 66) 110 (1952) (in Japanese).

[5] See note 2, *supra*.

[6] *E.g.*, Dando, *Comments*, 3 Collected Criminal Case Comments 150 (1943) (in Japanese); Koke, *Admissibility of Illegally Obtained Evidence*, 2 Keiho Zasshi (J. of Crim. Law) (No. 3) 71 (1951) (in Japanese); Hirano, *Criminal Procedure*, in Law Lecture Series 119 (4th ed. 1956) (in Japanese); Hirano, *Control of Investigation by Exclusion of Evidence*, 7 Keiho Zasshi (J. of Crim. Law) (Nos. 2, 3, and 4, consolidated) 243 (1957) (in Japanese); Hiraba, Lecture on Criminal Law 177, 178 (1955) (in Japanese); Adachi, *Seizure, Search, and Inspection*, in 2 Course on Legal Practice 342–44 (1953) (in Japanese); Yokogawa, A Study on Criminal Trial 163 (1953) (in Japanese); Saito, *Relations Between the Illegality in Procedure of Obtaining Evidence and the Admissibility of Evidence*, 6 Hoso Jiho (Lawyers Ass'n J.) (No. 9) 1 (1954) (in Japanese).

[7] *E.g.*, see articles by Hirano, Koke, and Seito, cited in note 6, *supra*.

[8] Some maintain that illegally seized evidence should be simply inadmissible; some contend that illegally seized evidence should be inadmissible unless illegality is due to minor technical errors; some contend that illegally seized evidence should be inadmissible if the illegality constitutes a crime.

[9] See Hirano, *op. cit. supra* note 6, at 247: "If the cause of such illegal activities are eagerness or desire to succeed in official business one may squash these objectives in preventing the illegal activities. Obstructing the conviction of the accused by excluding evidence will be the most effective remedy for over-zealous investigating officers; criminal penalty will only invite their dissatisfaction and resistance. On the contrary, if the causes of such illegal activities are feelings of superiority, arrogance, or indifference toward citizens, exclusion of evidence will not be very effective; direct discipline by punishment will be more effective.

"Which is the greater cause? This will not be simply decided. However, at least it may be said that there is a considerable tendency toward lawlessness owing to excessive eagerness; and it can be foreseen that this tendency will be growing in the future."

evidence.[10] It has been suggested that it is not the voluntary will of each individual officer but the blind will of the whole police organization which compels the individual to engage in the underhanded investigation.[11]

CONCLUSION[12]

Fairness and quick detection are two essential components of criminal justice. The harmonization of these competing values has been and will be the eternal objective of law. It is remarkable that thousands of years ago the ingenious inventors of Chinese characters already perceived this functional structure of criminal justice and succeeded in symbolizing it in an archaic style of the Chinese ideograph signifying "law" or "justice."[13]

In the latter part of the twentieth century we are still suffering from the age-old problem of achieving quick and strict justice together with fair and humanitarian justice. Unquestionably the maxim *"in dubio pro reo"* has been an effective amulet to protect human rights of the suspect and accused from uncivilized practice on the part of criminal investigators. So long as instances remain of uncivilized police practices,[14] any device that safeguards human rights against abusive investigating authority is worthy of retention.

On the other hand, it should not be overlooked that emphasis on the rights of suspects has led some judges to discharge suspicious defendants in difficult cases, particularly when there has been no confession to corroborate circumstantial evidence.[15]

It is my belief that the way of bridging the gap between idealism and realism is not to be found in elaborating the existing system into one of logical complexity or exquisite technicality, but in reconstructing the system practicably, giving consideration to human weakness as well as to human wisdom. The first step will be the establishment of a criminal justice with less reliance on confession or admission and more on the development of scientific investigation. The efforts to attain this objective should be accompanied by the painful activity of educating and enlightening both the general public and criminal investigators. It should be borne in mind that only by way of this thorny path can we hope to solve those difficult problems centered around the privilege against self-incrimination, the law of arrest and interrogation, the law of confession, and the rule relating to illegally seized evidence.

