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General report - common law

Van Caenegem, William

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William van Caenegem
Bond University, william_van_caenegem@bond.edu.au

NEW TRENDS IN ILLEGAL EVIDENCE IN CRIMINAL PROCEDURE

GENERAL REPORT, COMMON LAW COUNTRIES[*]

William van Caenegem, Bond University, Queensland, Australia.

1. INTRODUCTION

The general principle in common law jurisdictions is that relevant evidence is admissible, unless it falls within a category which is excluded by law, or it is excluded in the exercise of a recognized judicial discretion. If evidence falls within a legally excluded category, it is excluded irrespective of general factors that may favor its admission (such as the public interest in convicting the guilty), unless it falls within an exception to the exclusionary rule (eg hearsay is generally excluded but certain hearsay statements such as admissions are not).

In the English tradition illegally or improperly obtained evidence was not a category of evidence excluded by operation of law, and was thus admissible, whatever its character (eg whether brought into existence by the illegality or not). However, such evidence could be excluded even though relevant by the court in the exercise of its general fairness discretion. This fairness discretion focused primarily on exclusion of unreliable evidence and was thus rarely if ever exercised in relation to illegal real evidence, as opposed to confessional evidence. Evidence could be classed as illegal by reference to the ordinary law applicable to its obtaining, or, mostly where it was confessional in nature, as improperly obtained, ie given voluntarily but in circumstances where conduct by the authorities later judged improper resulted in the relevant statement being made.

In more recent times most of the common law jurisdictions have abandoned sole reliance on the fairness discretion and have developed discreet rules and discretionary powers concerning

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admission or exclusion of illegal and improper evidence, with human rights provisions becoming the main reference frame for determining admissibility.

However, in the United States tradition the exclusion of unlawful evidence was not a matter of discretion but of law, and unlawful evidence has consistently been characterized by reference not to ordinary laws or general fairness but to constitutional rights and guarantees. If evidence is obtained in breach of a constitutional right, whether specifically related to the criminal process (eg in relation to search and seizure) or broader (eg in relation to privacy), it is classed as unlawful evidence and its exclusion is mandatory, not a question of discretion, or overall fairness and the like. However, exceptions apply to blunt the edge of the mandatory exclusion rule.

2. SOURCE OF THE POWER TO EXCLUDE

In the United States, the source of the power to exclude evidence unlawfully or improperly obtained (below: 'Illegal evidence') is the Constitution and precedent. In South Africa, the source of the power to exclude is Section 35(5) of the Constitution of the Republic of South Africa Act 108 of 1996, an express provision relating to admissibility of evidence: "*Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice*". However, a common law power to exclude improperly obtained evidence has not been abolished by the constitutional provision (eg evidence obtained by trickery involving guile, untruth or deception). The Constitution contains express provisions concerning procedural rights and general rights.

Similarly, in Canada the courts' power to exclude illegal evidence rests on an express provision in the Canadian Charter of Rights and Freedoms, section 24: "*Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.*"

The Charter (a constitutionally entrenched instrument) contains express clauses protecting criminal suspects' rights during the investigative stage, including rights relating to detention, search and seizure, and access to counsel. If a state actor obtains evidence through a violation of one of these rights, or any other right in the Charter, then the right holder may seek to obtain as a 'remedy' the exclusion of evidence pursuant to section 24.

In New Zealand, the power to exclude illegal evidence is now based in the Evidence Act 2006. Section 30 of this Act consolidates the rules as to the admissibility of illegally and improperly

obtained evidence in criminal proceedings. This provision requires the courts to engage in a balancing process by reference to statutorily prescribed factors to determine admissibility. The new legislation enters into force on 1 July 2007.

The power to exclude illegal evidence in Australia is based on the common law and on statutory provisions. The common law in Australia recognizes two relevant discretions: the general fairness discretion derived from English law, and also a discreet 'public policy' discretion, to exclude illegally or improperly obtained evidence. In New South Wales, the Territories, and at the Commonwealth (ie federal) level a Uniform Evidence Act applies, which largely codifies the common law concerning evidence, including provisions concerning admission or exclusion of illegally or improperly obtained evidence. Although referred to as Uniform, in fact this Evidence Act was not adopted in the other states of Australia, where the common law as modified by disparate enactments continues to apply. In the Uniform Evidence Act, the public policy discretion has been codified in a statutory provision retaining the discretionary power of the courts to exclude evidence illegally or improperly obtained by reference to a non-exhaustive list of factors to be taken into account in making a determination: eg section 138 Evidence Act 1995 (Cth). In the other Australian states the common law fairness discretion and discreet public policy discretion apply to illegally and improperly obtained evidence. The framework for the exercise of the public policy discretion was developed in a number of High Court cases and is relatively well settled.

In England and Wales the power to exclude illegal evidence has a mixed basis. The old common law position is that such evidence is admitted unless it is excluded by the court exercising its general fairness discretion. The power to exclude evidence in the interests of fairness is also encapsulated in section 78(1) of the Police and Criminal Evidence Act 1984 (PACE), which provides: '*In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it*'. However, a separate common law rule has evolved providing for the mandatory exclusion of evidence resulting from torture. Further, the Regulation of Investigatory Powers Act 2000 has been held to prohibit implicitly the admission of intercepted communications to which the Act applies, including ones intercepted illegally. The European Convention on Human Rights (ECHR) informs decisions concerning exclusion of illegal evidence; there is a current debate as to the effect of Article 6(1) of the ECHR, which guarantees the right to a fair trial, in reshaping criminal evidence law as it concerns the fairness discretion and section 78 (1) of PACE.

In Scotland the power to exclude illegal evidence is based in the common law. In the leading case of *Lawrie v Muir* 1950 JC 19 Lord Cooper held that the court must determine whether improperly acquired real evidence should be admitted having regard to the need to balance preservation of civil liberties with ensuring that justice is done. This is seen not as a discretionary power, but as a question of law, Appeal Courts readily interfering with the decisions of trial courts as to the admission of such evidence. Nonetheless the Courts are required to weigh up

balancing factors (see further below). The Court's power to exclude evidence under the *Lawrie* formula is akin to and may be seen as inspired by the fairness discretion, but stands apart from it as the fairness discretion is seen to apply to confessions and admissions.

The sources of the power or discretion to exclude illegal evidence present a mixed picture in the common law jurisdictions reported on. In Canada and South Africa it is based on constitutional provisions expressly conferring on courts the power to exclude evidence obtained in breach of an entrenched human right, very similar in tenure and approach. The Constitutional provision in South Africa is relatively recent, representing a change from the previous approach and mirroring the Canadian approach in large measure. In Scotland and Australia the power is based on the cases ie on the common law, and seems to have evolved into a separate discretion distinct from the general and older fairness discretion, supported by a different rationale. In England and Wales the power to exclude rests on a mixture of the common law fairness discretion, specific statutory provisions and the ECHR. In Australian states and the Commonwealth the distinct public policy discretion crafted by the courts, has been codified in the Uniform Evidence Act. This has not resulted in any great distinction between those jurisdictions and the majority of states where the discretion rests only on the common law. In New Zealand also there has been a recent introduction of statutory provisions conferring a discretion on the courts to exclude improper evidence, but whereas the focus in that country is on breaches of the Bill of Right to found exclusion, in Australia it is on breaches of ordinary law.

3. NATURE OF THE POWER TO EXCLUDE

EXCLUSIONARY AND INCLUSIONARY RULES

Traditionally in the Common law world the United States stands apart in applying a mandatory exclusion rule. However, judicial techniques that moderate this unilateral approach have developed over time, by crafting exceptions for illegal evidence obtained under certain circumstances (eg compelling public security conditions). The US approach is based on the concern to protect the rights of citizens as reflected in the Constitution, and on the primacy of human rights. However, in the English tradition the inclusionary principle traditionally predominated, that is, illegal evidence is admissible, unless in the exercise of its general fairness discretion the trial court decides to exclude it. The fairness discretion focuses on the broad question whether admission of the evidence will be unfair to the accused, and not on concerns about human rights, deterrence of investigative misconduct or about the standing of the courts in the eyes of the community. Thus the exclusion of illegal real evidence in the exercise of the fairness discretion is quite rare, since, except for admissions and confessions, such evidence is not brought into existence by an illegality nor will illegality normally affect its reliability.

In some jurisdictions however, the courts crafted a separate discretion applying to illegal evidence alone, giving an additional common law basis for exclusion, not based on fairness to the accused but on public policy concerns (deterrence and standing of the courts). This was

clearly the case in Australia (the 'public policy' discretion) and arguably also in Scotland. Where this discretion was then translated into statutory provisions, these typically identify a non-exhaustive list of factors favoring or opposing admission to be weighed up by courts, without attaching any differential weight to them, and allowing for non-prescribed factors to play a role in a given case. This was also the case in New Zealand, where prior to Evidence Act 2006, the fairness discretion had been extended to cover exclusion of illegal evidence also on public policy grounds. In terms of admissions and confessions, separate principles developed revolving around voluntariness, and fairness.

DISCRETION

The proper exercise of a discretion requires the weighing up of largely well-recognized *pro* and *contra* factors, but a true discretion also implies proper deference from courts of appeal for trial court decisions. In other words, appeal courts should allow the trial judge a degree of latitude in exercising his or her discretion, although generally the complete failure to consider a relevant factor constitutes a basis for overturning the trial decision. In this sense the truly discretionary nature of the power to exclude illegal evidence is clear in Australia and in England and Wales (except in specific cases where exclusion is said to be mandatory, see above), but not in Scotland, where admission of illegal evidence is treated as a question rather of law, and appeal courts have not shown any reluctance to intervene or 'tweak' the decisions of lower courts. In New Zealand prior to the introduction of the Evidence Act 2006, for a long time a prima facie exclusionary principle was applied to illegal evidence. However, in *R v Shaheed* [2002] 2 NZLR 377, (2002) 19 CRNZ 165, the Court of Appeal replaced the prima facie rule with a new balancing approach under which various factors were to be weighed in determining the admissibility of evidence tainted by a breach of the Bill of Rights. This approach has now been superseded by the application of the new New Zealand Evidence Act, but the relevant provision of that act amounts to a codification of the discretionary balancing approach taken in *Shaheed*.

