LAW COMMISSION OF INDIA

NINETY-FOURTH REPORT

ON

EVIDENCE OBTAINED ILLEGALLY OR IMPROPERLY : PROPOSED SECTION 166A, INDIAN EVIDENCE ACT, 1872

JUSTICE K. K. MATHEW

No. F. 2(7)/83-L.C.

Shastri Bhavan
New Delhi
October 28, 1983.

My dear Minister,

I am forwarding herewith the Ninety-fourth Report of the Law Commission on "Evidence obtained illegally or improperly : Proposed Section 166A, Indian Evidence Act, 1872".

2. The subject was taken up by the Law Commission on its own. The need for taking up the subject is explained in para 1.3 of the Report. .

3. The Commission is indebted to Shri P. M. Bakshi, Part-time Member and Shri A. K. Srinivasamurthy, Member-Secretary, for their valuable assistance in the preparation of the Report.

With regards,

Yours sincerely,

(K. K. Mathew)

Shri Jagannath Kaushal,
Minister of Law, Justice & Company Affairs,
New Delhi

Enclo : 94th Report.

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APPENDIX

CHAPTER 1

INTRODUCTORY

Scope.

1.1. This Report proposes to deal with a specialised area of the law of evidence, namely, how far should there be a discretion with the court in a criminal case to exclude evidence that has been obtained illegally or improperly ? The question that has been broadly formulated in the preceding sentence has not, in judicial decisions in India, received the intensive attention that it has received in some other countries. However, for reasons to be mentioned later, the question needs to be examind in detail.[1]

The traditional approach.

1.2. Generally speaking, the traditional approach of the Indian courts has been to the effect that, absent a specific statutory or constitutional provision which provides for excluding particular types of evidence, the fact that evidence was obtained illegally remains of no consequence in regard to its admission at the criminal trial. Lord Scarman[2] noted in the English case of *Sang* that "judges are not responsible for the bringing or abandonment of prosecutions" and that "save in the very rare situation, which is not this case, of an abuse of process of the court.....the judge is concerned only with the conduct of the trial."[3] This has been the approach adopted in India also.

Need for study.

1.3. The traditional Indian view (as outlined above) represents a strictly legalistic approach. There appears, however, need for some fresh thinking on the subject.

The subject has been taken up for consideration by the Law Commission of its own, having regard to the importance that this and similar controversies have assumed, or are likely to assume, in the light of the increasing stress laid on human rights in recent times. In the Indian context, in particular, the expanding scope of article 21 of the Constitution (as currently interpreted) is likely to render such an enquiry of considerable practical importance in the not distant future. This is not to say that the present enquiry is necessarily aimed at suggesting any radical change in the law. The object of the enquiry is mainly to stimulate discussion on the subject, to disentangle the various issues involved to define with some concrete the contours of the controversy and generally to test the present position in India, in the light of the doctrine and developments mentioned above. If, as a result of such enquiry, there emerges a need for reform in the law, suggestions for appropriate reform will, of course, be made.

Methodology of study and tentativeness of the conclusions to be reached

1.4. In view of the constitutional overtones of the controversy and the importance of the subject from the point of view of human rights, it may be desirable for the purpose of the present inquiries to examine several theoretical and practical aspects. Developments in other countries, past as well as recent, are of interest. At the same time, it should be remembered that the position on the subject under discussion in certain other countries seems to

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1. Paragraph 1-3, *infra*.
2. Chapter 3, *infra*.
3. *R.* v. *Sang*, (1979) 3 W.L.R. 263, 288. Cf. *R.* v. *Sang*, (1979) 2 W.L.R. 439, 458 (C.A.).

be in a fluid condition,[1] and any assessment that one might make of the law in those countries should be regarded as very tentative, and may not necessarily be reflective of the up-to-date position in all its minuteness. In fact, since the subject itself is integrally connected with human values, even the conclusions that may be ultimately arrived at in the present inquiry should be regarded as possessing a validity only for a limited space of time, and as not ruling out a fresh examination of the subject after a reasonable interval.

Working Paper circulated by the Commission.

1.5. It may be mentioned here that in order to elicit informed opinion on the subject, the Commission circulated a Working Paper which set out most of the material incorporated in succeeding Chapters of this Report.[2] Towards its end, the Working Paper posed certain issues for consideration. We are setting out those issue,[3] in a later Chapter of this Report. The Working Paper was sent to the Secretary, Legislative Department, Ministry of Law, State Governments, High Courts, Bar Associations and other interested persons and bodies. Comments received on the Working Paper will be summarised in a later Chapter of this Report.[4]

1. See Meng Heong Yeo, "Discretion to exclude illegally and improperly obtained evidence (1981) Melbourne Univ. Law Rev. 31.
2. Working Paper circulated in April, 1983.
3. Chapter 11, *infra*.
4. Chapter 9, *infra*.

CHAPTER 2

THE DIFFERING APPROACHES

Differing approaches as to evidence illegally or improperly obtained.

2.1. Broadly speaking, the common law world may be said to present four varying models[1] as to the legal approach adopted on the question whether evidence that has been gathered illegally or improperly should, nevertheless, continue to be available for use at the trial for the offence, in the investigation whereof the evidence so gathered. The different approaches adopted by the various models reflect the varying degree of intensity of the law's concern for the observance of legal restrictions as to the methods to be employed for the gathering of evidence and for compliance with certain norms of propriety in the gathering of evidence.

Incidentally, the use, in the present discussion, of two separate expressions "illegal" and "improper" (and their adverbial counterparts) need not be taken as implying that the two situations represented by these two expressions always stand in water-tight compartments. Nor does the use of these expressions imply that every country which adopts a certain approach towards evidence obtained illegally necessarily maintains the same approach towards evidence obtained improperly, and *vice versa*. The two expressions have been employed in the discussion merely for the sake of convenience. If one were to go into minute details, one would find that the courts, in dealing with the problem, do not always articulate their thoughts on whether the decision in a particular case was influenced by the factor of illegality or by the factor of impropriety, or by both the factors.

Constitutional dimensions.

2.2. Another preliminary clarification also appears to be in order. Where a rule regulating the conduct of public officers has, in a particular country, attained the status of a constitutional mandate, the controversy may assume new dimensions and may present itself in a more complex form. Where, therefore, the position in the ensuing discussion is stated as the position under ordinary law, the statement may have to be taken as subject to qualification where the illegality or impropriety complained of has a constitutional dimension that was not raised specifically in the case law cited on the particular point.

Categories of countries—The first category.

2.3. As stated above, the differing approaches prevalent in various countries as to evidence obtained illegally or improperly seem to comprise four broad categories. In the first place, the strictest approach is adopted by certain countries (India included),[2] where the illegality or impropriety employed in the collection of evidence does not (in the absence of a specific statutory or constitutional provision on the subject), render the evidence so obtained legally inadmissible, though such illegality or impropriety might possibly affect its weight. The statement made in the preceding sentence about the Indian position should, of course, be taken as subject to the qualification that the expanding scope of article 21 of the constitution, and the everwidening interpretation placed on the words "procedure established by

1. Paragraph 2.3, *infra*.
2. Chapter 3, *infra*, discusses the Indian Law.

law" as occurring in that article might possibly alter the position in this respect; so far as could be ascertained, courts in India have not yet directly and squarely dealt with the question whether, in any particular circumstances, the use of illegal or improper methods in collecting evidence would constitute a breach of the requirement of "procedure established by law" laid down in article 21.

The second category.

2.4. For the present purpose, the second category mentioned above[1] is represented by countries[2] where the use of illegal or improper methods in collecting evidence is regarded as relevant to this extent, namely, that at the stage of trial, the court, in its discretion, may regard itself as justified in rejecting such evidence.

The third category.

2.5. The third category mentioned above is represented by situations wherein the law, by a specific statutory provision, excludes a particular type of evidence where it has been obtained in violation of some substantive norm of conduct prescribed for public officials in a separate (but connected) rule.[3]

The fourth category.

2.6. To the fourth category mentioned above belong those countries where a constitutional guarantee, or the judicial construction of a constitutional guarantee, excludes certain evidence from use at the trial, where the evidence has been obtained in violation of such constitutional guarantee. The most familiar example of this category is the United States.[4] The case law of that country on the Fourth Amendment (protection against unreasonable search and services) and the Fourteenth Amendment (the Due Process clause) in particular provides instances of situations falling in the category under discussion.

Geographical summary.

2.7. By way of a very brief statement of the position in selected areas, it may be stated that in the United States, in order to deter illegal activity in the securing of evidence in criminal proceedings, evidence is inadmissible if law enforcement officers have acquired it illegally or if illegal acts have led to the discovery of the evidence. In Canada, on the other hand, the courts have been more reluctant to subordinate the inquiry into truth to extrinsic policy considerations. In Scotland and Australia, a discretion is recognised and frequently exercised. The position in England is fluid in this regard.

In India, the legal relevance of the evidence to the facts in issue is, under the present law, the only pertinent consideration. The way in which the evidence was obtained is treated as a collateral issue, having no bearing on the admissibility of evidence in India, although the court can consider the matter as having some effect on the credibility of the party who produces it.[5]

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1. Paragraph 2.3, *supra*.
2. For example the Law in Scotland and Australia, Chapter 4.5, *infra*.
3. E.g. section 24, Indian Evidence Act, 1872.
4. Chapter 6, *infra*.
5. See, further Chapter 3, *infra*.

CHAPTER 3

THE INDIAN LAW

General approach.

3.1. According to the general approach of the Indian legal system, illegality or impropriety in the gathering or procuring of evidence does not, in itself, render the evidence so procured inadmissible, though it may affect its weight in some cases. Courts in India have, in general, treated such violations of the law as having no relevance to the admissibility of the evidence.

3.2. This approach might have been due, to some extent, to the fact that the Indian Law of evidence is almost entirely codified, with an elaborate classification of facts into relevant and irrelevant, and specific categorisation of admissible and inadmissible evidence, and similar other differentia laid down by statute. The Indian Evidence Act was perhaps the first comprehensive code of evidence enacted in the entire commonwealth (1872). By the time developments regarding the discretion of the court to exclude evidence on grounds of public policy took shape elsewhere, the Act had already become firmly embedded in the training and upbringing of the Indian Judiciary. The super-imposition of common law doctrines upon the codified framework of the law of evidence did not find a very hospitable soil in the Indian Legal system. Courts, in deciding questions of the admissibility or otherwise of evidence, had recourse only to the scheme and text of the Evidence Act, and were not inclined to go outside the four corners of the Act for determining questions of admissibility.

Codification.

3.3. There is also another feature of the legal system of India, relevant to the matter under discussion. It has so happened that by the time the Evidence Act came to be enacted, the substantive criminal law and the law of criminal procedure in India had also come to be in a codified form. In its totality, this situation seems to have led to the implicit assumption that one must, in this sphere, have recourse to the statute law only. This approach was fortified by the well-known pronouncement of the Privy Council to the effect that the "essence of a Code is to be exhaustive in respect of all matters dealt with by the Code." This statement of the Privy Council on the interpretation of Codes in general became a classical test, which came to be cited almost on every occasion when an attempt was made in the courts to persuade the judge to travel outside the code on a particular subject for seeking guidance in evolving the law. The same approach prevailed as for the interpretation of the Evidence Act.[1] In short, the law of evidence ceased to draw its juices from any other roots except what had been enacted in a codified form.

Confessions.

3.4. Besides this, we may mention yet another feature of the Indian legal system that might be appropriately referred to in the present context. The topic of admissibility of confessions in criminal cases has in other countries provided a fertile ground for the exercise of judicial discretion to exclude evidence obtained unfairly. But, in India, the subject has been treated elaborately in a chain of sections in the Evidence Act,[2] thereby removing this particular topic from the area of discretion and narrowing down the judicial creativity. Hence, in India, the question whether a particular confession can, or

1. Cf. *Lekhraj* v. *Mahipal*, (1878) I.L.R. 5 Cal. 744, 754 (P.C.).
2. Sections 24-30, Indian Evidence Act, 1872.

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cannot, be admitted on the record falls to be determined almost exclusively by the statutory law and interpretation thereof, rather than by drawing any principles originating in uncodified law. "Justice, equity and good conscience" has been almost barren in this area of the law.

