

## ARTICLES

### THE UNFAIR OPERATION PRINCIPLE AND THE EXCLUSIONARY RULE: ON THE ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE IN CRIMINAL TRIALS IN INDIA

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It is revolting to have no better reason for a rule of law than that so it was  
laid down in the time of Henry IV.†

- Justice Oliver Wendell Holmes

#### ABSTRACT

*This article addresses the admissibility of illegally obtained evidence, as a matter of evidence law, in criminal trials in India. The United States Constitution's Fourth Amendment jurisprudence provides, as a matter of constitutional law, that illegally obtained evidence is inadmissible. This rule is known around the world as the Exclusionary Rule. The U.S. Supreme Court has carved out several exceptions to the Exclusionary Rule; however, illegally obtained evidence remains inadmissible in criminal trials in the U.S. in most instances. Relevant legal propositions to this effect have been codified under the Police and Criminal Evidence Act of 1984 in the United Kingdom where inadmissibility of illegally or unfairly obtained evidence remains largely a matter of discretion with the trial*

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†. Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 469 (1897).

*judge. Under Indian law, there is no statutory prohibition against illegally obtained evidence under either the Indian Evidence Act of 1872 or the Code of Criminal Procedure of 1973. However, a review of reported Indian Supreme Court opinions on the point discloses the existence of a judge made doctrine, largely derived out of British common law, whereby illegally obtained evidence can be excluded at the discretion of the trial judge if the admission of the same would operate unfairly against the accused. This rule is designated as the Unfair Operation Principle.*

*This article, for the first time, closely engages with the Unfair Operation Principle as a matter of evidence law. The first part of this article provides a restatement of the law of admissibility of evidence at criminal trials in India by surveying existing Indian jurisprudence on the point. It locates the Unfair Operation Principle as a part of general law of admissibility. The second part of this article argues that a judge has no discretion to admit illegally obtained evidence under the Unfair Operation Principle. This proposition is supported by the philosophy of Professor Ronald Dworkin and accordingly a Dworkinian analysis is provided. The third part of this article compares the Unfair Operation Principle with the Exclusionary Rule in order to demonstrate the similarities and differences between the two. It argues that both rules are similar to the extent that they both protect the interests of an accused at a trial, but are distinct to the extent that one is a rule of evidence law and the other is a rule of constitutional law. Accordingly, the third part makes a comparative argument to support the proposition advanced in the second part.*

## INTRODUCTION

For sixty-six years now the Supreme Court of India has maintained that so long as any evidence, even though obtained illegally, is relevant to the facts-in-issue in the case and there is no express legal or constitutional prohibition against the admissibility of the same, such evidence is admissible in a criminal trial. Article 20 of the Indian Constitution provides several protections to accused in criminal trials. While many attempts have been made to read protections similar to the Fourth Amendment of the United States ("U.S.") Constitution into Article 20 and thus create an Indian 'Exclusionary Rule,' the Indian Supreme Court has consistently refused to expand the scope of Article 20. Consequently, without an express legal or constitutional prohibition against its admissibility, illegally obtained evidence remains admissible in criminal trials in India.

Whereas it has been argued that it is desirable to have a judicially created Indian Exclusionary Rule and that Article 20 can be used as a vehicle to create it, this Article will use the Indian Evidence Act of 1872 as a device to articulate an Indian Exclusionary Rule instead, whereby a trial judge can exclude illegally obtained evidence. On the issue of admissibility of illegally obtained evidence, Indian judicial opinion is very close to the British opinion, which allows admissibility of illegally obtained evidence so long as the evidence is relevant to the facts-in-issue at the trial. Judicial authority in India recognizes only one exception to this rule, which is also recognized by British judicial authority on the

point: the Unfair Operation Principle. According to this principle, illegally obtained evidence may be excluded at the trial judge's discretion if the admissibility of the same is going to operate unfairly against the defendant. Though the decided cases do repeatedly mention this rule, there are hardly any cases where the rule has been tested by application to the facts of the particular case. In order to develop an Indian Exclusionary Rule, this Article examines the Unfair Operation Principle closely and proposes that this rule be used more proactively in Indian trial courts to attack the admissibility of illegally obtained evidence.

This Article is divided into three parts. Part I provides a general restatement of the Indian law of admissibility of evidence. This restatement is applicable to civil as well as criminal trials; however, this Article focuses on admissibility in criminal trials. After providing the restatement of the law of admissibility of evidence in criminal trials, Part I focuses its attention on the Unfair Operation Principle, which is a judicially-made doctrine. The Unfair Operation Principle is a part of the restatement because it has been repeatedly mentioned in all leading Indian Supreme Court opinions on the point. However, the Court has never actually elaborated on the what the Unfair Operation Principle exactly means and how it operates. Part I ends with an exposition of the restatement and a description of the Unfair Operation Principle. Part II presents the Unfair Operation Principle and the Indian equivalent of the Exclusionary Rule as it is known in the U.S. In order to do so, the philosophy of Professor Ronald Dworkin is invoked. This analysis also relies on British, Australian and Canadian supreme court opinions. Part II exposes the gap in the reasoning of the Supreme Court of India whereby illegally obtained evidence is admissible even in the face of Unfair Operation Principle, and fills that gap by arguing that the Unfair Operation Principle mandates that if evidence has been obtained illegally the same should be excluded and that this is not a rule that admits of any judicial discretion. In other words, if it is demonstrated before the trial judge that the evidence was obtained by police misconduct, through the violation of the accused person's rights or through a binding rule of law, the evidence is inadmissible. Part III carries forward this analysis by comparing the Unfair Operation Principle and the Exclusionary Rule in the U.S. This part demonstrates the similarities and differences between the two rules. While the Exclusionary Rule is a part of the U.S. constitutional law, the Unfair Operation Principle is a long standing common law principle. However, both of these rules are intended to achieve the same purposes and have identical rationales justifying their existence.

#### **PART I – THE RULE OF ADMISSIBILITY UNDER INDIAN LAW OF EVIDENCE AND THE UNFAIR OPERATION PRINCIPLE**

##### *A. Rules of Admissibility Under Indian Evidence Law*

The general principles of evidence in India are codified in the Indian

Evidence Act of 1872 (hereinafter the “Evidence Act”).<sup>1</sup> Contrary to the general impression that one may get when first encountering the Indian law of evidence, the principles of evidence in India are not restricted to the Evidence Act. The Evidence Act is the principal legislation on the topic; however, there are important principles of evidence found in Parliamentary and State legislations, as well as a rich body of Indian Supreme Court opinions on the point. All these sources combined comprise the Indian law of evidence.

The law of “evidentiary presumptions” is one example of many that illustrates how these sources combine to form the Indian law of evidence. There are several provisions in the Evidence Act that codify the rules of evidentiary presumptions.<sup>2</sup> But the most general principle—that most of the presumptions are rebuttable by nature—is codified in section 114 of the Evidence Act.<sup>3</sup> This section reflects that the Court is entitled to presume that “a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen . . .” and such a presumption is valid only until “he can account for his possession.”<sup>4</sup> But what happens if a person, having just stolen my wallet, walks into a shop, makes a purchase and pays the shop-keeper using the cash that he just stole from me? Should a rebuttable presumption arise that the individual found in possession of the stolen article is the thief, in this case the shop-keeper, because he is the one who is in possession of the cash that was stolen from me, be extended to the shop-keeper? Clearly not, and Section 114 says so.<sup>5</sup> Accordingly, drawing a presumption under Section 114 is left to the discretion of the court as there is no statutory obligation on a court to draw all such presumptions that, by the application of Section 114, the parties may like the court to draw.<sup>6</sup>

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1. See, e.g., Vepa P. Sarathi, *Historical Background of the Indian Evidence Act, 1872*, 1 JOURNAL OF INDIAN LAW INST. 19, 19-25 (1972); Vepa P. Sarathi, LAW OF EVIDENCE 7-10 (6<sup>th</sup> ed. 2008).

2. See Indian Evidence Act, 1872, No. 1, Acts of Parliament, § 111A, 112, 113, 114, 114A.

3. This is a very long provision that lists a number of illustrations where evidentiary presumptions can be raised by the Court. See Indian Evidence Act, 1872, No. 1, Acts of Parliament, § 114 (“Court **may** presume the existence of certain facts . . . [t]he Court, may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in relation to the facts of the particular case”) (emphasis added).

4. Indian Evidence Act, 1872, No. 1, Acts of Parliament, § 114, Illustration (a).

5. *Id.* at § 114 (“But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it: - As to illustration (a) – A shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business . . .”).

6.

[T]his branch of the law is also well-settled by the decisions of this Court. Section 114 of the Evidence Act provides that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common

However, rules regarding evidentiary presumptions are found in other statutes as well. Section 118, subsection (a) of the Negotiable Instruments Act of 1881, titled “Presumptions as to Negotiable Instruments of Consideration,” provides a very good example.<sup>7</sup> The courts are therefore mandatorily required to presume that a negotiable instrument was drawn for consideration and has been subsequently negotiated for consideration, though this is also a rebuttable presumption. Thus, to take a very simple example, if A duly executes a note saying that he has purchased 20,000 bales of cotton from B and owes Rs. 100,000/- to B, and B sues for payment on the basis of this note, A cannot be allowed to make a preliminary argument that this transaction in fact never happened to defeat B’s claim. And since B has not proven the transaction, B’s claim should be thrown out at a preliminary stage. Maybe the transaction indeed never happened, but the burden to prove that it did not occur would be on A and not B.<sup>8</sup> Similarly under the Narcotic Drugs and Psychotropic Substances Act of 1985, the courts are mandatorily required to raise presumption as to the existence of a culpable mental state and the burden to prove otherwise is on the accused.<sup>9</sup> There is no need to multiply examples.

Having thus established that only the general principles of evidence are codified in the Evidence Act, and that several rules governing evidence are in fact found outside the Evidence Act, we can come to that single most important principle of evidence to which the rest of this article is devoted: the Rule of Admissibility. Specifically, what kind of evidence is admissible in a criminal

course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. **Under that provision the court is not bound to draw any presumption of fact.**

S. N. Bose v. State of Bihar, AIR 1968 SC 1292 (India) (emphasis added) (note that the word used in § 114 is “may”).

7. The Negotiable Instruments Act, 1881, No. 26, Acts of Parliament, § 118 (India) (“Until contrary is provided, the following presumptions **shall** be made: - (a) of consideration – that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration . . .” contrast the use of the word ‘shall’ here with the word ‘may’ in § 114 of the Evidence Act) (emphasis added).

