TRUTH OR DUE PROCESS? THE USE OF ILLEGALLY GATHERED EVIDENCE IN THE CRIMINAL TRIAL IN NORWAY

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I. THE GENERAL THEORY OF ADMISSIBILITY OF ILLEGALLY GATHERED EVIDENCE

A. Constitutional or Statutory Rules

1. No Written General Exclusionary Rules

In Norwegian criminal procedure it has never been any written rules on exclusion of illegally gathered evidence, neither constitutional nor statutory. This is now different in civil procedure; the 2005 Act relating to mediation and procedure in civil disputes (the Dispute Act),1 section 22-7 contains a provision – “prohibition against improperly obtained evidence”.2 The dominating principle in both criminal and civil procedure is, however, that of “free proof” (i.e. all evidential material should be adjudicated without any set rules as to its interpretation or weight). In this respect, Norwegian evidence law shares the common law axiom that all relevant evidence can be admitted, even though this foundational principle is not absolute.

Although the Norwegian Constitution, dating from 1814, does not contain any rules on exclusion of evidence, some provisions limiting gathering of evidence are included – most notably section 96 prohibiting interrogation by torture, section 99 stating that no one may be taken into custody except in the cases determined by law and in the manner prescribed by law, and section 102 regulating search of private homes.3 However, these provisions have not played any role in the development of exclusionary rules. In principle, evidence obtained in breach of the Constitution is subject to the same considerations as evidence obtained in breach of other rules. Of course, this does not mean that the character of the illegality in the gathering of information in a criminal case is irrelevant to the admissibility of the evidence.

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2 The section reads: “In special circumstances, the court may disallow evidence that has been obtained in an improper manner.” In the draft statute from the Committee preparing the act the following – somewhat more specified – rule was proposed (as section 25-7): “The court may in special circumstances refuse evidence that has been obtained in an improper manner, provided that presentation of such evidence would imply a violation of weighty concerns as to the protection of privacy and due process”, see NOU 2001: 32 B IV Draft statute and summary in English, p. 1085, available at www.regjeringen.no/pages/1585227/NOU32-bind-b.pdf. The sanctioned rule is commented in Schei et al. (2007) pp. 1096–1112.

3 The Constitution, as laid down on 17 May 1814 by the Constituent Assembly at Eidsvoll. The text is available in English translation at www.stortinget.no/en/In-English/About-the-Storting/The-Constitution/The-Constitution/.
2. General Duty to Determine the Truth
The obligation for the courts to seek the truth is not spelled out in the Norwegian Constitution, but can be implied from the Criminal Procedure Act (CPA) section 294, which states: “The court shall in its official capacity ensure that the case is fully clarified. For this purpose it may decide to obtain new evidence and to adjourn the hearing.”

To what extent the courts will take action to supplement the evidence produced by the parties is to a substantial degree depending on the discretion of the judges. Generally, courts seem more susceptible to ask for supplementary evidence in serious criminal cases. In minor cases, the court might acquit the defendant on account of insufficient evidence, even if it would be possible to produce further evidence that potentially could secure a conviction.

CPA section 294 does not require the court to seek all relevant information, no matter how it is provided. Thus, the rule does not once and for all solve whether illegally obtained evidence in criminal trials should be allowed. However, finding the truth takes precedence in Norwegian criminal procedure. Generally, it is fair to say that other sanctions for illegal conduct, first and foremost disciplinary or criminal sanctioning of the police, take priority over suppression of illegally seized evidence.

B. General Rules of Admissibility/Exclusion of Illegally Gathered Evidence in High Court Jurisprudence
1. The General Theory – Introduction
In Norwegian criminal procedure, illegality in the gathering of evidence is neither a necessary nor a sufficient condition for exclusion; there are, of course, other reasons for exclusion than such illegality – and not any irregularity in the investigation of a criminal case is sufficient to deprive the prosecution of its evidence.

The courts and the academic literature have developed an “exclusionary rule” that is most realistically described as a – somewhat vague – balancing test. On its face, many sources of law could be read as setting out the same (balancing) test regardless of the nature of the illegality in the gathering of evidence. However, there might be raised serious objections to such a unified
theory of admissibility. As we will see in section II and III, the courts – at least in result – have different approaches to “real” and “personal” evidence. In the following subsections I will, however, present what seems to be the common understanding of a “general theory” of admissibility/exclusion of illegally gathered evidence.

2. The Scope of the Exclusionary Rule: “Illegally” Obtained Evidence
Exclusion of evidence may in principle come into question due to any breach of a legal norm; there is no prerequisite for exclusion that the evidence is obtained in conflict with the constitution or any written act or code. It follows from this that the Norwegian criminal procedure is not familiar with the concept of procedural “nullities”, to indicate the result or consequence of different types of procedural defects. Having said this, the nature of the illegality is, of course, an important factor in the balancing test.

