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The Bigger the Crime, the Smaller the Chance of a Fair Trial?

Evidence Exclusion in Serious Crime Cases Under Swiss, Dutch and European Human Rights Law

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Abstract

This article discusses evidence exclusion under Swiss, Dutch and the ECtHR's case law. It is shown that different national rules can still lead to similar outcomes. This can be explained by the influence of the ECtHR's case law and by common normative underpinnings of evidence law. In all systems there are cases of strict exclusion of evidence (e.g., torture). If evidence cannot be strictly excluded courts apply a balancing approach. They consider among other factors the seriousness of the crime. Illegally obtained evidence can thus be used, if a serious crime is at stake. It is argued that this seriousness-argument not only fails to serve the objectives of evidence exclusion (deterrence, protection of rights etc.), but for the defendant it means that the bigger the crime he is accused of the smaller becomes his chance of a fair trial.

Keywords

criminal procedural law – evidence exclusion – European Court of Human Rights – procedural sanctions – serious cases – Switzerland – The Netherlands

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1 Introduction

Imagine the following standard case: the police believe that drugs are being sold at an apartment. They decide to search the apartment. As they still have some doubts as to the reliability of their suspicion they choose not to involve the prosecutor nor to obtain a search warrant. During their search they find enormous quantities of drugs. The two tenants are arrested and questioned. It turns out that large drug deals had been struck at the apartment. At the trial the defence claims that the main piece of evidence, the drugs seized, had been illegally obtained and must therefore be excluded from the proceedings. The court acknowledges that the search was unlawful but nevertheless admits the evidence. It argues that the failure to obtain a search warrant constitutes only a minor violation of procedural rules. Therefore, the public interest in having the two tenants convicted for serious drug crimes must prevail.

This case is fictitious, yet the court's reasoning is not. As will be shown in this paper, courts regularly balance the interests of the accused against the public interests in truth-finding and conviction. At first sight, this argument seems logical and grounded in common sense. Serious crimes require serious responses. The material truth is widely viewed as being more important than the mere technicalities of criminal proceedings. A closer look, however, raises doubts as to whether the seriousness of an alleged crime can ever be a good argument for disregarding procedural rules. Consequently, it may be the case that the bigger the crime, the smaller the chance of a fair trial.

In both Dutch and Swiss criminal procedure, the question of how courts should respond to unlawful police and prosecutorial conduct is a hotly debated topic.[1]

1 R. Kuiper, *Vormfouten. Juridische consequenties van vormverzuimen in strafzaken* (Deventer: Kluwer, 2014); M.J. Borgers, 'De toekomst van 359a Sv', 25 *Delikt & Delinkwent* (2012) 257–273; M.J. Borgers and T. Kooijmans, 'Alternatieven voor rechterlijke controle op vormverzuimen', in M. Groenhuijsen, T. Kooijmans and J. Ouwerkerk (eds), *Roosachtig Strafrecht* (Deventer: Kluwer, 2013), p. 17 ff.; For Switzerland see: L. Vetterli, *Gesetzesbindung im Strafprozess, Zur Geltung von Verwertungsverboten und ihrer Fernwirkung nach illegalen Zwangsmassnahmen* (Zürich: Schulthess, 2010); R. Fornito, *Beweisverbote im schweizerischen Strafprozess* (St. Gallen, 2000); D. Häring, 'Verwertbarkeit rechtswidrig erlangter Beweise gemäss Schweizerischer Strafprozessordnung — alte Zöpfe oder substanzielle Neuerungen?', 127 *Schweizerische Zeitschrift für Strafrecht* [*ZStrR*] (2009) 225–257; S. Gless, 'Heiligt der Zweck die Mittel? Beweisverbote im vereinheitlichten eidgenössischen Strafprozess', in M.A. Niggli, J. Hurtado and N. Queloz (eds), *Festschrift für Franz Riklin* (Zürich: Schulthess, 2007), p. 399 ff.; at p. 412; H. Vest and A. Eicker, 'Bundesgericht. I. Öffentlichrechtliche Abteilung, 18.5.2004. Y. c. X. und Staatsanwaltschaft sowie Obergericht des Kantons Aargau, staatsrechtliche Beschwerde. BGE 130 I 126', *Aktuelle Juristische Praxis* [AJP] (2005) 883–892; W. Wohlers,

Both jurisdictions allow for unlawfully obtained evidence to be admitted at trial if the alleged crime is sufficiently serious. However, they reach this result in very different ways. This makes these states an interesting case for a comparative analysis. We will first demonstrate that both systems have comparable responses to unlawful state conduct in general (Section 2). The focus of this paper lies on one of these responses, namely the exclusion of evidence (Section 3). In Swiss law there are detailed statutory regulations (Section 3.1); whereas in Dutch law the exclusionary rules are mainly set up by the Supreme Court (Section 3.2). Both systems are influenced by the case law of the European Court of Human Rights ('ECtHR'; Section 3.3). We will show that comparable cases of unlawful police and prosecutorial behaviour are decided accordingly. The assumption is that the underlying principles of evidence exclusion are the same in all three jurisdictions (Section 4). The factors considered in evidence exclusion (Section 4.1) and the purposes pursued with exclusion (Section 4.2) are almost identical. This will allow us to tackle the question of whether the seriousness of the crime at stake is a valid argument when deciding on evidence exclusion (Section 4.3). In the end we will resume the main findings and come back to the example in the introduction (Section 5).

2 General Consequences of Unlawful State Conduct

There is a whole array of possible reactions to unlawful behaviour. If the police engage in criminal activities in order to obtain evidence then they can be held criminally liable for such conduct. For example, a policeman who tortures a defendant or coerces him into a confession may face charges including assault, coercion, threatening behaviour or abuse of public office.[2] Alternatively, a prosecutor who violates procedural regulations may have to face disciplinary sanctions.[3] Further, anyone affected by police and prosecutorial misconduct can sue the state for compensation.[4] Beside these "collateral" consequences of misconduct, courts can also impose measures within the criminal proceedings. We now turn to these procedural sanctions.[5]

Bundesgericht, I. Öff.-r. Abt., 3 May 2005, X. c. StA/BL, st. B. (1P.570/2004, BGE 131 I 272), Bemerkungen, *Aktuelle Juristische Praxis* (2006) 627 ff.

2 See, e.g., ECtHR, *Gäfgen v. Germany* [GC], no. 22978/05, para. 122.

3 D. Häring *supra* (fn. 1), p. 243.

4 Article 146 Federal Constitution of the Swiss Confederation of 18 April 1999– State liability.

5 S. Gless and J. Martin, Water Always Finds Its Way — Discretion and the Concept of Exclusionary Rules in the Swiss Criminal Procedure Code, in M. Caianiello and J.S. Hodgson (eds), *Discretionary Criminal Justice in a Comparative Context* (Durham, NC: Carolina Academic Press, 2015), p. 162 ff.

The influence of courts on the investigative phase of criminal proceedings in The Netherlands can be traced back to the 1960s. As a result of the growing public awareness of fundamental rights and the influence of the European Convention on Human Rights ('ECHR'), courts imposed standardised reactions to unlawful police and prosecutorial conduct.[6] This case law later became black letter law. Pursuant to Article 359a CCP/NL courts *may* respond to procedural violations with the following sanctions: (1) mitigation of the sentence imposed, (2) the exclusion of the evidence obtained, or (3) a permanent stay of proceedings.