8. See Indian Evidence Act, 1872, No. 1, Acts of Parliament, § 102 (“On whom burden of proof lies. – The burden of proof in a suit or a proceeding lies on that person who would fail if no evidence at all were given on either side.”); See also K. L. Rallaram v. Custodian, Evacuee Prop., Bombay, AIR 1961 SC 1316 (India).

9. Narcotic Drugs and Psychotropic Substances Act, 1985, No. 61, Acts of Parliament, § 35 (“Presumption of culpable mental state. (1) In any prosecution for an offence under this Act, which requires a culpable mental state of the accused, the court **shall** presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had not such mental state with respect to the act charged as an offence in that prosecution.” (emphasis added)); (Again, contrast the use of the word “shall” here with the word “may” in § 114 of the Evidence Act); See also Narcotic Drugs and Psychotropic Substances Act, 1985, No. 61, Acts of Parliament, § 54.

trial? The answer to this question is found in Section 5 of the Evidence Act, which makes all relevant evidence admissible in a criminal trial.<sup>10</sup> If we were to restate Section 5 in simpler terms, the rule would be, “*all relevant evidence is admissible in a criminal trial.*”<sup>11</sup> What is “relevant?” Chapter II, entitled “Of the Relevancy of Facts,” of the Evidence Act has fifty sections that provide an exhaustive list of all the circumstances where a fact can be said to be relevant, a detailed discussion of which is not required for the purpose of this Article.

However, the above restatement of the Rule of Admissibility is not complete. There are categories of relevant evidences that are inadmissible, for instance, “spousal privilege,” a rule codified in Section 122<sup>12</sup> or “state privilege,” a rule codified in Section 123 of the Evidence Act.<sup>13</sup> We may now modify our restated rule as thus, “*subject to any legal prohibition, all relevant evidence is admissible in a criminal trial.*” But our restatement is not yet complete.

Article 20 of the Constitution provides for three very specific rights “in respect of conviction for offenses.”<sup>14</sup> First is protection against *ex post facto* laws.<sup>15</sup> Second is protection against double jeopardy.<sup>16</sup> And the third is protection

10. Indian Evidence Act, 1872, No. 1, Acts of Parliament, § 5 (“Evidence may be given of facts in issue and relevant facts. – Evidence may be given in any suit or proceedings of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.”); (This text is followed by an “Explanation” and two “Illustrations” reproduction of which will not be of much consequence).

11. See Osmond K. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 368 (1921) (internal citations omitted) (We may in passing note that the rule of admissibility of evidence used to the same extent in the United States until the exclusionary rule was established in *Boyd v. United States*, 116 U.S. 616 (1886) and later on expanded and refined by several U.S. Supreme Court cases. In the U.S. “... it had been the unvarying law that upon the trial of a criminal case, the Court, largely to prevent raising a collateral issue, would receive any competent evidence without inquiring into the means by which it had been procured.” the development of the “exclusionary rule” in the U.S. has been discussed part III of this article).

12.

[C]ommunications during marriage. – No person who is or has been married, shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representatives in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

Indian Evidence Act, 1872, No. 1, Acts of Parliament, § 122.

13. *Id.* at § 123 (“Evidence as to affairs of State. – No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit”).

14. INDIA CONST. Art. 20.

15. *Id.* at Art. 20, § 1 (“No person shall be convicted for any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the

against self-incrimination.<sup>17</sup> Article 21 of the Constitution, one of the most celebrated provisions of the Indian Constitution, provides that no person can be deprived of his life or personal liberty except by a procedure established by law.<sup>18</sup> Sections 25 and 26 of the Evidence Act, two of the most famous provisions of this statute, are statutory reflections of the third protection granted by Article 20, although Section 25 actually predates the Constitution by more than seven decades.<sup>19</sup> Accordingly we may restate our rule as thus, “*subject to any constitutional or legal prohibitions, all relevant evidence is admissible in a criminal trial.*” But the process of this restatement is not yet complete as we have yet to explore the weight of judicial authority on this point.

The Supreme Court of India ordinarily sits in divisions of two judges that are called “Division Courts” according to Article 145 of the Constitution, but are popularly known as a “Division Benches.”<sup>20</sup> If in the course of the hearing of any matter before a Division Bench it is decided that the matter must be dealt with by a larger bench, the matter is referred to the Chief Justice who constitutes a bigger bench, usually consisting of three judges.<sup>21</sup> If a case involves a substantial question of law as to the interpretation of the Constitution, a bench of five judges,

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commission of the offence”).

16. *Id.* at Art. 20, § 2 (“No person shall be prosecuted and punished for the same offence more than once.”).

17. *Id.* at Art. 20, § 3 (“No person accused of any offence shall be compelled to be a witness against himself.”).

18. INDIA CONST., Art. 21 (“No person shall be deprived of his life or personal liberty except according to procedure established by law”).

19. *See* INDIA CONST.; Indian Evidence Act, 1872, No. 1, Acts of Parliament (the Constitution was adopted in 1950 while the Indian Evidence Act came into force on March 15<sup>th</sup>, 1872), §25 (“Confession to police officer not to be proved. – No confession made to a police officer, shall be proved as against a person accused of any offence.”), § 26 (“Confession by accused while in custody of police not to be proved against him. – No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.”).

20. INDIA CONST. Art. 145, § 2 (“Subject to the provision of clause (3), rules made under this article may fix the minimum number of Judges who are to sit for any purpose, and may provide for the powers of single Judges and Division Courts.” accordingly the Supreme Court Rules, 1966, Order VII, Rule 1, Gazette of India, Extra (Jan. 15, 1966) provides “. . . every cause, appeal or matter shall be heard by a Bench consisting of not less than two Judges nominated by the Chief Justice . . .”. The title of Order VII reads “Constitution of Division Courts and Powers of a Single Judge.” there is a list of eight kind of matters, in Order VII, Rule 1 that a single judge can hear and dispose of an examination of which is not relevant for this article.)

21. Supreme Court Rules, 1966, Order VII, Rule 2, Gazette of India, Extra (Jan. 15, 1966) (“Where in the course of the hearing of any cause, appeal or other proceedings, the Bench considers that the matter should be dealt with by a larger Bench, it shall refer the matter to the Chief Justice, who shall thereupon constitute such a bench for the hearing of it.”).

or more if necessary, must be constituted.<sup>22</sup> Such a bench is popularly called a “Constitution Bench.” The bigger the bench of the Supreme Court that decides the case, the greater the doctrinal value attached to it.<sup>23</sup> For the purpose of our discussion, we will examine a few three judge opinions and two five judge Constitution Bench opinions delivered on this point so far.<sup>24</sup>

The 1967 three judge bench opinion delivered in *Y. S. Nagree v. State of Maharashtra* is a much cited case on the issue of admissibility of illegally obtained evidence.<sup>25</sup> The evidence in this case was attacked on all three grounds: that the evidence was irrelevant (which was a technical objection); that there was a legal prohibition against the admissibility of illegally obtained evidence; and that there was a constitutional prohibition against admissibility of illegally obtained evidence.<sup>26</sup> The accused was charged with bribing a government official under Section 165A of the Indian Penal Code.<sup>27</sup> The government official who was offered the bribe informed the police, and accordingly a trap was laid by the police at the official’s house to catch the accused.<sup>28</sup> The police installed a microphone in the outer room of the house, which was attached to a recording machine in the inner room of the house.<sup>29</sup> The accused entered the house, offered the official a bribe, and this conversation was recorded in the machine hidden in the other room though the police officials were not able to hear the conversation as it transpired.<sup>30</sup> At trial, the official testified to the conversation but the Bombay High Court was not willing to accept the testimony of the official without independent corroboration, which came from the tape-recording of the conversation, which was held as relevant evidence by the Bombay High Court

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22.

[T]he minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution ... shall be five Provided that, where the Court hearing an appeal under any of the provisions of this Chapter other than article 132 consists of less than five Judges and in the course of the hearing the appeal the Court is satisfied that the appeal involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the appeal, such Court shall refer the question for opinion to a Court constituted as required by this clause for the purpose of deciding any case involving such a question and shall on receipt of the opinion dispose of the appeal in conformity with such opinion.

INDIA CONST. Art. 145, § 3.

23. See generally A. LAKSHMINATH, PRECEDENT IN INDIAN LAW (4<sup>th</sup> ed. 2016).

24. See *State of Punjab v. Baldev Singh* (1999) 6 SCC 172 (India); see *Pooran Mal v. Director of Inspection*, (1974) 1 SCC 345 (India).

25. *Y. S. Nagree v. State of Maharashtra*, AIR 1968 SC 147 (India).

26. *Id.*

27. *Id.* at 148.

28. *Id.*

29. *Id.* at 148-149.

30. *Y. S. Nagree v. State of Maharashtra*, AIR 1968 SC 147, 149 (India).



and subsequently affirmed by the Supreme Court on appeal.<sup>31</sup> The appellant-accused first attached the statement of the evidence on the grounds that there were legal prohibitions against accepting the tape-recorded conversation (on the ground that it was irrelevant and thus inadmissible, which was rejected) and that there were legal prohibitions against accepting the testimony of government official, which was also rejected.<sup>32</sup> Lastly Article 20(3) of the Constitution was invoked to argue that the words said by the accused in the outer-room were self-incriminatory and therefore there was a constitutional prohibition against using such evidence.<sup>33</sup> Since the Court found that the accused was not under any compulsion to say what he said in the outer-room, the constitutional objections were also rejected.<sup>34</sup>

*R.M. Malkani v. Maharashtra*, a two judge bench opinion, is another widely cited case that is of great importance in this context.<sup>35</sup> A patient was admitted to the nursing home of one Dr. Adatia, who diagnosed the case as one of 'acute appendicitis'.<sup>36</sup> After the patient became serious, a second opinion by one Dr. Mehta was obtained who diagnosed the case as one of acute appendicitis with 'generalised peritonitis' and advised immediate operation.<sup>37</sup> After surgery, performed by Dr. Adatia, the patient developed paralysis of the ileum and was later removed to the care of one Dr. Motwani at Bombay Hospital, where the patient died after three days.<sup>38</sup> The dead body was disposed of without any post mortem (autopsy), but Bombay Hospital did issue a death intimation card (death certificate), noting that the patient died as a result of 'paralytic ileus and peritonitis following an operation for acute appendicitis'.<sup>39</sup> Following this, the Coroner of Bombay opened an investigation into this case (this being a case of post-operational death in a hospital).<sup>40</sup> As it happened, the Coroner told Dr. Motwani that Dr. Adatia might be 'at fault' but made a proposition to him that for

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31. *Id.* at 148-150.

