

The Exclusionary Rule in Criminal Procedure: a comparative study of the English, American, and Japanese approaches

by Ryo Ogiso

Although England and Wales do not have 'the exclusionary rule' adopted by the United States Supreme Court, s.78 of the *Police and Criminal Evidence Act 1984* allows the judge to exclude certain evidence based on unfairness in all the circumstances, including the illegality of the investigative procedures (Hungerford-Welch, *Criminal Litigation & Sentencing*, 5th ed., Cavendish Publishing (2000), p.448-449; Davis, Croall, Tyrer, *Criminal Justice*, 2nd ed., Longman (1999), p.208). As the *Human Rights Act 1998* came into force, the possibility that the defence challenge the admissibility of prosecution evidence alleging the breach of the European Convention of Human Rights seems to increase (Cheney, Dickson, Fitzpatrick, Uglow, *Criminal Justice and The Human Rights Act 1998*, Jordans (1999), p.24). The aim of this article is to compare the reasoning of and approaches to the exclusion of certain evidence in criminal litigation in England, in the United States, and in Japan.

EXCLUSIONARY DISCRETION IN ENGLAND AND WALES

There is both common law and statutory exclusionary discretion in England. In 1963, the Court of Appeal already held in *R v Payne* [1963] 1 WLR 637, where following a car collision the accused was induced into providing a specimen of blood by the pretence that it was required to determine whether he was ill, whereas in reality the reason for obtaining it was to show that the accused had been drinking alcohol, that the evidence should have been excluded because if the accused had realised that the specimen would be used against him, he might have refused to subject himself to examination. However, the leading case on common law exclusionary discretion was *R v Sang* [1980] AC 402, where the accused contended that he had been induced to commit the offence by an informer acting on the instruction of the police, and that therefore the trial judge should exclude any evidence of the commission of the offence thus induced. Their Lordships held that the judge's function at a criminal trial was to ensure a fair trial according to the law, and therefore the judge had a discretion to exclude prosecution evidence to ensure the accused a fair trial

when the judge finds that the evidence's 'prejudicial effect outweighs its probative value'. However, because a court is not concerned with how evidence was obtained but merely with how it is used at the trial, a judge has no discretion to refuse to admit relevant admissible evidence merely because it has been obtained by improper or unfair means. If an informer induced the accused to commit the alleged crime and therefore evidence against the accused had been improperly obtained by the police, it could be a factor in mitigating the sentence imposed on the accused, and might also be a matter for civil or disciplinary action against the police, but it was not a ground on which the judge could exercise his discretion to exclude the evidence.

The House of Lords seems to hold that a judge may exclude the evidence to the extent that it disturbs the sound fact-finding capacity of the jury, or to the extent that it prevents the jury from finding the truth (see, *Evidence*, *Inns of Court School of Law*, 2000/2001, pp.14-15). This means that the Lords handled the matter within the evidential principle.

On the other hand, s.78 of *PACE 1984* provides that a judge may exclude evidence when

'having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.'

The section overlaps with the common law exclusion, but the exclusion under s.78 might go beyond that because it is unfair if a court admits unreliable evidence, but the 'fairness of the proceedings' can also be challenged even if the evidence has ample probative value. Then what is the 'fairness of the proceedings'? Before studying the English cases, it is worth looking at American and Japanese approaches.

AMERICAN APPROACH

In 1914, the Supreme Court of the United States held in *Weeks v United States*, 232 US 383 (1914), where a government officer searched a defendant's room and seized certain letters without a warrant, that the evidence obtained without a warrant in violation of the 4th Amendment to the Constitution of the United States could not be used as evidence against the defendant. The Court held that:

The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law...'

'The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures ... should find no sanction in the judgments of the courts...'

... 'If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offence, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value...'

It was the first case in which the opinion of the Court announced the exclusionary rule, but because it was based on no explicit requirement of the Amendment itself nor on Congressional legislation, and because the effect of the rule is, in a sense, shocking, in that, as Justice Cardozo once put it,

'[The] criminal ... go free because the constable had blundered (People v Defore, 242 NY 13, 21, 150 NE 585,587 (1926)),'

The *raison d'être* of the rule has been vigorously debated (see, for example, Allen, Kuhns, Stuntz, *Constitutional Criminal Procedure*, 3rd. ed. (1995), p. 902).

