

Streamlining the exclusion of illegally obtained evidence in criminal justice

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*'The rules of Evidence, as recorded in our law, may be said to be essentially rational. The reason may not always be a good one, in point of policy. But there is always a reason.'*¹

*'[E]xclusionary rules are a reflection of shared democratic principles, even though the rules' particular provisions vary according to context and tradition.'*²

*'The exclusion of all evidence would be a denial of all justice.'*³

Abstract

This study, which forms part of the European Commission funded project entitled 'Defence Rights in Evidentiary Procedures', explores the principles underpinning exclusion of illegally obtained evidence in criminal justice systems from a comparative perspective.

Exclusionary rules have been intensely discussed in literature of past and recent years. Many studies discuss in-depth the features of the law of evidence of one or more countries, their rationales and consequences. Only few studies, however, have discussed the overall possibility to envisage harmonized solution between countries (within Europe and even outside Europe) based on a common sound logic of exclusion. The goal of this study is precisely this: to systematise the basic structures of the exclusionary rules and to identify the logic behind exclusionary rules, with a view to proposing a common uniform solution across Europe.

Starting from a comparative analysis of legal rules and doctrines regarding illegally obtained evidence in England and Wales, Belgium, Italy and Germany, this study identifies different structures of exclusionary mechanisms and, where possible, the rationales behind these rules and procedures.

The outcomes of this comparative examination suggest that none of the main rationales for excluding illegally obtained evidence can function as sole guiding principle for excluding illegally obtained evidence. However, it is the main argument of this study that nothing

¹ JH Wigmore, *A Treatise on the Anglo-American System of Evidence at Trials in Common Law*, second edition, vol. I (Little, Brown and Company: 1923) XIV.

² CM Bradley, 'The Exclusionary Rule in Germany' (1983) 96 *Harvard Law Review* 1032, 1066.

³ J Bentham, *A Treatise on Judicial Evidence* (Paget, 1825), 227.

prohibits a combination of different rationales, which would allow judicial discretion to consider a wider range of interests at stake. The study suggests also the way in which the different rationales should be combined, so that judges are not entrusted with too wide discretion.

To avoid unlimited judicial discretion, it is suggested that there should be a clear sequence in the decision-making process concerning exclusion of evidence. The study proposes a system of concentric circles: guidelines establishing a precise order to consider reliability, protective and integrity rationale. This form of guided judicial discretion does not exclude but regulates possibilities to balance these rationales against one another. This leads to the adoption of a cascade-system, whereby judges progressively narrow down the balancing, by taking each time different variables into consideration. It thereby ensures both the protection of minimum standards and consistency in the exclusionary process and the necessary flexibility to adopt the most appropriate solution for the concrete situation. The solution here envisaged is also sufficiently flexible to fit countries with different structures of criminal justice and different approaches towards courts' discretion and procedural legality.



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1 AIMS, METHODOLOGY, AND STRUCTURE OF THE STUDY

The criminal process centres around the problem of establishing whether a person is guilty or innocent. In the modern criminal process this is done by gathering information on the alleged facts. The question that immediately arises is: what information can be used to shed light on those alleged criminal facts? Can any information be used? A large part of the rules of the criminal process concern (or, at least, should concern) the collection of evidence (from finding evidence to gathering and keeping it), and its assessment. These rules establish the boundaries of the knowledge courts have when deciding on the case.

Criminal justice systems' approach to issues concerning admissibility and exclusion of evidence differ between jurisdictions. The evidentiary rules are a reflection of historical, cultural and institutional values and preferences developed within each system. This study explores the principles underpinning a particular type of exclusionary rules, namely that pertaining to illegally obtained evidence in criminal matters, from a theoretical and legal comparative perspective.

There are in fact different reasons for excluding (or not admitting) evidence. Evidence is not always excluded because it was collected in an improper manner. Sometimes it is excluded for other reasons, pertaining to the need to ensure that the information given to courts is trustworthy and reliable. For instance, the exclusion of hearsay evidence – in countries where a similar rule of exclusion exists – is based not on the idea that the evidence is tainted by a flaw, mistake or violation of principles in its gathering process. It is based instead on an inherent feature of the information itself – the fact that it is second-hand information, not directly coming from the original source – which makes it unsuitable for a decision in a criminal case. Likewise, evidence of bad or good character is not excluded because of the way in which it was collected but because it is feared that its probative value might exceed its effective relevance. Although the boundary between the different categories of exclusion is not always as sharp as it might seem at first sight, there is a difference which is clearly visible: exclusion of improperly obtained evidence refers to evidence collected in a wrongful way – and we shall see when and how it can be said that evidence is collected in a wrongful manner – while other exclusionary rules concern more the quality of information as such, regardless of the way in which it was obtained.

Moreover, exclusion of improperly obtained evidence seems to be more common across the different national experiences. In contrast to certain exclusionary rules that are viewed as belonging uniquely (or predominantly) to the common law tradition, such as the rule against

hearsay or bad character evidence,⁴ most criminal justice systems have adopted rules regulating the admissibility of illegally obtained evidence.

The study aims to bring greater conceptual clarity to the legal rules on (in)admissibility and exclusion of evidence in general, and the rules pertaining to exclusion of illegally obtained evidence, in particular. This is done moving from a comparative perspective, but not with a view to comparing systems. The comparative approach is a means to an end. Rather than just comparing and contrasting the existing rules on illegally obtained evidence in a range of jurisdictions, the present work sets out to elucidate the logic and normative principles that underpin exclusion of illegally obtained evidence and to analyse not just how these compare across jurisdictions, but what they entail exactly and how they could be harmonized across Europe. The goal is to identify how the principles can be shaped and how they can fit in a modern criminal justice system, inspired to rationale thinking and human rights protection.

As legal comparison may help shed light on how different values and legal traditions have shaped the rules on illegally obtained evidence, the paper adopts a legal comparative method.⁵ It compares and contrasts the approach to exclusion of illegally obtained evidence in selected jurisdictions, namely England and Wales, Belgium, Italy, and Germany. The choice for these countries as the subjects of the comparative research is based on the following considerations. The study aims to illustrate the approach towards admissibility and exclusion in the two dominant legal traditions, namely inquisitorial and adversarial criminal justice systems.⁶ England and Wales represent the archetypal adversarial jurisdiction in Europe. Belgium

⁴ MR Damaska, *Evidence Law Adrift* (Yale University Press 1997) 15–17; JD Jackson and SJ Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge University Press 2012) 33.

⁵ The most traditional comparative method goes under the name of functional method and it consists in analysing rules of different countries that play an equivalent function in the respective system: K Zweigert and H Koetz, *Introduction to Comparative Law* (Clarendon, 1998) 34; R Michaels, ‘The functional method of comparative law’, in M Reimann and R Zimmerman, *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 339-382; J Gordley, ‘The functional method’, in PG Monateri (ed.), *Methods of Comparative Law* (Edward Elgar, 2012) 107-119. Such approach does not go unchallenged. Among others, it is suggested that instead of looking just at rules, the comparative scholar should look more at the overarching legal culture and understand rules (and behaviours) within this overarching cultural of which they are a product: D Nelken, ‘Toward a sociology of legal adaptation’, in D Nelken and J Feest (eds.), *Adapting Legal Cultures* (Hart, 2001) 7-54, at 25. See also D Nelken, ‘Comparative criminal justice’, in D Nelken, *Comparative Criminal Justice* (London: Sage, 2010) and D Nelken, ‘Using legal culture: purposes and problems’, in D Nelken (ed.) *Using Legal Culture* (Wildy, Simmonds and Hill, 2012) 1-51. Another slightly different methodological approach has suggested to look more at the different layers of rules (formants) which ultimately compose each system: R Sacco, ‘Legal formants: a dynamic approach to comparative law (Installment I of II)’ 39(1) *The American Journal of Comparative Law* (1991): 1; R Sacco, ‘Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)’ 39(2) *The American Journal of Comparative Law* (1991): 343. To bring these partly different approaches together, it has been observed that comparative law can be characterized by a ‘methodological pluralism’, where the method changes depending on the goal of the study. See J De Coninck, ‘The functional method of comparative law: Quo Vadis’ 74 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (2010): 318-350, at 321. As the goal of the present study is to extrapolate the inner logic of exclusion, the approach taken is a functional one which tries to account for the different legal culture in which each rationale has been developed and is used.

⁶ Within the abundant literature on the divide between systems see in particular: M Damaska, ‘Structures of Authority and Comparative Criminal Procedure’ (1975) 84 *Yale Law Journal* 480.

represents historically an inquisitorial jurisdiction with Napoleonic heritage. Finally, Italy and Germany are chosen as a third term of comparison, because their traditional inquisitorial approaches have been significantly softened with the abolition of the investigating judge, and the introduction of stronger safeguards on the right to introduce and cross-examine evidence. Italy in particular is a hybrid jurisdiction that fits between the two dominant legal traditions, being a country with a historically inquisitorial model that has more recently adopted an adversarial approach.⁷ Additionally, the report refers occasionally to rules on illegally obtained evidence in France, and the Netherlands, with a view to giving further insights on the topic.

It is beyond the scope of this study to offer a comprehensive discussion of the various doctrinal and normative issues that arise in the law on illegally obtained evidence.⁸ As the focus is on the principles and logic underpinning different jurisdictions' approaches towards admissibility and exclusion of illegally obtained evidence, this comes at the expense of a detailed discussion of the specific substantive grounds for excluding evidence (such as the collection of evidence through entrapment, by torture and inhuman and degrading treatment, in violation of the right to privacy, the privilege against self-incrimination and the right to silence, the right to legal assistance, etc.) and how various jurisdictions' approaches may diverge or converge in this regard. Furthermore, all jurisdictions in this study are members of the Council of Europe and must thus conform to the standards set by the European Court of Human Rights in its interpretation of the European Convention of Human Rights. This study is a reflection on the reasons for excluding evidence and it aims to contribute to the possible development of a general common framework (as a minimum common denominator), in the context of possible initiatives of harmonisation in Europe.

The goal is, as mentioned, to identify what shape should an exclusionary rule have in a system of criminal justice that is based on rational foundations and on the protection of fundamental

⁷ WT Pizzi and M Montagna, 'The Battle to Establish an Adversarial Trial System in Italy' (2004) 25 Michigan Journal of International Law 429; M Panzavolta, 'Of Hearsay and beyond: Is the Italian Criminal Justice System an Adversarial System?' (2016) 20 The International Journal Of Human Rights 617.

⁸ There is an abundance of scholarly contributions on exclusion of illegally obtained evidence from a comparative perspective. For scholarly contributions in English in the last decade on this topic see e.g. MR Damaška, *Evaluation of evidence* (Cambridge University Press, 2020); S Thaman, "'Fruits of the Poisonous Tree" in Comparative Law' (2010) 16 Southwestern Journal of International Law 333; S Thaman, *Exclusionary Rules in Comparative Law* (Springer 2013); A Ryan, *Towards a System of European Criminal Justice: The Problem of Admissibility of Evidence* (Routledge 2014); T Ward and C Leon, 'Excluding Evidence (or Staying Proceedings) to Vindicate Rights in Irish and English Law' (2015) 35 Legal Studies 571; OE Gălăţeanu, 'Comparative Law Perspectives on the Exclusion of Evidence Obtained Illegally in the Criminal Proceedings' (2017) 19 Public Administration & Regional Studies (Galati) 47; S Gless and T Richter, *Do Exclusionary Rules Ensure a Fair Trial? A Comparative Perspective on Evidentiary Rules* (Springer 2019); D Giannouloupolous, *Improperly Obtained Evidence in Anglo-American and Continental Law* (Hart 2019); HL Ho, 'Exclusion of Wrongfully Obtained Evidence: A Comparative Analysis' in DK Brown, JI Turner and B Weisser (eds), *The Oxford Handbook of Criminal Process* (Oxford University Press 2019); S Thaman and D Brodowski, 'Exclusion or Non-Use of Illegally Gathered Evidence in the Criminal Process: Focus on Common Law and German Approaches' in K Ambos and others (eds), *Core concepts in criminal law and criminal justice: Volume 1: Anglo-German dialogues* (Cambridge University Press 2020).

rights. Rational foundations and protection of fundamental rights are in fact the two features that characterize the modern criminal justice systems, particularly of the western world.

The study is divided into 7 chapters. This first introductory chapter has offered an overview of the aims and scope of the report and has set out how the methodological approach will help achieve those aims. Chapter 2 sets the scene by addressing the main terminological issues. It aims to define terms as ‘admissibility’, ‘inadmissibility’, and ‘exclusion’ to enable a shared understanding of these concepts, as well as exploring what types/categories of exclusionary rules exist across jurisdictions. Additionally, it offers an overview of the foundational principles that underlie the two dominant legal traditions, namely adversarial and inquisitorial systems, and analyses how these have shaped different systems’ approach to exclusion of evidence. Moving from a general focus on exclusion of evidence towards a narrower focus on admissibility and exclusion of illegally obtained evidence specifically, Chapter 3 provides an overview of the legal rules and doctrines regarding such evidence in a range of jurisdictions. Since exclusionary rules come in different forms and operate in different ways, Chapter 4 systematises rules pertaining to exclusion of illegally obtained evidence in order to address the issue that exclusionary rules come in different forms and operate in different ways across jurisdictions. As this study aims to elucidate the normative principles that underpin admissibility and exclusion of evidence in a range of jurisdictions, an overview of the main rationales for excluding illegally obtained evidence is a necessary precursor, which is provided in Chapter 5. Chapter 6 compares and contrasts how mandatory exclusionary rules are shaped across jurisdictions, as well as analysing how judicial discretion is exercised and which factors are balanced in deciding on the admissibility and exclusion of illegally obtained evidence. Finally, Chapter 7 draws together the findings from the research, analysing the similarities and differences in respect of the approaches towards and principles underpinning admissibility and exclusion of evidence across jurisdictions.

2 SETTING THE SCENE: ADMISSIBILITY AND EXCLUSIONARY RULES IN COMMON LAW AND CIVIL LAW SYSTEMS

Even when accounting for translation issues, different terms may be used to refer to similar concepts, and similar terms may have diverging meanings in certain jurisdictions. Approaching the problem of admissibility and exclusion of evidence from a comparative perspective thus requires first developing a shared understanding of the concepts ‘(in)admissibility’ and ‘exclusion’ across jurisdictions. In order to do so, Section 2.1 first defines what is understood by these concepts within the context of this report. It then delineates the concept of rules of exclusion on the one hand, from rules for using and assessing or interpreting evidence on the other. It subsequently sets out the wide-ranging legal grounds for inadmissibility and specifies which exclusionary rules will be the focus of this report. As this study includes countries that belong to both the common law and civil law tradition, Section 2.2 sketches the key features of both systems and how they have shaped evidentiary exclusion.

2.1 Developing a shared understanding of the concepts ‘(in)admissibility’ and ‘exclusion’ across jurisdictions

2.1.1 Defining ‘admissibility’, ‘inadmissibility’ and ‘exclusion’

The English common law distinguishes between the concepts of ‘evidence’ and ‘proof’. Evidence can be described as ‘information by which facts tend to be proved’.⁹ Proof is the ‘establishment of the existence or non-existence of some fact...to the satisfaction of a legal tribunal ...’¹⁰ According to these definitions of evidence and proof, evidence can be considered a means of proof.¹¹ The way in which evidence offers proof is by establishing a connection between a “*factum probandum* (proposition to be established)” and a “*factum probans* (material evidencing the proposition)”.¹² Evidence is in other words a medium which conveys information to prove facts. We can classify evidence depending on the different mediums used, that is the different sources of the information (witnesses, documents, objects, etc.) and on the techniques or methods employed to extract information from the source (interviewing, decryption of encrypted documents, etc.). Similar categorizations are less frequently employed

⁹ A Keane and P McKeown, *Modern Law of Evidence* (13th edn, Oxford University Press 2020) 2.

¹⁰ W Twining, *Rethinking Evidence: Exploratory Essays* (2nd edn, Cambridge University Press 2006) 193.

¹¹ *ibid.*

¹² Wigmore (n 1) 6.

in the mainstream dialogue of criminal lawyers in the continent, although they can be found in the literature.¹³

It is commonplace that common law jurisdictions adopt a different approach to crime investigation, trial and proof compared to civil law jurisdictions. The common law system is generally associated with adversarial procedures, whereas civil law countries tend to have inquisitorial procedures at their origins.¹⁴ With respect to proof, common law systems have a discrete set of rules referred to as the ‘law of evidence’,¹⁵ which is distinct from substantive and procedural law. The fact that civil law jurisdictions do not have a distinct ‘law of evidence’ does not entail that there is an absolute absence of rules of evidence,¹⁶ although it is undoubtable that the rules governing evidence are less complex in the continent than in the Anglo-Saxon world.¹⁷ In civil law jurisdictions rules of evidence tend to be considered an integral part of the procedure, often being directly inserted in the Code of Criminal Procedure,¹⁸ In both systems, the law relating to evidence contains rules by which admissibility is assessed and that permit or compel courts to exclude evidence. While the general rule in all jurisdictions is one of inclusion or admissibility of relevant evidence, each legal system has – narrower or larger – exceptions to the use of all relevant evidence, according to which certain categories of evidence are inadmissible and/or must be excluded.

The concepts ‘admissibility’, ‘inadmissibility’, and ‘exclusion’ are often used in the same breath,¹⁹ yet it is worth clarifying what each means and how they relate to one another. In common law, admissibility refers to the determination of whether a particular piece of evidence should be received or ‘admitted’ into the trial.²⁰ Admissible evidence can be defined as evidence the court will receive for the purpose of determining the existence or non-existence of facts in issue.²¹ There are legal rules that prohibit certain evidence from being presented at trial. Such rules render the evidence to which they apply ‘inadmissible’ and require the judge to ‘exclude’ it.²² This entails that ‘(in)admissible’ is the legal status of the evidence, and

¹³ See, for instance, in Italy, G Ubertis, *Fatto e valore nel sistema probatorio penale* (Giuffrè, 1969); F Carnelutti, *La prova civile* (Giuffrè, 1992) 44.

¹⁴ See below Section 2.2.

¹⁵ JB Thayer and FV Hawkins, *A Preliminary Treatise on Evidence at the Common Law* (Little, Brown 1898) 2.

¹⁶ Jackson and Summers (n 4) 30.

¹⁷ See for instance the comparison made by John Spencer with regard to hearsay evidence: J Spencer, *Hearsay Evidence in Criminal Proceedings* (Hart Publishing, 2008), 16, footnote 52.

¹⁸ Ryan (n 8) 1–2.

¹⁹ See e.g. HL Ho, ‘The Legal Concept of Evidence’, *Stanford Encyclopedia of Philosophy* (Winter, 2015).

²⁰ P Roberts and AAS Zuckerman, *Criminal Evidence* (2nd edn, Oxford University Press 2010) 96.

²¹ Keane and McKeown (n 9) 22.

²² Ho, ‘The Legal Concept of Evidence’ (n 19). However, Choo suggests that relevant evidence which is not subject to an exclusionary rule and is therefore admissible, but is excluded later on in the exercise of (judicial) discretion, ‘is sometimes erroneously described as “inadmissible”.’ (ALT Choo, *Evidence* (5th edn, Oxford

‘exclusion’ is a procedural mechanism with a double effect. First, exclusion prevents the prosecution from adducing evidence to prove its case and satisfy its burden of proof. Secondly, it prevents the trial court from relying on this evidence to determine guilt and, where there is a duty to give reasons, to rely on this evidence to justify its finding of guilt in a reasoned judgment.²³

However, matters become more complicated when accounting for the fact that rules of evidence in common law and continental jurisdictions can differ considerably in the form they take, the way they are applied, and the way in which they influence judicial decision-making. As is clear from the above, ‘admissibility’ is a concept that common law jurisdictions use in connection with the trial stage and its specific features. The common law jurisdictions are (tend to be) trial-centred, which means that the trial is the centre of the criminal process. Admissibility builds upon this centredness: it is the mechanism for establishing what information can be formally presented to the court. The concept of ‘admissibility’ in common law is based on the premise that the trial court is not normally in possession of evidence when the trial starts: for the court to obtain information on the case, evidence must be explicitly admitted. This is different from what normally happens in continental jurisdictions. In several European countries (e.g. Belgium, the Netherlands), it is difficult to identify a term equivalent to ‘admission’. In these countries the trial court normally receives (after the committal to trial and, in any case, before the first hearing of the trial) the entire investigative file. A formal moment of ‘admission’ is therefore not envisaged, at least with regards to evidence that is already present in the file.²⁴ The parties (prosecution, defence, and, where possible, victims) can request the introduction of further evidence at trial, and in this case it is for the trial court to decide whether or not to allow it. As for the evidence resulting from the investigations, it could be said that ‘admission’ of the evidence at trial is implicit in the fact that the evidence (and/or the records of the evidence gathered during the investigations) is present in the file. There are exceptions to this approach even in continental systems. Systems, like the Italian one, that have moved away from the classic inquisitorial archetype, have now established stricter barriers between investigations and trial, with the result that they have developed a concept of admission of evidence focused on the trial phase (whereby the requested evidence requires a formal admission at trial).

University Press 2018) 12.) Yet he does not clarify why the post-factum labelling of excluded evidence as inadmissible would be inaccurate.

²³ In the specific context of illegally obtained evidence: Ho, ‘Exclusion of Wrongfully Obtained Evidence: A Comparative Analysis’ (n 8) 821.

²⁴ For sake of greater precision, it should be clarified that there are different categories of proceedings in these continental jurisdictions and in some cases the division between trial stage and earlier phases is more clearly marked. For instance, in Belgium, when the case is brought before a jury (Assize Court), the procedure entails a preliminary hearing when parties request the admission of witnesses (see articles 278 and ff.). The presiding judge adopts the list of witnesses to be heard and although the term ‘admission’ is not used it could be said that the situation is in fact equivalent to admitting evidence. The law uses the term *vaststellen* in Dutch, *dresser* in French, which could be literally translated as “draws up” or “writes out” the list of witnesses.

It is apparent what the risk of misunderstanding around the term ‘admissibility’ can be. In countries where no formal moment of admission (or decision on admission) is required (at least, for evidence coming from the investigations), the term ‘admissibility’ could be taken as a synonym for ‘collection of evidence’, and it could be used to refer also to stages of the proceedings before the trial.²⁵ When evidence collected (lawfully or not) during investigations enters automatically at trial, admission is a word that can be used to describe not the moment when evidence is presented to the judge, but rather the moment in which evidence enters the file (since the file will later be handed over to the trial judge).

Even when exclusively applied to the trial stage and even when clearly referred to a judicial decision of allowing the presentation of evidence before a trial court, the concept of admissibility remains a multi-faceted notion. In some cases, admissibility is the permission to collect information, while in another cases it is the permission to produce evidence that has already been produced. The concept of ‘admission’ of evidence must in other words be tied with the different types (or structures) of evidence. While some evidentiary items are already existent and fully formed before the moment of their admissions (eg. documents and other items seized, records of investigations), others are not (eg. trial testimonies). When requesting admission of testimonial evidence, one demands the permission to present witnesses (or experts, or even - where and insofar possible - defendants) before the court and to gather their account by asking them questions. This dualism between evidence existing before the admission, or only after it (which overlaps with the dualism between real evidence and testimonial evidence), has significant implications. To start with, one could say that admissibility rules on existing evidence look into the present (and the past), while admissibility rules of evidence to be collected at trial look at the future. In one case the judge can decide on the admission also by scrutinising the information collected and the way in which it was collected, while in the other case it can only assess the evidence requested in its potential to gather a certain piece of information, and to do so in a certain way.

Admissibility rules for evidence that will be collected before the trial court, can only be shaped *in abstracto* around the type/category of evidence one wants to introduce (since the collection still has to take place). They can essentially consider a) the legal desirability to obtain information from the particular source of evidence which has been requested (e.g. the testimony of a three-year-old as opposed to the testimony of an adult), and/or b) the legal desirability to collect the kind of information that, through that source, the party wants (that is, intends, hopes) to introduce. In other words, the courts must give an answer to the following questions: a) is it legally accepted to obtain information from the requested source of evidence?; b) supposing that the source is effectively capable of conveying the desired information, would it be relevant/desirable and/or fair to collect such information?

²⁵ For instance, Guinchard and Buisson in their handbook on French criminal procedure define ‘l’admissibilité de la preuve’ in terms of its liberty. They write : ‘*liberté dans l’admissibilité de la preuve*’: ‘[p]ar ce principe de la liberté de la preuve, le législateur signifie aux policiers, aux magistrats de la poursuite, de l’instruction ou de jugement, comme à la partie poursuivie, que sont admissibles tous les modes de preuve’ : S Guinchard, J Buisson, *Procédure pénale* (Lexis Nexis, 2014) 487.

Given the above, admissibility rules on already collected evidence can be shaped also around further elements. They can entail a reliability check that looks at the exact content of the information conveyed and they also can delve into the precise way in which that piece of information was collected. In this case, the assessment can be made *in concreto*, as the information has already been obtained. Some examples can help clarify the point.

Contrast in particular these two different situations. First, imagine a party asking the judge the permission to present in evidence the testimonial deposition of a public officer as to the prior convictions of the defendant. Imagine now a party asking the judge the permission to present in evidence a document concerning the prior convictions of the defendant, which document was obtained by the requesting party through stealing. In the first case (testimonial evidence of the officer), admissibility could only be shaped around the desirability to introduce information concerning the prior convictions of the defendant and the desirability to do so by means of that specific source (the deposing public officer). In the second case, instead, admissibility could concern not just the type of information (is it desirable to have information on the prior convictions of the defendants or could this be detrimental/prejudicial?) or the source (is it desirable that information on prior convictions be given by a witness, a public officer, or by that particular public officer?), but it could also relate to the way in which the document has been collected (is it desirable to allow the production in court of a document obtained through stealing?). In the first case, admissibility looks at the general type of information one wants to convey and at the source conveying it; in the second case, instead, it looks (it can look, because it does not have to) at the information it conveys and at way in which that specific information was collected (something which is possible only because the information has already been collected).

The above distinction carries implications on many levels. First, it shows that admissibility and exclusion are not necessarily two sides of the same coin, with exclusion being the mere reverse of admissibility. When evidence is admitted at trial, this does not *per se* entail that the court can use that evidence to take the decision. It could happen that the evidence is wrongly admitted, in which case it requires to be excluded. In this case is exclusion the other side of admissibility. It can also be the case that evidence is lawfully admitted, but that its collection at trial is tainted by irregularities, improprieties, unlawful actions, etc. This is for instance the case of the witness who is questioned in an improper manner, maybe even threatened, during the trial interview (as unlikely as this may be). Another example is the case in which witnesses are forced to testify without being informed of their privilege to remain silent. In this case evidence might require to be excluded although it had been lawfully admitted and exclusion becomes something different from, and something more than, admissibility.

Another relevant difference is that admissibility cannot be exclusively based on the criterium of the reliability of the information. If admissibility is regarded as a permission to introduce certain type of information at trial, it cannot be based on an assessment of the reliability of the information, at least insofar as the deciding body (the court, or the presiding judge) does not

have access to the information. In particular, when admissibility refers to evidence to be collected at trial, it is hardly the case that its admission can be decided on whether the information the party wants to introduce is reliable. At most the discussion could concern the presumptive reliability of the information the party aims to collect. It could be argued that the proposed method for collecting the information is unsuited to obtain truly reliable information (as it could be the case of a polygraph test²⁶). Alternatively, it could be contended that the source of evidence from which the party intends to extract information is unsuited for obtaining reliable information (as when the party requests the testimony of a very young child). Evidence could be denied admission also on the basis of the fact that certain categories of information are inherently unreliable, as is in some countries is the case with hearsay evidence, or bad (and good) character evidence, or evidence coming from anonymous sources. In all these cases the assessment is not based on the reliability of the specific information the party aims to introduce, but on the premise that certain methods (polygraph), certain sources (very young children), or categories of information (hearsay, bad character, anonymous information) are inherently suspicious as to their veracity. Nonetheless, the difference between an assessment of the reliability of a piece of information (*in concreto*) and the reliability of a method, source or category of information (*in abstracto*) is manifest. The testimony of somebody undergoing a polygraph test could turn out *in concreto* to be truthful when supported by other means of evidence, albeit the method being *in abstracto* suspicious. The deposition of a young child could ultimately (*in concreto*) point to truthful facts, although the young age raised doubts as to the effective capacity of the witness to observe and recount the facts properly. The deposition recounting the perceptions of another person (*de auditu* testimony or hearsay) can *in concreto* turn out to be veracious, despite the distrust toward second-hand testimony; just like, after all, the testimony of somebody recounting own perceptions can be – for many reasons – in *concreto* unreliable. To conclude, an assessment *in concreto* of the reliability of the information requires that the information has been collected, which assessment is impossible at the moment of admission for all the evidence that still has to be collected.

Admissibility is in fact normally based on the relevance (or pertinence) of the information for the finding on the charged criminal facts.²⁷ Evidence should be useful to reach a decision on the facts at issue. Only information that can shed some light on the alleged facts should find its way into the trial. As said, being pertinent does not mean that the information is reliable. The judgement on admissibility of evidence can hardly go as far as to assess whether evidence is reliable.

As mentioned, the admissibility test (in common law and in the continental jurisdictions that expressly provide for it) is not simply based on the relevance of the information. There are

²⁶ There is no agreement between countries as to whether a polygraph test is a proper method for obtaining veracious information. In some countries it is considered forbidden (e.g. Italy), while in others it is instead considered a permissible method, albeit being surrounded by very strong safeguards (see, for instance, article 112 *duodecies* of the Belgian code of criminal procedure).

²⁷ Wigmore (n 1) 155, 221; J Bentham, *A Treatise* (n 3) 230 (speaking of evidence “which is not pertinent”).

rules in place which tend to avoid that some items of evidence and information be presented to the court: this might be because they are considered suspicious, and often unreliable (following a judgement of unreliability *in abstracto*), or because they are considered to negatively influence the rational reasoning of the court, or for other similar reasons. Roberts and Zuckerman suggest the admissibility enquiry can be split up into two questions the judge must ask in order to determine whether evidence is admissible. First, is the evidence relevant? If it is, then the second question is whether the evidence is subject to any applicable exclusionary rules.²⁸ Keane and McKeown adopt the same logic, arguing that in English law ‘all evidence which is sufficiently relevant to prove or disprove a fact in issue and which is not excluded by the judge, either by reason of an exclusionary rule of evidence or in the exercise of her discretion, is admissible.’²⁹ The Italian code of criminal procedure expressly organizes the assessment of admissibility around two steps: first, all evidence that is not manifestly immaterial to the case (article 190, section 1); then, evidence that does not violate the prohibitions set out by the lawmaker (article 190, section 2; see *infra*).

There are indeed often grounds which – next to the relevance of the information – prevent its presentation to the court. On the one hand, it makes certainly sense – conceptually – to distinguish the question of relevance from the question of whether exclusionary rules in the strict sense apply, including for continental jurisdictions. Evidence must be suitably relevant to be admissible, but relevant evidence is only admissible insofar as it is not excluded by operation of any legal rule or by judicial discretion,³⁰ with a view to protecting the fact finding and other relevant legal interests. Indeed, it is common for irrelevant evidence or evidence of an immaterial fact to be referred to as ‘inadmissible’.³¹ Yet (ir)relevance is only one ground for (in)admissibility; exclusionary rules establish a host of other grounds for inadmissibility, as will be discussed below in Section 2.1.3. On the other hand, it should be further emphasized that exclusionary rules do not just prevent the admission of evidence, but they also work excluding evidence that was already admitted.

In light of the above remarks, it is once more apparent why admissibility and exclusion cannot be taken as synonyms. At the same time, the above remarks induce to clarify that what is meant by exclusion in this text is not just the rule (rather, set of rules) which prevents admissibility, but more generally all rules which prevent a piece of evidence to be used for a decision in a criminal case (either by preventing its insertion in the file, or by causing its exclusion from it, or by forbidding the courts to lawfully rely on them for taking their decisions). Such an approach allows to accommodate also those continental civil law jurisdictions which do not employ a sharp concept of admissibility of evidence in their daily work.

²⁸ Roberts and Zuckerman (n 20) 96.

²⁹ Keane and McKeown (n 9) 22–23.

³⁰ *ibid* 30.

³¹ Ho, ‘The Legal Concept of Evidence’ (n 19). On the conceptual relation between admissibility and relevance see also J Montrose, ‘Basic Concepts of the Law of Evidence’ (1954) 70 *Law Quarterly Review* 527, 541–543.

2.1.2 Distinguishing rules for excluding, using, and assessing or interpreting evidence

Amongst rules of proof, it is not always straightforward to discern which rules should be classified properly as exclusionary rules. Sometimes the law does not use the word “exclude”. In some countries the law speaks of irregular evidence, or void evidence (nullities), as for instance in Belgium. Sometimes the law prohibits that evidence be used for the decision, as in Italy. Sometimes the law spells out conditions for using/assessing evidence. For conceptual clarity, a three-fold distinction is made here between rules for excluding evidence (including, as said above, rules prohibiting admission of evidence), rules for using evidence, and rules for assessing or interpreting evidence. These three categories or rules may be conflated, as all of them impose constraints on triers of facts, in the sense that they require them not to rely on certain evidence or not to rely on it in a particular way. Nonetheless, they are distinct as set out here.

Rules for *excluding* evidence were defined in the previous section as rules that prevent the trial court from receiving this evidence or using it for reaching a decision or a verdict. If timely excluded, the trial court might not even be ever aware of this information. If excluded during trial, the court should not resort to this information for taking the decision. As mentioned above, it can also happen that the court identifies a case of exclusion after retiring for deliberation; also in this latter case the court should not use that information.

Rules for *using* evidence may instruct triers of fact not to use evidence, or not to use it unless certain conditions are met. For example, it is normally the case that evidence can be used only if all steps of gathering and securing the evidence are fully disclosed to all parties. Rules for *excluding* evidence are also *lato sensu* rules for *using* evidence; only they work solely in the direction of forbidding the use of the gathered information. Rules for *using* evidence *stricto sensu* have instead a more complicated function. They set conditions for using evidence, allowing its use if the requirements are met, and forbidding its use in all other cases.

Lastly, rules for *assessing or interpreting* evidence are generally designed to limit the weight of the evidence without having to exclude it altogether. For instance, in several jurisdictions the testimony of an anonymous witness, whom the accused did not have the opportunity to cross-examine, cannot be used as the sole or even as the decisive evidence to base a conviction on, but such evidence can be used to corroborate other evidence.³² Another example could be if some evidence needs to be interpreted in a specific way, for instance only in favour of the defendant. Rules for assessing or interpreting evidence may for instance also require triers of fact to presume certain facts based on other facts that have been proven. In their more lenient form, a rule for assessing or interpreting evidence can forbid triers of fact from resorting to

³² This is for instance the case in Belgium: see Article 189bis CCP-Belgium.

certain kinds of reasoning.³³ At times the divide between rules for *assessing* evidence and rules for *using* evidence might not be as clear.

Although all the above categories of rules have the common goal of ensuring the most accurate and reliable fact-finding, they clearly do so in different ways. The most radical option is that of exclusion and the subsequent analysis will focus on the relevant rules, and it will discuss the other types of rules only where it is felt necessary.

2.1.3 The wide range of exclusionary rules

It was said that evidence can be excluded – or refused admission – not simply because it is not relevant.³⁴ Next to the admissibility test, there are proper exclusionary rules.

Exclusionary rules are wide-ranging: they are ‘as many and varied as the diverse range of values, objectives, and policies they embody to promote’.³⁵ Keane and McKeown suggest that in English law evidence may have to be excluded for different reasons, including that ‘evidence may be insufficiently relevant or of only minimal probative force; it may give rise to a multiplicity of essentially subsidiary issues, which could distract the court from the main issue; it may be insufficiently reliable or unreliable; its potential for prejudice to the party against whom it is introduced may be out of all proportion to its probative value on behalf of the party introducing it; its disclosure may be injurious to the national interest; and so on.’³⁶

The German criminal justice system is inquisitorial in nature (*Untersuchungsgrundsatz*).³⁷ According to § 155 para 2 of the German code of criminal procedure (*Strafprozessordnung*, hereinafter: StPO), courts are both entitled and obliged to act independently, without being bound by requests made by the prosecution or the defence in the application of criminal law.

In line with the inquisitorial tradition, criminal proceedings intend to establish the substantive truth underlying an accusation.³⁸ Accordingly, § 244 para 2 StPO provides that the court shall *ex officio* extend the gathering of evidence to all facts and evidentiary elements that are relevant

³³ Jackson and Summers (n 4) 31 offer this description of certain rules of proof, yet without classifying them expressly as rules for assessing or interpreting evidence.

³⁴ The admissibility test can also take different shapes. In some countries, as in Italy, it can be based on the assessment of “manifest irrelevance”, which means that courts have to make a *prima facie* assessment of the pertinence of the evidence, and exclude only that evidence which appears clearly immaterial.

³⁵ Roberts and Zuckerman (n 20) 97.

³⁶ Keane and McKeown (n 9) 2.

³⁷ W Beulke and S Swoboda, *Strafprozessrecht* (15th edn, CF Müller 2020) 358.

³⁸ U Eisenberg, *Beweisrecht Der StPO* (10th edn, CH Beck 2017) 3; T Weigend, ‘The Potential to Secure a Fair Trial Through Evidence Exclusion: A German Perspective’ in S Gless and T Richter (eds), *Do Exclusionary Rules Ensure a Fair Trial?* (Springer Open 2019) 62.

for the decision. This imposes a comprehensive investigation of the facts that are relevant for the decision. As a matter of principle, all attainable evidence must be gathered, and all gathered evidence must be evaluated.³⁹

The examination of the truth does, however, not represent an absolute value.⁴⁰ Rather, it is delimited by legal boundaries that require that evidence be gathered and used in a procedurally admissible manner, in due consideration of other, overriding community values.⁴¹ These values include, for instance, the protection of human dignity, as enshrined in § 1 para 1 of the Basic Law for the Federal German Republic (*Grundgesetz*, hereinafter: GG), the principle of proportionality and the safeguard of the compliance of the proceedings with the rule of law.⁴²

To protect these values, the German criminal justice system contains rules on ‘evidence prohibition’ (*Beweisverbote*, a term coined by *Beling* in 1902).⁴³ These can be divided into prohibitions to acquire evidence (*Beweiserhebungsverbote*), which consist in procedural rules to be observed by law enforcement agencies in the investigation of facts,⁴⁴ and prohibitions to use evidence (*Beweisverwertungsverbote*), which preclude the consideration for the judgment of facts that are in themselves ascertainable, even if they correspond to the substantive truth.⁴⁵

Literature distinguishes between different types of prohibitions to acquire evidence: a) prohibitions concerning the topic of the evidence (*Beweisthemaverbote*) according to which, for instance, state secrets cannot be the object of evidence;⁴⁶ b) prohibitions concerning the method of evidence collection (*Beweismethodenverbote*) that include, for example, the prohibition under § 136a StPO of impairing the accused’s freedom to make up his mind and to manifest his will through ill-treatment, induced fatigue or physical intervention on the body, the administration of drugs, torture, deception or hypnosis (this prohibition directly provides for a prohibition to use the evidence in question);⁴⁷ c) prohibitions concerning certain types of evidence (*Beweismittelverbote*), which exclude certain categories of factual and personal

³⁹ Beulke and Swoboda (n 37) 358; Weigend, ‘The Potential to Secure a Fair Trial Through Evidence Exclusion: A German Perspective’ (n 38) 61–62.

⁴⁰ C Roxin, *Strafverfahrensrecht* (25th edn, CH Beck 1998) 1–2; M Löffelmann, ‘Die Lehre von Den Verwertungsverboten Oder Die Freude Am Hindernislauf Auf Umwegen’ (2009) 1 *Juristische Rundschau* 10, 10.

⁴¹ S Gless, ‘Beweisverbote in Fällen Mit Auslandbezug’ (2008) *Juristische Rundschau* 317, 319; Eisenberg (n 38) 139.

⁴² S Gleß, ‘Grenzüberschreitende Beweissammlung’ (2013) 125 *Zeitschrift für die gesamte Strafrechtswissenschaft* 573, 575; Eisenberg (n 38) 139–140; Beulke and Swoboda (n 37) 259.

⁴³ E Beling, *Die Beweisverbote Als Grenzen Der Wahrheitsforschung Im Strafprozess* (Sonderausgabe, Wissenschaftliche Buchgesellschaft 1968) 3.

⁴⁴ M Jahn, *Beweiserhebungs- Und Beweisverwertungsverbote Im Spannungsfeld Zwischen Den Garantien Des Rechtsstaates Und Der Effektiven Bekämpfung Von Kriminalität Und Terrorismus* (CH Beck 2008) C27; Eisenberg (n 38) 140.

⁴⁵ Jahn (n 44) C31; Eisenberg (n 38) 140.

⁴⁶ Eisenberg (n 38) 142–143; Beulke and Swoboda (n 37) 359.