32. *Id.* at 149-50. (this argument was made on the basis of section 162 of the Code of Criminal Procedure. Per this provision a statement given to a police under the said section was not admissible at a criminal trial).

33. *Id.* at 150.

34.

We cannot say that in this case the appellant was compelled to be a witness against himself. He was free to talk or not to talk. His conversation with [the government official] was voluntary. There was no element of duress, coercion or compulsion. His statements were not extracted from him in an oppressive manner or by force or against his wishes. He cannot claim the protection of Art. 20(3).

*Id.* (Justice Bachawat held for the court).

35. *R.M. Malkani v. Maharashtra*, (1973) 1 SCC 471 (India).

36. *Id.* at 473.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

a sum of Rs. 20,000 he would clear Dr. Adatia of all the charges.<sup>41</sup> Motwani conveyed this proposition to Adatia but he refused to pay, which Motwani conveyed to the Coroner, who then reduced the sum from Rs. 20,000 to Rs. 10,000.<sup>42</sup> Adatia refused to pay that as well.<sup>43</sup> A complaint was then lodged with the Anti-Corruption Bureau.<sup>44</sup>

After duly obtaining his consent, the police attached tape-recording equipment to the telephone of Dr. Motwani and asked him to call the Coroner about his demands for money in their presence.<sup>45</sup> An appointment to meet the following day was made and this conversation was recorded on tape.<sup>46</sup> During their meeting, the Coroner raised his demands from Rs. 10,000 to Rs. 15,000, which Adatia gave to Motwani. This amount was then paid to the Coroner but the transaction was never completed.<sup>47</sup> A second phone call followed, also recorded on tape, where the Coroner asked Motwani to carry the money to his residence and hand over the money to his wife along with a letter saying that he was returning a loan of Rs. 15,000.<sup>48</sup> Finally, no money ever exchanged hands and the Coroner was charged *inter alia* with attempting to obtain illegal gratification for doing or forbearing to do official acts.<sup>49</sup> Being found guilty by the Bombay High Court, the Coroner appealed to the Supreme Court and the Supreme Court affirmed.<sup>50</sup>

One of the questions in this appeal was whether “the trial Court and the High Court [had] erred in admitting the evidence of the telephonic conversation between Dr. Motwani and the appellant which was recorded on the tape.”<sup>51</sup> Two arguments were made to establish this error. We may call the first the “illegality argument” and the second the “constitutional argument” (though the nature of attacks on the admissibility of illegally obtained evidence was the same as *Nagree*). As per the illegality argument, the police had obtained the tape record of the telephonic conversation in violation of Section 25 of the Indian Telegraph Act of 1885 (hereinafter the “Telegraph Act”) according to which intercepting a telegraph line was a punishable offence.<sup>52</sup> Furthermore, Rule 149 of the Telegraph Rules provided that only a “Telegraph Authority” had the lawful jurisdiction to monitor or intercept a message transmitted through a telephone, and not a police officer.<sup>53</sup> On these grounds it was urged that the tape-recorded conversation

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41. 1 SCC at 473.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 474.

46. 1 SCC at 474.

47. *Id.*

48. *Id.*

49. *Id.* at 475.

50. *Id.* at 472, 480.

51. 1 SCC at 475.

52. *Id.* at 475-76.

53. *Id.* at 476.

should be held inadmissible.<sup>54</sup> Per the constitutional argument, the manner of acquiring the tape-recorded conversation was not a procedure established by law and caused involuntary incrimination of the appellant and thus, admissibility of the tape-recorded conversation was constitutionally prohibited.<sup>55</sup> The Bombay High Court had held that the tapping of the telephone by the police was indeed in violation of the Section 25 of the Telegraph Act, but since there was no legal prohibition against the admissibility of illegally obtained evidence, it was admissible.<sup>56</sup> The Supreme Court reversed this holding and rejected the illegality argument, and held that the police officers were not “intercepting” anything within the meaning of Section 25 of the Telegraph Act.<sup>57</sup> Also, because the Coroner’s statements were voluntary, the constitutional argument was rejected.<sup>58</sup>

The rationale behind the rejection of the illegality argument was that a tape recorded conversation is admissible evidence under Sections 7 and 8 of the Evidence Act, and so long as the voices are identifiable and the accuracy of the tape recorded conversation is not in question, the conversation, if found to be relevant, is admissible.<sup>59</sup> After rejecting the illegality argument, the Court went

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54. *Id.*

55. *Id.* at 479 (the appellant relied on Articles 20 and 21 of the constitution to make this argument).

56. 1 SCC. at 476.

57. *Id.* (Justice Ray held for the court); continuing:

[T]he Police Officer in the present case fixed the tape recording instrument to the telephone instrument with the authority of Dr. Motwani. **The Police Officer could not be said to intercept any message or damage or tamper or remove or touch any machinery within the meaning of Section 25 of the Indian Telegraph Act.** The reason is that the Police Officer instead of hearing directly the oral conversation between Dr. Motwani and the appellant recorded the conversation with the device of the tape recorder... When a person talking on the telephone allows another person to record it or to hear it, it cannot be said that the other person who is allowed to do so is damaging, removing, tampering, touching machinery battery line or post for intercepting or acquainting himself with the contents of any message.

(emphasis added)).

58. *Id.* at 479 (Justice Ray held for the court) (“The appellant’s conversation was voluntary. There was no compulsion. The attaching of the tape-recording instrument was unknown to the appellant. That fact does not render the evidence of conversation inadmissible. The appellant’s conversation was not extracted under duress or compulsion”).

59. Indian Evidence Act § 7, No. 1, Acts of Parliament, 1872 (“Facts which are the occasion, cause or effect of facts in issue. – Facts which are the occasion, cause, or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant”); § 8 (“Motive, preparation and previous or subsequent conduct. – Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact”); *Malkani*, (1973) 1 SCC at 477 (Justice Ray held for the court) (“Tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue; secondly, there is identification of the

into a further discussion on admissibility of illegally obtained evidence and observed:

There is warrant for proposition that even if evidence is illegally obtained it is admissible. Over a century ago it was said in an English case where a constable searched the appellant illegally and found a quantity of offending article in his pocket that it would be a dangerous obstacle to the administration of justice if it were held, because evidence was obtained by illegal means, it could not be used against a party charged with an offence.<sup>60</sup>

The Court cited two English cases, *Jones v. Owens* and *Kuruma v. R.*, in support of this observation.<sup>61</sup> In *Kuruma*, the evidence obtained by the police in a most flagrant violation of the law was held admissible by the Judicial Committee of the Privy Council ('JCPC').<sup>62</sup> The search of the accused was performed by a police officer who, by law, was not allowed to perform such a search.<sup>63</sup> The JCPC held: "[I]f evidence was admissible it mattered not how it was obtained."<sup>64</sup> In making this observation, however, a judicial rule was also noted in the following words:

There is of course always a word of caution. **It is that the Judge has a discretion to disallow evidence in a criminal case if the strict rules of admissibility would operate unfairly against the accused. That caution is the golden rule in criminal jurisprudence.**<sup>65</sup>

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voice; and thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape record").

60. *Id.* at 477. See *Jones v. Owen* (1870) 34 JP 759.

61. *Kuruma v. R.* [1955] AC 197 (PC) (appeal taken from Afr.); *Jones v. Owens* (1870) 34 JP 759 (UK); See Talha Abdul Rahmam, *Fruits of the Poisoned Tree: Should Illegally Obtained Evidence be Admissible?*, THE PRACTICAL LAWYER, Apr. 2011, at 38. (*Kuruma* remains one of the most heavily cited British authority by Supreme Court of India for the proposition that for admissibility of evidence the only test of relevancy notwithstanding the mode by which the state obtained that evidence. Whereas the British courts have themselves distanced themselves from this jurisprudence, the continued reliance of the Supreme Court of India on *Kuruma* has itself been criticized).

62. *Kuruma v. R.* [1955] AC 197 (PC) (appeal taken from Afr.).

63. *Id.*

64. Malkani, (1973) 1 SCC at 477.

65. *Id.* (emphasis added); See also *Rishbud v. State of Delhi*, AIR 1955 SC 196 (India) (where a unanimous three judge bench of the Supreme Court, speaking in the context of a police investigation conducted by police officers who were not authorized to conduct such an investigation, observed that, "If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows ... cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice." On facts, no such miscarriage was found).

When does this Unfair Operation Rule come into play? The Court did not elaborate on this point in *Malkani*, but we may profitably refer to a 1965 unanimous five judge bench opinion of the Court delivered in *Durgaprasad*.<sup>66</sup> Speaking in context of Section 105 of the Customs Act of 1962 the Court observed:

We are ... of the opinion that the power of search granted under S. 105 of the Customs Act is a power of general search. But it is essential that before this power is exercised, the preliminary conditions required by the section must be strictly satisfied, that is, the officer concerned must have reason to believe that any documents or things, which in his opinion are relevant for any proceeding under the Act, are secreted in the place searched.<sup>67</sup>

Thus, restating this Article's analysis as it emerges from a discussion of the statutory provisions and judicial authority: [S]ubject to all express constitutional and legal prohibitions, all relevant evidence is admissible, provided that if the evidence has been illegally obtained the Judge may in his discretion disallow the admission of such illegally obtained evidence if the admission of the same would operate unfairly against the accused.