Where a Bill of Rights guarantees certain procedural rights or contains provisions guaranteeing relevant rights such as the right to privacy, infringement of such a right is one factor that must be taken into account in the exercise of the discretion (eg in New Zealand, and to some extent in Australia – see section 138 (3) (f) Evidence Act 1995 (Cth) and further below). In South Africa, the exclusion of illegal evidence mandated by the Constitution is conditional. The South African Reporter states that: "*the Supreme Court of Appeal has held, with reference to the first leg of the test in section 35(5), "[t]hat there is no doubt that … a discretion exists … under the Constitution, upon the question of whether admission would or would not offend the constitutional guarantee" of the right to a fair trial. In exercising this discretion, the court should, where applicable, consider the factors as set out […]. If the court finds that admission of the impugned evidence will not render the trial unfair, it must proceed to the second leg of the test – and here, too, the court must exercise a discretion on the basis of certain factors or considerations which have been identified in case law […]".* The Canadian Charter provides that unconstitutionally obtained evidence "shall" be excluded. However, the standard for exclusion is so broadly expressed that the Courts have substantial latitude akin to a discretion. Appeal courts

have at least purported to give a fair degree of deference to trial judges' exclusionary decisions. However, conscriptive and non-discoverable evidence is almost always excluded in Canada.

4.RATIONALES FOR EXCLUSION

GENERALLY

A number of rationales for exclusion of illegal evidence have been identified by the courts and commentators: deterrence, vindication of rights, integrity and public standing of the courts, and respect for the rule of law. The deterrence rationale emphasizes that the authorities will be discouraged from using illegal or improper methods if evidence is as a consequence not available to the prosecution in court. The vindication rationale focuses more on human rights, whether general or procedural – exclusion of evidence obtained in breach of constitutional rights a vindicates their fundamental nature. Naturally the deterrence and vindication rationale are closely connected: the reason for deterring non-compliance with statutory or regulatory norms, is the fact that they exist in the first place to protect the citizenry against the depredations of the state.

The integrity rationale holds that courts should not countenance illegality, because this will diminish the public standing of, and confidence in the courts. The court's processes will be tainted by admission of evidence that has been illegally or improperly obtained. Courts exist to uphold the law, not to countenance and indirectly support such breaches by allowing them to benefit the prosecution.

The principal rationales opposing exclusion are that relevant evidence should not be excluded where its reliability is not in question, since there is a strong public interest in the guilty being convicted. Secondly, in terms of deterrence of illegal conduct, or protection of rights, there are other and more effective methods available, whether criminal proceedings against infringers, civil liability suits, or administrative proceedings and punishments.

IN THE VARIOUS JURISDICTIONS

These rationales are not always readily distinguishable and tend to intermingle in the courts' reasons in the various jurisdictions. There does not appear to be strong adherence to any single rationale in most jurisdictions reported on. In any case, where exclusion is discretionary, various factors connected to each rationale will have to be weighed up and balanced with one another. Even where illegality is defined by reference to breaches of human rights provisions, the courts might express or underpin their decisions by reference to deterrence and integrity.

In the US, no legislation sets out any rationale for exclusion. The courts have advanced integrity and respect for the rule of law, but deterrence of law-enforcement misconduct is the rationale most used by the courts and has recently been emphasized more and more.

In New Zealand the dominant approach to remedies for breaches of the Bill of Rights has been rights-centered. The Court of Appeal has emphasised that vindication of guaranteed rights is the overriding rationale for granting any remedy, including the exclusion of evidence. Although the rationale of the fairness discretion is self-explanatory, evidence has sometimes been excluded in the exercise of that discretion as a sanction against police misconduct or to prevent an abuse of process. In South Africa the rationale for exclusion is not expressed in legislation, but the drafters of the Constitution intended that human rights would be vindicated by way of the exclusionary rule in section 35(5) of the Constitution. The courts have identified several rationales for exclusion: judicial integrity; deterrence, including "systemic deterrence" (see below); and the need to discipline the police to protect constitutional rights – removing an "incentive … to disregard accused persons' constitutional rights." There is no discernable pattern in terms of which courts have recently tended to put more emphasis on any specific rationale.

In Scotland rules relating to the admissibility of improperly obtained real evidence have developed out of the rules relating to improperly obtained confessions. Lord Cooper in *Lawrie* (see above) noted that cases of improperly obtained real evidence "may bring into play the discretionary principle of fairness to the accused which has been developed so fully in our law in relation to the admission in evidence of confessions or admissions by a person suspected or charged with crime". This attitude has strengthened a misleading perception that exactly the same considerations apply to all irregularly obtained evidence, and an intermingling of fairness and integrity rationales. Scottish courts have never been clear about the precise justification or rationale for excluding improperly obtained evidence.

In Canada, the rationale for excluding unconstitutionally obtained evidence is not expressed in either the *Charter* or legislation. The Supreme Court of Canada has stated that while police misconduct often affects the repute of the administration of justice, section 24(2) is no remedy for such conduct. Rather, the provision's purpose is to prevent the further disrepute resulting from the admission of evidence that would "deprive the accused of a fair hearing, or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies." (*R v Collins* [1987]1 SCR 265 at 281). In subsequent decisions, however, the Court has placed increasing emphasis on the effect of exclusion in influencing "law enforcement authorities to respect the exigencies of the *Charter*" and promoting "the decency of investigatory techniques." (*R. v. Burlingham* [1995] 2 S.C.R. 206 at 231 and 242).

In Australia the public policy discretion is not concerned with ensuring fairness to the accused, but rather with on the one hand deterrence, ie to prevent the authorities from gaining comfort from the admission of illegal evidence, and engaging in the improper and illegal conduct in the future. On the other hand, underlying the separate development of this discretion in the common law and its inclusion in the Uniform Evidence Act, is also the concern to maintain the public standing of the court and its processes, and not allow it to be tainted by apparently condoning illegal conduct. These public interest concerns play a role in the balancing exercise that constitutes the core of the public policy discretion in the common law and statutory states.

5. RELATIONSHIP WITH OTHER POWERS/DISCRETIONS TO EXCLUDE EVIDENCE

GENERALLY

Generally speaking there is some overlapping or a close relationship between various discretions in common law jurisdictions. As mentioned above, the discretion to exclude illegal evidence subsists separately from the general fairness discretion in some common law jurisdictions, but exclusion falls under the broader fairness umbrella in others. A further relationship is that between the discretion to exclude illegal evidence and the power to exclude certain confessions and admissions. In the United States the situation is relatively straightforward, at least in theory: exclusion of unconstitutionally obtained evidence does not occur on a discretionary or general fairness basis, but is mandated whenever a violation of the Bill of Rights is found. Confessions obtained in violation of a constitutional right in the US or in the several states are simply treated as unlawful evidence and so excluded.

In Canada there was no discretion to exclude illegal evidence before the Charter, ie such evidence was generally admissible. The general fairness discretion only applied where the evidence was capable of misleading the trier of fact, so mostly in relation to admissions and confessions whose obtention in particular circumstances made them unreliable. After the introduction of the Charter, violation of its terms formed the apparent sole basis for exclusion of illegal evidence. However, it is now recognized by the courts that in limited cases, evidence can be excluded even though it was not obtained in violation of a Charter right, eg where introduction of the evidence into court itself would breach a Charter right, for instance that against self-incrimination. Cases where this has happened are very rare; however, it could occur where the violation occurred outside Canada, ie was not perpetrated by any person or in any circumstances where the Charter applies. Admissions and confessions obtained in breach of a Charter right (eg the right to silence) can be excluded on the basis of section 24 of the Charter as illegal evidence, but the common law rules concerning confessions are also operative: the Prosecution must prove beyond reasonable doubt that a statement was given voluntarily. Where a statement is obtained by trickery it may be treated as having been the result of oppression and thus not voluntary, but courts have also excluded voluntary statements where they were obtained by trickery "so appalling as to shock the community" (*R v Oickle* [2000] 2 SCR 3 at Para 67). The basis of this exclusion is not clear and few cases have identified trickery that meets this standard.

In South Africa the exclusion on the basis of Section 35 of the Constitution stands alone and is not part of, or a codification of some other or broader exclusion. In relation to confessions the South African Reporter states: "*In South Africa, the requirements for the admissibility of confessions and admissions are set by the Criminal Procedure Act 51 of 1977 (hereafter "the CPA"). Section 217 of the CPA provides, for example, that a confession will be admissible only if the prosecution can prove that the accused made the confession voluntarily and without undue*

influence, and whilst he was in his sound and sober senses. However, meeting these requirements does not necessarily guarantee admissibility. Where an accused alleges – and a court should find – that the otherwise admissible confession was obtained in breach of the constitutional right to be informed of the right to silence, the admissibility of the confession must still be determined with reference to the first and second leg of the test in section 35(5). The same approach applies in respect of an allegation and finding that the accused was prior to making his otherwise admissible confession, not informed of his constitutional right to have pre-trial access to a legal representative."

In Australia the 'public policy discretion' stands apart from the general fairness discretion. Its separate basis and rationale was recognized and explored in a number of High Court cases, notably *Rv Swaffield; Pavic v R* (1998) 192 CLR 159. It operates in relation to both illegally and improperly obtained evidence, the latter usually being admissions or confessions obtained by trickery. Thus the public policy discretion applies to more than just real evidence, and that both under the Uniform Evidence Act and in the common law states. Improperly obtained admissions or confessions, eg ones obtained by trickery or false statements may be excluded also for lack of voluntariness: it is up to the prosecution to establish that an admission or confession did not result from oppression or inducements that overbore the will of the accused. An admission or confession may also be excluded on the basis of the unfairness discretion, in the rare case where improper or unfair practices have been used to elicit an admission but it has nonetheless been held to be voluntarily given.