⁴⁷ Eisenberg (n 38) 144–145; Beulke and Swoboda (n 37) 103–104.

evidence, as for example the prohibition to hear the accused's relatives who, pursuant to § 52 StPO, have exercised their right to refuse testimony, or the prohibition resulting from § 96 StPO to introduce as evidence documents that are in the official custody of authorities or public officials and whose publication has been declared to be detrimental to the welfare of the Federation or of one of the *Länder*.⁴⁸ In addition, another category is represented by relative evidence prohibitions (*relative Beweisverbote*) that indicate that evidence can be gathered only by certain persons: for instance, according to § 81a StPO, physical examinations of the accused (taking of blood samples or other bodily intrusions) can only be carried out by a physician.⁴⁹ According to *Jahn*, however, this last category should be subsumed under the category of prohibitions concerning the method of evidence collection, as it imposes a certain way of collection that is determined by the need to protect fundamental rights.⁵⁰

Prohibitions to use evidence can be divided into a) prohibitions that are causally linked to a prohibition to acquire evidence as is the case with the prohibition to use evidence obtained through torture and hence in violation of a prohibition concerning the method of collection under § 136a StPO (dependent prohibitions to use evidence, *unselbstständige Beweisverwertungsverbote*); and b) prohibitions which result directly from the constitution (independent prohibitions to use evidence, *selbstständige Beweisverwertungsverbote*).⁵¹ Independent prohibitions arise even in the context of admissible evidence gathering whenever there is an interference with fundamental rights and, more precisely, with the core area of private life and, hence, the intimate sphere of the individual. This would be the case with the use of intimate diary records of a sexual relationship to prove perjury.⁵²

The Italian system is well known for its hybrid nature. It is the result of a reform of almost four decades ago (1988) which imported in a country of inquisitorial tradition the principles of the Anglo-American system of criminal justice and, in particular, the strict separation between investigative phase and the trial phase.⁵³

Since the Italian system initially derived from the Napoleonic archetype,⁵⁴ the traditional approach concerning evidence was that evidence should be excluded only in exceptional cases. The goal to find the 'material truth' was considered paramount. The trial courts (presided and mostly composed by professional judges) should be given access to the largest amount of information and it would then be left to their competence and wisdom to assess each piece of

⁴⁸ Eisenberg (n 38) 145; Beulke and Swoboda (n 37) 359.

⁴⁹ Roxin (n 40) 180–181.

⁵⁰ Jahn (n 44) C30–C31.

⁵¹ Eisenberg (n 38) 154.

⁵² Roxin (n 40) 191.

⁵³ G Illuminati, 'The Frustrated Turn to Adversarial Procedure in Italy', *Washington University Global Studies Law Review* 2005, 567-581.

⁵⁴ See G Illuminati, 'The Accusatorial Process from the Italian Point of View', *35 North Carolina Journal of International Law and Commercial Regulation* 2010, 297-318 (at 305 ff.).

information properly with a view to finding facts truthfully (*intime conviction*).⁵⁵ Exclusion was essentially connected to cases of *nullità* (nullity), that is breaches of rules which the law explicitly termed as null and void. The cases of *nullità* (nullity) concerning the process of evidence gathering were in any case very limited. Moreover, the system required from the party aggrieved by the breach to raise an immediate challenge; failure to raise the challenge would entail the breach to be considered as condoned and therefore remedied (it would be “sanitized”⁵⁶).

When in 1988 the decision was taken to move away from the mixed-inquisitorial system of criminal justice,⁵⁷ the body of the rules on evidence was substantially revisited. The new approach taken was that evidence should be collected (and then admitted) only where the law entrusted authorities with an explicit power to gather evidence. This marked a significant departure from the earlier approach, which considered it lawful – and also necessary – for authorities to collect all information, in light of the paramount goal to find the truth (save for the few existing cases of nullities).

The new rules introduced the general principle that evidence “acquired in violation of prohibitions established by law” cannot be used (Article 191, section 1).⁵⁸ Such provision codified the introduction of a new concept, that of *inutilizzabilità della prova*. The literal translation of *inutilizzabilità della prova* is “non-usability” of evidence and it could be best rendered in English as “prohibition to use evidence”. This general clause establishes in essence that certain information cannot be used in evidence if the law provides for a prohibition (to collect it or to use it). This rule innovated from the traditional system in that even breaches of the law not expressly termed as “*nullità*” (null and void) could lead to the exclusion of evidence. Moreover, Article 191 made explicitly clear in its section 2 that evidence prohibited by law (that is, acquired in violation of a prohibition established by law) may not be used at any stage of the proceedings, regardless of whether the aggrieved party has filed a timely challenge.

Prohibitions to use evidence are designed to operate at the trial phase in different moments. They first influence the formal decision of the trial court to admit evidence. As mentioned, the Italian system provides from a formal moment of admission of evidence at trial. The general rule is that all relevant evidence must be admitted by the trial court (who is unaware of investigative findings), and no evidence is implicitly admitted.⁵⁹ At the moment of admission, the Court should discard all requests that point to evidence prohibited by the law. In a second phase, the prohibitions to use evidence operate by requiring that evidence admitted – or

⁵⁵ M Nobili, *Il libero convincimento del giudice* (Giuffrè 1974).

⁵⁶ SC Thaman, *Comparative Criminal Procedure* (2nd edn, Carolina Academic Press 2008) 109.

⁵⁷ See above footnote n 53.

⁵⁸ The English translation can be found in SC Thaman *Comparative Criminal Procedure* 109.

⁵⁹ The only exception to this rule is the evidence that is placed in the dossier of the trial (“*fascicolo del dibattimento*”): Article 431 code of criminal procedure.

collected – in breach of the law be formally declared ‘unusable’ and excluded from the file. In a third way, the prohibitions compel courts not to use the evidence for the decision. The latter is in essence a prohibition not to use the tainted evidence in the reasons whereby courts justify the decisions taken. It should however be pointed out that some of these prohibitions are considered to be of such general and structural kind that they can also operate in the investigative phase. To this end, a distinction is made between absolute prohibitions to use evidence (*inutilizzabilità assoluta*) and relative prohibitions to use evidence (*inutilizzabilità relativa*).⁶⁰ The latter category refers to those prohibitions that are applicable only to the trial phase. The former category encompasses all rules prohibiting the use of some evidence in all stages of the proceedings, hence including the investigative (and pre-trial custody) phase.

Under Belgian law, legal doctrine generally distinguishes two kinds of limitations on the taking of relevant evidence: the exclusion of illegally obtained evidence (*onrechtmatig bewijs*) and the exclusionary rule that evidence may have to be excluded if the parties were denied the right to have a *débat contradictoire* about the evidence (*ontoelaatbaar bewijs*).⁶¹ The first exclusionary rule will be discussed in depth below. The second exclusionary rule entails that if evidence is submitted to the judge outside the trial hearing or without the knowledge of the parties and one of the parties has not been given the opportunity to challenge the evidence, it is inadmissible.⁶² In Belgian criminal proceedings this means that the judge may not rely upon this evidence in deciding on guilt and giving reasons for the judgment. This inadmissibility rule is a manifestation of the right to fair trial and, more specifically, of the right to a *procédure contradictoire*⁶³ or more broadly the right to confrontation as enshrined in Article 6.3.d ECHR.⁶⁴

Based on the foregoing, two conclusions can be drawn about the wide-ranging nature of exclusionary rules from a comparative perspective. First, rules that can be classified as exclusionary in one jurisdiction, may not be considered as such in another. For instance, the Belgian rule that evidence that has not been subject to contradictory argument must be excluded, which aims to protect the right to confrontation as established in Article 6.3.d ECHR, may be dealt with through different procedural mechanisms other than exclusionary rules in other jurisdictions. Likewise, while England aims to guard against inaccurate fact-finding by

⁶⁰ Cass., Sez. Un., 21 June 2000, Tammaro, *C.e.d. Cass.*, rv. 216247.

⁶¹ See R Verstraeten, *Handboek Strafvordering* (Maklu 2012) 984–1016.

⁶² Cass. 31 December 1985, *Arr. Cass.* 1985-86, 624; Cass. 25 September 2002, *Arr. Cass.* 2002, 1955, with opinion by J Spreutels.

⁶³ Verstraeten, *Handboek Strafvordering* (n 61) nr 1998-1999, 1015-1016.

⁶⁴ It is not straightforward to translate the term *procédure contradictoire*. The ECtHR seems to equate ‘*procédure contradictoire*’ with ‘adversarial procedure’. In *Al-Khawaja and Tahery v UK* the ECtHR held: “Article 6.3(d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument.” (*Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1, para 118). The term “adversarial argument” is referred to as “*débat contradictoire*” in the official French translation. Andrea Ryan argues, however, that something is lost in translation and that it is a fallacy to simply equate the two terms (Ryan (n 8) 77–79).

imposing the exclusionary rule against hearsay,⁶⁵ such a rule is not present in all continental jurisdictions:⁶⁶ for instance, while it exists in Italy,⁶⁷ it is completely absent in Belgium and in Germany.⁶⁸ Moreover, the range and type of exclusionary rules are affected by the underlying structure of the criminal process and by the national legal tradition.

Secondly, within each jurisdiction, it is evident that there is a host of legal rules that prohibit a court (or a judge) from receiving relevant evidence, or that allow the court initially to admit relevant evidence and to exclude it at a later stage in the proceedings. The distinctive characteristics and principles underpinning a specific exclusionary rule cannot be generalised for all exclusionary rules. The only satisfactory manner in which these legal rules and doctrines, with their complex jurisprudential structures and diverse underpinning rationales and justifications, can be analysed, is by examining each type of exclusionary rule individually.⁶⁹ To facilitate such in-depth analysis within the scope of this article, the focus must inevitably be narrowed to one type of exclusionary rule. The article will analyse exclusionary rules pertaining to illegally obtained evidence, as this is an exclusionary rule that exists in all liberal criminal justice systems.

2.2 The impact of the common law and civil law tradition on admissibility and exclusion of evidence and other relevant systemic variables

2.2.1 The (ir)relevance of the adversarial/inquisitorial dichotomy

Comparative legal scholarship tends to classify systems of evidence and procedure in two main categories.⁷⁰ One is defined as ‘adversarial’ or ‘accusatorial’ and is generally associated with the common law tradition, which can be found in all English-speaking countries, particularly commonwealth countries. The other is referred to as ‘non-adversarial’ or ‘inquisitorial’ and tends to be associated with continental systems or civil law tradition, mostly deriving from the French archetype. While the concepts of an accusatorial and adversarial trial process are in fact

⁶⁵ For a detailed discussion on the admissibility of hearsay evidence under the Criminal Justice Act 2003 see e.g. Choo, *Evidence* (n 22) ch 11; Keane and McKeown (n 9) ch 12; JR Spencer, *Hearsay Evidence in Criminal Proceedings* (Hart 2013).

⁶⁶ Damaska, *Evidence Law Adrift* (n 4) 15; MR Damaska, ‘Of Hearsay and Its Analogues’ (1992) 76 *Minnesota Law Review* 425; see further below Section 2.2.2 regarding the difference between ‘intrinsic’ and ‘extrinsic’ exclusionary rules.

⁶⁷ M Panzavolta, ‘Of Hearsay and beyond’ (2016) 20(5) *The International Journal of Human Rights* 617-633.

⁶⁸ Beulke and Swoboda (n 37) 331–332.

⁶⁹ Roberts and Zuckerman (n 20) 98.

⁷⁰ Jackson and Summers (n 4) 6; J Keiler and others, ‘Criminal law’, in J Hage and others (eds), *Introduction to law* (Springer 2018) 129-163 (at 155 ff.); JR Spencer, ‘Introduction’ in M Delmas-Marty and J Spencer (eds), *European Criminal Procedures* (Cambridge University Press 2002) 8-9.

divergent, space precludes a detailed analysis of this distinction.⁷¹ In what follows the dichotomy will be presented as one between the adversarial and inquisitorial model.

To the extent that the adversarial and inquisitorial model describe two different procedural systems that have been dominant in the common law and civil law world respectively, an understanding of the core characteristics of these procedures with respect to the structure and function of the fact-finding processes seems necessary to comprehend the evidentiary exclusionary rules of each system.⁷²

The adversarial tradition is based on the notion that the best way of determining guilt or innocence is by letting the State as the accuser (represented by the public prosecutor) and the accused compete against each other as two adversaries.⁷³ The idea is that a fair result ensues when the prosecution constructs a case for convicting the defendant and the defendant attempts to undermine the prosecution's case.⁷⁴ The responsibility for investigating and gathering evidence before trial, as well as selecting and presenting the evidence in court lies with the prosecutor and the defence.⁷⁵ The judge is not involved in the investigation and plays a rather passive adjudicative role at trial, acting as an umpire to ensure fairness in the proceedings and to guarantee the law is applied correctly, while jurors tend to adjudicate on the facts.⁷⁶ The trial is the focal point of the adversarial process, at which point the parties present their case and oral evidence is heard.⁷⁷ Although the rules of evidence are in principle applied in the same way when the judge sits alone, they have been designed primarily to fit the jury trial.⁷⁸

⁷¹ For an account of the precise differences between accusatorial and adversarial procedures on the one hand, and inquisitorial and non-adversarial procedures differences between these procedures see Ryan (n 8) 65–72.

⁷² HL Krongold, 'A Comparative Perspective on the Exclusion of Relevant Evidence: Common Law and Civil Law Jurisdictions.' (2003) 12 *Dalhousie Journal of Legal Studies* 97, 100.

⁷³ E Cape and others, 'Procedural Rights at the Investigative Stage: Towards a Real Commitment to Minimum Standards' in E Cape and others (eds), *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union* (Intersentia 2007) 5.

⁷⁴ L Campbell, A Ashworth and M Redmayne, *The Criminal Process* (5th edn, Oxford University Press 2019) 439.

⁷⁵ J Hodgson, *The Metamorphosis of Criminal Justice: A Comparative Account* (Oxford University Press 2020) 6–7. However, in practice in England and Wales the investigation is carried out predominantly by the police. The public prosecutor only becomes involved once the suspect is charged or summoned (E Cape and J Hodgson, 'The Investigative Stage of the Criminal Process in England and Wales' in E Cape and others (eds), *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union* (Intersentia 2007) 59–60).

⁷⁶ MR Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press 1986) 4; Cape and others (n 73) 5.

⁷⁷ Cape and others (n 73) 5. In practice, however, the trial may be circumvented if the defendant pleads guilty. In England and Wales, approximately 70 per cent of all Crown Court cases resulted in a guilty plea in 2020 (Ministry of Justice, 'Criminal Court Statistics Quarterly, England and Wales, January to March 2020' (2020) accessed 17 September 2020).

⁷⁸ Krongold (n 72) 100.

The inquisitorial system, on the other hand, is centred around the idea of a neutral State officer – either the public prosecutor or the investigating judge – carrying out an impartial enquiry into the criminal case.⁷⁹ The activities performed by the neutral public authority are recorded in writing and the transcripts of these activities, together with the evidence collected, are placed in a file (dossier), which at the end of the investigations is handed over to the trial court. A further distinction could be made between two types of inquisitorial jurisdictions. On the one hand, there are those inquisitorial systems that belong to the Napoleonic tradition (such as Belgium and France), who have retained the figure of the investigating judge (*juge d'instruction*) as the State authority who actively guides and steers the judicial investigation.⁸⁰ On the other hand, there are continental criminal jurisdictions (such as Italy, Germany and the Netherlands), which have dispensed with or marginalised the role of the investigating judge and entrust the prosecution with the criminal investigation.⁸¹

In contrast to the adversarial procedure, the evidence that comes before the court is predominantly the evidence collected by this neutral figure (or by these neutral figures, when more of them are active in the proceedings). The contribution of the defence remains therefore marginal in that it is looked as a partisan – and less reliable – input. Another important feature is that the trial judge has access to the criminal dossier before and during the trial. In that sense, there tends to be a bigger emphasis on the investigating phase in the inquisitorial model, as opposed to the trial being the focus in the adversarial tradition.⁸² Inquisitorial procedures are predominantly written, whereas the adversarial procedure is characterised by the principle of orality.

This classification of legal systems has been very prevalent in comparative criminal procedure and hence it would be odd to remain silent about this dichotomy here.⁸³ However, the adversarial/inquisitorial dichotomy also has its limits as a heuristic and explanatory tool to

⁷⁹ Campbell, Ashworth and Redmayne (n 74) 438–439; Hodgson (n 75) 7.

⁸⁰ However, even in these countries only a small minority of cases is led by the *juge d'instruction*. In most cases the investigation is carried out by the police under the supervision of the prosecutor (Cape and others (n 73) 7, fn 31).

⁸¹ Hodgson (n 75) 5, fn 6; Cape and others (n 73) 7; Germany abolished the office of the investigating judge (*Untersuchungsrichter*) in 1975 (T Weigend and F Salditt, 'The Investigative Stage of the Criminal Process in Germany' in E Cape and others (eds), *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union* (Intersentia 2007) 82).

⁸² Cape and others (n 73) 5–6.

⁸³ The most well-known work is by MR Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1973) 121 *University of Pennsylvania Law Review* 506 and Damaška (n 76) 3–6. For more recent contributions see e.g. R Vogler, *A World View of Criminal Justice* (Ashgate 2005); Hodgson (n 75) ch 1; M Langer, 'The Long Shadow of the Adversarial and Inquisitorial Categories' in MD Dubber and T Hörnle (eds), *The Oxford Handbook of Criminal Law* (Oxford University Press 2014); PJ van Koppen and SD Penrod, *Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (Kluwer Academic / Plenum Publishers 2003); JR Spencer, 'Adversarial vs Inquisitorial Systems: Is There Still Such a Difference?' (2016) 20 *International Journal of Human Rights* 601; M Langer, 'Strength, Weakness, or Both? On the Endurance of the Adversarial-Inquisitorial Systems in Comparative Criminal Procedure' in J Ross and S Thaman (eds), *Comparative criminal procedure* (Edward Elgar Publishing 2016).

elucidate the roots of a legal system, its organising principles and values, and how these affect the law of evidence in general and issues of admissibility and exclusion in particular for multiple reasons.⁸⁴ First, while countries tend to be associated with one or the other legal tradition, criminal justice systems in fact vary greatly. It is a truism that criminal justice systems are neither wholly inquisitorial nor adversarial but often incorporate values and procedures that belong to both systems.⁸⁵ Indeed, some suggest that there may be a trend in Europe to abandon the clear dichotomy and that jurisdictions may be converging,⁸⁶ or that individual jurisdictions advance and move beyond the defining features of the two models.⁸⁷ Hence, the added value of measuring actual legal systems against the typology of the adversarial or inquisitorial system may be rather limited, since neither of the systems exists in pure form in reality.⁸⁸ More than for describing or classifying systems, the dichotomy retains importance for understanding certain basic cultural and theoretical features of the criminal process, and it is best intended as an opposition between two theoretical models (the adversarial model of a dispute and the inquisitorial model of official inquiry) that represent two opposite poles within the theoretical spectrum of fact finding methodologies.⁸⁹

Secondly, the claim that an actual legal system does not adhere to the principles of one or the other model often imports a value judgement that certain key rights and principles of criminal justice are not respected. Yet, such a claim can only be made after careful analysis in the individual case, not when it is purely based on comparison with ‘some non-existent ideal type’.⁹⁰ Thirdly, the characteristics traditionally considered adversarial or inquisitorial nowadays bear only limited connection to the current legal framework of admissibility and exclusion of evidence in those systems.⁹¹ It was for instance seen that there might be some difference in terms of admissibility between common law (England in particular) and civil law (such as Belgium, France or the Netherlands), due to the different organization of the trial phase

⁸⁴ Keiler and others (n 70) 157.

⁸⁵ Hodgson (n 75) 5.

⁸⁶ See e.g. N Jorg, S Field and C Brants, ‘Are Inquisitorial and Adversarial Systems Converging?’ in C Harding and others (eds), *Criminal Justice in Europe: A Comparative Study* (Clarendon Press 1995); Spencer, ‘Adversarial vs Inquisitorial Systems: Is There Still Such a Difference?’ (n 71); contra: J Jackson, ‘The Effect of Human Rights on Criminal Evidentiary Processes: Convergence, Divergence or Realignment?’ (2005) 68 *Modern Law Review* 737 suggests that in its application of the ECHR, the ECtHR promotes a model that is distinct from the traditional adversarial and inquisitorial systems; G Teubner, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences’ (1998) 61 *Modern Law Review* 11, who is sceptic of convergence and points out the unintended effects of ‘transplanting’ processes and legal concepts from one culture and legal system to another.

⁸⁷ A Freiberg, ‘Post-Adversarial and Post-Inquisitorial Justice: Transcending Traditional Penological Paradigms’ (2011) 8 *European Journal of Criminology* 82.

⁸⁸ Campbell, Ashworth and Redmayne (n 74) 439.

⁸⁹ Keiler and others (n 70) 157.

⁹⁰ Campbell, Ashworth and Redmayne (n 74) 439-440.

and of the relationship between that phase and the investigations. Nonetheless, some civil law countries have by now also imported some of those structures (e.g. Italy).

Lastly, the dichotomy between inquisitorial systems and adversarial systems combines together many a feature of the criminal process, as if they were necessarily tied together. For instance, in the inquisitorial system the idea of the official investigation of a neutral enquirer, is combined with the written recording of that investigation, and then with the fact that the investigative results are handed over to a trial court, and sometimes with the judicial activism of the trial court. While it is true that these elements were tied together in the original historical model and that they form together a specific ideology of fact-finding, these elements might not always be present together, nor might they play an equal role in shaping other areas of the criminal law such as the law of evidence. This holistic approach can in fact cause confusion.

Consequently, rather than analysing issues of admissibility and exclusion across jurisdictions through the lens of the adversarial/inquisitorial divide, this report draws on Damaska's work '*Evidence Law Adrift*'.⁹² It constitutes a wider enquiry into the institutional and cultural factors that are characteristic of the common law and civil law or continental tradition and may thus be more apt as a heuristic tool and normative framework to theorise the diverging approaches to exclusionary rules in these systems.

2.2.2 'Intrinsic' vs 'extrinsic' exclusionary rules

Damaska draws a distinction between 'intrinsic' and 'extrinsic' exclusionary rules. Intrinsic exclusionary rules are those that are truly characteristic of the common law,⁹³ and exist predominantly to enhance the accuracy of fact finding and the pursuit of the truth.⁹⁴ This includes for instance the rule against hearsay and rules prohibiting the use of bad character evidence. The rule against hearsay evidence is mainly connected to the issue of reliability of evidence. Although countries outside of the common law world are aware of the dangers that admitting derivative evidence entails, any protection against said dangers has rarely resulted in the adoption of exclusionary rules.⁹⁵ Bad character evidence relates to the issue of potential prejudice. Like the hearsay rule, continental jurisdictions tend to appreciate the risk involved with admitting character evidence, but they focus more on whether information about a

⁹² Damaska, *Evidence Law Adrift* (n 4).

⁹³ *ibid* 14–17.

⁹⁴ MR Damaska, 'Free Proof and Its Detractors' (1995) 43 *American Journal of Comparative Law* 343, 348; Jackson and Summers (n 4) 71.

⁹⁵ Damaska, *Evidence Law Adrift* (n 4) 15.

person's (criminal) past has any true probative value rather than establishing an exclusionary rule.⁹⁶

Extrinsic exclusionary rules are those that are not limited to common law countries and also exist in continental legal systems.⁹⁷ Such rules are designed to protect other values that are not necessarily connected to truth finding, such as human dignity or privacy.⁹⁸ Their aim is not to maintain the accuracy of factfinding, but rather that truth finding happens in societally acceptable ways.⁹⁹ The paradigm example of this would be rules pertaining to improperly and illegally obtained evidence, which exist in all liberal criminal justice systems. Another example are testimonial privileges, affecting evidence given by people who are bound by a legal duty of confidentiality, such as doctors and lawyers, and the defendant's family members. For instance, the German Code of Criminal Procedure (CCP) provides explicitly that judges are not allowed to use witness statements of those who have made use of their right to refuse testimony.¹⁰⁰ Under German law, it would be accurate to characterise testimonial privileges as a separate extrinsic exclusionary rule, as this is evidence that may not be used because of the nature of the evidence, irrespective of how it was obtained. In Belgium, by contrast, gathering of evidence in violation of professional secrecy is dealt with under the general rules for illegally obtained evidence.¹⁰¹

Damaska's bifurcated typology of intrinsic and extrinsic exclusionary rules suggests a very Anglo-American centric viewpoint, as his typology essentially turns on whether a rule can be found only in common law countries or also in other countries. Nonetheless, his typology is drawn upon here as it helps elucidate how a divergence in institutional factors between the common law and continental tradition have shaped exclusionary rules, as the next section explains.

2.2.3 Evidentiary exclusion in common law and continental systems: institutional and cultural differences

The divergence between the common law and continental approach to evidentiary exclusion is the result of a set of institutional and cultural differences between both systems. Damaska identifies three 'institutional pillars' of the common law rules of evidence: the bifurcated organisation of the trial court, the temporal concentration of proceedings, and the adversary

⁹⁶ *ibid* 16–17. See also MR Damaska, 'Propensity Evidence in Continental Legal Systems' (1994) 70 *Chicago-Kent Law Review* 55.

⁹⁷ Damaska, *Evidence Law Adrift* (n 4) 12–14.

⁹⁸ Jackson and Summers (n 4) 70.

⁹⁹ Damaska, 'Free Proof and Its Detractors' (n 94) 348.

¹⁰⁰ §§52-55 CCP-Germany.

¹⁰¹ See e.g. R Verstraeten, 'De Granaataanslag, Het Beroepsgeheim En Antigoon' (2021) 16 *Nullum Crimen* 62, (case comment under Chamber of Indictment 25 June 2020) 66-69.

system of adjudicatory fact-finding in which the parties and their lawyers play prominent roles.¹⁰² The first institutional pillar pertains to the way the division of labour at trial is organised.¹⁰³ Common law criminal trials are bifurcated in two respects. The proceedings in which the defendant's guilt or innocence is determined are separate from the sentencing hearing. Additionally, there is also a bifurcation in the division of labour between the professional judge and the jury, which explains at least in part the need for common law exclusionary rules. Many of the current common law exclusionary rules have evolved from a time when the triers of facts were either jurors or lay judges, to whom professional judges adopted a rather paternalistic and protective attitude. A justification commonly cited for the extensive exclusionary rules in common law systems is that the jury (who are not professionally trained adjudicators) might overvalue the weight and importance of certain kinds of evidence or even treat it as conclusive. Hence, to avoid that particular information has an unwanted effect on their reasoning and could prejudice adjudication, the information that is presented to the jury needs to be carefully screened and the jury needs to be shielded from certain evidence.¹⁰⁴

Criminal trials in continental systems, on the other hand, have a unitary structure. The object of the trial is to determine issues of guilt and the sentence in a single proceeding, with both issues being decided by a single panel of professional judges.¹⁰⁵ In other words, the same judge who is responsible for determining the admissibility of evidence is also responsible for rendering the verdict on the defendant's guilt. The exception to this are jury trials, but these are relatively rare in continental criminal justice systems, and even in instances of joint decision making between professional judges and lay people there is very little division of labour between them.¹⁰⁶ Lay people are guided by the professional judges and the information flows rather freely between the two.¹⁰⁷

The bifurcated or unitary trial structure can explain in two ways the relative absence of intrinsic exclusionary rules in continental European systems. First, the perceived lesser need for exclusionary rules as a safeguard of correct decision-making is explained by the assumption that seasoned professional judges are not prone to the same cognitive errors as lay people. Secondly, owing to the unitary trial structure, continental trials are less set up for exclusionary rules in the strict sense of the word, where there is a separate moment before the trial where a professional judge decides whether or not to formally admit the evidence into the trial. From a

¹⁰² Damaska, *Evidence Law Adrift* (n 4) 4.

¹⁰³ *ibid* ch 2.

¹⁰⁴ Keane and McKeown (n 9) 3; Ho, 'The Legal Concept of Evidence' (n 19); E Grande, 'Comparative Approaches to Criminal Procedure: Transplants, Translations, and Adversarial-Model Reforms in European Criminal Process' in DK Brown, JI Turner and B Weisser (eds), *The Oxford Handbook of Criminal Process* (2019) 74.

¹⁰⁵ Ryan (n 8) 243 (with specific reference to the French and Italian trial).

¹⁰⁶ Damaska, 'Of Hearsay and Its Analogues' (n 66) 427; Damaska, *Evidence Law Adrift* (n 4) 48; Jackson and Summers (n 4) 72.

¹⁰⁷ Damaska, *Evidence Law Adrift* (n 4) 53.

practical viewpoint there is little point in shielding professional judges in continental systems from potentially inadmissible evidence since they will inevitably get sight of this evidence anyway as they are the ones ruling on admissibility. Rather than having to exclude evidence in the strict sense of the word of physically removing evidence from the criminal dossier or preventing the trier of facts from being exposed to such evidence, continental judges will be instructed to not take such evidence into account in reaching a verdict.¹⁰⁸ However, this institutional feature has certainly not precluded continental systems from adopting certain ‘extrinsic’ exclusionary rules, such as the one pertaining to illegally obtained evidence. The institutional divergence between common law and continental systems just means that the way in which such rules are applied and the way in which they influence the decision-making process differs between the two systems (see further for an in-depth comparison of exclusionary rules regarding illegally obtained evidence).¹⁰⁹

The rule against hearsay and exclusion of bad character evidence are some of the exclusionary rules that are explained on the basis of needing to avoid that lay jurors are exposed to evidence that may unduly impact their reasoning and decision-making and that are absent in continental jurisdictions are. However, Damaska argues that this justification alone for these exclusionary rules is insufficient. These exclusionary rules are based on cognitive shortcomings, and these affect lay people and professional judges alike.¹¹⁰ According to Damaska, a better justification for requiring exclusionary rules by reason of having a jury-system is related to the fact that the jury’s verdict presents itself as the binary conclusion of either guilty or not guilty, without any associated duty to give reasons. In continental jurisdictions, on the other hand, it is the duty of the professional judge to give a reasoned judgment. Tainted evidence will always linger in the decision-maker’s mind, but the exclusionary rule entails that inadmissible information cannot be relied up as a basis for conviction.¹¹¹ In the common law, where there is no such comparable practice, jury decisions may become inscrutable. Damaska argues that at least part of the rationale for evidentiary rules in the common law tradition, including the need for exclusionary rules, is the desire not only to avoid factual error but also to enhance ‘ex ante’ the legitimacy of inscrutable jury verdicts.¹¹²

The second institutional pillar of the common law of evidence is the temporal concentration of proceedings.¹¹³ In common law jurisdictions, certainly historically, lawsuits tended to be settled in a single continuous event, and evidence taking was centred around a ‘day-in-court’ trial.¹¹⁴ When a trial is organised as one single event, there is a greater need for rules that limit

¹⁰⁸ Damaska, ‘Of Hearsay and Its Analogues’ (n 66) 427–428.

¹⁰⁹ Jackson and Summers (n 4) 72.

¹¹⁰ Damaska, *Evidence Law Adrift* (n 4) 30.

¹¹¹ *ibid* 50–51.

¹¹² *ibid* 46.

¹¹³ *ibid* ch 3.

¹¹⁴ *ibid* 59.

the amount of information that adjudicators can absorb in a short space of time. This is the case regardless of whether the adjudicators are professional, lay, or mixed.¹¹⁵ It is necessary to have rules that ensure that the material is narrowed down in advance of the trial so that unfair surprise is avoided, since it is not possible to have another look at and check the material at a later moment in time.¹¹⁶ In contrast, criminal trials in continental countries are more organised as successive procedural instalments or ‘episodes’.¹¹⁷ The need to have answers to foundational questions at the point where evidence is first introduced in the criminal process is reduced, since further hearings can be scheduled to have another look at the material or to request additional information.¹¹⁸ Nowadays, the contrast between the Anglo-American ‘day in court’ and the continental episodic approach to criminal trials is no longer as sharp. While the temporal dimension of the criminal trial may thus no longer justify the existence of particular exclusionary rules in common law systems and the absence thereof in continental systems, it places the existence of the current rules in a historical context and still serves an explanatory purpose.¹¹⁹

Furthermore, one of the hallmarks of the continental system is the extensive pre-trial investigation and collection of all the evidence in the criminal dossier. The judge – who is also the fact-finder – has access to the criminal dossier prior to the trial. Consequently, she is rarely truly surprised thanks to her effort to prepare before the trial. The evidence is also not exclusively presented at trial. Some of the evidence may already be heard and challenged during the investigative stage.¹²⁰ Since all the evidence is collected in the file and it is examined by the judge (and possibly challenged by the parties) before the trial, this also reduces the need to organise and present evidence as carefully as is required in common law systems. In a system where the trial is temporally concentrated, there can be no reliance on evidence which has been preserved in a case file, since all the available information has to be presented fresh to the jury at the trial. Neither is there room to admit new evidence, as the judge cannot interrupt the trial to seek out further evidence to reach a more accurate decision and return to the trial at a later point in time with said information.¹²¹

The third pillar supporting the common law rules of evidence is the adversary system, which refers to the system of adjudication in which the parties play a prominent role in controlling the procedural action and judge remains rather passive.¹²² This entails that the parties have to

¹¹⁵ *ibid* 61.

¹¹⁶ *ibid* 62–63.

¹¹⁷ *ibid* 59.

¹¹⁸ *ibid* 63–64.

¹¹⁹ Specifically regarding the rule against hearsay evidence see Damaska, ‘Of Hearsay and Its Analogues’ (n 66) 430.

¹²⁰ Jackson and Summers (n 4) 72.

¹²¹ Damaska, *Evidence Law Adrift* (n 4) 72–73.

¹²² *ibid* ch 4.

seek evidentiary material, prepare it for use at trial, and present it in court.¹²³ Since the fact-finding is managed by the two adversaries, the means of proof are by nature partisan and polarised. Hence, there is a need for evidentiary rules that give each party the opportunity to challenge the evidence presented by the opponent. Each party can insist on the application of evidentiary rules; the judge has no duty to exclude evidence falling into ‘an epistemically problematic category’.¹²⁴ Damaska contrasts this with continental criminal justice systems where a ‘neutral’ State official is in charge of collecting the evidence, whether that is the *juge d’instruction* or the prosecution and the police. Rather than each party instructing their own expert witness as is the case in common law jurisdictions, expert witnesses are appointed by the court and are viewed as ‘aides’ to the judge rather than as actual witnesses.¹²⁵ The greater involvement of State official in fact-finding reduces the ‘bipolar tensions of factual inquiries’ and the means of proof tend to be conceived as repositories of neutral information.¹²⁶ Consequently, there is a reduced need to establish rules that permit the parties to challenge the opposing party’s evidence.

In sum, the common law system has a more ‘exclusionary ethos’¹²⁷ than continental countries do. This is evident from the fact that there are more categories of evidence subject to an exclusionary rule in common law countries, compared to their continental counterparts. The exclusionary ethos also entails that the fact-finder is usually shielded from seeing the inadmissible evidence. By contrast, continental systems have fewer exclusionary rules and exclusion does not usually entail that the fact-finder is prevented from being exposed to the inadmissible evidence. The continental system is more focused on regulating how certain pieces of evidence may be used.¹²⁸ The aforementioned institutional and cultural characteristics may explain, at least in part, this divergence in approach towards evidentiary exclusion. These institutional factors mean that there is both limited scope and limited need in continental European systems for notions of admissibility or for exclusionary rules in the way they are understood in common law countries,¹²⁹ i.e. requiring a formal moment where the professional judge decides whether the evidence is formally admitted to trial or whether it should be excluded, in which case the decision-maker is shielded from the substance or content of the evidence. Additionally, the institutional pillars may also elucidate why ‘extrinsic’ exclusionary rules, which can be found across the common law and civil law world, have been shaped and differ in the way they influence the decision-making process. The rest of this article will illustrate this, focusing specifically on the legal doctrines, rules, and principles regarding exclusion of illegally obtained evidence from a comparative perspective.

¹²³ *ibid* 74.

¹²⁴ *ibid* 87.

¹²⁵ *ibid* 78.

¹²⁶ *ibid*.

¹²⁷ Keane and McKeown (n 9) 3.

¹²⁸ Ryan (n 8) 97, 241.

¹²⁹ Jackson and Summers (n 4) 72.

3 OVERVIEW OF THE LEGAL RULES AND DOCTRINES REGARDING ILLEGALLY OBTAINED EVIDENCE

The term ‘illegally obtained’ evidence refers to evidence gathered in violation of a person’s rights or in breach of the law or procedure. Scholars may at times distinguish this from ‘improperly obtained’ evidence, which results from some deceit which is considered unfair or improper but falls short of a violation of rights.¹³⁰ In most cases, improper or illegal investigative action will entail problematic treatment of the suspect. However, on occasion, the person whose rights are breached or who is treated improperly may be a third party.¹³¹ In terms of the applicable legal rules and doctrines, it is rare for a jurisdiction to systematically distinguish between illegally and improperly obtained evidence. To enhance the legibility of this article, it will refer to illegally obtained evidence as a shorthand for both categories, except where explicit reference to improperly obtained evidence is required.

This chapter gives a brief overview of the rules on illegally obtained evidence per jurisdiction. It does not cover in detail exclusionary provisions and how they operate, but rather sets out their most significant features as a necessary precursor to the discussion about the normative justifications underpinning the rules.

3.1 England and Wales

Historically, English law has been reluctant to exclude illegally obtained evidence. The old common law position that the wrongfulness of the method by which evidence was gathered did not affect its admissibility was encapsulated in the well-rehearsed phrase of Crompton J in the 1862 case *Leatham*: ‘It matters not how you get it; if you steal it even, it would be admissible in evidence’.¹³² This radical inclusionary approach evolved gradually into the common law position as established in *Sang*, which is best characterised as a predominantly inclusionary approach but subject to exceptions.¹³³ It was held in *Sang* that, other than regarding admissions and confessions, a court is not concerned with how evidence was obtained and hence there was no judicial discretion to refuse to admit relevant admissible evidence on the grounds that it was obtained by improper or unfair means. However, the court in *Sang* equally held that since it was the judge’s function to ensure a fair trial, the judge was legitimately concerned with how

¹³⁰ PG Polyviou, ‘Illegally Obtained Evidence and R v Sang’ in R Cross and C Tapper (eds), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworth 1981) 226; A Skeen, ‘The Admissibility of Improperly Obtained Evidence in Criminal Trials’ (1988) 1 *South African Journal of Criminal Justice* 389, 389.

¹³¹ In England and Wales see e.g. *A v Home Secretary (No 2)* [2005] UKHL 71, which concerned the issue of whether information obtained by means of torture of a third party was admissible in domestic English proceedings.

¹³² *Leatham* (1861) 8 Cox CC 498, 501; HL Ho, ‘The Fair Trial Rationale for Excluding Wrongfully Obtained Evidence’ in S Gless and T Richter (eds), *Do Exclusionary Rules Ensure a Fair trial? A Comparative Perspective on Evidentiary Rules* (Springer 2019) 290.

¹³³ *Sang* [1979] UKHL 3, [1980] AC 402.

evidence was used at trial, and therefore there was a general discretion to exclude prosecution evidence on the grounds that the evidence's 'prejudicial effect outweighs its probative value'.¹³⁴

Under the current English law, illegally obtained evidence is governed by both statute and case law.¹³⁵ The most important provisions are section 76 and 78 of the Police and Criminal Evidence Act 1984 (PACE). A distinction is made between confession and non-confession evidence. Section 76 PACE establishes two grounds for mandatory exclusion pertaining to confessions the prosecution wishes to rely on. Confessions are defined in section 82(1) PACE as including 'any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise'. Under section 76(2)(a) PACE, any confession made by an accused person that was obtained by oppression is automatically inadmissible. Oppression is partially defined as including 'torture, inhuman and degrading treatment, and the use or threat of violence (whether or not amounting to torture)'.¹³⁶ Section 76(2)(b) PACE establishes a reliability test, according to which evidence is automatically inadmissible if it was obtained 'in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof'. The burden of proof is on the prosecution to demonstrate that the evidence was not obtained in any of the two ways established in section 76.¹³⁷

The automatic exclusionary rule of section 76 PACE is supplemented with discretionary exclusionary power under section 78(1) PACE, which provides:

In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

This provision has left courts with a 'broad and unstructured' discretion,¹³⁸ the sole criterion being whether admission of the evidence would adversely impact the fairness of the

¹³⁴ *Sang* [1979] UKHL 3, [1980] AC 402, 437 per Lord Diplock.

¹³⁵ As a member state of the Council of Europe, the United Kingdom must also conform to the standards set by the ECtHR in its interpretation of the ECHR, which the UK has 'incorporated' into domestic law by adopting the Human Rights Act 1998. On the influence of the ECtHR case law in England and Wales specifically on issues of illegally obtained evidence see e.g. ALT Choo, 'England and Wales: Fair Trial Analysis and the Presumed Admissibility of Physical' in S Thaman (ed), *Exclusionary rules in comparative law* (Springer 2013).

¹³⁶ S 76(8) PACE.

¹³⁷ Y Ma, 'Comparative Analysis of Exclusionary Rules in the United States, England, France, Germany, and Italy' (1999) 22 *Policing* 280, 285.