In Switzerland there is no statutory provision comparable to Article 359a CCP/NL that puts up general rules regarding the consequences of police and prosecutorial misconduct. Nor has the Federal Supreme Court set up a general rule of the kind. There are only a few individual provisions.[7] According to the case law, excessively long criminal proceedings may lead to a recognition of the excessive duration, a mitigated sentence, a conviction without sanction, or the total stay of the proceedings.[8] The only norm which in a general manner deals with unlawful state behaviour is Article 141 of the Swiss Federal Code of Criminal Procedure (CCP/CH).[9] It regulates evidence exclusion and will be discussed in the next section.

3 Exclusion of Evidence

3.1 *Swiss Law*

Article 141 CCP/CH sets up five levels of evidence exclusion,[10] descending from strict exclusion to full admissibility.

6 P. Spierenburg, *Please, please me's number one* (Den Haag: Boom Juridische Uitgevers, 2013) p. 30 ff.; T. Spronken, *Verdediging. Een onderzoek naar de normering van het optreden van advocaten in strafzaken* (Deventer: Gouda Quint, 2001) p. 125 ff.

7 E.g., Article 293 IV CCP/CH; F. Meyer, 'Neues zu den Rechtsfolgen unzulässiger Tatprovokation, zugleich Besprechung von EGMR v. 23.10.2014, Nr. 54648/09, Furcht v. Germany', *Forum poenale* (2015) p. 176 ff.

8 Federal Supreme Court Decision (available online at http: //www.servat.unibe.ch/dfr/dfr_bge07.html) BGE 117 IV 124 consid. 4.d; S.J. Summers, in M.A. Niggli, M. Heer and H. Wiprächtiger (eds), *Basler Kommentar, Schweizerische Strafprozessordnung — Jugendstrafprozessordnung*, 2nd edn (Basel: Helbing Lichtenhahn Verlag, 2014), Article 5 N 15 f.; H. Wiprächtiger and S. Keller, in M.A. Niggli and H. Wiprächtiger (eds), *Basler Kommentar, Strafrecht I*, 3rd edn (Basel: Helbing Lichtenhahn Verlag, 2013), Article 47 N 178 ff.

9 English translation by Swiss Government (http://www.admin.ch/opc/en/classified-compilation/20052319/index.html), CCP/CH (Gov); Translation by S.J. Summers, in A. Donatsch, T. Hansjakob and V. Lieber (eds), *Kommentar zur Schweizerischen Strafprozessordnung* (*StPO*), 2nd edn (Zürich: Schulthess, 2014), CCP/CH (Summers).

10 D. Häring, *supra* (fn. 1), p. 237 ff.

On the first level, evidence is strictly[11] excluded from any criminal proceedings if it has been gathered by coercion, violence, threats, promises, deception or methods that interfere with an accused's free will.[12] Evidence obtained by torture or through inhuman or degrading treatment (Article 3 ECHR), is categorically excluded. There is no balancing of interests.[13]

On the second level, evidence is strictly excluded if the Code explicitly declares evidence to be inadmissible.[14] At the start of the first interview the accused must be informed that he is entitled to remain silent and to appoint a defence lawyer.[15] Article 158 II CCP/CH explicitly states that any evidence obtained without these cautions is strictly inadmissible.[16] There is no balancing of interests and no reasoning about the epistemological value of such evidence.[17]

On the third level, evidence is generally excluded if the criminal justice authorities have obtained it in a "criminal manner" (Article 141 II CCP/CH).[18] What the legislator meant can be illustrated with *Schenk v. Switzerland*.[19] Pierre Schenk was suspected to have hired a hitman to kill his wife, Josette Schenk. The designated hitman, instead of executing his mission, secretly taped a phone conversation with Pierre Schenk. This tape was subsequently used as the main piece of evidence in Schenk's conviction. Secret taping of phone calls is a criminal offence in Switzerland (Article 179ter of the Swiss Criminal Code; CC/CH– Unauthorised recording of conversations).[20] Hence, the evidence is

11 S. Gless and J. Martin, *supra* (fn. 5), p. 167 ff.; for the distinction between *strictly* and *generally* excluded evidence see S. Gless, in M.A. Niggli, M. Heer and H. Wiprächtiger (eds), *Basler Kommentar, Schweizerische Strafprozessordnung — Jugendstrafprozessordnung*, 2nd edn (Basel: Helbing Lichtenhahn Verlag, 2014), Article 141 N 15 f.

12 Articles 140 I and 141 I clause 1 CCP/CH.

13 S. Gless, *supra* (fn. 11), Article 141 N 47.

14 Article 141 I clause 2 CCP/CH.

15 G. Godenzi, in A. Donatsch, T. Hansjakob and V. Lieber (eds), *Kommentar zur Schweizerischen Strafprozessordnung* (*StPO*), 2nd edn (Zürich: Schulthess, 2014), Article 158 N 9 ff.; N. Ruckstuhl, in M.A. Niggli and M. Heer and H. Wiprächtiger (eds), *Basler Kommentar, Schweizerische Strafprozessordnung — Jugendstrafprozessordnung*, 2nd edn (Basel: Helbing Lichtenhahn Verlag, 2014), Article 158 N 19 ff.

16 G. Godenzi, *supra* (fn. 15), Article 158 N 33 ff.; N. Ruckstuhl, *supra* (fn. 15), Article 158 N 33 ff.; for more examples S. Gless, *supra* (fn. 11), Article 141 N 48 ff.

17 See S. Gless, *supra* (fn. 11), Article 141 N 48.

18 L. Ottinger, 'L'exploitation des moyens de preuves obtenus illégalement: de la situation actuelle à celle du CPP unifié', *Jusletter* (24 August 2009); See also G. Hersch, 'Die Verwertbarkeit rechtswidrig erlangter Beweise gemäss Art.141 Abs. 2 StPO: Kodifizierung der Rechtsprechung des Bundesgerichts?', 130 *Schweizerische Zeitschrift für Strafrecht* (2012) 352–372, at 365.

19 See ECtHR, *Schenk v. Switzerland* [Plenary], no. 10862/84; BGE 109 Ia 244.

20 G. Godenzi, *Private Beweisbeschaffung im Strafprozess* (Zürich: Schulthess, 2008) p. 161 ff.

generally excluded.[21] General exclusion means that unlawfully obtained evidence is not admissible, but that there are exceptions.[22] When courts assess the general admissibility of evidence they have to engage in a balancing exercise.[23] The private interests of the accused have to be balanced against the public interests in truth finding and conviction.[24] The graver the alleged crime the likelier that the public interests prevail.[25] Not surprisingly, the courts decided that the public interest in resolving the murder charges overrode Pierre Schenk's private interest in the confidentiality of his phone call.[26] The tapes were thus admitted as evidence.