This is not the place for setting out the gist of the sections of the Evidence Act relating to confessions.[1] The Law Commission has had occasion in the past to analyse, as well as consider, these provisions in detail, in its comprehensive Report on the Evidence Act.[2] The point that is now being made is that matters which, if there had been no codified law of evidence, would probably have been dealt with in a more elastic manner by the exercise of the discretion of the court to exclude certain evidence have in India, been pre-empted by statutory provisions enacted on specific topics, of which confessions are one important example.

Illegal searches.

3.5. It is also probable that once this "statute-oriented" approach established itself in the sphere of confessions where there are specific statutory provisions as to the admissibility of confessions recorded in varying circumstances, it later became a matter of habit for the courts to adopt the same approach on other topics as well. As a result, in regard to other species of evidence also, even though there were no specific statutory provisions as to admitting or not admitting a particular species of evidence obtained in violation of the law, the same stance came to be adopted by the courts. The most familiar example of this is furnished by the judicial approach in India in respect of evidence procured by search. The Code of Criminal Procedure, 1973 lays down elaborate provisions as to the mode of search to be carried out by the police for the purposes of investigation into an offence.[3] These provisions incorporate a number of safeguards required to be observed by the police in carrying out such searches. When questions arose as to the admissibility in evidence of materials gathered in a search that had been conducted in violation of the relevant statutory requirements (particularly, the statutory requirement that the search must have been conducted in the presence of two independent witnesses),[4] the courts, in general, started adopting a legalistic approach. According to the trend of authority, evidence so obtained is not *per se,* inadmissible.[5] Nor is there recognised any discretion on the part of the trial judge to exclude evidence obtained through a search not conducted in accordance with law.

Non compliance with the statutory safeguards may call for strictures against the police and may, also, affect weight[6] of the evidence. But the legality of a conviction based on such evidence remains unaffected by the defect in the search.[7]

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1. Sections 24 to 30 Indian Evidence Act, 1872.
2. Law Commission of India, 69th Report (Indian Evidence Act, 1872) forwarded in May, 1977.
3. Section 100, Code of Criminal Procedure, 1973.
4. Section 100(4), Code of Criminal Procedure, 1973.
5. (a) *Benamali* v. *Emp.* ILR (1939) 1 Cal. 210.
   (b) *Valayudhan* v. *The State,* AIR 1961 Ker. 8 (FB).
   (c) *Kau Sain* v. *The State of Punjab,* AIR 1974 SC 329, para 9.
   (d) *Govindan,* AIR 1959 Mad. 544, 548.
6. (a) *Malal Khan* v. *Emp.* A.I.R. 1946 P.C. 16, 19.
   (b) *Legal Remembrancer* v. *Mamtazuddin,* I.L.R. (1947) 1 Cal. 439.
7. *Sunder Singh* v. *The State,* A.I.R. 1956 S.C. 411, 415.

Supreme Court decisions.

3.6. A Supreme Court decision of 1973[1] is sometimes regarded as recognising a discretion in the courts in India to exclude evidence obtained illegally. But in fact the Supreme Court in that case held the evidence to be admissible and did not accept the contention that illegality in gathering the evidence affected its admissibility. The point related to the admission, in evidence, of a tape record of a conversation that took place in the telephone. The charge was one of bribery, the accused being the Coroner of Bombay who had demanded a bribe of Rs. 20,000 from a Bombay Doctor. The bribe was demanded as the Coroner's price for not declaring the doctor guilty of negligence. The conversation that took place was between the doctor and the accused. The conversation was recorded by the anti-corruption police, who had been called in by the doctor for the purpose. A tape recorder was attached to the telephone at the doctor's end and the conversation that took place between the doctor and the accused was recorded on the tape recorder attached to the telephone. Rejecting the argument that it was illegal so to tamper with a telephone communication, the Supreme Court held that even if there was any illegality, admission of the evidence in question did not thereby become impermissible. A feeble attempt was made to challenge the evidence on the score of article 21 of the Constitution, but that challange also did not succeed.

In its discussion of the legal position relating to evidence obtained illegally and in support of the view that admissibility was not affected by the illegality, the Supreme Court referred, *inter alia,* to the English law on the subject. It was in this context that it referred to the judgment of Lord Goddard in the well known Privy Council case of *Kuruma.* Lord Goddard had, in that case squarely, held that the adoption of illegal means in collecting evidence did not affect its admissibility. Lord Goddard had ended this exposition of law with certain dicta about the existence of a judicial discretion to exclude evidence obtained illegally, if its admission was likely to operate unfairly against the party against whom it is sought to be tendered. The Supreme Court of India, when dealing with English law, naturally referred to Lord Goddard's judgment, and it was in this context that the Supreme Court made a brief mention of the above dootrine contained in the dicta towards the end of Lord Goddard's exposition of the law. But the Supreme Court had no occasion to consider at length the question whether courts in India possess any such discretion. In fact, the case before the Supreme Court was not decided on the basis of the existence or absence of any such discretion. The evidence was admitted notwithstanding the supposed illegality.

In any case, if the Supreme Court judgment is to be construed as indicating that the courts[2] in India have such a discretion, then our recommendation to incorporate such a discretion in our statute law should be welcome.

1. *R. M. Malkani* v. *State of Maharashtra,* A.I.R. 1973, S.C. 57.
2. Chapter 11, *Infra.*

CHAPTER 4

ENGLISH AND SCOTTISH LAW

I. ENGLAND

Privy Council case of Kuruma Discretion regarding evidence obtained illegally.

4.1. The classical statement of English law on the subject of evidence obtained illegally represented by the dicta to be found in the leading case of Kuruma.[1] The actual decision in that case was in favour of admission of the evidence, and the case itself did not arise in England, but was decided by the Privy Council. But the observations of the Judicial Committee of the Privy Council in that case are of great interest, and are generally taken as the starting point of any inquiry on the subject that does not support to go too deeply into the history of the subject.

The Privy Council in that case held that evidence of the accused's unlawful possession of ammunition, discovered in consequence of an *illegal* search of his person, was admissible. The Privy Council acted on the principle, recognised in some earlier English decisions, that, provided real evidence is relevant, it is legally admissible, however improperly, it had been obtained. The person against whom such evidence is tendered may have a civil remedy against the person who obtained it and the latter may be liable to disciplinary, or even criminal, proceedings. But the law is that : "It matters not how you get it; if you steal it even, it would be admissible in evidence."[2]

However, in delivering the opinion of the Board, Lord Goddard, L.C.J., said :

> "No doubt, in a criminal case the judge always *has a discretion to disallow* evidence if the strict rules of admissibility would operate *unfairly against an accused*..... If, for instance, ... some piece of evidence ..... had been obtained from a defendant by a trick, no doubt, the judge might properly rule it out."[3]

Decision in R. v. *Sang*.

4.2. It should be mentioned that in the comparative recent English decision of *R.* V. *Sang*,[4] the statement about the discretion of the Court appears in terms somewhat different from earlier cases. The general question certified in that case by the Court of Appeal as fit for consideration by the House of Lords was : "does a trial judge have a discretion to refuse to allow evidence—being evidence other than evidence of admissions—to be given in any circumstances in which such evidence is relevant and of more than minimal probative value ?" To this question, the following answer was given by four out of the five members of the House of Lords :—

> "(1) A trial judge at a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative.

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1. *Kuruma* v. *R.* (1955) 1 All E.R. 236 (P.C.).
2. *R.* v. *Leathem*, (1861) 8 Cox C.C. 408, 501 (Per Crompton, J.).
3. For the Canadian Law, see Clayton Hutchins, "Discretion of a trial Judge to exclude otherwise admissible evidence" (May 1981) Vol. 6, No. 3, Dalhousie L.J. 690, 699.
4. *R.* v. *Sang*, (1979) 3 W.L.R. 263, 288 (H.L.) Seen analysis 'Rosemary Pattenden, "The Exclusion of Unfairly obtained" evidence in England (1980) 29 ICL, 666-686.

(2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after his commission of the offence, he (the trial judge) has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained."

The formulation of the law by Lord Salmon (in the above case of *R. V. Sang* was in terms different from that of the other law Lords. But Lord Salmon did not disagree with the rest of the House.

4.3. *R. V. Sang,* referred to above, is a recent case and it is not possible to make any comment as to how far, if at all, it has modified the earlier understanding of the position in England as to evidence illegally obtained. It should however, be mentioned that[1] copies improperly obtained may be excluded to prevent documents brought into court for a limited purpose from being stolen.

Discretion as to evidence of similar facts.

4.4. There is another area where discretion is exercised in England in regard to evidence. Evidence may generally not be given of a party's misconduct on prior occasions, if its only purpose is to show that he is a person likely to have misconducted himself on the occasion in question. But such evidence is admissible if it is relevant for some other reason. Yet, the evidence so relevant for some other purpose may relate to something which occurred a long time ago,[2] or it may be of a tenuous nature :[3] As Cross states, "In all such cases, the judge ought to consider whether the evidence[4] which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interests of justice that it should be admitted. If, so far as the purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. "The decision must then be left to the discretion and sense of fairness of the judge."[5]

Discretion as to confession.

4.6. The classical example in this field is *Noor Mohamed V. R*[6] The accused had been convicted of murdering A, the woman with whom he had been living. He was a goldsmith, lawfully possessed of cyanide for the purposes of his business, and A certainly met her death through cyanide poisoning, although there was no evidence that the poison had been administered by the accused. The accused was on bad terms with her and there was a suggestion that she had committed suicide. The Judicial Committee ruled that the conviction should be quashed because the judge had wrongly admitted evidence in support of an inference that Noor Mohamed, (the accused) had previously caused the death of his wife, Gooriah, with whom also he had been on bad terms, by tricking her into taking cyanide as a cure for toothache. Lord Du Parq, delivering the judgment of the Privy Council, said of this evidence in its application to the facts of the case before him :

1. *I.T.C. Films* v. *Video Exchange* (1982) 2 All E.R. 241, 247.
2. *R* v. *Cole* (1941) 165 L.T. 125.
3. *R.* v. *Doughty,* (1965) 1 All E.R. 540; (1965) 1. W.L.R. 331.
4. Cross, Evidence (1973), page 90.
5. *Noor Mohammed* v. *R.* (1949) A.C. 182, 192; (1949) 1 All E.R. 365, 370. See also *Hams* v. *Director of Public Prosecution* (1952) A.C. 684, p. 707, (1952) 1 All E R. 1044, 1046 (per Lord Simon).
6. *Noor Mohamed* v. *R.* (1949) A.C. 182; (1949) 1 All E.R. 365 (P.C.).

"If an examination of it shows that it is impressive just because it appears to demonstrate, in the words of Lord Herschell in *Makin's case*[1] 'that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried' and if it is otherwise of no real substance, then it was certainly wrongly admitted."

Confessions.

4.7. Confessions constitute the third category of cases in which discrition is exercised. The judge's discretion in England to exclude legally admissible confessions is of a different type.[2] Few items of evidence can be more probative than a confession, *provided* it was not made in circumstances giving rise to a reasonable doubt concerning its reliability. The proviso mentioned in the preceding sentence lies at the root of the exclusionary rule of English law, which has been succinctly formulated in the following terms :—

> "It is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by police officer and of any statement made by that person, *that it shall have been voluntary,* in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.[3]

This is one of the principles to which the Judges' Rules of 1964 are expressly stated to be subject.[4] The Rules themselves are no more than guides to police officers in relation to the taking of statements providing for the administration of a caution at different stages of an interrogation. The introduction concludes with the remark that non-conformity with the Rules may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings. The judge thus has a *discretion* to exclude a confession obtained in breach of the Rules, although it is legally admissible. In fact, the concluding remark of the introduction simply recognises the existence of a discretion to exclude confessions which are "voluntary" within the above definition which had existed before the Rules were first formulated[5] in 1921.

Discretion in England in the realm of evidence and enumeration.