3. Prerequisites for Exclusion
a) Causation and the Object of Exclusion – Evasion and “Fruits of the Poisonous Tree”
Even though the Norwegian “exclusionary rule” may be described as a “balancing test”, some prior conditions can be established for the pro et contra evaluation – the first of this being causation, i.e. causality between the illegal action (or omission) at issue and the access to a piece of evidence. This prior condition must be understood as presupposed in the phrase “illegally gathered evidence” and similar expressions. Obviously, it is not a trivial task to explain how causality should be understood as a prerequisite for exclusion – as this concept is very complex in any field where it is relevant. Here it is sufficient to notice that this condition for exclusion has not played any important role in Norwegian criminal procedure so far. The same can be said about somewhat similar (but purely normative) questions, such as those to a U.S. audience associated with the so-called “inevitable discovery” doctrine.

These brief remarks on the question of causality indicate that the direct object of exclusion is, in principle, the illegally obtained piece of evidence. The evidentiary fact that could possibly be proved by that evidence is not as such precluded because of the illegality. But trying to evade a decision of exclusion will not easily be accepted. For example, if illegally seized documents are not admitted as evidence, the courts would probably not accept the officer who has performed the illegal seizure as a witness giving evidence to the contents of the documents in question.

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7 In academic literature these questions have, however, been touched upon, see Torgersen (2008) pp. 108–115, 150–162.

8 As in the US Supreme Court decision Nix v. Williams (1984), 467 U.S. 431. The Norwegian Supreme Court touches on the issue in Rt 1997 p. 1778, but limits itself to state that exclusion is not a necessary consequence in cases where the police would not have got to know about a crime but for the violation in question.

Indirect evidence – “fruits of the poisonous tree” – raises many questions, but causality is not among them since the possession of a piece of evidence that is made possible as an indirect consequence of other illegally obtained evidence, is undoubtedly caused by the initial illegality, cf. the Latin expression “causa causae est causa causati”. Quite another matter is that the Norwegian exclusionary rule does not – or if so only to a very limited extent – recognize exclusion of such “fruits”.\(^\text{10}\)

\(b\) “Standing” etc.
There is no precondition for exclusion that the illegality in the gathering of evidence is carried out by a specified class of persons. It does not necessary have to be the police or other authorities that is responsible for the breach. Evidence can be excluded as a consequence of illegal actions from private persons as well as from officials.

On the other hand, it is a prior condition for exclusion that the violated norm protects private interests.\(^\text{11}\) Furthermore, it seems to be a prerequisite for exclusion of evidence – at least in some situations – that the person rejecting the admission of the evidence in question is the holder of the protected interest that is violated.\(^\text{12}\) However, this person does not necessarily have to be the accused; an example to the contrary is where the evidence in question is a statement obtained in violation of the rights of a relative of the person being tried. Moreover, some sources suggest that exclusion is only possible where an implied function of the violated norm is to limit access to evidence.\(^\text{13}\)

c) Objection is no prerequisite for exclusion
It is no condition for exclusion in Norwegian criminal procedure that a party protest against admittance of the evidence, and certainly no condition that a formal objection for the record is made.\(^\text{14}\) In principle, the courts are obliged to reject an offer of illegally obtained evidence ex officio if all the conditions are met and the circumstances qualify for exclusion. But of course, as

\(^\text{10}\) Reading the Norwegian Supreme Court cases in Rt 1994 p. 1010, Rt 1997 p. 1778 and Rt 2006 p. 582, it sees that exclusion of indirect evidence is more or less out of the question, and it is fair to say that this is also the general position in academic literature, see Torgersen (2008) p. 182–185 with references. However the case referred in Rt 2001 p. 668 (and to some extent the decision in Rt 1994 p. 1010) holds the door open for exclusion of indirect evidence.

\(^\text{11}\) Rt 1984 p. 1076, 1083. See also the ECHR case \textit{Parris v. Cyprus} (2002).

\(^\text{12}\) Rt 1978 p. 859, 864 and Rt 2009 p. 567 para 17 (recording of witness’ conversation with under cover agent). Also in this context, see the ECHR case \textit{Parris}.

\(^\text{13}\) Rt 1984 p. 1076, 1083 and Rt. 1978 p. 859, 864 can be understood as pointing in this direction. For a general theory based on this notion, see Jäger (2003), particularly pp. 142–143.

long as no objection is made, the courts will probably be inclined to presume that the offered evidence is not tainted.

If the question of exclusion is not raised when evidence is given at trial, this might be a ground for appeal; lack of objection during the trial does not deprive a party the right to raise the question of exclusion on appeal.

4. Important Balancing Factors
a) Rationales as Balancing Factors
Different rationales for excluding illegally obtained evidence have been used as balancing factors in the courts reasoning. At least four distinctive rationales can be identified in the Norwegian sources of law, all of which will be discussed briefly before turning to the most important circumstances relevant as balancing factors.

