CHAPTER VI

GLOBAL TREND
After discussing the impact of improper evidence on civil and criminal cases, it is now proposed to discuss the global developments and give a comparative account of Indian law on the subject with that of some foreign countries like England, America, Canada, Australia and New Zealand. The researcher proposes to discuss this Global Trend under the following heads:

A. The Indian Law
B. English and Scottish Law
C. American Law
D. Canadian Law
E. Law in Australia and New Zealand
F. Arguments For and Against

Now these heads are discussed in detail with relevant case-law and references.

A. The Indian Law

According to the general approach of the Indian legal system, illegality or impropriety in the gathering or procuring of evidence does not, in itself, render the evidence so procured inadmissible, though it may affect its weight in some cases. Courts in India have, in general, treated such violations of the law as having no relevance to the admissibility of the evidence.
This approach might have been due, to some extent, to the fact that the Indian Law of evidence is almost entirely codified, with an elaborate classification of facts into relevant and irrelevant, and specific categorisation of admissible and inadmissible evidences and similar other differentia laid down by statute. The Indian Evidence Act was perhaps the first comprehensive code of evidence enacted in the entire commonwealth (1872). By the time developments regarding the discretion of the court to exclude evidence on grounds of public policy took shape elsewhere, the Act had already become firmly embedded in the training and upbringing of the Indian Judiciary. The super-imposition of common law doctrines upon the codified framework of the law of evidence did not find a very hospitable soil in the Indian Legal System. Indian Courts, in deciding questions of the admissibility or otherwise of evidence, had recourse only to the scheme and text of the Indian Evidence Act, 1872 and were not inclined to go outside the four corners of the Evidence Act for determining the questions of admissibility.

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

Besides this, there is yet another feature of the Indian legal system that might be appropriately referred to in the present context. The topic of admissibility of confessions in criminal cases has in other countries provided a fertile ground for the exercise of judicial discretion to exclude evidence obtained unfairly. But, in India, the subject has been treated elaborately in a chain of sections in the

Evidence Act, thereby removing this particular topic from the area of discretion and narrowing down the judicial creativity. Hence, in India, the question whether a particular confession can, or cannot, be admitted on the record falls to be determined almost exclusively by the statutory law and interpretation thereof, rather than by drawing any principles originating in uncodified law. “Justice, equity and good conscience” has been almost barren in this area of the law.

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

It is also probable that once this “statute-oriented” approach established itself in the sphere of confessions
where there are specific statutory provisions as to the admissibility of confessions recorded in varying circumstances, it later became a matter of habit for the courts to adopt the same approach on other topics as well. As a result, in regard to other species of evidence also, even though there were no specific statutory provisions as to admitting or not admitting a particular species of evidence obtained in violation of the law, the same stance came to be adopted by the courts. The most familiar example of this is furnished by the judicial approach in India in respect of evidence procured by search. The Code of Criminal Procedure, 1973 lays down elaborate provisions as to the mode of search to be carried out by the police for the purposes of investigation into an offence. 217 These provisions incorporate a number of safeguards required to be observed by the police in carrying out such searches. When questions arose as to the admissibility in evidence of materials gathered in a search that had been conducted in violation of the relevant statutory requirements (particularly, the statutory requirement that the search must have been conducted in the presence of two independent witnesses), 218 the courts, in general, started adopting a legalistic approach. According to the trend of authority, evidence so obtained is

217 Section 100, Code of Criminal Procedure, 1973
218 Section 100(4), Code of Criminal Procedure, 1973
not per se, inadmissible. Nor is there recognised any discretion on the part of the trial judge to exclude evidence obtained through a search not conducted in accordance with law.