*Pooran Mal v. Director of Inspection* is a case where Section 132 of the Income Tax Act of 1951 was challenged as unconstitutional.<sup>68</sup> Section 132 is a very long provision that grants "search and seizure" powers to the Director of Inspection or the Commissioner of the Income Tax Department, and lays down an elaborate procedure regarding how a "search and seizure" is to be conducted under that provision.<sup>69</sup> The constitutional challenges to Section 132 were all

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66. *Durgaprasad v. H. R. Gomes*, AIR 1966 SC 1209 (India).

67.

[I]f the Assistant Collector of Customs ... has reason to believe that any goods liable to confiscation, or any documents or things which in his opinion will be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorize any officer of customs to search or may search himself for such goods, documents or things.

Customs Act, 1962, No. 52, Acts of Parliament § 105 (relevant part); *Durgaprasad*, AIR 1966 SC at 1216 (India).

68. *Pooran Mal v. Director of Inspection*, (1974) 1 SCC 345 (India).

69.

[I]t will be seen in the first place that the power to direct a search and seizure is given to the Director of Inspection or the Commissioner. Secondly, the authorization for such search and seizure must be in favour of officers not below the grade of an Income Tax Officer. Thirdly the power to authorise search and seizure can be exercised only when the Director of Inspection or the Commissioner has reason to believe (1) that in spite of the requisitions under the relevant provisions mentioned in Section 132(1)(a) the required books and documents have not been produced; (2) that any person, whether

rejected in *Pooran Mal*.<sup>70</sup> We may, however, note that the first important U.S. Supreme Court case dealing with the Fourth Amendment, was *Boyd v. United States*.<sup>71</sup> Like *Pooran Mal*, *Boyd* also involved a taxation statute, specifically with a provision that allowed the revenue authorities to seize private papers of a person.

The most notable part of *Pooran Mal* relevant to this part of the Article is the relief of the writ of prohibition that was sought by the petitioner.<sup>72</sup> Petitioner argued that, assuming Section 132 was constitutionally valid, the search that was conducted under that provision was illegal because it was in contravention of that provision, and prayed that a writ of prohibition be issued restraining the income tax department from using any evidence gathered from such illegal search.<sup>73</sup> Here the “protection against self-incrimination” clause of Article 20 was specifically invoked and it was argued that evidence seized in violation of the procedure established by law was no better than illegally compelled evidence.<sup>74</sup> Petitioner argued that admission of evidence seized as a result of an illegal search and seizure is against the spirit of the Constitution.<sup>75</sup> Petitioner also referenced the Fourth and Fifth Amendment of the U.S. Constitution and cited U.S. cases.<sup>76</sup> The Court rejected all of these arguments, primarily relying on an eight Judge Constitution Bench opinion where it was first held that the Supreme Court of India cannot rely on Fourth and Fifth Amendment jurisprudence as developed in

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requisition under the above provisions is made or not, will not, or would not, produce or cause to be produced, any books of account and other documents which will be useful for, or relevant to, any proceeding under the Income-tax Act; or (3) that any person is in possession of any money, bullion, jewellery or any other valuable article or thing representing either wholly or partly undisclosed income or property.

*Id.* at 354 (Justice Palekar for the court).

70.

[I]n our opinion, the safeguards are adequate to render the provisions of search and seizure as less onerous and restrictive as is possible under the circumstances. The provisions, therefore, relating to search and seizure in Section 132 and Rule 112 cannot be regarded as violative of Article 19(1)(f) and (g)” and at 362, holding that, “...there is no substance in the contention that two different procedures for assessment are adopted and hence there is a discrimination under Article 14.

*Id.* at 358 (Justice Palekar for the court).

71. *Boyd v. United States*, 116 U.S. 616 (1885).

72. *Pooran Mal*, (1974) 1 SCC at 362 (India).

73. *Id.* at 362-63 (the Supreme Court of India as well as the High Courts of the respective states of the Union of India are empowered to grant five writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, depending on whichever writ is most appropriate). *See* INDIA CONST. Art. 32, § 2, Cl. 2 and INDIA CONST. Art. 226, § 1, Cl. 2.

74. INDIA CONST. Art. 20, § 3, Cl. 2; *Pooran Mal*, (1974) 1 SCC at 364 (India).

75. *Id.* at 363.

76. *Id.* at 364 (Justice Palekar only records that Fourth and Fifth Amendment cases were cited but does not record which cases were cited by counsel).

the U.S. because of textual differences.<sup>77</sup> As such, the attempt to have the admission of evidence obtained as a result of an illegal search and seizure was not successful in this case.<sup>78</sup> The reason given by the Court was that the Indian law of evidence “permits relevancy as the only test of admissibility of evidence...” and that there is no other law in India that permits exclusion of relevant evidence on the ground that it was illegally obtained.<sup>79</sup> Finding support in English law, the Court held as follows:

So far as India is concerned its law of evidence is modelled on the rules of evidence which prevailed in English Law, and Courts in India and in England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure.<sup>80</sup>

However, the same cautionary note was struck in this case as was struck in *Malkani*. While a “reasonably enforced” search and seizure was not unconstitutional, the courts have discretion to admit evidence obtained as a result of an illegal search.<sup>81</sup> Accordingly, the Court held:

[It is] open to the Court not to admit the evidence against the accused if the Court was of the view that the evidence had been obtained by conduct of which the prosecution ought not to take advantage. But that [would not be] a rule of evidence but a rule of prudence. It would thus be seen that in India, as in England, where the test of admissibility of evidence lies in relevancy, unless there is an express or implied prohibition in the Constitution or other law evidence obtained as a result of illegal search or seizure is not liable to be shut out.<sup>82</sup>

Thus understood, this Article’s analysis of admissibility of illegally obtained evidence in criminal trials reads as follows: Subject to all express or implied constitutional and legal prohibitions, all relevant evidence is admissible, provided that if the evidence has been obtained by the prosecution in a manner which they ought not to take advantage of, the Judge may in his discretion disallow the admission of such illegally obtained evidence.”

So, what became of the Unfair Operation Rule judicially laid down in *Malkani*? There are two answers to this question. One answer would be that

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77. *M. P. Sharma v. Satish Chandra*, AIR 1954 SC 300 (India).

78. *Id.*

79. *Pooran Mal*, (1974) 1 SCC at 363-364 (India).

80. *Id.* (Justice Palekar cited four cases to support this proposition, *Barindra Kumar Ghose v. Emperor*, (1910) ILR 37 (Cal.) 467 (India); *Emperor v. Allahdad Khan*, (1913) ILR 35 (All.) 358 (India); *Kuruma v. R* [1955] AC 197 (PC) (appeal taken from Afr.); *Herman King v. Queen* [1969] 1 AC 304 (PC) 314. *Kuruma v. R.* is the only case that is cited by both *Malkani* and *Pooran Mal* and in this case it has been cited twice).

81. *Id.* at 366.

82. *Id.* (holding that the search and seizure in this case was constitutionally valid and all the evidence so obtained was held admissible).

*Pooran Mal*, because it is a five judge bench opinion, has impliedly overruled *Malkani* on the Unfair Operation Rule, establishing a new standard that prosecution should be allowed to take advantage of the illegally obtained evidence if admission of such evidence is not unfair to the accused. The other answer would be that *Pooran Mal* has refined the Unfair Operation Rule by laying down a clear standard. Thus, if illegally obtained evidence operates unfairly against the accused, then evidence would not be admitted, because that would allow the prosecution to take advantage of misconduct they ought not be allowed to take advantage of. Both these answers overlap each other. Hold that thought for now as an analysis of post-*Pooran Mal* cases will reveal that the second answer seems to be the correct legal position.

The question of law in *State of Punjab v. Baldev Singh* arose in the narrow context of Section 50 of the NDPS Act.<sup>83</sup> Because of the two divergent views emerging out of the pre-*Baldev Singh* cases, a five-judge bench was set up in *Baldev Singh*.<sup>84</sup> The divergence of the view was on a question directly relevant to this article: should evidence collected in violation of Section 50 of the NDPS Act be admissible in evidence?<sup>85</sup>

The overarching importance of search and seizure, which the unanimous five judge bench described as essential in the ‘armoury of an investigator,’ was stressed by the Court.<sup>86</sup> The question essentially came down to interpreting the words “if the person so requires” as used in Section 50.<sup>87</sup> After a review of several pre-*Baldev Singh* cases, the Court concluded that this expression, as used in Section 50, grants to the accused a procedural safeguard in the nature of a right

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83.

[C]onditions under which search of persons shall be conducted. (1) When any officer duly authorized under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. ... (3) The gazetted officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made. ...

Narcotic Drugs and Psychotropic Substances Act, 1985, No. 61, Acts of Parliament, § 50 (relevant part); *State of Punjab v. Baldev Singh*, (1999) 6 S.C.C. 172 (India).

84. *State of Punjab v. Baldev Singh*, (1999) 6 S.C.C. 172, 182 (India).

85. *Id.*

86. *Id.* at 188. (relying on *M. P. Sharma v. Satish Chander*, A.I.R. 1954 SC 300 to support this view and citing *Pooran Mal* to stress the importance of search and seizure provisions.)

87.

[W]hat is the import of the expression *if such person so requires* he shall be taken to the nearest gazetted officer or Magistrate as occurring in Section 50. Does the expression not visualize that to enable the person concerned to require his search to be conducted before a gazetted officer or a Magistrate, the empowered officer is under an obligation to inform him that he has such a right?