Firstly, a possible rationale is the “reliability principle”; evidence should be excluded in the interest of the truth, or at least in the interest of safety to avoid that any innocent person is convicted. If the evidence, due to the way in which it was collected, is more unreliable than what would have been the case if it was collected in a lawful manner, this weighs against admitting it. Reliability is definitely not the dominating rationale for Norwegian evidence law in general; it is not considered an independent ground for exclusion.15 In the context of illegally obtained evidence, however, reliability is accepted as a relevant factor in the balancing test.16

A second rationale for exclusion is to discipline parties who dispatch from the rules – especially the police and the prosecution service – in order to secure that evidence (for the future) is collected according to law. This rationale has never been particularly well received in Norwegian criminal procedure, although it has not been totally rejected.17 An important reason for this position is probably that police and other authorities generally are thought not to break procedural rules applicable in crime investigation – at least not frequently or in a manner that amounts to grave violations of the citizen’s rights. There are little or no empirical studies to support whether this assumption is correct. Nevertheless, the preparatory works of the CPA is based on it.18 Maybe a bit surprisingly to some, the disciplinary rationale seems to have had a greater impact where evidence is illegally obtained by private persons than in situations of

15 Rt 1996 p. 1114, 1119.
18 Innst. 1969, l.c.
evidence illegally obtained by the authorities. Disciplining the collector of evidence seems to be a weightier factor in civil procedure than in criminal procedure.

As a third rationale, the legality of the procedure – and “purity” of the courts and the justice system as a whole – must be mentioned. It is seen as offensive to make use of illegally obtained evidence in a court of law. This rationale has been embraced in principle, and is important where more serious violations have occurred.

A fourth rationale for exclusion is “protection” of the rights that is violated by the illegal collection of evidence. This covers two quite different notions; (1) protection in the sense of “retroactive” compensation for the infringement of rights and (2) protection against the repeated violation if the evidence were admitted. (Moreover, disciplining the police or others as a rationale can be seen as “protection” of rights in the sense that it aims at avoiding future violations.)

To my knowledge, there is no trace in the sources of law of a purely compensative rationale for the Norwegian exclusionary rule.

Protection against further violation, on the other side, is of significant interest because the most important guideline connected to the Norwegian exclusionary rule is closely linked to this rationale: In some important decisions the Supreme Court has stated that illegally obtained evidence must normally, or as general rule, be excluded if the actual use of the evidence in court amounts to a prolonged or repeated violation of the interest that was infringed upon when the evidence was illegally obtained. The problem with this guideline – that seems to be more than just a balancing factor – is the difficulty in identifying the relevant interests in a precise manner: What exact interest (or interests) is protected by a given rule violated by the collection of a certain piece of evidence? And to what extent is the same interest violated when the evidence is used during trial? Because giving evidence is to present relevant information, it is reasonable to expect that the guideline apply in cases where evidence is obtained in breach of rules protecting informational interests. This is, however, not a very operational criterion.

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22 Most notably Rt 1999 p. 1269, 1272 and Rt 2006 p. 582. In the same direction, see the preparatory works to the CPA; Innst. 1969 p. 197 (although somewhat ambiguous) and to the Dispute Act; NOU 2001: 32 B p. 961. In some Supreme Court decisions the idea of prolonged or repeated violation is mentioned as just one balancing factor among others, see Rt 1991 p. 616, 623, Rt 1997 p. 1778, 1780, Rt 2003 p. 549 para 17 and Rt 2004 p. 858 para. 18.
To sum up, it is not possible to identify a single rationale governing the Norwegian rules on illegally obtained evidence. On the other hand, it is hard to exclude any of the suggested rationales as totally irrelevant.

b) The Nature of the Illegality
Obviously, any adjudication of whether illegally obtained evidence should be excluded must take the nature of the illegality as a starting point. As mentioned above, one can only to a limited extent point out formal prerequisites for exclusion related to the violated norm. It is also hard to find clear guidelines controlling the admissibility question as regards different categories of illegality. This is not the place for exploration of that issue. However, some comments on the exclusion question concerning different types of illegality may be found in subsection II and III.

c) The value or Importance of the Evidence
If the illegally obtained evidence is of high evidential value, the interest of truth speaks in favor of admitting it. On the other hand, the reasons to exclude the evidence might also come stronger into play. This factor is thus somewhat ambiguous, and not the most significant one.

d) The Seriousness of the Offence Being Tried
If the offence is very serious, this speaks significantly in favor of admitting the evidence. The reasonableness of this can be questioned – after all it is fair to assume that illegality in the investigation is a greater danger in the more serious cases. However, as previously mentioned, disciplining the police has never played an important role in the development of the exclusionary rule in Norway. To the (relatively limited) extent that the ECHR limits the admissibility of illegally obtained evidence, the seriousness of the offence being tried seems to play a subordinate role.

e) The Stage of the Proceedings at which the Question of Exclusion is Raised
As mentioned above, it is not a prerequisite for exclusion of illegally obtained evidence that a protest has been put forward. This does not exclude taking into account the stage of the proceedings. However, this factor is certainly a marginal one.

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25 See for example the case of Allan v. UK (2002) where use in a murder trial of evidence obtained in breach of the right to silence/privilege against self incrimination amounted to a violation of the right to a fair trial guaranteed in ECHR Article 6.
26 In one civil case, Rt 2004 p. 1366, the Supreme Court has stated that the higher court should have access to the same evidence as the lower court unless strong reasons suggests otherwise.
f) Evidence in Favor v. Disfavor of the Accused
In practice, the exclusionary rule seems reserved for evidence damaging to the accused. It is probably a quite intuitive thought that evidence in favor of the accused must always be admitted, or at least so if there is not a particularly good reason not to accept a possibly exonerating piece of information. In the latter cases, it might be an alternative for the prosecution to drop the charges.

g) Alternative Remedies to Exclusion
In the preparatory works to the CPA the drafters maintained that illegality in the investigation should first and foremost be met by other sanctions than exclusion.27 Given this starting point, one should expect that a weighty factor in the balancing test is whether such alternative sanctions has in fact been or is likely to be effectuated. Surprisingly, so far no trace of this thought can be found in the case law.