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

A Supreme Court decision of 1973 is sometimes regarded as recognizing a discretion in the courts in India to exclude evidence obtained illegally. But in fact the Supreme Court in that case held the evidence to be admissible and did not accept the contention that illegality in gathering the evidence affected its admissibility. The point related to the admission, in evidence, of a tape record of a conversation that took place in the telephone. The charge was one of bribery, the accused being the Coroner of Bombay who had demanded a bribe of Rs.20,000 from a Bombay Doctor. The bribe was demanded as the Coroner’s price for not declaring


221 Sunder Singh v. The State, AIR 1956 SC 411.

the doctor guilty of negligence. The conversation that took place was between the doctor and the accused. The conversation was recorded by the anti-corruption police, who had been called in by the doctor for the purpose. A tape recorder was attached to the telephone at the doctor’s end and the conversation that took place between the doctor and the accused was recorded on the tape recorder attached to the telephone. Rejecting the argument that it was illegal so as to tamper with a telephone communication, the Supreme Court rightly held that even if there was any illegality, admission of the evidence in question did not thereby become impermissible. A feeble attempt was made to challenge the evidence on the score of Article 21 of the Constitution of India, but that challenge also did not succeed.

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

The Law Commission observed that in any case, if the Supreme Court judgment is to be construed as indicating that the courts in India have such discretion, then it recommended in its 69th Report to incorporate such discretion in the statute law of evidence.
B. English and Scottish Law

Law of England

The classical statement of English law on the subject of evidence obtained illegally represented by the dicta to be found in the leading case of Kuruma.223 The actual decision in that case was in favour of admission of the evidence, and the case itself did not arise in England, but was decided by the Privy Council. But the observations of the Judicial Committee of the Privy Council in that case are of great interest, and are generally taken as the starting point of any inquiry on the subject that does not support to go too deeply into the history of the subject.

The Privy Council in that case held that evidence of the accused’s unlawful possession of ammunition, discovered in consequence of an illegal search of his person, was admissible. The Privy Council acted on the principle, recognised in some earlier English decisions, that, provided real evidence is relevant, it is legally admissible, however improperly, it had been obtained. The person against whom such evidence is tendered may have a civil remedy against the person who obtained it and the latter may be liable to disciplinary, or even criminal, proceedings. But the law is

223 Kuruma v. R. (1955) 1 All E.R. 236 (PC)
that: “It matters not how you get it; if you steal it even, it would be admissible in evidence.”

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

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

It may be noted that in a recent English decision of Reg v. Sang, the statement about the discretion of the Court appears in terms somewhat different from earlier cases. The general question certified in that case by the Court of Appeal as fit for consideration by the House of Lords was: “does a trial fudge have a discretion to refuse to allow evidence—being evidence other than evidence of admissions—to be given in any circumstances in which such evidence is relevant and of more than minimal probative value?” To this question, the following answer

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224  R. v. Leathem, (1861) 8 Cox C.C. 408, 501 (Per Crompton. J.)
225  For the Canadian Law, see Clayton Hutchins, "Discretion of a trial Judge to exclude otherwise admissible evidence" (May 1981) Vol. 6, No. 3, Dalhousie L.J. 690, 699.
226  (1979) 3 W.L.R. 263, 288 (H.L.)
was given by four out of the five members of the House of Lords:

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

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

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

Reg v. Sang, referred to above, is a recent case and it is not possible to make any comment as to how far, if at all, it has modified the earlier understanding of the position in England as to evidence illegally obtained. It should however, be mentioned that copies improperly obtained may be

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excluded to prevent documents brought into court for a limited purpose from being stolen.

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

228 Reg v. Cole (1941) 165 L.T. 125.
229 Reg v. Doughty, (1965) 1 All E.R. 540.
230 Cross, Evidence (1973), page 90
be left to the discretion and sense of fairness of the judge.”231