4.8. It is not necessary to burden this Report with an exhaustive discretion of all the situations in which courts in England are supposed to possess a discretion to exclude relevant evidence on a particular ground. A fairly recent study[6] enumerates these situations of discretion as under[7] :—

(a) Illegally obtained evidence.
(b) Improperly obtained evidence.
(c) Evidence of similar facts.
(d) Cross-examination of the accused as to character.
(e) Confessions.
(f) Admissions by accused persons.
(g) Evidence calculated to prejudice the course of the trial.[8]

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1. *Makin* v. *A.G. for New South Wales* (1894) A.C. 67 (PC.).
2. Cross Evidence (1979), page 32. See note confession—Recent Developmnt in England (1980) vol. I C.L.Q. 327, 345.
3. Cross, Evidence (1979) page 32.
4. The Rules are set out in (1964) 1 All E.R. 237. See now Home Office circular No. 89/Judges Rules and Administrative Directions is the Police 1978 page 6.
5. Cross Evidence 1979, page 32.
6. M.S. Weinberg, "Judicial discretion to exclude relevant evidence" (1975) 21 Mc Gill Law Journal 1, 11 to 13.
7. Footnotes appearing in the study are omitted for brevity.
8. On this, see the Australian case of *Wilson* v. *R.* (1970) 44 A.L.J.R. 221, 222 and the English case of *R.* v. *List* (1965) 3 All E.R. 710, 711.

II. SCOTLAND

The Scottish approach.

4.9. The law of Scotland on the subject of evidence obtained illegally has taken a different approach from that followed in England. The trial judge is not only granted a discretion to exclude evidence obtained illegally, but it would appear that the court initially acts upon the principle that the discretion is not to exclude, but to include, irregularly obtained evidence. While there is no absolute rule rendering evidence inadmissible because of irregularity, yet when such evidence is presented, which presumption the police may rebut by pointing to circumstances which excuse the irregularity and justify the admission of the evidence.[1] In reaching a conclusion as to the exercise of the above discretion, the judge is to bear in mind the statement of Lord Justice General Cooper[2] that :

> "The law must strive to reconcile two highly important interests which are liable to come into conflict—(a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from courts of law on any merely formal or technical ground".

In the case from which the above mentioned quotation is taken, a shopkeeper had been convicted of using, contrary to the Milk Order, milk bottles which had not belonged to her. The crucial evidence in the case was given by Inspectors of a milk-bottles collecting organisation, who found the bottles as a result of an *unauthorised search* of her premises. She appealed against the conviction on the ground, *inter alia,* that the evidence was inadmissible as having been obtained by an illegal search. The court held that while an irregularity in the obtaining of evidence will not necessarily render the evidence inadmissible, yet in this case the conviction must be quashed, because the Inspectors ought to have known that they were exceeding the limits of their authority.

Principle underlying Scottish law.

4.10. Scottish law in the area is founded upon the principle that "an irregularity in the manner of obtaining evidence is not necessarily fatal to its admissibility (but) irregularities of this kind always require to be 'excused' or condoned.....whether by the existence of urgency, the relative triviality of the irregularity or other circumstances.[3-4]

Examples of exercise of discretion.

4.11. Examples of exercise of the discretion in Scotland are available in plenty. Evidence gained by scraping the fingernails of a suspect without his having been arrested and without his consent having first been obtained was excluded,[5] as the conduct of the police was technically an assault. Documents obtained by illegal search were excluded in another case. Lord Guthrie wrote that their admission would "tend to nullify the protection afforded to a citizen by the requirements of a magistrate's warrant and would offer a positive inducement to the authorities to proceed by irregular methods.[6]"

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1. J. B. Dawson, "Exclusion of unlawfully obtained evidence" (July 1982) Vol. 31 ICLQ page 513, 537.
2. *Lawrie* v. *Muir,* (1950) Scotish Law Times 39, 40.
3. *McGovern* v. *H. M. Advocate,* (1950) S.L.T. 133, 135.
4. J. B. Dawson "Exclusion of unlawfully obtained evidence" (July 1982) Vol. 31, I.C.L.Q. 513, 537, 538.
5. *McGovern* v. *H. M. Advocate,* (1950) S.L.T. 133, 145.
6. *H. M. Advocate* v. *Turnbull,* (1951) S.L.T. 409, 411.

Guiding factor.

4.12. The Scottish judges thus exercise a broad and subjective discretionary jurisdiction to include improperly obtained evidence. Since the 1950s, however, a number of informal criteria guiding its exercise have evolved.

(i) An irregularity may be more readily excused where the misconduct was not deliberate. The evidence was admitted in *Fairly's case*[1] (for example), because the inspectors "acted in good faith, in a mistaken belief as to their powers and in an endeavour in the public interest to vindicate the law".

(ii) Evidence will be admitted if found by chance in the course of an otherwise legal search for another purpose.[2]

(iii) Evidence is less likely to be admitted if improperly obtained by private individuals rather than by public officials who may be held accountable to their superiors.[3]

(iv) Evidence may be excluded where there are no circumstances of urgency.[4]

(v) Where a specific procedure has been prescribed by statute[5] failure to comply with it may result in exclusion.

(vi) Where the police could easily have complied with legal requirements,[6] exclusion may be the result.

(vii) Where the illegality is a serious one, such as assault,[7] the evidence may be excluded.

On the other hand, exclusion of evidence is less likely in Scotland where the accused is charged with a serious offence, or where the crime is of a kind which is very hard to detect and prosecute by regular means,[8] such as in liquor offences or blackmail.

The major advantage of the Scottish approach is that it necessitates a continuing judicial scrutiny of police practices and shifts the burden of justifying improper action to where it belongs, namely, on the police themselves.

1. *Fairley* v. *Fishmongers of London*, (1951) S.L.T. 54, 58.
2. *H. M. Advocate* v. *Hepper*, (1958) J.C. 39.
3. *Lawrie* v. *Muir*, (1950) S.L.T. 37.
4. *Hay* v. *H. M. Advocate*, (1968) S.L.T. 334.
5. *Lawrie* v. *Muir* (1950) S.L.T. 37.
6. *McGovern* v. *H. M. Advocate*, (1950) S.L.T. 133.
7. *H. M. Advocate* v. *Turnbull* (1951) S.L.T. 409.
8. *Hopes* v. *H. M. Advocate*, (1960) J.C. 104.

CHAPTER 5

POSITION IN AUSTRALIA AND NEW ZEALAND

General rule in Australia and New Zealand.

5.1. Broadly speaking, in Australia, it is accepted that the judge has the power, in the public interest, to exclude evidence which has been improperly obtained.[1,2]

It appears that this is also the position in New Zealand.[3]

Australian Case as to breath test.

5.2. An interesting case arose recently in Australia,[4] in which a sample of the breath of the accused for the purpose of measuring its alcoholic content had been unlawfully obtained. The illegality consisted in failure by the police to require the accused to submit to a preliminary roadside test—as prescribed by statute. Initially, the stipendiary magistrate who heard the case held the evidence to be inadmissible on the ground that it had been obtained unlawfully[5] and consequentially dismissed the charge of driving under the influence of alcohol. However, following an order to review the decision the magistrate reheard the case. While recognising that illegality alone did not render the evidence inadmissible, he again excluded it, this time in the exercise of his discretion on the ground that the evidence had been unfairly obtained. The prosecution once again sought an order reviewing the decision, and the case ultimately reached the High Court of Australia.

Discretion as formulated by the High Court of Australia.

5.3. The High Court of Australia held that a judge at a criminal trial has, in addition to the discretion to exclude evidence which is more prejudicial than probative, a discretion to exclude admissible evidence obtained improperly. However, unlike Lord Diplock in *R.* V. *Sang*,[6] the High Court did not base this discretion on unfairness to the accused or on the need to discipline the police. No doubt, concern was expressed that by admitting illegally obtained evidence, the courts may appear to condone, and even to encourage, such conduct. But the emphasis which the High Court put was on the need to protect the right of a citizen.[7] In the words of Stephen and Aicken, JJ :—

> "It is not fair play that is called in question.....but rather society's right to insist that those who enforce the law themselves respect it, so that a citizen's precious right to immunity from arbitrary and unlawful intrusion into the daily affairs of private life may remain unimpaired."

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1. Gifford and Gifford, Our Legal System (1981), page 80.
2. For cases upto 1950 see Elliot Johnston. The Exclusionary Rule and controls over the abuse of public power (1950)-54 Aust. L.J. 466.
3. *R.* v. *Lee* (1978) 1 N.Z.L.R. 481, 486, 487. (Supreme Court of N.Z. per Chilwell J.) cited by Gifford and Gifford, Our Legal System (1981), page 80.
4. *Bunning* v. *Cross* (1978) 19 A.L.R. 641.
5. *R.* v. *Ireland* (1970) 44 A.L.J.R. 263, 268.
6. *R.* v. *Sang* (See Chapter 4, supra).
7. Compare Ashworth, "Excluding evidence as protecting rights" (1977) Criminal Law Review 723.

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Analyses.

5.4. In this decision,[1] public policy, rather than fairness to the accused, was held to be the basis of the discretion of the court to exclude evidence obtained illegally. The factors considered relevant (or not relevant) are as under[2] :—

(i) whether the law was deliberately or recklessly disregarded by those whose duty it is to enforce it;

(ii) whether the nature of the illegality affected the cogency of the evidence is not generally a factor to be considered, where the illegality deliberate or the result of recklessness;

(iii) case of compliance with the law;

(iv) the nature of the offence charged;

(v) whether there was a violation of statutory procedures;

(vi) the urgency of protecting perishable evidence;

(vii) the availability of alternative, equally cogent, evidence.

Queensland Report.

5.5. It may also be stated that in Queensland the Committee of Inquiry into the Enforcement of Law, has given a Report surveying the entire field of enforcement of criminal law and the fair and efficient administration of justice. The Report has particular reference to the preventing or inhibiting the fabrication of evidence by police officers or other persons, the protection of individuals from undue pressure with reference to investigation and interrogation by police officers and the question whether police powers of investigation, interrogation, search, seizure, and arrest are adequate to meet the needs of the community in present day circumstances. Besides recommendations for the tape recording of statements made to police officers which implicate the maker of the statement in the commission of an indictable offence and besides making certain other recommendations as to law enforcement, the Report of the Committee had made certain recommendations as to illegal evidence, which have been thus summarised[3] :—

"That the law concerning the judicial discretion to exclude evidence obtained by unlawful and unfair means should be recast and every appellate court should itself have an unfettered discretion to consider afresh the admission of evidence said to have been unlawfully or unfairly obtained and, if necessary, to substitute its opinion on the subject for the opinion of the court of first instance. Also the burden of satisfying the court that any illegally or unfairly obtained evidence should be admitted should rest with the party seeking to have the evidence admitted. The factors relevant to the exercise of the discretion when the prosecution is seeking to tender evidence (obtained by unlawful or unfair means) include—

(a) the seriousness of any crime being investigated, the urgency or difficulty of detecting of it and the urgency of attempting to preserve real evidence of it,

(b) the accidental or trivial quality of the contravention, and,

(c) the extent to which the contested evidence could have been lawfully or fairly obtained by means of an available common law or statutory procedure."

Confessions.

5.6. Besides evidence obtained unlawfully, some other situations may bring into play judicial discretion in Australia, but we do not pause to discuss them.[4]

1. *Bunning* v. *Cross* (1978) 19 A.L.R. 641, 658.
2. *Bunning* v. *Cross* (1978) 19 A.L.R. 641, 663.
3. (1981 April) Vol 7, No 2, Commonwealth Legal Bulletin, pages 623, 625.
4. As to confessions, see Note "Confession". Recent Developments in England, etc. (1980) Vol. 29 No. 3 I.C.L.Q. 327-345.

CHAPTER 6

POSITION IN CANADA

General approach upto 1971.

6.1. In general, as a matter of ordinary law, it was presumed before 1971 that Canadian law would recognise a discretion in a criminal court to exclude evidence illegally obtained, on the same lines as was the position in England as understood[1] before 1978.

Canadian case of 1971.

6.2. However, in 1971 there came an important pronouncement of the Supreme Court of Canada which seems to limit the discretion very narrowly, while not abolishing it altogether.