5. Comments on the Balancing – Many Relevant Factors, Few Clear Guidelines
As already outlined, the balancing test involves a lot of relevant factors, which opens for infinite considerations. Also, one will find few clear guidelines and almost no decisive criteria for different classes of situations (except for a few prerequisites for exclusion with limited potential for solving practical problems). Nevertheless, it would be mistaken to conclude that the vagueness of the Norwegian exclusionary rule makes the balancing test arbitrary.

There is less than a handful Supreme Court cases where evidence has actually been excluded from a criminal trial.28 Bearing this in mind, one could argue that the rule on exclusion is not really that vague. For practical reasons it is a very strong main rule that evidence is admitted despite any illegality collecting it. Thus, the balance is tipped in favor of admitting evidence.

Still, the limited number of Supreme Court cases does not necessarily imply that the exclusionary rule has not come into play relatively often in the lower courts – or that the prosecution has not refrained from offering tainted evidence. This is underscored by the fact that the few cases where the Supreme Court has excluded evidence are potentially relatively far reaching. The cases in question will be analyzed as we now turn to the different classes of illegally obtained evidence.

II. RULES OF ADMISSIBILITY/EXCLUSION IN RELATION TO VIOLATIONS OF THE RIGHT TO PRIVACY


A. General Provisions Protecting the Right to Privacy, to Develop One’s Personality
There is no explicit constitutional “right to privacy” in Norway. Privacy is only given a casuistic protection in the above mentioned Norwegian Constitution section 102, limiting the government’s access to private homes: “Search of private homes shall not be made except in criminal cases.”

A large number of statutory rules can be said to affect or touch upon the right to privacy. Additionally, section 2 of the Human Rights Act states that The European Convention on Human Rights (ECHR), as well as the UN Covenant on Civil and Political Rights (ICCPR), “shall have the force of Norwegian law”. The right to privacy as protected in ECHR Article 8 and ICCPR Article 17 thus has the force of law in Norway. A consequence of the Human Rights Act is that the case law from the European Court of Human Rights is relevant to questions of exclusion in Norwegian law. The ECHR Article 8 has not however been interpreted to prescribe exclusion of evidence in Norwegian law. Also the use at trial of evidence obtained in violation of Article 8 does not seem to constitute an independent violation of the right to a fair trial guaranteed in article 6.

The courts have also established some sort of general – and vague – protection of the privacy. It is somewhat unclear whether this protection has some sort of constitutional status. In any case, there are examples of Supreme Court decisions where evidence has been excluded with explicit reference to privacy rights.

B. Protection of Privacy in One’s Home
The conditions for conducting a lawful search of private homes and other buildings – reasonable suspicion of sufficiently grave criminality etc. – are set in the CPA Chapter 15. Evidence collected in violation of these rules quite generally seems to be admissible in Norway. The reasons given for such result is not totally convincing. However, the Supreme Court has

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30 The International Covenant of 16 December 1966 on Civil and Political Rights.


32 At least so far there has been no ECHR case dealing with the use of evidence from a search in breach of article 8. See the cases referred to in note 39.

33 Illegal searches amounts to a criminal offence sanctioned by the General Civil Penal Code section 116; Act of 22 May 1902 No. 10 (Penal Code) available in English translation at www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.pdf.

34 The reasons that have been given in academic literature and rulings of the Supreme Court are discussed in Torgersen (2008) pp. 329–346.
rejected claims of exclusion in two cases – the latest of which has a relatively far-reaching reasoning.

The first case (1992) dealt with the question of exclusion of evidence obtained by a secret search of a private home – which was contrary to the law at the time.\footnote{Rt 1992 p. 698, 701–706. A person was convicted of charges of serious espionage and the question of exclusion came up in connection with a petition for a new trial.}

In the second and probably more interesting case from 2006, the question was whether evidence – a handgun and ammunition – obtained from an illegal search of a vehicle should have been excluded in the trial against the owner of the gun and ammunition that was charged with weapon offences.\footnote{Rt 2006 p. 582.} The illegality in question tainting the evidence was that the search was conducted without sufficient grounds for suspicion of a criminal offence. Rejecting the disciplinary rationale, the court held that the evidence was admissible. The Supreme Court stated that if the police had known about the illegal handgun and ammunition, or had sufficient grounds for suspecting such possession, they would be authorized to conduct the search. This suggests that breaking the applicable rules does not render evidence inadmissible, as long as the police use methods that are generally legally accepted.

The practical scope of the decisions – especially the one from 2006 – is hard to determine with any certainty. So far there are no cases dealing with evidence collected from illegal searches of persons, or illegal searches of private houses in cases where the illegality in question is lack of sufficient grounds of suspicion. However, it is hard to find any authoritative support to suggest that evidence can be excluded in other situations of illegal search than those dealt with in the two cases referred to above.