[10] In the *Sugo* case (a case of "agent provocateur"; not guilty, the Oita District Court, Aug. 4, 1958; guilty but excused from punishment, the Fukuoka High Court, Sept. 12, 1959), a police officer was found guilty but excused from punishment for having supplied a radical group with dynamite for blasting a police box; but later he obtained a good position in a publishing company having connection with the police organization. It seems to be the general feeling among the police that a wounded "hero" must be warmly taken care of.

[11] Hirano, *op. cit. supra* note 6, at 247.

[12] This conclusion is purported to be a conclusive statement not only for the present article but also for my other articles published in this series. See 51 J. CRIM. L., C. & P.S. 178 (1960); 51 *id.* 429 (1960); and 52 *id.* 67 (1961).

[13] *Cf.* HSÜ SHEN (2nd Century, A.D.), SHUO WEN CHIEH TZU 4352 (Ku lin edition, I-hsüen shu-chü, Shanghai, 1928). Etymologically the rather complicated symbol consists of two parts. The left hand component means water, which in ancient times symbolized the even-handed justice. The right hand component, which again can be broken down into an upper part and a lower part, signifies an imaginary animal resembling a unicorn which was supposed to have the supernatural power of tossing the guilty party to one side, out of the forum—a mystic living lie-detector! Our oriental ancestors who invented this ingenious device for symbolizing the profound abstract concepts seem to have perceived the two essential functions of criminal justice, *i.e.*, (a) quick and accurate identification of the guilty from the innocent and (b) fair and even treatment of the people. For the ancient ideograph for "Law" see the cover of CRIMINAL JUSTICE IN JAPAN (Ministry of Justice, Tokyo, 1957, 2d ed. 1960).

[14] Among the recent cases in which judgments of "guilty" were reversed by the high courts and the Supreme Court for the reason that confessions were unlawfully coerced, the following four cases were most shocking and sensational: the *Matsukawa* case, the *Futamata* case, the *Sachiura* case and the *Yakai* case. In these cases, in which most defendants had been sentenced to death in the district courts, police brutality was ascertained by the high courts and the Supreme Court.

[15] Among several recent cases of this nature, the *Crowley* case was most typical. In this case an American millionaire allegedly, while intoxicated, killed his brother-in-law in the Imperial Hotel in Tokyo, and he was prosecuted for the crime of "inflicting a bodily injury resulting in death" (PENAL CODE, art. 205, par. 1). The Tokyo District Court acquitted the accused because of insufficient proof. The records show that there were many pieces of circumstantial evidence tending to prove his guilt, but the judges appeared to hesitate to convict him on circumstantial evidence. In this case the police did not press a confession, and naturally there was no confession or admission volunteered by the accused. It is reported that when the police asked him to be tested on the polygraph he refused the request in a highly emotional manner.

G. Norway*

ANDERS BRATHOLM†

I.

Before we examine the question of excluding unlawfully acquired evidence, it is well to mention briefly the rules which apply to the right of the police to obtain evidence against an accused person.

The right of the police *to search* is strictly regulated by the Norwegian Criminal Procedure Act of 1887. When a person is suspected on reasonable grounds of a punishable offence for which the maximum statutory penalty can exceed a fine, the police may search the person or his dwelling, provided that there is reason to believe that the search will lead to his arrest, or to discovery of evidence of the punishable offence, or to seizure of objects involved.[1]

Search of another party's dwelling can also be undertaken under certain circumstances, for instance when there is strong reason to believe that a wanted person, stolen property, or traces of a punishable act can be found in the dwelling.[2]

Whether the above-mentioned conditions are present or not, the police can institute a search of a place of business which can be operated only with police permission or which is available to the public.[3]

If the person concerned does not consent to the search, it can be undertaken only on a court order. But if the purpose of the search is likely to be thwarted by the delay involved in awaiting the court order, the prosecuting authority can issue an order to proceed with the search. If there is not even time for this, the search may be undertaken by the police without an order, provided there is strong suspicion of an offence for which the maximum statutory penalty is a term of imprisonment longer than six months.[4]

A police officer who, by order of the court or the prosecuting authority, is empowered to arrest an accused person may search the latter's dwelling without special permission.[5]

The Act contains different regulations for the carrying out of the search.[6]

In practice the accused generally consents to the search, thus making it unnecessary for the police to obtain an order from the court or the prosecuting authority.