*Id.* at 191 (emphasis added).



that creates a corresponding obligation on the part of the police officer to inform the accused of this right.<sup>88</sup> Accordingly, the Court held:

To be searched before a gazetted officer or a Magistrate, if the suspect so requires, is an extremely valuable right which the legislature has given to the person concerned having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act.<sup>89</sup>

After holding that Section 50 grants a right, the next obvious question before the Court was “whether evidence collected in a search conducted in violation of Section 50, is admissible in evidence.”<sup>90</sup> Rejecting the *Pooran Mal* position and the subsequent reading of *Pooran Mal* in post-*Pooran Mal* and pre-*Baldev Singh* cases, the Court held:

It is ... not possible to hold that the judgment in *Pooran Mal* case can be said to have laid down that the “recovered illicit article” can be used as *proof of unlawful possession* of the contraband seized from the suspect as a result of illegal search and seizure.<sup>91</sup>

For the first time the Court gave a hint of an Indian version of the U.S. Exclusionary Rule when it held that:

If after careful consideration of the material on record it is found by the court that the admission of evidence collected in search conducted in violation of Section 50 would render the trial unfair then that evidence must be excluded.<sup>92</sup>

#### *B. The Restatement of Rule of Admissibility under Indian Evidence Law*

This article’s evolving restatement in light of *Baldev Singh* follows in three distinctly identifiable but connected rules –

1. Subject to all express or implied constitutional and legal prohibitions, all relevant evidence is admissible.
2. If evidence has been obtained by violating a procedural statutory right

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88. *Id.* at 192, 195-97.

89. *Id.* at 197.

90. *Id.* at 201.

91.

[T]he illicit drug or psychotropic substance seized in an illegal search cannot *by itself* be used as *proof of unlawful conscious possession* of the contraband by the accused. An illegal search cannot also entitle the prosecution to raise a presumption under Section 54 of the [NDPS] Act because presumption, is an inference of fact drawn from the facts which are known as proved.

*Id.* at 205, 208 (emphasis added).

92. *Id.* at 206 (see also *R. v. Collins*, (1987) 1 S.C.R. 265, and *R. v. Stillman*, (1997) 1 S.C.R. 607).

granted to the accused, the Court may exclude the use of such evidence if the Court in its discretion is of the opinion that admission of such evidence would render the trial unfair.

3. If the conviction of the accused is secured only on the basis of evidence that has been obtained in violation of a procedural statutory right granted to the accused, then such a conviction cannot be upheld.

### *C. Anticipating and Responding to Some Criticisms of The Restatement*

Though Rule 1 as restated above is settled beyond any dispute, Rules 2 and 3 can be fairly subjected to some criticism. One criticism is that Rules 2 and 3 are stated too broadly or that they unfairly generalize the holding of *Baldev Singh*. Regarding Rule 2, that *Baldev Singh* is restricted to Section 50 of the NDPS, it is restricted to the context in which that case was decided and it cannot be expanded beyond its scope. In response to this criticism we may point the attention of the person making such a criticism to the following passage in *Baldev Singh*:

Procedure based on systematic and unconscionable violation of law by the officials responsible for the enforcement of law, cannot be considered to be a “fair”, just or reasonable procedure<sup>93</sup>... Indeed in every case the end result is important but the means to achieve it must remain over board. The remedy cannot be worse than the disease itself. *The legitimacy of the judicial process may come under a cloud if the court is*

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93. *Id.* at 198. (The U.S. Supreme Court seems to agree with the reasonability rationale. In *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985), Justice White, who delivered the opinion of the Court, held: “Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires ‘balancing the need to search against the invasion which the search entails.’” The Court in this case was speaking in the context of applicability of Fourth Amendment prohibitions on school authorities. Professor Akhil Amar in his influential article Akhil Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 768, 774 (1994) has, on authority of historical evidence, argued that the 4<sup>th</sup> Amendment was designed to protect people against unreasonable police conduct. On this basis he criticizes the U.S. jurisprudence on the point where warrant-less searches and seizures are declared violative of the Fourth Amendment and evidence thus obtained declared inadmissible. The explicit logic here has been that, even though the police had neither a true warrant nor a true waiver, they acted *reasonably*. But this is a recognition that reasonableness – not a warrant – is the ultimate touchstone for all searches and seizures); *See also* Tracy Maclin, *When the cure for the Fourth Amendment is worse than the disease*, 68 S. CAL. L. REV. 1, 4-5 (1994) (Professor Maclin accepts the “reasonability” rationale as the central thesis of Professor Amar’s article but does not agree with his central thesis. “First, [Professor Amar] wants to shift the Court’s focus away from judicial warrants and the probable cause requirement, and instead concentrate on the touchstone of the Fourth Amendment – reasonableness. In his view, the ‘core of the Fourth Amendment ... is neither a warrant nor probable cause, but reasonableness.’” (Internal citations omitted)).

*seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted.*<sup>94</sup>

If it is argued that Rule 2 is stated in a broader manner than *Baldev Singh* truly permits, one can respond by arguing that by recognizing that Section 50 of the NDPS Act grants a right to the accused (that in turn creates a corresponding duty in the police officer), the Court has accepted the proposition that procedural statutes can create statutory rights. If Section 50 of the NDPS Act, which regulates police search conduct, grants a procedural right to the accused, then on what authority of law can one argue that similar procedural provisions in other statutes cannot and in fact do not grant similar rights? Saying that Section 50 of the NDPS Act grants a procedural right and similar provisions in other statutes (i.e. provisions governing search and seizure) do not grant procedural rights to the accused is an unsustainable position. It is precisely because of the unsustainability of such a position that Rule 2 is stated the way it is.

On similar reasoning, Rule 3 can also be defended. If evidence resulting from a search that violates Section 50 of the NDPS Act cannot be used to sustain a conviction of the accused, then a search violating any other procedural position must also result in the same outcome. Rule 3 divides all the evidence into two categories: evidence obtained as a result of an illegal search and evidence obtained as a result of legal search. A conviction can still be sustained on the basis of that evidence obtained from a legal search. But if all we have is evidence that is a direct result of an illegal search, then how is it possible that a conviction under NDPS Act cannot be sustained, but a conviction under any other penal statute can be? This is also an unsustainable position. This view is partially supported by two unanimous five-judge Constitution Bench opinions. The first is a 1954 opinion delivered in *Wazir Chand v. State of Himachal Pradesh*.<sup>95</sup> In this case, several searches and seizures conducted by the Himachal Pradesh police

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94. *Id.* at 199 (However, it needs to be noted that the “reasonability” that the Supreme Court of India is referring to is not the same as the “reasonability” rationale put forth by Professor Amar. The Court is more concerned with preventing police misconduct and abuse of search and seizure powers by the police officers. To that extent, Professor Amar’s “reasonability” rationale is not of much assistance. Professor Maclin has countered Professor Amar’s “reasonability rationale” in following words: “Professor Amar wants common sense to be the lodestar of Fourth Amendment rules. In the real world, police stop automobiles driven by black teenagers because the officer’s commonsense tells him that ‘with blacks ‘there is always a greater chance of something wrong.’ This counter clearly points out that it is police misconduct and abuse of powers that the central to 4<sup>th</sup> Amendment.” See Maclin, *supra* note 93 at 38).

95. *Wazir Chand v. State of Himachal Pradesh*, A.I.R. 1954 S.C. 415 (India). See also *Rishbud v. State of Delhi*, A.I.R. 1955 S.C. 196 (India); See also *Durga Prasad v. H. R. Gomes, Superintendent (Prevention), Central Excise*, A.I.R. 1966 S.C. 1209, 1216 (India).

that resulted in recovery of valuable medicinal drugs were challenged as illegal.<sup>96</sup> The petitioners argued that the illegally seized articles should be released and restored to them.<sup>97</sup> The petitioner argued that the searches were conducted without the orders of a magistrate and were also without jurisdiction.<sup>98</sup> The State admitted that the necessary order of a magistrate was not obtained in this case.<sup>99</sup> The Court, accepting the jurisdictional argument, held: “[G]oods in the possession of a person who is not lawfully in possession of them cannot be seized except under authority of law, and in absence of such authority, Wazir Chand could not be deprived of them,” and ordered that the illegally seized goods be restored to the petitioner.<sup>100</sup> The other is a 1968 opinion delivered in *Commissioner of Commercial Taxes v. R. S. Jhaver*.<sup>101</sup> In this case, a search and seizure conducted under Section 41 of the Madras General Sales Tax Act of 1959 (hereinafter the “Madras Act”) was challenged as illegal and it was prayed that the articles seized as a result of this illegal search be returned to the petitioner.<sup>102</sup> The provision central to the case was Section 41(2) of the Madras Act.<sup>103</sup> Finding

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96. *Wazir Chand v. State of Himachal Pradesh*, A.I.R. 1954 S.C. 415, 416-17 (India).

97. *Id.*

98. *Id.* at 417.

99.

[T]he Solicitor-General appearing for the respondents was unable to draw our attention to any provision of the Code of Criminal Procedure or any other law under the authority of which these goods could have been seized by the Chamba police at the instance of Jammu police. Admittedly these seizures were not made under the orders of any magistrate.

*Id.*

100.

[T]he Chamba police were not authorized to investigate the offence regarding which a report has been made to the Jammu and Kashmir police... The procedure prescribed by the section was not followed. The Jammu and Kashmir police had no jurisdiction or authority whatsoever to carry out investigation of an offence committed in Jammu and Kashmir in Himachal Pradesh territory without the authority of any law or under the orders of any magistrate passed under the authority of any law.

*Id.*

101. *Commissioner of Commercial Taxes v. R. S. Jhaver*, A.I.R. 1968 S.C. 59 (India).

102. *Id.* at 60.

103.

[A]ll accounts, registers, records and other documents maintained by a dealer in the course of his business the goods in his possession and his offices, shops, godowns, vessels or vehicles shall be open to inspection at all reasonable times by [any empowered] officer:

Provided that no residential accommodation (not being a place of business-cum-residence) shall be entered into and searched by such officer except on the authority of a search warrant issued by a Magistrate having jurisdiction over the area...

Madras General Sales Tax Act, 1959, No. 1, Acts of Parliament, § 41(2) (relevant part); *Commissioner of Commercial Taxes v. R. S. Jhaver*, A.I.R. 1968 S.C. 59, 62 (India).

that the warrant issued by the Magistrate for the search of petitioner's residential premises was illegal on the ground of "non application of mind" making the account books recovered the fruits of an illegal search, the Court ordered: "[A]nything recovered from the search of the residential accommodation on the basis of this defective warrant must be returned [to the petitioner]."<sup>104</sup> The Court also observed that any search conducted in violation of the safeguards provided under the Code of Criminal Procedure would be a "defective" search and fruits of such a search must be returned.<sup>105</sup>

The reasons given by the Chief Justice in the above quoted passage are sufficient and a strong warrant to read the *Baldev Singh* holding in the way the three restated rules read them. It can hardly be anyone's case that dealing stringently with the lawless conduct of NDPS officers is somehow more desirable, but for some reason lawless conduct, on the part of an ordinary police officer, must be condoned. The Chief Justice also used the word 'investigative agency,' which is sufficiently large to bring within its ambit, not just the NDPS officers, but all kinds of police officers engaged in the noble work of law enforcement.