**C. Protection of Privacy in One’s Communications**

Wiretapping and other intrusions of private communications without meeting the strict conditions of the CPA is a criminal offence.\footnote{See the CPA Part IV, particularly Chapter 16 a and 16 b. The criminal offence of secret surveillance is sanctioned by the Penal Code section 145 a.} But the question of exclusion where evidence is collected by means of illegal secret surveillance is not explicitly regulated.

So far we have no case concerning exclusion of evidence from illegal wiretapping conducted by the authorities. In academic literature however, it seems to be the general point of view that evidence obtained by illegal wiretapping or eavesdropping should be excluded. The breach of privacy that takes place when a third party intercepts the communication of others can be said to...
be prolonged or repeated if the information thus obtained is admitted as evidence. With this approach the guideline briefly discussed in section I.B.4 a) comes into play, and the evidence should normally or as a general rule be excluded. It is difficult to determine to what extent the courts will accept this reasoning for evidence collected as a result of illegal secret surveillance in different circumstances.

The ECHR jurisprudence is unlikely to solve the problem of exclusion/admissibility. So far the use at trial of different recordings collected in breach of article 8 has not constituted an independent violation of the right to a fair trial in article 6.

As already mentioned the Norwegian general position is that the “fruit of the poisonous tree” doctrine does not apply. In principle, it is fair to assume that the factors relevant in the balancing test applicable for direct evidence are also relevant to the admissibility of indirect fruits of the direct evidence. But the already high threshold for exclusion is even higher for such derivative evidence. Given the lack of authoritative sources regarding the issue of evidence obtained by means of illegal wiretapping or eavesdropping, any attempt to describe the legal situation regarding indirect evidence would easily end up as mere speculation.

**D. Other Actions Invasive of Privacy, Which Could Lead to Suppression of Evidence**

In an important decision from 1991 the Supreme Court dealt with a case where evidence was secured using secret camera recordings in a fast-food establishment. The camera – administered solely by the owner, not by the police – allegedly filmed an employee taking money from the cashbox. Charged for embezzlement, the employee objected to the use of the camera recordings as evidence. The Supreme Court discussed whether the recordings were in breach of any statutory provision, but did not reach a conclusion since the court found that the general interest of privacy demanded exclusion of the recordings as evidence. The court considered secret camera recordings at a

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41 Rt 1991 p. 616. The camera was not itself secret, only the recording.
workplace to amount to a serious infringement on the integrity of the employee that was
offensive and should be counteracted, thus accepting the disciplinary rationale in this context.  

Similarly, in a civil case concerning the right to custody of children, secret recordings made by
one parent of telephone conversations between a child and the other parent were excluded. The
reasoning is in line with the decision in the camera recording case from 1991 mentioned above.  
Secret recordings of conversations between a police agent and the accused, on the other hand,
might raise questions of exclusion due to breach of the right to silence/the right to be free from
self incrimination, see section III below, but not because of a violation of the right to privacy.

Data mining has not raised any questions of exclusion of evidence in Norwegian criminal
procedure so far, and is not likely to do so.

E. Invasion of Privacy as Indirect Fruit of Violation of a Different Constitutional Right
So far, the Norwegian courts have not been dealt with the question of excluding evidence gained
by invasion of privacy that is an indirect consequence of violation of some other right. However,
as previously mentioned, the “fruit of the poisonous tree” doctrine has generally not been
embraced in Norwegian criminal procedure.

Given the fact that evidence from illegal searches is generally not excluded, it seems quite clear
that evidence from a search that is a fruit of an unlawful arrest or seizure would be admissible.

It is more questionable whether evidence from a search that is a fruit of unlawful interrogation
could be excluded. At least in case of grave violations of the right to silence, real evidence that is
revealed as an indirect fruit of illegal interrogation might possibly be excluded – and this would
not be an unlikely result if the violation in question amounted to torture. In such an event the
fairness requirement in ECHR Article 6, might point to exclusion. The European Court of
Human Rights has stated that evidence from torture should never be relied upon as proof of the
victim’s guilt “whether in the form of a confession or real evidence”.  
“Real evidence” is in this
context most likely a reference to fruits of compelled confessions. Typically, interrogations
under torture can only extract confessions as a direct fruit, not real evidence. It is however
unclear to what extent the decisions can be interpreted this way.

42 Rt 1991 p. 616, 623. In two civil cases camera recordings has been excluded as evidence in trials concerning
discharge of employees, see Rt 2001 p. 668 and Rt 2004 p. 878.

43 Rt 1997 p. 795.


45 See the case Gäfgen v. Germany (2008) where the use of different real evidence obtained as a consequence of
threatening to submit the complainant to torture in the criminal trial against him did not render the hearing unfair.
III. RULES OF ADMISSIBILITY/EXCLUSION IN RELATION TO ILLEGAL INTERROGATIONS

A. The General Right to Remain Silent/Privilege Against Self-Incrimination

There is no clear consensus as to the rationale (or rationales) for the right to remain silent or to what extent the right is distinguishable from the privilege against self-incrimination (in the following I will use both terms as a reference to the same issue). The privilege against self-incrimination is generally associated with human dignity, the burden on the prosecution to prove its case and the presumption of innocence, and to a very limited extent – if at all – with the right to privacy. Anyway, it might be fair to say that the Norwegian position is the one expressed by Judge Frankfurter: “The privilege against self-incrimination is a specific provision of which it is peculiarly true that ‘a page of history is worth a volume of logic’”.46 The very essence of the privilege is by no means controversial. Nevertheless, its scope is widely discussed *inter alia* in connection with administrative sanctions.