Since *Weeks* was a federal prosecution case interpreting the United States Constitution, the Court later addressed the question whether the exclusionary rule is inherently implicit in the 4th Amendment and is therefore binding on the states through the 14th Amendment Due Process Clause in *Wolf v Colorado*, 338 US 252 (1949). In that case, the Court held that the

'Security of one's privacy against arbitrary intrusion by the police ... which is at the core of the Fourth Amendment ... is basic to a free society. [And] it is therefore ... enforceable against the States through the Due Process Clause. ... But the ways of enforcing such a basic right raise questions of a different order. ... [The Weeks ruling] was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication. [W] E must hesitate to treat [the exclusionary rule] as an essential ingredient of the right.'

Then the Supreme Court reconsidered *Wolf* and overruled it in 1961 (*Mapp v Ohio*, 367 US 643 (1961)). The Court held that:

'The admission of the right [to privacy] could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right, but in reality to withhold its privilege and enjoyment.'

There, the Court recognised the exclusionary rule was 'an essential part of the right to privacy (*Mapp v Ohio*, *supra* at 657).' The Court also pointed out, in replying to the 'criminal goes free' criticism, that:

'There is another consideration ... the imperative of judicial integrity. The criminal goes free, if he must, but it is the law that sets him free.' ...

*'Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. If the Government becomes a lawbreaker, it breeds contempt of law (*Mapp v Ohio*, *supra* at 660).'*

Growing concern about crime must have had influence on the interpretation of the rule. The Supreme Court held in 1984 that:

"The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern (United States v Leon, 468 US 897, at 907 (1984))."

*'The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands ... The wrong condemned by the Amendment is fully accomplished by the unlawful search or seizure itself, and the exclusionary rule is neither intended nor able to cure the invasion of the defendant's rights which he has already suffered. The rule thus operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved. ... Whether the exclusionary sanction is appropriately imposed in a particular case ... is an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct. Only the former question is currently before us, and it must be resolved by weighing the costs and benefits of preventing the use in the prosecution's case-in-chief of inherently trustworthy tangible evidence ... (United States v Leon, *supra*, at 906, 907).'*

Hence the exclusionary rule is derived from the protection of privacy, and we see three rationales of the rule indicated in these cases. The first one says that the rule is an implicit part of the Fourth Amendment. The second one says that the purpose of the rule is to maintain judicial integrity, while the third one claims the deterrent effect of the rule. The theory best based on principle is the first one because it states that the rule is a constitutional imperative. According to the second theory, a court would suppress the evidence to the extent that the suppression of the evidence is useful to maintain public confidence in the justice system, while the third one claims the suppression of the evidence only when the court can expect the deterrent effect of the suppression on future police conduct.

JAPANESE APPROACH

In Japan, the Constitution of Japan and the Code of Criminal Procedure, both of which are strongly influenced by Anglo-American law, regulate arrests, searches and seizures. Art. 35 of the Constitution of Japan, modelled on the Fourth Amendment of the United States Constitution, provides that the right of all persons to be secure in their homes, and their papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for probable cause, and describing the particular place to be searched and items to be seized.

Apart from the powers of search and seizure, a police officer has the power of stop and inspection (not search), being allowed to stop a person suspected of being involved in a crime, to question him, and to inspect his/her personal belongings if it is necessary to clear the suspicion. This power must be executed upon reasonable grounds for suspecting that a person is about to commit or has committed an offence, or that a person has some knowledge about an offence which is going to be committed or has been committed. The inspection of a person's belongings cannot be made without the consent of that particular person being questioned.