On the fourth level, evidence is again generally excluded if the criminal justice authorities have obtained it in violation of 'validity rules' (Article 141 II CCP/CH). These are rules designed to protect the fundamental rights of the accused. At examination hearings witnesses have to be informed of their duty to tell the truth. If this caution is not given "the examination hearing is invalid" (Article 177 I CCP/CH). Despite its denomination, 'invalidity' does not necessarily mean that evidence is unusable. If a validity rule is breached, Article 141 II CCP/CH again applies. Evidence is generally excluded unless the alleged crime is sufficiently serious that there is a public interest in its inclusion. This assessment requires the courts to engage in the aforementioned balancing process.[27]

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21 S. Gless, *supra* (fn. 11), Article 141 N 64; for further examples, see N. Schmid, *Schweizerische Strafprozessordnung* (*StPO*), *Praxiskommentar*, 2nd edn (Zürich and St. Gallen: Dike, 2013), Article 141 N 6; Federal Council Dispatch on the unification of the Swiss Laws on Criminal Procedure of 21 December 2005, BBl 2006 p. 1085 ff., 1183 (http://www.admin.ch/opc/de/federal-gazette/2006/1085.pdf).

22 S. Gless, *supra* (fn. 11), Article 141 N 14, 63 ff. ; S. Gless and J. Martin *supra* (fn. 5), pp. 168 f.

23 D. Häring, *supra* (fn. 1), p. 243 f. ("*klassischen Interessenabwägung*"); S. Gless and J. Martin *supra* (fn. 5), p. 171; partly different W. Wohlers, in A. Donatsch, T. Hansjakob and V. Lieber (eds), *Kommentar zur Schweizerischen Strafprozessordnung* (*StPO*), 2nd edn (Zürich: Schulthess, 2014), Article 141 N 20; dissenting G. Hersch, *supra* (fn. 18), p. 371; In the past the Swiss Courts also had to assess whether illegally obtained evidence could also have been obtained in accordance with the law, see BGE 131 I 272 consid. 4.1; L. Ottinger, *supra* (fn. 18), *Jusletter* II.3; L. Vetterli, *supra* (fn. 1), p. 63; rightly rejecting this argument J.D. Jackson and S.J. Summers, *The Internationalisation of Criminal Evidence, Beyond the Common Law and Civil Law Traditions* (Cambridge: Cambridge University Press, 2012) p. 191 f.

24 Federal Supreme Court Decision of 7 September 1983, cited after ECtHR, *Schenk v. Switzerland* [Plenary], no. 10862/84, para. 30 (=BGE 109 Ia 244 consid. 2b).

25 BGE 130 I 126 consid. 3.2; see also BGE 131 I 272 consid. 4.1.2.

26 ECtHR, *Schenk v. Switzerland* [Plenary], no. 10862/84, para. 30, 49.

27 See for criticism: W. Wohlers, *supra* (fn. 23), Article 141 N 19 ff.; S. Gless, *supra* (fn. 11), Article 141 N 79 ff., 84; L. Vetterli, *supra* (fn. 1), p. 16 ff.; D. Häring, *supra* (fn. 1), p. 245 ff.; R. Fornito, *supra* (fn. 1), p. 246 ff., 252; for "*fishing expeditions*" see BGE 137 I 218 consid. 2.3.2.

On the fifth level, evidence "obtained in violation of administrative rules shall be usable".[28] Whilst a violation of an administrative rule may lead to disciplinary sanctions, the evidence remains fully admissible. 'Administrative rules' are designed to guarantee the smooth administration of criminal proceedings.[29] They are one level beneath the 'validity rules' as their violation should — by definition — not result in an infringement of the accused's personal interests. However, it is very hard to draw a clear line. The rule that an expert witness has to be reminded of his duty to tell the truth has been regarded as an *administrative* rule.[30] Some view the duty to get a search warrant as an administrative rule.[31] According to the Supreme Court, a provision regarding the physical search of mobile phones is only of administrative nature.[32] It is difficult to conceive how there is no interference with the accused's interests in these cases.

The levels of evidence exclusion under Swiss law can be summed up by referring to the example in the introduction. If the information about the drug deals had been obtained coercively, or without cautioning the tenants, evidence would be strictly unusable. If the police had forged a search warrant in order to get into the apartment, the evidence would have been gathered in a "criminal manner" (Article 317 CC/CH — Forgery of a document by a public official). Still, this would not lead to automatic exclusion. It could be admissible if the drug offences were deemed to be sufficiently serious.[33] If the police had searched the house without authorization, the consequences depend on whether the duty to obtain a search warrant is viewed as a validity

28 Article 141 III CCP/CH (Summers, fn. 9).

29 On procedural provisions as "mere suggestions", see M. Caianiello, Procedural Sanctions in the EU Framework: Toward a Harmless Error Doctrine and Practice, in M. Caianiello and J.S. Hodgson, *Discretionary Criminal Justice in a Comparative Context* (Durham, NC: Carolina Academic Press, 2015), p. 208; and M. Caianiello, 'To Sanction (or not to Sanction) Procedural Flaws at EU Level, A Step forward in the Creation of an EU Criminal Process', 22 *European Journal of Crime, Criminal Law and Criminal Justice* (2014) 317–329, at 319.

30 Decision by the Court of Cassation of the Canton of Sankt Gallen, 27 October 1967, *St. Gallische Gerichts- und Verwaltungspraxis* (GVP/SG) (1967) no. 54; N. Oberholzer, *Grundzüge des Strafprozessrechts* (Bern: Stämpfli, 2012) 3rd edition N 813.

31 For references, see D. Häring, *supra* (fn. 1), p. 241 and N. Burger-Mittner and S. Burger, 'Die „freiwillige" Hausdurchsuchung im schweizerischen Strafprozess', *forumpoenale* (2012) p. 307 ff., 309; BGE 96 I 437 consid. 3, 139 IV 128 consid. 1.7.

32 BGE 139 IV 128 consid. 1.7.

33 S. Gless, *supra* (fn. 11), Article 141 N 64 ; the fact that the search was performed without due cause could be another ground for exclusion, see BGE 139 IV 128 E. 2.1 ("*fishing expeditions*").

or an administrative rule.[34] In the latter case it would be fully admissible. In the former, the public interests in conviction would have to be weighed against the accused's right to privacy.

3.2 *Dutch Law*

The Dutch law on the exclusion of evidence is more flexible and mostly developed via case law. Courts can address violations of procedural rules that have occurred during the investigative proceedings[35] via Article 359a CCP/NL.[36] This article — unlike Article 141 of the Swiss Code — does not make a distinction between the types of procedural rules that have been breached.[37] Thus, in principle it applies to all types of procedural rules, whether they protect fundamental rights of the accused or the efficiency of the proceedings; unless the violation can still be repaired.[38] In deciding what remedy would be most appropriate "the court takes into account the relevance of the breached provision, the seriousness of the violation and the damage caused by the violation". These factors need to be considered regardless of the remedy that is chosen (mitigation of sentence, exclusion of evidence, or a stay of proceedings). In 2004, the Supreme Court ruled on the interpretation of Article 359a CCP/NL that evidence can only be excluded if the unlawful conduct that had led to the discovery of this evidence, constitutes a significant breach of an important procedural provision.[39] In 2013 more detailed rules for evidence exclusion were set up by the Supreme Court.[40] The case that led to this concerned an unauthorized search of a home resulting in the discovery of large quantities of cannabis, as well as installations for growing cannabis plants. At trial the defence argued that the evidence obtained by the unlawful search of the home should be excluded.