The classical example in this field is **Noor Mohamed v. Reg**232 The accused had been convicted of murdering A, the woman with whom he had been living. He was a goldsmith, lawfully possessed of cyanide for the purposes of his business, and A. certainty met her death through cyanide poisoning, although there was no evidence that the poison had been administered by the accused. The accused was on bad terms with her and there was a suggestion that she had- committed suicide. The judicial Committee ruled that the conviction should be quashed because the judge had wrongly admitted evidence in support of an inference that Noor Mohamed, (the accused) had previously caused the death of his wife, Gooriah, with whom also he had been on bad terms, by V tricking, her into taking cyanide as a cure for toothache. Lord Du Parq, delivering the judgment of the Privy Council said of this evidence in its application to the facts of the case before him:

“If an examination of it shows that it is impressive just because it appears to demonstrate, in the words of Lord


232 Noor Mohammed v. R. (1949) A.C. 182; (1949) 1 All E.R. 365 (P.C.)
Herschell in Makin’s case\textsuperscript{233} “that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried and if it is otherwise of no real substance, then it was certainly wrongly admitted.”

Confessions constitute the third category of cases in which discretion is exercised. The judge’s discretion in England to exclude legally admissible confessions is of a different type.\textsuperscript{234} Few items of evidence can be more probative than a confession, provided it was not made in circumstances giving rise to a reasonable doubt concerning its reliability. The proviso mentioned in the preceding sentence lies at the root of the exclusionary rule of English law, which has been succinctly formulated in the following terms:

“\textit{It is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage,}

\textsuperscript{233} Makin v. A.G. for New South Wales (1894) A.C. 67 (PC).
exercised or held or by a person in authority, or by oppression.\textsuperscript{235}

This is one of the principles to which the Judges’ Rules of 1964 are expressly stated to be subject.\textsuperscript{236} The Rules themselves are no more than guides to police officers in relation to the taking of statements providing for the administration of a caution at different stages of an interrogation. The introduction concludes with the remark that non-conformity with the Rules may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings. The judge thus has a discretion to exclude a confession obtained in breach of the Rules, although it is legally admissible. In fact, the concluding remark of the introduction simply recognises the existence of a discretion to exclude confessions which are ‘voluntary’ within the above definition which had existed before the Rules were first formulated\textsuperscript{237} in 1921.

It is not necessary to burden this Report with an exhaustive discretion of all the situations in which courts in England are supposed to possess a discretion to exclude relevant evidence on a particular ground. A fairly recent

\textsuperscript{235} Cross, Evidence (1979) page 32.
\textsuperscript{236} The Rules are set out in (1964) 1 All E.R. 237. See now Home Office circular No. 89/Judges Rules and Administrative Directions is the Police 1978 page 6.
\textsuperscript{237} Cross Evidence 1979, page 32.
study 238 enumerates these situations of discretion as under 239

(a) Illegally obtained evidence.

(b) Improperly obtained evidence.

(c) Evidence of similar facts.

(d) Cross-examination of the accused as to character.

(e) Confessions.

(f) Admissions by accused persons.

(g) Evidence calculated to prejudice the course of the trial.240

**Scottish Approach**

The law of Scotland on the subject of evidence obtained illegally has taken a different approach from that followed in England. The trial judge is not only granted a discretion to exclude evidence obtained illegally, but it would appear that the court initially acts upon the principle that the discretion is not to exclude, but to include, irregularly obtained evidence. While there is no absolute

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239 Footnotes appearing in the study are omitted for brevity.

rule rendering evidence inadmissible because of irregularity, yet when such evidence is presented, which presumption the police may rebut by pointing to circumstances which excuse the irregularity and justify the admission of the evidence.\textsuperscript{241} In reaching a conclusion as to the exercise of the above discretion, the judge is to bear in mind the statement of Lord Justice General Cooper\textsuperscript{242} that:

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

In the case from which the above mentioned quotation is taken, a shopkeeper had been convicted of using, contrary to the Milk Order, milk bottles which had not belonged to her. The crucial evidence in the case was given by Inspectors of a milk-bottles collecting organisation, who found the bottles as a result of an unauthorised search of her premises. She appealed against the conviction on the

\textsuperscript{241} J.B. Dawson, ”Exclusion of unlawfully obtained evidence” (July 1982) Vol. 31 ICLQ page 513, 537.
ground, inter alia, that the evidence was inadmissible as having been obtained by an illegal search. The court held that while an irregularity in the obtaining of evidence will not necessarily render the evidence inadmissible, yet in this case the conviction must be quashed, because the Inspectors ought to have known that they were exceeding the limits of their authority.