In New Zealand the exclusion of evidence now falls to be determined under the 2006 Act unless another enactment prescribes particular rules concerning evidence-gathering and the exclusion of evidence in case of non-compliance. Previously in New Zealand the Judges' Rules (crafted by judges of the Queen's Bench Division in England in 1912) applied to the admissibility of admissions and confessions. Even in the presence of the Bill of Rights, because some aspects of those rules had no counterpart in the Bill, the Judges Rules continued to remain relevant as guidelines for police conduct. Under the Evidence Act 2006, the Judges' Rules are replaced by practice notes issued by the Chief Justice. The general common law fairness discretion continued to operate alongside the Bill of Rights, and continues to operate after the introduction of the Evidence Act 2006. The fairness discretion in New Zealand is broader than the power of English courts and is part of the general jurisdiction to prevent an abuse of process. The fairness discretion has therefore also been exercised to reflect the courts' concern with due administration of justice, for instance as a means of disciplining police, and not solely with regard to fairness to the accused. The normal voluntariness rule applies to admissions and confessions.

In England and Wales the general fairness discretion applies to illegally obtained evidence where appropriate (see above). There is no separate discretion applying only to illegally or improperly obtained evidence, and there is thus no issue as to whether such a discretion is to be applied to admissions and confessions. The overall controlling standard of fairness to the accused is applied to admissions or confessions obtained by trickery or deceptive practices, and the voluntariness rule applies in the manner described above in relation to Canada. Some forms of illegal evidence, such as evidence obtained by torture, are not subject to the fairness discretion, but to mandatory

exclusion. This is also the case with some evidence obtained under specific enactments.

In Scotland the discretion to exclude illegal evidence stands separate from the general fairness discretion as well.

INHERENT POWER TO ORDER A STAY

The power to stay proceedings is inherent in the courts across common law jurisdictions, but is commonly exercised in cases of long delay, and where unfairness might result from reasons other than the admission of illegal or improper evidence, or of questionable confessions. A stay of proceedings as a remedy takes on most significance where illegal evidence is only excluded in the exercise of an overall fairness discretion, since the integrity interests protected by the granting of a stay cannot logically be accommodated within the purview of the fairness discretion.

Thus the courts in England and Wales have held that the alternative course (alternative to exclusion of evidence) of a stay of proceedings is available where otherwise a fair trial would be impossible, but also where continuing a trial would compromise the integrity of the criminal justice process. In the latter case, the standard is that continuing the trial would be an 'affront to the public conscience', in that it would otherwise appear to countenance behaviour that threatened human rights or the rule of law, thus eroding or degrading the administration of justice. In *In R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1AC 42 this power was exercised because of the authorities' disregard for the rule of law in a rendition case. Thus the power to order a stay is used on the basis of a rationale analogous to that underlying the 'public policy' discretion in Australia, but only in extreme cases where dealing with the issue as a question of admissibility going to fairness is not satisfactory.

As mentioned, in Canada section 24(1) of the *Charter* authorizes courts to remedy *Charter* violations in any manner that is "appropriate and just in the circumstances." Despite this broad wording courts have been reluctant to award other remedies. The Reporter states that though rare, stays of proceedings are occasionally awarded for abuses of process and breaches of the *Charter* right to be tried within a reasonable time. Stays are ordered when a *Charter* violation cannot otherwise be remedied, or when continued prosecution would cause 'irreparable prejudice to the integrity of the justice system'. Stays for abuse of process, however, will only be awarded "in the clearest of cases."

In New Zealand as well all courts have the inherent power to order a stay of proceedings, but this is a remedy of last resort and not normally appropriate to vindicate rights implicated by unlawfully or improperly obtained evidence; rather a stay is appropriate in relation to the right (in the Bill of Rights), to be tried without undue delay and the right to a fair trial. In Australia also the courts dispose of an inherent power to order a stay of proceedings, but since the public policy exclusion allows evidence to be withheld with a view to preserving the public standing of the courts and the integrity of the process, the granting of a stay with regard to illegal or improper evidence is rarely apposite.

6. WHAT IS ILLEGALLY OBTAINED EVIDENCE

ILLEGAL AND UNCONSTITUTIONAL CONDUCT

In a number of common law jurisdictions, illegally obtained evidence is evidence that has been obtained in breach of a constitutional right of the accused. That is of course the longstanding situation in the United States, where included for instance is evidence obtained by breach of constitutionally guaranteed rights relating to the criminal process, eg evidence obtained following illegal search and seizure. Evidence obtained as a direct result of an illegal arrest can also be excluded in that manner. The right to remain silent and the right to counsel can each be vindicated by exclusion of evidence. In the United States as in most of the other jurisdictions reported upon, evidence cannot be excluded for breaches of the criminal law and regulations. Evidence obtained improperly in some other way (ie in a manner that does not constitute a violation of a constitutional right) is also not excluded although evidence of identification obtained by excessive suggestion is excluded as a matter of due process of law.

In South Africa and Canada illegality is also expressly defined by reference to constitutional human rights. In Australia the situation is different as it is a breach of the law or of regulations that gives rise to discretionary exclusion. Australia, alone amongst the common law states reported on, does not have a bill of rights – in other words there is no constitutional guarantee concerning procedural rights in criminal proceedings, nor is there a constitutional limit on Parliament's sovereignty concerning procedural rights or other human rights of relevance to criminal proceedings (such as the right to privacy). Nonetheless, according to the Commonwealth Evidence Act, one of the factors to be weighed up by a court exercising its discretion in relation to evidence illegally obtained is whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognized by the International Covenant on Civil and Political Rights (see Evidence Act 1995 (Cth), sec 138 (3) (f)).

In New Zealand the Bill of Rights is not an entrenched statute. However, it took on great significance in relation to illegality even before the introduction of the Evidence Act 2006 (see above). Illegality became largely defined by direct reference to breaches of the provisions of the Bill of Rights, several of which are expressly directed to the criminal process, including the right to be secure against unreasonable search and seizure, the right not to be arbitrarily arrested or detained, the rights of persons arrested or detained, the rights of persons charged, and minimum standards of criminal procedure. Nonetheless, section 30 of the new Evidence Act 2006 still defines improper evidence (which comprises illegal evidence) as evidence obtained in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the Bill of Rights applies (section 30 (5)(a); evidence obtained unfairly (sec 30 (5) (c); and evidence obtained in consequence of a statement made by an accused that is or would be inadmissible if it were offered in evidence by the prosecution (sec 30(5)(b)). It is clear that the Bill remains central to the question of the discretionary exclusion of illegal or improper evidence, and one of the factors listed in sec 30(3) which a court may have regard to is 'The importance of any right

breached by the impropriety and the seriousness of the intrusion on it'. The preservation of the Rights protected by the Bill will remain the dominant feature of decisions under the new legislation.

In England and Wales illegality may consist of a breach of legislation, a breach of the common law, a breach of a Code of Practice, a breach of applicable guidelines, or any conduct considered unfair in the circumstances such as the use of trickery. However, the introduction of the Human rights Act 1998 has meant that alleged breaches of relevant Convention (ECHR) rights have "increasingly provided the focus for arguments for exclusion." The situation in England and Wales has some similarities to that in New Zealand; however, whereas in the latter country the cases have become firmly focused on breaches of rights in the Bill, the courts in England and Wales have been reluctant to allow direct reference to the ECHR human rights standards (eg to a fair trial) to usurp the existing fairness discretion in relation to illegal evidence. The courts there are apparently opposed to the idea that the law on the exclusion of illegal evidence may be altered by the application of the Human Rights Act 1998, which requires public authorities, including courts, to act in a manner compatible with Convention rights unless provisions in primary legislation of the Parliament of the United Kingdom requires them to act differently. In other words, courts in England and Wales prefer to proceed by way of the fairness discretion rather than by way of direct reference to breaches of human rights guaranteed by the Convention.

There is thus an interesting divergence within common law jurisdictions which results from their differential approaches to human rights guarantees in general, and from their direct application to the question of admission of illegal evidence in particular. In the United States, Canada and South Africa, human rights provisions stand squarely in the centre of considerations concerning admission of illegal evidence. In New Zealand and England and Wales, human rights play an increasing role, but considerable resistance to their direct influence on the rules of admissibility is evidence in England and Wales. The status of human rights guarantees in those countries is not simple or straightforward in a constitutional sense. In Australia and possibly also in Scotland, human rights issues play a far smaller role. In Australia there is no constitutional Bill of Rights, and in Scotland the courts have not proceeded on the basis of the ECHR, continuing to ensure fairness of criminal processes by reference to the traditional judicial powers and discretions.

IMPROPER CONDUCT

Connected to the question whether illegality or unconstitutionality form the basis for exclusion, is the question whether impropriety is a sufficient basis for exclusion of evidence under the same general rubric. In Australia the public policy discretion to exclude also extends to improperly rather than illegally obtained evidence. In New Zealand, under the new Evidence Act 2006, the statutory category of 'improper evidence' includes both illegally obtained and unfairly obtained evidence. In England and Wales, conduct considered unfair in the circumstances, such as trickery, resulting in the obtaining of evidence, will be able to be excluded in the exercise of the general fairness discretion. In other jurisdictions the question will be whether some constitutional

right has been violated because of or as an incidence of an improper practice on the part of the authorities (eg circumvention of the right to silence or to have counsel present). In other cases where confessions or admissions are concerned the basis for exclusion may be a lack of voluntariness. In South Africa, a common law power to exclude improperly obtained evidence has not been removed by the introduction of the relevant provisions of the Constitution; courts have been prepared to consider exclusion, even where a constitutional challenge has been dismissed, if police trickery involved guile, untruth or deception which amounted to disreputable or unacceptable police conduct. See also below, Entrapment.