¹³⁸ DC Ormerod, 'ECHR and the Exclusion of Evidence: Trial Remedies for Article 8 Breaches?' [2003] *Criminal Law Review* 61, 64.

proceedings. The main differences between section 76 and 78 are obvious: section 76 imposes a duty on courts to exclude and only covers confessions, whereas section 78 creates a discretionary power to exclude and pertains to any kind of evidence. A confession which is not automatically excluded on one of the grounds contained in section 76, is presumptively admissible but could still be excluded as a matter of discretion on the grounds of trial fairness under section 78. Equally, there can be an overlap between cases which fall under section 76(2)(a) or (b) and under section 78. When the UK Government introduced the Bill that would later become PACE, it had intended that section 78 would serve a limited purpose of excluding statements that fell outside the scope of section 76.¹³⁹ However, that is not how section 78 is used in practice. In fact, in many cases which could have been decided under section 76, courts instead opt to consider it under section 78.¹⁴⁰

Finally, in addition to section 76 and 78 PACE, there is a third legal basis on which courts could exclude illegally obtained evidence. Section 82(3) PACE preserves the common law exclusionary discretion. Hence, courts still have the power to exclude evidence if it is ‘more prejudicial than probative’, as established in *Sang*, though it is questionable whether this adds anything to the broadly formulated fairness test in section 78.¹⁴¹

3.2 Belgium

From the 1920s onwards, Belgium had a strict exclusionary rule according to which any illegally obtained evidence automatically had to be excluded.¹⁴² Over time this strict rule softened somewhat, and in effect became a *prima facie* prohibition on the use of illegally obtained evidence with a few exceptions.¹⁴³ On 14 October 2003, the Belgian Court of Cassation reversed this rule in a landmark judgment: it made exclusion of illegally obtained evidence the exception rather than the rule.¹⁴⁴ The *prima facie* exclusionary rule was substituted with *prima facie* admissibility of illegally obtained evidence, subject to only a few exceptions.¹⁴⁵ This judgment is commonly referred to as the “Antigon” judgment, owing its

¹³⁹ K Grevling, ‘Fairness and the Exclusion of Evidence under Section 78(1) of the Police and Criminal Evidence Act’ (1997) 113 Law Quarterly Review 667, 671.

¹⁴⁰ *ibid* 667–668.

¹⁴¹ *ibid* 672.

¹⁴² Cass., 12 March 1923, *Pas.* 66 1923, I, 233; Cass. 10 December 1923, *Pas.* 1924, I, 66 with opinion by AG Leclercq.

¹⁴³ For an overview of the different steps in this evolution see F Deruyck, ‘Wat Krom Is Wordt Recht. Over de Bruikbaarheid van Onrechtmatig Verkregen Bewijs’ in L Arnou and others (eds), *XXXIIste post-universitaire cyclus Willy Delva, 2005-06, Strafrecht en strafprocesrecht* (Kluwer 2006) 203–206; MA Beernaert and P Traest, ‘Belgium: From Categorical Nullities to a Judicially Created Balancing Test’, *Exclusionary rules in comparative law* (Springer 2013) 164–165.

¹⁴⁴ Cass. 14 Oct 2003, *T.Strafr.* 2004, 129, comment P Traest.

¹⁴⁵ Beernaert and Traest (n 143) 166; P Traest, ‘Actualia Bewijs in Strafzaken’ in Departement permanente vorming van de Orde van Advocaten van de Balie van Kortrijk (ed), *Bewijsrecht* (Larcier 2014) 140.

name to the police operation called “Antigon” during which evidence was obtained illegally. The body of cases that further developed the principles set out in the judgment is known as the “Antigon” doctrine.¹⁴⁶

In 2013, the Antigon doctrine was codified in Article 32 Preliminary Title Code of Criminal Procedure (‘PT CCP’).¹⁴⁷ This article provides that the judge may declare illegally obtained evidence inadmissible only if:

- (i) Statute law explicitly provides nullity as a sanction for failing to respect the formality;
- (ii) The irregularity has tainted the reliability of the evidence; or
- (iii) The use of the evidence is in violation of the right to fair trial.

Article 32 is a mere codification of the three exclusionary grounds that had already been developed by the Court of Cassation in the Antigon judgment; the legislature decided to omit any statutory reference to further developments of the Antigon doctrine in the case law. Consequently, the case law predating the enactment of this provision remains important for its application.¹⁴⁸ These three grounds for exclusion of evidence are exclusive: only if any of these three circumstances are present may the court decide to exclude the evidence.¹⁴⁹ The Antigon doctrine has been approved by both the Belgian Constitutional Court¹⁵⁰ and the ECtHR.¹⁵¹

Based on the text of Article 32, at least in principle Belgian law does not differentiate between the source of the norm that was violated, i.e. it does not differentiate between whether the

¹⁴⁶ For an elaborate discussion of what this doctrine encompasses see e.g. B De Smet, *Nietigheden in Het Strafproces* (Intersentia 2011).

¹⁴⁷ Act of 24 October 2013, *Belgian Official Bulletin* 12 November 2013; For a detailed discussion of this provision see F Lugentz, ‘La Sanction de l’irrégularité de La Preuve En Matière Pénale Après La Loi Du 24 Octobre 2013’ [2015] *Journal des tribunaux* 185; J De Codt, ‘La Nouvelle Loi Sur Les Nullités: Un Texte Inutile?’ (2014) 3 *Revue de Droit Pénal et de Criminologie* 245.

¹⁴⁸ J Meese, ‘Het Bewijs in Strafzaken’ in P Taelman (ed), *Efficiënt procederen voor een goede rechtsbedeling. XLste postuniversitaire cyclus Willy Delva 2014-2015* (Wolters Kluwer 2016).

¹⁴⁹ Cass. 5 January 2016, *T. Strafr.* 2016, 231, comment by B Meganck; Cass. 19 April 2016, *NC* 2017, 65, opinion of Attorney General A Winants, *T. Strafr.* 2016, 366, comment by C Van de Heyning; Cass. 9 January 2018, *VAV* 2018, 12, comment by L Brewaeyns. Even prior to the enactment of Article 32 PT CCP, the Court of Cassation had already specified that these three circumstances set out in the Antigon judgment were the exclusive grounds on which illegally obtained evidence can be excluded: Cass. 23 March 2004, *Arr. Cass.* 2004, 518, *RABG* 2004, 1061, comment F Schuermans, *Rev. Dr. Pén.* 2005, 661, comment C De Valkeneer; Cass. 12 October 2005, *Arr. Cass.* 2005, 1903, *T. Strafr.* 2006, 25, comment F Verbruggen.

¹⁵⁰ Constitutional Court decision of 22 December 2010, nr. 158/2010, *Arr. GwH* 2010, 2445, *RABG* 2011, 563, case comment F Schuermans; Constitutional Court decision of 27 July 2011, nr. 139/2011, *Arr. GwH* 2011, 2357, *NC* 2011, 365, case comment H Berkmoes.

¹⁵¹ *Lee Davies v Belgium* App no 18704/05 (ECtHR, 28 July 2009).

violated norm is enshrined in a treaty or the constitution or any other statute.¹⁵² In other words, there is no separate requirement that a fundamental or constitutionally protected right be violated in the collection of evidence for the evidence to be excluded. For instance, the Court of Cassation has accepted that evidence obtained by illegal searches in violation of the Article 15 of the Belgian Constitution, which provides that the domicile is inviolable and that no visit to an individual's residence can take place other than as established by law and in the form prescribed by law, need not necessarily be excluded.¹⁵³ Neither does Belgian law distinguish between the type of evidence, in contrast to England where a distinction is made between confession and non-confession evidence.

Recently, a Bill for a new Code of Criminal Procedure was submitted to and debated in Parliament, where it is awaiting possible further amendments and the final vote.¹⁵⁴ Amongst other areas of criminal procedure, the Bill proposes a new set of rules on illegally obtained evidence. In essence, it proposes to replace the current inclusionary rule with a prima facie exclusionary rule with certain exceptions depending on the legal norm that was violated in the gathering of evidence. This will be analysed in more depth below.¹⁵⁵

3.3 Italy

As mentioned, the Italian system of exclusion of evidence centres around two competing concepts: *nullità* (nullities) and *inutilizzabilità* (non-usability). For both categories the law sets out general rules and then a series of specific provisions.

For nullities, the general rules are to be found in article 178 of the code of criminal procedure. It establishes the defects which make procedural acts (including, evidence) null. The provision is general in that it covers all procedural acts affected by the flawed identified by the article. For collection of evidence, particularly relevant is the provision of letter *c*, which focuses on the violation of the defendant's (and suspect's) right to intervene, be assisted and be represented during the proceedings. If evidence is collected in breach of one of these rights (when the law provides for them), the evidence is tainted by a nullity.¹⁵⁶ For instance, an interview by the police without a lawyer would entail a nullity. Likewise, the carrying out of an investigative act without giving information to the lawyer of the suspect (e.g. in case of a

¹⁵² Cass. 19 April 2016, *NC* 2017, 65, opinion of Attorney General A Winants, *T. Strafr.* 2016, 366, comment by C Van de Heyning. See also V Vereecke, 'Artikel 32 V.T.Sv. Regelt de Procedurele Nietigheid' [2015] RABG 38. (case comment under Cass. 28 May 2014).

¹⁵³ Cass 16 November 2004, *Arr. Cass.* 2004, 1829, opinion of Attorney General P Duinslaeger, *T. Strafr.* 2005, 285, comment by R Verstraeten and S De Decker.

¹⁵⁴ Bill for the Code of Criminal Procedure, *Parl. Doc.* Chamber 2019-2020, no 55 1239/001, <https://www.lachambre.be/FLWB/PDF/55/1239/55K1239001.pdf>.

¹⁵⁵ Section 6.1.

¹⁵⁶ M Panzavolta, 'Nullità degli atti processuali' (II) Diritto processuale penale), *Enciclopedia giuridica* (XIV° aggiornamento, Treccani 2006) 1-19.

line-up). Also failure to inform the suspect at the moment of a house search when he happens to be present entails a nullity. And further examples could be added. Next to general provisions, the code also contains specific provisions. Special (or specific) provisions on nullities are scattered around the code, and they establish the nullity of a specific procedural act in consequence of the violation of some legal conditions. There are however few instances of special nullity affecting evidence (the classic examples are the nullity of the witness testimony due lack of information of the family privilege to remain silent.¹⁵⁷ Evidence affected by a nullity cannot be introduced at trial. If the nullity occurs at trial, the evidence cannot be used.¹⁵⁸ Nonetheless, nullities can mostly be “sanitized” if they are not lamented immediately and in any case if they are not declared by the end of the proceedings in first instance.

For non-usability, the main general provision is the one spelled out in Article 191, forbidding the use of evidence acquired in violation of the prohibitions set out by the law. Next to this provision, the code sets out two more rules of general kind. One is contained in Article 189 and it establishes that evidence not explicitly regulated by the law is admissible only if it can be useful for the finding of the facts and insofar it does not affect the moral freedom of the person. As evident this rule contains a general implicit prohibition to admit (and use) evidence affecting the moral freedom (or moral integrity of the person). The Court of Cassation has interpreted the provision extensively and it has gone as far as to say that evidence admitted in violation of the constitutional rights of the person should be inadmissible.¹⁵⁹ Another general is the provision of Article 526. It concerns the end of the hearing before the trial court. Before the deliberation, the court should formally establish which evidence can be used at trial and which not. In this respect Article 526 states that the court cannot use for the decision evidence other than that lawfully introduced at trial.¹⁶⁰ Next to these general provisions, there are a number of instances in which the law explicitly provides for non-usability of certain categories of evidence, failing to respect some specific procedural conditions. For instance, evidence obtained by means of torture must always be excluded, except for the proceedings against those who perpetrated torture.¹⁶¹ Also, the law provides for a number of specific grounds of non-usability in the area of interceptions.¹⁶² Non-usability is a much stronger sanction than nullity. In fact, it cannot be “sanitized” and the court is always bound to declare it.¹⁶³

A large doctrinal debate centres around the proper way for identifying a prohibition to use evidence (*divieto probatorio*) in the rules of the code of criminal procedure. It is in fact only in few instances that the provisions of the code employ the wording “it is prohibited” (“è vietato”,

¹⁵⁷ Article 199 Code of Criminal Procedure.

¹⁵⁸ M Panzavolta, *Contributo allo studio dell'invalidità derivata* (Aras 2012).

¹⁵⁹ Cass. Sez. Un., 28 May 2003, Torcasio, *C.e.d. Cass.*, rv. 225467.

¹⁶⁰ M Nobili, ‘Divieti probatori e sanzioni’ (1991) *Giustizia penale* 641.

¹⁶¹ Article 191, section 2*bis* code of criminal procedure.

¹⁶² Article 271 Code of criminal procedure.

¹⁶³ Article 191 Code of criminal procedure.

“è fatto divieto”). Clearly the drafters of the new code did not want to restrict the exclusion of evidence to those few instances. The majority of authors tend to believe that a legal prohibition can be expressed also in less explicit terms.¹⁶⁴ Some reach the conclusion that the exclusion should be diagnosed whenever the law does not provide for an explicit power to admit certain items of evidence.¹⁶⁵ Whenever a piece of information could in no way be admitted at trial in a lawful way, they reason, there lacks a power to admit the evidence. Others tend to favour a larger approach (that is, in the direction of more exclusion) by stating that a prohibition could derive not just from the absence of the power for authorities to collect some evidence but also by the wrong or improper exercise of such evidence gathering power. This approach considers in other words also all legal conditions for the collection of evidence as cases of indirect (or implicit) prohibitions, at least when it is clear that those conditions are considered essential.¹⁶⁶ It leads to the conclusion that in the majority of the cases in which there was a departure from a codified rule concerning the collection of evidence, the evidence should be excluded (or, in any case, not be used, if it was not timely excluded during the proceedings). Others again extend the breadth of the exclusionary rules by looking at the interest protected by the rule that was breached,¹⁶⁷ particularly by considering the protection of fundamental rights and the need to safeguard the sound logic of fact-finding.¹⁶⁸

This debate is further fuelled by the disagreements concerning the correct interpretation of the word “acquired” in article 191 section 1. Some interpret the word as to mean that evidence “admitted in violation of prohibitions established by law” cannot be used,¹⁶⁹ whereas others read the clause in the sense that evidence “obtained in violation of prohibitions established by law” may not be used.¹⁷⁰ The first interpretation looks mostly at the trial stage, where evidence is formally admitted by a judicial decision. By interpreting the word “acquired” to mean “admitted”, these scholars consider in essence that the provision of Article 191 simply states that evidence wrongfully admitted is excluded.¹⁷¹ They reach the conclusion that the way in which the evidence is collected as a rule should not affect its “usability”, as long as there was a power to collect such evidence (because the collection of evidence at trial follows its

¹⁶⁴ F Grifantini, ‘Articolo 191’ in G Illuminati and L Giuliani (eds), *Commentario Breve al Codice di Procedura Penale* (Cedam 2020) 758.

¹⁶⁵ A Scella, ‘Inutilizzabilità (dir. proc. pen.)’ (2009) *Enciclopedia del diritto. Annali II*, I, 486.

¹⁶⁶ M Nobili, *La nuova procedura penale* (Clueb, 1989) 150. The author states in particular that a provision permitting to collect evidence only under certain conditions is equivalent to a provision prohibiting to collect evidence without certain conditions.

¹⁶⁷ N Galantini, *L’inutilizzabilità della prova* (Giuffrè, 1992).

¹⁶⁸ N Galantini, ‘Inutilizzabilità (diritto processuale penale)’ (1997) *Enciclopedia giuridica. Aggiornamento I*, 694.

¹⁶⁹ F Cordero, *Procedura Penale* (8th edn, Giuffrè 2006); F Grifantini, ‘Inutilizzabilità’ (1993) VII *Dig disc pen* 245.

¹⁷⁰ M Nobili, ‘Articolo 191’, in M Chiavario (ed), *Commento al nuovo codice di procedura penale*, II (Utet 1991) 412.

¹⁷¹ This interpretation is often tied with the first extensive interpretation of the concept “prohibitions by law”: see above footnote 165.

admission). For instance, the witness testimony of the co-defendant for the same alleged offence would be a case of *inutilizzabilità*, because this type of testimony can never be admitted at trial. In no case information coming from that source could be acquired, hence there is no power to introduce such evidence. Others, instead, adopt a larger interpretation, where acquired to ‘admitted’, but also ‘collected’.¹⁷² They reach the conclusion that also the violation of the rules for collecting evidence can lead to cases of exclusion (non-usability).

It should also be mentioned that next to the general rule on *inutilizzabilità* (referring to the violation of evidentiary prohibitions) there is a series of special provisions in the code, which expressly state that certain information in certain cases cannot be used. For instance, searches conducted in the office of lawyers without the respect of specific safeguards; or evidence obtained by means of torture; or evidence obtained by wiretappings in violation of specific rules; etc. These cases of “independent”, or autonomous”, or “specific” prohibitions would in any case add to the general prohibitions set out by Article 191 and – with regard to trial evidence – by Article 526 of the Code.

Three points should be further clarified. First, although the literal translation of the Italian expression “*inutilizzabilità della prova*” refers to the prohibition to use evidence, this situation could also be termed as “exclusion of evidence”. Whenever the court (or the judge) identifies a prohibition, the evidence should in fact be excluded from the file (“thrown out”). This does not mean however that all evidence present in the file at the end of the trial (or at the end of a procedural stage) can always be used. The concept of “non-usability” extends to those cases where the information remained in the file until the end (either because no challenge was raised or because nobody spotted the violation before). If the information can be classified as “acquired in violation of a prohibition of the law” it cannot be used for the decision even if it remained in the file.

Second, scholars point out that the prohibition to use evidence corresponds in fact to a prohibition to refer to said evidence in the written reasons of the decision. In Italy the Constitution requires that all decisions be accompanied by written reasons (Article 111 section 6), even when the decision is taken by panels composed of lay judges.

Third, the concept of “non-usability” refers directly to a specific decision to be taken. Evidence cannot be used with a view to taking that decision, within that specific procedural stage. This means that “non-usability” (or exclusion) can operate differently with regard to different decisions and different procedural stages. For instance, investigative evidence cannot be used at the trial stage but it is perfectly usable for decisions on pre-trial detentions, or on the taking of investigative measures.

¹⁷² Nobili, ‘Articolo 191’ (n 170) 412.

3.4 Germany

In the German criminal justice system, the scope of prohibitions to acquire evidence and the scope of prohibitions to use evidence do not necessarily overlap. As the category of independent prohibitions to use evidence (*selbstständige Beweisverwertungsverbote*) demonstrates, the violation of a prohibition to acquire evidence is not a mandatory precondition for the prohibition to use such evidence.¹⁷³

At the same time, not every irregular or unlawful evidence acquisition leads to the impossibility to use said evidence (*unselbstständige Beweisverwertungsverbote*). A general rule of when a prohibition to acquire evidence leads to a prohibition to use evidence does not seem to have been developed yet.¹⁷⁴

Case law and literature have developed various approaches to solve the question, of which the doctrines described below represent a non-exhaustive list.

- A) The Federal Court of Justice (*Bundesgerichtshof*, hereinafter: BGH) has developed the so-called *Rechtskreisstheorie* (theory of the legal sphere) regarding a violation of the duty to instruct witnesses about their right to refuse to provide information set forth in § 55 para 2 StPO.¹⁷⁵ According to this theory, the usability of evidence gathered in violation of a prohibition to acquire evidence depends on whether the violation *substantially* affects the legal sphere of the person requiring the application of a prohibition to use.¹⁷⁶

Under the *Rechtskreisstheorie*, the defendant cannot base his grievance on the violation of § 55 para 2 StPO, as these are designed for the protection of the witness and do therefore not substantially affect his legal sphere.¹⁷⁷ The theory in question has been applied also to cases in which a violation to advise the accused undergoing questioning that the law grants him the right to respond to the charges or not to make any statement on the charges and the right, at any stage, even prior to his examination, to consult defence counsel of this choice, pursuant to § 136 para. 1 sentence 2 StPO, has been committed vis-à-vis a co-defendant.¹⁷⁸

This theory raises concern insofar as the defendant has a right to a lawful procedure and, hence, a right to have mandatory procedural rules respected even if they do not

¹⁷³ Beulke and Swoboda (n 37) 360.

¹⁷⁴ Roxin (n 40) 181; Eisenberg (n 38) 155; Beulke and Swoboda (n 37) 360–361.

¹⁷⁵ BGHSt (Grs) 11, 213, 215.

¹⁷⁶ Beulke and Swoboda (n 37) 362.

¹⁷⁷ Eisenberg (n 38) 155.

¹⁷⁸ BGH 4 StR 195/16 – Decision of 9 August 2016 (LG Magdeburg).

specifically serve to protect him.¹⁷⁹ According to more recent case law of the BGH¹⁸⁰ and to scholars, *Rechtskreistheorie* alone does not suffice to determine whether the violation of a prohibition to acquire evidence generates a prohibition to use such evidence.¹⁸¹ An autonomous use of this theory lies therefore in the past.¹⁸²

- B) Against this background, part of the relevant literature focuses on the protective purpose (*Schutzzweck*) of the violated provision to allow for a more comprehensive assessment of the possibility to use evidence obtained in violation of a prohibition to acquire evidence.¹⁸³

According to *Grünwald*, it must be examined in each case whether the protective purpose of the provision is already definitively frustrated as soon as it has been violated - or whether the exploitation of the evidence would only represent the completion or a deepening of the violation of the protected interest.¹⁸⁴

In this latter case, the prohibition to use the evidence obtained through the violation of the prohibition to acquire evidence follows directly from the ratio of the violated rule. For example, § 52 StPO on the right of the accused's relatives to refuse testimony intends to guarantee that nobody be forced actively contribute to the conviction of their family member. Moreover, the provision protects the need of human beings to confide in his family members without having to fear that the state will force the disclosure of the information and use it against them. It further protects the interest of the general public in the preservation of the trust relationship between relatives. A prohibition to use the information obtained in violation of § 52 StPO derives from the fact that the infringement of the protected interest has not yet occurred irreparably, as long as the inadmissibly obtained evidence has not been exploited.¹⁸⁵

If, on the other hand, the violation of the protected interest is completed with the violation of the prohibition concerning its acquisition, then it must be assessed whether there are additional reasons against the use of the evidence or whether there is no longer any interest that could stand in the way of establishing the truth.¹⁸⁶

¹⁷⁹ E Schmidt, 'Die Verletzung Der Belehrungspflicht Gemäß § 55 II StPO Als Revisionsgrund' (1958) 13 *JuristenZeitung* 596, 598.

¹⁸⁰ BGHSt 42, 73, 77.

¹⁸¹ G Grünwald, 'Beweisverbote Und Verwertungsverbote' (1966) 21 *JuristenZeitung* 489, 490; S Schwaben, *Die Personelle Reichweite von Beweisverwertungsverbote* (Cuvillier Verlag 2005) 46; Beulke and Swoboda (n 37) 362.

¹⁸² Jahn (n 44) C41; Beulke and Swoboda (n 37) 362.

¹⁸³ Eisenberg (n 38) 156.

¹⁸⁴ Grünwald (n 176) 492.

¹⁸⁵ *ibid* 492, 497.

¹⁸⁶ *ibid* 492–493.

Additional reasons could be the interest of preventing privileged information from being made public: where a doctor, in violation of § 53 StPO on the right to refuse testimony on professional grounds, has been wrongfully induced to disclose facts outside the main hearing, the violation of that right has already been completed. However, there is still an interest in not introducing privileged information into the main hearing and, by making it public, intensifying the violation. This justifies the application of a prohibition to use the evidence at issue.¹⁸⁷

On the contrary, § 55 StPO on any witness' right to refuse to give information merely protects the right or interests of third persons. This protective function is thwarted once and for all once the evidence is gathered. Since the violation would not be exacerbated through the exploitation of the evidence, prohibition to use such evidence does not apply.¹⁸⁸

An exception is represented in case witness information has been obtained through serious infringement of rights, eg through abuse or torture, in violation of §§ 69 para 3 and 136a StPO. In that case, the prohibition to use evidence can have a disciplinary effect on law enforcement agencies discouraging them from disregarding procedural rules.¹⁸⁹

- C) The theory accepted by majority case law¹⁹⁰ and by part of the literature is the so-called balancing (*Abwägung*) theory, according to which, in the absence of generally binding criteria, an appropriate decision can only be made in individual cases on the basis of a comprehensive assessment of the conflicting interests, ie, of the state in the investigation of the crime and of the person concerned in the protection of his or her individual legal interests.¹⁹¹

The main criteria that this theory considers are the seriousness of the offence to be investigated – to the extent this can be assessed at the respective stage of the proceedings – and the intensity or weight of the procedural violation for the personal sphere of the person concerned. According to the balancing theory, the prohibition to use evidence would be necessary if the violated procedural provision is intended to secure the foundations of the procedural position of the suspect or the accused.¹⁹²

¹⁸⁷ *ibid* 498.

¹⁸⁸ *ibid* 499.

¹⁸⁹ *ibid*; T Weigend, 'Unverzichtbares Im Strafverfahrensrecht' (2001) 113 *Zeitschrift für die gesamte Strafrechtswissenschaft* 271, 290.

¹⁹⁰ BGH 24 125, 130; 58 84.

¹⁹¹ Eisenberg (n 38) 156.

¹⁹² BVerfGE 130,1; BGH 38 220.

D) *Jahn* proposes the authority of evidence theory (*Beweisbefugnislehre*), which can be considered a development of the balancing doctrine. The principle states that state action in certain fundamental areas is only legitimised by a law in the formal sense.¹⁹³ This doctrine understands § 244 para 2 StPO as the authorisation basis for the evaluation of evidence and, hence, for the fulfilment of duties deriving from the inquisitorial nature of the German criminal justice system (*Untersuchungsgrundsatz*).¹⁹⁴ Within the framework of a proportionality test, it is examined whether the use of a certain piece of evidence is suitable, necessary and also appropriate in relation to the theory of interaction, according to which § 244 para 2 StPO must be interpreted in the light of the meaning of the fundamental rights in question, in order to achieve a certain evidentiary goal.¹⁹⁵

A solution has been suggested by *Beulke*, according to whom insofar as violations of the rules of criminal procedure are to be assessed, as is the case with dependent prohibitions to use evidence, the balancing theory (*Abwägungslehre*) is not appropriate. In these cases, the legislator has already made an explicit decision on the correct balancing by standardising the procedural rules, so that there is no room for further weighing and only the so-called protective purpose doctrine (*Schutzzwecklehre*) allows (to a certain extent) for assess if a prohibition to use evidence applies. On the other hand, in the case of independent prohibitions to use evidence which are derived from the constitution, the balancing doctrine may be used in the absence of an assessment by the law maker.¹⁹⁶

However, none of the present models seems to offer a general solution regarding the scope of application of prohibitions to use evidence.¹⁹⁷ The absence of a general rule for the application of exclusionary rules and, hence, for the resolution of the conflict between protection of individual rights and the assessment of the substantive truth reflects the reluctance of German criminal justice, as an inquisitorial system, to renounce to information relevant for the judgement because of the way in which such information has been obtained.¹⁹⁸

In literature, there is disagreement as to whether this represents a gap that ideally needs to be filled by the law maker with clear rules, as suggested *inter alia* by *Weigend*,¹⁹⁹ or whether the

¹⁹³ *Jahn* (n 44) C66–C67.

¹⁹⁴ *ibid* C70.

¹⁹⁵ *ibid* C71.

¹⁹⁶ *Beulke* and *Swoboda* (n 37) 362; see also *Eisenberg* (n 38) 158.

¹⁹⁷ *Eisenberg* (n 38) 158.

¹⁹⁸ *Weigend*, ‘The Potential to Secure a Fair Trial Through Evidence Exclusion: A German Perspective’ (n 38) 67.

¹⁹⁹ *Weigend*, ‘Unverzichtbares Im Strafverfahrensrecht’ (n 184) 290.

dialectic of the different doctrines is sufficient to adequately address a wide range of issues relating to the usability of evidence, as maintained in *Rogall*.²⁰⁰

²⁰⁰ K Rogall, 'Beweiserhebungs- Und Beweisverwertungsverbote Im Spannungsfeld Zwischen Den Garantien Des Rechtsstaates Und Der Effektiven Bekämpfung von Kriminalität Und Terrorismus' (2008) 63 *JuristenZeitung* 818, 819.

4 SYSTEMATISATION OF RULES ON EXCLUSION OF ILLEGALLY OBTAINED EVIDENCE

Exclusionary rules pertaining to illegally obtained evidence can vary widely across jurisdictions in a number of ways. Distinctions can exist in terms of who the competent actor is to decide on admissibility and on guilt; at what stage of the proceedings exclusion takes place; the use of rules forbidding the collection of evidence, rules prohibiting the use of evidence, and rules requiring physical exclusion or even destruction of the evidence; whether the rules are written or unwritten; whether they impose mandatory exclusion or allow for a judicial discretion with a balancing test; how domestic and foreign illegally obtained evidence is treated; and how illegally obtained evidence may be used for incriminating and exonerating purposes. This section analyses these distinctions with the aim of systematising exclusionary rules across jurisdictions and illuminating why and in what way similar issues might be approached in (seemingly) different ways in different criminal justice systems.

4.1 Who decides on exclusion and at what stage of the proceedings?

The different structure of the trial in continental jurisdictions compared to common law countries explains the diverging approaches in terms of which actors decide on admissibility and exclusion of evidence and guilt and at what stage of the proceedings, but only to some extent. As explained in chapter 2 (section 2.2.1), common law countries generally have a bifurcated trial structure, whereas continental jurisdictions have adopted a unitary trial structure.²⁰¹ Traditionally the dichotomy is presented as common law countries excluding evidence ‘ex ante’, which entails that there is a moment before the trial where the judge decides on the admissibility of the evidence. Any inadmissible evidence is excluded at that point and is withheld from the jury, who is the fact-finder. In continental jurisdictions, by contrast, there is rarely a moment at trial where evidence is formally admitted. Instead, the judge usually has access to all the evidence contained in the criminal dossier. At the trial, a professional judge is tasked with deciding whether particular evidence should be used in the criminal trial and establishing the facts. The same professional judge who has to decide on the defendant’s guilt, will also already have been exposed to the evidence that needs to be excluded. The unitary trial structure is such that the fact-finder is not shielded from the tainted evidence. In this context, ‘exclusion’ of evidence does not necessarily mean that the evidence is physically removed from the criminal dossier, but rather that the judge needs to disregard or ignore the tainted evidence when deciding on the defendant’s guilt and, where there is a duty to give reasons, when giving a judgment.²⁰² However, this section demonstrates that this classic representation of the two

²⁰¹ Damaska, *Evidence Law Adrift* (n 4) ch 2. See supra Section 2.2.3.

²⁰² Giannouloupoulos (n 8) 7; Thaman and Brodowski (n 8) 428; Ryan (n 8) 97.

systems should be considerably nuanced and that in fact England, Germany, Italy and Belgium are all hybrid systems that do not neatly correspond with these two models.

4.1.1 England and Wales

In England, there is a distinction to be drawn between criminal cases heard at the Crown Court and the magistrates' court.²⁰³ In the English Crown Court there is a bifurcation of the division of labour between the trial judge and the jury. Issues regarding the admissibility of evidence are considered matters of law, which entails the judge, not the jury, decides on them. If the prosecution proposes to adduce evidence and the defence objects to its admissibility for whatever reason, the court will first have to hear evidence on the preliminary facts pertaining to admissibility and adjudicate upon them. The judge hears the evidence and adjudicates upon the disputed preliminary facts at a trial on the *voir dire*,²⁰⁴ which is a pre-trial hearing and colloquially referred to as a 'trial within a trial',²⁰⁵ without the presence of the jury. This is to avoid that the triers of fact are exposed to the disputed evidence, which may be ruled inadmissible. The jury will then decide on matters of fact, notably whether or not the defendant is guilty, without any knowledge of evidence that was previously excluded.²⁰⁶

However, the majority of criminal cases are decided in the magistrates' court.²⁰⁷ Magistrates decide both on issues of law and fact. Magistrates must undertake the same artificial mental exercise as judges in continental trials (see further), which requires them to ignore the tainted evidence which they have just before decided should be excluded.²⁰⁸ Depending on the legal ground the defence invokes to exclude the evidence, the magistrates have to decide on questions of admissibility either as a preliminary issue in a trial within a trial, or they may decide to hear the entire prosecution case first, including the disputed evidence, and decide on admissibility of the evidence only at the end of the hearing.²⁰⁹

²⁰³ For a detailed discussion of all the procedural issues exclusion of evidence may raise see P Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (Clarendon 1997) ch 3.

²⁰⁴ This is occasionally spelled with an optional extra 'e': *voire dire* (Roberts and Zuckerman (n 20) 450, fn 216).

²⁰⁵ Keane and McKeown (n 9) 37–38; Roberts and Zuckerman (n 20) 450.

²⁰⁶ Giannouloupoulos (n 8) 7; Keane and McKeown (n 9) 37–38.

²⁰⁷ Almost all cases start in the magistrates' court and 95 per cent is completed there: see 'Magistrates' Court' (*Courts and Tribunals Judiciary*) <<https://www.judiciary.uk/you-and-the-judiciary/going-to-court/magistrates-court/>> accessed 3 September 2020.

²⁰⁸ Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (n 203) 34.

²⁰⁹ For a more detailed account of which grounds for exclusion will influence when admissibility issues are decided in the magistrates' courts see Keane and McKeown (n 9) 39–40.

4.1.2 Belgium

In Belgium, evidence can be declared inadmissible both at the investigating stage in certain circumstances and at the trial stage. The key differences between exclusion of illegally obtained evidence in the investigating stage and the trial stage are the competent body to decide on admissibility on the one hand, and the procedural mechanism by which evidence is excluded on the other.

4.1.2.1 Pre-trial investigating stage

In order to understand at what stages of the proceedings evidence can be declared inadmissible in Belgium, a short introduction to the Belgian criminal justice system is required. The pre-trial investigation is conducted in writing. Every investigative measure and its result, regardless of whether it is legal, must be contained in the case file. In 90 per cent of criminal cases, the investigation is done in the context of a ‘preliminary investigation’ (*information/opsporingsonderzoek*), conducted by the public prosecution service (*ministère public/openbaar ministerie*). In the remaining 10 per cent of cases, a judicial enquiry (*instruction/gerechtelijk onderzoek*) is launched, during which the investigation is conducted by an investigating judge (*juge d’instruction/onderzoeksrechter*) under the supervision of the Indictment Chamber of the Court of Appeal (*Chambre des Mises en Accusation/Kamer van Inbeschuldigingstelling*). As part of the investigation, the accused and witnesses are questioned. The written record of their statements (*procès-verbaux/processen-verbaal*) are collected in the investigative dossier or case file, alongside other pieces of evidence. The trial court has access to this dossier before and during the trial.

In case a ‘preliminary investigation’ is carried out by the public prosecution, illegally obtained evidence can only be excluded at the subsequent trial. There is no mechanism by which evidence can be filtered out before the trial and it can be avoided that the trial judge gets sight of the tainted evidence. At the end of the preliminary investigation, the prosecution does have the option, however, of not referring the case to trial if it is concerned that the illicit action may hamper its case.²¹⁰

The situation is different if a case is subject to a ‘judicial enquiry’ led by an investigating judge. When the investigating judge deems his enquiry to be complete and after the prosecution service has formulated the indictment, the case will be brought before the Council Chamber (*chambre du conseil/raadkamer*) of the local criminal court. It has the power to decide whether there is sufficient evidence to refer the suspect to trial or whether there is no case to answer. Additionally, the Council Chamber has the power to ‘purify’ the case file at a pre-trial hearing

²¹⁰ S De Decker and F Verbruggen, ‘Across the River and Into the Poisonous Trees: From Exclusion to Use of Illegally Gathered Evidence in Criminal Proceedings in Belgium’ in AW Jongbloed (ed), *The XIIIth World Congress of Procedural Law: the Belgian and Dutch Reports* (Intersentia 2008) 83.

by eliminating any procedural acts or documents that are null and void, such as illegally obtained evidence.²¹¹ The Indictment Chamber, which supervises the actions taken during the investigating stage and deals with appeals against certain decisions by the investigating judge and the Council Chamber, has the same power.²¹² The documents that are considered null and void are then physically removed from the case file and deposited at the registry of the court of first instance.²¹³ This procedure is commonly referred to as the ‘purification of nullities’ (*zuivering van nietigheden/purge des nullités*).

The rationale behind the exclusion of evidence at the investigating stage is threefold. First, it aims to avoid that the trial judge has knowledge of the tainted evidence and is subconsciously influenced by it when deciding on the defendant’s guilt.²¹⁴ Secondly, the procedure equally avoids that parties who are involved in the proceedings only after the case has already been referred to the trial court,²¹⁵ would be able to view evidence that has been removed from the case file.²¹⁶ Third, there is a concern for procedural economy. The idea is that it is better that parties know sooner rather than later whether certain investigative acts are valid and the evidence can be used, to avoid that an extensive and expensive trial must be conducted during which the trial judge will need to exclude evidence on the basis of a nullity that was present from the outset, thus potentially undermining the whole case.²¹⁷

However, the physical removal of the tainted evidence from the criminal dossier does not mean that they cannot be used at all anymore and have some influence on the outcome of the trial. The Council Chamber and Indictment Chamber decide to what extent these documents may still be consulted and used at a later stage of the proceedings.²¹⁸ For instance, it is conceivable that the prosecution is prohibited from using a piece of illegally obtained evidence to incriminate the defendant, but that the defendant may rely on said evidence to exonerate himself.²¹⁹

²¹¹ Article 131, §1 CCP.

²¹² Article 235bis, §6 CCP.

²¹³ Article 131, §2 and 235bis, §6 CCP.

²¹⁴ Verstraeten, *Handboek Strafvordering* (n 61) 680 nr 1325.

²¹⁵ Eg a victim who only formally becomes *partie civile* at the first trial court hearing or a party who is directly summoned by the investigative courts (ie Council Chamber and Indictment Chamber) after they have already referred the case to trial.

²¹⁶ Verstraeten, *Handboek Strafvordering* (n 61) 764.

²¹⁷ J Fermon, F Verbruggen and S De Decker, ‘The Investigative Stage of the Criminal Process in Belgium’ in E Cape and others (eds), *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union* (Intersentia 2007) 51; Verstraeten, *Handboek Strafvordering* (n 61) 680 nr 1325.

²¹⁸ Article 131, §2 and 235bis, §6 CCP respectively.

²¹⁹ Cass. 12 November 1997, *Arr. Cass.* 1997, 1115, *Rev. dr. Pén.* 1998, 586; Cass. 3 November 1999, *Arr. Cass.* 1999, 1369, *T. Strafr.* 2000, 255, comment J Meese. See below Section 4.7 on incriminating and exonerating use of illegally obtained evidence.

Judges can exclude evidence at their own motion or at the request of one of the parties.²²⁰ If any irregularities or nullities are raised before the Council Chamber and it decides not to declare the investigative actions or documents null and void, and no appeal is lodged against this decision, the parties can raise this same motion again before the trial court. If, however, the Council Chamber declares the investigative action or documents null and void and removes it from the case file, and no appeal is lodged, a motion to exclude the evidence can no longer be raised at trial.²²¹ If irregularities or nullities are raised before the Indictment Chamber, they can no longer be raised at trial, regardless of the decision the Indictment Chamber comes to, except for any issues pertaining to the valuation of evidence.²²² This approach is justified in light of procedural economy. The reason why a different rule applies to the decisions of the Council Chamber and those before the Indictment Chamber seem to rest on the Belgian machinery of justice, in that the Indictment chamber occupies a higher position than the Council Chamber and the first instance trial judge. Overall, however, it can be debated whether the said disparity is entirely warranted even in the context of a different institutional position of the two courts.

The recently introduced Bill for a new Code of Criminal Procedure proposes to abolish the pre-trial ‘purification of nullities’ procedure.²²³ Instead, any decision regarding the admissibility and exclusion of illegally obtained evidence will only be made by the trial judge. The explanatory notes accompanying the Bill set out the various reasons for the proposed change. It mentions that the current procedure during the investigating phase does not achieve the anticipated aim of shielding the trial court from the tainted evidence. This is due to the fact that it is optional to raise any irregularities or nullities before the Indictment Chamber; some parties choose strategically to raise these issues only during the trial stage. Additionally, the current system is said not to be sufficiently respectful of the rights of third parties who are not involved in the ‘purification of nullities’ procedure, such as another accused or a party who will not be included in the proceedings until a later stage. Finally, the Bill proposes to change the approach to exclusion of illegally obtained evidence altogether. Under the current system as established in Article 32 PT CCP and the Antigon case law, judges have a wide discretion to admit or exclude illegally obtained evidence.²²⁴ The Bill suggests that the decision of whether or not such evidence should be excluded often depends on the proceedings as a whole, which justifies leaving it until the trial stage to decide on admissibility.²²⁵

²²⁰ In respect of the Indictment Chamber: Article 235bis, §1 CCP. There is no equivalent statutory provision pertaining to the Council Chamber, but the same rule applies there: Verstraeten, *Handboek Strafvordering* (n 61) 681 nr 1327.

²²¹ *ibid* 683, nr. 1330.

²²² Article 235bis, §5 CCP.

²²³ Bill for the Code of Criminal Procedure, *Parl. Doc.* Kamer 2019-2020, no 55 1239/001.

²²⁴ See above Section 3.2.

²²⁵ Bill for the Code of Criminal Procedure, *Parl. Doc.* Kamer 2019-2020, no 55 1239/001, <https://www.lachambre.be/FLWB/PDF/55/1239/55K1239001.pdf>, 70-71.