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34 Controversial; see D. Häring, *supra* (fn. 1), p. 241; N. Burger-Mittner and S. Burger, *supra* (fn. 31), p. 309; BGE 96 I 437; Dispatch 2005, *supra* (fn. 21), p. 1183.

35 An example is investigations done in the context of intelligence and security services (Dutch Supreme Court 5 September 2006, ECLI:NL:HR:2006:AV4122).

36 Violations committed by private persons generally do not fall under this article (Dutch Supreme Court 14 January 2003, ECLI:NL:HR:2003:AE9038).

37 As will be shown below the case law of the Supreme Court does make such distinctions in deciding which violations can be remedied through the exclusion of evidence.

38 Such is the case when for instance the defendant is not granted the opportunity to conduct a counter analysis. According to the Supreme Court this can be remedied by granting such an opportunity at a later stage (Dutch Supreme Court 1 November 2005, ECLI:NL:HR:2005:AU2239).

39 Dutch Supreme Court 30 March 2004, ECLI:NL:HR:2004:AM2533, para. 3.4.2.

40 Dutch Supreme Court 19 February 2013, ECLI:NL:HR:2013:BY5321.

The Supreme Court concluded that the exclusion of evidence is only warranted in three instances, namely where (1) the unlawful act directly affects the right to a fair trial under Article 6 ECHR; (2) there is a significant breach of an important procedural provision or principle — other than Article 6; and finally (3) the defence can show the existence of exceptional circumstances in which a particular procedural violation has been so frequent that it can be considered structural.

The first category leads to strict exclusion of evidence. It includes the violation of the right to counsel during police interrogations (known as the *Salduz*-exception),[41] statements of the defendant elicited by a police informant,[42] or evidence gathered in violation of Article 3 ECHR.[43] In these situations the courts must exclude the illegally obtained evidence and no balancing of interests takes place.

The second category concerns breaches of important procedural provisions that do not violate the right to a fair trial. Nevertheless, the exclusion of evidence is deemed a necessary measure to prevent future procedural irregularities. Examples are an unlawful body cavity search, or the use of privileged communications.[44] Unlike the first category where the exclusionary rule is applied in a strict manner, this second category explicitly demands that courts weigh the pros and cons in order to apply the exclusionary rule. The exclusion of evidence under this category is therefore warranted only in the case of a significant violation of a fundamental right of the accused.

The third category concerns structural violations of procedural rules by police or prosecution. The defence must prove that responsible authorities have not done enough to prevent such violations. The prosecutor can then demonstrate that adequate remedies have been taken. The court again has to engage in a balancing exercise and explain why the exclusion of evidence will have a deterrent effect on the police and prosecution. Because of the high threshold to be met by the defence this category has never been applied in practice.

As mentioned the first category is a strict exclusion of evidence, whereas the second and third require courts to engage in a balancing exercise. In doing so courts should take account of the following factors:

41 ECtHR, *Salduz v. Turkey* [GC], no. 36391/02.

42 ECtHR, *Teixeira de Castro v. Portugal*, no. 25829/94.

43 ECtHR, *Gäfgen v. Germany* [GC], no. 22978/05.

44 Dutch Supreme Court 29 May 2007, ECLI:NL:HR:2007:AZ8795; Dutch Supreme Court 12 January 1999, ECLI:NL:HR:1999:ZD1402; Dutch Supreme Court 2 October 2007, ECLI:NL:HR:2007:BA5632.

First it must be established that an important right of the accused has been breached. Does the violated procedural rule protect important rights or interests of the accused? This rule is referred to as the *Schutznorm*. In a 2004 case an illegal search of the premises led to the discovery of contraband. The Supreme Court dictated that the breached rule seeks to protect the privacy and inviolability of the occupant's home. Considering that the defendant was not the occupant of the premises, but merely used the house to store the contraband, *his* interests were not harmed according to the *Schutznorm* and therefore evidence was not excluded.[45]

The second factor is the graveness of the violation. To what extent have the law enforcement authorities deliberately violated the procedural rule?[46] In cases of deliberate violations, the exclusion of evidence is more appropriate as it will meaningfully deter the police. Consequently, a violation committed in good faith will not easily lead to the exclusion of the obtained evidence.[47]

The third factor mentioned in Article 359a CCP/NL is the harm caused by the violation. Generally it can be stated that the graver the harm that is caused to the defendant's right, the more appropriate the exclusion of the evidence will be. If the police destroy crucial information, rendering it impossible for the defendant to challenge the underlying evidence, the judge will exclude that evidence due to the harm caused to the defendant's rights.[48] An exemplary case is where the police had destroyed a car that was involved in a serious car accident. Before the car was destroyed investigators had conducted forensic investigations on the car and had written a report on their findings. When the defence later requested additional investigations to be conducted on the car, it turned out that this was not possible as the car was destroyed. The court decided that as the right of the defence to challenge the evidence was rendered impossible by the conduct of the police, the written report of the forensic investigators could not be used at trial and therefore excluded it from evidence. The basic thought is that the accused has suffered harm due to the violation, and this harm needs to be compensated. So for instance, if a defendant has not been notified of his right to remain silent, one can establish that this procedural rule seeks to protect the right of the accused. Thereby establishing the *Schutznorm*.

45 There are some exceptions, such as the wire-tapping of a lawyer and the co-accused: Dutch Supreme Court 12 January 1999, ECLI:NL:HR:ZD1402.

46 This factor can also be found in the case law of the US Supreme Court. See for instance in R.M. Re, 'The Due Process Exclusionary Rule', 127 *Harvard Law Review* (2005) 1885–1966, at 1895.

47 Dutch Supreme Court 19 June 2001, ECLI:NL:HR:2001:AB2202; contra M. Caianiello *supra* (fn. 29), p. 318.

48 Dutch Supreme Court 23 January 2001, ECLI:NL:HR:2001:AA9594.

However, if the accused does not give any statement, or merely states his name, one should conclude that no actual damage was done.[49] Implicitly this factor refers to the harm caused to the fair trial rights of the defendant, thus violations of privacy rights will not easily render the exclusion of evidence.

A fourth factor — not mentioned in Article 359a CCP/NL — is the seriousness of the crime at stake.[50] This is especially important in cases where the exclusion of evidence would result in an (mandatory) acquittal. One of the reasons given for considering the graveness of the crime is that serious crimes should not go unpunished just because public authorities have made minor mistakes.[51] The Supreme Court demands that the public interest in conviction is weighed against the individual interests of the defendant. It also looks on positive obligations that derive from human rights law. In the Supreme Court's view the exclusion of evidence can, under certain circumstances (when the prosecution of a serious crime is at stake), be inconsistent with these positive obligations, as it can interfere with the state's duty to put in place an effective prosecution and punishment of the crime at stake.[52] In this view human rights law imposes both an obligation to protect the defendant's rights, as well as positive obligations that seek to protect victim's rights (the duty to prevent, suppress and sanction breaches of serious human rights violations).[53] This conflict of obligations should be taken into account by the court in deciding on evidence exclusion. Thus, when the breach of the defendant's rights can be remedied by other means, such as a mitigation of the sentence, the Supreme Court argues that this is a more appropriate remedy in light of the public interest in general and the rights of the victims of the crime.