Impropriety will arise mostly in relation to the obtaining of confessions and admissions, but it may also arise in the context of other categories of evidence; for instance, it may be improper to obtain a legal search warrant to obtain evidence which had been identified previously at premises during an illegal search. This then is a matter of causation or fruit of the poisonous tree-doctrines – see further below. However, relevant behavior may also include breaches of internal police guidelines or policy (as opposed to the law), unfair identification processes, arrest for minor offences, certain police practices including incidences of entrapment, inducing a witness to provide information on the promise of not having to give evidence and changing the conditions subsequently, etc. It is not possible to list or define exhaustively what may be improperly obtained evidence; it is also not possible to determine a priori how or under what power or discretion it will be dealt with by the courts. Suffice it to say that in some jurisdictions improperly obtained evidence can be dealt with in the same way and in the same category as illegal evidence – such is for instance the case in Australia. Impropriety seems particularly apt to be dealt with on a discretionary basis by courts, but in some jurisdictions a relevant discretion does not exist, and other means need to be developed to deal with the issue.

ILLEGAL CONDUCT BY NON-STATE ACTORS

This issue may be significant in two ways: first, can evidence gathered by private parties in a manner that is illegal or unconstitutional (if gathering information by private actors can be unconstitutional in the relevant jurisdiction) be excluded as illegal evidence; and secondly, can evidence gathered by foreign actors be so excluded. The latter question may be of relevance in to rendition cases, for instance.

In Canada, only if a state actor is engaged in illegality can illegal evidence be excluded under section 24(2) of the *Charter*. However, the Reporter states: "[…] courts have suggested that evidence that was not so obtained may sometimes be excluded on the basis that its acquisition involved misconduct [..] (perhaps) […] by a private actor. This can occur, for example, when evidence is obtained outside Canada […] (citations omitted)". The situation in New Zealand now appears similar, in that by virtue of section 30 of the new Evidence Act 2006, improper evidence obtained in consequence of a breach of any enactment or rule of law only by *a person to whom section 3 of the Bill of Rights applies* (sec 30 (5)(a); italics added) is subject to exclusion. However, this limitation does not apply to evidence unfairly obtained (sec 30(5)(c)), nor should it affect the application of the general common law fairness discretion.

In England and Wales mandatory exclusion of evidence obtained by torture has been held to be required even if the conduct was engaged in by non-UK authorities. The power to stay proceedings has been held to apply in cases of unlawful rendition where the authorities acted in blatant disregard of international law. Courts can thereby "refuse to countenance behaviour that threatens […] the rule of law" (see Bennett, above, at 62). As to the general application of exclusionary principles to private actors, the courts have warned against equating commercial lawlessness with executive lawlessness.

In South Africa the issue of application to private actors has arisen in the context of evidence obtained by vigilantes. The Court in *S v Hena* 2006 (2) SACR 33 (SECLD) held that unconstitutional evidence could be excluded even if no state authority was engaged in obtaining it. The same tests applied as to evidence obtained by the state; in *Hena* the evidence was excluded, having been obtained by way of gross violations of constitutional rights. In the United States illegally obtained evidence is not excluded if state actors have not been involved in the breach, but evidence obtained by private actors cooperating with state authorities is treated as obtained by the state. In Australia the public policy discretion is not limited to evidence obtained by law enforcement agencies, and for instance, the Commonwealth Evidence Act refers to illegality in general as a basis for exclusion, not only to illegal conduct by authorities; this appears to reflect the position under the common law.

Furthermore, in Australia the fairness discretion will also potentially apply to exclude evidence obtained overseas in circumstances that are not within Australian standards. In *R v Thomas* [2006] VSCA 165, a terrorism case, the court held on appeal that if the statements given to Australian police officers by the accused while detained in Pakistan had been held voluntarily made, it would still have excluded them as against public policy. The fairness of the surrounding circumstances was relevant to the public policy discretion. The accused did not have access to legal counsel when giving the interview which in the circumstances was unfair. It was important that courts do not demean their public standing and undermine their own statements concerning legal conduct by the authorities, by not excluding the evidence in question. However, in this case questioning by Australian police officers was at issue, even if they were operating abroad; the public policy rationale of deterrence will not operate in the same manner in the context of illegal conduct by non-state actors, such as foreign authorities.

ENTRAPMENT

Australia, Canada and the UK have all rejected entrapment as a substantive defense. In Canada entrapment is technically not an aspect of illegally obtained evidence, but of the common law abuse of process doctrine. The remedy is a stay of proceedings. Entrapment is also not part of the unlawful evidence doctrine in the United States; it is an affirmative defense to prosecution for an offence that is was brought about by entrapment. If the accused would not have committed the offence in the absence of the trap, then no public policy is served by conviction. In New Zealand, entrapment can be a ground for unfairness as a form of improper conduct by the police. Similarly in England and Wales evidence obtained by entrapment is subject to 'fair trial' exclusion in

theory, but it is now settled that the proper remedy for improper entrapment is a permanent stay as an abuse of court process. In South Africa entrapment is not a substantial defense but is addressed by the Criminal Procedure Act 1977 (section 252A) which regulates traps and undercover operations. It requires evidence to be excluded in certain cases if a trap goes beyond providing opportunity for the commission of an offence. If it is obtained in an improper or unfair manner which would render the trial unfair or would otherwise be detrimental to the administration of justice the court must decide on exclusion by weighing up the personal interest of the accused with the public interest by way of consideration of certain statutorily prescribed factors. However, this provision has been held to remain subject to the terms of section 35 (5) of the Constitution, so that exclusion is mandatory if a court is satisfied that admission would result in one of the consequences identified in that section. In Australia the question of impropriety arose in the case of *Ridgeway* (see above) where there were issues of police entrapment. Whilst the law does not recognize the defense of entrapment, improper or unfair police actions can give rise to the exclusion of evidence under the public policy discretion.

7. FACTORS RELEVANT TO EXCLUSION

In the United States mandatory exclusion of illegal evidence means that exclusion is not a matter for discretion on the basis of weighing up more or less pre-established factors. However, the courts have crafted exceptions to the exclusionary principle, which arguably have an effect or result analogous to the discretionary balancing approach. For example, if good faith is present and a breach is technical in nature, evidence will not be excluded (eg where a search is illegal due to a technical failing of the warrant document); and evidence will also not be excluded where circumstances of public emergency resulted in the evidence being obtained in a manner which breached some constitutional guarantee.

In England and Wales the general fairness discretion governs exclusion of illegal evidence, except for those categories of evidence whose exclusion is quasi-mandatory (see above). But despite protestations to the contrary from the courts, it is not clear under English law what the ingredients of a fair trial are, nor do the courts appear willing to provide much general guidance. Reliability is the primary guide of fairness, and other notions of fairness or other rationales for exclusion of evidence illegally obtained receive little attention. Because reliability is the paramount consideration, the fairness discretion plays a significant role in relation to confessions and admissions (where illegality might affect the reliability of the evidence) but almost no role in relation to real evidence, whose reliability is not normally affected by illegality. It is practically meaningless in relation to evidence obtained in an illegal search. Further, the fairness discretion under section 78 of PACE and the ECHR-guaranteed right to a fair trial have been treated as almost coextensive; in other words, if a court has turned its mind to fairness under PACE then that is sufficient consideration of the fair trial question under the ECHR, for instance in a case where the right to privacy is at issue. As the Reporter states: “In a decision on evidence of telephone intercepts, the House of Lords held, referring to Khan v UK, that “the direct operation of articles 8 and 6 does not … alter the vital role of section 78 as the means by which questions of the use of evidence obtained in breach of article 8 are to be resolved at a criminal trial. The

criterion to be applied is the criterion of fairness in article 6 which is likewise the criterion to be applied by the judge under section 78."". In that vein, the Court of Appeal has held that appropriate consideration of section 78(1) was sufficient to ensure compliance with the ECHR. Thus a breach of a right such as in article 8 of the ECHR does not, according to decisions to date, result in automatic exclusion in any way. As the Reporter states: "In sum, in England and Wales the approach taken is that a court's "powers to regulate the admission of evidence, pursuant inter alia to s 78 and its inherent jurisdiction, represent means of ensuring that Article 6 is not infringed. … unlawfully obtained evidence may be inadmissible but is not ipso facto so. Nor is a trial in which it is relied upon necessarily unfair."" In other words, a breach of human rights is only relevant to the exercise of the fairness discretion, and that discretion tends to be exercised with regard primarily to reliability. Although specific prescriptive legislation may mandate exclusion of evidence obtained in a manner that contravenes its prescriptions, this is not the case with PACE, breaches of which fall to be considered under the fairness discretion. However, the apparently narrow basis for exclusion in England and Wales is somewhat mitigated by the power to stay proceedings which constitute an abuse of the process of the court. Proceedings can be so stayed if a fair trial would be impossible but also if continuing a trial would compromise the integrity of the process of justice. Here the deterrence rationale clearly comes into play, as this power is concerned with preventing an abuse of power. However, the power to stay is only exercised in relatively egregious cases, such as rendition, torture and the like; cases where the administration of justice would be brought manifestly into disrepute by a continuing prosecution.

In Canada, although there is no presumptive or mandatory exclusion, evidence that is both conscriptive (ie compelled self-incrimination by a statement, use of the body or provision of bodily samples) and non-discoverable (ie unobtainable by legal means) will, according to recent Supreme Court authority, in almost all cases require exclusion. In other cases the deliberateness of the Charter violation is a factor to be assessed: whether it was in good faith, inadvertent or merely technical, or deliberate, wilful or flagrant. As well as inadvertent, misconduct must be reasonable to avoid exclusion of resulting evidence. It may be reasonable because it was based on a legal assessment with some authority, including police policy notices, that was later held to be in error. Urgency, whether legal means were available, and the extent of any invasion of privacy are also factors to be weighed. A further set of relevant factors concerns the impact on the reputation of the legal system of a decision concerning illegal evidence. The seriousness of the crime and the probativeness of the evidence are significant factors considered by courts in this manner. However, the Reporter states: "This set of factors has received less jurisprudential attention than the others and likely plays a lesser role in deciding admissibility." Some commentators have suggested these factors do no work at all.