4.1.2.2 Trial stage

In Belgium, the vast majority of criminal cases are tried by police courts (*tribunal de police/politierechtbank*) and correctional courts (*tribunal correctional/correctionele rechtbank*). The focus of the trial is debating issues of guilt on the basis of the evidence that is included in the case file, to which all the parties have access, and sentencing issues.²²⁶ Trials before these courts have a unitary structure, which entails that the issue of defendant's guilt and his sentence are determined in a single proceeding. The unitary structure also means that the professional judge is both the trier of facts, deciding on the defendant's guilt, and the competent actor to rule on admissibility and exclusion of evidence. As in the investigation stage, judges at the trial stage can exclude evidence of their own motion or at the request of one of the parties. If a judge decides that illegally obtained evidence must be 'excluded', this does not entail that evidence is physically removed from the dossier. In line with the traditionally continental approach, this entails that the judge may not rely on it to reach a verdict. In that sense, like in Germany, exclusion of evidence in the Belgium is best viewed as a prohibition on the use of evidence. While it is questionable whether professional judges are indeed capable of 'ignoring' the tainted evidence, the situation is even more problematic before the court of assizes (*cour d'assises/hof van Assisen*), which is the only Belgian criminal court where the lay jury is the trier of facts.²²⁷ This court adjudicates the most serious offences, which make up less than 0,1 per cent of all criminal cases.²²⁸ The presiding professional judge decides on the exclusion of illegally obtained evidence, but this debate is held in full presence of the jury.²²⁹ The lay jury may find it even more difficult than professional judges not to be subconsciously influenced by the tainted evidence in reaching their verdict.

4.1.3 Germany

In Germany, the trial court in the main proceedings (*Hauptverhandlung*) is, as per § 244(2) StPO, solely responsible for deciding what evidence is introduced at trial. This marks a difference compared to the law in England and Wales where evidence may be excluded *ex ante* in a separate pre-trial hearing or *voir dire*.²³⁰

This is not to say that within the German system there is no judicial protection against invasive investigative measures before the trial phase. In fact, the German Code of Criminal Procedure provides under §101(7) StPO for remedies against unlawfully ordered or unlawfully executed

²²⁶ De Decker and Verbruggen (n 210) 84.

²²⁷ Ibid, 271; K Beyens and V Scheirs, 'Encounters of a Different Kind. Social Enquiry and Sentencing in Belgium' (2010) 12 Punishment and Society 309, 313.

²²⁸ De Decker and Verbruggen (n 210) 65, fn 6; B Aerts, 'Voortdurend Gesleutel Aan Assisen Is Basis Voor Vergissingen' (2016) 333 Juristenkrant 10.

²²⁹ De Decker and Verbruggen (n 210) 84.

²³⁰ Giannouloupoulos (n 8) 7.

undercover measures also during the investigative stage. However, unlike in Belgium, according to general opinion, such decision on the lawfulness of the order or execution of undercover investigative measures has no binding effect for the later decision on the inclusion or exclusion of evidence by the trial court.²³¹

After the investigation stage has been terminated, the prosecutor may decide to file a formal accusation (*Anklage*), at which point a second stage in the proceedings is entered, the so-called intermediary procedure (*Zwischenverfahren*). The prosecutor submits the formal accusation alongside the criminal dossier, containing the evidence gathered during the investigation stage, to the trial court. The members of the trial court, sitting without lay judges, then review the file and decide whether there is sufficient evidence available to make the accused stand trial on the charges and decide accordingly whether to open the main proceedings or whether the proceedings should be provisionally terminated.²³² At this stage of the proceedings, the trial court also considers whether the evidence the prosecution proposes to introduce is admissible at trial. Issues such as the admissibility of evidence can be discussed during this intermediary phase of the proceedings, which are normally conducted in writing, or the court may decide to hold a special hearing (§202a StPO) before the trial.²³³

The inquisitorial principle (*Untersuchungsgrundsatz*) enshrined in § 244(2) StPO imposes an obligation for the court to take evidence to comprehensively clarify the facts of the case. According to the BGH,²³⁴ this obligation extends so far as the circumstances, that are known to the court or should have been known to the court, urge or suggest the use of a particular further piece of evidence.²³⁵ This is necessary since the court shall decide on the result of the taking of evidence, at its discretion and conviction based on the entire content of the hearing, in line with § 261 StPO establishing the principle of judge's free evaluation of evidence.²³⁶

Against this background, the exclusion of evidence creates a dilemma that opposes the interest in basing a judgement on true and complete facts to the interest of conducting fair proceedings.²³⁷ As *Weigend* remarks, each exclusion of evidence affects the court's truth-finding process. Both legislature and courts,²³⁸ including the Federal Constitutional Court

²³¹ Eisenberg (n 38) 1187; Thaman and Brodowski (n 8) 457, fn 138.

²³² §§ 199-211 StPO.

²³³ Weigend, 'The Potential to Secure a Fair Trial Through Evidence Exclusion: A German Perspective' (n 38) 67.

²³⁴ BGH StV 1981, 164.

²³⁵ Beulke and Swoboda (n 37) 319.

²³⁶ *ibid* 317.

²³⁷ Weigend, 'The Potential to Secure a Fair Trial Through Evidence Exclusion: A German Perspective' (n 38) 61-62.

²³⁸ BGHSt (Grs) 11, 213, 214.

(*Bundesverfassungsgericht*, hereinafter: BVerfG),²³⁹ are therefore hesitant to accept broad rules of excluding illegally obtained evidence, which must remain an exception.²⁴⁰

The restrictive approach towards exclusionary rules emerges also in the so-called objection solution (*Widerspruchslösung*). According to this solution, to which a 1992 BGH decision has given an enormous boost,²⁴¹ to recognise the validity of an increasing number of prohibitions to use evidence, the defendant must propose timely objection against the use of a specific evidence.²⁴² For an objection to be timely, it must be proposed immediately after the evidence in question is taken – as soon as it is possible for the first time. This is in line with the delay indicated under § 257 StPO regarding the questioning of the defendant and his right to make a statement after taking of evidence. After that, the objection and with it the imposition of a prohibition to use certain evidence is precluded.²⁴³

This solution has encountered harsh criticism on the part of the literature,²⁴⁴ as it transfers judicial duties of clarification and care to the defence counsel, leads to the disregard of the most serious procedural violations without a legal basis and thus violates defendant's right to a fair trial.²⁴⁵ Nevertheless, the BVerfG²⁴⁶ confirmed that the objection solution is constitutional: in the past, the basis for this reasoning was identified in the defendant's right of disposition, more recently case law justifies this position with the goal of preservation of resources by imposing an assertion of the prohibition to use evidence as early as possible.²⁴⁷

If the court finds that the prohibition to use certain evidence applies, its judgment must not be based on this evidence.²⁴⁸ The evidence whose use is inhibited remains, however, in the case file and are therefore known to the judges. If evidence is introduced at trial and later determined to be inadmissible, not only professional judges but also lay judges will see this evidence. In that sense, the term 'non-use' of evidence or 'prohibition on the use of evidence' is more accurate than 'exclusion' in the German context.²⁴⁹

²³⁹ BVerfG (Beschluss der 1. Kammer des Zweiten Senats) 9 November 2010 – 2 BvR 2101/09 –, Rn 1-62.

²⁴⁰ Weigend, 'The Potential to Secure a Fair Trial Through Evidence Exclusion: A German Perspective' (n 38) 73.

²⁴¹ BGHSt 38, 214.

²⁴² Beulke and Swoboda (n 37) 363.

²⁴³ OLG Celle, Judgment of 18 December 2013 – 31. Ss 35/13.

²⁴⁴ Jahn (n 44) C111–C112; M El-Ghazi and A Merold, 'Der Widerspruch Zur Rechten Zeit' (2013) 14 HRRS Onlinezeitschrift für Höchststrichterliche Rechtsprechung zum Strafrecht 412, 414.

²⁴⁵ Beulke and Swoboda (n 37) 364.

²⁴⁶ BVerfG, Beschluss des Zweiten Senats vom 7. Dezember 2011 – 2 BvR 2500/09 –, Rn. 1-182.

²⁴⁷ Jahn (n 44) C110; Beulke and Swoboda (n 37) 364.

²⁴⁸ Weigend, 'The Potential to Secure a Fair Trial Through Evidence Exclusion: A German Perspective' (n 38) 74–75.

²⁴⁹ See e.g. Thaman and Brodowski (n 8), who use similar terms.

Judges are required to ‘ignore’ or ‘forget about’ inadmissible evidence when deciding on the defendant’s guilt and they may not refer to or include inadmissible evidence in the oral and written justification that must accompany the judgment (§ 267 StPO).²⁵⁰ The question arises, however, to what extent judges, and even more so lay judges, will be capable of performing such a ‘psychological acrobatics’ by blanking out unusable findings when reaching a decision.²⁵¹

If the evidence is admitted by the trial court although it should have been excluded due to a prohibition to use, the defendant may lodge an appeal on legal grounds (so-called *Revision* regulated under § 337 StPO), on this fault. For this legal remedy to be effective, it must be established that the judgment would have been different if the court had disregarded the evidence in question.²⁵²

4.1.4 Italy

In Italy the admission of evidence is a concept that applies specifically to the trial stage. During the investigative stage the evidence is collected by the prosecutors and the police without any formal decision on admission. When the defence intends to add to the file the results of private investigations, this does require a formal moment of admission.²⁵³ Unlike in Belgium, there is in Italy no moment during the investigative stage where the file is purged by tainted elements. Such a control would be unnecessary due to the fact that investigative evidence is not normally handed over to the trial court. Nonetheless, this does not mean that exclusionary rules cannot play a role already at the investigating stage.²⁵⁴ If an element is tainted, it means that it cannot be used for a decision to be taken during the pre-trial phase: e.g. the placing of a person in custody, or the ordering of some intrusive investigative means (e.g. interceptions), or the committal to trial of the accused. Non-usability rules, just like nullities, do not necessarily entail a removal of the tainted evidence from the file, but they certainly preclude the competent court/judge from basing its decision on that element. It is worth adding, at this point, that the exclusionary rules (*rectius*, non-usability rules) operating in the investigating phase are

²⁵⁰ Weigend, ‘The Potential to Secure a Fair Trial Through Evidence Exclusion: A German Perspective’ (n 38) 75; T Weigend, ‘Germany’ in CM Bradley (ed), *Criminal Procedure: A Worldwide Study* (2nd edn, Carolina Academic Press 2007) 197–198; T Weigend, ‘Throw It All Out? Judicial Discretion in Dealing with Procedural Faults’ in M Caianiello and J Hodgson (eds), *Discretionary Criminal Justice in a Comparative Context* (Carolina Academic Press 2015) 189; Bradley (n 2) 1963.

²⁵¹ Löffelmann (n 40) 10; Weigend, ‘The Potential to Secure a Fair Trial Through Evidence Exclusion: A German Perspective’ (n 38) 75.

²⁵² Weigend, ‘The Potential to Secure a Fair Trial Through Evidence Exclusion: A German Perspective’ (n 38) 75.

²⁵³ Article 391-*octies* code of criminal procedure. According to section 3 of this article, evidence collected by private parties is simply placed in a special dossier which is kept by the registry of the judge for the preliminary investigations. Alternatively, the defence can hand these results directly to the judge or to the public prosecutor (Article 391-*octies*, section 1, 2 and 4, Code of criminal procedure).

²⁵⁴ A Scella, *Prove penali e inutilizzabilità* (Giappichelli 2000) 187; Court of Cassation 22 April 1999, Madonia, *Cass. pen.* 2000, 964.

however fewer than in the trial phase. At trial, these rules also entail the exclusion of investigative evidence. Moreover, there are specific trial rules for the collection of evidence that do not apply to the earlier stages, such as strict limits on second-hand testimony,²⁵⁵ and stricter protocols for questioning witnesses.²⁵⁶

When the trial starts, the parties request the evidence they want to introduce, and it is for the court to decide on admission.²⁵⁷ As mentioned, the trial court does not have access to the investigative file and/or to the investigative evidence, with only few exceptions.²⁵⁸ The exceptions mostly concern the investigative means that cannot be replicated at trial and the evidence that has exceptionally been collected during the trial stage with the safeguards of a trial hearing.²⁵⁹ The rules for admission of evidence apply to all proceedings regardless of the court competent for adjudication. Hence, the same provisions apply before the Court of Assize, where professional judges are joined in the panel by lay judges.

The rules on exclusion of evidence are called rules of “non-usability”. Nonetheless, these rules already apply at the moment of the admission of the evidence in that they prevent the admission of the evidence requested by the party if one of the legal prohibitions apply. This is the case with regard to prohibitions concerning specific categories of evidence or specific source of evidence. Although it is not common in Italian law to categorize legal prohibitions to use evidence as the German literature has done with regard to *Beweisverboten*, similar classifications could be made. In some cases the law forbids certain categories of evidence (e.g. the testimony under oath of a defendant), while in other cases it forbids to obtain information from certain source (e.g. the testimonial deposition of the judge). Methods contravening to the liberty and moral integrity of people are also forbidden.²⁶⁰ Whenever the court does not admit evidence, this prevents that it be collected at trial, hence shielding the trier of fact from being influenced by the information in question. When the evidence requested is real evidence (objects, documents, etc.), though, the non-admission of the evidence might still give the judge the possibility to get knowledge of the information. The trier of fact has indeed knowledge of the information when the ground of non-usability surfaces after the admission. Nonetheless, it is assumed that the courts are able to mentally remove any prejudicial effect in these cases, by taking their decision solely on lawful evidence.

It is however possible that the courts wrongly decide on the admission. In this case, evidence ought to be declared non usable during the trial, or at the moment of the closing of the hearing

²⁵⁵ Article 195 Code of criminal procedure.

²⁵⁶ Article 498 and 499 Code of criminal procedure.

²⁵⁷ Article 190 Code of criminal procedure.

²⁵⁸ See Article 431 Code of criminal procedure.

²⁵⁹ M Panzavolta, ‘Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System’ (2005) 30(3) North Carolina Journal of International Law and Commercial Regulation 577-624.

²⁶⁰ Article 189 Code of criminal procedure.

before deliberation. Nothing precludes that a similar decision be taken during the deliberation, though no formal decision was taken earlier.

It was mentioned that rules prohibiting the use of evidence do not only concern categories of evidence, or sources of information. Sometimes the prohibition concerns the way in which the evidence has been collected. For instance, testimonial depositions are normally admissible, but if witnesses are questioned in an improper manner, the declarations obtained cannot be used. In similar cases, the rules on non-usability do not prevent the admission of the evidence, but they simply prevent the trial court from using it. The scholarship describes the difference by resorting to the latin expression ‘*an*’ and ‘*quomodo*’, ‘if’ and ‘how’. Some rules establish ‘if’ the evidence can be introduced at trial, other rules stipulate ‘how’ it can be introduced (that is, collected) at trial. While prohibitions of the first type prevent admission and use altogether, prohibitions of the second type prevent only the use of the evidence.

The declaration that a certain piece of evidence is tainted by a ground of non-usability does not entail the removal from the file. It is only in some instances that the Code explicitly requires that evidence be removed from the file and even destroyed. The literature calls these cases of “enhanced non-usability”, because the prohibition to use the evidence is enhanced by the physical removal of the evidence.²⁶¹

4.1.5 Interim conclusion

The traditional dichotomy between common law and continental jurisdictions in terms of which actor decides on admissibility and exclusion and at what stage of the proceedings applies only partially to the jurisdictions in this report. In the English Crown Court, and in the Belgian investigating stage during the pre-trial hearing before the Indictment Chamber, evidence is excluded before the trial and the triers of fact remain ignorant of it. In this regard, there is no significant difference between how exclusionary rules operate in unitary and bifurcated trial contexts, because the impact of exclusion is the same in both settings.²⁶² It is recalled, however, that in Belgium parties only get the opportunity of submitting a nullity application to the Council Chamber or Chamber of Indictment if the investigation is carried out as a ‘judicial enquiry’ rather than a ‘preliminary investigation’, which remains the minority of all criminal cases. Parties may also strategically opt not to submit a nullity application in the pre-trial phase and wait to raise the issue until the trial stage. Finally, the Bill for a new Code of Criminal Procedure proposes to abolish the pre-trial purification of nullities. In other words, while the overall impact of the ‘purification of nullities’ procedure is already limited under the current law, if the Bill is passed Belgium will lose any pre-trial mechanism for exclusion of evidence altogether.

²⁶¹ Scella, *Prove penali* (n 254) 111.

²⁶² Damaska, *Evidence Law Adrift* (n 4) 47.

When the need for assessing the admissibility of evidence only arises at the trial stage, the contrast between unitary and bifurcated trial organisation is significant. In the English Crown Court any admissibility issues that arise at trial are determined by professional judges at the *voir dire*, in absence of the jury, owing to its bifurcated structure. By contrast, in the English magistrates' courts, as well as in the Belgian and German trial, which all have a unitary structure, the same individuals who decide on the admissibility of evidence and thus get sight of the possibly tainted evidence also decide on the defendant's guilt.²⁶³ While it is not possible to do justice to this issue within the scope of this study, it is questionable whether professional judges, and indeed lay judges, are in fact capable of disregarding or ignoring the illegally obtained evidence in their decision-making and not relying on it to inform their judgment.²⁶⁴

4.2 Different procedural concepts with similar effects: exclusion, prohibition of use, and nullity

The previous section already indicated that a distinction must be made between the concept of exclusion of evidence in the strict sense and a prohibition on the use of evidence. In general, common law jurisdictions use the notion 'exclusion' in the strict sense of shielding the fact-finder from the tainted information, and continental countries instead regulate its use. Additionally, Napoleonic inquisitorial jurisdictions, such as Belgium and France, traditionally treated errors in carrying out procedural acts as procedural 'nullities', which entails that the procedural act is void of any legal force.²⁶⁵ In France, procedural 'nullities' are still the only statutory grounds for excluding evidence.²⁶⁶ However, Belgium's current rules on illegally obtained evidence are based on the procedural sanction of 'nullity', as well as 'exclusion' in the sense that the evidence is physically removed from the case file at the pre-trial stage, and 'prohibition of use' at the trial stage whereby the evidence remains in the case file but the fact-finders are prohibited from relying on the evidence to reach a verdict. German law refers to the 'evidentiary prohibitions' or 'prohibitions on the use of evidence' (*Beweisverbote*).²⁶⁷ Italy has a mixed system, containing both modern rules of 'non-usability' (*inutilizzabilità*),²⁶⁸ as well as

²⁶³ See *ibid.*

²⁶⁴ See e.g. concurring opinion of judge Župančič in *Dvorski v Croatia* (2016) 63 EHRR 7, paras 11-14; *ibid* 47–52; Weigend, 'Throw It All Out? Judicial Discretion in Dealing with Procedural Faults' (n 250), 189; Giannoulououlos (n 8) 7–11.

²⁶⁵ In modern French law see Article 170, 171, 174, para 3, 802 CCP-France; S Thaman, 'Balancing Truth Against Human Rights: A Theory of Modern Exclusionary Rules' in S Thaman (ed), *Exclusionary rules in comparative law* (Springer 2013) 410–412. In modern Belgian law see Article 32 PT CCP-Belgium; De Smet, *Nietigheden in Het Strafproces* (n 146).

²⁶⁶ Thaman, "'Fruits of the Poisonous Tree" in Comparative Law' (n 8) 345; Thaman, 'Balancing Truth Against Human Rights: A Theory of Modern Exclusionary Rules' (n 265) 410.

²⁶⁷ Beling (n 43) 3; Jahn (n 44) C27, C31; Eisenberg (n 38) 140.

²⁶⁸ Article 191 CCP-Italy.

‘nullity’ (*nullità*).²⁶⁹ In order to bring some clarity to the multitude of procedural concepts, this section sets out to what they entail and how they operate procedurally.

4.2.1 Exclusion of evidence

Exclusion of evidence in the strict sense of the word implies that the fact-finder is shielded from the substance or content of the evidence.²⁷⁰ This is the case, for instance, in a trial where there is a bifurcation of roles between the professional judge and the jury, like the English Crown Court. The judge decides on issues of admissibility and exclusion, and the jury only gets sight of the admissible evidence when deciding on the defendant’s guilt. Indeed, exclusion is most prevalent in common law countries,²⁷¹ where jury trials are more common than on the continent. Nonetheless, exclusion in the strict sense also exists in Belgium, where there is a bifurcation of roles between the judge reviewing the legality of investigative measures and the trial judge. At the pre-trial stage, the Council Chamber and the Chamber of Indictment have the power to physically remove the tainted evidence from the criminal dossier,²⁷² which means the trial judge is prevented from seeing this evidence.

4.2.2 Prohibition of use or non-usability of evidence

A prohibition on the use of evidence or ‘non-usability’ of evidence is common in continental countries. Most trials in those jurisdictions have a unitary structure according to which a professional judge determines both issues of admissibility and issues of guilt. Jury trials do exist for the most serious crimes, but they tend to be relatively rare.²⁷³ The unitary structure entails that judges get sight of all evidence, including the evidence they themselves decide is inadmissible. Additionally, in most continental systems such as Belgium, France, and Germany, evidence is not, or not solely, presented at trial. All the evidence that was gathered during the investigative stage is collected in the criminal dossier, which is then passed on to the trial judge. By contrast, systems such as the English and Italian one have a clearer separation between the pre-trial and the trial phase in terms of the presentation of evidence. For instance, witness statements are collected and presented during the trial throughout the process of cross-examination which is led by the lawyers of both parties.²⁷⁴ This contrasts with the dominant continental practice where the judge gets sight of the written record (*procès-verbal/proces-verbaal*) of the witness statement taken by the police during the investigative

²⁶⁹ Tahman, ‘Balancing Truth Against Human Rights: A Theory of Modern Exclusionary Rules’ (n 265) 410.

²⁷⁰ Jackson and Summers (n 4) 72.

²⁷¹ Giannouloupoloulos (n 8) 6.

²⁷² Article 131, §2 and 235bis, §6 CCP.

²⁷³ Jackson and Summers (n 4) 72.

²⁷⁴ M Daniele and E Calvanese, ‘Evidence Gathering’ in RE Kostoris (ed), *Handbook of European Criminal Procedure* (Springer) 382.

stage. The structure of most continental trials is such that actual exclusion in the strict sense of the word, whereby the fact-finder is prevented from seeing the tainted evidence, is impossible.²⁷⁵ Instead, most continental systems tend to have rules concerning how the evidence may be used. A prohibition on the use of evidence entails that judges may not rely on the tainted evidence in reaching a verdict and may not refer to it when giving oral or written reasons for their judgment.

4.2.3 Nullity

The procedural sanction of nullity entails that, if an act is performed in breach of a procedural standard, the act will be declared ‘null and void’, meaning it is devoid of validity. Strictly speaking, a ‘nullity’ relates to procedural acts, and not directly to the evidence that these acts might have produced.²⁷⁶ The procedural act that is null and void does not produce its legal effects. As a consequence, the evidence that was obtained through this act is prohibited from being used in the remainder of the criminal process. For example, if the police conduct a search in violation of a procedural rule, the search will be declared null and void and will not produce the legal effect of the discovery of evidence. This often entails that the evidence obtained from the nullified search will have to be excluded from the criminal dossier at the pre-trial stage. However, it is possible that the evidence remains in the criminal dossier and when the case proceeds to trial, the trial court will find the evidence to be inadmissible, meaning it may not base its judgment on it.²⁷⁷

For instance, in France Article 802 CCP provides:

In case of violations of formalities prescribed by law under penalty of nullity or [in case of] violations of substantial formalities, every jurisdiction, including the Court of Cassation, to which an application of nullity is referred to or [every jurisdiction] that examines such irregularity *ex officio*, can only pronounce a nullity if the irregularity has the effect of harming the interests of the party that it concerns.

In other words, irregularities in the process of gathering evidence may lead to nullity of the procedural act. However, declaring an act null and void is subject to the discretionary finding that the party concerned has in fact suffered procedural ‘harm’ as a consequence of the irregularity. A breach of a provision does not in itself lead to exclusion of evidence. It first allows the court to exercise its discretion to declare the procedural act null, and then in turn allows the court to make the evidence obtained through the procedural act non-usable in the

²⁷⁵ Jackson and Summers (n 4) 72.

²⁷⁶ Thaman, “‘Fruits of the Poisonous Tree’ in Comparative Law” (n 8) 345; Thaman, ‘Balancing Truth Against Human Rights: A Theory of Modern Exclusionary Rules’ (n 265) 410.

²⁷⁷ Giannouloupoulos (n 8) 6–7; Ho, ‘Exclusion of Wrongfully Obtained Evidence: A Comparative Analysis’ (n 8) 821–822.

criminal process. Article 802 CCP-France pertains to so-called ‘private interest’ nullities. These must be distinguished from ‘public order’ nullities. If a provision of public order has been breached, there is no need to demonstrate that the defendant has suffered any prejudice; the harm is presumed and the nullity is automatic. In respect of illegally obtained evidence, the ‘private interest’ nullities are most important.²⁷⁸

It is recalled that in Belgium, the sole statutory provision on illegally obtained evidence is Article 32 PT CCP. While the provision was quoted above,²⁷⁹ a very literal translation of this provision demonstrates that the concept of nullity actually features twice:

Nullity of illegally obtained evidence shall be the result only if:

- (i) Respect for certain formalities is required under penalty of nullity, or;
- (ii) The irregularity has tainted the reliability of the evidence, or;
- (iii) The use of the evidence is in violation of the right to fair trial.²⁸⁰

Arguably, not just the text of the provision itself, but the law in general would have been clearer if the reference to nullity would have been omitted. Instead of stating that ‘nullity’ of illegally obtained evidence can result only in three limited circumstances, it would have been more straightforward to provide that illegally obtained evidence may not be used in the criminal proceedings in the three aforementioned circumstances. Secondly, the first ground for exclusion is the violation of a formality under penalty of nullity. As will be argued below, this exclusionary ground has very limited scope of application in practice as there are only a handful of statutory nullities in Belgian criminal procedure. Furthermore, there is another category of nullities, so-called substantial nullities that has been omitted from the law on illegally obtained evidence.²⁸¹

In Italy, nullities and exclusionary rules are different categories. The latter was introduced precisely to complement the former in the field of evidence. It was in fact observed that the rules on nullities were inadequate to address the problem of evidence collected improperly.

In modern law, the concept of ‘nullity’ adds little to the concepts of ‘exclusion’ and ‘non-usability’. If anything, it is a highly technical and complex remainder of the Napoleonic influence in systems such as the Belgian, French, and Italian one. Nonetheless, the concept of nullity still features to this day in a range of Codes of Criminal Procedure, and so it is necessary to understand what this concept entails and how it functions procedurally.

²⁷⁸ Giannouloupoulos (n 8) 85–86.

²⁷⁹ See Section 3.2.

²⁸⁰ Own translation.

²⁸¹ See Section 6.1.1.

In sum, ‘exclusion of evidence’, ‘non-usability’ or a ‘prohibition on use’ of evidence, and ‘nullity’ in principle exercise the same function: they prevent the fact-finder from considering the evidence and relying on it to reach a verdict.²⁸² Hence, throughout the rest of the report the general term ‘exclusion’ will be used to encompass all three, unless specific reference to one distinct concept is required. Nonetheless, Section 4.1 and 4.2 have demonstrates that the cultural and institutional differences between common law and continental jurisdictions, as well as individual differences between legal systems, influence how these concepts are applied in practice in terms of which legal actor excludes and at what stage of the proceedings.

4.3 Legal source of exclusionary rules

In terms of the legal source of exclusionary rules, a broad distinction can be made between rules established in books and texts on the one hand (such as international treaties, constitutions, or statutory provisions), and rules created by courts on the other. Neither in England and Wales, nor in Belgium is there a comprehensive statutory framework for illegally obtained evidence. In England and Wales statutes provide that confessional evidence must be excluded in certain circumstances as per section 76 PACE, but in the vast majority of cases illegally obtained evidence is dealt with under section 78 PACE. The latter encapsulates the starting point that illegally obtained evidence is in principle admissible, unless the court decides that admission of the evidence would have an adverse effect on the fairness of the proceedings. As section 78 gives courts considerable discretion to exclude prosecution evidence, the majority of the rules on illegally obtained evidence are case law-based.

Under Belgian law, Article 32 PT CCP is the single statutory provision that regulates the use of illegally obtained evidence. This statutory framework is very limited, as it merely copies the three legal grounds for exclusion that had been set out in the case law without incorporating or further improving the body of rules the case law has developed. We can only infer from it that illegally obtained evidence is in principle admissible, unless one of three exceptions applies.²⁸³ Any formalities required under penalty of nullity, which is the first exception, are established by the legislator and hence the courts have no judicial discretion in this regard. However, the courts have considerable judicial discretion in excluding evidence on the basis of the other two exceptions.²⁸⁴ In that sense, the formal starting point in Belgium and England are the same, namely that illegally obtained evidence is in principle admissible but subject to one or more exceptions.

²⁸² Giannouloupoulos (n 8) 6.

²⁸³ Cape et al state that some jurisdictions start from the position that illegally obtained evidence is not admissible and count Belgium amongst these (Cape and others (n 73) 14)). However, while this was arguably already the case since the Antigon judgment in 2003, the statutory language of Article 32 PT CCP leaves no room for doubt: the formal starting point is that illegally obtained evidence is in principle admissible and exclusion is the exception.

²⁸⁴ Article 32, second and third bullet point PT CCP.

The formal starting point – as it is expressed in constitutions, criminal codes, and other statutes – may indicate something about the values underpinning the criminal justice system. For instance, if illegally obtained evidence is in principle admissible, this may indicate that truth finding and crime control are core values and may outweigh the value of protecting and respecting the suspect’s procedural rights.²⁸⁵ However, as statutory frameworks in these jurisdictions studied are so limited, little can actually be inferred from them about the principles underpinning admission or exclusion of illegally obtained evidence. The practice of how the law is interpreted and applied by courts must be taken into consideration.²⁸⁶

It is not surprising that the statutory framework in these jurisdictions is limited. Facts can vary so greatly that it would not be recommended to adopt a one-size fits all approach to illegally obtained evidence that is fixed by statute. As Roberts and Zuckerman state, ‘[t]he merits of admitting or excluding improperly obtained evidence are frankly too complex, circumstantial, and uncertain to be reduced to any simple, algorithmic, all-purpose rule.’²⁸⁷ Judicial discretion is required to allow judges to adopt a facts-based approach and weigh up the specific elements of a case. This does not necessarily need to lead to an unstructured case-by-case approach that ultimately leads to legal uncertainty. When judicial discretion is structured by a framework of principle, it can allow judges to engage with the moral and practical complexities of illegally obtained evidence in a coherent and consistent manner.²⁸⁸ In the absence of such a statutory framework, it is left to the judiciary to define the lines on how to deal with illegally obtained evidence through consistent case law. Chapter 6 will analyse to what extent courts have been successful in creating principled and structured balancing tests for the exclusion of illegally obtained evidence.

4.4 Exclusion by strict rule vs judicial discretion

Exclusionary rules can be placed along a spectrum, ranging from a strict exclusion to permitting broad judicial discretion.²⁸⁹ A strict exclusionary rule entails that the exclusion of

²⁸⁵ See Polyviou (n 130) 226–227, who argues that one of the grounds on which an absolute rule admitting all relevant evidence, however obtained, can be defended is that such a rule would enable courts ‘to reach correction determinations of specifically defined disputed issues; illegally obtained evidence is as reliable and as probative as evidence lawfully obtained; and since the court needs all reliable evidence material to the only issue before it, which is the guilt or innocence of the particular accused, the way in which probative evidence currently before the court was obtained is immaterial to *this* issue and such evidence should therefore be considered.’ It is worth emphasising, however, that neither England nor Belgium has adopted an absolute inclusionary rule, and indeed that, where reliability has been harmed, this considered a factor in both jurisdictions that may prompt courts to exclude illegally obtained evidence. See Chapter 6.

²⁸⁶ In a similar sense Cape and others (n 73) 14–15.

²⁸⁷ Roberts and Zuckerman (n 20) 159.

²⁸⁸ *ibid* 160.

²⁸⁹ For a more intricate way of theorising legal approaches to exclusion of improperly obtained evidence see Ho, ‘Exclusion of Wrongfully Obtained Evidence: A Comparative Analysis’ (n 8) 834–836. Ho distinguishes between the determinacy of application of an exclusionary rule on the one hand, and the wrongful provenance of evidence

evidence is mandatory by virtue of its illegal provenance. The evidence is inadmissible from the outset and the judge must exclude it, there is no scope for weighing or balancing competing considerations.²⁹⁰ A strict rule is also sometimes referred to as an automatic or categorical rule. For instance, confessions obtained by torture are subject to a strict exclusionary rule simply because such evidence was obtained in said manner, as is for instance the case in Germany²⁹¹ and England and Wales.²⁹²

Where evidence is *prima facie* admissible, the criminal court may nevertheless still exclude it under certain circumstances as a matter of discretion but is not obliged to do so. Exclusionary discretion entails that the tests to be applied by trial judges in deciding whether or not to exclude evidence are usually flexible and ‘open-textured’: they give judges a degree of latitude in deciding whether to exclude the evidence.²⁹³ According to Ho, discretion encompasses ‘a choice between different interpretations and applications of the law’.²⁹⁴ He suggests that we may speak of discretion where one or more of three criteria are fulfilled. First, there is discretion where the conditions for applying an exclusionary rule are stated broadly. This is the case, for instance, where admission of improperly obtained evidence turns on whether it affects the ‘fairness of the proceedings’, whether it might ‘bring the administration of justice into disrepute’, or impair the ‘integrity of the proceedings’. Such concepts can be subject to a number of different interpretations. The exclusionary rule leaves open the choice between these interpretations. An example of such an exclusionary rule that allows judicial discretion based on a broad concept is section 78 PACE, which permits courts to exclude prosecution evidence if admission of evidence would have an ‘adverse effect on the fairness of the proceedings’. Similarly, one of three exclusionary grounds under Belgian law is that the use of the evidence would violate the right to fair trial.²⁹⁵ Secondly, it is inherent in the exercise of discretion that these abstract concepts must be applied to the specific facts of the case. Thirdly, a rule may be described as discretionary where it requires a balancing of factors. This essentially requires the trial judge to determine in the case before her the relative importance of competing principles and interests and achieve a compromise between them.²⁹⁶ As will be discussed below, the dominant approach adopted in the West-European jurisdictions analysed in this report entails that it is left to the judiciary to conduct a balancing exercise between competing factors.

as the direct and indirect ground for exclusion on the other. It is beyond the scope of this study to explore in depth the difference between these two metrics by which the operation of exclusionary rules may be conceptualised.

²⁹⁰ *ibid* 835–836.

²⁹¹ §136a CCP-Germany.

²⁹² Section 76(2)(a) PACE provides that any confession made by an accused person that was obtained by oppression is automatically inadmissible. As per section 76(8) PACE, oppression includes torture.

²⁹³ Choo, *Evidence* (n 22) 14.

²⁹⁴ Ho, ‘Exclusion of Wrongfully Obtained Evidence: A Comparative Analysis’ (n 8) 834.

²⁹⁵ Article 32, third bullet point PT CCP.

²⁹⁶ Ho, ‘Exclusion of Wrongfully Obtained Evidence: A Comparative Analysis’ (n 8) 834–835.

In principle, it would only be correct to speak of an exclusionary *rule* to refer to instances of strict exclusion where there is no judicial discretion. Nonetheless, the term ‘exclusionary rule’ has been employed in legal scholarship not just to refer to rules on exclusion of illegally obtained evidence specifically, but also as a shorthand for both rules of strict exclusion and judicial discretion.²⁹⁷ The term will be used in the same manner in this report, referring generally to rules that compel or permit the exclusion of illegally obtained evidence.

4.5 Original vs derivative evidence and the fruits of the poisonous tree

Original illegally obtained evidence can be described as evidence that is obtained directly as a result of the initial illegality. Derivative evidence is obtained as a result of the evidence that was originally improperly obtained. The exclusion of the latter goes often under the name of doctrine of the ‘fruits of the poisonous tree’. The doctrine entails that if original evidence was illegally obtained and must be excluded, the derivative evidence must be excluded too.²⁹⁸

It should first be observed that a correct understanding of the divide requires to identify in a uniform manner what is originally tainted and what is affected only in consequence thereof.

Belgium and England have adopted quite diverging approaches to the issue of derivative evidence. The Belgian Court of Cassation has consistently endorsed the fruits of the poisonous tree doctrine, ruling that if the conditions for exclusion of the original evidence are fulfilled, any derivative evidence must also be excluded.²⁹⁹ If the original evidence must be excluded on one of the three grounds for exclusion established in Article 32 PT CCP, the judge cannot take into consideration any evidence obtained directly or indirectly as a consequence of the initial illicit act.³⁰⁰ For instance, any confession obtained when the suspect is confronted with the results of an illegal home search³⁰¹ will need to be excluded, as well as the evidence obtained directly from the home search.³⁰² Nonetheless, some legal commentators have expressed doubt about whether the ‘fruits of the poisonous tree’ doctrine should always be applied so rigidly. If

²⁹⁷ See e.g. Thaman, ‘Balancing Truth Against Human Rights: A Theory of Modern Exclusionary Rules’ (n 265); C Slobogin, ‘A Comparative Perspective on the Exclusionary Rule in Search and Seizure Cases’ in JE Ross and SC Thaman (eds), *Comparative criminal procedure* (Edward Elgar Publishing 2016); Gless and Richter (n 8); Ho, ‘Exclusion of Wrongfully Obtained Evidence: A Comparative Analysis’ (n 8) 821; Thaman and Brodowski (n 8).

²⁹⁸ The doctrine is thought to have its origin in the US in the case of *Silverthorne Lumber Co v United States* (1920 (251 US 385)) and the term was first used in *Nardone v United States* (1939 (308 US 338)).

²⁹⁹ Cass. 16 June 1987, *Arr. Cass.* 1986-87, nr 627; opinions of AG Leclercq with Cass. 10 December 1923, *Pas.* 1924, I, 66; Cass. 22 May 2001, *T. Strafr.* 2002, 36; Cass. 30 March 2010, *T. Strafr.* 2010, 276, comment K. Beirnaert. Some of this case law pre-dates the judicial developments in the Antigon case law (Cass. 14 Oct 2003, *T. Strafr.* 2004, 129, comment P Traest) and the codification of the rules in Article 32 PT CCP, but remains valid until today.

³⁰⁰ De Decker and Verbruggen (n 210) 82; Verstraeten, *Handboek Strafvordering* (n 61) 1001–1003 nr 1979.

³⁰¹ As was the case for instance in Cass. 24 May 1948, *Arr. Cass.* 1948, 287-289.

³⁰² Meese, ‘Het Bewijs in Strafzaken’ (n 148) 535.

the original evidence was obtained in violation of a formality prescribed under penalty of nullity or if its use would violate the right to fair trial and the evidence is excluded on these grounds, it makes sense that any derivative evidence is also excluded. By contrast, if the original illegally obtained evidence must be excluded because the reliability has been tainted (i.e. the second statutory exclusionary ground),³⁰³ this need not necessarily affect the reliability of the derivative evidence. Verstraeten offers the example of a wiretap, carried out without respecting the requirements established in Article 90sexies CCP-Belgium, which may entail that there are insufficient guarantees that the evidence obtained through the wiretap are reliable. However, if the suspect is then confronted with the results of the illegal wiretap and makes a confession, he argues the reliability of the confession need not necessarily be tainted and so this evidence should not be excluded.³⁰⁴

That original and derivative unlawfully obtained evidence need not always be treated alike is illustrated by the English approach. In the same way English law distinguishes between original confession and original non-confession evidence, it subjects these two categories to different treatment when derivative evidence is concerned. Section 76(2) PACE provides that confessions obtained by oppression or made in consequence of anything said or done which was likely to render the confession unreliable, must be excluded. This section pertains to original evidence. Rather than subjecting derivative evidence consistently to the same fate as original evidence as in Belgium, under English law if an otherwise legal confession was obtained following one obtained in violation of section 76(2), the key question is whether the earlier impropriety or illegality continues to exert a ‘malign influence’ during the later interview.³⁰⁵ If the later but properly obtained confession is tainted, it will be automatically inadmissible under section 76(2),³⁰⁶ or it may be excluded in the exercise of judicial discretion under section 78. Whether a later but properly obtained confession will be tainted by the earlier impropriety or illegality inevitably depends on the circumstances of the particular case and is a matter of ‘fact and degree’.³⁰⁷ If the initial confession is excluded under section 78, the fate of the subsequent confession is less clear. There are conflicting authorities on whether the fact

³⁰³ Article 32, second bullet point PT CCP.

³⁰⁴ Verstraeten, *Handboek Strafvordering* (n 61) 1002, nr. 1979; endorsed by Deruyck (n 143) 225 nr 28.

³⁰⁵ *Y v DPP* [1991] Crim LR 917.

³⁰⁶ See e.g. *McGovern* (1991) 92 Cr. App. R. 228: the first confession was made as a result of the defendant having been denied access to a solicitor and was thus held to be unreliable under section 76(2)(b) PACE. The Court of Appeal held that it was likely that the first confession had an effect upon the accused during the second interview and the latter was similarly tainted and had to be excluded.