In a case concerning the unlawful frisking of a defendant, where a weapon was found, the court decided that the exclusion of evidence would not be a proper remedy as it would make the conviction of the defendant impossible. Considering the gravity of the offence, it instead chose to mitigate the sentence as a remedy for the violation of the defendant's right.[54] The reversed result is

49 Since the 2013 ruling this example would fall under the first category, the strict exclusion.

50 Dutch Supreme Court 25 June 2002, ECLI:NL:HR:2002:AD9204.

51 See the annotation under Dutch Supreme Court 9 May 2000, ECLI:NL:HR:2000:AA5732, NJ 2000, 521.

52 See for positive obligations under human rights law for instance ECtHR, *Osman* v *United Kingdom* [GC], no. 23452/94; ECtHR, *X & Y v. The Netherlands,* no. 8978/80; and P.H.P.H.M.C. van Kempen, *Repressie door mensenrechten* (Nijmegen: Wolf Legal Publishers, 2008) p. 15 ff.

53 This view of the Supreme Court is strongly influenced by F. Vellinga-Schootstra and W.H. Vellinga, *Positive obligations' en het Nederlandse Strafprocesrecht* (Nijmegen: Ars Aequi Libri, 1998).

54 Dutch Supreme Court 25 June 2002, ECLI:NL:HR:2002:AD9204.

that in the prosecution of 'minor offences', violations of procedural rules are not tolerated as they outweigh the crime at stake.

In conclusion, it should be clear from the discussed case law that the Supreme Court is very reluctant to apply the exclusionary rule. In principle, only violations of procedural rules that infringe the right to a fair trial of the accused are remedied through the exclusion of the unlawfully obtained evidence.[55] This is only a small category of procedural violations. Violations of other rules will always be balanced against other interests. The right to a fair trial is not part of national Dutch law, so courts must refer to the ECtHR for the interpretation and meaning of this right. Thus the strict exclusionary rule is to a high degree dependent on the Strasbourg case law. This reliance can be problematic, as the ECtHR does not lay down general rules of admissibility of evidence but rather states that this is a matter for national law to legislate for.

3.3 *ECtHR*

Generally the position of the ECtHR in addressing the admissibility of evidence is marked by caution.[56] In *Schenk v. Switzerland* the Court stated that Article 6 "does not lay down rules on the admissibility of evidence as such, which is primarily a matter of regulation under national law".[57] The court does not formulate general rules on the admissibility of evidence, but rather ascertains whether the criminal proceedings as a whole have been fair.[58] However, the Court in some cases had *de facto* set up such rules.

In *Harutyunyan* confessions were obtained by immense ill-treatment (squeezing of fingertips with pliers). The Court — *ratione temporis* — could not decide whether the inflicted cruelties amounted to torture. Nevertheless, it found that the use of such evidence rendered the trial as a whole unfair.[59] The more recent case law allows for a general interpretation that evidence gathered by torture (Article 3) is strictly excluded from any proceedings — irrespective of its probative value.[60]

55 M.J. Borgers and T. Kooijmans, *supra* (fn. 1), p. 20.

56 J.D. Jackson and S.J. Summers, *supra* (fn. 23), p. 151.

57 ECtHR, *Schenk v. Switzerland* [Plenary], para. 46; ECtHR, *Jalloh v. Germany* [GC], no. 54810/00, para. 94; S. Lubig and J. Sprenger, 'Beweisverwertungsverbote aus dem Fairnessgebot des Art. 6 EMRK in der Rechtsprechung des EGMR', 9 *Zeitschrift für Internationale Strafrechtsdogmatik* (2008) 433–440, at 434 ff.

58 ECtHR, *Khan v. United Kingdom,* no. 35394/97, para. 34; see also ECtHR, *Schenk v. Switzerland* [Plenary], para. 46; ECtHR, *Allan v. United Kingdom*, no. 48539/99, para. 42.

59 ECtHR, *Harutyunyan v. Armenia*, no. 36549/03, para. 61 ff.

60 ECtHR, *Gäfgen v. Germany* [GC], no. 22978/05, para. 167.

This absolute exclusion of unlawful evidence does not, however, apply to all Article 3 violations. With regard to evidence gathered by acts classified as ill-treatment, but falling short of torture, the Court takes a more lenient approach. For example, in *Jalloh* the defendant was forced to swallow emetics in order to retrieve a small bag of cocaine. The ECtHR held that this inhuman treatment did not automatically render the proceedings unfair. But considering that the impugned measures were the decisive element in the conviction for a minor drug charge the Court concluded that overall the trial was unfair.[61] In *Gäfgen* on the other hand, the trial was considered fair even though there had been a violation of Article 3. The applicant had kidnapped and — unbeknownst to the police — suffocated an 11-year-old boy. In order to make him reveal the boy's whereabouts the police threatened Gäfgen with "considerable physical pain". He then disclosed the location of the body. The ECtHR qualified this threat of torture as inhuman treatment. Nevertheless, it found no violation of Article 6. The ECtHR concluded that his conviction was mainly based on a second voluntary confession, which was given at trial. It thus considered that his trial as a whole had been fair.[62]

The ECtHR has also considered that the violation of fair trial rights can lead to inadmissibility. In its landmark decision *Salduz* the applicant's right of access to a lawyer was restricted during his police custody. Salduz' statement to the police was used for his conviction. The court decided that "neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during police custody".[63] His defence rights had thus been irretrievably affected.[64]

A violation of the privilege against self-incrimination can also lead to inadmissibility. In *Saunders* evidence given to administrative inspectors without allowing the accused to be silent was subsequently used in criminal proceedings. The Court recalled that the right not to incriminate oneself lies at the heart of a fair procedure and found a violation of Article 6.[65]

The privilege against self-incrimination and the right to silence were also at stake in *Allan*. The applicant was in detention on a murder charge. He refused

61 ECtHR, *Jalloh v. Germany* [GC], no. 54810/00, para. 103 ff.

62 ECtHR, *Gäfgen v. Germany* [GC], no. 22978/05, paras 108 and 169 ff.

63 ECtHR, *Salduz v. Turkey* [GC], no. 36391/02, para. 58.

64 ECtHR, *Salduz v. Turkey* [GC], no. 36391/02, para. 62; J.D. Jackson and S.J. Summers, 'Confrontation with Strasbourg: UK and Swiss approaches to criminal evidence', *Criminal Law Review* (2013) 114–130, at 125 ff.; J.R. Spencer, Strasbourg and defendant's rights in criminal procedure, 70 *Cambridge Law Journal* (2011) 14–17.

65 ECtHR, *Saunders v. United Kingdom* [GC], no. 19187/91, para. 67 ff.

to give statements to the police. A covert police collaborator was then placed in his cell. The elicited information was used as decisive evidence in his conviction. The Court stressed the importance of the freedom to remain silent when questioned by the police. This freedom had been undermined and Article 6 para. 1 of the Convention violated.[66]

Finally, the Court has considered many cases regarding evidence gathered in violation of the right to privacy (Article 8).[67] It has consistently held that the use of evidence obtained in breach of the right to privacy does not render the proceedings as a whole unfair.[68] In *Khan* a covertly recorded conversation among drug dealers was the *only* piece of evidence available. Lacking a statutory basis regulating covert surveillance the evidence had been obtained in violation of Article 8. Still, the Court found no violation of Article 6. The accused had "ample opportunity to challenge both the authenticity and the use of the recording". Additionally, the epistemological value of evidence was deemed to be very high.[69]

In summary, there are many different ways and means to deal with illegally obtained evidence. However, there is common ground too. In all three jurisdictions there are categories of violations that lead to strict exclusion of evidence. The standard example is torture. It is deemed to be so incompatible with fair trial rights that it taints the entirety of the proceedings. On the other hand, there are violations that only in general lead to evidence exclusion. The comparison has shown that whenever courts have to decide whether to generally exclude or to admit evidence they resort to similar arguments. In the next section we take a closer look at these arguments.