The Criminal Procedure Act also contains regulations on when *seizure* can take place. The main provision is that seizure may be made of objects which can be considered of importance as evidence, or that ought to be regarded as confiscable.[7]

If the person concerned does not consent to the seizure, a court order must be sought, or if time does not allow this, an order from the prosecuting authority. If even then the delay would be too long, the police may act on their own authority.[8]

If there has been no time to obtain a court order, the question whether the seizure shall be upheld must be laid before the court at the earliest possible opportunity.[9]

A person in possession of an object considered important as evidence can, if he is obliged to offer testimony in the case, be ordered by the court to produce the object.[10] Those exempt from the obligation to give evidence are chiefly the family of the accused and persons bound by professional secrecy to whom the accused has given confidential information (defending counsel, doctors, ministers, etc.).[11]

There are detailed provisions in the act regarding the method of carrying out seizure and returning objects seized to the owner, etc.[12]

Evidence against an accused person may also be obtained by interrogation, blood tests, confrontation and the like. The question of the extent to which the police can question the accused, submit him to various tests, etc., is dealt with

* This paper is mainly an abbreviated form of an article written by the author on the exclusion of illegally seized evidence. The article was published in NORDISK TIDSKRIFT FOR RETTSVITENSKAP (The Northern Journal of Law) 109–32 (1959).

[1] CRIMINAL PROCEDURE ACT (hereinafter called CPA) of 1887, §221.

[2] *Ibid.*

[3] CPA, §222.

[4] CPA, §223.

[5] *Ibid.*

[6] CPA, §§224–26.

[7] CPA, §212.

[8] CPA, §215.

[9] *Ibid.*

[10] CPA, §216.

[11] CPA, §§176–78.

[12] CPA, §§218–20.

more thoroughly in earlier articles by the author in this series.[13]

II.

The Norwegian Criminal Procedure Act has no provision concerning the admissibility of evidence seized in contravention of the Act. Nor is much guidance to be found in literature on Norwegian criminal procedure. The only declaration of principles I can find is given by the Norwegian Professor of Criminal law, Johs. Andenaes, who declares that if a confession is extracted under conditions at variance with those required at police questioning, there is much to be said for excluding the confession on the principle that the police should not be allowed to offer evidence acquired in an illegal manner. But, it is added, it is doubtful if our courts, generally speaking, would accept such a principle.[14]

So far as I can see the question of the steps that should be taken with regard to illegally seized evidence has not been comprehensively dealt with in any Scandinavian country.

III.

Before we go further into the question of how the problem should be solved in Norway, it might be profitable first to consider the most important reasons for and against excluding illegally seized evidence.

In favour of the acceptance of illegally seized evidence, it may be put forward that the task of the court is to come to a materially correct decision, and that all information, apart from that positively excluded by the law, should therefore be taken into consideration. There might be unhappy results, both in respect of the security of society and general deterrence, if persons who are blatantly guilty escape punishment simply because the evidence was obtained in an unlawful manner. This is especially important in the case of criminals who might commit grave punishable offences if not deprived of their liberty. If there is reason to reproach the police or others on account of the method in which the evidence was obtained, liability should be met in the form of punishment or other measures. If the measures which can now be applied are not considered stringent enough, stronger remedies should be considered.

Against the admission of illegally seized evidence, the objection can be raised that this would encourage the use of unjustified methods of investigation. For even if the guilty officer runs the risk of punishment or other sanctions, it would in practice be difficult to insure that the sanctions in fact are applied. It is clear that it is necessary to have a policeman investigate the case against another policeman, and this position, taken together with the circumstance that the illegal act was committed in the course of the fight against criminality, might easily lead to weakness in elucidation of the case and any possible penal consequences. Only if broad rules are laid down forbidding the admission of illegally acquired evidence can one hope to be able to put a stop to illegalities of this kind.