## PART II – THE UNFAIR OPERATION PRINCIPLE AS THE INDIAN 'EXCLUSIONARY RULE' – A DWORKININ ANALYSIS

### *A. Dworkin And Admissibility of Illegally Obtained Evidence*

In his highly influential article *Hard Cases*, Professor Ronald Dworkin pointed out the crucial distinction between an argument based on principle and an argument based on policy.<sup>106</sup> When presented with a hard case, the judge should avoid "making decisions that seem right in isolation, but cannot be brought within some comprehensive theory of general principles and policies that is consistent with other decisions also thought right."<sup>107</sup> A legal claim must be supported by a principled justification based on the legal principles that are in line

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104. *Id.* at 67.

105. *Id.* (The Court held: "Therefore, as the safeguards provided in section 165 of the Code of Criminal Procedure were not followed, anything recovered on a defective search of this kind must be returned." However, in *Sheonath Prasad v. State of Bihar*, A.I.R. 1968 SC 1517 (India), a two judge bench of the Court, in context of Section 17 of the Bihar Sales Tax Act of 1947, since repealed by Act 19 of 1959 took the view that the provisions of the Code of Criminal Procedure do not apply to the search and seizure provisions under the Bihar Sales Tax Act. No authority has been cited to support this proposition. It is submitted that the position taken by the Division Bench in this case is at odds with the Constitution Bench in *Jhaver*).

106. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1058-59 (1975); see also Upendra Baxi, "A known but an indifferent judge": *Situating Ronald Dworkin in contemporary Indian jurisprudence*, 1 INT'L. J. CONST. L. 557, 562 (2003).

107. See Ronald Dworkin, *supra* note 112 at 1064, 1065.

with the general principles of law in the area in which the case has arisen.<sup>108</sup> A legal claim that makes illegally obtained evidence inadmissible, as made by a criminal defendant at a trial, must be justified by the general legal principles in evidence law for it to be accepted. In other words, if it can be shown that the legal claim whereby illegally obtained evidence is inadmissible is based on existing general principles of evidence law, then such a claim would be based on a legal right that the criminal defendant is trying to enforce in his or her trial. Such a claim would not be based on a fundamental right granted to all criminal defendants, for example, under Article 20 of the Indian Constitution. Such a claim would be based on general principles of evidence law and would exist independent of any fundamental rights that may or may not flow from Article 20 or any other provision of the Indian Constitution. Dworkin's rights thesis applies to the question of admissibility of illegally obtained evidence, which states as follows:

**The accused in a criminal case has a right to a decision in his favour if he is innocent, but the state has no parallel right to a conviction if he is guilty.** The court may therefore find in favor of the accused, in some hard cases testing the rules of evidence, for example, on an argument of policy that does not suppose that the accused has any right to be acquitted.<sup>109</sup>

The enboldened part of the above quoted passage has been called the "criminal law exception" and has been subject of significant commentary.<sup>110</sup> The criminal law exception has been criticized on the ground that it involves "an assumption concerning the nature of criminal proceedings that ignores a fundamental aspect regarding who and what the State represents in a criminal trial."<sup>111</sup> What competes with the "perceived rights of the accused" is the right of the victim of the alleged crime to obtain justice and the State acts as a representative of that right.<sup>112</sup> Thus Dworkin's thesis is criticized on the ground that he fails to take into consideration the rights of the victim of the crime, something that is inconsistent with his own thesis.<sup>113</sup> Retributive theory of justice is pressed into service to support this attack

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108. Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L. J. 353, 355-56 (1997) ("We justify legal claims by showing that principles that support those claims also offer the best justification of more general legal principles in the doctrinal area in which the case arises."); See also Richard A. Posner, *Conceptions of Legal "Theory": A Response to Ronald Dworkin*, 29 ARIZ. ST. L. J. 377 (1997) ("Dworkin's idea of "theory," specifically of the kind that should guide judges faced with difficult cases, requires that judges "justify legal claims by showing that principles that support those claims also offer the best justification of more general legal practice in the doctrinal area in which the case arises") (internal citations omitted).

109. See Ronald Dworkin, *supra* note 112 at 1077 (emphasis added).

110. See e.g., H. Scott Fairley, *The Asymmetry of Ronald Dworkin's Rights Thesis in Criminal Cases: A Troublesome Exception*, 7 PEPP. L. REV. 373 (1980).

111. *Id.* at 375.

112. *Id.* at 380-381.

113. *Id.* at 381

on Dworkin's thesis.<sup>114</sup> This criticism, however, does not hold water when the underlying principles that justify the exclusion of illegally obtained evidence are closely examined.

The procedure whereby crimes are investigated and criminals are punished have been divided into two categories: the Crime Control Model and the Due Process Model.<sup>115</sup> Whereas central to the Crime Control Model is the repression of criminal conduct, central to the Due Process Model is the reliability of the fact-finding process.<sup>116</sup> The presumption of guilt becomes a necessary part of the Crime Control Model because the model is designed to increase efficiency in suppressing crime at the cost of accuracy in the fact-finding part. But in the Due Process Model, the presumption of guilt has no place because this model is based on the assumption that the "stigma and loss of liberty that is embodied in the end result of the criminal process is ... the heaviest deprivation that government can inflict on the individual."<sup>117</sup> But there is a deeper principle that underlies the Due Process Model, abuse of discretionary power in criminal process.<sup>118</sup> Thus, the Due Process Model rejects the crime-suppression efficiency principle of the Crime Control Model "in the interest of preventing official oppression of the individual."<sup>119</sup> It would hardly require any detailed exposition to show that the British, Indian, and American systems of criminal administration squarely fall into the Due Process Model.

In any system that falls in the Due Process Model, it would be incorrect to argue that the State prosecutes the allegedly guilty as a representative of the victim in order to obtain retributive justice for the victims of the crime. The State prosecutes the allegedly guilty because it is the State's duty to enforce the criminal laws of the land and to punish those who have broken those laws. The State, as enforcer and upholder of the law, cannot itself break the very laws it exists to uphold. The discretion of the judge to exclude illegally obtained

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114. *Id.* at 382.

115. Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 9, 13 (1965); See Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964) (the distinction between the crime control model and the due process model have come to be widely respected and well accepted in the literature on criminal procedure and have received critical commentary); See Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009 (1974).

116. *Id.* at 9, 14.

117. *Id.* at 16.

118.

[P]ower is always subject to abuse, sometimes subtle, other times, as in the criminal process, open and ugly. Precisely because of its potency in subjecting the individual to the coercive power of the state, the criminal process must, on this model, be subjected to controls and safeguards that prevent it from operating with maximal efficiency. According to this ideology, maximal efficiency means maximal tyranny.

*Id.*

119. *Id.*

evidence under the Unfair Operation Principle is, in principle, not a truly discretionary rule, the application of which would change from one case to another depending on the facts of the cases.<sup>120</sup> Therefore, in principle, if the State has gathered evidence that it proposes to produce at trial to establish the guilt of the accused by illegal means, or by taking unfair advantage against the accused, such evidence must be excluded.

The power of a judge to exclude illegally obtained evidence under the Unfair Operation Principle exists for the benefit of the accused and not for the benefit of the State.<sup>121</sup> The principle of relevancy exists to ensure accuracy in the fact-finding procedure (i.e. the trial). A rule of evidence that mandates that in order to determine the admissibility of that evidence, first the evidence must be examined to determine whether the evidence has any weight or is more or less reliable than any other piece of evidence, betrays the very fundamental principle underlying the common law of evidence (i.e. admissibility of evidence and the weight of evidence are two completely distinct things and one should never be mistaken for the other).<sup>122</sup> Evidence that is relevant might not be very reliable and thus, the court might not attach strong or even any weight to that piece of

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120. In a Dworkinian world, a judge cannot have uncontrolled discretion. See John W. Van Doren, *Theories of Professors H.L.A. Hart and Ronald Dworkin – A Critique*, 29 CLEV. ST. L. REV. 279, 296 (1980); Upendra Baxi, “*A known but an indifferent judge*”: *Situating Ronald Dworkin in contemporary Indian jurisprudence*, 1 INT’L. J. CONST. L. 557, 559-60 (2003); Ian Duncanson, *Power, Interpretation and Ronald Dworkin*, 9 U. TAS. L. REV. 278 (1989) (the thesis advanced by this article attacks the judicial discretion involved in the practice of the unfair operation principle, primarily, on the ground that the unfair operation principles gives uncontrolled discretion to the judge to exclude or include illegally obtained evidence in face of a clear principles objection to its inclusion and further that the judges exercise that discretion on principally incorrect grounds).

121. Fraenkel, *supra* note 12 at 372; Tracy Maclin, *When the Cure for the Fourth Amendment is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 5, 7, 16, 24, 45 (1994) (even in a world where the fourth amendment did not exist, the prevention of improper government action remains the primary driving factor for the articulation of a different set of exclusionary rules).

Freed from the constraints of Fourth Amendment language and precedent, this Article has proposed a reconceptualization of search and seizure law along with both procedural and substantive lines. Procedurally, it has focused on *the prevention of improper governmental action* by proposing that law enforcement officers be required, prior to all nonexigent searches or seizures, to seek authorization from a decisionmaker (not necessarily legally trained) who is sufficiently isolated from the action in question to make an independent evaluation of it.

See Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 106 (1991).