Generally, it is assumed that the scope of the privilege against self-incrimination is limited to “coercion or oppression in defiance of the will of the accused”.47 As a consequence, the privilege will generally not be violated when the police gather real evidence. But if an accused is forced to provide information in the form of real evidence, the privilege can come into play.48

The Norwegian Constitution has no general provision protecting the right to remain silent or the privilege against self-incrimination, but section 96 states: “Interrogation by torture must not take place”. Furthermore, section 99 states: “No one may be taken into custody except in the cases determined by law and in the manner prescribed by law.” Taken together, the two provisions prohibit collection of evidence by means of secretly depriving citizens of their liberty and expose them to rough treatment during interrogation. Of course torture and other forms of mistreatment constitute criminal offences.49

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48 See the ECHR cases *J.B. v. Switzerland* (2001) and *Funke v. France* (1993). Also see the case *Jalloh v. Germany* (2006) where the court held that the privilege against self-incrimination was violated in a case similar to the famous U.S. Supreme Court case *Rochin v. California* (1952), 341 U.S. 165 (forced administration of an emetic solution).

49 See the Civil Penal Code, particularly section 117 a concerning torture and section 115 concerning an officers use of illegal means to extract a confession, and more generally chapter 22.
The right to silence/privilege against self-incrimination is also guaranteed explicitly in ICCPR Article 14, 3 g) and also in ECHR Article 6 as this provision has been interpreted by the Court.\textsuperscript{50} As already mentioned, both Conventions have the force of law in Norway.

In the CPA, the right to remain silent is presupposed in various sections, most significantly in section 90 and 92 cf. 232 (concerning the suspect/accused) and section 123 (concerning witnesses). Moreover, the CPA also contains more “subtle” rights to guarantee that any statements are given without any form of compulsion, e.g. the duty to inform detainees, suspects and witnesses of their rights, cf. section 232 (suspect/accused) and section 235 (witnesses).

None of the above-mentioned rules in the Constitution or the CPA regulate the admissibility of evidence obtained in breach of the right to silence or the privilege against self-incrimination. As for other forms of illegal gathering of evidence, the general balancing test apply. The Strasbourg case law plays here a quite significant role.

**B. The Protection Against Involuntary Self-Incrimination: Torture, Coercion, Threats, Promises, etc. – Admissibility/Exclusion**

1. **Introduction**
   
   The Norwegian Supreme Court has only in one case touched on involuntary confessions in the real sense of the word, and this was in the aftermath of the Second World War in 1948.\textsuperscript{51} Three persons were suspected of having murdered a member of the resistance movement. To obtain confessions, each of the suspects was brought to the crime scene under circumstances similar to the night of the execution. The intention was to give the suspects the impression that they were to be executed in the same manner, and as a result of this break down and confess. This plan succeeded and confessions were secured. The Supreme Court sharply criticized the actions of the police, but held that the use of the confessions at trial could not have had any impact on the result of the case and the appeal was dismissed.

   Today the 1948 decision is probably mainly of historical interest. However, the European Court of Human Rights has a rich jurisprudence on evidence extracted by use of torture.

2. **Evidence Obtained from the Use of Torture or Other Ill Treatment**

   In *Harutyunyan* the European Court of Human Rights held that the use at trial of confession obtained under torture violated the right to a fair trial.\textsuperscript{52} In addition to the complainant, also two


\textsuperscript{51} Rt 1948 p. 46.

witnesses had been subject to torture. Also the use of the witness statements was contrary to the fairness requirement. All of the victims had been threatened that they would suffer from further torture if they changed their statements. The court thus rejected the government’s claim that out of court statements given to officers others than those who had committed the torture was not a consequence of the ill treatment. For the same reason the Court rejected the government’s claim that the witness statements given at trial was admissible. Further the Court rejected the government’s claim that the evidence in question was allegedly not decisive; “regardless of the impact the statements obtained under torture had on the outcome of the applicant’s criminal proceedings, the use of such evidence rendered his trial as a whole unfair”.53

Confessions obtained from other ill treatment than torture will generally be excluded, at least to the extent that the illegality amounts to “inhuman or degrading treatment” as this is understood in ECHR Article 3. The Court seems to have a somewhat broader approach in cases involving ill treatment that does not amount to torture, but in result the use of evidence gained from inhuman or degrading treatment tend to render the trial as a whole unfair.54

The use of forced administered “truth serum” under interrogation to secure a confession or incriminating statements would probably lead to exclusion of the obtained evidence. It must be fair to assume that the use of such drugs under interrogation typically also is followed by other infringements of the accused rights.

3. Evidence Obtained Using Other Forms of Illegal Influence – Illegal Detention, Promises, and Incorrect Information etc.