Another objection against the admission of illegally acquired evidence is that it could cause difficulties in respect of the rehabilitation of the individual offender, and besides it might reduce the general respect for the law. Experience indicates that criminals are especially sensitive to encroachment on the part of the authorities and that the feeling of having been unjustly treated can have the effect of inducing criminality. These handicaps will, in the long run, more than counterbalance the advantage of convicting one or another criminal as a consequence of the illegal methods.

Besides, it can be claimed that it will be of little practical significance if an offender now and then should escape punishment. This is especially the case today when the suspension of prosecution or sentence has to wide an application.[15] The purpose of the prosecution often seems to be fulfilled when the case is cleared up and the offender identified, and this he generally will be, even if the evidence against him is excluded with the result that he escapes a formal sanction.

There seem to be weighty reasons in favour of both solutions, and this may well indicate that it is impractical to lay down any definite regulations in

[13] See Bratholm, *The Privilege Against Self-Incrimination (Norway)*, 51 J. CRIM. L., C. & P.S. 186 (1960); Bratholm, *Police Interrogation Privileges and Limitations (Norway)*, 52 *id.* 72 (1961).

[14] ANDENAES, POLITIEMBEDSMENNENES BLAD (The Journal of Police Officials) 154 (Oslo 1958).

[15] According to the Norwegian criminal statistics of 1958, about three out of four persons guilty of a felony (felonies may be generally defined as offenses punishable by more than three months' imprisonment) got suspended sentence or suspended prosecution. In Norway the Public Prosecution Authority may suspend prosecution though the guilt of the accused appears beyond doubt. For further information, see Bratholm, *Arrest and Detention in Norway*, 108 U. PA. L. REV. 336, 341, nn.24, 25, & 26 (1960).

favour of one solution or the other. As far as I know, a definite choice between solutions has not been made in any country, but to a greater or lesser extent the decision has depended upon the circumstances in each particular case. In some countries, however, an attempt has been made to lay down definite solutions in certain types of cases; however, it seems to have proved difficult, even in such limited fields, to follow definite rules,[16] in the absence of compulsory legal provisions such as those in the West-German Criminal Procedure Act of 1950. This includes a provision, Section 136a, which forbids various closely defined methods of improper questioning. Evidence obtained by use of the forbidden methods cannot be admitted, even if the accused himself consents to the admission. Certainly no other country has such extensive provisions for the protection of the accused against illegal methods of questioning. These rules must be seen against the background of experiences gained by the German people under the National Socialist regime.

IV.

When deciding whether unlawfully acquired evidence should be excluded, there are a number of points which may be taken into account.

(1) Attention should first be paid to the gravity of the unlawful procedure, whether it was wilful or inadvertent, or whether, perhaps, it was the result of completely innocent misconception of competence. In the latter case it does not seem likely that there would be any reason to exclude the evidence.

Generally speaking, a course of procedure which is punishable must be considered more grave than one to which no penalty is attached, in so far as criminal legislation gives special protection to essential interests. But there are important interests which do not lend themselves to protection by criminal law, or which have not yet attained such protection, and therefore decisive weight should not be laid on whether the course of action is a crime in law. In Anglo-Saxon law, for example, evidence has been excluded on the grounds that the method of obtaining it involved an "unfair trick" against the accused.[17]

[16] See COWEN & CARVER, ESSAYS ON THE LAW OF EVIDENCE 77 (Oxford 1956); Williams, *Evidence Obtained by Illegal Means*, CRIM. L. REV. (Eng.) 342 (1955); Comment, 49 J. CRIM. L., C. & P.S. 59, 63 (1958).

[17] COWEN & CARTER, *op. cit. supra* note 16, at 88, 102.

Another important point to consider is whether material encroachment has taken place or whether there has only been a breach of the form prescribed by law. There is, for example, an essential difference between the seizure of evidence when the law positively forbids it (for example a medical case history) and the seizure of evidence when the police have failed to obtain consent of the court in a case where they could have obtained consent had they requested it. In the last mentioned case there is little to be said in favour of excluding the evidence, since the police have not acquired evidence unobtainable under the strict provisions of the law.