122. See John H. Wigmore, *Book Review*, 3 ILL. L. REV. 477, 477-78 (1909); Charles L. Barzun, *Rules of Weight*, 83 NOTRE DAME L. REV. 1957, 1959 (2008) (John Wigmore, hailed as “the century’s leading evidence scholar,” while reviewing a book by CHARLES MOORE, *A TREATISE ON FACTS OR THE WEIGHT AND VALUE OF EVIDENCE* (1908) that argued for probative value of evidence as the test of admissibility, condemned Moore’s book as moral treason for making such a suggestion).



evidence. But that is an exercise that can logically be undertaken only when the evidence is there to be examined (for the purpose of finding out its probative value). Therefore the rules whereby admissibility of evidence is determined and the rules whereby weight is assigned to the admitted evidence exist in two mutually exclusive compartments and cannot intersect.<sup>123</sup> No rule of admissibility mandates that a piece of evidence that is of little or no weight is inadmissible in evidence because it is of little or no weight.<sup>124</sup> The British Court of Criminal Appeal opinion in *R. v. Payne* supports this point.<sup>125</sup> In that case, which involved a drunk driving charge, the court excluded the evidence of a doctor who had examined the accused while he was in police custody.<sup>126</sup> The accused was told that the doctor's duty was only to see if he had any illness or disability and not to give an opinion on the accused's fitness to drive.<sup>127</sup> The doctor was called as a prosecution witness to give evidence to the effect that the accused was drunk and thus unfit to drive.<sup>128</sup> The evidence of the doctor was excluded and the conviction was quashed.<sup>129</sup> Now, if weight of the evidence was the key consideration, then the doctor's evidence could not be excluded, yet it was. Therefore, it is incorrect to say that it is the weight of the evidence that is the key consideration when deciding whether or not evidence should be excluded. The absence of a clear understanding of the theoretical and practical distinction between "admissibility" and "relevancy" is the root cause of a conceptual confusion in the Supreme Court of India's jurisprudence on the point. However,

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123. See Barzun, *supra* note 128 at 1966-67 (to insist otherwise would be to approve of Jeremy Bentham's theory of "free-proof" whereby, "... judges found facts entirely unencumbered by rules." But such a theory, on the authority of Wigmore, has been roundly rejected and forms no part of Anglo-Saxon jurisprudence of law of evidence prevalent in the U.K., U.S.A., and India as well as other similar jurisdictions such as Australia and Canada).

124. See, e.g., Geoffrey S. Corn & Kevin Cieply, *The Admissibility of Confessions Compelled by Foreign Coercion: A Compelling Question of Values in an Era of Increasing International Criminal Cooperation*, 42 PEPP. L. REV. 467, 482-84 (2015) (speaking in the context of admissibility of confessions, obtained by coercion albeit by foreign government officials, in a criminal trial in the United States, the authors observe that, "... reliability is not the linchpin of admissibility analysis for coerced confessions ... while excluding inherently unreliable evidence is a *potential* interest served by due process, reliability is not the dispositive interest") (emphasis supplied); See also *New Jersey v. T.L.O.*, 469 U.S. 325, 345 (1985) (where the U.S. Supreme Court, relying on Federal Rules of Evidence, Rule 401 held that, "... it is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

125. *R. v. Payne*, [1963] 1 W.L.R. 637 (U.K.).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

to be fair, the Supreme Court of India is not the only court that has fallen prey to this confusion.<sup>130</sup>

*B. Dworkin, Discretion and The Unfair Operation Principle*

On one hand, the Supreme Court of India has clearly articulated the Unfair Operation Principle where illegally obtained evidence is not admitted, though the principle is stated in terms that really makes it discretionary on the judge whether or not to admit such evidence.<sup>131</sup> The key consideration while exercising this discretion is the probative value of this evidence, in absence of which the accused person will be acquitted. A similar rationale has been expressed in the United States.<sup>132</sup> The problem with this approach, in Dworkinian terms, is as follows: for all legally obtained evidence, the standard of review applied for admissibility is relevancy, whereas for illegally obtained evidence, the standard of review applied is relevancy plus the weight of that evidence. This legal principle applied to illegally obtained evidence is disavowed in two circumstances. First, of course, is legally obtained evidence. And second is evidence that is otherwise relevant but

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130. See, e.g., *Herman King v. Queen*, [1969] 1 AC 304 (PC) at 311, 314 (where evidence was illegally obtained by a police constable after searching the accused acting pursuant to a warrant that did not authorize the search of a person. In fact Lord Hodson observed that, "... the search was not on the face of it justified by the warrant nor in their Lordship's opinion can authority for search of any person be implied from the language of the section without express authorisation." But the illegally obtained evidence was not excluded by the law lord because, "[a]lthough the search was not authorised by the Dangerous Drugs Law or the Constabulary Force Law there was no evidence that the appellant was willfully misled by the police officers or any of them into thinking that there was such authorisation." although it is beyond the stated brief of this article to subject *Herman King* to a closer scrutiny here, but there is ample British authority on the point clearly pointing to the same direction as the Supreme Court of India, i.e. it is the weight assignable to the evidence that must be looked into while deciding whether the evidence should be excluded and not the violations of law by the police/investigators and the consequences of those violations to the reputation of the judicial system and the rights of the individual. The position in the United States is different and is discussed at length in Part III of this article).

131. The Unfair Operation Principle is a part of British jurisprudence on this point as well. The considerations on which the discretion to exclude evidence can be exercised by a British judge, though, seem to be based on the test of "wilful misleading" by the police of a suspect to obtain evidence. See, e.g., *Herman King v. Queen*, [1969] 1 AC 304 (PC) at 314. (If the evidence is obtained by "a trick" the judge is allowed to exclude that evidence. The consideration under British law seems to be that allowing such evidence would render the conviction unsafe. This consideration is more concerned with reliability of the evidence).

132. See Slobogin, *supra* note 127 at 5 (Taking a novel approach the Fourth Amendment analysis Professor Slobogin analyzes the issue by assuming that the Fourth Amendment does not exist. In this context he notes: "... the primary state objective implicated by searches and seizures is effective law enforcement. Because of the significant harm that crime causes the the state's citizens and to the state's social, economic, and cultural fabric, the government's interest in apprehending offenders and securing evidence for their conviction is extremely weighty.").

still not permitted to be admitted, for example, evidence covered by spousal privilege<sup>133</sup> or state privilege.<sup>134</sup> It is no one's case, nor has it ever been, that evidence excluded consequent to the rule of spousal privilege or state privilege is so excluded because this evidence is not relevant or does not have enough weight. The courts have never lamented that the truth-seeking function of a criminal trial is jeopardized by excluding this otherwise relevant evidence.<sup>135</sup> The reasons for such exclusion reside outside the principles of relevancy or the principles used to ascertain the weight of relevant—and consequently admissible—evidence. The refusal to exclude illegally obtained evidence, therefore, on the ground that it is relevant and carries weight, is a principle that flies in the face of every accepted general principle of evidence law and is inconsistent with the theory of evidence law. In Dworkinian terms, such inconsistency is unfair.<sup>136</sup> Not only is admitting illegally obtained evidence inconsistent with a proper theoretical understanding of the rules of admissibility that underlie all common law of evidence, there are additional illegalities that may follow from them that are completely impermissible under the general principles of evidence law.

For example, as noted by the Australian High Court in *Queen v. Ireland*,<sup>137</sup> admitting illegally obtained evidence may cause a prejudice to the accused because inferences adverse to the accused are liable to be drawn from the same.<sup>138</sup> Evidence law permits the derivation of such adverse inferences but those principles of evidence law are based on an underlying assumption that the evidence, on the basis of which an adverse inference is drawn, is legally admissible. But in the case of illegally obtained evidence, the law of adverse inferences works unfavorably against the accused, thus causing a grave injustice and creating inconsistency in the administration of evidence law.<sup>139</sup> If an adverse

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[C]ommunications during marriage. – No person who is or has been married, shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

See Indian Evidence Act, 1872, No. 1, Acts of Parliament, § 122.

134. *Id.* § 123 (“Evidence as to affairs of State. – No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.”).

135. See, e.g., Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2476 (1996).

136. See Dworkin, *supra* note 114 at 362.

137. *Queen v. Ireland*, [1970] 126 CLR 321 (Austl.).

138. *Id.* at 331.

139. In the context of jury trials, the importance of protecting the jury from evidence that it

inference is derivable only from legally admissible evidence, the derivation of an adverse inference from evidence that, in principle, is inadmissible because it was illegally obtained, is a grave theoretical inconsistency that can be remedied only by disallowing the admission of such illegally obtained evidence.<sup>140</sup> In the words of Chief Justice Barwick of the Australian High Court, in such cases “evidence of relevant statements or admissions obtained by conduct in breach of that rule will not for that reason become irrelevant and inadmissible. The breach of the rule will afford a ground for considering the exercise of judicial discretion to exclude such evidence.”<sup>141</sup> Therefore, the reason why illegally obtained evidence is inadmissible is not that this evidence has been found irrelevant by application of the rules of admissibility. If that were the case, a consideration of the question of how the evidence was obtained would not be required. The reason why illegally obtained evidence becomes inadmissible is the manner in which it has been obtained.<sup>142</sup> Thus, Chief Justice Barwick observed, “convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion.”<sup>143</sup> Justice Frankfurter, in the famous Stomach Pumping Case, similarly observed, “convictions cannot be brought about by methods that offend a ‘sense of justice.’”<sup>144</sup>

The price is too high because the conviction in such cases, to quote the Supreme Court of Canada in *R. v. Collins*, brings the administration of justice into disrepute. In words of Justice Lamar:

[M]isconduct by the police in the investigatory process often has some effect on the repute of the administration of justice, but Section 24(2) is

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cannot properly evaluate has been stressed. *See, e.g.*, Edmund M. Morgan & John MacArthur Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 919 (1937).

140. *See, e.g.*, *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391-92 (1920) (The government in this case argued that it should be allowed to use the knowledge that it has obtained from an unconstitutional seizure. Justice Holmes, rejecting this argument, observed that accepting such an argument would reduce the Fourth Amendment to a “form of words.” This judicial authority supports the proposition that an inference of facts, while permissible to be drawn in a criminal trial, and the extent of such derivation is controlled by the law of evidentiary presumptions, which is a sub-set of general law of evidence, the law of evidentiary presumptions is applicable only to relevant evidence legally obtained).

141. *Queen v. Ireland*, [1970] 126 CLR 321, 333 (Austl.).

142. *Id.* at 334.