³⁰⁷ *Neil* [1994] Crim LR 441. Relevant circumstances that can be taken into consideration in making this assessment include whether the initial illegalities were of a fundamental and continuing nature, and whether the accused had been given sufficient opportunity to exercise an informed and independent choice before the second interview as to whether he should repeat or retract what he said in the first interview or remain silent (*Singleton* [2002] EWCA (Crim) 459, para 10). In general see P Mirfield, ‘Successive Confessions and the Poisonous Tree’ [1996] Criminal Law Review 554.

that an impropriety or illegality led the suspect to make a first confession in itself has an adverse effect on the fairness of admitting the second confession.³⁰⁸

Whereas the admissibility of confession evidence obtained subsequent to an inadmissible confession could go either way, the admissibility of non-confession evidence that has been discovered as a result of a confession that must be excluded under section 76(2) PACE is a bit more straightforward. Section 76(4)(a) PACE provides that the exclusion of a confession under section 76(2) shall not affect the admissibility of ‘any facts’ discovered as a result of the confession. This entails that if an excluded confession leads the investigating authorities to discover physical evidence, the latter is still admissible at trial.³⁰⁹ However, it could still be excluded in the exercise of judicial discretion, either under section 78 or the common law discretion that was preserved in section 82(3).³¹⁰ The effect of section 76(5) is that the prosecution is prohibited from introducing evidence that a fact which was discovered was obtained in consequence of an inadmissible statement made by the accused; only the accused himself may introduce such evidence.³¹¹

4.6 Domestic vs foreign evidence

As cross-border crime becomes more common, evidence may be collected abroad and subsequently introduced in domestic criminal proceedings. At EU level, the European Investigation Order (EIO) Directive 2014/41/EU provides supranational rules that permits EU member states to have investigative measures carried out in other member states to obtain evidence in criminal matters.³¹² However, it does not affect national rules on admissibility of evidence.³¹³ This section sets out the Belgian and English approach towards evidence that may have been gathered illegally in a foreign jurisdiction and is introduced in domestic criminal proceedings and analyses whether such evidence is treated differently from evidence collected domestically.

³⁰⁸ For a detailed discussion of this issue see Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (n 203) 146–148.

³⁰⁹ Thaman, “Fruits of the Poisonous Tree” in *Comparative Law*’ (n 8) 360–361.

³¹⁰ Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (n 203) 225.

³¹¹ Choo, ‘England and Wales: Fair Trial Analysis and the Presumed Admissibility of Physical’ (n 135) 344. For an unclear reason, the situation in which non-confession evidence was obtained illegally and is excluded under section 78, but has led to the discovery of other evidence, is much less debated in English legal scholarship than the hypotheses set out here pertaining to confession evidence.

³¹² Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (2014) *Official Journal* L130.

³¹³ Daniele and Calvanese (n 274) 364.

4.6.1 Belgium

If evidence gathered abroad is introduced in the Belgian criminal trial, the issue of whether the evidence was obtained illegally must be established on the basis of the law of the foreign nation (the so-called ‘*lex loci*’).³¹⁴ This rule forms part of the broader principle of ‘*locus regit actum*’ in international cooperation in criminal justice matters, which can be translated literally as ‘the place rules the act’.³¹⁵ This principle requires the application of the procedural rules of the state that has been addressed with a legal assistance request.³¹⁶

Once it is established that evidence was gathered illegally abroad, the issue of whether it may be used in the Belgian criminal trial is to be determined in accordance with Article 13 of the Act of 9 December 2004 on international mutual legal assistance in criminal matters.³¹⁷ This provision states:

In the context of criminal proceedings conducted in Belgium, no use may be made of evidence:

1° which was obtained illegally abroad if:

(iv) The evidence was gathered in violation of a formality under penalty of nullity according to the law of the state where the evidence was gathered;

(v) The illicit act taints the reliability of the evidence;

2° the use of which violates the right to a fair trial.

It is clear that this provision contains the same three exclusionary grounds as Article 32 PT CCP-Belgium (known as the ‘Antigon criteria’), which is applicable to evidence obtained illegally in Belgium.

If evidence was obtained legally according to the law of the foreign state, this does not entail that it can automatically be used in the Belgian criminal trial. If the evidence was obtained legally abroad but interferes with the Belgian public order (*ordre publique/openbare orde*), it cannot be used.³¹⁸ In this context the public order ought to be understood as the ‘international public order’, which consists of rules and regulations that are considered so important for the

³¹⁴ Cass 23 December 1998, *Arr. Cass.* 1998, 1166, *AJT* 1998-99, (541) 547; B De Smet, *Internationale Samenwerking in Strafzaken Tussen Angelsaksische En Continentale Landen* (Intersentia 1999) 152.

³¹⁵ AX Fellmeth and M Horwitz, *Guide to Latin in International Law* (Oxford University Press 2009). See e.g. *ibid* 146–159; G Vermeulen and others, *Een Nieuwe Belgische Wetgeving Inzake Internationale Hulp in Strafzaken* (Maklu 2002) 123–125.

³¹⁶ This principle is contrasted with the principle of ‘*forum regit actum*’, according to which the requesting state’s rules on the given procedure should be applied. See K Karsai, ‘Locus/Forum Regit Actum: A Dual Principle in Transnational Criminal Matters’ (2019) 60 *Hungarian Journal of Legal Studies* 155.

³¹⁷ *Belgian Official Bulletin* 24 December 2004. For applications of this provision see for instance Antwerp Court of Appeal decision of 18 May 2009, *RW* 2009-10, nr. 39, 1646-1647. For a more detailed discussion of evidence that was obtained illegally abroad see De Smet, *Nietigheden in Het Strafproces* (n 146) 103–106.

³¹⁸ Cass. 12 October 1993, *Arr. Cass.* 1993, nr. 404; Cass. 25 April 1996, *Arr. Cass.* 1996, 347; Cass 23 December 1998, *Arr. Cass.* 1998, 1166, *AJT* 1998-99, 541; Cass. 13 March 2002, *RD* 2003, comment P Monville.

fairness of the proceedings that they cannot be called into question, even if the ‘imported’ evidence was obtained legally.³¹⁹ Criminal procedure is an area of law that affects state sovereignty and is considered to be an aspect of the ‘public order’.³²⁰ In sum, the judge may use evidence obtained abroad in the Belgian criminal trial, provided the evidence was obtained in accordance with the law of the foreign jurisdiction and it does not violate the Belgian legal order.³²¹

The judge must determine the legality of evidence obtained abroad by assessing whether the law of the foreign nation permits the use of the evidence; whether the evidence violates the Belgian public order, including the international and supranational norms that are applicable in the internal legal order; and whether the evidence was obtained in accordance with the law of the foreign jurisdiction. The judge must not assess specifically whether the law of the foreign jurisdiction complies with Article 6 ECHR.

These rules suggest that both domestic and foreign evidence are subjected to the same regime in respect of the admissibility of illegally obtained evidence. Some scholars have suggested, however, that domestic and foreign evidence are not treated entirely similarly. Article 32 PT CCP-Belgium provides that domestic illegally obtained evidence can ‘only’ be excluded on one of the three statutory grounds, which indicates it is a closed provision.³²² By contrast, it seems that for evidence obtained illegally abroad, the judge might have the option of excluding evidence on the basis of other criteria that are not established by statute, in addition to the three statutory grounds. This argument is based on the interpretation that Article 13 of the Act of 9 December 2004 is a more ‘open’ provision as it does not explicitly state that evidence obtained abroad is prohibited from being used in Belgian criminal proceedings in ‘only’ three instances.³²³ Assuming this interpretation is correct and domestic and foreign illegally obtained evidence are indeed subject to diverging regimes, there is arguably no good reason to make this distinction and to subject evidence obtained illegally abroad to a harsher regime than evidence so obtained in Belgium. If this distinction would ever be challenged before the

³¹⁹ De Smet, *Nietigheden in Het Strafproces* (n 146) 105 – referring to C. Van den Wyngaert, “The protection of human rights in international cooperation in criminal matters”, RIDP 1994, 197; P Traest, ‘De internationalisering van het bewijsrecht: over telefoontap en de Eisen die aan het in het buitenland verworven bewijs moeten gesteld worden’ (1996) Rec Cass 141-148; F Thomas, *Internationale rechtshulp in strafzaken* (Kluwer 1998) 170 (KU Leuven Libraries Law RBIB: Rechtsgeleerdheid 2A PEN 4 BE THOM 1998); I Onsea, *De bestrijding van georganiseerde misdaad* (Intersentia 2003) 443 (KU Leuven Libraries Law RBIB: Rechtsgeleerdheid 2A PEN 3 BE ONSE 2003).

³²⁰ De Smet, *Nietigheden in Het Strafproces* (n 146) 105.

³²¹ Cass. 6 April 2005, P.05.0218.F, opinion by Attorney-General Loop, www.cass.be; Cass. 8 May 2007, P.07.0129.N, www.cass.be.

³²² Lugentz (n 147) 187.

³²³ Meese, ‘Het Bewijs in Strafzaken’ (n 148) 518; in the same sense De Codt (n 147) 249–250.

Belgian Constitutional Court, it might be held to be in violation of the constitutionally enshrined equality principle.³²⁴

4.6.2 England

The legal situation pertaining to the use of illegally obtained foreign evidence in domestic proceedings is less straightforward in England than it is in Belgium. Considering how complicated and unclear this area of the law is, it is surprising that it has attracted relatively little scholarly attention.³²⁵ The situation is not governed by statute, and the case law on this matter is rather patchy and incoherent. Nonetheless, the following guiding principles can be discerned.

4.6.2.1 Evidence obtained legally abroad according to the foreign law

Like Belgium, the English approach to the question of whether evidence obtained abroad may be used in English criminal proceedings starts from the principle of '*locus regit actum*': the English court will assess whether the evidence was obtained legally abroad on the basis of the law of the foreign jurisdiction.³²⁶ If evidence was obtained *legally* abroad according to the law of the foreign nation but would be considered to have been obtained in violation of English law, such evidence is not necessarily inadmissible in English criminal proceedings, subject to the judicial discretion in section 78 PACE.³²⁷ English courts seem to adopt an inclusionary approach, concluding more often than not that such evidence is admissible. This was the case in *Lane*, where a police interview was conducted under Scottish procedure without a solicitor. While these circumstances would make the evidence gathering illegal according to English law, the English Court of Appeal held that the evidence was admissible. The Court deemed it important that the interview had been conducted in accordance with Scottish criminal procedure, and that no bad faith on the part of the Scottish police could be demonstrated.³²⁸ In *Konscol*, a man charged with conspiracy to import drugs into the UK was interviewed by a Belgian customs officer under instruction of a Belgian magistrate.³²⁹ He was not cautioned,³³⁰

³²⁴ Article 10-11 Belgian Constitution; Meese, 'Het Bewijs in Strafzaken' (n 148) 518.

³²⁵ See e.g. M Mackarel and C Gane, 'Admitting Irregularly Or Illegally Obtained Evidence From Abroad Into Criminal Proceedings: A Common Law Approach' [1997] Criminal Law Review 720; JR Spencer, 'Electronic Eavesdropping and Anomalies in the Law of Evidence' (1999) 58 Cambridge Law Journal 43; R Loof, 'Obtaining, Adducing and Contesting Evidence from Abroad: A Defence Perspective on Cross-Border Evidence' [2011] Criminal Law Review 40.

³²⁶ Loof (n 325) 54.

³²⁷ K Pitcher, *Judicial Responses to Pre-Trial Procedural Violations in International Criminal Proceedings* (TMC Asser Press 2018) 243.

³²⁸ [2001] EWCA Crim 1605; [2002] 1 Cr. App. R. (S.) 72.

³²⁹ [1993] 5 WLUK 161, [1993] Crim LR 950.

³³⁰ A caution is a warning that under English law should normally be given by a police officer in accordance with Code C of the Police and Criminal Evidence Act 1984, when he has grounds for suspecting a person has committed

nor offered access to legal representation during the interview. The man appealed against his conviction in the UK on the grounds that the interview had not been obtained in accordance with PACE 1984. The Court of Appeal held, however, that the interview had been conducted properly and fairly according to the Belgian law that was in force at the time.³³¹ The Court explicitly refused to lay down any guidelines as to when a court should admit or exclude a statement obtained in a foreign country in accordance with those rules but in contravention of the English rules of procedure as established in PACE. The Court concluded that the trial judge had exercised his discretion not to exclude the evidence under section 78 PACE appropriately.

A number of cases concern the use of intercept evidence that was legally obtained in a foreign jurisdiction. If collected in England, such evidence is inadmissible, regardless of whether it was obtained legally or illegally. The ban on the use of intercept material is now contained in Section 56 Investigatory Powers Act 2016 and was previously established in section 9 Interception of Communications Act 1985. Courts have consistently held that the Interception of Communications Act 1985 does not apply to evidence obtained outside the UK and that intercept evidence obtained legally abroad is admissible in domestic English proceedings.³³² The House of Lords in *P* held that, while English law treats secrecy as paramount and thus considers intercept evidence inadmissible in order to keep the evidence out of the public domain, the law of the foreign nation did not treat secrecy as such an important value and accordingly permitted the use of intercept evidence. There was no rule of English public policy that intercept evidence that was admissible in a foreign jurisdiction was inadmissible in England.³³³

The English courts' inclusionary approach towards evidence that was lawfully obtained abroad but in a manner inconsistent with English law, has been criticised for being overly pragmatic, tilting the balance in favour of effective crime control, at the expense of the conflicting values of respect for rules of due process and fairness to the accused.³³⁴ However, it is telling that, the Court of Justice of the European Union (CJEU) considers that issues pertaining to admissibility of evidence obtained in violation of EU law are a matter for the member states in which the Court will not interfere. For instance, in its recent ruling on indiscriminate mass surveillance regimes in EU states, the CJEU held:

[A]s EU law currently stands, it is, in principle, for national law alone to determine the rules relating to the admissibility and assessment, in criminal proceedings against

an offence or when arresting him (J Law (ed), *A Dictionary of Law* (9th edn, Oxford University Press 2018)). See Section 10 Code C PACE 1984.

³³¹ It is worth noting that this case pre-dates the ECtHR's decision in *Salduz v Turkey* (2009) 49 EHRR 19.

³³² *R. v. Governor of Belmarsh Prison and another, ex p. Martin* [1995] 1 WLR 412, [1995] 2 All E.R. 548; *R v. Aujila* [1997] 11 WLUK 107, [1998] 2 Cr. App. R. 16.

³³³ [2002] 1 AC 146, 165.

³³⁴ *Mackarel and Gane* (n 325) 727.

persons suspected of having committed serious criminal offences, of information and evidence obtained by [the] retention of data contrary to EU law.³³⁵

The CJEU clearly adopts a deferential approach to member states' national law on issues of admissibility of evidence obtained in violation of EU law. In a similar way, English courts are deferential to foreign jurisdictions' assessment that evidence was *legally* obtained according to their national law, but still with the corrective mechanism of England's own exclusionary discretion. While English courts have never said as much explicitly, their approach seems to be based on an idea of mutual trust. Mutual trust in international criminal justice matters is founded on the belief that another state's legal system functions adequately and adheres to certain fundamental norms. Such trust may then entail that the foreign jurisdiction's opinion that the evidence was legally obtained should permit its use in an English criminal trial. The situation is different, however, if evidence was obtained *illegally* abroad according to the law of the foreign jurisdiction, as will be discussed in the next section; arguably there is no good justification for subjecting such evidence to a different legal regime than domestic illegally obtained evidence.

4.6.2.2 Evidence obtained illegally abroad according to the foreign law

The situation is different if evidence was obtained *illegally* according to the law of the foreign nation. Such evidence is not necessarily inadmissible in English proceedings. English courts carry out a separate assessment as to whether the evidence should be admitted in the domestic proceedings and seem to do so on the basis of the same criteria as they would apply to domestic evidence. *Governor of Pentonville Prison, ex p. Chinoy* concerned a committal for extradition in the magistrates' court in which evidence was being adduced that had been obtained in France contrary to French law and European human rights legislation.³³⁶ The defendant argued *inter alia* that the magistrate should have exercised his discretion under section 78 PACE to exclude the evidence. On appeal the Divisional Court rejected the argument. The trial court had to take into account that the evidence had been obtained in violation of French law but if the evidence would have been legitimate in England, then the court would not be required to exclude the evidence. Under English law, such evidence should only be excluded 'if its prejudicial effect outweighs its probative value' as per *Sang*.³³⁷ Nolan J stated that '[i]f (subject to section 78 of the Police and Criminal Evidence Act 1984) evidence unlawfully obtained in England is admissible, as *R v Sang* declares, then why should a different rule apply with regard to evidence obtained unlawfully in another country?'³³⁸ The Divisional Court in effect adopted a policy of

³³⁵ Joined Cases C-511/18 *La Quadrature du Net and others*, C-512/18 *French Data Network and others*, and C-520/18 *Ordre des barreaux francophones et germanophone and others* (European Court of Justice (Grand Chamber), 6 October 2020, para 222.

³³⁶ [1992] 1 All ER 317.

³³⁷ [1980] AC 402.

³³⁸ *Governor of Pentonville Prison, ex p. Chinoy*, [1992] 1 All ER 317, 330.

non-enquiry into evidence obtained in another EU member state by foreign law enforcement officials,³³⁹ stating that save in respect of admissions and confessions and evidence obtained from the accused after the commission of the offence, the judge has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means.³⁴⁰ In sum, despite the illegal provenance of the foreign evidence, the Divisional Court decided to admit the evidence, relying on the common law authority of *Sang*,³⁴¹ as it would do in respect of domestic evidence. Upon referral of the case to the European Commission of Human Rights, the Commission decided the application was inadmissible. It found no indication or arbitrariness in the UK's decision to admit such evidence and concluded that, accordingly, there was a legal basis for the application's detention in the sense of Article 5 ECHR.³⁴²

A similar approach was adopted in *Redmond*.³⁴³ The UK police had made covert recordings in Spain and Ireland of conversations involving the defendant, who was later convicted for conspiracy. The defendant appealed against his conviction, alleging that there had been abuse of process on the ground that the evidence of tape-recorded conversations had been illegally obtained in Spain and Ireland. The Court of Appeal held that evidence probative of guilt that was obtained unlawfully was not automatically inadmissible, and neither was it automatically the case that it would be unfair for that evidence to be considered by the jury.³⁴⁴ The key question was whether the police authorities had knowingly abused their executive powers. If the trial judge had been wrong in concluding that the evidence was not obtained in breach of Spanish [or Irish] law, the issue of whether the police had acted in bad faith 'turned on [the trial judge's] assessment of the credibility of the officers whose evidence he heard.'³⁴⁵ The Court of Appeal concluded that the trial judge was entitled to decide on the basis of the evidence of the police officers that they had not acted in bad faith when using the covert surveillance recordings. This decision indicates that for the English courts, whether there has been an abuse of process is not only determined by the legality of the procedure by which the evidence was obtained abroad; it should also be considered whether the investigating authorities acted in bad faith when committing the violations of the foreign procedures.³⁴⁶ This case concerned the staying the proceedings on the grounds of abuse of process because illegally obtained evidence was used, which is a graver procedural sanction than mere exclusion of evidence on the grounds of unfairness of the proceedings under section 78 PACE. Nonetheless, the Court's reasoning indicates that, in respect of how illegally obtained foreign evidence

³³⁹ Mackarel and Gane (n 325) 725.

³⁴⁰ *Governor of Pentonville Prison, ex p. Chinoy*, [1992] 1 All ER 317, 329-330.

³⁴¹ *Ibid.*

³⁴² *Chinoy v the United Kingdom* App no 15199/89 (Commission Decision, 4 September 1991).

³⁴³ [2006] EWCA Crim 1744, [2009] 1 Cr. App. R. 25.

³⁴⁴ *Ibid.*, para 26.

³⁴⁵ *Ibid.*

³⁴⁶ Loof (n 325) 54.

should be treated in domestic proceedings, English courts would apply domestic standards, emphasising the authorities' bad faith in collecting the evidence in this instance.³⁴⁷

In *A v. Secretary of State for the Home Department (No 2)* the House of Lords ruled unanimously that confessions obtained by torture are categorically inadmissible, regardless of where and by whom the torture was inflicted.³⁴⁸ The Court was more equivocal, however, when it came to real evidence obtained as a result of a confession obtained through torture abroad. The House of Lords effectively applied the approach taken in English law towards the 'fruit of the poisonous tree' in respect of real evidence (see previous section). Lord Bingham justified the diverging approach towards confessions obtained by torture and derivative real evidence obtained by torture on the grounds of reliability:

First, there can ordinarily be no surer proof of the reliability of an involuntary statement than the finding of real evidence as a direct result of it.... Secondly, there is an obvious anomaly in treating an involuntary statement as inadmissible while treating as admissible evidence which would never have come to light but for the involuntary statement. But this is an anomaly which the English common law has accepted, no doubt regarding it as a pragmatic compromise between the rejection of the involuntary statement and the practical desirability of relying on probative evidence which can be adduced without the need to rely on the involuntary statement.³⁴⁹

The House of Lords thus maintained the English distinction between confessions and real evidence in respect of evidence obtained abroad and regarded reliability as paramount in comparison to non-epistemic considerations.

One might take issue with the English courts' reasoning and the factors and rationales relied upon in the exercise of their exclusionary discretion.³⁵⁰ Independent of that assessment, however, the English court's approach of applying the same standards to foreign and domestic illegally obtained evidence is arguably the right one. Indeed, there seems to be no good justification for subjecting these two to different regimes.

³⁴⁷ On the criterion of bad faith in the exercise of English courts' exclusionary discretion see further below Section 6.2.2.2.

³⁴⁸ [2005] UKHL 71, [2006] 2 AC 221.

³⁴⁹ *Ibid*, para 16.

³⁵⁰ For a more detailed discussion see below Section 6.2.

4.6.3 Germany

Pursuant to the *locus regit actum* principle applicable to cross-border evidence gathering, the requested state must comply with the standards of criminal procedural law in his jurisdiction.³⁵¹ The BGH has therefore established that in such cases the application of German criminal procedural law cannot be expected.³⁵² If evidence is collected or obtained in violation of such standards, this can lead to a variety of difficulties in the use of such evidence in the requesting state.³⁵³

The 2000 Convention on mutual legal assistance in criminal matters between the Member States of the European Union (hereinafter: 2000 MLA Convention)³⁵⁴ and, later, the Directive 2014/41/EU on the European Investigation Order (hereinafter: EIO Directive)³⁵⁵ have allowed to a partial shift towards the *forum regit actum* principle as requesting or issuing authorities are allowed to indicate specific formalities and procedures to be followed by the requested or executing authority (art 4 para 1 2000 MLA Convention and art 9 para 2 EIO Directive).

Unlike the rules on evidence gathering, the rules on the use of the evidence acquired abroad are left to national law and are, hence, dictated by the German law. Since rules regulating evidence acquisition and evidence use, respectively, derive from different systems, there are various constellations that must be considered when reflecting upon the possibility to use foreign evidence in German proceedings.³⁵⁶

- A) Possibility to use evidence gathered abroad, even if German law has not been respected. This would be the case of an interrogation through a foreign judicial authority that is fully compatible with the *lex loci* but disregards German rules requiring the presence of other parties to the proceedings, whose consideration and respect had been explicitly requested by the German public prosecutor.³⁵⁷

Although such a statement has less probative value than it would have had if German procedural law had been strictly adhered to, this does not make the evidence inadmissible because under German law the use of evidence always requires a special

³⁵¹ FP Schuster, 'Verwertbarkeit von Beweismitteln Bei Grenzüberschreitender Strafverfolgung' [2016] Zeitschrift für Internationale Strafrechtsdogmatik 564, 565.

³⁵² BGH, Urteil vom 22. April 1952 – 1 StR 622/51 = BGHSt 2, 300 (304).

³⁵³ Eisenberg (n 38) 198.

³⁵⁴ Council Act establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (29 May 2000) OJ C197/1.

³⁵⁵ Directive (EU) 2014/41 of the European Parliament and of the Council regarding the European Investigation Order in criminal matters (3 April 2014) OJ L130/1.

³⁵⁶ Jahn (n 44) C119–C120.

³⁵⁷ Schuster (n 351) 566 citing a case from 1885 on the possibility to use as evidence to be considered for the judgment the minutes of an interrogation by an investigative judge in Vienna following a rogatory letter.

justification, which has nothing to do with the probative value as such. As long as the *lex loci* is respected, there is no procedural injustice.³⁵⁸ This approach reflects, again, the tendency in the German criminal justice system to give priority to comprehensive fact-finding.³⁵⁹

- B) Impossibility to use evidence gathered abroad because of the breach of German law. Case law³⁶⁰ has established that where German authorities can request the executing authorities to comply with German procedural requirements, as it is the case with 2000 MLA Convention or with the EIO Directive, and such procedural requirements are not respected, a prohibition to use such evidence applies, but only to the extent that it is impossible to subsume such failure under an exception provided for under German law.³⁶¹

Moreover, the disregard of instruction imparted by the requesting/issuing authority would also result in a breach of obligations deriving from supranational law by the requested/executing authority. As the provisions under art 4 para 1 2000 MLA Convention and art 9 para 2 EIO Directive, both regarding the general duty of the requested or executing authority to comply with the formalities and procedures expressly indicated by the requesting or the issuing authority (provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State), have modified the national law of all contracting parties and Member States, the failure to respect the instructions of the requesting/issuing authority translates also in a violation of the law of the requested/executing country. The resulting prohibition to use evidence would therefore be causally linked to this violation and, hence, be qualified as ‘dependant’.³⁶²

- C) Impossibility to use evidence gathered abroad, despite lawful acquisition under foreign law. In cases in which the requested state has not assumed such far-reaching obligations of legal assistance or the evidence was initially collected for its own proceedings, so that the foreign legal system inevitably had to be applied, the mere non-compliance with German law does not constitute a dependent prohibition on the use of evidence. A problem arises, however, when the foreign law is of such a nature that it (grossly) violates national conceptions of the rule of law.³⁶³

An independent prohibition to use foreign evidence could arise regarding the instruction of the accused on his right to remain silent. The different concepts of this

³⁵⁸ RG, Urteil vom 5. Januar 1885 – 3048/84 = RGSt 11, 391 (397).

³⁵⁹ Schuster (n 351) 566–567.

³⁶⁰ BGH, Urt. v. 19.3.1996 – 1 StR 497/95 = BGHSt 42, 86 (91).

³⁶¹ For instance, an exception to the mandatory prior notification of the date of a witness interrogation is provided under § 165 para 2 StPO for cases in which this would jeopardise the success of the investigation.

³⁶² Schuster (n 351) 268.

³⁶³ *ibid* 568.

guarantee adopted even among European countries could cause difficulties when introducing statements of the defendant gathered in countries with a less strict approach to the right to silence – it suffices to think of the possibility in common law systems such as the United Kingdom³⁶⁴ or Ireland³⁶⁵ to draw negative inferences from the silence of a suspect or accused person both at the police station and at trial – as evidence to be used for the decision in criminal justice systems which, as the German, have a more encompassing understanding of the right in question.³⁶⁶

In this sense, *Schuster* strictly excludes the possibility of using for a judgment in a German criminal trial a confession which was not preceded by prior instruction of the right to remain silent, or a confession made based on an indirect compulsion to testify. In this case, not the acquisition of the evidence but its use is to be regarded as unlawful because it would infringe upon constitutional values such as human dignity and right to privacy, which the right to silence is designed to protect.³⁶⁷

- D) Impossibility to use evidence because of a violation of foreign law. Majority case law³⁶⁸ in Germany holds the view that the German judge has only limited authority to review violations of foreign law to weigh up whether there is a prohibition on the use of the evidence thus obtained in the domestic main proceedings.³⁶⁹

Based on a limited standard of review, the German judge is therefore only entitled to review the compatibility with general principles of the rule of law, in particular the ECHR and the national *ordre public*.³⁷⁰ These would, in case of a violation, determine an independent prohibition to use the evidence in question.

Dependent prohibitions to use evidence obtained in violation of the *lex loci* for which, however, a violation of the ECHR or the national *ordre public* has not been ascertained, are, as *Gless* explains, not relevant in matters of cross-border evidence gathering. Such evidence is in principle admissible without regard to the way the evidence was obtained.³⁷¹

³⁶⁴ Sections 34-39 CJPOA (The Criminal Justice and Public Order Act 1994, England and Wales).

³⁶⁵ Art 52 Offences against the State Act, 1939 (Ireland).

³⁶⁶ *Schuster* (n 351) 568–569.

³⁶⁷ *ibid* 569–570.

³⁶⁸ BGH 1 StR 39/14 - Beschluss vom 9. April 2014 (LG Traunstein); see also Beschluss von 18. Oktober 1995 – 1 StR 365/05.

³⁶⁹ M Böse, ‘Die Europäische Ermittlungsanordnung – Beweistransfer Nach Neuen Regeln?’ [2014] *Zeitschrift für Internationale Strafrechtsdogmatik* 152, 163; *Schuster* (n 351) 571.

³⁷⁰ BGH, *Beschl. v. 29.09.1977, Az.: 4 ARs 16/77*; see also M Böse, ‘Die Verwertung Im Ausland Gewonnener Beweismittel Im Deutschen Strafverfahren’ (2002) 114 *Zeitschrift für die gesamte Strafrechtswissenschaft* 148, 151–152.

³⁷¹ *Gless* (n 41) 320; Böse, ‘Die Europäische Ermittlungsanordnung – Beweistransfer Nach Neuen Regeln?’ (n 369) 161.

In case of an EIO proceeding, on the other hand, there is at least an obligation for the trial court in the issuing state to take into account the way evidence was obtained in the executing state. Rights of the defence and fairness of the proceedings shall be respected when assessing the evidence obtained through the EIO, however, without prejudice to national procedural rules. This does not translate, however, into an obligation for the court in the issuing state not to use evidence obtained in violation of the *lex loci*.³⁷² According to art 14 para 7 EIO Directive, in case of a successful challenge in the executing state against the recognition or execution of an EIO, the competent authority in the issuing state is required to take this decision into account and to let the consequences provided for by the *lex fori* follow.³⁷³

According to Böse, however, prohibition to use evidence may arise from violations of rules directly protecting the individual involved, such as the violation of the obligation of the issuing authority to verify that the principle of proportionality and the equality clause under art 6 para 1 EIO Directive have been met, the violation of trial fairness according to art 47 of the Charter of fundamental rights of the European Union (hereinafter: the Charter),³⁷⁴ or the violation of protective individual rights pursuant to art 14 para 7 EIO Directive.³⁷⁵

- E) Impossibility to use evidence based on the principle of speciality under international law. Limitations to the possibility to use evidence gathered abroad in criminal proceedings can also derive from sovereignty rights of the requested state which may make his legal assistance conditional upon the respect of certain limitation in the use of the evidence provided. Traditionally, Switzerland,³⁷⁶ in particular, makes mutual assistance with Germany dependent on the evidence not being used in criminal tax proceedings (except for tax fraud).³⁷⁷ In this way, a prohibition of exploitation arises regarding other offences or criminal proceedings.³⁷⁸

As far as EIO proceedings are concerned, Directive 2014/41/EU³⁷⁹ provides for the possibility of the executing State to make its consent to an EIO issued for the

³⁷² A Mosna, 'Europäische Ermittlungsanordnung Und Europäische Staatsanwaltschaft: Die Regelung Grenzüberschreitender Ermittlungen in Der EU' (2019) 131 Zeitschrift für die gesamte Strafrechtswissenschaft 808, 829.

³⁷³ Böse, 'Die Europäische Ermittlungsanordnung – Beweistransfer Nach Neuen Regeln?' (n 369) 160–161.

³⁷⁴ *ibid* 163.

³⁷⁵ Gleß (n 42) 575–576; Eisenberg (n 38) 208–209.

³⁷⁶ Art 67 IRSG (Rechtshilfegesetz, Switzerland); art 24 IRSV (Rechtshilfeverordnung, Switzerland).

³⁷⁷ Schuster (n 351) 573.

³⁷⁸ Böse, 'Die Verwertung Im Ausland Gewonnener Beweismittel Im Deutschen Strafverfahren' (n 365) 172.

³⁷⁹ Art 30 para 5 Directive (EU) 2014/41.

interception of telecommunications subject to conditions which would be observed in a similar domestic case and to thereby limit the usability of the information provided only to a specific set of offences, implying a prohibition to use it for all the others.³⁸⁰

4.6.4 Italy

The code of criminal procedure sets out some basic rules concerning evidence collected abroad. These rules are however supplementary – or complementary – in nature, meaning that they become relevant only insofar as no supranational instrument (at international or European level) finds application.³⁸¹ With regard to the circulation of evidence within the European Union, the rules are now set out in the statute implementing the Directive 2014/41/EU on the European Investigation order (Decreto legislativo 21 giugno 2017 , n. 108) and in the statute implementing the rules of the Brussels Convention of 2000 on mutual legal assistance (Decreto legislativo 5 aprile 2017, n. 52). Both implementing statutes, however, do not set out specific rules concerning non-usability of evidence.

In the code of criminal procedure, the issue of non-usability surfaces in Article 729.³⁸² Section 1 of that provision states that when evidence has been collected abroad, and the foreign State where the evidence was collected has set out specific conditions for its use, the courts are bound to respect those conditions. This can happen, for instance, if the foreign authority expressly requests that evidence be used only for the finding on some specific crimes. It remains implicit that foreign law must be respected when collected the evidence, although it is unclear whether any small departure from foreign evidence could affect the usability of the evidence.³⁸³ The section codifies in essence the relevance of the foreign law (according to which the evidence was collected) in the assessment of the evidence. This does not mean however that the Italian system fully endorses the traditional *ius loci* rule (whereby evidence collection follows the rules of the place where it is collected), making completely irrelevant the *ius fori* rule (whereby evidence is to be assessed – and excluded – in light of the rules applicable in the place of the trial).³⁸⁴ The following sections of the Article, and particularly section 2 and 4, point in fact in the direction that foreign evidence is also to be assessed in light of Italian standards.

³⁸⁰ Schuster (n 351) 573.

³⁸¹ Article 696 Code of criminal procedure.

³⁸² Article 729 is applicable with regard to active procedures, i.e. cases where Italy has requested to other countries the collection of evidence. In the context of passive procedures (when evidence is requested by foreign authorities), it is Article 725 that spells out the rules on collection of evidence on behalf of foreign authorities (passive collection of evidence). The provision does not provide for specific limits to the use of the evidence in the foreign decisions/trial.

³⁸³ FR Dinacci, *L'inutilizzabilità nel processo penale* (Giuffrè 2008) 153.

³⁸⁴ Dinacci, *L'inutilizzabilità nel processo penale* (n 383) 145.

In particular, section 2 of Article 729 states that when the foreign states execute the Italian request (i.e. collects evidence requested by Italian authorities) with modalities other than those explicitly requested by the Italian authorities,³⁸⁵ the evidence cannot be used but only when the law explicitly prohibits it (that is, when the failure to respect one or more such conditions would trigger a case of non-usability under Italian law). Article 431 section 1 *f* of the code of criminal procedure further states that evidence collected abroad can exceptionally be included in the file of the trial court, when such evidence has been collected at the presence of the counsel for the defence and the counsel has had the opportunity to exercise the rights exercised by the Italian law.³⁸⁶

Moreover, it is commonly accepted that for foreign evidence to be used in Italian trials, it must comply with the general fundamental principles of the Italian legal order.³⁸⁷ Nevertheless, Courts are very cautious when making this assessment. They seem to be stricter only with regard to the rule that the defence should have had a possibility to be present and where possible raise challenges. In this vein Courts have clarified, for instance, that the deposition of witnesses collected abroad cannot be used if the foreign authority did not inform the Italian authority (despite the explicit request of being informed) and the defence had not been able to be present at the deposition,³⁸⁸ though sometimes even such rule is considered to be amenable to derogation.³⁸⁹ For the rest, the courts tend to follow an approach which could be termed as ‘favourable’ to the non-exclusion of foreign evidence, meaning that they do not require that the safeguards of Italian law be necessarily present. For instance, evidence collected without giving the party the possibility to pose direct questions to the witness (with questions being posed only though the judge) was deemed admissible.³⁹⁰

4.7 Incriminating vs exonerating use

In England, section 78(1) PACE explicitly confers upon judges the discretionary power to exclude illegally obtained evidence that the prosecution adduces. Hence, it applies to any evidence on which the prosecution proposes to rely, whether it is proffered by the prosecution

³⁸⁵ As is mentioned in Article 727 section 9 of the code.

³⁸⁶ Article 431 section 1 *d* states that foreign evidence which is not amenable to later collection in court (e.g. the results of a house search) can also be included in the file of the trial judge. Such provision falls however in the general logic that investigative evidence which cannot later be collected in court can be immediately presented to the trial court. Instead, the provision of Article 431 section 1 *f* is the expression of another exception, by which foreign investigative evidence collected with respect of defence rights is directly admissible at trial.

³⁸⁷ See Cass., 5 June 1995 Neirotti, *Cass. pen.* 1996, 1196; Cass., 14 January 1999, Faiani, *Cass. pen.* 1999, 3538.

³⁸⁸ Cass., 15 July 2021, Nikolli Resmi, *C.e.d. Cass.*, rv. 282048. See also Cass., 5 March 2021, Z., *C.e.d. Cass.*, rv.281646.

³⁸⁹ Cass., 22 January 2009, Pizzata, *C.e.d. cass.*, rv. 243795. In this case the Court has admitted the introduction of the statements of the co-defendants that had been collected abroad without the presence of the counsel.

³⁹⁰ Cass., 28 April 2009, Russo, *C.e.d. cass.*, rv. 243938.

itself or a co-accused.³⁹¹ Section 76(2) PACE is also thought to apply to prosecution evidence, as it explicitly provides that the court shall not allow the confession to be admitted as evidence unless ‘the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid’, namely by oppression or in consequence of anything said or done which was likely to make the confession unreliable.³⁹² It can be inferred that the court’s duty to exclude under section 76 and judicial discretion to exclude under section 78 does not extend to evidence the defence wishes to adduce to disprove guilt. In other words, the defendant may always rely on exonerating evidence, even if it was illegally obtained.

The same is true in Belgium: a suspect can always rely on illegally obtained evidence if it is exculpatory.³⁹³ It is irrelevant in this regard whether the suspect was personally involved in the illicit action from which the evidence resulted.³⁹⁴ This rule is underpinned by the respect for the right to defence and fair trial;³⁹⁵ it is inherent in the right to fair trial that the suspect freely determines in what way he will defend himself and whether or not he will insist he is innocent.³⁹⁶ If evidence is exculpatory for one suspect but incriminating for another, the judge will have to admit it when dealing with the former but may have to exclude it in respect of the latter if one the three statutory criteria for exclusion in Article 32 PT CCP are fulfilled.³⁹⁷

³⁹¹ Keane and McKeown (n 9) 330.

³⁹² Roberts and Zuckerman (n 20) 460.

³⁹³ Cass. 12 November 1997, *Arr. Cass.* 1997, 1115, *Rev. dr. Pén.* 1998, 586; Cass. 3 November 1999, *Arr. Cass.* 1999, 1369, *T. Strafr.* 2000, 255, comment J Meese.

³⁹⁴ Verstraeten, *Handboek Strafvordering* (n 61) 989 nr 1958.

³⁹⁵ Meese, ‘Het Bewijs in Strafzaken’ (n 148) 520; Verstraeten, *Handboek Strafvordering* (n 61) 989 nr 1958.

³⁹⁶ Cass. 24 August 1988, *Arr. Cass.* 1998, 820.

³⁹⁷ De Decker and Verbruggen (n 210) 72–73; Meese, ‘Het Bewijs in Strafzaken’ (n 148) 520.

5 RATIONALES FOR EXCLUDING ILLEGALLY OBTAINED EVIDENCE

To what extent relevant evidence that was improperly or illegally obtained should be excluded raises conflicting points of principle. On the one hand, there is the need for effective law enforcement (the predominantly common law perspective) and the criminal courts' duty to determine the 'material truth' (the predominantly continental inquisitorial perspective). On the other hand, respect for the rights of the individual criminal defendant (and more broadly for all citizens) is required in a '*Rechtsstaat*'³⁹⁸ i.e. in a state that honours the rule of law and where state actions should be lawful.³⁹⁹ Simply by acknowledging the conflicting interests there can be no doubts that extremes solutions are unfit. As Bentham already observed, '[t]he exclusion of all evidence would be a denial of all justice';⁴⁰⁰ at the same time, "[e]ven evidence, even justice itself, like gold, may be bought too dear. It always is bought too dear, if bought at the expense of a preponderant injustice".⁴⁰¹ Similarly, it is argued that an inflexible admissibility or inadmissibility rule will always undermine the public confidence in the criminal process. If a court consistently admits illegally obtained evidence, it will be perceived to be 'condon[ing] the malpractice of the law-enforcement activities'. By contrast, if a court always excludes such evidence, it will be seen to 'abandon its duty to protect us from crime'.⁴⁰² If a more flexible rule is adopted, the dilemma presented by these conflicting values will always be at the heart of a court's decision whether or not to exclude illegally obtained evidence. The key question is then where the balance between the competing values should lie. The answer to that question inevitably depends on the rationale or normative justification for exclusion of illegally obtained evidence one adopts.