It may be submitted that Scottish law in the area is founded upon the principle that “an in the manner of obtaining evidence is not necessarily fatal to its admissibility (but) irregularities of this kind always require to be ‘excused’ or condoned .........whether by the existence of urgency, the relative triviality of the irregularity or other circumstances.243

Further, the examples of exercise of the discretion in Scotland are available in plenty. Evidence gained by scraping the fingernails of a suspect without his having been arrested and without his consent having first been obtained was excluded,244 as the conduct of the police was technically an assault. Documents obtained by illegal search were excluded in another case. Lord Guthrie wrote that their admission would “tend to nullify the protection

afforded to a citizen by the requirements of a magistrate’s warrant and would offer a positive inducement to the authorities to proceed by irregular methods.\textsuperscript{245}

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

(i) An irregularity may be more readily excused where the misconduct was not deliberate. The evidence was admitted in Fairly’s case\textsuperscript{246} (for example), because the inspectors “acted in good faith, in a mistaken belief as to their powers and in an endeavour in the public interest to vindicate the law”.

(ii) Evidence will be admitted if found by chance in the course of an otherwise legal search for another purpose.\textsuperscript{247}

(iii) Evidence is less likely to be admitted if improperly obtained by private individuals rather than by public officials who may be held accountable to their superiors.\textsuperscript{248}

\textsuperscript{245} H.M. Advocate v. Turnbull, (1951) S.L.T. 409, 411.
\textsuperscript{246} Fairley v. Fishmongers of London, (1951) S.L.T. 54, 58.
(iv) Evidence may be excluded where there are no circumstances of urgency.\textsuperscript{249}

(v) Where a specific procedure has been prescribed by statute\textsuperscript{250} failure to comply with it may result in exclusion.

(vi) Where the police could easily have complied with legal requirements,\textsuperscript{251} exclusion may be the result.

(vii) Where the illegality is a serious one, such as assault,\textsuperscript{252} the evidence may be excluded.

On the other hand, exclusion of evidence is less likely in Scotland where the accused is charged with a serious offence, or where the crime is of a 'kind which is very hard to detect and prosecute by regular means,\textsuperscript{253} such as in liquor offences or blackmail.

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

\textsuperscript{251} McGovern v. H.M. Advocate, (1950) S.L.T. 133.
\textsuperscript{252} H.M. Advocate v. Turnbull (1951) S.L.T. 409.
\textsuperscript{253} Hopes v. H.M. Advocate, (1960) J.C. 104.
C. American Law

Before 1914 illegally obtained evidence was always admissible in United States courts.254 The law has changed since then, through judicial construction of the Fourth, Fifth and Fourteenth Amendments to the Constitution. The American courts have held that the Fourth Amendment right to be secure from unreasonable searches and seizures can only be enforced by the sanction of excluding evidence obtained in breach of it both in state and federal courts.255 The rule extends to the “fruit of the poisonous tree”, i.e. evidence obtained by using the information gained from the illegal search and seizure.256 It extends to oral evidence as well as real, e.g. statements overheard through a microphone driven into the wall of a house,257 or statements made to police during an unlawful search.258 A more spectacular recent extension is the holding that wire tapping and eavesdropping fall within “searches and seizures”.259

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

256 Silverthorne Lumber Co. v. United States (1926) 251 U.S. 385.
An accused cannot invoke the rule if the evidence was obtained in breach of another's rights. The rule does not apply to breaches by a private individual rather than a state official. It does not apply to evidence put to a federal grand jury. It does not apply to evidence admitted only on some issue collateral to guilt, such as the accused's credibility as a witness. The requirements of the Fifth and Fourteenth Amendments that the federal or a state government shall not “deprive any person of life, liberty or property, without due process of law” may lead to the exclusion of evidence obtained by methods which “do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically”, that is, methods which “shock the conscience”, e.g., the forcible stomach pumping of the accused to reveal his having swallowed drugs. Normally evidence obtained through breaches of the law which do not infringe constitutional rights is admissible.