In 1978, the Supreme Court of Japan announced that illegally obtained evidence had to be excluded from the prosecution evidence in certain circumstances, even though there is no provision of an exclusionary rule of tangible evidence. In that case, a police officer stopped a person for a suspicion of soliciting and drug dealing on the street. Having questioned him for a certain time, the officer frisked the person and felt something hard in an inside coat pocket. The officer requested him to show his belongings, which the person refused to do. After unsuccessfully trying to persuade him to do so, the officer put his hand into the pocket without his consent, and pulled out a metal case, which contained a hypodermic syringe and some white powder, which turned out to be meta-amphetamine. Referring to arts. 35 and 31 (Due Process Clause) of the Constitution, the Supreme Court held that a court had to exclude the prosecution evidence when the breach of the

law is so serious that the exclusion would be appropriate to prevent future police misconduct. To determine if the exclusion of specific evidence is appropriate or not, a court should take all the circumstances into account, e.g., seriousness of the offence, seriousness of the illegality of the police officer's conduct, the effect of the exclusion of evidence, the strength of prosecution's case, etc. (*Saihan S. 53.9.7, Keishu 32.6.1672*).

Not surprisingly, we see the influence of the American precedents here. The question that a court has to address is twofold. Firstly, should the individual right to privacy be violated by police conduct, and, if the answer is positive, then secondly, is the exclusion of evidence appropriate or not. Accordingly, even if the right to privacy is violated, evidence might not be excluded. As a matter of fact, the Supreme Court of Japan held in that particular case that although the police officer's conduct (taking personal belongings out from pocket without consent) amounted to unlawful search without warrant or consent, taking all the circumstances into account, the illegality was not serious enough to exclude the crucial evidence of drug-related crime. Since then, although there are many lower court cases where the prosecution evidence was excluded because of the illegality of the investigation procedure, there is no Supreme Court case where the Court has actually excluded the prosecution evidence. The conviction rate is very high in Japan partly because the prosecution scrutinises cases and chooses serious ones backed up by strong evidence to indict. This might lead the Supreme Court to find that the strength of the prosecution case and the seriousness of crime predominate over the seriousness of the police misconduct and therefore not to exclude the evidence.

KEY UK JUDGMENTS AND IMPACT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

In 1992, the Court of Appeal held that to admit the evidence obtained by unwarranted interception of cordless telephone conversations was not unfair because there was no deliberate contravention of the law by the police, and probably because the offences charged were serious enough to outweigh the unfairness done to the defendants (*R v Effik, R v Mitchell* [1992] Crim LR 580). In *R v Khan* [1996] 3 All ER 289, the appellant visited the home of another man to which the police, unknown to either of them, had attached a listening device, whereby the police obtained a tape recording of a conversation which showed that the appellant was involved in the importation of controlled drugs. The appellant contended, *inter alia*, that the admission of the tape recording would breach the right to respect for private life protected under art. 8 of the *European Convention of Human Rights*, and the judge should exercise his discretion to exclude it under s.78 of *PACE* 1984 because of that breach.

The House of Lords held that:

- (1) under English law, there was in general nothing unlawful about a breach of privacy, therefore even if the right to privacy existed, the tape recording was admissible as matter of law,
- (2) the fact that the evidence was obtained in circumstances, which amounted to a breach of art.8 of the Convention, was relevant to, but not determinative of, the judge's discretion to admit or exclude such evidence under s.78.

The judge's discretion had to be exercised according to whether the admission of the evidence would render the trial unfair, and the use of material obtained in breach of rights of privacy did not itself mean that the trial would be unfair.

'It would be a strange reflection on our law if a man who has admitted his participation in the illegal importation of a large quantity of heroin should have his conviction set aside on the grounds that his privacy has been invaded. (R. v Khan supra, at 302).'

Article 8 of the *European Convention* as regards English law, and apart from the possible change of significance which may come along with the *Human Rights Act 1998*, it is interesting to see how the English approach to privacy differs from the American one (compare *Katz v United States*, 389 US 347 (1967)). The breach of individual privacy does not necessarily trigger the judge's discretionary power either under common-law or under s.78. Then, when is the trial considered to be unfair?