The normative justifications for exclusion of illegally obtained evidence have been the subject of various academic contributions, particularly in Anglo-American scholarship.⁴⁰³ Since these

³⁹⁸ The German term *Rechtsstaat* is defined as 'a State that lives under law and respects fundamental rights': N MacCormick and D Garland, 'Sovereign States and Vengeful Victims: The Problem of the Right to Punish' in A Ashworth and M Wasik (eds), *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsh* (Clarendon Press 1998) 16.

³⁹⁹ Thaman and Brodowski (n 8) 430, 454–455.

⁴⁰⁰ J Bentham, *A Treatise* (n 3) 227.

⁴⁰¹ J Bentham, *Rationale of Judicial Evidence*, vol. IV (Hunt and Clarke, 1827) 482.

⁴⁰² AAS Zuckerman, *The Principles of Criminal Evidence* (Clarendon Press 1989) 345.

⁴⁰³ See e.g. A Ashworth, 'Excluding Evidence as Protecting Rights' [1977] *Criminal Law Review* 723; Y Kamisar, 'Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?' (1983) 16 *Creighton Law Review* 565; AAS Zuckerman, 'Illegally Obtained Evidence: Discretion as a Guardian of Legitimacy' (1987) 40 *Current Legal Problems* 55; IH Dennis, 'Reconstructing the Law of Criminal Evidence' (1989) 42 *Current Legal Problems* 21; Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (n 203) chs 2 and 6; A Ashworth, 'Exploring the Integrity Principle in Evidence and Procedure' in P Mirfield, RJ Smith and C Tapper (eds), *Essays for Colin Tapper* (Oxford University Press 2003); D Ormerod and D Birch, 'The Evolution of the Discretionary Exclusion of Evidence' [2004] *Criminal Law Review* 767, 778–784; A Ashworth and M Redmayne, *The Criminal Process* (4th edn, Oxford University Press 2010) 344–348 (this section was omitted in the most recent edition Campbell, Ashworth and Redmayne (n 74)); Roberts and Zuckerman (n 20) 179–191; Jackson and Summers (n 4) 153–158; N Monaghan, *Law of Evidence* (Cambridge University Press 2015) 158–163; Choo, *Evidence* (n 22) 161–162; JI Turner and T Weigend, 'The

rationales for exclusion have been discussed at length, it suffices to give a brief summary of them here. At least four well-rehearsed principles capable of explaining why it may be appropriate to exclude illegally obtained prosecution evidence can be distinguished. First, the *reliability* principle entails that a piece of illegally obtained evidence should be excluded when the manner in which the evidence was gathered has tainted its reliability. Exclusion of such evidence is required as admitting it would entail the risk that the fact-finder is presented with unreliable evidence that he may nonetheless take into account and would lead to a wrongful conviction.⁴⁰⁴ As will be argued below, both Belgium and England rely at least in part on the lack of reliability to exclude and indeed on proof of reliability to admit illegally obtained evidence. However, from a practical perspective, this rationale alone does not explain the current law, since certain illegally obtained evidence is excluded but is in fact reliable.⁴⁰⁵ Equally from a principled perspective, reliance on accuracy of the verdict in terms of the substantive truth alone could be seen as an unacceptable position, as it fails to take into account of the competing values set out in the previous paragraph that are also important if the rule of law is to be adhered to.

Secondly, according to the *deterrence* or *disciplinary* principle exclusion is a means of preventing investigators and prosecutors from committing improprieties and illicit acts in the future by prohibiting that the fruits of these acts can be used to secure a conviction. The idea is that, if judges routinely exclude improperly obtained evidence, this sends a message to state officials that there is nothing to be gained from breaking the law and consequently they will refrain from doing so.⁴⁰⁶ This is the dominant theoretical justification for exclusion of illegally obtained evidence in the United States.⁴⁰⁷ A common practical objection to this principle is that it is highly questionable whether the exclusionary rule does in fact deter police officers.⁴⁰⁸ Ashworth notes that ‘the police may not be deterred if they are unaware of the relevant rules, if they think that the misconduct will not come to light, if they think that the suspect will plead

Purposes and Functions of Exclusionary Rules: A Comparative Overview’ in S Gless and T Richter (eds), *Do Exclusionary Rules Ensure a Fair trial? A Comparative Perspective on Evidentiary Rules* (Springer 2019).

⁴⁰⁴ Jackson and Summers (n 4) 154.

⁴⁰⁵ IH Dennis, *The Law of Evidence* (7th edn, Sweet & Maxwell 2020) 105.

⁴⁰⁶ Roberts and Zuckerman (n 20) 151.

⁴⁰⁷ It has been endorsed by the US Supreme Court: see e.g. *Elkins v United States*, 364 US 206 (1960); *Mapp v Ohio*, 367 US 643 (1961). See also MW Orfield, ‘The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers’ (1987) 54 *University of Chicago Law Review* 1016; LT Perrin and others, ‘If It’s Broken, Fix It: Moving beyond the Exclusionary Rule - a New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule’ (1998) 83 *Iowa Law Review* 669; K Kinports, ‘Culpability, Deterrence, and the Exclusionary Rule’ (2013) 21 *William and Mary Bill of Rights Journal* 821; Slobogin, ‘A Comparative Perspective on the Exclusionary Rule in Search and Seizure Cases’ (n 297) 283–285.

⁴⁰⁸ See e.g. Roberts and Zuckerman (n 20) 156–157; C Slobogin, ‘Why Liberals Should Chuck the Exclusionary Rule’ (1999) 2 *University of Illinois Law Review* 363, 368. ff; P Duff, ‘Admissibility of Improperly Obtained Physical Evidence in the Scottish Criminal Trial: The Search for Principle’ (2004) 8 *Edinburgh Law Review* 152, 163–164; DA Sklansky, ‘Is the Exclusionary Rule Obsolete?’ (2008) 5 *Ohio Journal of Criminal Law* 567, 582. For more principled objections to the deterrence principle see Roberts and Zuckerman (n 20) 155–156; Duff 161–163.

guilty, or if for any other reason gathering evidence for use at trial is not what is motivating their conduct....'⁴⁰⁹

Thirdly, in line with the *protective* or *remedial* rationale the holder of a right should be protected against the consequences of a state official's breach of that right. Exclusion is seen as the most appropriate remedy for violation of defendants' rights committed by the investigating authorities while collecting evidence.⁴¹⁰ Criminal courts should use their authority and rule in such a way that the 'state and the citizen are placed in the positions they would have been in' had their rights not been violated.⁴¹¹ Taking this position to its logical extreme, exclusion would be in order in any and every case where the rights of the accused have been violated. Indeed, critics argue that the protective principle is blind to 'comparative reprehensibility': exclusion as a remedy would be disproportionate where there is a breach of a minor right and there is strongly probative evidence of a serious offence.⁴¹² Additionally, the evidential *status quo ante* – i.e. the state of the evidence before the breach of rights occurred – can in reality never be reached again. Once the state discovers cogent evidence, albeit by improper or illegal means, the state cannot simply pretend that it does not have this information and choose not to fulfil its crime control responsibilities.⁴¹³ Proponents of the protective principle usually qualify it, by adding that the case for applying this principle is strongest where fundamental or human rights, as enshrined in the ECHR or a constitution, were violated, but that it should probably not be applied in cases where the breach of a right is merely small or 'technical'.⁴¹⁴ Another issue with the protective principle is that, while it takes the rights of the accused seriously, it would not provide a basis for excluding evidence that was obtained by violating the rights of a third party.⁴¹⁵

A final justificatory theory for the exclusion of illegally obtained evidence centres on *integrity* or *moral legitimacy*. The focus of this principle is not on reliability of the evidence, on the investigating authorities, or on the victim of the rights violation, but on the administration of justice. Different ways of theorising this principle have been put forward.⁴¹⁶ According to the

⁴⁰⁹ Ashworth and Redmayne (n 403) 344.

⁴¹⁰ See especially Ashworth, 'Excluding Evidence as Protecting Rights' (n 403). In the US see also WA Schroeder, 'Restoring the Status Quo Ante: The Fourth Amendment Exclusionary Rule as a Compensatory Device' (1983) 51 *George Washington Law Review* 633; J Norton, 'The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante' (1998) 33 *Wake Forest Law Review* 261.

⁴¹¹ Ashworth, 'Exploring the Integrity Principle in Evidence and Procedure' (n 403) 111–112.

⁴¹² Y Kamisar, "'Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule' (1987) 86 *Michigan Law Review* 1; Zuckerman, *The Principles of Criminal Evidence* (n 402) 349; Duff (n 408) 169.

⁴¹³ Roberts and Zuckerman (n 20) 153.

⁴¹⁴ Ashworth, 'Exploring the Integrity Principle in Evidence and Procedure' (n 403) 112.

⁴¹⁵ RA Duff and others, *The Trial on Trial: Volume 3: Towards a Normative Theory of the Criminal Trial* (Hart 2007) 232.

⁴¹⁶ See e.g. Ashworth, 'Exploring the Integrity Principle in Evidence and Procedure' (n 403); Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (n 203) 23–25; Ho, 'Exclusion of Wrongfully Obtained Evidence: A Comparative Analysis' (n 8) 829–833.

‘public attitude integrity’ variation of the principle judgments need to appear legitimate in the eyes of the public.⁴¹⁷ The idea is that citizens will lose their faith in the administration of Justice if judges too easily condone wrongdoing by state authorities. Equally, the legitimacy of the administration of Justice will suffer if citizens see that people who have committed serious offences go free because of relatively minor wrongdoing.⁴¹⁸ This variation of the integrity principle thus inherently requires courts to perform a balancing exercise, weighing competing public interests, in which multiple factors can be taken into account. Another variation is ‘court-centred integrity’, according to which the use of illegally obtained evidence jeopardises the moral and expressive authority of the verdict.⁴¹⁹ Exclusion of the tainted evidence is considered a way of renouncing the impropriety and preserving the integrity of the court specifically and of the criminal justice system generally.

The merit of the integrity principle is that it enables legal systems to articulate the fundamental tension that dealing with illegally obtained evidence inevitably entails. On one end of the spectrum, states would emphasise truth finding as the main aim of the criminal process but routinely condone malpractice by law enforcement agencies. On the other end of the spectrum, states would uphold due process values and demonstrate respect for suspects’ procedural rights, whilst possibly letting criminals go free on the basis of a mere technicality and failing to protect citizens from (future) criminality. In both extremes, the moral integrity and procedural legitimacy of the criminal justice system may be compromised.⁴²⁰ Adopting the integrity principle may then provide states a theoretical framework within which they can navigate this tension and make their balancing exercise, in which they can take a variety of factors into account,⁴²¹ explicit. This is the case regardless of whether balancing happens in the context of the legislature establishing pre-balanced statutory rules or in the exercise of judicial discretion.

However, the integrity principle also has its flaws. No matter which variation of this principle is adopted, Ashworth questions whether it can overcome the objection of the ‘separation thesis’. According to this thesis, courts are viewed as independent of law enforcement agencies. Consequently, pre-trial breaches of rights do not compromise the fairness of the trial itself, especially if separate remedies are available, and breaches of rights by the police or other investigating authorities do not compromise the integrity of the judiciary.⁴²² Ashworth initially

⁴¹⁷ This approach has been adopted in Canada: see Article 24(2) Canadian Charter of Rights and Freedoms which essentially centres on whether the administration of justice would be brought into disrepute by the admission of the evidence; *R v Grant*, [2009] 2 S.C.R. 353, para 67-71.

⁴¹⁸ Ashworth and Redmayne (n 403) 346.

⁴¹⁹ Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (n 203) 24. A good example of this variation is the case of *A v. Secretary of State for the Home Department (No. 2)* [2005] UKHL 71, [2006] 2 AC 221 in which the House of Lords relied on clear moral reasoning to conclude that the admission of evidence obtained by torture of a third party abroad would compromise the integrity of the judicial process (see *ibid*, para 87 and 91 per Lord Hoffmann).

⁴²⁰ Roberts and Zuckerman (n 20) 158–159.

⁴²¹ On the variety of factors that may be relevant upon adoption of the integrity rationale see Duff (n 408) 172.

⁴²² Ashworth, ‘Exploring the Integrity Principle in Evidence and Procedure’ (n 403) 121.

concluded that there is no convincing reason to reject the separation thesis and used this argument to decide ultimately in favour of the protective principle, which he suggested fitted better with the notion of human rights.⁴²³ However, more recently he provided a three-fold response to the separation thesis. First, to the extent that admission of evidence encourages investigating authorities to break the law, it would be hypocritical of courts to endorse any version of the separation thesis. Secondly, viewed from a historical perspective, the separation thesis is unrealistic, as at least in England and Wales courts have always taken responsibility for oversight of the police. Thirdly, there may be instances where, even if a decision to admit evidence does not condone the illegal conduct that produced it, it would still compromise the court's integrity, especially in cases such as *A v. Secretary of State (No 2)*⁴²⁴ which concerned the use of evidence obtained by torture of a third party in a foreign State (see further below Section 6.2.2.1).⁴²⁵

The reasons justifying the admission or exclusion of illegally obtained evidence are important because, whichever justification is adopted, it has an influence on the scope of the exclusionary rule, whether a balancing of interests and values is required, and how such a balancing exercise may be conducted. The next chapter will analyse the Belgian and English approach towards illegally obtained evidence and examine whether and which rationales for admission or exclusion of evidence can be identified. This will in turn inform the analysis in Chapter 2 regarding the similarities and differences in approach, as well as any conclusions on the principles underpinning the doctrine of illegally obtained evidence from a comparative perspective.

⁴²³ *ibid* 122.

⁴²⁴ [2005] UKHL 71, [2006] 2 AC 221.

⁴²⁵ Ashworth and Redmayne (n 403) 361–362.

6 MANDATORY EXCLUSION AND JUDICIAL DISCRETION: IN SEARCH OF A PRINCIPLED APPROACH

This section aims to discern which principles underpin the different approaches to admission and exclusion of illegally obtained evidence, if any. It does so by analysing on what grounds illegally obtained evidence is subject to mandatory exclusion, to what extent jurisdictions rely on judicial discretion, and which factors are considered in a balancing exercise. Detailed discussion of the substantive grounds for impropriety or illegality and how different jurisdictions deal with certain types of rights violations (e.g. evidence obtained by torture or inhuman and degrading treatment; surveillance, wiretapping and violations of the right to privacy; violations of the privilege against self-incrimination and the right to remain silent; denial of access to legal advice; etc) is discussed only with a view to elucidating the general logic for exclusion of evidence.

6.1 Belgium

Recall that under Belgian law, illegally obtained evidence may only be excluded in three circumstances: (i) if statutory legislation explicitly provides nullity as a sanction for failure to meet a formality; (ii) if the reliability of the evidence has been tainted; (iii) if use of the evidence violates the right to fair trial.⁴²⁶ The first ground leads to mandatory exclusion, whereas the second and especially the third ground gives courts broad discretion. These three exclusionary grounds will be discussed in turn.

6.1.1 Mandatory exclusion: statutory nullity

When evidence is gathered in violation of a statutory provision that explicitly provides nullity as a sanction for failure to meet a procedural formality, the judge has no discretion and is obliged to exclude this evidence.⁴²⁷ A formality is either fulfilled or it is not; there is in principle simply no scope for judicial discretion. Additionally, the idea is that if the legislature decides that a certain procedural rule is of fundamental importance and sanctions its violation with nullity, this takes precedence over any judicial discretion.⁴²⁸

There are extensive statutory rules governing the procedures for intrusive investigative measures. By contrast, surprisingly little legislative attention has been paid to the issue of how evidence obtained in violation of said rules should be treated. This can be explained by the fact

⁴²⁶ Article 32 PT CCP; Cass. 14 Oct 2003, *T.Strafr.* 2004, 129, comment P Traest.

⁴²⁷ P Traest, 'Onrechtmatig Verkregen Doch Bruikbaar Bewijs. Het Hof van Cassatie Zet de Bakens Uit' [2004] *Tijdschrift voor Strafrecht* 133, 137; Verstraeten, *Handboek Strafvordering* (n 61) 1008; De Smet, *Nietigheden in Het Strafproces* (n 134) 68; Traest, 'Actualia Bewijs in Strafzaken' (n 145) 141; Deruyck (n 143) 210 nr 12.

⁴²⁸ Traest, 'Actualia Bewijs in Strafzaken' (n 145) 141–142.

that the original drafters of the Code of Criminal Procedure assumed that including procedural formalities in statutes was sufficient to ensure that these formalities would be respected. It was thought to be self-evident that if the legislature provided nullity as a sanction for violation of a rule, that rule was considered so fundamental that exclusion of evidence was justified, even if it meant the defendant would be acquitted.⁴²⁹ Consequently, the CCP initially did not contain any provisions on how illegally obtained evidence should be treated. Up until today there are only very few instances where nullity is explicitly provided as a sanction for failing to meet a procedural formality. Nullity is currently only provided for violation of certain specific requirements relating to seizure of immovable property,⁴³⁰ testimonies by witnesses who wish to remain anonymous,⁴³¹ and - as of 1 January 2021 - when a polygraph test is performed.⁴³² Indeed, some of the few statutory nullities have been abolished in recent years.⁴³³ Since there are only few formalities under penalty of nullity in Belgian criminal procedure, this exclusionary ground has a limited scope in practice.⁴³⁴ It appears that this ground for exclusion is more the remains of the traditional approach on nullities. Moreover, these few instances do not seem to have a common denominator.

In addition to the procedural formalities for which legislation prescribes nullity, the case law developed the so-called ‘substantial formalities’. These formalities are not accompanied by statutory nullity, yet judges regard them as concerning the essence of criminal procedure and they are thought to exist in the general interest.⁴³⁵ As ‘substantial formalities’ are deemed so essential, it would make sense that they lead to exclusion of evidence in the same way that the formalities under penalty of nullity do.⁴³⁶ However, that is not what the Court of Cassation decided in a case concerning a home search for which the owner had not given prior written consent, which is required under the Act of 7 June 1969, albeit not under penalty of nullity. The Court held that unless a treaty or statutory provision explicitly provides what the procedural consequences are for violation of a formality, it is up to the judge to decide what

⁴²⁹ B De Smet, ‘Stromingen in Het Stelsel van Nietigheden. Nieuwe Criteria Voor de Uitsluiting van Onrechtmatig Verkregen Bewijs’ (2005) 4 Tijdschrift voor Strafrecht 248, 249.

⁴³⁰ Article 35bis CCP.

⁴³¹ Article 86bis and 86ter CCP

⁴³² New version of article 112duodecies CPP.

⁴³³ Article 90quater, §1, second paragraph, 5° CCP requires that a wiretapping order issued by the investigating judge mentions the name and rank of the police officers involved in wiretapping. Violation of this requirement used to be sanctioned with nullity, but this was abolished in 2016 (article 66 of the Act of 5 February 2016 amending criminal law and criminal procedure and laying down various provisions on the administration of justice, *Official Bulletin* 19 February 2016). Parliament was of the opinion that the consequences of a nullity sanction (i.e. exclusion of any evidence obtained in violation of the formality) were disproportionate in the serious cases in which wiretaps were used (Explanatory Memorandum, *Parl.St.* Kamer 2015-16, nr. 54K1418/001, 62).

⁴³⁴ M Sterkens, ‘De Gewijzigde Cassatierechtspraak Met Betrekking Tot de Onrechtmatige Bewijsverkrijging En de Weerslag Ervan Op Het Vooronderzoek - KU Leuven’ [2005] Tijdschrift voor Strafrecht 508, 509–515.

⁴³⁵ Traest, ‘Onrechtmatig Verkregen Doch Bruikbaar Bewijs. Het Hof van Cassatie Zet de Bakens Uit’ (n 427) 142.

⁴³⁶ *ibid.*

the result should be.⁴³⁷ In other words, failing to meet substantial formalities does not automatically lead to nullity and exclusion of evidence. This judgment makes the distinction the case law traditionally drew between substantial formalities and other non-substantial rules of criminal procedure less important.⁴³⁸ Whether judges deem a procedural formality that is not prescribed under penalty of nullity to be substantial or not is irrelevant. Only violation of legal requirements explicitly prescribed under penalty of nullity will *automatically* lead to exclusion of evidence. Evidence obtained in violation of a substantial nullity (or a non-substantial rule of criminal procedure, for that matter) will only be excluded if the trial judge decides that the reliability has been tainted or the right to fair trial has been violated (see following sections).

While the Belgian legislature should explicitly provide the penalty of nullity for any norm it considers fundamental,⁴³⁹ the paucity of such provisions nearly twenty years after the Antigon doctrine was introduced, makes it amply clear that this has not been the case. It seems that the legislature instead prefers to leave it to judges to exercise their discretion in specific cases and balance the various interests at stake, which will be analysed in the next section.

6.1.2 Discretionary exclusion and balancing tests

6.1.2.1 *Reliability has been tainted by the illegality*

If statute law does not provide nullity as a sanction, exclusion of evidence is still possible on the basis of two other criteria, namely that the illegality has tainted the reliability of the evidence⁴⁴⁰ or that the use of the illegally obtained evidence would violate the right to fair trial.⁴⁴¹ In those instances, exclusion is not compulsory and is instead subject to judicial discretion. The notion of ‘reliability’ in Belgian law is rather broad, which remedies in part the limited scope of applicability of the first criterion (formality under penalty of nullity).⁴⁴²

The question arises how one can know, from an epistemological standpoint, whether evidence is reliable. A distinction should be made between two types of evidence.⁴⁴³ First, the existence

⁴³⁷ Cass. 16 November 2004, RABG 2005, 504, RW 2005-06, 387, comment P Popelier, T. Strafr. 2005, 285, comment R Verstraeten and S De Decker; Cass. 15 November 2005, Pas. 2005, 2254, T. Strafr. 2006, 264.

⁴³⁸ Verstraeten, *Handboek Strafvordering* (n 61) 1008, nr. 1987; De Decker and Verbruggen (n 210) 76.

⁴³⁹ Traest, ‘De internationalisering van het bewijsrecht: over telefoontap en de Eisen die aan het in het buitenland verworven bewijs moeten gesteld worden’ (n 319) 136–137, 142; Traest, ‘Actualia Bewijs in Strafzaken’ (n 145) 145–146.

⁴⁴⁰ Article 32, second bullet point PT CCP.

⁴⁴¹ Article 32, third bullet point PT CCP.

⁴⁴² Verstraeten, *Handboek Strafvordering* (n 61) 1009, nr. 1988.

⁴⁴³ The same distinction is made by De Decker and Verbruggen (n 210) 76–77.

of certain evidence is dependent on a person's free will to provide it, a prime example being witness statements and confessions. The reliability of such evidence would be tainted if the free will of the person is undermined, for instance if the police put undue pressure or has mislead the person. Secondly, there is evidence that exists independent of a person's free will, so called 'real evidence'. This may include DNA samples, evidence obtained through surveillance, etc. In order to ascertain whether such evidence is reliable, one would need to examine the protocol or procedure by which such evidence may be obtained. If such a protocol is absent, or it does not mention in detail the technicalities and steps involved in gathering this kind of evidence, the logical conclusion would be that the evidence is not reliable.

Some Belgian scholars suggest that whether or not evidence is reliable would and should be taken into account as part of the judge's general assessment of the probative value of the evidence, rather than as part of the assessment on the admissibility of the evidence.⁴⁴⁴ The argument goes that if, in the context of the assessment of the probative value of the evidence, the judge deems the evidence to be unreliable, she would not take it into account anyway.⁴⁴⁵ However, conceptually, it makes sense to distinguish between a first stage of the proceedings in which the judge determines whether illegally obtained evidence is admissible, and a second stage in which the judge assesses the probative value of all the evidence that has been admitted to trial.⁴⁴⁶ In the first phase the judge must answer a distinct question, namely whether the illegal or improper manner in which the evidence was collected has tainted its reliability. If the judge decides that the evidence is unreliable, she will declare it inadmissible. If the judge determines that the evidence, despite its illegal provenance, may be admitted at trial, in the second phase she must determine the reliability in a general sense, independent of how the evidence was obtained, along with all legally obtained evidence. If at that stage the judge decides that the evidence is unreliable, she should not declare the evidence inadmissible (for that assessment has already been made at the first stage) but rather should decide not to rely on the evidence in deciding upon the criminal charge. While this is an important conceptual distinction, it is of little practical relevance in the Belgian context. The admissibility assessment usually does not occur until the trial stage and there is no exclusion in the strict sense of the word where the trier of fact is shielded from the inadmissible evidence. Instead, there are rules on how the evidence may be used.⁴⁴⁷ Hence, both if a judge decides that the reliability of *illegally* obtained evidence has been tainted and if a judge rules that *legally* obtained evidence is unreliable, the result will be that she is not permitted to rely on this evidence in determining the criminal charge and giving reasons for her judgment.

⁴⁴⁴ Traest, 'Onrechtmatig Verkregen Doch Bruikbaar Bewijs. Het Hof van Cassatie Zet de Bakens Uit' (n 427) 137.

⁴⁴⁵ Beernaert and Traest (n 143) 167.

⁴⁴⁶ In a similar sense Deruyck (n 143) 215.

⁴⁴⁷ Section 4.1 and 4.2.

6.1.2.2 Violation of the right to a fair trial

The third exclusionary ground, which requires that the judge excludes illegally obtained evidence if its use would violate the defendant's right to fair trial, is the one that is most relied upon in practice. In multiple judgments, the Court of Cassation has specified five subfactors the trial judge may take into account in her assessment of whether admitting illegally obtained evidence would violate the right to fair trial.⁴⁴⁸ It confirmed these subfactors after Article 32 PT CCP was enacted.⁴⁴⁹

A first factor is the intentional or grossly negligent⁴⁵⁰ nature of the authorities' illegal investigative action.⁴⁵¹ Only if the authority in charge of the investigation committed the illegality with intention or gross negligence might this prompt the trial judge to exclude the evidence, though this is not mandatory.⁴⁵² Some authors suggest, however, that while the mindset with which a police officer committed the illegality may be relevant to determine the type of disciplinary sanction they should face, it is hard to see how this factor is relevant to decide whether or not the evidence should be admissible at trial.⁴⁵³ Arguably, however, the 'mens rea' of the police in committing the illegality is not only relevant from a disciplinary perspective but also from the perspective of the integrity of the criminal justice system. A violation of suspects' rights committed mala fide is a more 'troubling display of excess or abuse of power' than a violation committed in good faith.⁴⁵⁴ Hence, a mala fide breach requires a

⁴⁴⁸ Cass. 23 March 2004, *RABG* 2004, 1061, comment F Schuermans, *RDPC* 2005, 661, comment C De Valkeneer; Cass. 12 October 2005, *JT* 2006, 109, *JLMB* 2006, 585, *Pas.* 2005, 1904, *Rev. dr. Pén.* 2006, 211, *T. Strafr.* 2006, 25, comment F Verbruggen; Cass. 2 March 2005, opinion AG Vandermeersch, *JLMB* 2005, 1086, comment M-A Beernaert, *JT* 2005, 211, *RABG* 2005, 1161, comment S Berneman, *Rev. dr. pén* 2005, 668, comment C De Valkeneer; Cass. 12 October 2005, *Arr. Cass.* 2005, 1903, *T. Strafr.* 25, comment F Verbruggen; Cass. 31 October 2006, *T. Strafr.* 2007, 53, comment F Schuermans and comment J. Van Gaeve; Cass. 23 September 2008, *T. Strafr.* 2009, 151, comment F Schuermans; Cass. 5 June 2012, *Arr. Cass.* 2012, 1547, *NC* 2013, 439, with comment; Cass. 28 May 2013, *Arr. Cass.* 2013, 1311, *RABG* 2014, 29, comment V Vereecke, *RW* 2013-14, 1616, comment B De Smet.

⁴⁴⁹ Cass. 5 January 2016, *T. Strafr.* 2016, 231, comment B Meganck.

⁴⁵⁰ The Dutch and French case law use the term 'een niet te verontschuldigen onachtzaamheid', and 'une negligence inexcusable' respectively.

⁴⁵¹ Initially, the Court of Cassation only referred to the intentional nature of the illegality: see e.g. Cass. 23 March 2004, *RABG* 2004, 1061, comment F Schuermans, *RDPC* 2005, 661, comment C De Valkeneer; Cass. 31 October 2006, *T. Strafr.* 2007, 53, comment F Schuermans and comment J Van Gaeve; Cass. 5 June 2012, *Arr. Cass.* 2012, 1547, *NC* 2013, 439, with comment. The Court added later that the trial judge can take into consideration not only whether the investigating authorities committed the illegality intentionally but also whether they did so in a grossly negligent manner: Cass. 23 September 2008, *T. Strafr.* 2009, 151, comment F Schuermans; Cass. 26 January 2011, *Arr. Cass.* 2011, 319, *T. Strafr.* 2011, 268, comment F Schuermans; Cass. 28 May 2013, *Arr. Cass.* 2013, 1311, *RABG* 2014, 29, comment V Vereecke, *RW* 2013-14, 1616, comment B De Smet.

⁴⁵² Cass. 31 October 2006, *Arr. Cass.* 2006, nr. 535 and *T. Strafr.* 2007, 53, comment F Schuermans.

⁴⁵³ Traest, 'De internationalisering van het bewijsrecht: over telefoontap en de Eisen die aan het in het buitenland verworven bewijs moeten gesteld worden' (n 319) 141; MA Beernaert, 'La Preuve En Matière Pénale: Principes Généraux', *Droit pénal et procédure pénale (loose-leaf book)* (Die Keure 2007) 20 nr 43.

⁴⁵⁴ Ho, 'Exclusion of Wrongfully Obtained Evidence: A Comparative Analysis' (n 8) 838. See also Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (n 203) 31.

clear signal from the judiciary that they denounce and disapprove of such conduct by excluding the evidence.

Another factor in the balancing exercise is the seriousness of the offence under investigation compared to the seriousness of the illegality.⁴⁵⁵ This criterion entails a proportionality test. If the offence is ‘far more serious’⁴⁵⁶ than the illegality committed in the collection of evidence, the right to fair trial is not jeopardised. Conversely, the right to fair trial would be violated if the seriousness of the offence clearly does not outweigh the seriousness of the illegality. In one case, the traffic police had been accompanied by a television crew which had filmed the detection of traffic offences and the subsequent procedure. The material was intended to be used for a documentary on a commercial television channel. The Court of Cassation ruled that the seriousness of the illegality (the violation of privacy by the camera crew) far exceeded the seriousness of the traffic offence and that exclusion of the evidence was in order.⁴⁵⁷ In a similar case, the trial judge decided not to exclude the evidence, as none of the video footage had actually been broadcast. The Court of Cassation upheld this decision as it was up to the trial judge to make this assessment.⁴⁵⁸ The Liège Court of Appeal considered a violation of medical professional secrecy more serious than the drug offence that was revealed this way and excluded the evidence.⁴⁵⁹

The seriousness of the offence charged is a controversial subfactor, as it implies that in cases concerning serious offences the judge can condone graver procedural irregularities. Paradoxically, lower courts which adjudicate less serious cases would then have to apply a stricter notion of the right to fair trial compared to the higher courts which adjudicate the most serious offences.⁴⁶⁰ On the one hand, the seriousness of the offence should never be a consideration when assessing whether illegally obtained evidence should be excluded, let alone that a more serious offence could more easily justify admission than a petty offence. If the offence is more serious and the anticipated penalty is more severe, it is all the more important to respect procedural norms to avoid mistakes and miscarriages of justice.⁴⁶¹ In the English

⁴⁵⁵ Cass. 23 March 2004, *RABG* 2004, 1061, comment F Schuermans, *RDPC* 2005, 661, comment C De Valkeneer.

⁴⁵⁶ The literal phrasing in the case law is ‘de ernst van het misdrijf overstijgt de begane onrechtmatigheid *veruit*’ / ‘la gravité de l’infraction excède *largement* l’irrégularité commise’ (own emphasis).

⁴⁵⁷ Cass. 8 November 2005, *Pas.* 2005, 2181, *RABG* 2006, 930, comment S Berneman, *RDPC* 2006, 672, *T. Strafr.* 2006, 85, *Vigiles* 2006, 22, comment F Schuermans.

⁴⁵⁸ Cass. 21 November 2006, *Pas.* 2006, 2437.

⁴⁵⁹ Court of Appeal Liège 25 May 2009, *JLMB* 2009, 1184.

⁴⁶⁰ De Smet, ‘Stromingen in Het Stelsel van Nietigheden. Nieuwe Criteria Voor de Uitsluiting van Onrechtmatig Verkregen Bewijs’ (n 429) 258; Deruyck (n 143) 219.

⁴⁶¹ R Verstraeten and S De Decker, ‘Antigoon Sluit de Achterpoort, Maar Opent Een Raam’ (2005) 4 *Tijdschrift voor Strafrecht* 289, 295; A De Nauw, ‘Is de Bepaling van de Gevolgen Vande Niet-Naleving van Strafprocessuele Voorschriften Geen Gedeelde Opdracht van de Wetgever En van de Rechter?’ [2011] *Ius & Actores* 122; Beernaert (n 453) 20 nr 44.

context, where the same factor is considered relevant in the exercise of judicial discretion,⁴⁶² Ashworth argues:

[J]ust as the greater seriousness of the crime makes it more of a social priority for the guilty to be convicted, so also the greater seriousness of the crime makes the allegation more crucial for defendants, particularly the innocent, and hence more important that all the fundamental rights are properly secured.⁴⁶³

On the other hand, while Ashworth's statement is intended to support his argument that the seriousness of the offence should never be a consideration,⁴⁶⁴ his statement equally points to a powerful competing criminal justice value, namely society's interest in convicting the guilty, which is greater in case of a murder than for a victimless traffic offence.

Thirdly, the fact that illegally obtained evidence only concerns a material element of the offence is a factor in favour of admitting the evidence.⁴⁶⁵ This rather vague factor pertains to the distinction between evidence that merely reveals the existence of the offence, as opposed to evidence identifying the suspect.⁴⁶⁶ For example, illegally obtained evidence that only uncovers the body of the murdered person but does not link it with a suspect is more likely to be admitted.⁴⁶⁷ This criterion may be difficult to apply in practice, as evidence may often reveal both information about the crime and the suspect. It would lead to complex and absurd situations if trial judges could use evidence in their assessment of whether or not the crime was committed, but not in the attribution of the crime to a suspect.⁴⁶⁸

In its decision of 2 March 2005 the Court of Cassation added a fourth factor, namely whether the illegality has an impact on the freedom or right that the violated norm is intended to protect.⁴⁶⁹ A shopkeeper had installed a hidden camera to catch one of his employees he suspected of stealing. The video footage had been illegally obtained. The legally binding collective labour agreement⁴⁷⁰ required employers to inform their employees about the use of

⁴⁶² See below Section 6.2.

⁴⁶³ Ashworth, 'Exploring the Integrity Principle in Evidence and Procedure' (n 403) 120.

⁴⁶⁴ He expresses this view clearly in Ashworth, 'Excluding Evidence as Protecting Rights' (n 403) 732.

⁴⁶⁵ Cass. 23 March 2004, *RABG* 2004, 1061, comment F Schuermans, *RDPC* 2005, 661, comment C De Valkeneer.

⁴⁶⁶ De Decker and Verbruggen (n 210) 80; Verstraeten, *Handboek Strafvordering* (n 61) 1012 nr 1993.

⁴⁶⁷ J Meese, 'The Use of Illegally Obtained Evidence in Criminal Cases: A Brief Overview' (2017) 18 *ERA Forum* 297, 305; Verstraeten, *Handboek Strafvordering* (n 61) 1012–1013 nr 1193.

⁴⁶⁸ Deruyck (n 143) 220.

⁴⁶⁹ Cass. 2 March 2005, opinion AG Vandermeersch, *JLMB* 2005, 1086, comment M-A Beernaert; *JT* 2005, 211; *RABG* 2005, 1161, comment S Berneman, *Rev. dr. pén* 2005, 668; comment C De Valkeneer. This criterion was applied also in Court of Appeal Antwerp 26 October 2005, *T. Strafr.* 2006, 31.

⁴⁷⁰ Article 9 of the Collective Labour Agreement no. 68, 16 June 1998 on the protection of the privacy of employees in relation to cameras in the workplace, *Belgian Official Bulletin* 20 October 1998.

cameras, which the shopkeeper had omitted to do. The Court of Cassation held, however, that the illegality did not impact upon the employee's right to privacy. Since the camera was pointed at the public area of the shop and was only pointed at the cash register, the employee's private life, which was protected by the collective labour agreement, was not affected by the illegality. Hence, the Court held that the use of the footage did not violate the right to a fair trial.

This factor bears a close resemblance to the German criterion of the *Schutzzweck der Norm*. Similarly, article 359a, second paragraph of the Dutch Code of Criminal Procedure provides that the trial judge, in assessing which procedural consequences should be attached to the illegal gathering of evidence, must take into account the 'interest' that the violated legal rule serves, i.e. the protective purpose of the legal rule.

The most recent factor the Court of Cassation has added is whether the illegal action was of a purely formal nature.⁴⁷¹ The subfactor of 'formal legality' was also mentioned in the judgment of the Court of Appeal in Ghent of 16 March 2004, which led to the Cassation judgment of 16 November 2005. The occupants had only given their oral consent to have their private property searched but not their written consent, even though legislation required both. The Court of Appeal held that this illegality (i.e. the absence of written consent) was of a purely formal nature, and decided that admission of the evidence did not violate the defendant's right to fair trial.⁴⁷² This criterion is vague; it certainly is not clear exactly how the formal nature of an illegality has any bearing on the right to a fair trial. The very existence of this criterion creates the impression that the legislature might create criminal procedural rules out of sheer formality, rather than to protect core values and rights.⁴⁷³ Indeed, formal legal requirements may be imposed precisely to protect fundamental rights and interests. The requirement that a search warrant or wiretap order must be signed by the investigating judge ensures that such intrusive measures can only be imposed by an independent and impartial judge.⁴⁷⁴ Furthermore, the added value of this criterion is unclear, since similar considerations will already be taken into account as part of the proportionality test or when assessing the impact of the illegality on the right the violated norm is intended to protect. If the illegality is merely of a formal nature, the seriousness of the offence will likely outweigh the seriousness of the illegality or the chance will be slim that it will have a big impact on the protected right. In both instances, the right to a fair trial is not jeopardised.⁴⁷⁵

The five factors set out above are neither cumulative - meaning that the judge is not obliged to take all these factors into consideration - nor exhaustive - so the judge also has the option of

⁴⁷¹ Cass. 12 October 2005, *Arr. Cass.* 2005, 1903, T. *Strafr.* 25, comment F. Verbruggen.

⁴⁷² Court of Appeal Ghent 16 March 2004, T. *Strafr.* 2005, 304.

⁴⁷³ Deruyck (n 143) 223.

⁴⁷⁴ Traest, 'Onrechtmatig Verkregen Doch Bruikbaar Bewijs. Het Hof van Cassatie Zet de Bakens Uit' (n 427).

⁴⁷⁵ Verstraeten, *Handboek Strafvordering* (n 61) 1013–1014 nr 1995; De Decker and Verbruggen (n 210) 82; Traest, 'Actualia Bewijs in Strafzaken' (n 145) 164; Deruyck (n 143) 223.

taking other elements into consideration.⁴⁷⁶ None of the individual factors are decisive in and of themselves. For instance, the fact that investigating authorities intentionally committed an illegal act when gathering evidence does not necessarily lead to exclusion of evidence.⁴⁷⁷ Rather, the judge should take into account all the elements of the case to decide whether or not the use of illegally obtained evidence would violate the right to a fair trial. As will be argued in the next section, the subfactors are such that they leave the courts with considerable discretion. In practice, this judicial discretion mostly leads courts to admit illegally obtained evidence; it is only very rarely excluded.

6.1.3 Absence of a clearly acknowledged rationale

The Belgian rules on illegally obtained evidence can be criticised on many grounds, all of which are symptomatic of a larger problem, namely the absence of a principled approach. It has been claimed that the rationale for the exclusionary rule in Belgium ‘has always been and remains that this sanction will have a dissuasive effect on overzealous police officers, prosecutors and perhaps even investigating judges.’⁴⁷⁸ However, neither statements in the case law, nor in the *travaux préparatoires* accompanying legislation suggest that much thought has been given to the principles that should underpin exclusion of illegally obtained evidence, let alone that a disciplinary rationale would be preferred. Even if the disciplinary principle would in theory be considered dominant in Belgium – which is questionable – current practice certainly cannot be explained by reference to this principle. The courts’ tendency is to admit illegally obtained evidence, exclusion has become the exception. This approach entails the danger that law enforcement officers will be less inclined to respect the rules if they are aware that the chance is high that the evidence will be used in court anyway,⁴⁷⁹ thus eroding the disciplinary principle.