In South Africa all the circumstances are relevant to the assessment of the two aspect of section 35 (fairness on the one hand and detriment to the administration of justice on the other). There are thus no mandatory factors to be taken into account. However, the courts have developed a fairly rigid set of guidelines in the period since the introduction of section 35(5). Breach of the pre-trial right to silence is directly relevant to the fairness of a trial. But unlike in Canada not all conscriptive evidence, such as a statement obtained without a warning concerning the dangers of self-incrimination, is automatically excluded. Although this is very likely where the omission

was deliberate, where the omission was not flagrant and occurred under the pressure of circumstances (analogous to the public safety exception in US law), and the police were bona fide, evidence has been admitted. By contrast, where the evidence is real evidence (and thus not non-discoverable) admission will rarely render the trial unfair.

If it is found not to be unfair to admit the evidence, then the court must still consider whether admission would be detrimental to the administration of justice – will the courts' standing be better served by inclusion or exclusion? Respect for human rights must be balanced against respect for the judicial process. In this context, the following factors favor admission: good faith and reasonableness; triviality of the breach of a constitutional right; urgency re public safety; the 'extremely high level of crime in South Africa'; inadvertent and technical breach; real evidence which is non-conscriptive; the need for balance between crime control and due process; and the need to maintain confidence in the judicial system by a robust attitude towards human rights breaches. They must be weighed up against factors favoring exclusion, which are essentially the opposites of those factors listed above: bad faith; failure to followed procedures prescribed by legislation; gross and flagrant breaches will thus favor exclusion. Systemic deterrence will also play a potential role – thus it might be necessary to exclude evidence to deter practices that have developed erroneously within the police, so that 'the system (the South African Police Service) [can be] brought to heel.', as the Reporter states. Courts have not set down rules as to any differential weight that must be accorded to the different factors. Section 35(5) has not abolished the common law discretion to exclude improperly obtained evidence. This discretion was hardly ever exercised, but courts have been prepared to consider whether evidence held not to impinge upon a constitutional right should nevertheless be excluded, for instance where trickery involved guile, untruth or deception amounting to unacceptable or disreputable police conduct.

In New Zealand the new Evidence Act 2006, section 30, defines 'improperly obtained evidence' as evidence obtained (1) in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the Bill of Rights applies; (2) in consequence of a statement made by an accused that is or would be inadmissible if it were offered in evidence by the prosecution; or (3) unfairly. In accordance with (2) real evidence derived from information contained in an illegally obtained statement is improperly obtained evidence. In relation to (3) the Reporter indicates that "the retention of this broad catchment of unfairness will allow the courts a significant margin of discretion in excluding evidence that is not otherwise improperly obtained under (1) or (2) or that is not inadmissible under other provisions of the Act." To determine unfairness the courts by virtue of section 30 (5) (c) must take into account guidelines to be issued in practice notes by the Chief Justice. Like the Judges' Rules these practice notes will not have the force of law; at the time of writing these practice notes had not been released.

If on the balance of probabilities the court determines that evidence has been improperly obtained, it must decide whether or not the exclusion of the evidence is "proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety but also takes account of the need for an effective and credible system of justice" (section 30 (2) (b)). Section 30(3) provides a non-exhaustive list of factors, drawn directly from the case of *R v Shaheed* (see above):

(1) The importance of any right breached by the impropriety and the seriousness of the intrusion on it.
(2) The nature of the impropriety, in particular whether it was deliberate, reckless, or done in bad faith.
(3) The nature and quality of the improperly obtained evidence.
(4) The seriousness of the offence with which the accused is charged.
(5) Whether there were any other investigatory techniques not involving any breach of rights that were known to be available but were not used.
(6) Whether there are alternative remedies to exclusion of the evidence which can adequately provide redress to the accused.
(7) Whether the impropriety was necessary to avoid apprehended physical danger to the police or others.
(8) Whether there was an urgency in obtaining the improperly obtainedevidence.

The only *Shaheed* factor omitted from the statutory list of factors is the importance of the evidence to the prosecution case. Whether or not this factor is comprehended within one of the other statutory factors, the list is inclusive rather than exhaustive. Thus whether evidence is obtained in breach of a strict compliance regime in special legislation is another factor that may be considered.

In Australia the public policy discretion stands apart from a broader fairness discretion both in the common law states and where the Uniform Evidence Act applies. Whether evidence constitutes illegal evidence is not determined by reference to human rights, but by reference to compliance with ordinary laws. The Evidence Act 1995 (Cth) (the Uniform Evidence Act as enacted by the Commonwealth) provides that evidence obtained improperly or in contravention of law is 'not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained' (section 138). Impropriety is not exhaustively defined but includes admissions obtained by false statements or by doing something that impairs substantially the ability to respond rationally. The non-exhaustive list of factors in section 138 (3) is as follows:
(a) the probative value of the evidence; and
(b) the importance of the evidence in the proceeding; and
(c) the nature of the relevant offence, cause of action or defence and the nature of the subject‑matter of the proceeding; and
(d) the gravity of the impropriety or contravention; and
(e) whether the impropriety or contravention was deliberate or reckless; and
(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

These factors are the same as apply in the exercise of the common law public policy discretion in

the States that have not adopted the Uniform Evidence Act. They are in fact a codification of the factors recognized by the High Court and relatively well settled prior to the introduction of the Uniform Evidence Act. Fairness to the accused is not one of the factors listed. However, in the common law states there have been suggestions that fairness to the accused is a relevant factor, without this detracting from the separate development of the general fairness discretion and the public policy discretion in Australian law. Both serve different purposes, the public policy discretion serving the purpose not of preventing an unfair trial or excluding unreliable evidence (such as involuntary confessions), but of deterrence and integrity – ie that the standing of the courts not be diminished by condoning the use of illegally obtained evidence. By excluding illegal evidence, the public interest is served; ie the question is whether the evidence has been obtained at 'too high a price'. In Australia, some statutes that have expanded police powers also contain provisions confirming the discretionary nature of the exclusion of evidence obtained in breach of particular prescriptions.

As pointed out above the situation in Scotland is similar to that in Australia in that there is a recognized discretion to exclude illegal or improper evidence which stands apart from the fairness discretion (the *Lawrie* test). Where an irregularity has been established, courts have to consider whether such irregularity can be excused. They must weigh up the public interest in protection from illegal or irregular invasions of liberty by authorities, and the sometimes countervailing interest of the State in securing conviction of offenders. Hence evidence should not be withheld from the courts on a mere formality or technicality. Whether it can be withheld depends on the nature of the irregularity, the circumstances and "in particular, the discretionary principle of fairness to the accused" (as had been fully developed in relation to confessions). Despite some confusion in Scotland about the factors that are relevant in determining admissibility and weight, the Reporter states that amongst the issues that have been taken into account are the gravity of the crime; the extent of the irregularity; the urgency of the investigation; the need to preserve evidence; the authority and identity of those who obtained the evidence; the motive of those responsible for the impropriety; the extent of the infringement of the accused's rights; and the issue of fairness to the accused. The Reporter states that the judiciary has tended to pick and mix from the list, and proceed on an *ad hoc* basis; uncertainty and confusion have resulted according to some commentators. Judges in Scotland do not have a discretion, in the true sense of the word, whether to exclude improperly obtained evidence. The decision is regarded as one of law and reviewable as such by the Appeal court (contrary to PACE sec 78 in England, where review is only possible on *Wednesbury*-principles). In fact there are relatively few cases where the courts have been prepared to reject evidence on the *Lawrie* test. Partly however this may be due to the avoidance techniques often used, such as appeal courts holding that the trial court's decision that there was an irregularity was wrong; on the basis of urgency; and on the basis of procedural points (eg that the Crown had not made an attempt to excuse an irregularity). The courts have also conflated the issues whether there was an irregularity and whether it can be excused, which complicates the picture and makes the reasoning confusing. For instance, courts may leave aside the question whether police actions were proper or required to be excused, and ask whether it was fair to the accused to let the evidence in, which required balancing the interests of the public in conviction of the guilty against the interests of the individual.

8. **PROCEDURAL ISSUES**

BURDEN AND STANDARD OF PROOF/POWER TO EXCLUDE

In the United States the power to exclude is only to be exercised by the Courts, properly so called. Unlawfulness can be and is invoked by pre-trial motion. If an issue concerning illegal evidence arises during the trial a motion can be made at that time, but if not the issue is waived. The burden of proof of compliance with the constitution is generally on the prosecution, although there are some complex applicable rules. Courts have the power to raise questions of illegality but this occurs but rarely.

In Canada a tribunal has the power to exclude illegal evidence only if it can be properly defined as a "court of competent jurisdiction" (to grant remedies, such as the exclusion of evidence). The Reporter states: "Applying this test, the Supreme Court has determined that unconstitutionally obtained evidence may be excluded in criminal and quasi-criminal trials, but not at preliminary hearings in criminal matters, since preliminary inquiry judges do not grant remedies (they only decide whether the case should proceed to trial). The application of the test to administrative tribunals has generated mixed results (citations omitted)." In other words, evidence may only be excluded at trial in Canada. Defendants have the onus of establishing violation of a Charter right on the balance of probabilities, and similarly of establishing whether admission would "bring the administration of justice into disrepute". Courts can raise the issue of illegality but the burden of proof is with the accused in the manner just described. In South Africa admissibility of unconstitutionally obtained evidence must be raised at trial and dealt with by a 'trial within a trial' – it cannot be raised by pre-trial motion and a pre-trial application for a stay has never been successful. As to onus, although there are inconsistencies in the decisions, the Reporter states that the correct view is that once the accused has alleged that evidence was obtained in breach of a constitutional right, the 'state must prove the contrary beyond reasonable doubt'. If it fails to do so the court must then consider whether admission of the evidence will result in one of the consequences identified in section 35 (5) of the Constitution. Since this is a discretionary determination, there is no onus at this stage. A court may raise an issue of illegality of its own motion, and is obliged to do so where the accused is unrepresented. In tribunals, as opposed to courts, section 35(5) cannot be relied upon, but other constitutional provisions guarantee fair administrative processes, which may form the basis for the exclusion of illegal evidence.