A diversity of situations involving illegal influence on the accused could potentially raise admissibility questions. Although the general theory applies, in most cases it will probably be decisive whether the evidence is gained in breach of the will of the accused. If so, exclusion is likely. The following presentation will be limited to a few comments on a couple of situations where illegal influence on the will of the accused might raise questions as to whether an obtained confession is admissible.

In situations where a suspect legally held in custody decides to give a confession, it is clear that his admissions are not automatically regarded involuntary because of the detention. If the detention on the other hand is illegal, this could obviously threaten the free will of the accused and this is definitely the situation if the detention is explicitly used to force the prisoner to talk. Evidence obtained in such a manner may very well be excluded. But illegal imprisonment is not in itself a sufficient reason for excluding an otherwise voluntary confession.

53 Para. 66.

In section 92 of the CPA it is prescribed that a suspect must not be given any “promises” or “incorrect information”. Of interest in the context of exclusion of evidence is particularly information that might influence the accused’s free will (whether he chooses to give statements to the police or invoke his right to silence). Of particular interest are promises of an advantage if the accused breaks his silence. Practical examples might be that the police inform a detainee that he will be released if he provides certain information, or less severely punished if he confesses the crime in question. To what extent this is legal is a difficult question, but it will at least under some circumstances be illegal. A typical example of “incorrect information” mentioned in section 92 is that the police incorrectly assert possession of evidence, e.g. that a co-defendant has already confessed.

It is hard to give any clear guidelines on the admissibility question in situations of illegal influence on the free will of the accused by means of false promises etc. However, for one type of illegal influence the result is relatively certain, namely where the police promise not to take action against a specified offence. Such a “plea of pardon” is illegal in Norway (also if administered by the prosecution service). In a 1994 decision the Norwegian Supreme Court seems to presuppose that a confession or admission, given in trust of a promise that the authorities will not take action against a specified offence, is inadmissible as evidence against the accused in a trial concerning the “pardoned” offence.

C. The Protection Against Unknowing Self-Incrimination: the Miranda paradigm – Admissibility/Exclusion

1. Introduction

Respecting the free will of a suspect depends not only on freedom from torture and other forms of direct compulsion or influence as discussed above, but also on whether the suspect is informed of his rights – most significantly the right to remain silent and the right counsel. I will only discuss the former because the right to counsel has not played an independent role as a ground for exclusion of evidence in Norwegian criminal procedure. The European Court of Human Rights, however, held in 2008 that “[t]he rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction”. 57

55 Rt 1994 p. 1139, 1141.
56 A duty to inform a charged person of the right to counsel is established in the CPA section 94. For a discussion on the issue of admissibility, see Torgersen (2008) pp. 228–230.
57 Salduz v. Turkey (2008) para. 55 i.f. Article 6 § 1 and § 3 (c) of the convention was violated. The case was about denying the accused access to counsel, and not about failure to inform of such a right. Also, see para. 56–62, where the Court, inter alia, points to the systematic restriction, without any specific justification on the right to counsel, and further to the fact that the complainant was a minor at the time of his arrest (17 years old).
2. The Situation where the Suspect or a Witness is Not Informed on the Right to Silence Prior to Interrogation

According to the CPA section 232 a suspect shall be informed that he is not obliged to testify before the police examines him.\(^{58}\) The duty to inform a suspect of his right to silence is not limited to “custodial” interrogation, as in the U.S. If the required information is not given it is however relevant to the question of admissibility whether the suspect was or had been in custody.

A witness is never obliged to testify to the police and is exempted from the duty to testify in court for a number of reasons, including when a close relative is charged or if the witness risks incriminating himself or his relatives, see the CPA sections 121–125. In these situations, according to the CPA section 235, the police shall inform the witness of its right not to testify at the beginning of an out-of-court interview.\(^{59}\)

Violation of the duty to inform a witness of the right not to testify against a family member charged with a criminal offence leads to exclusion of the testimony as evidence against that family member.\(^{60}\) Exclusion in these situations protects only the *interest of the witness* as regards his family relations; should the evidence be relevant against persons outside the family, the violation of the right to information about the privilege cannot be used as a ground for exclusion. And of course a condition for exclusion is that the witness resists testifying in court.

It is less certain whether an omission to inform the suspect of his right to silence prior to examination renders his testimony inadmissible as evidence. The question has not been decided in the context of an ordinary police questioning.

In a 1999 case regarding disguised questioning, the Supreme Court has however held that the admissions that were gained had to be excluded because the suspect’s right to silence was violated.\(^{61}\) I will discuss this case in the next section.

\(^{58}\) Also the CPA section 90 states that the first time a person charged attends the court he shall be informed that he is not obliged to testify.

\(^{59}\) According to the CPA section 127 a witness shall also be informed in court if it is assumed that a right to refuse to testify may apply.

\(^{60}\) This is well established in case law in relation to the CPA section 122, see Rt 1954 p. 573, Rt 1984 p. 1105, Rt 1987 p. 1318, Rt 1988 p. 633 and Rt 2008 p. 657. The admissibility question is less clear in case of omission to inform a witness of other grounds for exemption from the duty to testify. For a discussion on these issues, see Torgersen (2008) pp. 278–293 with further references.