In the Canadian case of 1971, the accused had been acquitted upon a verdict of murder by the trial judge (in a trial held with jury). The appeal against acquittal filed by the Crown to the Court of Appeal for Ontario had also been dismissed.[2] This dismissal was challenged by the Crown in its appeal before the Supreme Court of Canada. The main question involved was as to the validity of the principle stated in the reason of the Court of Appeal of Ontario, that a trial judge in a criminal case has a discretion to reject evidence, even of substantial weight, if the trial judge considered that the admission of the evidence would be unjust or unfair to the accused. By a majority, the Supreme Court of Canada allowed the appeal of the Crown. The alleged illegal evidence in this case was a confession of the accused which had led to the discovery of incriminating facts (the finding of the rifle with which the murder was committed). After a review of English and Canadian decisions, Mr. Justice Martland, speaking for the majority of the Supreme Court of Canada, held that the recognition of a discretion to exclude admissible evidence, beyond the limited scope recognised in a Privy Council case of 1949,[3] was not warranted by authority and would be undesirable. He expressly disagreed with the observations of Lord Goddard, Lord Chief Justice,[4] in the English case of 1955, to the effect that "the judge had always a discretion to disallow evidence if the strict rules of evidence would operate unfairly against the accused." He pointed out that the English decisions pronounced after 1955 had all relied on the dictum of Lord Goddard, which itself was (in his view) not warranted by authority.

Constitutional case in Canada.

6.3. Is evidence rendered inadmissible merely by reason of the fact that it has been procured in contravention of the provisions of the Canadian Bill of Rights ? The Supreme Court of Canada, in a ruling of 1975, considered[5] the admissibility of a certificate concerning a breathalizer test administered by officers who had refused the prior request of the accused to consult counsel. It was argued on behalf of the accused that refusal of an opportunity to consult the counsel was a violation of the Canadian Bill of Rights, that the breathalizer test and sample was illegally obtained and therefore the certificate concerning it ought not to be admitted as evidence. The Supreme Court by majority held that even if the evidence had been illegally

1. Chapter 4, *supra*.
2. *Queen* v. *Wray*, (1971) S.C.R. 272. (Canada).
3. *Noor Mohammed* v. *The King*, (1949) A.C. 181 (1949) 1 All E.R. 510 (P.C.).
4. *Kuruma* v. *The Queen*, (1955) A.C. 197 (P.C.).
5. *Hogan* v. *The Queen*, (1975) 2 S.C.R. 574 (Canada).

or improperly obtained, there was no ground for excluding it at common law and that, in view of other evidence of intoxication, one could not characterise as unfair the acceptance of the evidence as proof of the exact quantity of alcohol absorbed into the blood stream. Speaking for the majority, Ritchie, J. said, "I cannot agree that, wherever there has been a breach of one of the provisions of that Bill, (the Canadian Bill of Rights) it justifies the adoption of the rule of absolute exclusion on the American model which is in derogation of the common law rule long accepted in this country." The evidence had been obtained in violation of section 2(c)(ii) of the Canadian Bill of Rights which (so far as is material) provides that—

"2.....no law of Canada shall be construed or applied so as to

(c) deprive a person who has been arrested or detained

(ii) of the right to retain and instruct counsel without delay

....."

Speaking for the majority of the court, and dismissing the appeal of the accused person from a judgment of the Nova Scotia Supreme Court (Appeal Division) which had affirmed the conviction of the accused on a criminal charge, Ritchie, J. made the following observations which clinched the matter :

"The case of *R.* Vs. *Drybones*[1] is authority for the proposition that any law of Canada which abrogates, abridges or infringes any of the rights guaranteed by the Canadian Bill of Rights should be declared inoperative and to this extent is accorded a degree of paramountcy to the provisions of that statute, but whatever view may be taken of the constitutional impact of the Canadian Bill of Rights, and with all respect for those who may have a different opinion, I cannot agree that, wherever there has been a breach of one of the provisions of that Bill, it justifies the adoption of the rule of 'absolute exclusion' on the American model which is in derogation of the common law rule long accepted in this country."

Constitutional and legal position.

6.4. So far as could be ascertained, the position in Canada is still substantially what it was stated or held to be in the above paragraphs. In other words, (a) as a matter of ordinary law, (i.e. apart from constitutional issues), the discretion of Canadian courts to exclude evidence obtained illegally is very limited;[2] (b) even in matters falling within the sphere of constitutional law, that is to say, where a specific provision of the Canadian Bill of Rights has been violated, there does not appear to be any more strict or different approval in this regard.[3]

Some writers on Canadian law even think that the majority judgment of the Supreme Court of Canada in the *Queen* Vs. *Wray*[4] has substantially closed the doors in Canada on judicial discretion to exclude evidence where the discretion is based on the method of obtaining the evidence.[5]

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1. *R.* v. *Drybones,* (1970) S.C.R. 282, 9 D.L.R. (3d) 473. (Supreme Court of Canada).
2. Paragraph 6.2, *supra.*
3. Paragraph 6.3, *supra.*
4. Paragraph 6.3, *supra.*
5. K. Shroff and S. Clarke, Admissibility of illegally obtained evidence (1981) page 31, cited by Barry F. Shanks, Comment, (February 1983) 57 Tulane Law Rev. 648, 664.

Ontario Law Commission.

6.5. It may be of interest to refer here to certain moves for reform in Canada. The Ontario Law Reform Commission has recommended legislation to reconcile the interest in avoiding illegality and the interest in admitting probative evidence. The proposed provision would read this way :—

> "In a proceeding where it is shown that anything tendered in evidence was obtained by illegal means, the court, after considering the nature of the illegality and all the circumstances under which the thing tendered was obtained, may refuse to admit it in evidence if the court is of the opinion that because of the nature of the illegal means by which it was obtained its admission would be unfair to the party against whom it is tendered."[1]

Proposed Evidence Code (Canada).

6.6. Section 15 of the proposed Evidence Code, (Canada), while not addressed directly to the precise problem here, attempts a more difficult compromise encompassing illegally obtained evidence.[2]

> "15. (1) Evidence shall be excluded if it was obtained under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute.
>
> "(2) In determining whether evidence should be excluded under this section, all the circumstances surrounding the proceedings and the manner in which the evidence was obtained shall be considered, including the extent to which human dignity and social values were breached in obtaining the evidence, the seriousness of the case, the importance of the evidence, whether any harm to an accused or others was inflicted wilfully or not, and whether there were circumstances justifying the action, such as a situation of urgency requiring action to prevent the destruction or loss of evidence."

Civil action for damages.

6.7. This proposal does not seem to have yet been enacted into law. It appears that the typical Canadian remedy is civil action against the offending official for tort damages.[3]

Interception of communications.

6.8. As to the interception of communications the Canadian Criminal Code has an elaborate provision in Section 178.16 of the Criminal Code to which we shall advert later when discussing the position in U.S.A. [4,5]

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1. Stanley Schiff, Evidence in the Litigation Process (1978), Vol. 2, page 961.
2. Stanley Schiff, Evidence in the Litigation Process (1978), Vol. 2, page 961 : Law Reform Commission of Canada, Report from Evidence (1975), p. 22.
3. Barry F. Sharks, Comment (Feb. 1983) Tulane Law Rev. 648-665.
4. Paragraph 7.12, *infra*.
5. For the English position, see C. B. Walker. Police Surveliance by Technically Devices (1980) Public Law 184, 191-198.

CHAPTER 7

POSITION IN U.S.A.

Search and seizure (Fourth Amendment).

7.1. The American law illustrates a position at the extreme, in view of one of the constitutional guarantees as judicially interpreted in that country. Examples of this approach can be drawn from the Fourth Amendment in a large number. A fairly uptodate American work on Evidence gives a neat and concise statement of the law as to search and seizure in that country in these terms :—[1]

> "Evidence obtained as a not-too-remote or not-too attenuated result of violation of the federal Constitutional prohibition against illegal government-sponsored searches and seizures.....(matter in parenthesis omitted in this quotation) cannot be admitted as substantive evidence in a criminal case in any court in the land (matter in parenthesis omitted in this quotation) as against the person whose rights were invaded."

Matter appearing in the first parenthesis (in the above statement of the position) relates to the federal constitutional prohibition. It states that the federal Constitutional prohibition against illegal searches and seizures in the Fourth Amendment "is applicable against agents of the States by virtue of the Fourteenth Amendment—the two provisions being probably co-terminous as interpreted in the present respect". Matter appearing in the second parenthesis in the above statement states that the bar against admission as substantive evidence in a criminal case arises "again by virtue of the Fourth and Fourteenth Amendments which are again probably co-terminous for these purposes."

Constitutional rights—effect of violation on the law of evidence.

7.2. Thus, for violations of constitutional rights, there are available in U.S.A. not only ordinary civil, criminal and equitable sanctions, but also a privilege to exclude evidence[2] obtained in breach of such rights.

Exception in regard to illegal search.

7.3. There is an exception to the privilege for use of the evidence for impeachment[3] "(impeaching the credit)", where the accused, who has been the victim of the illegal search or seizure, takes his stand and (in either direct examination or cross-examination) denies possession of the materials seized from him as a result of the illegal search or seizure.[4]

Illegal search and seizure.

7.4. What constitutes illegal search and seizure is more a matter of Constitutional Law than of the law of evidence in U.S.A. However, some of the that have relevance to the present discussion may be stated :[5]

A search or seizure will be illegal if it is unreasonable as to

(i) the grounds of suspicion stimulating it (even if the search thereafter uncovers sufficient grounds), or

(ii) the manner of execution, or

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1. Rothstein, Evidence in a Nutshell (May 1981) page 465.
2. Rothstein, Evidence in a Nutshell (May 1981) page 463.
3. Rothstein, Evidence in a Nutshell (May 1981) pages 465-466.
4. (a) *U.S.* v. *Havens,* (1980) 446 U.S. 620.
   (b) *Walder* v. *U.S.,* (1954) 347 U.S. 62.
5. Rothstein, Evidence in a Nutshell (May 1981) pages 466-467.

(iii) the range of the search, or

(iv) the items seized.

Arrest.

7.5. Arrest is a "seizure" of the person, so that it must comply with these requirements in order to be constitutional, and in order that the evidence obtained in consequence may be regarded as legal.

Warrant when required.

7.6. If these things are complied with, a warrant (of arrest or search) is not necessarily required. However, a warrant is required (in addition to these other requirements) in special areas which the courts deem to be high in privacy expectations (provided getting a warrant would not entail substantial law enforcement problems), such as the defendant's home,[1] assuming there are no special exigent circumstances.[2]

Civil cases.

7.7. Some jurisdictions in U.S.A. extend a similar privilege to civil cases. However, this approach is not favoured by the Supreme Court.[3]

Criticism.

7.8. The approach adopted by the Supreme Court of U.S.A. in relation to evidence procured by illegal search has provoked conflicting responses from those concerned with the administration and from academic writers.

Speaking to the American Bar Association's[4] 1981 annual meeting in New Orleans, Vice President Bush decried the "lawyer who gets a brutal murderer acquitted by a deft use of exclusionary rule" and endorsed the call of the Attorney-General's Task Force on Violent Crime for a modification of the rule. A few weeks later, in New Orleans, President Reagan also backed the Task Force's recommendation and said that the rule was based on an "absurd proposition". As far back as 1971, Chief Justice Burger declared (in a dissent) that the rule results in the release of "countless guilty criminals".

7.9. In contrast, a spokesman for the American Bar Association, urging the task force to support retention of the rule, recently asserted that the exclusionary rule (which forbids the use of illegally seized evidence against a criminal defendant), "has contributed to substantial law reform.....increased the professionalism of federal law enforcement officers.....(and) vastly enhanced the integrity of the federal judicial process."[5]

Recent comment as to the exclusionary rule based on the Fourth Amendment.