Generally, unlawful methods of procedure directed against the person, in the form of compulsion, threats, and the like, must be considered more serious than unlawful acts performed in obtaining material evidence. A method of procedure is considered especially serious if it involves a breach of Section 96 of the Norwegian Constitution, which forbids questioning with torture.

(2) It must also be considered important whether the unlawful action constitutes a direct injury to the accused or whether it is harmful first and foremost to the interests of others. One can, for example, imagine that the police have acquired decisive evidence against the accused by an unlawful examination of a witness or by an unlawful search of the house of a third party. In these cases the *accused* hardly has a justifiable claim that the evidence should be excluded, since he had no control over the object produced in evidence and therefore should have been prepared for the fact that the witness or the third party might consent to the searching. On the other hand, in certain of these cases *the witness or the third party* must have the right to oppose the admission of evidence. The decision probably depends on a weighing on the one hand of the importance to justice of the admission of the evidence, and on the other hand of the extent of injury the admission could cause to the offended party.

(3) Who obtained the illegal evidence is also a significant question; it seems, generally speaking, less harsh to admit evidence unlawfully obtained by a private person than by the police, since there is no question of encroachment on the part of the authorities.

(4) Further, the type of accusation is important. The more serious the accusation, the more hesitancy must there be in excluding evidence. This

is especially the case when there is a danger that the offender will commit more serious crimes if he is not imprisoned.

(5) The strength of the evidence is also probably important (if there is a basis for judging its strength). There will be little hesitancy in rejecting unlawfully obtained evidence considered to have little importance to the outcome of the case. However, in many cases, the fact that evidence was obtained unlawfully will itself lead to a serious weakening of its importance; if, for example, a confession is obtained by force, there is little reason to pay attention to it.

(6) Lastly, an important point may arise concerning *when* an objection is raised against the unlawfully acquired evidence. The longer an accused person or his counsel waits before putting forward an objection, the weaker must that objection become, since the public prosecutor may have omitted to introduce other evidence, relying on the evidence already before the court. Moreover, difficult problems of procedure will easily arise if the accused postpones the raising of his objection, especially if he raises it for the first time after the evidence has been laid before the trial court. If evidence is to be excluded in such a case, either the court must disregard it—no easy matter when it is already known—or a new trial must be instituted, with other judges. These practical difficulties could justify the admission of evidence that ought to have been excluded had the objection been raised in time, especially when the accused is to blame for failing to object at an earlier stage.

V.

It may be asked how the points of view given in the paragraphs above tally with court practice in Norway in respect of the admission of unlawfully obtained evidence. In reply it must be noted that it is difficult to form a reliable picture of this practice since there are so few published court decisions in Norway.

The dearth of court decisions could be taken as indicating that evidence is seldom obtained in Norway in an unlawful manner, but this would be a hasty conclusion. In this field one must assume the existence of a certain number of unknown instances of illegal seizures of evidence.

First, unlawfully obtained evidence can aid in clearing up a case without being known to anyone but the investigator concerned. For example, the investigator might come upon a trace of the guilty party's actions by unlawfully opening letters or tapping telephones. By means of such information the investigator finds a lead to other evidence, and neither during the investigation nor later is it disclosed that the case was cleared up on the basis of unlawful means.

It must also be assumed that a certain number of accused persons who have been victims of unlawful methods of investigation omit to make a complaint on this point, either because they are not aware that the method is unlawful, or because they cannot prove that any unlawful act has been committed, or—if they can prove such an act—that there is any causal connection between the unlawful method of procedure and the evidence.

It is also possible that many accused persons and counsel in Norway doubt the possibility of excluding unlawfully obtained evidence. This too can help explain the paucity of cases in practice.

The scarcity of court decisions can also be attributed to the fact that the public prosecutor is somewhat reserved in using illegally obtained evidence, especially if the case turns on a serious illegality, both because he desires to conceal the illegality and because he considers it unfair to the accused to make use of the evidence. It may be that a fully solved criminal case is shelved where it would have been tried if the evidence had been obtained in a regular manner.

VI.

I shall describe some cases of unlawful obtaining of evidence which have been recorded.