The exclusionary rule has continued to be controversial in U.S.A. The general public undoubtedly sees

261 Burdeau v. McDowell (1921) 256 U.S. 465. This seems to be an anomalous survival for private persons of the “silver platter” doctrine rejected in Elkins v. United States (1960) 364 U.S. 206, by which evidence illegally obtained by state officials could be used in federal courts.
265 Muller v. United States (1958) 357 U.S. 301.
it as one of the “technicalities” of the law which handcuffs police and lets criminals go free. But scholars and judges also join in the criticism. In a major article, Dallin H. Oaks concluded that the rule did not deter police misconduct and that it had the negative effects of fostering false testimony by law enforcement officers, seriously delaying and overloading criminal proceedings and diverting attention from the search for truth on the guilt or innocence of the defendant. But, in spite of these weaknesses and disadvantages, Oaks would not abolish the rule “until there is something to take its place.............. It would be intolerable if the guarantee against unreasonable search and seizure could be violated without practical consequence.”266

Oaks would replace267 the exclusionary rule “by an effective tort remedy against the offending officer or his employer.................. A tort remedy, could break free of the narrow compass of the exclusionary rule, and provide a viable remedy with direct deterrent effect upon the police whether the injured party was prosecuted or not.’

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

Some of the key issues and considerations in the growing debate the exclusionary rule, in the context of search and seizure, have been examined in a recent article in the Anglo-American Law Review. The article concludes that the U.S. Supreme Court would be Unwise to abolish the exclusionary rule. It is pointed out that even if the exclusionary rule does not protect the integrity of the judiciary in the eyes of the public, it does support the credibility of the court and the law in the mind of police officers. Moreover, according to the article, there is good reason to believe, that the exclusionary rule does not allow criminals to go free as much as would be the case if direct sanctions were applied. At the same time, the article demonstrates that the exclusion of evidence obtained in

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violation of the Constitution acts as a reasonable deterrent to illegal police searches. While scholars have expressed doubts about the propriety of the rule, according to the article, the police would not understand, or respect, a court which would reverse itself on a matter which appears to be so fundamental. American constitutional tradition is such that the police would have difficulty in believing that any civilized Government would like to profit by a violation of the law.

D. Canadian Law

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

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

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

272 Kuruma v. The Queen, (1955) A.C. 197 (P.C.).
the English decisions pronounced after 1955 had all relied on the dictum of Lord Goddard, which itself was (in his view) not warranted by authority.

Is evidence rendered inadmissible merely by reason of the fact that it has been procured in contravention of the provisions of the Canadian Bill of Rights? The Supreme Court of Canada, in a ruling of 1975, considered the admissibility of a certificate concerning a breathalizer test administered by officers who had refused the prior request of the accused to consult counsel. It was argued on behalf of the accused that refusal of an opportunity to consult the counsel was a violation of the Canadian Bill of Rights, that the breathalizer test and sample was illegally obtained and therefore the certificate concerning it ought not to be admitted as evidence. The Supreme Court by majority held that even if the evidence had been illegally or improperly obtained, there was no ground for excluding it at common law and that, in view of other evidence of intoxication, one could not characterize as unfair the acceptance of the evidence as proof of the exact quantity of alcohol absorbed into the blood stream. Speaking for the majority, Ritchie, J. said, “I cannot agree that, wherever there has been a breach of one of the provisions of that Bill, (the Canadian Bill of