In general, *R v Quinn* [1990] Crim LR 581 held that the function of the judge is to protect the fairness of the proceedings, and that the proceedings may become unfair, for example, where there has been an abuse of process, where evidence has been obtained in deliberate breach of procedures laid down in an official code of practice. But

'The mere fact that there has been a breach of the Codes of Practice does not of itself mean that evidence has to be rejected. It is no part of the duty of the court to rule a [piece of evidence] inadmissible simply in order to punish the police for failure to observe the Codes of Practice (R. v Delaney [1988] 153 JP 103, at 106).'

In *Matto v DPP* [1987] Crim LR 641, where the police officers knowingly took a breath sample from a driver on his private property, the Divisional Court quashed the Crown Court conviction based on the illegality of the investigative procedure. The court found that the s.78 required the court to have regard to the way the evidence was obtained, and that at the breath test, the police were acting *mala fides* in that they knew they were acting in excess of their powers. In *R v Mason* [1988] 86 Cr App R 349, the Court of Appeal held inadmissible under s.78 the confession obtained after the accused and his solicitor were falsely told by the police that the fingerprints of the accused had been found on the scene of crime. In *R v Samuel* [1988] 2 All ER 135 it was held that the refusal of access to the appellant's solicitor

before the interview without reasonable grounds was the denial of one of the most important and fundamental rights of a citizen, and therefore the admission of evidence of the interview was not allowed. In *R v Canale* [1990] 91 Cr App R 1, where the police officers did not take a contemporaneous note of the interviews, the court quashed the conviction because there were 'flagrant', 'deliberate' and 'cynical' breaches of the Code of Practice, and because the most important evidence in the shape of a contemporaneous note was not available to the judge. And in *R v Nathaniel* [1995] 2 Cr App R 565, where the appellant's DNA profile was retained in breach of s. 64(1) of *PACE* and he was, in effect, misled in consenting to give the blood sample, the Court of Appeal found that to allow the blood sample to be used in evidence at a trial would have had an adverse effect on the fairness of the trial.

On the other hand, it was held in the following situations that the evidence should not be excluded.

The appellant had been arrested on suspicion of the theft of a motorcycle. After he was cleared from that suspicion, the police officer went through the breath specimen's procedure without telling the appellant that he was no longer under suspicion for the theft or that he was under arrest for another offence. The appellant failed to provide the specimens and was found guilty of refusing to provide the specimens without reasonable grounds. The court found that there was neither *mala fides* nor impropriety to admit the evidence of breath specimen's procedure (*Daniels v DPP* [1992] 156 JP 543). When the police devised a subterfuge to arrest drug smugglers, and jewellery thieves and handlers, the evidence was admissible if the accused, unprovoked, acted under his own free will on the assumption that the facts were as he believed them to be (*R v MacLean and Kosten* [1993] Crim LR 687; *R v Christou* (1992) 95 Cr App R 264).

The accused was suspected of two different rapes. While he was under arrest for the second offence, on which he was later tried and acquitted, a sample of his hair was taken on the basis of an assurance given to the accused and his solicitors that the sample would only be used in connection with the second offence. Instead of making a comparison with the hair found at the scene of second offence, the police made a comparison with a body sample of the first offence and the result showed a match. Being uncertain about the admissibility of this evidence, the police requested the accused to give a further hair sample, which he initially refused to do, but after he was told that the police would take a sample by force and three officers entered the cell in riot headgear, he finally consented to give it. The court held that the fairness of proceedings involves fairness to the public good as well as to the defence, and that the DNA profile provided very strong evidence of the offence. Even if the taking of the sample was not authorised by statute, this did not cast doubt on the accuracy or strength of the evidence and the evidence should not be excluded (*R v Cooke* [1995] Crim LR 497).

The accused was suspected of stealing gas and electricity. Having been denied entry into his home, one of the officers of the electricity company, accompanied by police officers and armed with a warrant, kicked and knocked on the door so as to indicate his intention to forcibly enter if it was necessary, at which point the accused opened the door and was found to have used mechanical apparatus to bypass the gas and electricity supply recordings. The court held that even if there have been breaches of Code of Practice as to the entry, the admission of the evidence did not have any effect at all on the fairness of the proceedings. The apparatus was there for all to see, notwithstanding whether the entry was effectuated properly or not. Its existence was such that no possible injustice to the accused could have been occasioned (*R v Stewart* [1995] Crim LR 500).