The first case concerned evidence obtained by means of unlawful arrest and seizure. The case concerned two Swedish citizens who had unlawfully transported a consignment of coffee from Norway over the border to Sweden, where they were arrested by Norwegian customs officials. They both accepted a fine, but later withdrew their acceptance and claimed that the decision must be quashed and the impounded coffee handed over to them because the arrest and seizure had taken place unlawfully on Swedish territory.

The judge of the Supreme Court delivering the court's opinion[18] declared that even if the customs officials had acted illegally in arresting the accused on the Swedish side of the border, this could be of no decisive importance in judging the criminal nature of their conduct or the validity of their

[18] Norsk Retstidende (Nor. Law Rep.) 684 (1918 I).

acceptance of the fine; the complaint was thereupon dismissed.

The second case concerned the use of unlawful methods of questioning. It involved three traitors who lay in prison in 1945 suspected of various punishable actions during the war, including the liquidation of a member of the Norwegian Resistance Movement. The accused declared themselves not guilty of the liquidation. Two constables on temporary service in the police decided they should attempt to extract a confession by taking the suspects by night to the place where the liquidation had taken place, under conditions as similar as possible to those which obtained on the night of the liquidation. The first man broke down and confessed before they had reached the spot; the second was taken there and then confessed; thereupon the third man admitted his guilt, before it was necessary to subject him to the same treatment.

The judge of the Supreme Court delivering the court's opinion[19] declared that on the occasion referred to the police had openly violated a number of procedural provisions designed for the protection of the accused, and that their action bore the stamp of a disrespect for law which was foreign to Norwegian justice and which must not be tolerated. But the court did not conclude that the confessions must therefore be excluded. The question of the admissibility of the evidence was not discussed clearly, and as far as I can see from the judgment, it was not clearly maintained by the defence that the manner in which the evidence was obtained should cause the court to disregard it completely.

There are some decisions concerning the admissibility of a statement given to the police by one closely related to the accused, when the witness was not informed by the police (as is required) of his right to refuse to make a statement, but later pleads exemption from court proceedings. The evidence can be used either by introducing the police report containing the witness's declaration or by testimony of the police officer concerning what the person questioned told him. Opinions on the admissibility of such evidence are divided. There is no solution offered in the law, and consistent precedents are not available. In some cases evidence is admitted, but in others it is excluded.

VII.

On the basis of the meagre precedent referred to here, we must conclude that apparently no extensive powers exist under Norwegian law to exclude unlawfully obtained evidence; nevertheless, we may not conclude that *no* such powers exist, since in the cases where such evidence has been admitted no especially strong reasons for excluding it have been present.

Little can be said in favour of quashing the conviction in the coffee smuggling case. The unlawful action of the customs officials hardly seems grave according to the information at hand. That the accused persons accepted the fine and waited to object until the time of their appeal may well have contributed to the result, even though the Supreme Court did not deal with this question.

Nor does the sentence of the Supreme Court in the case of the traitors seem open to criticism. The accusation related to the most serious crime known to criminal law, premeditated murder; moreover, even if the method of investigation was highly irregular, it can hardly be described as grave under the conditions which prevailed just after the war.

Another important point concerns the practical difficulties which probably would have arisen had the court decided to exclude the unlawfully obtained evidence in this case. It is not positively stated, but there is a strong probability that the suspects' confessions and their detailed statements on the liquidation led to the revelation of other evidence.

Had the court quashed the conviction because of the confessions, it would then have had to pass on the admissibility of the evidence brought to light as a consequence of the confessions. Much could be said in favour of excluding this evidence too, for the police would not have been able to obtain it if they had proceeded in a strictly lawful manner.

In practice it is at times difficult to distinguish between evidence directly obtained by unlawful methods, and other evidence; it may be asked how this doubt can be eliminated. Should all evidence be excluded which is a consequence of evidence obtained in an unlawful manner, or should discretion be the keynote of admission? The decision should probably be made along the lines I have mentioned earlier, that is, on the basis of such circumstances as the degree of illegality of the method of procedure, the type of crime, and so on.

In the case involving the traitors, if the charge

[19] Norsk Retstidende (Nor. Law Rep.) 46 (1948).