273 Hogan v. The Queen, (1975) 2 S.C.R. 574 (Canada).
Rights) it justifies the adoption of the rule of absolute exclusion on the American model which is in derogation of the common law rule long accepted in this country.” The evidence had been obtained in violation of section 2(c) (ii) of the Canadian Bill of Rights which (so far as is material) provides that—

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

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

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

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

“The case of Reg v. Drybones274 is authority for the proposition that any law of Canada which abrogates, abridges or infringes any of the rights guaranteed by the

Canadian Bill of Rights should be declared inoperative and to this extent is accorded a degree of paramountcy to the provisions of that statute, but whatever view may be taken of the constitutional impact of the Canadian Bill of Rights, and with all respect for those who may have a different opinion, I cannot agree that, wherever there has been a breach of one of the provisions of that Bill, it justifies the adoption of the rule of ‘absolute exclusion’ on the American model which is in derogation of the common law rule long accepted in this country.”

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

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

Section 15 of the proposed Evidence Code, (Canada), while not addressed directly to the precise problem here, attempts a more difficult compromise encompassing illegally obtained evidence.276

“15. (1) Evidence shall be excluded if it was obtained under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute.

“(2) In determining whether evidence should be excluded under this section, all the circumstances surrounding the proceedings and the manner in which the evidence was obtained shall be considered, including the extent to which human dignity and social values were breached in obtaining the evidence, the seriousness of the case, the importance of the evidence, whether any harm to an accused or others was inflicted wilfully or not, and whether there were circumstances justifying the action, such as a situation of urgency requiring action to prevent the destruction or loss of evidence.”

It appears that this typical Canadian remedy provides civil action against the offending official for tort damages.277

As to the interception of communications, the Canadian Criminal Code has an elaborate provision in Section 178.16 of the Criminal Code as under278:

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

(a) the interception was lawfully made; or

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

(2) Notwithstanding sub-section (1), the Judge or magistrate presiding at any proceedings may refuse to admit evidence obtained directly or indirectly as a result of

information acquired by interception or a private communication that is itself inadmissible as evidence where he is of the opinion that the admission thereof would bring the administration of justice into disrepute.

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

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

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

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

E. Law in Australia and New Zealand

Broadly speaking, in Australia and New Zealand, it is accepted that the Judge has the power, in the public
interest, to exclude evidence which has been improperly obtained.

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

The High Court of Australia held that a judge at a criminal trial has, in addition to the discretion to exclude evidence which is more prejudicial than probative, a discretion to exclude admissible evidence obtained

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improperly. However, unlike Lord Diplock in *Reg v. Sang*, the High Court did not base this discretion on unfairness to the accused or on the need to discipline the police. No doubt, concern was expressed that by admitting illegally obtained evidence, the courts may appear to condone, and even to encourage, such conduct. But the emphasis which the High Court put was on the need to protect the right of a citizen.

In the words of **Stephen and Aicken**, JJ:

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

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

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

(ii) whether the nature of the illegality affected the cogency of the evidence is not generally a factor to

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281 *Reg v. Sang* (1979) 3 WLR 263.
be considered, where the illegality deliberate or the result of recklessness;

(iii) case of compliance with the law;

(iv) the nature of the offence charged;

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

(vi) the urgency of protecting perishable evidence;

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

F. Arguments For and Against

In order that a proper decision may be taken as to whether there is need for amendment of the law of India on the subject under consideration, it will be convenient to mention here the arguments in favour of, or against, such an amendment. The major policy arguments in support of the adoption of a rule empowering the court to exclude illegally obtained evidence are connected with the element of deterrence, the ethical argument, the argument of unfairness to the accused, the argument connected with the integrity of the judicial process, and the argument as to symmetry and development of the law.
Those who put forward the argument of deterrence as justifying a rule of exclusion lay emphasis on the need to have, in the law, an effective deterrent against illegal conduct in law enforcement. It is stated that in order that such conduct may not be resorted to in law enforcement, the only effective sanction within the apparatus of the law is a rule which excludes evidence obtained illegally. The strict exclusionary rule adopted in the U.S.A. rests on this assumption, though, no doubt, its adoption in that country has been buttressed by the fact that what is in issue is an infringement of a constitutional provision.