A drug courier was intercepted at an airport and persuaded to make a call to the accused. The conversation was recorded and a transcript was presented before the court as evidence. The accused appealed, contending that the evidence should be excluded. The court held that the mere fact that the evidence was obtained by subterfuge did not necessarily lead to its exclusion. The courts had not gone so far as to say that all was fair in tackling with organised drug crimes, but they had not sought to limit the general common law principle that evidence might be, and usually was, admissible regardless of the source from which it came and the means by which it was obtained. There was no special reason for unfairness in the present case (*R v Cadette* [1995] Crim LR 229).

JUDICIAL ATTITUDES TO EXCLUSION IN ENGLAND AND WALES, US AND JAPAN

According to the ruling of *R v Latif* [1996] 1 All ER 353 at 361, in deciding whether to exclude illegally obtained evidence, the judge must weigh both the balance of the public interest in ensuring that those that are charged with serious crimes should be tried, as well as the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means. In the end, the courts in England, in the United States, and in Japan adopt the same approach when facing the exclusion problem, i.e., by taking all the circumstances into account and weighing the costs and benefits of the exclusion. It is exclusion on a case-by-case basis, and as the commentary to *R v Cooke* noted, the courts seems to be reluctant to exclude evidence which clearly shows that an accused person has committed a serious offence (*R v Cooke*, *supra*, at 499).

However, the reasoning of the exclusion differs from country to country. American and Japanese courts seem to adhere to the deterrent theory. The rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Constitution against unreasonable searches and seizures. It is designed to safeguard Fourth Amendment rights through its general deterrent effect by removing the incentive to disregard it,

rather than a personal constitutional right of the party aggrieved (*Elkins v United States*, 364 US 206 at 217 (1960); *United States v Calandra*, 414 US 338 at 348, 349 (1974)). However, should a trial court predict or evaluate the deterrent effect of exclusion of evidence on future police conduct? According to that theory, a court, facing an exclusion submission from the defence, may exclude the evidence when the exclusion of *certain evidence in that specific case* might have a *general deterrence effect on future police misconduct*. Is this the function of a criminal trial? Are trial courts capable of estimating the effect? It is true that one of the functions of the higher court is to establish a legal standard of the practice of the executive branch through its decisions. The exclusionary discretion exercised by the highest court may have a deterrent effect on future police conduct to the extent that it draws a legal line between what is lawful and what is not. But the courts do so in order to state what the law is, and not to supervise the executive.

As to this point, the English courts' stance stated in *R v Mason* is clear:

'This is not the place to discipline the police ... we are concerned with the application of the proper law. The law is ... that a trial judge has a discretion to be exercised, of course, upon right principles to reject admissible evidence in the interests of a defendant having a fair trial (R v Mason, supra at 354).'

Although the cases quoted above are not comprehensive, the English courts seem to exclude evidence under s.78 when

- (1) police misconduct casts doubt on the reliability of the evidence, and
- (2) police misconduct is so serious in the nature or in the way of breach that the admission of the evidence renders the judicial process unfair.

Finding the truth and punishing the criminals/acquitting the innocent is the primary concern of a criminal trial. But there is another important function: *the protection of human rights*. In a free society, where constitutional law guarantees fundamental human rights, the police powers also have to be subject to the constitutional law. If police practice exceeds the power vested by the constitutional law, or the practice breaches the fundamental principles, which are designed to protect fundamental human rights, the prosecution must not enjoy the fruit of that practice. The court does not punish or discipline the police, but the court should not use the evidence, which would *not exist* if the police have followed the fundamental principle. Convicting a defendant with the evidence, which could not have lawfully existed, would be unfair. (A)

Ryo Ogiso

Associate Professor, Faculty of Law, Komazawa University, Tokyo, Japan

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