4 Normative Underpinnings of Evidence Exclusion

The above comparison suggests that there are common normative underpinnings of evidence exclusion. To verify this assumption we first examine the

66 ECtHR, *Allan v. United Kingdom*, no. 48539/99, para. 42 ff.; compare to ECtHR, *Bykov v. Russia* [GC], no. 4378/02, para. 101 ff. Contrary to Allan, Bykov was not detained and the conversation had taken place at his estate. Therefore, the court considered that Bykov had not made the statements under psychological pressure.

67 ECtHR, *Schenk v. Switzerland* [Plenary], no. 10862/84; ECtHR, *Klass and others v. Germany* [Plenary], no. 5029/71; ECtHR, *Kruslin v. France*, no. 11801/85; ECtHR, *Khan v. United Kingdom*, no. 35394/97; ECtHR, *P.G./J.H. v. United Kingdom*, no. 44787/98; ECtHR, *Dragojević v. Croatia*, no. 68955/11; ECtHR, *Bykov v. Russia* [GC], no. 4378/02.

68 ECtHR, *Dragojević v. Croatia*, no. 68955/11, para. 131 ff.

69 ECtHR, *Khan v. United Kingdom*, no. 35394/97, paras 22 and 29 ff.

factors weighed in determining whether evidence ought to be excluded (1). In the second section we look at the purposes of evidence exclusion. If unlawful state behaviour in all jurisdictions can lead to inadmissibility this must serve common ends (2). In the final section we focus on the most controversial factor used by courts, the seriousness of the crime. We will analyse this factor in light of the stated purposes of evidence exclusion (3).

4.1 *Factors in Evidence Exclusion*

4.1.1 Epistemology

The probative value of evidence is an important factor in the case law of the ECtHR.[70] Traditionally courts hesitate to disregard reliable evidence merely because technicalities have not been complied with. If the epistemological value of evidence is high enough the ECtHR even ignores its own 'sole and decisive' rule.[71] In *Khan* a covertly recorded conversation was viewed to be highly reliable. The ECtHR ruled that it was justifiably admitted even though it was the only piece of evidence.[72] Epistemological arguments can be found in Swiss case law too. The fear is that excluding reliable evidence would lead to "absurd results".[73] Although the Dutch Supreme Court does not explicitly recognise this factor, it does take into account the general interest in truth-finding, thereby implicitly referring to the probative value of evidence.[74] The emphasis on reliability of evidence shows that even in modern criminal proceedings truth-finding still trumps procedural rights.[75]

70 ECtHR, *Khan v. United Kingdom*, no. 35394/97, para. 37.

71 Cf. in general ECtHR, *Al-Khawaja and Tahery v. The United Kingdom* [GC], no. 26766/05; 22228/06, para. 119.

72 ECtHR, *Khan v. United Kingdom*, no. 35394/97, para. 29 ff.; different ECtHR, *Dragojević v. Croatia*, no. 68955/11, para. 133 and ECtHR, *Schenk v. Switzerland* [Plenary], no. 10862/84, para. 48.

73 Federal Supreme Court Decision of 7 September 1983, cited after ECtHR, *Schenk v. Switzerland* [Plenary], no. 10862/84, para. 30 (=BGE 109 Ia 244 consid. 2b); sceptical S. Gless and J. Martin *supra* (fn. 5), p. 164.

74 Dutch Supreme Court 30 March 2004, ECLI:NL:HR:2004:AM2533.

75 L. Vetterli, *supra* (fn. 1), p. 18 f.; G. Hersch, *supra* (fn. 18), p. 363; M. Thommen, 'Gerechtigkeit und Wahrheit im modernen Strafprozess', *recht* (2014) 264–276, at 264 ff., 268 ff. For the relation between truth-finding and rights in Dutch law see J.H. Crijns and P.P.J. van der Meij, 'Over de grenzen van de materiële waarheidsvinding', in R.H. Haveman and H.C. Wiersinga (eds), *Langs de randen van het strafrecht. Meijers-reeks* 91 (Nijmegen: Wolf Legal Publishers, 2005), p. 45 ff.

4.1.2 Damage

The second factor considered when deciding whether unlawfully obtained evidence should be admitted is the "damage caused by the violation".[76] This factor refers to damage in a broad sense: both physical damage as well as damage to interests.[77] Physical damage often occurs in the context of inhuman and degrading treatment (Article 3). In *Jalloh* the administration of emetics was deemed to be a "grave interference with his physical and mental integrity".[78] The suffering caused to him was thus an argument to render the whole proceedings unfair. The violation of fair trial rights (Article 6) can also cause damage to the interests of the accused. For example, if a failure to caution a suspect results in a self-incriminating statement. This potential damage is the justification for giving the caution in the first place. Violations of privacy rights (Article 8) rarely lead to comparable damage and hence seldom result in evidence exclusion.

4.1.3 Seriousness of the Violation

The seriousness of the violation[79] is the third factor taken into account when deciding on evidence exclusion. Whereas the damage-argument is about the impact of a violation this seriousness-argument looks at the type and degree of the violation. Some very serious types of violations, such as torture or the failure to grant access to a lawyer, should lead to strict exclusion of evidence. The degree of violation matters too. With regard to evidence gathered in a "criminal manner" or in violation of "validity rules" (Article 141 II CCP/CH) it must be judged how severely rules have been broken. If the police forge a search warrant the violation is more severe than if they merely enter the house without authorization. For this reason in Dutch case law violations committed in good faith only rarely lead to evidence exclusion.[80]

4.1.4 Seriousness of Crime

As a fourth factor courts gauge the seriousness of the crime at stake. In Switzerland unlawfully obtained evidence can be used if it is essential "to secure a conviction for a serious offence" (Article 141 II CCP/CH).[81] The Dutch

76 Article 359a II CCP/NL; M. Caianiello, *supra* (fn. 29), p. 209.

77 Dutch Supreme Court 12 December 2010, ECLI:NL:HR:2010:BN4163; Dutch Supreme Court 4 January 2011, ECLI:NL:HR:2011:BM6673.