7.10. A recent comment on the subject, after summing up the rival views, expresses itself thus :[6]

> "What clearly emerges from these prominent and frequently echoed statements is that those who debate the merits of the Fourth Amendment exclusionary rule—judges included—have not been timid in making assertions of the facts about the operation and effect of the rule.
>
> "But is there empirical support for these assertions ? If not, do we have the capacity to test them empirically ? These questions become increasingly important as judicial and political campaigns to

1. *U.S.* v. *Chadurak*, (1977) 433 U.S. 1.
2. Rothstein, Evidence in a Nutshell (May 1981), pages 466, 467.
3. *U.S.* v. *Janis*, (1976) 428 U.S. 433.
4. William A. Gelner, "Is the Evidence in for the Exclusionary Rule" (May 1981) 67 ABAJ 1642.
5. William A. Gelner, "Is the Evidence in for the Exclusionary Rule?" (May 1981) 67 ABAJ 1642.
6. William A. Gelner, "Is the Evidence in for the Exclusionary Rule?" (6 May 1981) 67 ABAJ 1642.

modify or abandon the exclusionary rule pick up momentum (bills are now pending in the Senate to modify or eliminate the rule) and bar groups and others invest considerable resources in its defense. We may be on the brink of a major policy decision without benefit of sufficient empirical materials to inform."

Interception of communications in U.S.A.

7.11. Apart from search proper, the scope of the Fourth Amendment ment has been extended in the United States[1] by excluding evidence of an accused person's conversation over a telephone in a telephone booth, where the evidence was obtained by an electronic listening and recording device attached outside the telephone booth.

Canadian law—section 178.61—Canadian Criminal Code.

7.12. With this, one may contrast the statutory provision in Canada. Section 178.16 inserted in 1977 in the Criminal Code (so far as is material) reads as under[2] :—

"178.16 (1) A private communication that has been intercepted is inadmissible as evidence against the originator of the communication or the person intended by the originator to receive it unless

(a) the interception was lawfully made; or

(b) the originator thereof or the person intended by the originator to receive it has expressly consented to the admission thereof; but evidence obtained directly or indirectly as a result of information acquired by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence.

(2) Notwithstanding sub-section (1), the Judge or magistrate presiding at any proceedings may refuse to admit evidence obtained directly or indirectly as a result of information acquired by interception or a private communication that is itself inadmissible as evidence where he is of the opinion that the admission thereof would bring the administration of justice into disrepute.

(3) Where the judge or magistrate presiding at any proceedings is of the opinion that a private communication that, by virtue of sub-section (1), is inadmissible as evidence in the proceedings

(a) is relevant to a matter at issue in the proceedings, and

(b) is inadmissible as evidence therein by reason only of a defect of form or an irregularity in procedure, not being a substantive defect or irregularity, in the application for or the giving of the authorisation under which such private communication was intercepted,

he may, notwithstanding sub-section (1), admit such private communication as evidence in the proceedings."

The established trend in U.S.A.

7.13. The invocation of the constitutional guarantees of civil liberties by the United States Supreme Court has proceeded on lines different from Canada and even though there has been a retreat in recent years, it is unlikely that the trends established in the 50s and 60s would be totally reversed. The

1. *Katz* v. *U.S.* (1967) 389 U.S. 347.
2. Section 178.16, Canadian Criminal Code, cited in Stanley Schiff, Evidence in the litigation process (1978) Vol. 2, page 961.

general attitude of the Supreme Court of the United States in this matter has been to exclude evidence obtained in violation of a specific constitutional prohibition. The principle was very dramatically stated in a well known case decided in 1952,[1] which holds that evidence obtained as a result of violation of a due process right of the accused (right to be free from abusive treatment at the hands of the State authorities) would, if introduced against him a criminal case, itself be a violation of his right to due process. There the accused was made to vomit up incriminating evidence that he had swallowed. Had testimonial statements rather than physical evidence been coerced out of the defendant, this principle would overlap those for coerced confessions and the privilege against self-incrimination. The case has not yet been applied where the abuse was not perpetrated by or for or with the complicity of the government, or to civil cases.

Evolution of the law.

7.14. This principle was developed in other well-known case of 1964[2] in which the accused had been refused by the police his request to consult his lawyer during interrogation and had not been informed of his right to remain silent. An inculpatory statement made by the accused person while he was being interrogated in police custody and before he had been charged was, by reason of the above mentioned refusal of the police, held to be not admissible at the subsequent trial. The ruling was based on the Sixth Amendment to the Constitution of United States, which, so far as is material, reads :—

> "In all criminal prosecutions, the accused shall enjoy the right.....to have the assistance of counsel for his defence."

Cases of 1961 —1966.

7.15. Going further, in 1966,[3] the rules as to police interrogation of criminal suspects were examined in detail. The new doctrine (to quote from the court's own words) was thus stated :—

"The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination" (The Fifth Amendment guarantees that "no person shall.....be compelled in any criminal case to be a witness, against himself.....".

Equally relevant is the earlier decision of 1961.[4] The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures". Implementing this constitutional guarantee, the Supreme Court held that any real object seized by the police is barred from evidence in all federal and state criminal proceedings.

State Courts.

7.16. Until Wolf Vs. Colorado,[5] the Supreme Court did not consider whether the exclusionary rule applied in state courts. In that case, the Fourth Amendment was held to be binding on the States, but, six members of the Court voted not to embody the exclusionary rule in the Fourteenth Amendment. Mr. Justice Frankfurther, after a survey of the practice on

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1. *Rochin* v. *California,* (1952) 342 U.S. 165.
2. *Escobedo* v. *Illinois,* (1964) 378 U.S. 473.
3. *Miranda* v. *Arizona,* (1966) 384 U.S. 436.
4. *Mapp* v. *Chio,* (1961) 367 U.S. 643.
   See para 7.17, *infra.*
5. *Wolf* v. *Colorado* (1949) 338 U.S. 25 (reviews comparative practice in other countries also), (overruled in *Mapp.* v. *Ohio* (1961) 367 U.S. 463).

this point, concluded that "most of the English-speaking world does not regard as vital.....the exclusion of evidence thus (illegally) obtained". Accordingly, the Court, he said, "must hesitate to treat this remedy as an essential ingredient of the right." If evidence secured by illegal invasion of privacy was nonetheless used in court, the sanctions suggested by Frankfurther J. were—"the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford."

7.17. In Mapp Vs. Chio[1] the Court by a five to three vote, overruled Wolf Vs. Colorado. Police officers, suspecting that a law violator was hiding in a certain house, broke in the door, manhandled a woman resident, searched the entire premises, and discovered some obscene materials in a trunk. The woman was convicted of possession of these materials. The State Court, pointing out that the objects have not been taken from the defendant's person by brutal or offensive physical force (as in Rochin),[2] permitted their use in evidence on the basis of Wolf. But the Supreme Court disposed of Wolf Vs. Colorado, Justice Clark saying :

"The ignoble short-cut to conviction left open to the State (by Wolf) tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognised that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be protected against rude invasions of privacy by State officers is, therefore, constitutional in origin, we can no longer permit that right again to remain as an empty promise".

Case law in United States.

7.18. Before 1914 illegally obtained evidence was always admissible in United States courts.[3] The law has changed since then, through judicial construction of the Fourth, Fifth and Fourteenth Amendments to the Constitution. The American courts have held that the Fourth Amendment right to be secure from unreasonable searches and seizures can only be enforced by the sanction of excluding evidence obtained in breach of it both in state and federal courts.[4] The rule extends to the "fruit of the poisonous tree", i.e. evidence obtained by using the information gained from the illegal search and seizure.[5] It extends to oral evidence as well as real, e.g. statements overheard through a microphone driven into the wall of a house,[6] or statements made to police during an unlawful search.[7] A more spectacular recent extension is the holding that wire tapping and eavesdropping fall within "searches and seizures".[8]

But the American rule has limits, some quite old, others more recent.

An accused cannot invoke the rule if the evidence was obtained in breach of *another's* rights.[9] The rule does not apply to breaches by a private

1. *Mapp* v. *Ohio* (1961) 367 U.S. 463.
2. *Rochin* v. *California* (1952) 342 U.S. 165.
3. *Boyd* v. *United States* (1896) 116 U.S.; *Adams* v. *New York* (1904) 192 U.S. 585.
4. *Weeks* v. *United States* (1914) 232 U.S. 383; *Wolf* v. *Colorodo* (1949) 338 U.S. 25; *Mapp* v. *Ohio* (1961) 367 U.S. 643.
5. *Silverthorne Lumber Co.* v. *United States* (1926) 251 U.S. 385.
6. *Silverman* v. *United States* (1961) 365 U.S. 505.
7. *Wong Sun* v. *United States* (1963) 371 U.S. 471.
8. *Katz* v. *United States* (1967) 389 US. 347; *United States* v. *White*, (1971) 301 U.S. 745.
9. *Alderman* v. *United States* (1969) 394 U.S. 165; cf. *People* v. *Mortin* (1955) 290 p. 2d 855.

individual rather than a state official.[1] It does not apply to evidence put to a federal grand jury.[2] It does not apply to evidence admitted only on some issue collateral to guilt, such as the accused's credibility as a witness.[3] The requirements of the Fifth and Fourteenth Amendments that the federal or a state government shall not "deprive any person of life, liberty or property, without due process of law" may lead to the exclusion of evidence obtained by methods which "do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically", that is, methods which "shock the conscience", e.g., the forcible stomach pumping of the accused to reveal his having swallowed drugs.[4] Normally evidence obtained through breaches of the law which do not infringe constitutional rights is admissible.[5]

Criticism in U.S.A.

7.19. The exclusionary rule has continued to be controversial in U.S.A. The general public undoubtedly sees it as one of the "technicalities" of the law which handcuffs police and lets criminals go free. But scholars and judges also join in the criticism. In a major article, Dallin H. Oaks concluded that the rule did not deter police misconduct and that it had the negative effects of fostering false testimony by law enforcement officers, seriously delaying and overloading criminal proceedings and diverting attention from the search for truth on the guilt or innocence of the defendant. But, in spite of these weaknesses and disadvantages, Oaks would not abolish the rule "until there is something to take its place..... It would be intolerable if the guarantee against unreasonable search and seizure could be violated without practical consequence."[6]

7.20. Oaks would replace[7] the exclusionary rule "by an effective tort remedy against the offending officer or his employer..... A tort remedy, could break free of the narrow compass of the exclusionary rule, and provide a viable remedy with direct deterrent effect upon the police whether the injured party was prosecuted or not."

7.21. In Bivens Vs. Six Unknown Name Agents[8] Burger C.J. (dissenting) took the same position. Although he opposed the exclusionary rule, he likewise agreed that it would not be abandoned until some meaningful alternative can be developed". He recommended that "Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated."

A recent discussion about the U.S.A.

7.22. Some of the key issues and considerations in the growing debate about the exclusionary rule, in the context of search and seizure, have been

1. *Burdeau* v. *McDowell* (1921) 256 U.S. 465. This seems to be an anomalous survival for private persons of the "silver platter" doctrine rejected in *Elkins* v. *United States* (1960) 364 U.S. 206, by which evidence illegally obtained by state officials could be used in federal courts.
2. *United States* v. *Calandra* (1974) 414 U.S. 338.
3. *Walder* v. *United States* (1954) 347 U.S. 62.
4. *Rochin* v. *California* (1952) 342 U.S. 165, at p. 172 per Frankfurther J.
5. *Muller* v. *United States* (1958) 357 U.S. 301.
6. Dallin H. Oaks, "Studying the Exclusionary Rule in Search and Seizure" (1970) 37 University of Chicago Law Review 665, See Pritchett, The American Constitution (1977), page 438.
7. Dallin H. Oaks, "Studying the Exclusionary Rule in Search and Seizure" (1970) 37 Univ. of Chicago L.R. 665.
8. *Bivens* v. *Six Unknown Names Agents,* (1971) 403 U.S. 388.

examined in a recent article in the Anglo-American Law Review.[1] The article concludes that the U.S. Supreme Court would be unwise to abolish the exclusionary rule. It is pointed out that even if the exclusionary rule does not protect the integrity of the judiciary in the eyes of the public, it does support the credibility of the court and the law in the mind of police officers. Moreover, according to the article, there is good reason to believe, that the exclusionary rule does not allow criminals to go free as much as would be the case if direct sanctions were applied. At the same time, the article demonstrates that the exclusion of evidence obtained in violation of the Constitution acts as a reasonable deterrent to illegal police searches. While scholars have expressed doubts about the propriety of the rule, according to the article, the police would not understand, or respect, a court which would reverse itself on a matter which appears to be so fundamental. American constitutional tradition is such that the police would have difficulty in believing that any civilized Government would like to profit by a violation of the law.