Both the legislature and the judiciary have omitted to develop a clear principled viewpoint on the rationale that should underpin exclusionary rules and what their scope should be. First, a theoretical framework is absent on the statutory level. The legislature has failed to create a comprehensive set of rules for illegally obtained evidence, let alone set out the normative

⁴⁷⁶ Cass. 23 March 2004, *Arr. Cass.* 2004, 518, *RABG* 2004, 1061, comment F Schuermans, *Rev. Dr. Pén.* 2005, 661, comment C De Valkeneer (the judge may “take into consideration one or all of the following circumstances”), Cass. 5 June 2012, *Arr. Cass.* 2012, 1547, *Nullum Crimen* 2013, 439, with case comment (“the fact that the judge does not take all factors into consideration does not make the judgment invalid”); Cass. 31 October 2006, *T.Strafr.* 2007, 53, comment F Schuermans and comment J Van Gaever; Cass. 28 May 2013, *RABG* 2014, 29, comment V Vereecke, *RW* 2013-14, 1616, opinion AG P Duinslaeger and comment B. De Smet; Verstraeten and De Decker (n 403) 290; C Conings, *Klassiek En Digitaal Speuren Naar Strafrechtelijk Bewijs* (Intersentia 2017) 367–368; B De Smet, ‘Criteria En Subcriteria Voor de Beoordeling van Onregelmatigheden Inzake de Bewijsverkrijging’ *Rechtskundig Weekblad* 1620, 1624 (case comment with Cass. 28 May 2013).

⁴⁷⁷ Cass. 31 October 2006, *T.Strafr.* 2007, 53, comment F Schuermans and comment J Van Gaever.

⁴⁷⁸ F Verbruggen and C Conings, ‘After Zigzagging between Extremes, Finally Common Sense? Will Belgium Return to Reasonable Rules on Illegally Obtained Evidence?’ (2021) 7 *Revista Brasileira de Direito Processual Penal*, 273, 300.

⁴⁷⁹ Traest, ‘Actualia Bewijs in Strafzaken’ (n 145) 190.

justifications that should underpin this area of the law.⁴⁸⁰ Consequently, the case law has had to fill this lacuna. In 2013, when the legislature intervened by merely codifying the three exclusionary grounds established in the Antigon case law, without including further case law developments or establishing a new clear set of rules, it missed yet another opportunity to create a coherent normative framework. At present, the only instance where the legislature intervenes in the area of illegally obtained evidence is by prescribing certain formalities under penalty of nullity. Yet, there are almost no such statutory nullities. One way for the legislature to create a more coherent and principled framework for illegally obtained evidence would be to define clearly which breaches of formal regulations should be sanctioned by the exclusion of evidence.⁴⁸¹

Secondly, there is no clear normative framework underpinning the case law on illegally obtained evidence either. Indeed, statements by Belgian courts on the rationale for exclusion of evidence or the principles guiding the exercise of their discretion are extremely rare, if not inexistent. In the multitude of cases on this issue that have been decided since the Antigon rule was established in 2003, the Court of Cassation has never clearly indicated why illegally obtained evidence must only be excluded on three particular grounds. However, while the Court itself has never identified a rationale, this does not entail that no normative justifications whatsoever for excluding can be discerned. For instance, the second exclusionary ground – i.e. the court must exclude the evidence if the illegality has tainted the reliability – implies in and of itself a choice for the reliability rationale. It reflects the normative viewpoint that relevant evidence should be used at trial, regardless of how it was obtained, as long as the evidence is reliable.⁴⁸² Yet, in practice, courts rely on this criterion nowhere near as much as they do on the fair trial criterion to justify their inclusionary or exclusionary approach.

Because there are almost no formalities prescribed under penalty of nullity and the reliability criterion is rarely used in practice, the violation of the right to a fair trial has become the dominant criterion to discern whether illegally obtained evidence should be excluded. The five subfactors courts can take into consideration when conducting a balancing exercise are wide-ranging, non-exhaustive, and not decisive in and of themselves. Consequently, courts have a broad and unstructured discretion. Judges could reach diverging outcomes on whether or not the use of illegally obtained evidence would violate the right to a fair trial, depending on which subfactor(s) they choose to consider, including any subfactors that have not been endorsed by the Court of Cassation.⁴⁸³ The law on illegally obtained evidence is characterised by a case-by-

⁴⁸⁰ In the same sense Meese, ‘Het Bewijs in Strafzaken’ (n 148) 540–541, nr. 31.

⁴⁸¹ Traest, ‘Onrechtmatig Verkregen Doch Bruikbaar Bewijs. Het Hof van Cassatie Zet de Bakens Uit’ (n 427) 136–137.

⁴⁸² E Maes, ‘Onrechtmatig Verkregen Bewijs En Het Integriteitsprincipe in Het Wetsvoorstel Voor Een Nieuw Wetboek van Strafprocesrecht’ (2020) 15 *Nullum Crimen* 493, 499.

⁴⁸³ Meese, ‘Het Bewijs in Strafzaken’ (n 148) 530 nr 21.

case approach.⁴⁸⁴ As the application of the exclusionary rule has become highly dependent on the facts of the case, it escapes evaluation by the Court of Cassation; the Court of Cassation may only adjudicate on questions of law and may not interfere with a finding of fact from a first instance judge or appeals court.⁴⁸⁵ Consequently, the Court of Cassation's ability to provide guidance and structure for the exercise of judicial discretion is limited. Unstructured judicial discretion leads to arbitrary decision-making,⁴⁸⁶ which in turn breeds inconsistency and uncertainty over the fate of illegally obtained evidence.⁴⁸⁷ Additionally, as judges can decide which subfactors to apply without much guidance or structure, some argue this has the potential to foster inequality before the law⁴⁸⁸ and create 'justice based on class'.⁴⁸⁹ Such an approach, characterised by arbitrary decision-making and the absence of principled framework, undermines the legitimacy and integrity of the criminal justice system.⁴⁹⁰

6.1.4 Towards a more principled approach in the new Code of Criminal Procedure?

Considering the criticism on the current law, it is not surprising that the recently drafted Bill for a new Belgian Code of Criminal Procedure proposes to wipe the slate clean and reverse the position currently adopted in Article 32 PT CCP.⁴⁹¹ It is beyond the scope of this report to analyse the Bill extensively and evaluate it on its merits. However, as it proposes to change the law on exclusion of illegally obtained evidence, the key aspects will be covered here. Under the newly proposed system, there would be three categories of illegally obtained evidence, each subject to its own legal regime. First, there are two instances in which exclusion will be

⁴⁸⁴ F Kutu, 'La Règle d'exclusion de La Preuve Illégale Ou Irrégulière: De La Precision Au Bouleversement' [2004] RCJB 408, 437 (case comment with Cass. 14 October 2003); F Kutu, 'Le Droit de La Preuve à l'épreuve Des Juges' [2005] JT 349, 355, nr. 28; S Vandromme and C De Roy, 'Franchimont Wetgeving: Van Mini Naar Maxi' in S Vandromme and others (eds), *De Praktijkjurist XIII* (Story Publishers 2007) 46 nr 93; B Reynaerts, 'De Sanctiëring van Onrechtmatig Verkregen Bewijs Voor de Vonnisgerechten' [2013] Nullum Crimen 94, 115; Traest, 'Actualia Bewijs in Strafzaken' (n 145) 191.

⁴⁸⁵ F Schuermans, 'Cassatie Verfijnt En Relativeert de Bewijsuitsluitingsregels in Strafzaken' [2004] RABG 1066, 1071 (case comment with Cass. 23 March 2004); Traest, 'De internationalisering van het bewijsrecht: over telefoontap en de Eisen die aan het in het buitenland verworven bewijs moeten gesteld worden' (n 319) 142; De Smet, 'Stromingen in Het Stelsel van Nietigheden. Nieuwe Criteria Voor de Uitsluiting van Onrechtmatig Verkregen Bewijs' (n 429) 255, nr. 26; Reynaerts (n 484) 114; Meese, 'Het Bewijs in Strafzaken' (n 148) 531, nr. 22; De Smet, 'Criteria En Subcriteria Voor de Beoordeling van Onregelmatigheden Inzake de Bewijsverkrijging' (n 476) 1624.

⁴⁸⁶ Meese, 'Het Bewijs in Strafzaken' (n 148) 541, nr. 31.

⁴⁸⁷ Kutu, 'Le Droit de La Preuve à l'épreuve Des Juges' (n 484) 355 nr 28; Reynaerts (n 484) 115; Meese, 'Het Bewijs in Strafzaken' (n 148) 530, nr. 21.

⁴⁸⁸ De Smet, 'Stromingen in Het Stelsel van Nietigheden. Nieuwe Criteria Voor de Uitsluiting van Onrechtmatig Verkregen Bewijs' (n 429) 258 nr 34; Vandromme and De Roy (n 484) 46 nr 93; Reynaerts (n 484) 115.

⁴⁸⁹ Meese, 'Het Bewijs in Strafzaken' (n 148) 530, nr. 21.

⁴⁹⁰ *ibid* 541 nr 31.

⁴⁹¹ Bill for the Code of Criminal Procedure, *Parl. Doc.* Chamber 2019-2020, no 55 1239/001, <https://www.lachambre.be/FLWB/PDF/55/1239/55K1239001.pdf>.

mandatory. Any evidence obtained in violation of the Article 3 ECHR prohibition on the use of torture and inhuman and degrading treatment must automatically be excluded.⁴⁹² Under the current rules, it is not guaranteed that evidence obtained in violation of the prohibition on torture will be excluded; the judge has discretion to decide this on the basis of the reliability⁴⁹³ and the right to fair trial criterion.⁴⁹⁴ Furthermore, the Bill specifies that information obtained without the requisite permission from the investigating judge (*onderzoeksrechter/juge d'instruction*) must always be excluded.⁴⁹⁵

Secondly, violation of certain fundamental rights and principles will in principle always lead to evidentiary exclusion, namely the right of defence, right to private life, right to integrity of persons, the rules concerning the competence of courts, or the secrecy of sources in journalism. However, evidence obtained in violation of these rights and principles may nonetheless be admitted if the following admissibility criteria are cumulatively fulfilled: (1) the illicit act is not the result of an intentional or grossly negligent violation of a right or value; and (2) the seriousness of the violation does not outweigh the societal importance of prosecuting and possibly punishing the offender; and (3) the use of the illegally obtained evidence does not harm the integrity of the justice system.⁴⁹⁶ The first two criteria have been recovered from the current law, under which they are considered subfactors of the right to a fair trial criterion. By contrast, the third criterion is a new and welcome addition to the law on illegally obtained evidence, as will be argued further below.

The third category is the residual category, encompassing any illegally obtained evidence that does not fall into category one or two. Such evidence is in principle admissible unless the judge rules that its use would harm the integrity of the justice system.⁴⁹⁷ In other words, on occasions where the violated right is not a fundamental one, there is only one criterion on the basis of which the judge may still decide to exclude the evidence.

There is much to commend in this new approach to illegally obtained evidence. It is fitting for a state that respects the rule of law to adopt the standpoint that illegally obtained evidence is in principle inadmissible, with narrowly defined exceptions. By explicitly stating that any evidence obtained in violation of Article 3 ECHR must be excluded, Belgium is bringing its law in accordance with Article 15 of the UN Convention against Torture (UNCAT),⁴⁹⁸ thus

⁴⁹² Article 9 Bill for the Code of Criminal Procedure, *Parl. Doc.* Chamber 2019-2020, no 55 1239/001, 72-75.

⁴⁹³ Article 32, second bullet point PT CCP.

⁴⁹⁴ Article 32, third bullet point PT CCP.

⁴⁹⁵ Article 10 Bill for the Code of Criminal Procedure, *Parl. Doc.* Chamber 2019-2020, no 55 1239/001, 75-76.

⁴⁹⁶ Article 11 Bill for the Code of Criminal Procedure, *Parl. Doc.* Chamber 2019-2020, no 55 1239/001, 76-78.

⁴⁹⁷ Article 12 Bill for the Code of Criminal Procedure, *Parl. Doc.* Chamber 2019-2020, no 55 1239/001, 78.

⁴⁹⁸ This article provides: "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

ensuring compliance with its international law obligations.⁴⁹⁹ Furthermore, by making explicit reference to the integrity of the justice system as a criterion for the admission or exclusion of illegally obtained evidence in the two discretionary categories, the Bill endorses a particular normative justification for the exclusion of evidence, namely the integrity principle.⁵⁰⁰ The endorsement of a clear normative justification to guide the judicial discretion is in sharp contrast with the current law, under which the amalgamation of reasons to exclude illegally obtained evidence suggest no clear principled approach to the issue of illegally obtained evidence. Nonetheless, the Bill merely refers to the integrity principle without any further explanation. An important task awaits the legislature or judiciary to bring clarity on how this principle should be interpreted and applied in the Belgian legal order.⁵⁰¹

6.2 England and Wales

6.2.1 Mandatory exclusion

Under English law, exclusion of illegally obtained evidence is mandatory on two statutory grounds. Section 76(2) PACE establishes two grounds for mandatory exclusion of confessions. The first is where a confession was obtained by oppression of the person making the confession (section 76(2)(a) PACE). ‘Oppression’ includes torture, inhuman or degrading treatment, and the use or threat of violence (section 76(8) PACE). Reliability is not the underpinning rationale of this provision. It deliberately makes no reference to the veracity of the confession. The point is rather that any form of oppression is considered an unacceptable means of securing evidence, even if it may sometimes yield reliable confessions. Instead, it is arguable that the integrity rationale justifies the mandatory exclusion of any confession evidence obtained in said way, in line with the idea that a jurisdiction cannot maintain its status as a liberal criminal justice system if it resorts to investigative techniques including physical and psychological abuse of suspects.⁵⁰²

One of the leading decisions on the meaning of ‘oppression’ suggests that it is a given a narrow interpretation, covering only fairly harsh treatment.⁵⁰³ Consequently, it is rather straightforward for the prosecution to prove that a confession was not obtained by oppression,

⁴⁹⁹ Belgium ratified this Treaty in 1999 (see the Act of 9 June 1999 concerning the ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, accepted in New York on 10 December 1984, *Belgian Official Bulletin* 28 October 1999).

⁵⁰⁰ See Chapter 5.

⁵⁰¹ Maes (n 482) 500, 503–504.

⁵⁰² Roberts and Zuckerman (n 20) 453.

⁵⁰³ See e.g. *R v. Fulling* [1987] QB 426, 432: Lord Lane C.J. stated that ‘oppression’ should be given its ordinary meaning, which according to the Oxford English Dictionary entails ‘exercise of authority or power in a burdensome, harsh, or wrongful manner; unjust or cruel treatment of subject, inferiors, etc.; the imposition of unreasonable or unjust burdens.’ He added that oppression would usually entail some impropriety of conduct of the interrogator.

thus taking the case outside the remit of the automatic exclusionary rule. For instance, an interviewing officer who in an isolated instance raised his voice, used bad language, or lost his temper, was held to be insufficient to amount to oppression.⁵⁰⁴ Shouting at the suspect what the police officers want him to say, by contrast, was considered to be a hostile and intimidating approach for police officers to take towards a suspect and was held to constitute oppression.⁵⁰⁵

The second statutory ground for mandatory exclusion is established in section 76(2)(b) PACE, which targets confessions that may be unreliable as a result of something ‘said or done’. It requires the court to determine not whether the particular confession is itself reliable, but rather whether the conditions under which the confession was obtained are in general conducive to unreliability.⁵⁰⁶ Common indicators of unreliability are threats, promises, and inducements.⁵⁰⁷ It would seem straightforward that the rationale underpinning this provision is reliability. While that is true, it is worth emphasising that the provision is not so much concerned with reliability of the particular confession in the case-at-hand. The idea is rather that consistent application of the provision will foster reliability of confession evidence in general and in the long run. Even if a confession in a specific case appears to be true, it may still be excluded if the conditions in which it was obtained are dubious, and this approach can be said to promote reliability in future cases. The alternative would be that courts make exceptions for seemingly reliable confessions in specific cases obtained in questionable circumstances, and this in turn encourages police officers to ignore procedural requirements while interviewing suspects in the hope that courts will continue to make exceptions for apparently reliable confessions.⁵⁰⁸

Like section 76(2)(a), section 76(2)(b) has been interpreted narrowly in at least two ways. First, the thing that was ‘said or done’ must be attributable to something or someone external, not to the accused making the confession. For instance, in *Goldenberg* a drug-addicted suspect was experiencing withdrawal symptoms. The suspect himself requested the interview with the police officers during which he made confessions so that he could be released on bail and use drugs again. The Court of Appeal held that there was no ground on which to exclude the confession under section 76(2)(b) as there was no suggestion that the suspect had confessed in consequence of anything said or done *by the interviewing officers*.⁵⁰⁹ Secondly, courts have held that there must be a causal connection between the circumstance conducive to unreliability and ‘something said or done’. In *Law-Thompson*, a suspect with ‘autistic psychopathy’ and Asperger syndrome had given a confession during a police interview without an appropriate

⁵⁰⁴ *R. v. Emmerson* (1991) 92 Cr. App. R. 284, 287.

⁵⁰⁵ *R. v. Paris* (1993) 97 Cr. App. R. 99, 103.

⁵⁰⁶ *Roberts and Zuckerman* (n 20) 455.

⁵⁰⁷ *ibid* 457.

⁵⁰⁸ *ibid* 456.

⁵⁰⁹ *R. v. Goldenberg (Meir)*, (1989) 88 Cr. App. R. 285. See also *R. v. Crompton* (1991) 92 Cr App R 369.

adult present. The Court of Appeal held that section 76(2)(b) could not be invoked as the confession had not been obtained *in consequence of* the absence of an appropriate adult.⁵¹⁰

The jurisprudence on section 76(2) remains very underdeveloped. This is mainly because many cases which could have been decided under section 76 are dealt with instead under the discretionary exclusion on the basis of section 78,⁵¹¹ which will be discussed in the next section.

6.2.2 Discretionary exclusion and balancing tests

As per section 78 PACE, the sole criterion on the basis of which judges can exercise their exclusionary discretion is whether admission would have an ‘adverse effect on the fairness of the proceedings’. The wording of the statute is ambiguous. Indeed, it is not clear how broadly ‘proceedings’ should be construed, nor what makes them fair.⁵¹² It is rare that courts indicate precisely why and how admission of a piece of evidence would or would not adversely affect the fairness of the proceedings.⁵¹³ The concept of fairness in itself is too broad to offer courts any concrete guidance on how to balance the elements of the case and can be judicially manipulated allowing courts the flexibility to avoid having to adopt any clear rationale.⁵¹⁴

Section 78 PACE gives courts considerable discretion, which has been described as ‘broad and unstructured’.⁵¹⁵ Appellate courts have been rather reluctant to provide guidelines to assist judges in exercising their discretion.⁵¹⁶ They have adopted diverging approaches, making it difficult to derive clear principles,⁵¹⁷ which has been criticised.⁵¹⁸ As is the case in Belgium when courts apply the fair trial criterion,⁵¹⁹ there is a non-exhaustive and non-obligatory list of factors English judges can take into consideration in their balancing exercise, including:

⁵¹⁰ *R. v Law-Thompson (Howard James)* [1997] Crim. L.R. 674.

⁵¹¹ *Grevling* (n 139) 667–668.

⁵¹² *Ashworth and Redmayne* (n 403) 352; *Ormerod and Birch* (n 403) 784–785.

⁵¹³ *Grevling* (n 139) 675–676.

⁵¹⁴ *Ormerod and Birch* (n 403) 784.

⁵¹⁵ Ormerod, ‘ECHR and the Exclusion of Evidence: Trial Remedies for Article 8 Breaches?’ (n 138) 64.

⁵¹⁶ See e.g. *R. v Samuel* [1988] Q.B. 615, 630: ‘It is undesirable to attempt any general guidance as to the way in which a judge’s discretion under section 78 ... should be exercised. Circumstances vary infinitely’; *R. v Jelen* (1990) 90 Crim. App. 456, 465: ‘The circumstances of each case are almost always different, and judges may well take different views in the proper exercise of their discretion even where the circumstances are similar. This is not an apt field for hard case law and well-founded distinctions between cases’.

⁵¹⁷ For a comprehensive discussion of the diverging approaches that courts have taken see e.g. Roberts and Zuckerman (n 20) 160–174; Ashworth and Redmayne (n 403) 342–362; Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (n 203) ch 6 and 7; ALT Choo and S Nash, ‘What’s the Matter with Section 78?’ [1999] *The Criminal Law Review* 929.

⁵¹⁸ See e.g. Choo, *Evidence* (n 22) 174; Roberts and Zuckerman (n 20) 174; Choo and Nash (n 517).

⁵¹⁹ Section 6.1.2.2.

[A] review of the legality of the police actions; the seriousness of the offence; the bad faith of the investigators; the type of evidence and its potential reliability; the existence of other evidence; the opportunity to challenge the evidence at trial; the type of impropriety involved; and the type of right or protection infringed.⁵²⁰

Indeed, in both England and Belgium the breadth of courts' power is considerable under the fair trial/fair proceedings criterion: judges in both jurisdictions are expressly permitted to take account of all relevant factors.⁵²¹ The most important factors that courts take into account will be discussed in the following paragraphs.

6.2.2.1 Reliability

Section 78 is often given a narrow interpretation, according to which the key or even sole discerning factor to exclude evidence is its reliability.⁵²² Wherever the improper or illegal gathering of evidence has affected its reliability, courts appear quicker to exclude the evidence.⁵²³ Conversely, if the evidence looks convincing and reliable despite the illegal way in which it was gathered, courts usually exercise their discretion to admit the evidence.⁵²⁴ This is especially the case where the courts are presented with cogent real evidence that predates the wrongdoing, as opposed to evidence voluntarily created by the accused as a consequence of an impropriety, the prime example being a testimony.⁵²⁵

In this view, unless evidence is unreliable, the decision to admit it cannot make the proceedings unfair.⁵²⁶ This reading of section 78 equates the proceedings only with the trial. This is evident, for instance, from Lord Nicholls' statement in the conjoined case of *Looseley; Attorney General's Reference (No 3 of 2000)*: '[t]he phrase "fairness of the proceedings" in section 78 is directed primarily at matters going to fairness in the actual conduct of the trial; for instance, the reliability of the evidence and the defendant's ability to test its reliability'.⁵²⁷ It may be the case that investigators acted improperly or illegally while collecting evidence in the pre-trial phase. But that unfairness precedes the trial and is not caused by a decision to admit the

⁵²⁰ Ormerod, 'ECHR and the Exclusion of Evidence: Trial Remedies for Article 8 Breaches?' (n 138) 64.

⁵²¹ In England: Ormerod and Birch (n 403) 780.

⁵²² Choo, 'England and Wales: Fair Trial Analysis and the Presumed Admissibility of Physical' (n 135) 352; Ormerod and Birch (n 403) 779–780.

⁵²³ See e.g. *R. v. Delaney* (1989) 88 Cr App R 338; *R v Bryce* (1992) 95 Cr App R 320.

⁵²⁴ See e.g. *R. v. Sanghera (Rashpal)*, [2001] 1 Cr. App. R. 20, para 15: 'There was no issue as to the reliability of the evidence'; JR Spencer, 'Bugging and Burglary by the Police' (1997) 56 *The Cambridge Law Journal* 6, 7.

⁵²⁵ Grevling (n 139) 685.

⁵²⁶ Ashworth and Redmayne (n 403) 351–352.

⁵²⁷ [2001] UKHL 53; [2001] 1 WLR 2060, para 12.

evidence.⁵²⁸ Indeed, only very few cases attempt to clarify how an impropriety or illegality in the pre-trial proceedings has adversely affected the fairness of the trial itself.⁵²⁹

The case of *Cooke* illustrates that section 78 allows courts to make use of highly probative evidence, even though it was obtained in an improper manner.⁵³⁰ In this rape case, the accused was arrested and asked to provide a hair sample to obtain DNA evidence. When he refused, the police threatened to take the sample by force. The threat was reinforced by the presence of three police officers in riot gear at the accused's cell door. The accused eventually decided not to resist and some hairs were taken from his scalp. The DNA analysis provided 'very strong evidence that the [accused] had had sexual intercourse' with a woman on the night she was raped. The Court of Appeal acknowledged that if the sample had not been taken in accordance with the procedural requirements of PACE, it would have amounted to an assault. Yet it said obiter that, even if the evidence would have been obtained in these circumstances, it would still have been right not to exclude the evidence under section 78(1) as it was highly probative of the accused's guilt and an assault 'did not cast doubt upon the accuracy or strength of the evidence.'⁵³¹

Equally in *Chalkley* the reliability of the evidence was a primary concern for the Court of Appeal. The defendant was convicted of conspiracy to rob in proceedings where the trial judge had admitted evidence of secret tape recordings obtained in breach of PACE and the civil law of trespass and in violation of Article 8 ECHR.⁵³² The Court of Appeal held that the trial judge had been right not to exclude the evidence under section 78. Auld LJ stated that 'save in the case of admissions and confessions and generally as to evidence obtained from the accused after the commission of the offence there is no discretion to exclude evidence unless its quality was or might have been affected by the way in which it was obtained'. The Court in effect limited the discretion to exclude evidence on the ground that it had been improperly obtained to the scenario where the method of evidence gathering had affected its reliability.⁵³³ Criticising this decision, Choo and Nash suggest that such a narrow approach, according to which real evidence must always be admitted if it is reliable, is contrary to the ordinary meaning of the terms in section 78;⁵³⁴ according the statutory terms 'the circumstances in which the evidence was obtained' their plain meaning does not imply that courts are restricted to considering only circumstances that cast doubt on the reliability of the evidence.⁵³⁵

⁵²⁸ Ashworth and Redmayne (n 403) 352.

⁵²⁹ Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (n 203) 131.

⁵³⁰ [1995] 1 Cr App R 318.

⁵³¹ [1995] 1 Cr App R 318, 328.

⁵³² [1998] 2 Cr App R 79.

⁵³³ [1998] 2 Cr App R 79, 105-106.

⁵³⁴ Choo and Nash (n 517) 935.

⁵³⁵ *ibid* 930.

Choo and Nash criticise the move away from focusing on the *nature of the breach*, to a focus on the *nature of the evidence*.⁵³⁶ Courts tend to be less concerned with so-called ‘non-epistemic considerations’ unrelated to reliability, such as judicial integrity and protection of the suspect’s or third parties’ (human) rights. They seem less willing to balance such values against reliability considerations,⁵³⁷ and to exclude evidence merely on the basis of a substantial breach of a suspect’s rights or on the grounds that the use of such evidence would harm judicial integrity, in instances where the breach has had no effect on the reliability of the evidence.⁵³⁸

There are, however, exceptions to the firmly-entrenched view that reliability of the evidence is the dominant consideration in deciding whether or not to admit illegally obtained evidence. For instance, a rare exception to the court’s general reluctance to exclude evidence on the mere basis that the suspect’s rights were breached, even though the evidence is reliable, can be found in *DPP v Godwin*, in which evidence of a positive breath specimen was obtained following an unlawful arrest.⁵³⁹ The Queen’s Bench held that the trial court was right to exclude the evidence in exercise of its discretion under section 78 on the basis that the prosecutor had obtained evidence that would not have been obtained but for the illegality and that significantly prejudiced the defendant; there was no need to demonstrate bad faith on the part of the police or prosecuting authorities to justify the exclusion of evidence. That this may be a solitary example is confirmed by Lord Bingham’s statement that justices at other tribunals may well have reached the opposite decision without acting unreasonably. Nonetheless, the trial judges in the case-at-hand had exercised their exclusionary discretion appropriately.⁵⁴⁰

A v. Secretary of State for the Home Department (No. 2) is another example of a case where non-epistemological considerations outweighed reliability issues.⁵⁴¹ The House of Lords considered the admissibility of evidence obtained by torture of a third party abroad. This case was decided primarily on the basis of the common law.⁵⁴² The House of Lords held that evidence obtained by torture is automatically inadmissible in proceedings in the United Kingdom, regardless of where, by whom, and against whom the torture was committed. While

⁵³⁶ *ibid* 933.

⁵³⁷ Giannouloupoulos (n 8) 83.

⁵³⁸ Keane and McKeown (n 9) 334.

⁵³⁹ *DPP v Godwin* [1991] RTR 303.

⁵⁴⁰ *DPP v Godwin* [1991] RTR 303, 308.

⁵⁴¹ *A v. Secretary of State for the Home Department (No. 2)* [2005] UKHL 71, [2006] 2 AC 221.

⁵⁴² The administrative proceedings leading up to the House of Lords’ decision were before the Special Immigration Appeals Commission (SIAC), which is not bound by the normal rules of evidence (see Rule 44(3) of the Special Immigration Appeals Commission (Procedure) Rules 2003 (Statutory Instrument 2003/1034): ‘The Commission may receive evidence that would not be admissible in a court of law’). The appellants thus had to establish the existence of an exclusionary common law rule that would also apply to the Rule 44(3) regime by drawing on analogies to uncover the principles of the common law from which the rule could derive (Nathan Rasiah, ‘A v Secretary of State for the Home Department (No 2): Occupying the Moral High Ground?’ (2006) 69 *The Modern Law Review* 995, 997–998).

the reliability of statements obtained through torture is highly questionable,⁵⁴³ the Law Lords based their decision on the integrity principle rather than on considerations of reliability. Lord Hoffman stated:

[Methods for obtaining evidence] may be such that it would compromise the integrity of the judicial process, dishonour the administration of justice, if the proceedings were to be entertained or the evidence admitted. In such a case the proceedings may be stayed or the evidence rejected on the ground that there would otherwise be an abuse of the processes of the court.⁵⁴⁴

He went on to state that the purpose of the rule excluding evidence obtained by torture is not to discipline the police (although this may be an incidental consequence) but to uphold the integrity of the administration of justice,⁵⁴⁵ thus explicitly endorsing the integrity principle and rejecting the disciplinary principle. The House of Lords based its ruling on intrinsic moral reasons. This decision represents an acknowledgment that courts may sometimes have to exclude illegally obtained yet reliable evidence on moral grounds.⁵⁴⁶

6.2.2.2 *Gravity of the illicit act*

A second factor courts take into account in exercising their exclusionary discretion is the gravity of the illicit act, i.e. the impropriety or illegality committed. The more ‘significant and substantial’ the breach is, the readier courts are to exclude evidence obtained as a result of the breach.⁵⁴⁷ The relevant question for courts is not how important or significant the violated rule or provision is, which might suggest that courts would adopt a rights-based principle for exclusion of evidence. Instead, the relevant question is what the effect of the breach is on trial fairness.⁵⁴⁸ When this factor was introduced, presumably for the first time in *Walsh*,⁵⁴⁹ Saville J did not explain why significant and substantial breaches that occur in the investigative stage should entail that the fairness of the proceedings has been affected.⁵⁵⁰

⁵⁴³ See e.g. SM O’Mara, *Why Torture Doesn’t Work: The Neuroscience of Interrogation* (Harvard University Press 2015).

⁵⁴⁴ *A v. Secretary of State for the Home Department (No. 2)* [2005] UKHL 71, [2006] 2 AC 221, para 87.

⁵⁴⁵ *A v. Secretary of State for the Home Department (No. 2)* [2005] UKHL 71, [2006] 2 AC 221, para 91.

⁵⁴⁶ Choo, ‘England and Wales: Fair Trial Analysis and the Presumed Admissibility of Physical’ (n 135) 337. with reference to Lord Carswell’s statement in *A v. Secretary of State for the Home Department (No. 2)* [2005] UKHL 71, [2006] 2 AC 221, para 148.

⁵⁴⁷ See e.g. *R v Keenan* [1990] 2 QB 54; *R. v. Walsh* (1990) 91 Cr. App. R. 161, 163.

⁵⁴⁸ Keane and McKeown (n 9) 334.

⁵⁴⁹ *R. v. Walsh* (1990) 91 Cr. App. R. 161, 163.

⁵⁵⁰ Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (n 203) 138.

A series of elements determine how ‘significant and substantial’ the breach was. If the defendant is considered not to have been actually disadvantaged by the breach, exclusion will be unlikely.⁵⁵¹ For instance, in *Alladice*, which concerned denial of access to legal advice, the Court of Appeal found that even had the solicitor been present, his advice would have added nothing to the suspect’s knowledge of his rights.⁵⁵² In other words, a confession would likely have been made anyway, even if the breach had not occurred. This approach has been described as problematic, however, as it may pave the way for courts to rationalise events ‘post hoc’.⁵⁵³ Conversely, if the suspect was at a disadvantage as a consequence of the illicit action, the evidence is more likely to be excluded. In *Parris*, which also involved denial of access to legal advice, the Court of Appeal held that the evidence of a confession should have been excluded because if a solicitor had been present, the defendant would probably have declined to answer the questions. Moreover, the presence of a solicitor would have meant that he could give evidence as to whether the police fabricated the confession, or at least his presence would have discouraged such fabrication.⁵⁵⁴

A key element in determining how serious the illicit act was, is the authorities’ bad faith. If the investigators deliberately ignored the rules, this is more likely to lead to exclusion as opposed to accidental violation of rules.⁵⁵⁵ Conversely, if the police acted ‘bona fide’, courts will be more inclined to admit the evidence.⁵⁵⁶ Bad faith can convert a breach which is not already significant and substantial into one which is, whereas some breaches are significant and substantial by their very nature, even if the police acted in good faith.⁵⁵⁷

6.2.2.3 Gravity of the offence

Finally, the gravity of the offence is another factor that can be taken into account in the exercise of exclusionary discretion. The more serious the crime, the less likely courts are to exclude relevant evidence on grounds that it was improperly or illegally obtained. This is illustrated by the House of Lords’ reasoning in *Attorney General’s Reference (No 3 of 1999)*.⁵⁵⁸ A DNA sample that had previously been taken from the defendant in connection with an unrelated burglary had not been destroyed as required by section 64 PACE and had been relied upon to

⁵⁵¹ Choo, ‘England and Wales: Fair Trial Analysis and the Presumed Admissibility of Physical’ (n 135) 342 with reference to case law.

⁵⁵² *R v Alladice* (1988) 87 Cr. App. R. 380, 386–7.

⁵⁵³ Choo, ‘England and Wales: Fair Trial Analysis and the Presumed Admissibility of Physical’ (n 135) 343.

⁵⁵⁴ (1989) 89 Cr App R 68. See also *R. v. Samuel* [1988] QB 615.

⁵⁵⁵ See e.g. *R v Mason* (1988) 86 Cr App R 349; *R v Canale* (1990) 91 Cr App R 1; *R v Walsh* (1989) 91 Cr App R 161; *R v Samuel* [1988] 1 QB 615; *R v. Alladice* (1988) 87 Cr. App. R. 380, 386; *R v Marcus* [2004] EWCA Crim 3387, para 24.

⁵⁵⁶ See e.g. *R. v. Sanghera (Rashpal)* [2001] 1 Cr. App. R. 20, para 16; *R v Hoyte* [1994] Crim LR 215.

⁵⁵⁷ Choo and Nash (n 517) 930.

⁵⁵⁸ [2001] 2 AC 91.

convict the defendant of rape. Both the trial judge and the Court of Appeal held that section 64 was mandatory and that the DNA evidence was inadmissible. After the Attorney General had referred a question to the House of Lords concerning the interpretation of section 64 PACE, the House ruled that even if there would have been a breach of that section, the court retained a discretion under section 78 to admit evidence that had been unlawfully obtained. Referring to the gravity of the offence in the case at hand, Lord Steyn considered that ‘on the interpretation of the judge and the Court of Appeal a case involving evidence of a very serious rape could never reach the jury and in *Weir* a conviction for a brutal murder was quashed on the ground that the DNA evidence should not have been placed before the jury’. He concluded that regard had to be had not just to the privacy of the defendant, but also to the public interest and the position of the victim.⁵⁵⁹

In *Bailey*, two men charged with robbery were questioned by the police but they exercised their right to remain silent.⁵⁶⁰ They were subsequently both detained in the same cell, in which the police had placed a listening device. The suspects made incriminating statements which were recorded and they were convicted on this basis. The Court of Appeal held that this method to obtain confessions was not in breach of PACE or its Codes of Practice. It held that the strategy of bugging the cell should not be used frequently, but that it could be used in grave cases. Emphasising the gravity of the offence, the Court concluded that the evidence was admissible at trial:

But where, as here, very serious crimes have been committed—and committed by men who have not themselves shrunk from trickery and a good deal worse—and where there has never been the least suggestion that their covertly taped confessions were oppressively obtained or other than wholly reliable, it seems to us hardly surprising that the trial judge exercised his undoubted discretion in the manner he did.⁵⁶¹

In *Khan*, the defendant had visited a private house in which the police had planted a listening device.⁵⁶² He made incriminating statements during his visit and was convicted on the basis of this evidence for his involvement in the importation of heroin. The House of Lords held that, even though the police had committed trespass and criminal damage in planting the listening device in a private house without the knowledge of its owners or occupiers and this evidence was thus illegally obtained, the evidence should not be excluded under section 78 PACE. Having decided the evidence was admissible, Lord Nolan said:

I confess that I have reached this conclusion not only quite firmly as a matter of law, but also with relief. It would be a strange reflection on our law if a man who has

⁵⁵⁹ [2001] 2 AC 91, 118, D-F.

⁵⁶⁰ (1993) 97 Cr App R 365.

⁵⁶¹ (1993) 97 Cr App R 365, 375.

⁵⁶² [1997] AC 558.

admitted his participation in the illegal importation of a large quantity of heroin should have his conviction set aside on the grounds that his privacy had been invaded.⁵⁶³

While Lord Nolan states that he reached his conclusion that the evidence was admissible on the basis of the law, the reference to the gravity of the offence – even if only seemingly as an afterthought – may indicate that this factor did weigh into the House of Lords’ decision making.

6.2.3 Absence of a clearly acknowledged rationale

Parliament did not endorse any specific rationale for exclusion of evidence when it enacted section 78 PACE. Neither have the courts filled this legislative lacuna: they almost never identify a particular rationale that underpins their judicial discretion.⁵⁶⁴ The most prominent statement is that courts do not consider it their task to discipline the police,⁵⁶⁵ thus rejecting the disciplinary or deterrence principle. Consequently, it remains possible for the discretion to be exercised on the basis of a multitude of principles. Yet the choice for any such principle is not without practical consequences; the way in which fairness is construed and exclusionary discretion is exercised inevitably depends on the theoretical rationale for exclusion of evidence one adopts.⁵⁶⁶ In line with the protective principle, fairness would be viewed in relation to the individual accused. According to the reliability principle, the determining factor for fairness would be whether the evidence is reliable. If the moral integrity and legitimacy principle is adopted, this would allow courts to consider the more long-term effects of admission of illegally obtained evidence. Courts could exclude such evidence because it would taint the public’s confidence in the administration of justice or might harm the moral and expressive authority of the verdict.⁵⁶⁷

Insofar as any principles can be derived from the Court of Appeal and House of Lords/Supreme Court case law, it is clear that the case law cannot be explained by reference to one rationale alone.⁵⁶⁸ The reliability rationale seems to be a key driver for courts exercising their discretion under section 78 PACE, as is evident from cases such as *Looseley*, *Sanghera*, *Cooke*, and *Chalkley*. Endorsing the reliability principle in the way appellate courts have, effectively equates the term ‘fairness of the proceedings’ in section 78 PACE with ‘fairness of the trial’.⁵⁶⁹

⁵⁶³ [1997] AC 558, 582.

⁵⁶⁴ *Grevling* (n 139) 676; *Roberts and Zuckerman* (n 20) 161; *Ormerod and Birch* (n 403) 778; *Ashworth and Redmayne* (n 403) 357.

⁵⁶⁵ See e.g. *R. v. Mason* [1988] 1 W.L.R. 139, 144; *R v Christou* [1992] QB 979, 987, endorsing Lord Diplock’s dicta in *Sang* that ‘it is no part of a judge’s function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at trials is obtained by them’; *R. v Hughes* [1994] 1 WLR 876, 879; *Mirfield, Silence, Confessions and Improperly Obtained Evidence* (n 203) 139.

⁵⁶⁶ *Ashworth*, ‘Excluding Evidence as Protecting Rights’ (n 403) 723.

⁵⁶⁷ *Grevling* (n 139) 676.

⁵⁶⁸ *Pitcher* (n 327) 247.

⁵⁶⁹ *Ormerod and Birch* (n 403) 779–780.

However, legal commentators have suggested that this interpretation of ‘fairness’ fails to give due weight to rights considerations.⁵⁷⁰ Indeed, section 78 PACE should be given a broader interpretation which places fairness of the entire criminal process central.⁵⁷¹

It is important to bear in mind, however, that there is a limit to the inferences that may be drawn from the appellate case law on section 78 regarding the rationales for exclusion, as a result of how the appellate review process functions in England and Wales depending on whether exclusionary rules or exclusionary discretion are in play. Discretion inherently allows the trial judge some leeway in his judgment. As section 78 confers a discretion on to the trial judge to exclude prosecution evidence, the appellate court will interfere with the trial judge’s decision only in limited circumstances, according to the *Wednesbury* principles,⁵⁷² which include that the decision is one which no reasonable court could have come to.⁵⁷³ If appellate courts uphold a trial judge’s decision because it is one which she could reasonably have come to, this does not necessarily entail that the appellate court would have decided the case in the same way. It is coherent for the appellate court to say that it *would* regard the admission of the evidence as rendering the proceedings unfair and *would* itself have excluded the material, while at the same time still upholding the trial judge’s decision to admit it.⁵⁷⁴ Consequently, if an appellate court has only ruled on the reasonableness of the trial judge’s decision, caution is needed when inferring from this that the appellate court itself endorses or applies a particular rationale. In cases where the appellate court has decided not to interfere with the trial judge’s discretion to admit illegally obtained but reliable evidence, it may be more accurate to state that such cases ‘have the effect of placing reliability considerations at the forefront’, rather than upholding this rationale.⁵⁷⁵ Nonetheless, in the cases discussed above such as *Looseley*, *Cooke*, and *Chalkley*, the courts seem to do more than just assess the reasonableness of the trial court’s judgment. The cases contain statements indicating that that the trial judge’s decision to admit the reliable evidence was right.