78 ECtHR, *Jalloh v. Germany* [GC], no. 54810/00, para. 82.

79 Article 359a II CCP/NL; for Swiss Law S. Gless, *supra* (fn. 11), Article 141 N 69.

80 Dutch Supreme Court 19 June 2001, ECLI:NL:HR:2001:AB2202.

81 S. Gless, *supra* (fn. 11), Article 141 N 72; H. Vest and A. Eicker, *supra* (fn. 1), p. 891; L. Vetterli, 'Kehrtwende in der bundesgerichtlichen Praxis zu den Verwertungsverboten', 130 *Schweizerische Zeitschrift für Strafrecht* (2012) 447–470, at 462 ff.; G. Hersch, *supra* (fn. 18),

Supreme Court considers that the exclusion of evidence is not an adequate remedy in serious crime cases.[82] In such cases national courts generally are very reluctant to exclude evidence. The ECtHR's jurisprudence on this factor is ambiguous.[83] The *Gäfgen* case was about the murder of an 11-year-old boy. Hence, there was a huge public interest in conviction. This interest ultimately outweighed one of the most fundamental rights of the Convention (Article 3). In *Salduz*, however, a case concerning terrorism charges, the Court held that that the gravity of the crimes cannot be a valid argument to limit the right to counsel: "These principles are particularly called for in the case of serious charges".[84] However, in the recent *Ibrahim* decision, a case concerning terrorism charges too, the Court accepted "compelling reasons which justified the temporary delay of all four applicants' access to lawyers."[85] Namely the imminent (terrorist) threat to public safety.[86]

4.2 *Purpose of Evidence Exclusion*

As shown courts in all three systems resort to similar arguments when it comes to evidence exclusion. This raises the question whether they also seek to achieve the same goals with evidence exclusion. In this section we will discuss the Swiss, Dutch and ECtHR system in light of these purposes.

The exclusion of evidence as a response to unlawful state conduct can be justified in different ways. The most frequently stated purpose is deterrence.[87] It is often argued that the exclusion of illegally obtained evidence 'is the only practical solution' to discourage investigating authorities from unreasonable searches and seizures.[88] In Dutch and Swiss Law deterrence is accepted as a

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p. 368 f.; A. Donatsch and C. Cavegn, 'Ausgewählte Fragen zum Beweisrecht nach der schweizerischen Strafprozessordnung', 126 *Schweizerische Zeitschrift für Strafrecht* (2008) 158–173, at 166.

82 Dutch Supreme Court 19 February 2013, ECLI:NL:HR:2013:BY5321.

83 Compare ECtHR, *Jalloh v. Germany* [GC], no. 54810/00, para. 97 with ECtHR, *Salduz v. Turkey* [GC], no. 36391/02, para. 54.

84 ECtHR, *Salduz v. Turkey* [GC], no. 36391/02, para. 54.

85 ECtHR, *Ibrahim and others v. United Kingdom*, no. 50541/08, para. 203; Grand Chamber decision pending.

86 Compare with Articles 3(6) and 12 EU Directive 2013/48/EU.

87 It is also one of the oldest purposes: *Boyd v. United* States, 116 US 616 (1886); *Weeks v. United States*, 232 US 383 (1914); *Mapp v Ohio*, 367 US 643, 656 (1961); and in Europe the German theory of E. Beling, *Die Beweisverbote als Grenzen der Wahrheitserforschung im Strafprozess* (Darmstadt: Wissenschatliche Buchgesellschaft, 1903).

88 H.F. Way Jr., 'Exclusion of evidence illegally obtained', 26 *Tennessee Law Review* (1958–1959) p. 332 ff., 351; ; D.A. Dripps, 'The "New" Exclusionary Rule Debate: From "Still

purpose as well.[89] The Dutch Supreme Court requires courts to reason whether evidence exclusion is necessary in order to achieve "norm-compliant" behaviour by law enforcement authorities.[90] Swiss courts had used the deterrence argument already in 1949. It was argued that illegally recorded evidence must be excluded to prevent the spread of "investigative measures of totalitarian states".[91] The ECtHR recognizes deterrence too. In *Gäfgen* it acknowledged that if evidence obtained by inhuman treatment is admitted this "might be an incentive for law-enforcement officers to use such methods".[92]

A second argument is that evidence exclusion is necessary for the protection of rights.[93] Defendants have certain rights that need to be protected in the context of criminal proceedings. Evidence obtained in violation of these rights needs to be excluded as a remedy for the violation of the defendant's rights. In Dutch literature this justification can be found in the "reparation argument". Police and prosecution should not benefit from the violation of the defendant's rights and the best way to 'repair' such violations is to exclude illegally obtained evidence.[94] The Dutch *Schutznorm* and the Swiss validity rules are also about protection of rights. The basic question in both of these arguments is whether the procedural norm breached was designed to protect fundamental rights of

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Preoccupied with 1985" to "Virtual Deterrence"', 37 *Fordham Urban Law Journal* (2009) 743–801, at 756; R.M. Re, *supra* (fn. 46), p. 1894 ff.; R.M. Bloom and D.H. Fentin, 'A More Majestic Conception : The Importance of Judicial Integrity in Preserving the Exclusionary Rule', 13 *University of Pennsylvania Journal of Constitutional Law* (2010) 47–80; D.A. Sklansky, 'Is the Exclusionary Rule Obsolete?', 5 *Ohio State Journal of Criminal Law* (2008) 567–584; T. Jacobi, 'The Law and Economics of the Exclusionary Rule', 87 *Notre Dame Law Review* (2011) 585–675.

89 G.J.M. Corstens and M.J. Borgers, *Het Nederlandse strafprocesrecht* (Deventer: Kluwer, 2014) p. 817 ff.; L. Vetterli, *supra* (fn. 1), p. 257 ff.; L. Vetterli, *supra* (fn. 81), p. 456; S. Gless, *supra* (fn. 11), Art 141 N 6; R. Fornito, *supra* (fn. 1), p. 57 f.; H. Vest and A. Eicker, *supra* (fn. 1), p. 891; S. Gless and J. Martin *supra* (fn. 5), p. 162 ff.

90 See above Section 3.2.

91 Obergericht des Kantons Bern, II. Strafkammer, 21. Februar 1949, i.S. Sch. und M., 88 *Zeitschrift des Bernischen Juristenvereins* (1952) p. 86.

92 ECtHR, *Gäfgen v. Germany* [GC], no. 22978/05, para. 178; see also M. Caianiello, *supra* (fn. 29), p. 321.

93 A. Ashworth, 'Excluding Evidence as Protecting Rights', 3 *Criminal Law Review* (1977) 723–735; J.D. Jackson and S.J. Summers, *supra* (fn. 23), p. 155; see also R.M. Re, *supra* (fn. 46), p. 1907 and ; S. Gless and J. Martin *supra* (fn.5), p. 165.

94 W.E.C.A. Valkenburg, in P.C. van Duyne (ed.), *Cross border crime in a changing Europe* (Huntington, NY: Nova Science Publishers, 2001), p. 222 ff.; G.J.M. Corstens and M.J. Borgers, *supra* (fn. 89), p. 816 ff.

the accused. However, the exclusionary rule is focused on the protection of fair trial rights, violations of privacy rights rarely lead to evidence exclusion.[95]

According to a third argument the main purpose of evidence exclusion is to restore the moral integrity of the criminal justice system.[96] The underlying reasoning is that the use of illegally obtained evidence makes the court an accomplice to the violation.[97] The Dutch "demonstration argument" is very similar. By excluding unlawfully obtained evidence, courts demonstrate that the government is as much bound by the law as its citizens.[98] This reasoning can also be found in the ECtHR's case law regarding violations of Article 3. "Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself."[99] The Swiss doctrine argues that exclusion is a means to restore confidence in the criminal law system.[100] The trust in the system not only hinges on the fact *that* but also *how* a wrongdoer is convicted.[101]

4.3 *"The Bigger the Crime..."*

Courts often decide on evidence exclusion in a weighing-up exercise. The private interests of the accused are balanced against the public interests in truth-finding and conviction. The graver the alleged crime the more the public interests prevail. Many have argued that this balancing approach is conceptually misconceived.[102] Its underlying assumption is that the public interests can be opposed to individual procedural rights. One could argue that these are not opposing interests but both parts of the common endeavour to seek a just verdict. Truth cannot trump rights. Legitimate truth in criminal proceedings presupposes

95 See above Section 3.3.

96 Y. Merin, 'Lost Between the Fruits of the Tree: In Search of a Coherent Theoretical Model for the Exclusion of Derivative Evidence', 18 *New Criminal Law Review* (2015) 273–329, at 279.