1. Loewenthal, "Evaluating the exclusionary rule in search and seizure" (1980) Vol. 9, No. 3, Anglo-American Law Rev. pages 238-256.

CHAPTER 8

A CASE FROM JAMAICA

Privy Council case from Jamaica.

8.1. There is an interesting Privy Council decision on appeal from Jamaica, which represents one approach concerning the effect of a constitutional provision on evidence obtained illegally or improperly. The Privy Council[1] considered the subject of illegally obtained evidence generally and the effect of the search and seizure provision in the Jamaican Constitution. Many of the relevant cases in Scotland and England were discussed.

Unfairness to be judged from all the surrounding circumstances.

8.2. The evidence in question had been obtained by an illegal search of the accused. The Privy Council discussed in this context the following statement of Lord Parker concerning judicial discretion to exclude illegally or improperly obtained evidence : "It would certainly be exercised by excluding the evidence if there was any suggestion of it having been obtained oppressively, by false representations, by a trick, by threats, by bribes, anything of that sort."[2]

The Privy Council, however, qualified this statement by concluding that unfairness to the accused in this context is not susceptible of close definition and must be judged in the light of all the material facts and findings and of the surrounding circumstances. This, with respect, is a very welcome exposition of the concept of unfairness, if that is to be taken as criterion for excluding evidence obtained illegally or improperly.

Constitutional aspect of the Privy Council ruling.

8.3. However, the particular relevance of the above ruling of the Privy Council to constitutional issues is the disposition of the argument that, where the illegally obtained evidence was obtained in violation of the accused's constitutional right, it ought to have been excluded under the Jamaican Constitution. Lord Hodson disposed of this argument concisely :

> "This constitutional right may or may not be enshrined in a written constitution, but it seems to the Lordships that it matters not whether it depends on such enshrinement or simply upon the common law as it would do in this country. In either event the discretion of the court must be exercised and has not been taken away by the declaration of the right in written form".

1. *King* v. *The Queen* (1978) 2 All E.R. 610 (P.C.).
2. *Callis* v. *Gunn*, (1964) 1 Q.B. 495, 502.

CHAPTER 9

COMMENTS RECEIVED ON THE WORKING PAPER

Comments received ; a general description.

9.1. Having dealt with the legal position in India and elsewhere, we now turn to the opinion on the subject. A Working Paper prepared on the subject by the Commission was circulated in February 1983 for comments to interested persons and bodies, including the Secretary, Legislative Department, Ministry of Law, all High Courts, all State Governments and Bar Associations. A request was made to forward comments by the 15th April, 1983. The Commission has before finalising its views, taken into account all comments received upto the 15th September, 1983.

Replies have been received from three High Courts, four State Governments, two Registrars of High Courts (personal views), one Additional Chief Metropolitan Magistrate and one lady advocate. We are grateful to all of them for having responded to the Questionnaire. We shall presently deal with some of the important points made in the comments.

High Courts.

9.2. Three High Courts have sent replies in response to the Working Paper—

(i) The Judges of the one High Court have no views to offer in the matter.[1]

(ii) Another High Court[2] regards the present law as just and fair and not needing reform.

(iii) As regards the third High Court, nine of its judges have no views to offer. The rest have not expressed their reaction.[3]

State Governments.

9.3. Four State Governments have sent comments on the Working Paper.[4] Of these four, two favour the proposal for amendment (put forth in the Working Paper) so as to confer a discretion on the court. The third State Government is of the view that even now such a discretion exists and no amendment is needed. The fourth is opposed to any amendment, giving the reason that it may lead to collateral inquiries, which is not desirable.

Other comments.

9.4. The Registrar of one High Court, presumably expressing his personal view, agrees that a statutory amendment, as proposed in the Working Paper conferring a discretion on the court, is needed.[5]

The Registrar (Appellate side) of another High Court, again expressing his personal view, is opposed to an amendment, thinking that vesting a discretion even in the judiciary may "degenerate into caprice." However, in the very next paragraph of his reply, he has stated that violations of human rights can be more effectively checked by "judicial vigilance" rather than by the suggested changes in the law.[6] In this context, it should be pointed out that

1. Law Commision File No. F. 2(7)/83-L.C. s. No. 4.
2. Law Commssion File No. F. 2(7)/83-L.C. s. No. 8.
3. Law Commission File No. F. 2(7)/83-L.C. s. No. 10.
4. Law Commission File No. F. 2(7)/83-L.C. s. No. 11, 13, 14 and 15.
5. Law Commission File No. F. 2(7)/83-L.C s. No. 9.
6. Law Commission File No. F. 2(7)/83-L.C. s. No. 2.

judicial vigilance is precisely what is contemplated in the recommendations that are going to be made in this Report.[1]

The comments of the Registrar (Appellate side) of the High Court express the apprehension that a judicial discretion to exclude such evidence will help criminals.[2] But we are happy to note that the other side of the picture has been correctly put by an Additional Chief Metropolitan Magistrate, who has stated in his comment as under[3] :—

> "If the courts overlook the collection of evidence by illegal or improper means, the respect for the purity of the judicial process is undermined in the public eye..... If the rule of wholesale admission of evidence illegally or improperly obtained were to be applied, then there is a live danger that the conduct of the police in securing such type of evidence will be seldom scrutinized in the courts of law. The cross-examining counsel will become resigned to the position and may not question the police about their questionable methods."

He has wholeheartedly favoured the conferment of a discretion on the judge to exclude evidence obtained illegally or improperly, where the illegality is of a shocking nature. Besides wholly agreeing with proposed section 166A, he has also made the suggestion that confessions obtained by fraud, deception or trick should be made inadmissible and that section 29, Evidence Act should be amended for the purpose.[4]

Confining the proposal to criminal cases.

9.5. We must now turn to a point raised by Mrs. Phiroza Anklesaria, an Advocate of the Bombay High Court and a Solicitor of the Supreme Court of England.[5] She has raised the question whether confining the proposed provision to criminal cases will not mean that in civil cases the law tolerates the illegality.

In this context, we would like to point out that what the proposal amounts to is creating one more sanction in respect of illegality. It does not mean that the illegality as such is condoned. Even now, for illegal conduct which amounts to a crime or a tort, the appropriate remedy can be pursued, and that remedy remains unaffected. The proposal merely adds to that remedy one more sanction.

One can rationally suggest a special provision in this regard for criminal cases, where life and liberty are involved much more frequently than in civil cases. Experience also shows that occasions for committing serious illegalities or improprieties that shock the judicial conscience arise more often in the pre-trial processes concerned with criminal investigation than in preparatory steps for civil cases. The need for a provision on the subject is therefore much stronger in criminal cases than in civil cases.

Some point made as to existing laws.

9.6. Some of the comments received on the Working Paper seem to assume that discretion to exclude evidence illegally procured is already vested in the court under the existing law.[6] This does not, however, appear to be

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1. Chapter 11, *infra*.
2. Law Commission File No. F. 2(7)/83-LC. s. No. 2.
3. Law Commission File No. F. 2(7)/83-LC. s. No. 2 (Two comments were received with s. No. 2)
4. Law Commission File No. F. 2(7)/83-LC, s. No. 2.
5. Law Commission File No. F. 2(7)/83-LC, s. No. 1.
6. Law Commission of India File No. F. 2(7)/83-LC. s. No. 1 (Mrs. Phiroza Anklesaria Advocate).

quite a correct assumption. We have discussed in an earlier Chapter the present law and pointed out that[1] no Indian decision—not even a Supreme Court decision of 1973, sometimes relied on for such an assumption—regards illegality as a ground for rejecting evidence gathered illegally.

Illegality and irregularity.

9.7. A few comments on the Working Paper have argued that Indian law already makes a distinction between illegality and irregularity, even in the matter of admission of evidence. They assume that where an illegality goes to the root of the investigation of the wrong or the offence, the evidence is liable to be excluded in the trial of the matter. This assumption, however, does not harmonise with the judicial approach as reflected in numerous decisions. In fact, the Supreme Court has clearly held[2] that illegality in obtaining evidence does not lead to its exclusion. Probably some confusion has been created because *procedural illegality in a trial of a criminal case may be a ground for quashing the conviction,* while, in contrast, mere irregularities do not lead to such a position. This does not mean that illegality in the gathering of evidence leads to its exclusion from use at the trial.

Questions of procedure are mostly decided on consideration like the mandatory or directory character of a procedural safeguard. What the present inquiry is concerned with is a different aspect : is the misconduct of a law enforcement officer such that the court ought not to lend its aid to it and should discourage it by excluding the evidence from admission ? Some considerations may overlap in concrete cases, but the philosophy that needs consideration, and may supply justification for exclusion of evidence in situations contemplated by the present Report, is quite distinct from an exercise focussed on the mandatory or non-mandatory character of a statutory provision.

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1. Paragraph 3.6, *supra.*
2. (a) *R. M. Malkani* v. *State of Maharashtra,* AIR 1973 S.C. 153.
   (b) *Magraj* v. *R. K. Birla,* A.I.R. 1971 S.C. 1295.

CHAPTER 10

ARGUMENTS PRO AND CON

Various arguments summarised.

10.1. In order that a proper decision may be taken as to whether there is need for amendment of the law of India on the subject under consideration, it will be convenient to mention here the arguments in favour of, or against, such an amendment. The major policy arguments in support of the adoption of a rule empowering the court to exclude illegally obtained evidence are connected with the element of deterrence, the ethical argument, the argument of unfairness to the accused, the argument connected with the integrity of the judicial process, and the argument as to symmetry and development of the law.

Deterrence.

10.2. Those who put forward the argument of deterrence as justifying a rule of exclusion lay emphasis on the need to have, in the law, an effective deterrent against illegal conduct in law enforcement. It is stated that in order that such conduct may not be resorted to in law enforcement, the only effective sanction within the apparatus of the law is a rule which excludes evidence obtained illegally. The strict exclusionary rule adopted in the U.S.A. rests on this assumption, though, no doubt, its adoption in that country has been buttressed by the fact that what is in issue is an infringement of a constitutional provision.

Difficulty of determining the deterrent effect.

10.3. Students of criminology are aware that it is difficult to assess with reasonable accuracy the deterrent effect of any legal sanction. How far any legal prescription adequately deters illegal conduct in a particular area of human activity regulated by law is mostly a matter of opinion. Because of this general position (which applies to evidence gathered illegally also), the question whether the introduction of a rule or discretion of exclusion of evidence adequately deters illegal conduct in the collection of evidence will always remain a matter of opinion. Material enabling the formation of an objective conclusion on the point is not always available. At the same time, the adoption of a rule or discretion of exclusion might, *prima facie,* remove the incentive to break the law for the purpose of obtaining evidence. Deterrence has been the principal basis of criminal sanctions, and there should be a presumption in favour of the effectiveness of judicially enforceable sanctions against attempts to procure evidence illegally obtained. It appears that the studies[1] conducted in the U.S.A. for the purpose of testing the deterrent effect of the exclusionary rule have remained inconclusive, and are likely to be so. "The issues are not susceptible of quantitative solution," according to Mr. Justice Frankfurter.[2] This, in fact, may be true of many other laws imposing criminal sanctions. Were the proponents of every such law required to demonstrate a specific deterrent effect, one suspects that a great deal of our law might have to be striken from the books.[3]

There is another aspect of the matter that needs to be mentioned. The operation of a rule excluding evidence obtained illegally may obstruct the

1. J. B. Dawson, "Exclusion of Unlawfully obtained Evidence" (July 1982) 31 I.C.L. 513, 520, 521, 522.
2. *Holf v. Colorado,* (1949) 338 U.S. 26, 28.
3. J. B. Dawson, "Exclusion of Unlawfully obtained Evidence" (July 1982) 31 I.C.L.Q. 513, 520, 522.

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process of seeking the truth. In individual cases, the guilty may even go free. The question is, whether such cases will be no large in number as to prevent any move for a change in the law, if the change is otherwise required in the interests of justice.