Further support for the reliability rationale can be derived from the fact that courts may admit reliable evidence even if the illicit action is ‘significant and substantial’. Section 78 requires courts to evaluate the *degree* of the ‘adverse effect’ that evidence admission would have on the fairness of the proceedings, which in itself involves an element of discretion. As is the case with judicial discretion under the fair trial criterion in Belgium, English judges are explicitly allowed to take account of *all* relevant factors in securing the fairness of the proceedings, which makes the breadth of judicial power in both jurisdictions considerable. Ormerod and Birch

⁵⁷⁰ Giannouloupoulos (n 8) 116–117.

⁵⁷¹ Choo and Nash (n 517) 939–940.

⁵⁷² *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223.

⁵⁷³ Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (n 203) 123–124; Ormerod and Birch (n 403) 777. On the other bases for overturning an exercise of discretion see Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (n 203) 124.

⁵⁷⁴ Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (n 203) 123.

⁵⁷⁵ Pitcher (n 327) 254.

suggests that the emphasis on the overall interests of justice opens the door for courts to admit reliable evidence even if it was unfairly obtained.⁵⁷⁶

While courts place a strong emphasis on reliability, examples can equally be found in English law where reliability is considered of lesser importance in comparison to other principles. This is primarily the case with regard to confession evidence; in respect of real evidence, where reliability is usually not problematic, courts still tend to decide in favour of admitting highly probative evidence. For instance, regarding section 76(2) PACE, if either paragraph (a) or (b) is satisfied, the confession must be excluded 'notwithstanding that it may be true'. This suggests that presumed unreliability of the actual confession in the case at hand is not the rationale for exclusion,⁵⁷⁷ but rather the integrity of the justice system as was explained above.⁵⁷⁸ In *A v Secretary of State for the Home Department (No 2)*, where the House of Lords relied on the exclusionary rule at common law for torture evidence, none of their Lordships seemed to refer to presumed unreliability of said evidence as the primary or even sole rationale for exclusion. Instead, they adopted a strict moral reasoning which endorses the integrity principle.⁵⁷⁹ This was the case at least in relation to confession evidence; real evidence obtained directly through torture or as a fruit of the poisonous tree may still be admissible.

English courts emphasise truth finding and ensuring factually accurate verdicts, sometimes at the expense of non-epistemic considerations, such as the legitimacy of the adjudication process, the moral authority of a (guilty) verdict, the rights of the suspects or third parties, and due process concerns in general.⁵⁸⁰ Particularly a rights-based approach and endorsement of the protective principle seems to be rather absent.⁵⁸¹ Courts routinely refuse to exclude evidence, even in instances where there have been grave breaches of fundamental rights such as Article 8 ECHR right to privacy if the evidence was reliable.⁵⁸² Even if some individual cases can be explained on the basis of the protective rationale, the case law as a whole does not conclusively point towards this rationale.⁵⁸³ Two factors often relied on by the courts, namely the gravity of the illicit act and the seriousness of the offence are not consistent with the protective rationale. The dominant concern according to the protective rationale is whether the defendant was disadvantaged by the violation of his rights. It is irrelevant what the law enforcement

⁵⁷⁶ Ormerod and Birch (n 403) 780.

⁵⁷⁷ Dennis, *The Law of Evidence* (n 405).

⁵⁷⁸ See above Section 6.2.1.

⁵⁷⁹ See above Section 6.2.2.1.

⁵⁸⁰ Choo, 'England and Wales: Fair Trial Analysis and the Presumed Admissibility of Physical' (n 135) 352.

⁵⁸¹ Ormerod and Birch (n 403) 782.

⁵⁸² See, e.g. P [2002] 1 A.C. 146; Mason [2002] EWCA Crim 385; [2002] Crim.L.R. 841; DC Ormerod "Police Cells and Unwanted Bugs" [2003] Journal of Criminal Law 37.

⁵⁸³ Ashworth and Redmayne (n 403) 358.

authorities' attitude was when committing the violation,⁵⁸⁴ or whether the offence with which the defendant is charged is a minor or a serious one.

In theory, the criterion of the gravity of the breach and the authorities' bad faith could be explained by reference to the disciplinary rationale. As the seriousness of the breach or the investigating authorities' malevolence increases, the case for deterrence becomes stronger.⁵⁸⁵ It is arguable that precisely in cases in which law enforcement officers have deliberately violated procedural rules, there is more reason to exclude the resulting evidence in an attempt to deter them from flouting the law in the future, compared to where the breach is a result of mere ignorance or a mistake.⁵⁸⁶ However, English courts have stated on a number of occasions that disciplining the police and punishing police officers is not part of the judicial function.⁵⁸⁷ While it may be the case that excluding illegally obtained evidence has the side-effect of deterring police officers, the disciplinary rationale certainly does not seem to be the principle guiding judicial discretion.⁵⁸⁸ Indeed, it is questionable even whether a court's decision to exclude evidence because of the authorities' bad faith has the effect in practice of disciplining the police. Ormerod and Birch argue that, when basing a decision on the bad faith criterion, courts tend to exclude evidence only in the extreme cases in which it can be shown that the police deliberately flouted the rules. Mere negligence or sloppiness which results in breaches of procedural rules tends to be insufficient to result in exclusion of evidence and so the officers are not deterred from committing future violations in those instances. Accordingly, 'the effect of this use of s. 78 might even be to encourage the police to be sloppy in their investigations since if an officer is unaware of the regulation he cannot be said to have acted in bad faith by deliberately flouting it!'⁵⁸⁹

The criterion of the seriousness of the breach and bad faith is consistent with the integrity principle. To preserve the integrity of the administration of justice, the judiciary should publicly condemn the investigating authorities' abuse of power by excluding the illegally obtained evidence. As mentioned in the Belgian context, where the similar criterion of the authorities' intentional or grossly negligent conduct may inform the decision to exclude illegally obtained evidence,⁵⁹⁰ from the perspective of the integrity of the justice system there is a clear moral distinction between a police officer who is mistaken or ignorant and one who

⁵⁸⁴ Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (n 203) 32.

⁵⁸⁵ *ibid* 30.

⁵⁸⁶ *ibid* 31.

⁵⁸⁷ See e.g. *R. v. Mason* [1988] 1 W.L.R. 139, 144; *R v Christou* [1992] QB 979, 987, endorsing Lord Diplock's dicta in *Sang* that 'it is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at trials is obtained by them'; *R. v Hughes* [1994] 1 WLR 876, 879; *ibid* 139.

⁵⁸⁸ Pitcher (n 327) 248.

⁵⁸⁹ Ormerod and Birch (n 403) 781.

⁵⁹⁰ See above Section 6.1.2.2.

deliberately flouts the rules.⁵⁹¹ This distinction is clear regardless of whether one adopts the public attitude or the court-centred variety of the integrity principle.⁵⁹² If the public attitude variety is adopted, the public is surely able to draw the aforementioned moral distinction and will find it relevant to what it thinks of the action taken by the court. Under the court-centred variety, the more serious the breach, the more likely the court will exclude the evidence, as it is more damaging to the integrity of the justice system for the court to condone more serious or significant breached than to condone lesser ones.⁵⁹³

Consideration of the seriousness of the offence *may* be consistent with the integrity principle, but it is a double-edged sword. Under the court-centred variation of this principle, on the one hand, the more serious the offence, the more difficult it is to justify to the public that evidence is excluded and that a factually guilty person may be acquitted. On the other hand, the more serious the offence, the more serious the consequences of conviction will be and so ‘the higher should be the moral rectitude of the means by which it is achieved’.⁵⁹⁴ Under the court-centred variety, it *may* be appropriate for the court to condone the investigating officer’s conduct, who committed the breach in his own knowledge or belief regarding the seriousness of the offence, but that would depend on the particular moral theory the judge would adopt.⁵⁹⁵

No account should be taken of the seriousness of the offence with the protective principle. According to this principle, if the suspect was harmed by the rights violation, exclusion of the resulting evidence is in order. The suspect is entitled to a remedy for that violation, regardless of whether he is suspected of having committed a serious or minor offence.⁵⁹⁶ Indeed, the suspect should be accorded more protection in the form of procedural rights if the allegation against him is serious.⁵⁹⁷ Similar considerations apply in the case of the disciplinary principle, according to which exclusion of evidence is a tool to punish the police for and deter them from wrongdoing. If admission of evidence would be in order where the most heinous crimes are concerned, the deterrent message would be muted considerably in those cases.⁵⁹⁸

In sum, the English case law cannot be explained by reference to one rationale alone. If anything, the lack of a principled approach is signified by the variety of factors that courts can take into account – none of which are decisive and binding and which can be explained by

⁵⁹¹ Ho, ‘Exclusion of Wrongfully Obtained Evidence: A Comparative Analysis’ (n 8) 838.

⁵⁹² See above Chapter 5.

⁵⁹³ Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (n 203) 31.

⁵⁹⁴ Zuckerman, ‘Illegally Obtained Evidence: Discretion as a Guardian of Legitimacy’ (n 403) 62–63; Zuckerman, *The Principles of Criminal Evidence* (n 402) 356.

⁵⁹⁵ For more details on this position see Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (n 203) 32–33.

⁵⁹⁶ *ibid* 31–32.

⁵⁹⁷ Ashworth, ‘Excluding Evidence as Protecting Rights’ (n 403) 732.

⁵⁹⁸ For a more detailed account of whether the seriousness of the offence may be a relevant factor under the disciplinary principle see Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (n 203) 32.

reference to multiple and sometimes competing rationales. The absence of a clearly articulated rationale is one of the contributing factors, if not the most important one, to section 78 discretion being broad and unstructured. Adopting a clear rationale would enable courts to identify a range of factors which are mutually consistent that they must take into account in the exercise of their discretion. This might in turn lead to greater certainty in terms of which factors will be taken into account, greater transparency regarding the precise factors that a judicial decision to admit or exclude is based upon, and greater consistency in decision making.⁵⁹⁹

6.3 Germany

6.3.1 Mandatory exclusion

The German law maker has introduced explicit exclusionary rules only in isolated cases, which comprise the exclusion of evidence obtained through force, threat or other forbidden measures (§ 136a para 3 StPO), and of ‘core private’ evidence acquired through telecommunications surveillance (§ 100a StPO), covert remote search of information technology systems (§ 100b StPO), or acoustic surveillance of private premises (§100c StPO), even where the measure through which it was obtained was as such lawful.⁶⁰⁰

In theory, the positively regulated prohibitions on the use of evidence demand unconditional obedience from the practitioner of the law. They must be applied without exception and irrespective of any contradictions on the part of the parties concerned.⁶⁰¹ However, the objection solution (*Widerspruchslösung*) introduced in the early 1990s by the German jurisprudence (4.1.3.), might limit the scope of this obligation as the BGH has considered requiring formal and timely objection from the interested party in order to enact the prohibition to use evidence gained through prohibited methods of interrogation, as set forth under § 136a para 3 sentence 2 StPO.⁶⁰²

6.3.2 Discretionary exclusion and balancing tests

Apart from these provisions on mandatory exclusions aiming at protecting the dignity of persons and their core privacy rights, rules on the prohibition to use evidence are not explicitly

⁵⁹⁹ For a robust argument in favour of structured discretion and a proposal for how the current law could be reformed see Ormerod and Birch (n 403) 786–787.

⁶⁰⁰ Weigend, ‘The Potential to Secure a Fair Trial Through Evidence Exclusion: A German Perspective’ (n 38) 73–74.

⁶⁰¹ M Heghmanns, ‘Beweisverwertungsverbote’ [2016] *Zeitschrift für Internationale Strafrechtsdogmatik* 404, 408.

⁶⁰² BGH, Urteil vom 20.12.1995, Az.: 5 StR 445/95.

laid down and, hence the source of vivid discussion.⁶⁰³ Case law and scholars have developed, over time, different theories to best identify cases in which the prohibition to use evidence must be established (see above, 3.3.). Currently, majority case law appears to follow the *Abwägungslehre*, the balancing theory according to which the trial court excludes unlawfully obtained evidence on a case-by-case basis.⁶⁰⁴

The balancing operation considers *inter alia* the purpose of the rule that has been violated, the gravity of the violation of a procedural rule and whether the state agent violated it knowingly, the seriousness of the crime charged, and the importance of the evidence to establishing the truth.⁶⁰⁵ However, the *Abwägungslehre* is viewed critically by the literature.⁶⁰⁶ The vagueness of the assessment criteria, the individual ideas of the persons who must carry out such an assessment in individual cases due to the lack of a uniform assessment scale, can hardly guarantee uniform, predictable results.⁶⁰⁷

6.3.3 Absence of a clearly acknowledged rationale

The StPO lacks a systematic set of rules on evidence law.⁶⁰⁸ Even where the German law maker has provided for statutory prohibition to use certain evidence, they have created such positive regulations without any claim to systematic consistency, which is why any attempt to force them into a system would inevitably fail. The fact that positive prohibitions on exploitation (and use) only exist in certain areas points to a basic structure of the law, namely that procedural errors are not in principle subject to any consequences of non-utilisation.⁶⁰⁹

The absence of a clearly acknowledged rationale is also reflected in the fact that in all the other areas, a case-by-case approach taken to determine whether evidence should be admitted despite the unlawful way in which it was obtained, without one theory being officially acknowledged and accepted as the most appropriate one.⁶¹⁰

As *Weigend* puts it, ‘Germany still pursues the ideal of finding the truth in the criminal process and places great emphasis on this goal’.⁶¹¹ The inquisitorial nature of the German criminal

⁶⁰³ Roxin (n 40) 182.

⁶⁰⁴ Beulke and Swoboda (n 37) 362.

⁶⁰⁵ Weigend, ‘The Potential to Secure a Fair Trial Through Evidence Exclusion: A German Perspective’ (n 38) 73–74.

⁶⁰⁶ Heghmanns (n 586) 409.

⁶⁰⁷ Eisenberg (n 38) 156.

⁶⁰⁸ Weigend, ‘The Potential to Secure a Fair Trial Through Evidence Exclusion: A German Perspective’ (n 38) 72.

⁶⁰⁹ Heghmanns (n 601) 408–409.

⁶¹⁰ Weigend, ‘The Potential to Secure a Fair Trial Through Evidence Exclusion: A German Perspective’ (n 38) 74.

⁶¹¹ *ibid* 87.

justice system is reflected in the fact that exclusion of evidence appears as an anomaly because it hinders the determination of the facts on which the judgment must be based.⁶¹²

6.4 Italy

6.4.1 Only mandatory grounds

Italy adheres to a strict legality principle also in the area of procedural law. The underlying idea is that the rules governing procedure must be clearly set out by the legislature. This should in principle entail that judges cannot create exclusionary. Furthermore, the legal rules should be drafted in a way that leaves little margin of discretion to the judge. This is considered particularly true for the rules concerning evidence. The fear is manifold. On the hand, the scholarship fears that too wide a discretion might lead to too much exclusion, which is seen as counterproductive.⁶¹³ On the other hand, it is feared that empowering the judge with the discretion to exclude evidence would leave the judge exposed to the sensitivity of the facts of the case at hand. In other words, if judges could decide whether or not to exclude evidence, their decision could be affected by the decision they intend to take on the case. In this respect some scholars already observe that the general provision of non-usability (art. 191) lacks sufficient determination, leaving it to the judge to establish the criteria for identifying a prohibition to use evidence.⁶¹⁴

It derives from these premises that all rules of non-usability are considered of a mandatory nature.⁶¹⁵ The judge enjoys no discretion, exception made for the discretion that is inherent in the interpretation of the legal rules. Nonetheless, as it was already observed, the rules are written in such a way that they allow for a large breadth of possible interpretations, hence reinstating *de facto* a significant amount of discretion.

6.4.2 Discussions on underlying rationales

The Italian rules on exclusion of evidence do not make clear what purpose the exclusion should serve. By referring to the prohibitions of the law, Article 191 of the Code fails to give an indication as to the substantive principles that should guide the exclusion. This leads to a discussion between interpreters. Some favour a more formalistic approach, where the prohibitions are identified on the basis of the wording of the law, either in the form of explicit

⁶¹² *ibid* 73.

⁶¹³ C Conti, *Accertamento del fatto e inutilizzabilità nel processo penale* (Cedam 2007) 154; Grifantini, 'Inutilizzabilità' (n 169); Scella, *Prove penali* (n 254) 153.

⁶¹⁴ Conti, *Accertamento del fatto* (n 613), 57.

⁶¹⁵ Scella, *Prove penali* (n 254) 181.

prohibitions or in the form of indirect prohibitions.⁶¹⁶ Indirect prohibitions are those where the law confers the power to admit/collect evidence but only under specific conditions.⁶¹⁷ The focus on the wording of the provision makes the identification of the rationales for the exclusion of evidence largely irrelevant. The formalistic approach supersedes the need to identify the purposes and functions of the exclusion. At most, the scholars could attempt to identify, categorize and study all prohibitions stipulated by the law in order to extract underlying patterns from which to detect the purpose of exclusion. Other scholars prefer instead to look beyond the wording of the text of the legal provisions: they suggest to embrace an approach whereby the courts must weigh the illegality occurred, by considering the nature and importance of the interest protected by the provision that was breached, and the degree of the violation.⁶¹⁸ Even those who endorse this approach remain however faithful to the primacy of the law. The courts should assess the importance of the interest and the degree of the violation *in abstracto*; that is to say, not without looking at the circumstances of the case, but rather by evaluating if a breach of a certain magnitude of a certain interest is considered to be prohibited in the overall logic set out by the law.⁶¹⁹ In other words, the protection of the reliability of the evidence or of other interests beyond that of an accurate fact finding (including fundamental rights) can help guide the assessment of what the will of the legislature was (or should be), but they do not replace the will of the legislature.

The Italian debate takes a spin where the discussion on the overall rationales of the exclusion remains blocked behind the controversies on the exact concept of “prohibitions stipulated by the law”. The scholarship agrees that the reliability of the fact finding is the main interest pursued by the rules on non-usability. Most scholars also believe that exclusion serves also to protect further interests and particular fundamental rights.⁶²⁰ But since the courts do not (*rectius*, should not) enjoy any discretion in establishing the purposes of the exclusion, the debate on the principles is perceived to be of limited importance outside of the interpretation of the law.⁶²¹

The law leaves however sufficient opening for courts to be flexible in their approach. Though formally not entitled to any discretion, the courts enjoy ultimately quite some freedom when making their assessment. The case-law ends up suffering from a rather casuistic approach, where it is difficult to distil clear patterns as to the underlying guiding principles. The only discernible trend seems to be the approach of courts to downplay the relevance of the reliability rationale, at least in all cases where it is not certain that the violation taints the veracity of the

⁶¹⁶ M Nobili, ‘Articolo 191’ (n 170) 411; P Ferrua, ‘Admissibility of Evidence and Exclusionary Rules’ (2021) 7 Rev. Brasileira de Direito Processual Penal 232.

⁶¹⁷ Nobili, ‘Articolo 191’ (n 170) 181.

⁶¹⁸ Galantini, *L’inutilizzabilità* (n 167) 139.

⁶¹⁹ C Conti, ‘Il volto attuale dell’inutilizzabilità: derive sostanzialistiche e bussola della legalità’ (2010) Dir pen proc 781.

⁶²⁰ Conti, ‘Il volto attuale’ (n 619) 781.

⁶²¹ Panzavolta, *Contributo allo studio* (n 158) 261.

evidence. After all, courts reason, the reliability of the evidence must be accurately checked at the moment of final assessment, hence there is no need to exclude it. For instance, courts do not exclude witness depositions collected with violations of the rules on how to pose questions.⁶²² Moreover, when giving decisions on the reason for excluding (or non-excluding evidence), courts do not feel authorised to refer to general principles guiding exclusion (such as, reliability, protective, judicial integrity). Though the rationales underpinning these principles occasionally surfaces,⁶²³ it often remains hidden under the more formal discussion of whether the specific provision at hand, which was violated when collecting evidence, entails an effective prohibition or not. The result is a rather haphazard case-law, where exclusion does not possess a clear logical dimension of its own.

6.5 Interim conclusion

Two points can be made in light of the findings of this section. First, there appears to be a large variety of approaches concerning the structuring of exclusionary rules around mandatory rules and rules empowering judges with discretion. This is also the result of different ways to intend the division between mandatory and discretionary exclusion. While in some countries mandatory exclusion refers to the fact that judge have little or no discretion, in other cases mandatory exclusion is simply the opposite of ‘optional’: courts can be allowed to exercise discretion in assessing the existence of a ground of exclusion, but if they find that the ground is present they are required (‘mandated’) to exclude.

Second, even countries where the legality principle in procedure seem to be stricter, are not fully able to effectively remove the discretion of courts on exclusion. Whether explicitly admitted, or whether *de facto* tolerated behind the interpretation of the legal provisions, discretion is needed. It is simply impossible for the legislature to govern *in abstracto* all possible cases of evidence wrongfully obtained in a manner that is effectively so precise to take away all discretionary exclusion from the court. Already when the provisions on exclusion of illegally obtained evidence are drafted in a more general way, they lend themselves to multiple interpretations, which pave the way for the exercise of discretion.

Guiding discretion in exclusion of evidence would therefore seem to be the most appropriate way of dealing with this branch of the law of evidence. This does not mean that some specific cases of precise – and mandatory – exclusion cannot be introduced, as for instance with regard

⁶²² Cass., 25 June 2019, B., *C.e.d. Cass.*, rv. 277988.

⁶²³ For instance, Cass., 16 June 2020, Ladisa, in *C.e.d. Cass.*, rv. 280159, considers irrelevant the violation of the protocol for the conservation of samples (food substances in the case) before the scientific examination of the expert, because this does not necessarily affect the reliability of the evidence, although the court should make sure that the evidence is truly reliable when assessing it. Similarly, Cass., 11 January 2021, *C.e.d. Cass.*, rv. 280623. Cass., 17 December 1996, Bektas C., *C.e.d. Cass.*, rv. 207521, states that exclusion of statements collected from a person who was heard as a witness while he was already a suspect is mandated by the legislature to deter from violations. Likewise, Cass., 11 April 1994, Curatola, *C.e.d. Cass.*, rv. 198521.

to evidence obtained with torture. Some of these precise and mandatory grounds of exclusion, which restrict – or even fully remove – court’s discretion, can be beneficial, particularly for the most egregious cases of violations, or when one fears that the discretion of the court might in some circumstances be negatively influenced. But it is clearly unrealistic to build a system composed only of rules of specific mandatory exclusion. There is no alternative to accepting court’s discretion and it seems that the best approach is precisely to guide such discretion, in order to reduce the risk of abuses and inequalities.

7 SIMILARITIES, DIFFERENCES, AND CONCLUSIONS TO BE DRAWN

7.1 Minimal statutory framework and automatic exclusionary rules

In both England and Belgium the statutory grounds for mandatory exclusion of illegally obtained evidence are fairly scant. As will be argued below, automatic exclusionary rules should be reserved for protecting the most fundamental rights. England and Wales have adopted section 76(2) PACE, which pertains strictly to confession evidence and protects. Both clauses of section 76(2) are interpreted narrowly and this provision is relied upon far less frequently than the judicial discretion mandated by section 78 PACE. In Belgium there are only a handful of statutory nullities left. These are rooted in a strict legality principle, according to which any violation of a procedural formality nullifies the validity of the act and the resulting evidence therefrom.⁶²⁴ This report has argued that one way for principle to be restored to the Belgian approach towards illegally obtained evidence would be for the legislature to identify which rights and freedoms are considered so fundamental that they should be sanctioned with nullity. Yet, the legislature has ostensibly refrained from doing so; the current statutory nullities are so few in number and protect a rather random collection of rights⁶²⁵ that it can hardly be said to be underpinned by a principled vision on which rights are most worthy of protection through exclusion of evidence obtained in violation thereof. Additionally, the fact that so-called ‘substantial nullities’, which are considered to be substantial for the criminal justice system, do not result in exclusion of evidence, further strengthens the argument that the concept of nullities as protecting the most fundamental values/rights/freedoms has become an empty shell.

7.2 Prevalence of wide judicial discretion and multi-factor balancing tests

Consequently, in England as well as Belgium nearly all decisions on admission or exclusion of evidence are left to the discretion of the judiciary. In both jurisdictions, the vast majority of – if not all – decisions are based on the ‘fair trial’ assessment. In England, as per section 78 PACE, the judicial decision whether to admit or exclude illegally obtained evidence turns on whether the admission of this evidence would have an adverse effect on the fairness of the proceedings. While in Belgium judicial discretion may equally be based on the reliability criterion, the majority of decisions are based on the fair trial criterion and the case law related to this criterion is more developed.

⁶²⁴ Thaman, ‘Balancing Truth Against Human Rights: A Theory of Modern Exclusionary Rules’ (n 265) 415.

⁶²⁵ Recall that nullity is currently only provided for violation of certain specific requirements relating to seizure of immobile goods (Article 35bis CCP), testimonies by witnesses who wish to remain anonymous (Article 86bis and 86ter CCP), and when a polygraph test is performed as of 1 January 2021.

The judiciary has created similar but not identical multi-factor balancing tests in their interpretation of the ‘fair trial’ or ‘fairness of the proceedings’ criterion. In both jurisdictions the courts’ discretion is astoundingly wide, as they are explicitly allowed to balance a plethora of non-decisive and non-exhaustive factors.⁶²⁶ The fair trial criterion is vague and flexible to the point that English and Belgian courts have gotten away with specifying factors whilst omitting to clarify how these factors have a bearing on whether or not the defendant received a fair trial. Both countries take into account whether the manner in which evidence was gathered has tainted its reliability. In England, this is a factor to be considered when assessing whether admission of evidence would have an adverse effect on the fairness of the proceedings. In Belgium, by contrast, reliability is a separate substantive ground for exclusion, independent of whether the right to a fair trial might be violated. This would entail that strictly speaking in Belgium reliability of the evidence is not weighed against other considerations that belong to the fair trial prong, such as the investigating authorities’ attitude and the seriousness of the offence. In practice, however, the English and Belgian approach towards reliability functions in a similar manner. In England reliability is one of the factors courts may take into account when assessing the impact of evidence admission on the fairness of the proceedings. In Belgium, if the manner in which the evidence was gathered has tainted the reliability, it will be excluded under the second prong of the test. If the evidence is deemed reliable, then the court should still assess whether use of the evidence at trial will violate the right to fair trial. Hence, in effect, reliability considerations are still weighed against the plethora of factors that fit under the fair trial criterion, as is the case in England.

Furthermore, both jurisdictions take into account the factors of the authorities’ bad faith, as well as the seriousness of the offence with which the suspect is charged. By contrast, the status of the right violated – for instance whether it is one of the most fundamental human rights - is not a factor that is explicitly taken into account in either jurisdiction. Yet factoring in the severity of the breach may serve as a proxy for that.

Belgian courts also consider whether the illegality has had an impact on the freedom or right the violated norm is intended to protect, a factor which is consistent with the protective rationale. There is some overlap between this criterion and English court’s consideration of how disadvantaged the defendant was by the breach in order to assess how ‘significant and substantial’ the breach was. Finally, Belgian courts can also take into account certain other factors, including whether the illegally obtained evidence concerns only a material element of the offence as opposed to attributing it to a suspect, and whether the illegal action is of a purely formal nature. As mentioned, these factors are rather vague, may be difficult to apply in practice, and add little to the other factors. Consequently, it is unsurprising that these factors have not featured in English case law.

⁶²⁶ Ormerod and Birch (n 403) 780; Ormerod, ‘ECHR and the Exclusion of Evidence: Trial Remedies for Article 8 Breaches?’ (n 138) 64.

Another difference is that England distinguishes between types of evidence, notably confession and non-confession evidence. This is true in respect of the automatic exclusionary rule in section 76 PACE, which only pertains to confession evidence. However, the strict distinction is weakened in the sense that confession evidence which is not excluded under section 76 can still be considered under section 78. Indeed, most confession evidence is considered under the latter rather than the former provision. Yet, within the case law on section 78, courts still seem to distinguish between confession and real evidence, especially when it comes to reliability. By contrast, in Belgium no such distinction between types of evidence is made, at least not in formal legislation (everything falls under the Antigon rule).

7.3 The absence of a clearly identified rationale and resulting problems

Ashworth: '[T]he differing facts of individual cases will have to be evaluated in the light of certain general principles... The choice of principle cannot be avoided in the practical exercise of such a discretion; it is therefore vital that the issue of principle is confronted and resolved on a general plain, and not left to the whim of each court.'⁶²⁷

If multiple elements are in play, and courts are allowed to balance various factors, how can they allocate priorities to one element over another when competing interests are at play, when no dominant principle(s) have been identified according to which to do so? It is hardly inevitably that inconsistent and unpredictable case law would result.

As there are only few statutory grounds for mandatory exclusion and there is a prevalence of balancing tests in which very similar factors are taken into consideration, it comes as no surprise that the Belgian and English approach towards illegally obtained evidence has been criticised on comparable grounds. Both jurisdictions suffer from very similar problems. The good thing about the Belgian Court of Cassation case law is that it has made the subfactors to be considered as relevant to trial fairness explicit over the years (compare England: it's not that the Supreme Court has authoritatively laid down a list of factors in the way the Belgian Court of Cassation has, but consistent reference to certain factors in the appellate and Supreme Court case law arguably has a similar effect). The bad thing about it is that (1) these factors do not suggest any clear underlying principle – why are precisely these factors relevant for trial fairness? In England it is difficult to discern the consistent application of any underlying principles.⁶²⁸ Some factors return in the case law: reliability, gravity of breach, gravity of offence. But similarly to Belgium we can ask: which principle underpins the choice for these criteria? Unlike in Belgium, where the Court of Cassation has authoritatively determined which non-exhaustive and non-exclusive criteria can be taken into account, there is no English

⁶²⁷ Ashworth, 'Excluding Evidence as Protecting Rights' (n 403) 734.

⁶²⁸ Grevling (n 139) 684.

authority that has conclusively established which subfactors are relevant. Courts apply certain factors, but they are non-binding and non-decisive. The discretion is unstructured, both jurisdictions adopt vague balancing tests. Arguably at the source is lack of clarity on a principled rationale. The consequences are similar: lack of transparency of judicial decision making, lack of consistency and certainty, and possibly equality before the law.

7.4 In defence of judicial discretion

The foregoing paragraphs have demonstrated that judicial balancing is at the heart of the English and Belgian approach to illegally obtained evidence. This is not surprising. There is a wide variety in the constellation of facts, circumstances and variables that come into play in the illegal gathering of evidence. This can include the gravity of the breaches, ranging from a mere formality to a grave violation of a fundamental right. The impact of the breach on the right or freedom violated may vary. The attitude with which the investigating authorities were acting may vary between intentional infractions or a mere mistake. It includes the seriousness of the offence charged. Even if a principled approach is adopted and courts are transparent about the dominant rationale, whether the emphasis should lie on the reliability, protective, disciplinary, or integrity rationale may vary according to the situation at hand. Courts can only do justice to this multitude of relevant elements if they can weigh them up in a balancing exercise.⁶²⁹ Underlying these various elements is the fundamental dilemma between the aim of the criminal trial process to uncover the truth and ensure factually correct verdicts on the one hand, and respect for human rights and due process considerations on the other.⁶³⁰ The admissibility or exclusion of illegally obtained evidence will always be a matter of ‘concatenated and irreducible moral and legal complexity’.⁶³¹ Indeed, if courts always admit illegally obtained evidence, it is seen as emphasising truth finding at the cost of condoning the improper and illegal activities of law enforcement agencies. If courts invariably exclude the evidence, it will be seen to uphold defendant’s rights but to abdicate its duty towards society to protect it from crime. Consequently, a rigid rule of either mandatory exclusion or admissibility would be inadequate to address the fundamental dilemma that illegally obtained evidence presents democracies with.⁶³² This not only explains but also justifies that the jurisdictions included in this report resort to balancing exercises.

How wide judicial discretion should be is inherently intertwined with the rationale for exclusion one adopts. In the purest form of the protective rationale, which allows no exceptions

⁶²⁹ Thaman and Brodowski (n 8) 438.

⁶³⁰ Thaman speaks of ‘navigating between the Scylla of fundamental or constitutional rights and the Charybdis of truth and accuracy in criminal trials’: Thaman, ‘Balancing Truth Against Human Rights: A Theory of Modern Exclusionary Rules’ (n 265) 408.

⁶³¹ P Roberts, ‘Excluding Evidence as Protecting Constitutional or Human Rights?’, *Principles and values in criminal law and criminal justice: essays in honour of Andrew Ashworth* (University Press 2012) 190.

⁶³² Zuckerman, *The Principles of Criminal Evidence* (n 402) 345; Roberts and Zuckerman (n 20) 190.

based on the status of the right violated, there is hardly any discretion. As soon as it is established that the defendant's rights were violated, any resulting evidence should be excluded. Discretion is in theory similarly narrow or even non-existent under the disciplinary principle: wrongdoing by investigating authorities should be deterred and punished. But discretion can be added to the protective and disciplinary rationales by allowing exceptions to be made in certain cases.⁶³³ As explained in Chapter 5, discretion is inherent in the integrity rationale: balancing will always be required between admission and exclusion of evidence as either decision may impact negatively upon the legitimacy of the adjudicative process and the moral authority of the verdict depending on the specific circumstances of the case.⁶³⁴

If a rationale is adopted according to which balancing is permitted or even required, the question still remains whether inflexible exclusionary rules, or at least a very strong presumption of exclusion that can only be rebutted on narrowly defined grounds, can ever be warranted. Arguably, there may be rights and rights and freedoms that are so fundamental and the violation of which is considered so serious that they should be subject to automatic exclusion. A paradigm example would be evidence obtained by torture. Towards more structured discretion and a principled approach

While there are good arguments for judicial discretion - not least that illegally obtained evidence will virtually always present democracies with a fundamental dilemma that requires balancing of competing considerations – this does not entail that discretion should be unfettered. Indeed, some structure is required to ensure respect for the rule of law. Where illegally obtained evidence is concerned, these rule of law considerations include transparency and public accountability of lawmakers and courts, legal certainty, and equality before the law. Broad and unstructured discretion is symptomatic of and can contribute to the lack of a principled approach, which can in turn lead to inconsistency, legal uncertainty and unpredictability, and inequality before the law. Both the example of Belgium and England illustrate that problems occur when judicial discretion is too broad and unstructured. In the English context, Ormerod and Birch that one of the great virtues of judicial discretion under section 78 PACE is that it gives courts flexibility to respond to the specificities of individual cases. Yet, the unconstrained width of the discretion has created problems.⁶³⁵

What needs to happen for the situation in Belgium and England to be remedied? Beyond the scope of this report to suggest a comprehensive proposal for reform, let alone that one proposal could be fit for both jurisdictions; despite the similarities between the two, differences and cultural preferences and specificities remain. It is clear from the foregoing a cure-all that will allow jurisdictions to do justice to the wide variety of issues that come into play when dealing with illegally obtained evidence in all possible circumstances is utopian. Nonetheless, a few

⁶³³ Ashworth and Redmayne (n 403) 347–348.

⁶³⁴ Roberts and Zuckerman (n 20) 158–159.

⁶³⁵ Ormerod and Birch (n 403) 785.

general suggestions can be made. Discretion can gain structure through the development of case law or by adopting legislation. First, it would be key that the judiciary or legislature identifies factors that trial judges should consider in deciding to admit or exclude evidence. Mere identification of factors is not sufficient, however; they should be consistent with a dominant rationale for exclusion of evidence.

Secondly, the balancing exercise should be conducted in a transparent manner so that it is clear where the balance between competing values lies and which interest of principle is given priority in individual cases.⁶³⁶ As Zuckerman writes, this will allow us to hold lawmakers and courts publicly accountable for the decisions they make, as well as develop a suitable theory for underpinning the legitimacy of the administration of justice.⁶³⁷ In his defence of adopting the principle of judicial integrity or legitimacy, he argues that if the judicial balancing exercise is made explicit, this will inform the public of the difficulty of deciding to either admit or exclude evidence. Making the court's reasoning transparent will in turn secure support even from those people who would have preferred a different result in a specific case.⁶³⁸ Additionally, the purpose of discretion should also be transparent in terms of the standard to which the judge must be satisfied that admission or exclusion of evidence is in order.⁶³⁹

7.5 A proposal for guided judicial discretion

This study has shown that exclusionary rules in the jurisdictions under consideration do not always respond to a clear rationale. Moreover, none of the four main rationales described under Section 5 appears to be able, alone, to function as guiding principle for the exclusion of evidence. It is submitted here, however, that as these principles are not mutually exclusive, they may be combined to allow for judicial decisions that consider a wider range of interests affected whenever evidence is gathered improperly.

To avoid that arbitrary mixing of the relevant principles leads, on the one hand, to neutralising their respective purposes and, on the other hand, to inconsistencies on a case-by-case basis in the outcome of the exclusion process, this study proposes a system for guided judicial discretion. It establishes a predetermined order for considering the different rationales. Though not annihilating the margin of appreciation for the court, this system sets boundaries for judicial discretion by guiding and, to a certain extent, limiting the possibility of balancing the factors relevant for the decision on evidence exclusion.

⁶³⁶ In a similar sense JB Dawson, 'The Exclusion of Unlawfully Obtained Evidence: A Comparative Study' (1982) 31 *International and Comparative Law Quarterly* 513, 515.

⁶³⁷ Ormerod and Birch (n 403) 785.

⁶³⁸ Zuckerman, 'Illegally Obtained Evidence: Discretion as a Guardian of Legitimacy' (n 403) 59.

⁶³⁹ Ormerod and Birch (n 403) 785.

The envisaged system can be defined as a structure of concentric circles. Each circle corresponds to a specific principle of exclusion. The arrangement of the circles determines the order in which the various criteria are examined. The evaluation accomplished pursuant to the criterion to be considered in each circle either leads to the outright exclusion of the evidence in question or to the continuation of the evaluation according to the rationale included in the next circle. The circles are organised to allow for an increasing degree of judicial discretion from one circle and, thus, from one principle to the next. Moving from the outermost circle towards the centre of the structure, the judicial reasoning traces what can be defined as a ‘cascade system’.

The first circle focuses (exclusively) on the reliability principle. Evidence reliability is crucial to ensure that a judicial decision fulfils its essential task of determining whether an offence can be attributed to the accused person. This rationale does therefore not allow for any balancing of the reliability criterion with other factors at this stage. The question of evidence reliability lies at the centre of the fair trial concept; to admit unreliable evidence would entail to accept the risk of wrongful conviction and, hence, endanger the legitimacy of the judicial decision itself. If the illegal way the evidence was gathered is found to have tainted its reliability, the evidence must be excluded.

If, on the contrary, the evidence is found to be reliable, the proposed system does not mandate its automatic admission. Reliable evidence will subsequently be evaluated in light of the criterion included in the second circle. Thereby, the system envisions a qualified variation of the reliability principle that differs from its pure application, according to which the higher the probative value of evidence, even if improperly obtained, the stronger the call for inclusion of such evidence.⁶⁴⁰

The second circle requires the examination of reliable evidence under the protective principle. This principle establishes that procedural rules are aimed at guaranteeing not only a fair and accurate decision but also that the rights of the accused are duly safeguarded. While a pure application of this principle would require the exclusion of evidence each time the suspect’s right have been violated, this study proposes a system that adopts a qualified variation of this principle. This allows to avoid a too stiff application of this principle and to extend judicial discretion to include an evaluation of the disadvantage suffered by the accused and of the gravity of the breach as well as the identification of the most appropriate redress.

Other interests are not part of the balancing included in judicial discretion at this stage: the court’s reasoning does not consider elements such as the enforcement officers’ motive when causing the violation, the seriousness of the offence, whether and to what degree rights of third people were violated or the fact that the illegality was committed by a private citizen as opposed to a state official. These are factors that flow into the evaluation accomplished within the third and innermost circle.

⁶⁴⁰ Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (n 203) 28.

The third step requires to consider the integrity principle, which allows for the widest judicial discretion. Improperly obtained evidence that is reliable and did not cause a significant breach of the accused's rights is considered, may still be excluded at this stage to ensure the highest legitimacy of the decision and of the administration of justice. This step includes also the consideration of another, not explicitly mentioned rationale, the disciplinary principle: disciplinary considerations, e.g. the enforcement officers' motive when giving rise to the violation, are integrated as sub-factors of the integrity principle. Similarly, this last circle allows also to exclude evidence when committed by a private citizen.

This system proposes an evaluation method that allows for consideration of various interests and values at stake, without opening the gate to unfettered discretion of the courts. The arrangement in concentric circles of different exclusionary principles that guide judicial reasoning through a cascade system of choices between exclusion and further inquiry give rise to a model of guided judicial discretion. This structure combines the need for minimum standards (e.g. only reliable evidence is eligible to be finally admitted) and consistency in the exclusionary process with the necessity to balance certain factors concerning improperly obtained evidence and their consequences to reach the most appropriate decision in the concrete case.

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