\(^{61}\) Rt 1999 p. 1269.
In 2003 the Supreme Court decided a case where the police had questioned a person if he had drove a car parked in the street and whether he had been drinking.62 Even if the questioning was potentially incriminating the court held that the initial phase did not constitute an examination in the sense of the CPA section 232. However, the police should have informed the suspect of his right to remain silent when the answers to the first questions made it likely that he was guilty of DUI. Nevertheless, the court held that all the statements obtained were admissible (i.e. the testimony from the police as to the whole conversation with the driver).

In academic literature opinions differ as to what extent omission to inform the suspect of his right to silence prior to an ordinary police questioning renders the statements given inadmissible. The law seems to be relatively open, but probably exclusion is the most likely result.63

3. Disguised Questioning as “Functional Equivalent” to Interrogation and Therefore a Violation of the Right to Silence

As mentioned above, the Supreme Court has held that disguised questioning – typically involving an undercover agent asking questions – might violate the right to silence and lead to exclusion of admissions or confessions. The rules on admissibility in this context are quite complex, and I will restrict the presentation to the most important points.

As a starting point it is clear that not all covert gathering of information affects the right to silence in a way that can lead to exclusion of evidence. First, a prerequisite for the right to silence to come into play is that the government has made “a crucial contribution to executing the scheme”.64 Second, the privilege against self-incrimination is not violated if a police agent acts as a passive observer – if so the free will of the accused is not affected. Third, it is clear that not any influence on the suspect suffice to violate the right to silence.65 Against this background, the crucial question is what kind of influence might violate the right to silence and therefore render an admission inadmissible.

In the previously mentioned case from 1999 the charge against the suspect – a prison officer – was that he had aided an inmate in his escape from prison. Prior to the covert questioning the suspect had been arrested, detained and repeatedly formally interrogated without any result. The

65 See the decision in Allen v. UK (2002), where the police had placed a number of suspects in the same jail cell – monitored with a microphone – hoping that they would talk about the case. The Court stated that it did not find “any element of coercion or oppression inducing the applicants to break the silence”.

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disguised questioning took however place after his release. The Supreme Court held that the
agent’s incriminating questioning in this situation circumvented the right to silence and that the
recorded statements should not have been accepted as evidence. This decision has received some
criticism, and it can be questioned whether the result was necessary as a consequence of the
jurisprudence of the ECHR.66

4. Admissibility of Indirect Evidence
Real evidence obtained as a consequence of “unwarned” questioning is unlikely to be excluded
in Norway. It is uncertain whether a confession taken without proper warning can be “repaired”
by taking a new confession preceded by the proper admonitions, or whether there is a risk of
exclusion also of this latter statement.67

D. Derivative Exclusion of Otherwise Valid Confession as Fruit of Unlawful Arrest/Seizure
or Search
The mere fact that an otherwise valid confession is preceded by unlawful arrest, search or seizure
will not result in exclusion of a confession in Norwegian criminal procedure. As discussed
above, exclusion will only be the result if it can be questioned whether the confession was
voluntary. Whether there will be exceptions to this in case of very grave violations is hard to say
– so far we have no such example in our case law, and no consensus in academic literature.

IV. CONCLUSION
To sum up, whether to exclude illegally obtained evidence or not in Norwegian criminal
procedure is determined by using a somewhat vague balancing test including many relevant
factors and few clear guidelines.

The interest of truth weighs heavily, and real evidence is normally admissible even if obtained
illegally. Exceptions may apply in the case of very grave violations of the rights of the citizens –
such as violation of article 3 of the ECHR protecting the right to be free from torture and
inhuman or degrading treatment.

The situation is more complicated when it comes to testimonies to the police, confessions and
recordings of communications, but generally exclusion is a possibility where evidence is
collected in breach of the right to silence/privilege against self-incrimination. Violating the right

and a discussion of the ECHR cases, among others, Allan v. UK (2002), Heglas v. Czech (2007) and Bykov v. Russia
(2007) – the latter is now decided in a 2009 Grand Chamber decision.

67 The need for qualified warning, including information as to the admissibility of the prior confession, is discussed
to privacy is normally not in itself sufficient to render evidence inadmissible, but this might be different where secret electronic surveillance is used illegally to intercept private communication.

The “fruit of the poisonous tree” doctrine does not apply, or at least only to a very limited extent.

Even though the details of the admissibility question are discussed in academic literature, and court decisions sometimes criticized, the balancing test seems to be broadly accepted. Consequently, there is nothing to suggest that any major reform is on its way.

More principled and rigid regulation might be advantageous for a diversity of reasons. However, the more pragmatic balancing test, combined with a relatively high threshold for exclusion, is perhaps favourable since the diversity of the situations where questions of admissibility might be raised, calls for diverse considerations.

Almost 200 years ago Jeremy Bentham observed: "Exclusion knows no gradations. Blind and brainless, it has but one alternative: shut or open, like a valve: up or down, like a steam engine". As this is as true today as it was then, maybe the vagueness – and flexibility – in the Norwegian balancing test is a fair compensation for the uncompromising effect of excluding evidence.

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68 Rationale of Judicial Evidence, Volume V, p. 81.
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