Alternative remedies.

10.4. An assessment of the validity and force of the argument of deterrence naturally involves a consideration of the alternative remedies that are available under the general law against illegal conduct. Such alternative remedies are at present, principally the following :—

(a) Criminal sanctions for the conduct in question, where such sanctions are applicable in law;

(b) Tort remedies, where recognised in law for such conduct; and

(c) Departmental action against the enforcement agencies.

Theoretically, the sanctions mentioned above may be available, but there are certain practical difficulties which should not be overlooked. For example, as regards criminal sanctions, it is not easy for a victim of illegal search to pursue such sanctions effectively, since, with his own resources, he may not be able to muster sufficient evidence for the purpose. Again there are certain legal pre-requisites, such as the need for a prior sanction for prosecution, which also must be fulfilled. In practice, it is not easy to cross these legal hurdles.

Civil actions as a remedy for unlawful search and seizure present equally notorious practical difficulties. In a well known English case, Lord Denning, M. R.[1] wrote that when entering a house by stealth or force, the "police risk an action for tresspass. It is not much risk."

Then, as regards disciplinary action, that also is a tardy process, for reasons which need not be gone into for the present purpose. Thus, there are many counter-balancing considerations which render the alternative remedies of little practical consequence. One might then be confronted with the limits of current legal remedies and their inability to maintain the standards of legality.

The ethical arguments : the doctrine of "clean hands.".

10.5. So much as regards the element of deterrence. Then, there is what may be called the "ethical" argument. These who would favour some type of exclusionary rule argue in support that justice requires that the wrong doer must be denied the benefit of his wrongful act. One can call it the doctrine of "clean hands". Exclusion of evidence acquired illegally, it is believed, works as a sanction against the deriving of such benefit by a person who obtained the evidence illegally. No doubt, in a modern State, where the enforcement of law is a complete mechanism, this argument, in a form in which it concentrates on *personal conduct,* cannot be applied literally. The particular enforcement officer who might have been personally guilty of the alleged wrong doing is merely a cog in the whole administrative wheel; moreover, that particular officer may have been transferred to another place and succeeded by another officer before the prosecution commences and before the evidence alleged to have been obtained illegally is tendered. The result is, that though the wrong is committed by 'A', the benefit of the evidence gathered illegally may go to 'B', and the application of a doctrine of "clean hands" based on personal fault would be meaningless in such circumstances.

1. *Chani* v. *Janes,* (1970) 1 Q.B. 693, 705.

1. Cf. Sunderland, "Exclusionary Rules : A requirement of Constitutional Principle" (1978) 69 Journal of Criminal Law and Criminology, 141.

However, it is possible to apply the doctrine of "clean hands" in an impersonnal manner, by viewing the machinery of law enforcement as one undertaken by the State as an entity, and by applying the argument of clean hands against the State as an organisation, rather than against individuals personally.

Unfairness.

10.6. One more argument to support on exclusionary rule is the argument of unfairness. The admission of evidence obtained illegally, it is stated, would be unfair or unjust to the accused. This was the traditional basis of the English rule on the subject.[1]

Purity of the Judicial process.

10.7. An argument which has gained popularity in modern times, and which seems to carry considerable force behind it, addresses itself to the purity and integrity of the judicial process, rather than to the conduct of individual litigants or to the element of deterrence. According to this argument, what is at stake is not merely the regulation of illegal conduct and the need to deprive a wrong doer of the benefit of his wrong doing, but the need to ensure that the stream of justice is not polluted by material originally obtained by the commission of an illegality. Exclusion of such evidence is considered proper in order to protect the integrity of the court by requiring or permitting the court to refuse to countenance unlawful actions.

Wigmore's view criticised.

10.8. The argument has a greatly persuasive force. No doubt, Wigmore, the eminent American writer on evidence took the view that even if the court admits illegally obtained evidence, the court does not thereby condone the illegality, but merely ignores it.[2] Any view expressed by this eminent jurist must command very great respect. But it appears to us that this is not an entirely satisfactory way of disposing of the matter. Even if it be assumed that the court, by admitting illegally obtained evidence, merely ignores the illegality, the court, by doing so, indirctly implicates itself in the illegality. To this extent, the court becomes a party to a procedure which can breed disrespect for the law and for the judicial process. The law has so many rules based on the public policy (in the wider sense), whereby certain conduct is refused to be countenanced by the court on the principle that the law would not lend its aid to some serious illegality unworthy of a civilised society. The adoption of some rule of an exclusionary character would be in symmetry with legal rules of this category. An argument that seeks to keep the stream of justice unpolluted cannot be dismissed summarily.

Symmetery and development of the law.

10.9. In justification of a rule or discretion for excluding illegally obtained evidence, there is also an argument resting on what may be called the symmetry and development of the law. The argument can be put thus, in brief. If the judge does not even have the option of excluding evidence obtained by illegal search and seizure it means that such conduct will seldom be scrutinised in the courts. The legality of the police conduct will not, then, be a live issue is criminal trials, there will be no stage at which police officers may be cross-examined with regard to the propriety of their actions and there will be no incentive for defense counsel even to raise such issues. The law of search and seizure will continue to develop only haphazardly (if at all), through rare civil actions for trespass brought against police officers, or in the rather inappropriate context of prosecutions that may be brought for the "obstruction" of a constable acting in the execution of his duty. In contrast a rule or discretion of exclusion may help the symmetry of the law and its proper development.

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1. *Callis* v. *Gunn*, (1963) 2 All E.R. 677.
2. Wigmore, Evidence (McNaughten Revision 1961), Vol. 8, Article 2176.

Arguments against exclusion.

10.10. Against the introduction of an exclusionary rule, it is argued that where evidence is logically relevant to the facts in issue, it should be admitted despite the fact that it was illegally obtained because :

(i) the predominant concern of the tribunal of fact is the search for truth, and the fact of the illegal acquisition of evidence does not effect the logical relevance of that evidence and the court should not undertake a collateral inquiry;

(ii) other sanctions and remedies exist against the prepetrator of illegal acts that are better suited to deter wrongdoers than an evidentiary rule of exclusion; and,

(iii) it would be a grave injustice to a party to be denied the use of illegally obtained evidence where he was not involved in the illegality.

Collateral inquiry.

10.11. The most important argument[1] against the introduction of an exclusionary rule in any form, is the objection to a collateral inquiry. It is argued that the application of such a rule involves, in a criminal trial, a collateral inquiry which may delay the trial and distract the court. To put the same argument in a different form, the method by which the evidence is obtained is stated to be a collateral issue, and not the central issue of inquiry before the court. A court is concerned with a resolution of the facts in issue and should therefore refuse to hear arguments that might draw it into regions far removed from the central issues under inquiry. The argument was lucidly put in an American ruling, pronounced at a time when the exclusionary rule had not yet established itself in that country. "We think such testimony (illegally obtained) is admissible. It is not the policy of the courts, nor is it practicable; to pause in the trial of a cause, and open *up a collateral* inquiry upon the question of whether a wrong has been committed in obtaining the information which a witness possesses".[2]

Vindication of rights of the accused.

10.12. Against this, it is stated that though an exclusionary rule entails a collateral inquiry in a criminal trial, it does vindicate the accused's rights immediately, without the need for him to start expensive new proceedings. The accused may have alternative remedies, but such alternative remediers are not always adequate.[3] Criminal proceedings against a wrong-doer have to overcome several obstacles, such as the burden of proof and the possible sympathy of the court for the policeman. Moreover, the victim of the illegality is unlikely to know how to initiate criminal proceedings or to be able to do so, particularly if he is poor, uneducated, or in prison precisely because of the admission against him of the illegally obtained evidence. The State may be unlikely to undertake criminal proceedings against police officers. In the words of an American Judge, "self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered".[4]

Hence, even though, from the technical point of view, an inquiry into illegality may be collateral one, it is required in the interests of justice.

The fundamental question.

10.13. In passing, it may be observed that this part of the controversy touches the fundamental question that recurs again and again in any consideration of the law of evidence in general, namely, what should be the limits

1. Paragraph 10.10(i), *supra.*
2. *Cluett* v. *Bosenthal,* (1894) 100 Mich. 193 53 N.W. 1009, 1010.
3. Para 10 4, *supra.*
4. *Wolf* v. *Colorado* (1949) 338 U.S. 26, 42 per Murphy, J. (dissenting).

of the expense of the factual inquiry in a judicial trial, and where should the line be drawn to demarcate between matters of direct relevance and matters not of direct relevance ?

Alternative remedies.

10.14. The second possible objection[1] to a rule of exclusion of evidence obtained illegally is based on the reasoning that there are available alternative remedies for redress against such illegal action. These alternative remedies at present are criminal sanctions, tort remedies and disciplinary action. This aspect has been already dealt with.[2]

The argument of injustice.

10.15. Finally, there is the argument that it will be grave injustice to deny the use of evidence to a party not involved in the alleged illegality.[2a] This argument naturally has some force, but the objection becomes irrelevant when one views the State as an entity or organisation engaged at various stages in law enforcement.[3] The functionaries through whom the process is carried on may be different at various stages and may change from time to time, but the organisation remains the same. The judicial sanction of refusal to admit evidence illegally obtained would thus be applied not against an individual as such, but against an organisation viewed as a whole.

The constitutional aspect.

10.16. The arguments for and against the exclusion of evidence illegally obtained, that have been summarised above, do not, of course, take into account the constitutional aspects. In a particular country, where rights guaranteed by the Constitution are in issue, the controversy may acquire a different colour. The law then, has to concern itself also with values whose importance is heightened by the Constitution. Introducing an exclusionary rule can, in such countries, be argued for with greater force. This, in fact, happened in the United States, where the Fourth Amendment of the American Constitution, protecting the citizen *inter alia* against unreasonable search and seizure, ultimately came to be invoked as the foundation for a rule excluding evidence acquired as the consequence of an illegal search or seizure. It is on this basis that Courts in the United States have held that the States are required to exclude, from State criminal trials, evidence illegally seized by State Officers.[4] The Supreme Court of the United States has said the same thing in different words by observing that "the primary purpose of the exclusionary rule is to deter future unlawful police conduct and thereby *effectuate the guarantees of the* Fourth Amendment against unreasonable search and seizure."[5]

Position under the Indian Constitution.

10.17. How far the adoption of a rule or discretion excluding the admission of illegal evidence becomes a constitutional imperative or desideratum in India is a question which cannot, in the present state of the law, be answered with certainty, there being no direct authority on the subject. We do not have a provision in the Indian Constitution strictly corresponding to the Fourth Amendment of the U.S.A. As regards the concept of "procedure established by law" laid down in article 21 of the Indian Constitution, that concept still remains to be spelt out in its application to the law of evidence. While a number of judicial pronouncements on this article have added a richness and lent a new dimension to our constitutional jurisprudence, the particular question now in issue has not yet arisen in the courts, except[6] once.

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1. Paragraph 10.10 (ii), *supra.*
2. Para 10.4, *supra.*
2a. Para 10.10, (iii) *supra.*
3. Compare para 10.5, *supra.*
4. *Mapp* v. *Ohio* (1961) 367 U.S. 643.
5. *U.S.* v. *Calendra* (1974) 414 U.S. 338, 347, (Powell, J., speaking for the Court).
6. R. M. Malkani's case, AIR 1973 SC 153.

There is no doubt that this question will arise in the courts some day. When it arises, the courts will be called upon to make a difficult choice, but they will have a number of models available for concrete study.

Need for an elastic approach.

10.18. On an examination of the pros and cons of the matter under discussion it would appear that in this area there are no absolutes. On the one hand, if evidence obtained illegally is not admitted at the trial, grave injustice might be caused in some cases and the respect for the courts *as courts of justice* would be lowered. On the other hand, there are cases where the illegal conduct is so shocking that the count would consider it unjust to admit the evidence. There are many degrees of illegality, and it would appear that, for this reason, an element of elasticity in the law may, in the majority of cases, better serve the interests of justice than a blind adherence to a rigid rule of exclusion. At the same time, the question that must be considered is whether the present position in India is consistent with justice.