In Australia as well, tribunals such as the Administrative Appeals Tribunal, which is not a court, are not bound by the common law rules of evidence. In Australia the matter of exclusion of illegal evidence is not one for the consideration of magistrates at committal hearings, but it may be raised at a preliminary hearing as to admissibility under statutory provisions that allow such matters to be determined prior to trial. Alternatively the question of admissibility of evidence can be raised at the trial proper. At the preliminary hearing or at the trial on the *voir dire* the defense must raise illegality as a ground of exclusion. The prosecution must then establish grounds for admitting the evidence, although the court, in the exercise of its discretion, can take relevant matters into consideration regardless of whether the parties have raised them.

In England and Wales matters of admissibility can also be determined at a pre-trial hearing, which may be held after the issue whether such a hearing should be held is raised at plea and/or case-management hearings. PACE provides that a court can raise the matter of admissibility of a confession of its own motion and require the prosecution to prove that it was not obtained in a manner proscribed by section 76(2) of that Act. The question of fairness of admitting evidence against an accused can also be raised by the court of its own motion. It is then a matter of discretion and the courts regard it as inappropriate to approach the question in terms of an onus of proof lying on one or another party. In New Zealand admissibility of impugned evidence can be challenged in summary and indictable proceedings before, during or after trial. As to the fairness discretion, some cases have taken the English approach that this is not a matter amenable to formal rules concerning onus and burden of proof, where others have held that once unfairness is raised the prosecution must negate it beyond reasonable doubt. Previously the accused bore the initial burden to establish a 'sufficient foundation' that a breach had occurred, with the subsequent onus being on the prosecution to establish compliance with the Bill of Rights on the balance of probabilities. The new Evidence Act provides that the accused must establish an evidentiary foundation for the claim that evidence was improperly obtained (as statutorily defined). Subsequently there is no indication of onus of proof, it being up to the court to decide on the balance of probabilities whether the evidence should be excluded or not. In Scotland it seems that the crown must excuse an irregularity when it is raised by the defense. The matter has been considered a question of law rather than of discretion, but without strict rules concerning burden of proof being formulated or observed.

APPEALS

A significant issue is whether the decision to admit or exclude illegal evidence, is a matter of discretion or law, and whether the question is one of admissibility or of discretionary exclusion. The answer will determine the proper approach of appeal courts to reviewing decisions to admit or exclude such evidence at trial. In South Africa (where the matter arises only at trial) admissibility of evidence is a question of law, and any person aggrieved by the decision may appeal. An appeal court may set aside a conviction if evidence was incorrectly admitted, or may substitute its own decision for that of the trial court, or may make any order justice requires. In Scotland the situation appears similar: appeal courts have been very willing to intervene and not treat decisions about exclusion of illegal evidence as discretionary and therefore entitled to greater deference (see also above). In Canada, technically speaking the power to exclude is not discretionary either. However, it is expressed in such broad statutory terms that courts of appeal have shown 'a fair degree of deference' to trial decisions concerning exclusion. Nonetheless, for conscriptive and non-discoverable evidence the discretion is more limited, exclusion closer to mandatory. In Canada there is no direct relationship between general appeal standards in criminal cases and decisions concerning illegally obtained evidence: appeal courts may not consider illegally obtained evidence in determining the broader question whether a substantial miscarriage of justice has occurred or not. In the United States a refusal to exclude unlawfully obtained evidence may be challenged on appeal. It is a matter of law rather than discretion, but the Supreme Court has held that erroneous admission of an unconstitutionally obtained

confession may be a ‘harmless error’ if there is ample other evidence to sustain a conviction.

In England and Wales erroneous admission of illegal evidence will not automatically result in a successful appeal against conviction – the overall standard, whether the conviction is unsafe, will apply. A retrial may be ordered upon a successful appeal if the interests of justice require it in the eyes of the appeal court. If a ruling on admissibility against the prosecution would terminate the case because the Crown would not proceed with it, an appeal lies against a trial decision to exclude. In New Zealand in summary district court proceedings an appeal lies either on a question of law or as a general appeal, and inter-locutory pre-trial decisions on admissibility can also be appealed. Questions of admissibility may be reserved by the trial court during or after trial for the opinion of the Court of Appeal. A general appeal lies against any conviction on indictment, including on the basis of an erroneous decision in law as to admissibility, but such appeal can be rejected on the basis that notwithstanding an error in law, there has been no ‘substantial miscarriage of justice’. The question asked in relation to the proviso is whether a properly directed jury would on the evidence properly admitted, without doubt convict. The situation in Australia is similar on that point. Public policy exclusion being discretionary in nature, a trial court decision in that regard is treated with the usual deference due to discretionary rulings. The question to be considered is whether the discretion has miscarried.

ILLEGAL EVIDENCE IN CIVIL CASES

In the United States, in general, unlawfully obtained evidence is not excluded outside criminal trials. In Canada improperly obtained evidence is generally admissible in civil cases, but in Quebec, it may be excluded if fundamental rights and freedoms would be breached and its use would tend to bring the administration of justice into disrepute. Further the Reporter states: “It is also possible to argue in civil proceedings (in every jurisdiction in Canada) that evidence obtained in an unconstitutional manner by a state agent should be excluded under section 24(2) of the Charter. However, as the consequences of a finding of liability are not as onerous, exclusion is less likely in civil cases where the state is a party than in criminal cases. Exclusion under section 24(2) is even less likely in civil cases where the state is not a party, since the party seeking to adduce the evidence will typically have had no involvement in the illegal actions that produced it (citations omitted)”. In England the question has not often been considered but in *Jones v University of Warwick*, [2003] EWCA Civ 151, [2003] 1 WLR 954 (an insurance case where video evidence was offered) the Court of Appeal suggested a flexible approach should be taken involving the balancing of competing public interests. However, it would be a rare and outrageous case where the evidence would be excluded where it is relevant and probative. The Court pointed out that its disapproval of the conduct at issue could be marked in ways other than exclusion of evidence, for instance in an appropriate order for costs.

In South Africa, section 35(5) does not apply to civil proceedings, but the Reporter states “[in a civil matter] it was held that the denial of a discretion to exclude unconstitutionally or otherwise improperly obtained evidence, would be “a retrogressive step in the development of our law …” A court, it was said, is directed by section 39(2) of the Constitution […] to “promote the spirit, purport and object” of the Bill of Rights. In [a civil matter] evidence obtained by the applicant in

breach of the respondent's constitutional right to privacy, was excluded. It was held that admission thereof "would bring the administration of justice in disrepute … [and] … would invite similar disrespect for the law and Constitution."(citations omitted)". In Australia evidence has at times been excluded in civil cases on the basis of the public policy discretion. In New Zealand, the new Evidence Act provision (section 30) concerning improper evidence only applies to criminal proceedings. There is no reference in the Act to the specific question of admissibility of such evidence civil proceedings.

REMEDIES OTHER THAN EXCLUSION OF EVIDENCE

Exclusion of evidence is one way in which illegal conduct by authorities can be remedied, by denying the authorities the forensic advantage against the accused that admission would bring. However, more direct remedies are also generally available, although maybe less readily to accused persons. Thus in all jurisdictions criminal proceedings may be brought against officers of the state who breach the criminal law. Civil proceedings for damages arising out of breaches of the law may also lie, whether on a purely compensatory basis or, with due regard to flagrancy, augmented by punitive damages. In some jurisdictions actions for damages may be available for breaches of constitutional human rights (eg at the Federal level in the US). Alternatively the cause of action may lie in the traditional torts of trespass to goods, to land or to the person. Also, administrative processes or proceedings might exist either at the behest of individual citizens or as a matter of departmental procedure.

In the United States, injunctive relief for patterns of abuse of federal constitutional rights is also available (since 1994). The latter may be brought as a private claim through a class action (a difficult and onerous case), or through a complaint to the Department of Justice, which is authorized to bring such actions as a matter of government civil rights enforcement. In that country more generally, damages are available for violations of constitutional rights, as well as for state-based torts such as assault or trespass. Disciplinary proceedings against individual officers of local and federal departments are also an available option. There is a general movement in favor of external review of police complaints, which is sometimes supported, sometimes opposed by police officials. A federal prosecution for violation of civil rights is possible, as is a local prosecution for a state crime such as assault or homicide. Such prosecutions in the states are increasingly common, although the conviction rates remain low. The availability of other remedies doesn't affect the exclusionary rule in criminal proceedings, although the Reporter states that scholars and judges sometimes argue that the availability of the alternative remedies removes the rationale for the exclusionary rule.

In New Zealand, by contrast, in *Ministry of Transport v Noort, Police v Curran* [1992] 2 NZLR 260, the Court of Appeal rejected the claim that appellants should also be awarded monetary compensation for serving sentences that ought not to have been imposed, where evidence was held subsequently to be inadmissible. Avoiding a conviction was held to be ample redress. The Reporter states: "It has yet to be decided whether a reduction in sentence is available as an alternative remedy to exclusion of improperly obtained evidence. The idea was regarded as "strange" by the main judgment in R v Shaheed (above) on the ground

that it would bring the administration of justice into disrepute by engendering a general perception that the police could now breach the Bill of Rights but still secure a conviction." However, in *R v Williams* [20007]NZCA 52 the NZ Court of Appeal "was not prepared to exclude the possibility of such further remedies as making declarations of breach and/or referring breaches to the Police Commissioner and, in extreme cases, to the Police Complaints Authority. As it seemed to the court, such measures would enable the nature of the right to be publicly recognised, systemic difficulties to be identified and addressed, and individual transgressors to be dealt with in an appropriate manner (including by retraining individual police officers)." Note that it was pointed out above that the Bill of Rights in New Zealand generally left the question of an appropriate response or remedy for breaches of the Bill open and a matter to be dealt with by the courts as an incident of their general jurisdiction and powers.