97 P. Duff, 'Admissibility of Improperly Obtained Physical Evidence in the Scottish Criminal Trial: The Search for Principle', 8 *Edinburgh Law Review* (2004) 152–176, at 172; for the reverse argument to *admit* slightly tainted evidence in order to protect the system's moral integrity see P. Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (Oxford: Clarendon Press, 1997) p. 31 f.

98 G.J.M. Corstens and M.J. Borgers, *supra* (fn. 89), p. 817.

99 ECtHR, *Othman* (*Abu Qatada*) *v. The United Kingdom,* no. 8139/09, para. 264.

100 S. Gless, *supra* (fn. 11), Article 141 N 84; R. Fornito, *supra* (fn. 1), p. 60 f.

101 See L. Vetterli, *supra* (fn. 1), p. 32; see also F. Dencker, *Verwertungsverbote im Strafprozess, Ein Beitrag zur Lehre von den Beweisverboten* (Cologne: Heymann, 1977) p. 56 ff.

102 S.C. Thaman, 'Balancing Truth Against Human Rights: A Theory of Modern Exclusionary Rules', in: S.C. Thaman, ed., *Exclusionary Rules in Comparative Law* (Dordrecht: Springer, 2013) p. 403 ff.; R. Fornito, *supra* (fn. 1), p. 248 ff.; W. Wohlers, *supra* (fn. 1), p. 632.

rights. Thus doing justice in criminal proceedings means establishing the material facts while at the same time respecting individual rights.[103] A second argument is that the balancing of interests may lead to arbitrary results. As there are no pre-existing criteria to identify, value and compare competing interests, courts can use this method of judicial interpretation to reach any predetermined result.[104] The risk is that violations of procedural rights will be relativized. In practice, however, balancing is widely accepted in all three jurisdictions as a tool to achieve equitable decisions. We thus have to examine the consequences of this balancing practice in serious criminal cases.

We have shown that courts are very reluctant to disregard evidence if a grave crime is at stake. In the face of a heinous crime there is enormous public pressure for conviction. The seriousness of the crime at stake is thus used as an argument against evidence exclusion. The question is whether the seriousness of the crime can be a valid argument to admit illegally collected evidence.[105] We therefore have to examine the relationship between the seriousness-of-the-crime-argument and the purposes of evidence exclusion.

Can deterrence be achieved if the crime at stake is a deciding factor in evidence exclusion? Evidence is rarely excluded when a serious crime is at stake. This became particularly clear in the *Gäfgen*-case. The problem of this practice is that it does not deter unlawful behaviour but actually encourages it. Looking at the seriousness of the crime conveys a fatal message to law enforcement authorities. For in serious crime cases it tells the police that all measures can be taken regardless of the procedural rights concerned.[106] So deterrence is undermined if the seriousness of the crime is factored into the decision on evidence exclusion.[107]

Secondly, the seriousness-of-the-crime-argument fundamentally stands at odds with the aim to protect rights. Nowhere is the protection of rights more important than in serious criminal cases. The ECtHR acknowledged this in *Salduz*. It held that early access to counsel is "particularly called for in the case of serious charges".[108] In Swiss law the protection of rights in serious cases is

103 L. Vetterli, *supra* (fn. 1), pp. 51, 153; M. Thommen, *supra* (fn. 75), p. 267 ff.

104 On balancing of interests, see T.A. Aleinikoff, 'Age of Balancing', 96 *The Yale Law Journal* (1987) 943–1005, at 945.

105 Denied by W. Wohlers, *supra* (fn. 1), p. 632; R. Fornito, *supra* (fn. 1), p. 250; H. Vest and A. Eicker, *supra* (fn. 1), p. 891.

106 L. Vetterli, *supra* (fn. 1), p. 25.

107 See on the relation between the nature of procedural rules and the sanction for their breach M. Caianiello, *supra* (fn. 29), p. 319.

108 ECtHR, *Salduz v. Turkey* [GC], no. 36391/02, para. 54.

held in very low esteem. Evidence obtained in violation of validity-rules can be admitted if "its use is essential to solving serious criminal offences".[109] Dutch case law shows a similar tendency.[110] Consequently, if evidence is only excluded in minor cases the objective of protecting rights is clearly missed. There should on the contrary be particular emphasis on the lawfulness of the evidence taking in serious cases.[111]

A third goal is the protection of the moral integrity of the criminal justice system. If the state disregards procedural rules in the prosecution of heinous crimes it fatally undermines its own moral integrity. The message is: We respect rules only if nothing is at stake. The moral integrity argument is grounded in the rule of law. As the Cantonal Court of Berne stated already in 1949, the use of illegally collected evidence is an unworthy investigative measure in a state avowed to the rule of law.[112] In *Jalloh* the ECtHR held that the use of coercively obtained evidence would indirectly legitimise this morally reprehensible conduct and "afford brutality the cloak of law".[113]

This brings us to the core question of this paper. Is the gravity of the crime at stake a valid factor in deciding on evidence exclusion? To look at the alleged crime when assessing the admissibility has perplexed consequences. The more serious the crime, the more likely it becomes that unlawfully obtained evidence is admitted at trial. In *Schenk* it was held that the exclusion of evidence would lead to "absurd results".[114] At first sight, this argument seems to be grounded in common sense. If a murder charge is at stake and it is "clear" that the defendant is guilty, mere technicalities of the procedure should not stand in the way of a conviction. However, a closer look shows that the use of the severity-argument leads to absurd results. If illegally obtained evidence is admitted because a serious crime is at stake this means — on a general level — that if only a crime is grave enough any violation of procedural rules can be justified.[115] The argument ultimately suggests that the crime of the defendant can make up for the crimes of the police. All this results in the provocative

109 Article 141 II CCP/CH (Summers, fn. 9).

110 See fn. 54.

111 A. Ashworth, *Human rights, serious crime and criminal procedure* (London: Sweet & Maxwell, 2002), p. 115.

112 OG/BE, *supra* (fn. 91), p. 86.

113 ECtHR, *Jalloh v. Germany* [GC], no. 54810/00, para. 105 citing the *United States Supreme Court's judgment in the Rochin case*.

114 Federal Supreme Court Decision of 7 September 1983, cited after ECtHR, *Schenk v. Switzerland* [Plenary], no. 10862/84 para. 30 (=BGE 109 Ia 244 consid. 2b).

115 L. Vetterli, *supra* (fn. 1), p. 63; S. Gless, *supra* (fn. 11), Article 141 N 84.

question put up in the title of this paper: The bigger the crime the smaller the chance to a fair trial.

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