It is in the light of these considerations that we approach the matter. Our own views will be indicated more concretely on each issue in due course.[1]

1. (Chapter 11, *infra.*)

CHAPTER 11

ISSUES FOR CONSIDERATION AND RECOMMENDATIONS

Issues.

11.1. It may be convenient to formulate now the important issues that call for consideration, in the light of the discussion contained in the preceding Chapters. In broad terms, these appear to be as under :—

(1) Is the present law in India as to the admissibility, in a criminal case, of evidence that has been obtained illegally or improperly just and fair ? Or, does it stand in need of reform ?

(2) If a reform in the present law is to be effected, should the reform take the shape of a statutory amendment giving to the court (in a criminal case) a discretion to exclude evidence obtained illegally or improperly ? Or should it be a more radical one ?

(3) If such a discretion as it prostulated above is to be conferred on the criminal court, what should be the considerations to be laid down in the statutory provision in the behalf ?

(a) Should the statutory provision lay down that the discretion to be conferred is to be exercised having regard to the need to exclude evidence procured in circumstances that would tend to bring the administration of justice into disrepute ? or

(b) Should the statutory amendment provide that the discretion to be conferred should be exercised, having regard to the need to avoid unfairness to the party against whom the evidence is sought to be used ?

(4) Should the proposed statutory amendment (o.2-3 above) further enumerate the circumstances to be taken into account in exercising the discretion?

Conclusion as to need for reform

11.2. On a careful consideration of the various issues, the Commission has come to the conclusion that there is need for conferring on the court a discretion to exclude evidence obtained illegally or improperly if, in the circumstances of the case, the admission of such evidence would bring the administration of justice into disrepute. The discretion, of course, will be guided by certain factors, which we shall set out in detail when suggesting the precise legislative amendment. In order to enable us to state in greater detail the reasons for our main conclusion, we find it convenient to take up the issues that fall to be considered.

The first issue—need for reform.

11.3. With reference to the first issue,[1] which raises the basic question of the need for law reform, we are of the opinion that the present position in India,[2] under which the legal "relevance" of the evidence of the facts in issue in the particular proceedings is the principal consideration, cannot be regarded as totally satisfactory. From time to time, there must arise cases where the illegality or impropriety is so shocking and outrageous that the judiciary would wish that it had a power to exclude the evidence. But the present Indian law has no specific provision recognising such a power. The

1. (Paragraph 11.1), *supra.*
2. Paragraph 2.3 and 2.7 and Chapter 3, *supra.*

general understanding of the legal position in India puts the court within very narrow confines. The matter is viewed primarily as one of interpretation of a specific statutory provision—if and where a statutory provision regulating the gathering of evidence of the type at issue in a particular case is shown to be in existence. If, on a proper consideration of the particular provision that comes up for construction, the court cannot regard admission of the evidence as barred by that provision, then there is no residuary power in the court to reject the evidence, howsoever gross may be the illegality perpetrated in collecting it and whatever may be the extent to which those concerned with law enforcement may have invaded human dignity. This position, which represents the narrowest approach of all the four models[1] prevalent amongst the major legal systems, must cause injustice on many occasions. The major deficiency in the present Indian position is that it reflects a legalistic and statute-oriented approach, which completely shuts out any consideration of deeper human values. We think that there ought to be recognised a power in the court to take into account all these important aspects, which are of basic relevance to the functioning of an agency charged with the administration of justice.

Second issue—Discretion to be given.

11.4. The need for reform in the law is therefore manifest. At the same time, we recognise that a provision mandatorily shutting out a piece of evidence merely because some illegality has been perpetrated in collecting it would not be advisable. Such a provision would be an extreme one and fail to take note of the infinite variety of situations that can arise in life. This is precisely the consideration that the present position also fails to take notice of, thus constituting another extreme. Both the extremes ought to be avoided. We would therefore, prefer the conferment of a discretion on the court, rather than a mandatory statutory provision. This answers the second question posed above.[2]

Third issue—the governing consideration.

11.5. This logically takes us to the third question posed by us.[3] What ought to be the governing consideration that should weigh with the court in exercising the proposed discretion ? Should the governing consideration be —

(i) the fact that the circumstances in which the evidence was procured were such that admitting the evidence would be bringing the administration of justice into disrepute.

(ii) the need to avoid unfairness to the party against whom the evidence is sought to be used ?

What have been put as items (i) and (ii) above are to be considered as alternatives. In fact, they were so put in our Working Paper. After careful consideration, we have come to the conclusion that the first one should be the governing consideration. The second one, based on the test of unfairness, while there is something to be said in its favour, may occasionally turn out to be vague. As regards the first one, it is undeniably a reasonably concrete test. Moreover, since, in exercising its discretion, the court is expected to take into account various circumstances (see the recommendation in the next paragraph), the court will have some assistance in arriving at a decision.

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1. Paragraphs 2.3 to 2.6, *supra.*
2. Paragraph 11.1, *supra.*
3. Paragraph 11.1, *supra.*

Fourth Issue —factors to be considered.

11.6. We now come to the fourth and the last issue that remains to be considered,[1] before formulating the legislation to be recommended. Should the law enumerate the circumstances to be taken into account by the court in exercising the discretion to exclude evidence obtained illegally or improperly ? We think that there should be such an enumeration. We are aware that such enumerations can never be exhaustive, and that their utility may therefore be limited. Still, we think that an indication of the important guidelines may be helpful in concrete cases. The guidelines that we have in mind will be apparent from the draft of the legislative provision that we are giving towards the end of this Chapter.[2] In that draft, we have put human dignity and social values in the forefront. These two considerations constitute, in a sense, the ethical justification for a statutory provision giving the proposed discretion to the court.[3] This composite concept will, of course, be applied with reference to the context of each case. That context is sought to be spelt out in three concrete factors[4] mentioned in our draft, which are intended to cover the seriousness of the case, the importance of the evidence and the magnitude of the wilful harm, if any.

The demands of law enforcement—which may possibly balance the factors so far enumerated—have also been given due weight in the last clause of our formulation,[5] which expects the court to consider whether there were any circumstances justifying the action complained of as illegal or improper.

Recommendation.

11.7. In the light of the above discussion, we recommend that in the Indian Evidence Act, 1872, a new Chapter containing new section 166A should be inserted on the following lines :—

"CHAPTER 10A

EVIDENCE OBTAINED ILLEGALLY OR IMPROPERLY

166A. (1) **In a criminal proceeding, where it is shown that anything in evidence was obtained by illegal or improper means, the court, after considering the nature of the illegality or impropriety and all the circumstances under which the thing tendered was obtained, may refuse to admit it in evidence, if the court is of the opinion that because of the nature of the illegal or improper means by which it was obtained its admission would tend to bring the administration of justice into disrepute.**

(2) **In determining whether evidence should be excluded under this section, the court shall consider all the circumstances surrounding the proceedings and the manner in which the evidence was obtained, including —**

(a) **the extent to which human dignity and social values were violated in obtaining the evidence;**

(b) **the seriousness of the case;**

(c) **the importance of the evidence;**

(d) **the question whether any harm to an accused or others was inflicted wilfully or not, and**

(e) **the question whether there were circumstances justifying the action, such as a situation of urgency requiring action to prevent the destruction or loss of evidence."**

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1. Paragraph 11.1, *supra*.
2. Paragraph 11.7, *infra* [Section 166A, Evidence Act, as recommended].
3. Section 166A(2)(a), as recommended.
4. Section 166A(2)(b) to (d), as recommended.
5. Section 166A(2)(e), as recommended.

(K. K. MATHEW)
CHAIRMAN

(NASIRULLAH BEG)
MEMBER

(J. P. CHATURVEDI)
MEMBER

(DR. M. E. RAO)
MEMBER

(P. M. BAKSHI)
PART-TIME MEMBER

(VEPA P. SARATHI)
PART-TIME MEMBER)

(A. K. SRINIVASAMURTHY)
MEMBER-SECRETARY

Dated : October 28, 1983.

APPENDIX

SOME ILLUSTRATIVE SITUATIONS OF EVIDENCE OBTAINED ILLEGALLY OR IMPROPERLY

In order to make the discussion concrete, there is given below an illustrative list of certain situations in which evidence can be said, *prima facie*, to have been obtained illegally or improperly. The listing of any situation here does not, of course, necessarily imply that in that particular situation the discretion should be exercised for excluding the evidence in question.

The cases cited in the corresponding footnote against a listed situation are mentioned here for the facts involved. The court did not, in each such case, exclude the evidence.

1. Arrest
   - (a) unlawful arrest;
   - (b) unlawful removal from custody.

2. Physical examination
   - (a) illegal search of the person of the accused;[1]
   - (b) illegal blood tests;[2]
   - (c) illegal breath test;[3]
   - (d) unwarranted medical examination ;[4]
   - (e) medical examination of the accused to obtain evidence of drunkenness, when all that the accused was told was that the examination was necessary to see if he was ill ;[5]
   - (f) medical examination of the accused to obtain evidence of drunkenness, where it was undertaken merely after telling the accused that it would be advantageous to him ;[6]
   - (g) taking the finger prints of the accused without telling him that he might refuse to give them;[7]
   - (h) compulsory breath test which is permitted by law only for using them on certain minor charges, where it is employed for more serious cases.

3. Search of property

   Illegal search of property;[8]

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1. *Kuruma* v. *R.*, (1955) A.C. 197 (P.C.).
2. *Attorney General of Quebec* v. *Begin*, (1955) 5 D.L.R. 394 (Supreme Court of Canada).
3. *Merchant* v. *R.*, (1971) 45 A.L.J.R. 310 (High Court of Australia).
4. *R.* v. *Ireland* (No. 1), (1970) 126 C.L.R. 321 (High Court of Australia).
5. *R.* v. *Payne*, (1963) 1 All E.R. 848.
6. *R.* v. *Nowell*, (1948) 1 All E.R. 794.
7. *Callis* v. *Gunn*, (1964) 1 Q.B. 495.
8. *Mac Farlane* v. *Sharp*, (1972) N.Z.L.R. 64.

4. Breach of privacy (including interception of communications),
   (a) illegal telephone tapping;[1]
   (b) photographs illegally taken by telling the accused wrongly that it was compulsory;[2]
   (c) eavesdropping; [3-5]
   (d) overhearing a conversation between blackmailers and the victim;[6]
   (e) incriminating letter written by the accused in Jail, which the jailor promised to post, but which was handed over to the prosecutor.[7]

5. Denial of legal advice
   (a) Confession obtained after its maker had been refused the advice of a solicitor;[8]

6. Tricks played by the law enforcement agency
   (a) Evidence obtained by reason of a policeman describing himself as a magistrate;[9]
   (b) Evidence of drunkenness obtained from medical examination which, the accused was told, was just to see if he was ill.[10]

7. Entrapment

   The use of agent provocateurs [11-12]

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1. *R.* v. *Mathews*, (1972) V.R. 3 (Supreme Court of Victoria).
2. *R.* v. *Ireland* (No. 1), (1970) 126 C.L.R. 321.
3. *R.* v. *Bucan*, (1964) 1 W.L.R. 365.
4. *R.* v. *Maqsud Ali*, (1965) 2 All E.R. 464.
5. *R.* v. *Stewart*, (1970) 1 W.L.R. 907.
6. *Hopes* v. *H.M. Advocate*, (1960) J.C. 104 (Scotland).
7. *R.* v. *Derrington*, (1826) 172 E.R. 188.
   See, however, *Rumping* v. *D.P.P.* (1964) A.C. 814.
8. *R.* v. *Alien*, (1977) Crim. L.R. 163.
9. *R.* v. *Pettipiece*, (1972) 7 C.C.C. (2d) 133 (Canada).
10. *R.* v. *Payne*, (1963) 1 All E.R. 848.
11. *R.* v. *Ameer*, (1977) Crim. L.R. 104, 105.
12. For the position in U.S., see Note, "Entrapment as a due process defence" : developments after *Hempton* v. *U.S.*, 96 S. Ct. 1646; (1982) Winter, 57 Indiana Law J. 89, 130.

MGIPN—S3—442 LAD/ND/83—14-8-84—625.