By contrast the language of the Canadian constitutional admissibility provisions, perhaps unusually in the common law countries, allows the courts to remedy Charter violations in any manner "appropriate and just in the circumstances." But courts have been reluctant to award other remedies for breaches of the Charter; damages and sentence mitigation are very rare, but costs orders reflecting failures of disclosure are less uncommon. Various civil actions lie for instance for false imprisonment or malicious prosecution. Exclusion of unconstitutionally obtained evidence under section 24(2) of the *Charter* bears no direct relationship to the availability of other remedies. According to the Reporter "It is probably fair to say, however, that in recent decades judges have become increasingly skeptical of the idea that alternative remedies are effective in disciplining the police."

In England and Wales, although the language of 'remedies' there appears more unusual, they include civil actions against the police for damages; private prosecution against the police; and bringing a complaint against the police. The Reporter states that "In 2004 the Independent Police Complaints Commission, which represented the culmination of reforms to the police complaints system, replaced the Police Complaints Authority, which had attracted considerable criticism. An investigation of a complaint against the police may be followed by disciplinary action against the police, or the referral of the case to the Crown Prosecution Service for a decision on whether to bring a public prosecution." No discussion is to be found in the cases in England and Wales concerning the relevance for the issue of exclusion of the availability or otherwise of other "remedies". In South Africa criminal charges or civil action against individual police officers or the Police Service are always available to a person aggrieved by police conduct, or the conduct of any other involved party. Such actions do not impact on the application of section 35(5). Disciplinary processes have not been changed in recent times. In Australia criminal proceedings may lie against persons in authority who breach the law, as well as civil actions for compensation flowing from trespass to goods or to the person. Administrative and disciplinary proceedings may be initiated. There is not particular right of action in relation to breaches of human rights as exists in some other jurisdictions, inter alia for the obvious reason that there is no Bill of Rights.

ILLEGAL EVIDENCE USED TO IMPEACH

The Reporter for Canada states that in " [R]. v. Calder, the Supreme Court of Canada decided that evidence excluded under section 24(2) could not be admitted to impeach credibility, save for "very limited circumstances" where "a material change of circumstances . . . would warrant reopening the issue." This does not include, however, the fact that the accused's trial testimony contradicts a statement that he or she made to police (citations omitted)". In the United States evidence obtained through an unlawful search may be used to impeach an accused who takes the stand, but evidence of an unlawful confession may not. In South Africa a non-coerced pre-trial statement by an accused which was excluded under section 35(5) could not be used in cross-examination of an accused who gave evidence, but a co-accused has been allowed to use such a statement in cross-examination of another co-accused.

9.CAUSATION AND FRUIT OF THE POISONOUS TREE

Two questions are at issue here. The first is whether there is a sufficient connection between the illegality and the evidence sought to be tendered to justify exclusion: is the evidence tainted by the illegality? The second more specific question is whether further evidence discovered by reliance on information obtained in a manner vitiated by illegality, can still be admitted or not. A strict 'fruit of the poisonous tree' doctrine would see such evidence excluded as well; but although strongly vindicating rights, strict application of the doctrine considerably impedes the authorities' ability to obtain convictions of guilty parties. Commonly such evidence ('fruit of the poisonous tree') will be admitted if it would or could be obtained legally and independently.

The 'fruit of the poisonous tree' doctrine is most strong in the US. It is there said that the essence of the exclusion of unlawful evidence is that it should not be used at all, rather than that it should not be used in a trial or prosecution of the accused. The doctrine applies to physical and verbal evidence, and to evidence obtained in violation of the accused's right to counsel. In *Wong Sun v United States* the relevant question to ask was said to be "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint" (371 U.S. 471, 487-88 (1963)). Elapsing of time can, for instance, sufficiently attenuate the link. However, that evidence is obtained from an unlawful arrest does not protect an individual from prosecution on evidence otherwise sourced. The authorities must prove that the evidence comes from an independent source. Although there are no exceptions to the exclusion, various legal devices permit the use of evidence that is found independent of the unlawful act.

In Canada evidence that is "obtained in a manner" that violates a *Charter* right is subject to discretionary exclusion by virtue of section 24(2), including evidence causally derived from unconstitutionally obtained evidence. However, the causal link must not be too "remote." Causal remoteness is adjudged by reference to the terms "obtained in a manner" found in the *Charter*. Causation issues may also arise when determining whether admission could "bring the administration of justice into disrepute." That unconstitutionally obtained evidence could have been (or in fact was subsequently) obtained legally heightens the seriousness of the *Charter*

violation because it tends to demonstrate a "blatant disregard for the *Charter*." A presumption of exclusion applies to self-incriminating evidence so for this purpose it is relevant to determine whether evidence is discoverable or not. There may in fact be an "independent source" for the evidence, according to the Reporter "for example, where police had grounds to obtain a warrant to seize a bodily substance but failed to do so. Second, notwithstanding the Charter violation, police may have "inevitably" discovered the evidence. In either case, the prosecution must prove (on a balance of probabilities) that the evidence "would have been discovered in the absence of the unlawful conscription of the accused." (citations omitted)".

A strong doctrine of taint has not been accepted in New Zealand (ie that all subsequently obtained evidence is tainted by an earlier breach). The courts have recently largely settled on a 'real and substantial connection' test of causal link between illegality and evidence. At present even if subsequent evidence would not have been obtained 'but for' the earlier illegality, it will still be admitted if this can be done without reference to or being contingent on the earlier breach, and if its probativeness does not depend on the evidence obtained by the earlier breach. A notion of attenuation of breach reminiscent of the US position also applies in New Zealand, ie that at some moment the earlier breach is so remote that it should be disregarded in considering admissibility.

In Australia, there is also no automatic exclusion of further evidence which is obtained by reliance on excluded illegal evidence. The Commonwealth Evidence Act provides (section 138) that evidence obtained '*(b in consequence of an impropriety or of a contravention of an Australian law*' is to be considered subject to the discretionary factors just as illegally or improperly obtained evidence itself is; ie such evidence '*is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained*.' The strength of the causal connection, together with other relevant factors such as the ability to obtain the evidence by legal means, will be taken into account in the exercise of the discretion by a court. The same applies to evidence 'obtained in consequence of the admission' where that admission was improperly obtained. This substantially represents the common law position in that country as well.

In England and Wales the matter is partially dealt with by express statutory provision: sections 76(4) and 76(6) of PACE read in conjunction mean that derivative evidence discovered wholly or partly because of an excluded confession is admissible as a matter of law. However, the prosecution is expressly prohibited from introducing evidence that the fact was discovered as a result of a confession by the accused. Nonetheless, derivative evidence flowing from a confession can still be excluded on the basis of the fairness discretion. Thus an earlier illegality may 'taint' a later but properly obtained confession and render it liable to be excluded from evidence in the exercise of the "fair trial" discretion. Whether a later confession will be deemed to be tainted will depend on the nature of the earlier illegality – can it be cured by the conducting of a proper interview later? It can be that the earlier illegality is considered to continue to exert a 'malign influence'; an accused may consider him- or herself self bound by statements made in

the earlier interview, in the absence of an environment in which he or she feels safe to withdraw or reverse the earlier admissions.

In South Africa derivative evidence is in principle also subject to potential exclusion under section 35(5) of the Constitution. It may be excluded then, because its admission will bring the administration of justice into disrepute, but the Court need not exclude it if it will not render a trial unfair or otherwise be detrimental to the administration of justice. A standard of remoteness is applied in terms of taint – thus where written statements given more than two years earlier were excluded, oral evidence to the same effect given at trial was not considered to be similarly tainted any more. In Scotland, it has been held that an irregular search could be excused, inter alia because the search would have been carried out anyway, although in other cases good faith and the fact that a regular search would have taken place anyway has carried little weight. Somewhat artificial distinctions have at times been used by the courts to disconnect certain evidence from an irregularity, eg by holding that if police 'just happened to come across' incriminating material in a search, the fact that the material was outside the scope of the search warrant did not render it inadmissible as the fruit of an irregular search.

REGULATORY CONTEXT – DEVELOPMENTS

Changes in the regulatory environment may be relevant where they render previously illegal or improper conduct legal. This may be the case in the context of increased state powers in the face of the threat of terrorism, for instance. This will of course have to occur within the broader strictures of constitutional review in most countries, where considerable constitutional restraints are thus placed on Parliament or regulators. In other countries, either without a Bill of Rights, or with a Bill that is not entrenched, there will be greater latitude for parliaments to modify rules regarding the gathering of evidence. Regulatory changes may also have either clarified rules concerning police conduct, or rendered certain conduct illegal where that was not previously the case. There is certainly a tendency, noted above, in the jurisdictions reported on, to introduce legislation which sets clear rules for the conduct of police investigations in the pre-trial phase.

While Parliament in Canada has given a handful of new investigative powers to police in recent years, there has been no change to the regulation of investigative conduct. Since 2001, police powers have been modestly enhanced. For example, in terrorism cases police may apply to a judge for an order compelling a person to answer questions in court. Police must first establish, however, that there is probable cause to believe that a terrorism offence has been or will be committed and that the person has "direct and material" information relating to that offence. The statements so compelled may not be used in evidence against the informant. In England and Wales there has been a strong movement towards detailed regulation of police powers in recent times, to the extent that there are now eight Codes of Practice under PACE. Further the Regulation of Investigatory Powers Act (RIPA) makes provision for authorization of interceptions of communications, surveillance operations and the use of covert human intelligence sources.