Students of criminology are aware that it is difficult to assess with reasonable accuracy the deterrent effect of any legal sanction. How far any legal prescription adequately deters illegal conduct in a particular area of human activity regulated by law is mostly a matter of opinion. Because of this general position (which applies to evidence gathered illegally also), the question whether the introduction of a rule or discretion of exclusion of evidence adequately deters illegal conduct in the collection of evidence will always remain a matter of opinion. Material enabling the formation of an objective conclusion on the point is not always available. At the same time the adoption of a rule or discretion of exclusion might, prima facie, remove the
incentive to break the law for the purpose of obtaining evidence. Deterrence has been the principal basis of criminal sanctions, and there should be a presumption in favour of the effectiveness of judicially enforceable sanctions against attempts to procure evidence illegally obtained. It appears that the studies284 conducted in the U.S.A. for the purpose of testing the deterrent effect of the exclusionary rule have remained inconclusive, and are likely to be so. “The issues are not susceptible of quantitative solution,” according to Mr. Justice Frankfurter.285 This, in fact, may be true of many other laws imposing criminal sanctions. Were the proponents of every such law required to demonstrate a specific deterrent effect, one suspects that a great deal of our law might have to be stricken from the books.286

There is another aspect of the matter that needs to be mentioned. The operation of a rule excluding evidence obtained illegally may obstruct the process of seeking the truth. In individual cases, the guilty may even go free. The question is whether such cases will be no large in number as to prevent any move for a change in the law, if the change is otherwise required in the interests of justice.

286 Supra note 284
An assessment of the validity and force of the argument of deterrence naturally involves a consideration of the alternative remedies that are available under the general law against illegal conduct. Such alternative remedies are at present, principally the following:

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

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

(c) Departmental action against the enforcement agencies.

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

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

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

So much as regards the element of deterrence. Then, there is what may be called the “ethical” argument. These who would favour some type of exclusionary rule argue in support that justice requires that the wrong doer must be denied the benefit of his wrongful act. One can call it the doctrine of “clean hands”. Exclusion of evidence acquired illegally, it is believed, works as a sanction against the deriving of such benefit by a person who obtained the evidence illegally. No doubt, in a modern State, where the enforcement of law is a complete mechanism, this argument, in a form in which it concentrates on personal conduct, cannot be applied literally. The particular enforcement officer who might have been personally guilty of the alleged

wrong doing is merely a cog in the whole administrative wheel; moreover, that particular officer may have been transferred to another place and succeeded by another officer before the prosecution commences and before the evidence alleged to ‘have been obtained illegally is tendered. The result is that though the wrong is committed by ‘A’, the benefit of the evidence gathered illegally may go to ‘B’, and the application of a doctrine of “clean hands” based on personal fault would be meaningless in such circumstances.

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

One more argument to support on exclusionary rule is the argument of unfairness. The admission of evidence obtained illegally, it is stated, would be unfair or unjust to the accused. This was the traditional basis of the English rule on the subject.288

An argument which has gained popularity in modern times, and which seems to carry considerable force behind

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

The argument has a greatly persuasive force. No doubt, Wigmore, the eminent American writer on evidence took the view that even if the court admits illegally obtained evidence, the court does not thereby condone the illegality, but merely ignores it. Any view expressed by this eminent jurist must command very great respect. But it appears to us that this is not an entirely satisfactory way of disposing of the matter. Even if it be assumed that the court, by admitting illegally obtained evidence, merely ignores the illegality, the court, by doing so, indirectly implicates itself in the illegality. To this extent, the court becomes a party to a procedure which can breed disrespect for the law and for the judicial

process. The law has so many rules based on the public policy (in the wider sense), whereby certain conduct is refused to be countenanced by the court on the principle that the law would not lend its aid to some serious illegality unworthy of a civilised society. The adoption of some rule of an exclusionary character would be in symmetry with legal rules of this category. An argument that seeks to keep the stream of justice unpolluted cannot be dismissed summarily.