In the United States, investigation of organizations or groups by infiltration of informers for the

purpose of investigating political opinion was limited in the last thirty years, but since September 2001, these controls have been largely revoked, and political investigations have little administrative control. There has been a tremendous increase in political investigations during this time. But as the Reporter states: "the exclusionary rules could not have been used at any time to prevent such investigations even before the recent changes". In South Africa, the regulation of investigative conduct has not been significantly modified or amended in recent times. As the Reporter states: "South Africa only recently became a constitutional democracy, sporting a justiciable Bill of Rights. There is, understandably, a reluctance to introduce extraordinary crime control measures which might restrict or indeed be in conflict with constitutional due process." In Australia there has been some codification at states-level of rules relating to police conduct, previously found in the Judges Rules and other disparate sources; see for instance the Police Powers and Responsibilities Act 2000 (Qld); see also the Law Enforcement (Powers and Responsibilities) act 2002 (NSW). The result has been increased regulation of police conduct but also to render certain conduct previously (arguably) illegal now legal under prescribed conditions. Notably legislation allows 'Controlled operations' and 'Controlled activities' which would otherwise constitute criminal and thus illegal conduct (such as importation of drugs in a sting operation), so that it escapes the reach of the discretion to exclude for illegality. The Terrorism (Police Powers) Act 2002 (NSW) allows certain searches without warrant. Broader powers are also conferred under the Australian Security Intelligence Organization (ASIO) Legislation Amendment (Terrorism) Act 2002 (Cth) allow detention of persons who may have information in relation to a crime, rather than persons suspected of having committed a crime. Although exclusion may therefore not be relevant to the person detained, the fruit of the poisonous tree doctrine would arguably not apply to information so derived that may be used in the prosecution of another person. Access to lawyers is also restricted under this legislation and questioning may take place in the absence of a lawyer of choice.

NEW INVESTIGATIVE TECHNIQUES

Certain technological advances, related to the analysis of bodily samples for the purpose of identification, and to surveillance (more sophisticated wiretaps and bugs, thermal imaging etc.) have occurred in recent times. In the United States the drawing of bodily samples such as blood has not been viewed as a potential violation of privacy, so that the exclusionary rules do not come into play in that regard. In New Zealand the Criminal Investigation (Bodily Samples) Act 1995 establishes a regime for the taking of bodily samples for DNA testing, but it does not deal with the question of admissibility of evidence. Recently the Court of Appeal held that any discretion based in the common law to admit evidence despite breaches of the regulatory requirements in the act would be exercised very sparingly. The balancing approach is also applicable to breaches of the Bill of Rights. Serious breaches of the 1995 Act would almost invariably constitute an unreasonable search and/or seizure. The same approach will continue under the Evidence Act 2006. In Canada evidence is more likely to be excluded if it is both conscriptive and non-discoverable. Conscriptive evidence arises when an accused is compelled to incriminate him or her self by a statement but also by use of the body or by providing a bodily sample. Evidence is non-discoverable if it could not have been obtained by legal, non-conscriptive means. Whereas exclusion is not mandatory in cases of conscriptive and non-

discoverable evidence, it does not fall far short of that standard. In Australia, State legislation concerning the obtaining of bodily samples, such as the NSW Crimes (Forensic Procedures) Act 2000 and the Criminal Law (Forensice Procedures) Act 1998 (SA) contains provisions prohibiting admission, unless evidence should be admitted in the interests of the proper administration of justice, a number of statutorily prescribed factors requiring consideration by the court.

10. GENERAL RECENT TRENDS

IN THE VARIOUS JURISDICTIONS

In the United States, the exceptions and weaknesses in the exclusionary rules date largely from more than ten years ago. The Reporter states that the exclusionary rules are well-established, although the complexion of the Supreme Court might change that. Problems that will arise will chiefly be in relation to sophisticated modes of surveillance that have not been passed on in the past.

In Canada the most significant recent development has been a (modest) weakening of the distinction between unconstitutionally obtained evidence implicating self-incrimination concerns and other unconstitutionally obtained evidence. In the previous ten year period the distinction had been strengthened. The Reporter states that: "[D]uring the first period, self-incriminating evidence was almost always excluded. Conversely, evidence not so categorized was most often admitted, even in cases where the constitutional violation was arguably quite serious. In the most recent period, courts have been more willing, on the one hand, to admit unconstitutionally obtained, self-incriminating evidence, and on the other hand, to exclude unconstitutionally obtained evidence that is not self-incriminating (citations omitted)".

In the Reporter's view, this trend is likely to continue. Various factors are likely to result in a further to a de-emphasising (if not an outright abandonment) of the distinction between self-incriminating and non-self-incriminating evidence.

In England and Wales, the most important development in the law on illegally obtained evidence in recent times has been the House of Lords decision that any evidence obtained by torture is automatically inadmissible. The Reporter states that "[T]he decision represents an acknowledgment that there may be circumstances in which a court should be prepared, "on moral grounds", to exclude reliable evidence because of the manner in which it was obtained. It may signify a recognition that the mismatch between the courts' divergent approaches to exclusion of illegally obtained evidence and stays for abuse of process has finally been laid to rest, and that integrity considerations, long thought to be confined to abuse of process determinations, do after all have a role to play in the context of evidential exclusion."

In South Africa, the introduction of section 35(5) has resulted in a complete break with the traditional Anglo-South African common law inclusionary approach has been a complete one.

The Reporter states that "[M]y impression is that over the past decade South African courts have done well in their interpretation and application of section 35(5), given the fact that they had to deal with a constitutional novelty. The general trend is that they have stood firm in upholding the constitutional right to a fair trial (the first leg of the test) and have shown the necessary flexibility in dealing with the issue whether admission of the evidence would be detrimental to the administration of justice (the second leg of the test). They have to some extent succeeded in striking an acceptable balance between a rigid exclusionary approach and a rigid inclusionary approach. Indeed, they were able to do so on account of the broad criteria contained in section 35(5)." A significant factor in South Africa is the extremely high level of serious crime. This will result in pressure on judicial officers to interpret the law in a manner that favours crime control, especially as regards the second leg of the test. Although no such clear trend has as yet developed, the Reporter states that the "[...] risk is certainly real and looming."

In New Zealand the most significant changes over the last ten years have been (1) the abolition of the prima facie exclusionary rule and the adoption of a new balancing approach in determining the admissibility of evidence obtained in breach of the Bill of Rights; and (2) the translation in the Evidence Act 2006 of that approach to all forms of improperly obtained evidence. The Reporter states that "[a]s for the future in New Zealand, arguments about the admissibility of improperly obtained evidence will focus on the new rules in section 30 of the Evidence Act rather than, as in the past, being based discretely on the Bill of Rights, the Judges' Rules, the fairness discretion, or some combination thereof. It is to be hoped that this will spawn a more coherent jurisprudence, not just on the substantive heads of 21 impropriety, but on other matters such as standing, evidence and proof, and the application of the factors which may be considered in the balancing process. Subject to the scope of the new practice notes to be issued by the Chief Justice, the statutory recognition of unfairness as a ground of impropriety may also encourage the courts to take a more expansive view of the circumstances in which evidence, not otherwise inadmissible on any other ground, will nonetheless be excluded."

In Australia the most significant recent development has been the introduction of the Uniform Evidence Act, with its codification of the common law 'public policy' discretion previously developed in the cases. Unfortunately for the sake of consistency and clarity, the Uniform Evidence Act has not been adopted in the majority of Australian states, with whom most of the responsibility for the criminal law and criminal procedure lies. Nonetheless there appears to be a well established and satisfactory recognition that there are different rationales underlying discretionary exclusion on grounds of fairness and on grounds of illegality or impropriety; this gives a degree of consistency and clarity to the law in this area, which is perhaps lacking in some other jurisdictions. The striking lacuna in Australian jurisprudence continues to be the absence of constitutional human rights provisions, or any non-entrenched Bill of Rights along New Zealand lines. This means that consideration of human rights issues, and a consistent human rights framework for consideration within the public policy discretion, has barely developed. The inclusion of a reference to the International Convention in the list of factors in sec 138 is an interesting development in that regard. In Scotland, the failure of the courts to develop a clear rationale for the exclusion of irregularly obtained evidence has prevented the development of a coherent and consistent approach. This lack of a consistent principled approach was noted soon

after *Lawrie* but is still noticeable today. The appeal courts have not pronounced clear and consistent principles, preferring to engage with the minutiae of factual circumstances in their unwillingness to concede a true discretionary power to the trial courts. There is little to indicate that a principled, logical and coherent approach has begun to emerge in Scotland.

GENERALLY

These are two quite distinct traditions in the common law world with a different underlying rationale. In many common law jurisdictions there is a trend away from dealing with illegal evidence purely on the basis of the fairness discretion toward a greater focus on human rights breaches. This process has not been universal, without resistance or without difficulties. It has resulted from the introduction of basic human rights laws (eg the Bill of Rights in New Zealand), and is most strikingly illustrated by the inclusion of express provisions dealing with exclusion of illegal evidence in constitutional enactments, such as the Constitution of South Africa. The only country reported on that is still without any universal human rights bill is Australia, and it is not surprising that there the law has developed with a predominant focus on compliance with ordinary laws and regulation rather than on a vindication of individuals' rights. In the US by contrast the human rights framework for consideration of admissibility of unlawful evidence is of long standing and stable.

A further trend in most common law countries is towards the codification of rules of evidence, some with specific provisions concerning illegal evidence (eg New Zealand and Australia). In two jurisdictions express rules concerning admissibility of illegal evidence are contained within the constitution further reinforcing the connection between human rights and exclusion of evidence. In Scotland and some of the Australian States, by contrast, the common law is still the predominant source of rules concerning evidence law in general and illegal evidence in particular.

At the most general level then one can identify a trend towards statutory codification of common law discretions; towards inclusion of express constitutional provisions dealing with the question of admissibility of illegal evidence; and towards a focus on human rights issues to define illegality.

In all jurisdictions a critical issue for the courts is how to develop a consistent approach to balancing policy arguments that favour exclusion, ie vindication of rights, deterrence of police misconduct, fairness to the accused, public standing of the courts, with arguments that favour inclusion, ie that all relevant evidence should be available to a court in the interests of obtaining conviction of the guilty, and thus protection of the citizenry. Despite the shared common law heritage of the jurisdictions reported upon, striking a balance has been achieved by differing constitutional, statutory and judicial techniques in the various jurisdictions reported upon.

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