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

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

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

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

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

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

The arguments for and against the exclusion of evidence illegally obtained, that have been summarised above, do not, of course, take into account the constitutional aspects. In a particular country, where rights guaranteed by the Constitution are in issue, the controversy may acquire a different colour. The law then, has to concern itself also with values whose importance is heightened by the Constitution. Introducing an exclusionary rule can, in such countries, be argued for with greater force. This, in fact, happened in the United States, where the Fourth Amendment of the American Constitution, protecting the citizen *inter alia* against unreasonable search and seizure, ultimately came to be invoked as the foundation for a rule excluding evidence acquired as the consequence of an illegal search or seizure. It is on this basis that Courts in the United States have held that the States are required to
exclude, from State criminal trials, evidence illegally seized by State Officers.\textsuperscript{290} The \textbf{Supreme Court of the United States} has said the same thing in different words by observing that “the primary purpose of the exclusionary rule is to deter future unlawful police conduct and thereby effectuate the guarantees of the Fourth Amendment against unreasonable search and seizure.\textsuperscript{291}

How far the adoption of a rule or discretion excluding the admission of illegal evidence becomes a constitutional imperative or desideratum in India is a question which cannot, in the present state of the law, be answered with certainty, there being no direct authority on the subject. India does not have a provision in its Constitution strictly corresponding to the Fourth Amendment of the U.S.A. As regards the concept of “procedure established by law” laid down in Article 21 of the Indian Constitution, that concept still remains to be spelt out in its application to the law of evidence.

On an examination of the pros and cons of the matter under discussion it would appear that in this area there are no absolutes. On the one hand, if evidence obtained illegally is not admitted at the trial, grave injustice might be caused in some cases and the respect for the courts as courts of

\textsuperscript{290} Mapp v. Ohio (1961) 367 U.S. 643.
justice would be lowered. On the other hand, there are cases where the illegal conduct is so shocking that the court would consider it unjust to admit the evidence. There are many degrees of illegality, and it would appear that, for this reason, an element of elasticity in the law may, in the majority of cases, better serve the interests of justice than a blind adherence to a rigid rule of exclusion. At the same time, the question that must be considered is whether the present position in India is consistent with justice.

It is in the light of these considerations that the Law Commission of India in its 94th Report has recommended insertion of a new Section 166-A in the Indian Evidence Act, 1872, to give discretion to courts to assess evidence obtained illegally or improperly and to refuse to admit such evidence under certain circumstances set out in the proposed amendment. The Law Commission of India made a detailed study and pointed out that the traditional approach of courts in India is to admit almost every bit or evidence irrespective of the fact that it is obtained illegally or properly. Therefore, the Law Commission has recommended that it is necessary to provide that the Court under certain circumstances are armed with the discretion to exclude tainted evidence obtained illegally or improperly. The recommendation of Law Commission is as under:
Section 166 A. (1) In a criminal proceeding, where it is shown that anything in evidence was obtained by illegal or improper means, the court, after considering the nature of the illegality or impropriety and all the circumstances under which the thing tendered was obtained, may refuse to admit it in evidence, if the court is of the opinion that because of the nature of the illegal or improper means by which it was obtained its admission would tend to bring the administration of justice into disrepute.

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

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

(b) the seriousness of the case;

(c) the importance of the evidence;

(d) the question whether any harm to an accused or others was inflicted willfully or not, and
(e) the question whether there were circumstances justifying the action, such as a situation of urgency requiring action to prevent the destruction or loss of evidence.

The above recommendation is awaiting implementation. Therefore, it is concluded that the Law Commissions recommendation be implemented following the global trend and the courts in India be given discretion to exclude improper evidence. At the same time, to avoid failure of Justice to the victim and the society, any improper or illegal evidence be given wait through suitable amendment in the law.