143. *Id.* at 335.

144. *Rochin v. California*, 342 U.S. 165, 173 (1952) (in this case, the accused Rochin was suspected of selling narcotics. Three police officers, deputy sheriffs, forcibly entered Rochin’s bedroom in his house. Rochin swallowed two morphine capsules. After being arrested, he was taken to a hospital where a doctor, against his will, forced an emetic solution into his stomach through a tube. This “stomach pumping” caused Rochin to vomit, which contained the two morphine capsules that he had earlier swallowed. The morphine capsules obtained were held inadmissible since allowing these to be admitted would amount to “sanctioning a patently illegal conduct by the police”).

not a remedy for police misconduct, requiring the exclusion of the evidence if, because of this misconduct, the administration of justice was brought into disrepute . . . [T]he purpose of Section 24(2) is to prevent having the administration of justice brought into *further disrepute* by the admission of evidence in the proceedings. This further disrepute will result from the admission of evidence that would deprive the accused of a fair hearing, or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies. It will also be necessary to consider any disrepute that may result from the exclusion of evidence. It would be inconsistent with the purpose of Section 24(2) to exclude evidence if its exclusion would bring the administration of justice into greater disrepute than would its admission.<sup>145</sup>

It is correct that the Canadian Charter of Rights and Freedoms specifically provides in Section 24(2) that if evidence has been obtained in a manner that infringes or denies any rights or freedoms guaranteed by the Charter, such evidence shall be excluded if it is established under the circumstances that the admission of the same would bring administration of justice into disrepute. But it can hardly be anyone's case that admission of illegally obtained evidence started bringing administration of justice into disrepute only after Section 24(2) of the Canadian Charter was enacted. The Australian and Canadian positions fall eminently within the Due Process model.

Upon a proper jurisprudential analysis, it is found that the Indian system, based on the British system and similar to the Australian, Canadian and American systems, falls into the Due Process Model category where rights of the accused are more important. In this system, the State has no right of obtaining a conviction of a guilty person. In Professor Packer's words: "[D]oubts about the ends for which power is being exercised create pressure to limit the discretion with which that power is exercised."<sup>146</sup> Once these doubts are dispelled it is discovered that the Unfair Operation Principle is not truly discretionary in excluding illegally obtained evidence. In Dworkian terms, under the Unfair Operation Principle, illegally obtained evidence ought to be excluded on principle, notwithstanding its probative value, if the State has presented sufficient evidence that it has illegally obtained.<sup>147</sup> This exclusion has nothing in particular

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145. R. v. Collins, [1987] 1 S.C.R. 265 (Can.).

146. Packer, *supra* note 121 at 20.

147. See, e.g., Mark M. Stavksy, *Ronald Dworkin and the Fourth Amendment: A Rights-based Rationale*, 14 LEGAL STUD. F. 163, 168 (1990) ("Thus, a judge must refuse to consider illegally obtained evidence – not as a part of his function as a finder of fact or law – but because of his duty as a government official not to utilize an illegal search and seizure in order to function better as a judge. For the government possibly to be injured through the resultant damage to the accuracy of the guilt-finding process is a cost, but a cost in social policy. This cost must be borne; the alternative is far worse").

to do with the accused. It has everything to do with the State.<sup>148</sup> The State being the upholder of law cannot, on principle, be allowed to break the law in order to secure a conviction.<sup>149</sup> In a study to understand the deterrent effect of the Exclusionary Rule in the United States, several Chicago Narcotics Officers went on record saying that the Exclusionary Rule is necessary to prevent abuse of powers by police officers.<sup>150</sup> This study supports the rationale behind the Unfair Operation Principle being advanced in this Article, i.e. the Unfair Operation Principle exists to control the State and not to protect the accused. In the aforementioned study, the police officers conceded that the alternative to the Exclusionary Rule is “turning the police department loose,” creating a “military state” or a “police state” of some sort that has “enormous possibility of abuse.”<sup>151</sup> The use of phrases like “military state” or “police state” is understandable, as one commentator observes, because the American public developed a “heightened sensitivity to police excesses at home” when they learned about Hitler’s Germany and Stalin’s Russia.<sup>152</sup> Of note is the fact they were used by the police officers themselves, which indicates a very clear awareness on their part that their powers are liable to be misused unless a strong deterrent is created and enforced rigorously.

The argument that the Unfair Operation Rule will stand in the way of effectively investigating crimes and prosecuting criminals is unpersuasive for two reasons. First, admissibility of illegally obtained evidence as a matter of evidence law is a legal proposition that can only be maintained on a flawed understanding of evidence law. When the law is understood properly it becomes clear that illegally obtained evidence is inadmissible. Second, the data does not support the claims of high costs and reduced effectiveness of the police in investigating crimes and the prosecutors in prosecuting criminals.<sup>153</sup> The Unfair Operation

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148. See Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1393 (1983) (speaking in the context of the U.S. Constitution Fourth Amendment, Professor Potter Stewart noted that, “[i]t is the price the framers anticipated and were willing to pay to ensure the sanctity of the person, the home, and property against unrestrained governmental power.” Whereas in the U.S. Constitution, the principle has been constitutionalized, the case remains the same in India where the principle exists as a part of common-law of evidence).

149. Packer, *supra* note 121 at 25 (“It causes disrespect for law when there are great deviations between what the law on the books authorizes the police to do and what everyone knows they actually do.”).

150. Myron W. Orfield, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1051-1054 (1987).

151. *Id.* at 1051-1052.

152. Abraham S. Goldstein, *supra* note 122 at 1011.

153. See, e.g., Thomas Y. Davies, *A Hard Look at What We Know (And Still Need to Learn) about the “Costs” of the Exclusionary Rule: The NIJ Study and Others Studies of “Lost” Arrests*, AM. B. FOUND. RES. J. 611 (1983) (This study has been cited with approval by the U.S. Supreme Court (Justice White) in *United States v. Leon*, 468 U.S. 897, 907 (1984), a leading Fourth Amendment case that has been discussed in this part of the article and has also been hailed as the

Principle is the Indian equivalent to the Exclusionary Rule of the United States with the distinction that the Unfair Operation Principle is based on the traditional common law of evidence and not constitutional provisions. The acquittal of the factually guilty but the legally innocent is an unintended consequence under the Unfair Operational Principle, a price that must be paid under the Due Process Model.

**PART III – THE UNFAIR OPERATION PRINCIPLE AS THE INDIAN  
“EXCLUSIONARY RULE” – A FOURTH AMENDMENT COMPARISON**

The first and perhaps the most widely cited U.S. Supreme Court opinion on the point is the 1885 case of *Boyd*.<sup>154</sup> The petitioner in this case was charged with importing merchandise into the U.S. without payment of custom duties and therefore, had committed a fraud under a Congressional statute passed in 1874.<sup>155</sup> The statute of 1874 provided that upon the order of the court, which was to be passed at the court’s discretion, the defendant was required to produce such “book, invoice or paper” in the court as the prosecution might require on the ground that such book, invoice or paper will tend to prove any allegation made by the prosecution.<sup>156</sup> But if the defendant fails to or refuses to produce such book, invoice or paper, “the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the Court.”<sup>157</sup> An order under this statute was passed by a

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more careful and balanced assessment of all available empirical data by academic commentators); See Wayne R. LaFave, “*The Seductive Call of Expediency*”: *United States v. Leon, It’s Rationale and Ramifications*, U. ILL. L. REV. 894, 904 (1984) (Professor Davies found that the, “... most striking feature of the data is the concentration of illegal searches in drug arrests (and possibly weapons possession arrests) and the extremely small effects in arrest for other offences, including violent crimes.” Professor Davies concluded that the empirical data cast a doubt of the alleged high cost of the exclusionary rule); See also Maclin, *supra* note 99 at 43-44.

154. *Boyd v. United States*, 116 U.S. 616 (1885) (though it is beyond the stated brief of this article to establish that *Boyd* is in fact the first U.S. Supreme Court opinion on the point, a brief survey of U.S. Supreme Court opinions on the point discloses that in every subsequent Fourth Amendment case of any doctrinal substance cited *Boyd*); See *Weeks v. United States*, 232 U.S. 383, 390 (1914); *Mapp v. Ohio*, 367 U.S. 643, 646, 662 (1961); *Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 696 (1965); See also Fraenkel, *supra* note 12 at 366 (where *Boyd v. United States* is stated to be the first case on the point; and *infra* note 180 and accompanying text); See David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1740 (2000) (Professor Sklansky also notes that *Boyd v. United States* is the “first major interpretation” of the Fourth Amendment).

155. *Boyd v. United States*, 116 U.S. 616, 617-18 (1885); The word “petitioner” is used in this part of the paper to refer to the party that was before the U.S. Supreme Court alleging a breach of its Fourth Amendment rights. The traditional U.S. term appellee has not been used.

156. *Id.* at 619-20.

157. *Id.* at 620.

lower court requiring him to produce certain invoices that the prosecution deemed necessary in their case for seizure and forfeiture of property of the petitioner.<sup>158</sup> The invoices were accordingly produced by the petitioner, but they objected to the reception of these invoices as evidence on the ground that no evidence can be compelled from the petitioner in a suit for forfeiture and to the extent the impugned statute compelled production of the evidence to be used against claimant was unconstitutional and void.<sup>159</sup>

Note here the similarity between the provisions of the NDPS Act that were under consideration in *Baldev Singh* and the presumption raised by the statute of 1874. In *Baldev Singh*, the trial court was mandatorily required to presume the guilt of the person from whom illegal drugs were recovered. The burden of proving innocence therefore was shifted to the accused, with prosecution only required to establish that illegal drugs were recovered from the person of the accused. The statute of 1874 is similar to the extent that it created an adverse presumption to be drawn from the refusal or failure to produce documents. But, it pushed the presumption too far. It was not simply a rebuttable adverse presumption that was required to be drawn in *Boyd* – the refusal or failure was to be taken as a confession of the allegation stated in the motion. It was perhaps such a drastic provision that caused the constitutional challenge to be raised in this case.<sup>160</sup>

The question before the U.S. Supreme Court in *Boyd* follows:

Is a search or seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws, is such a proceeding for such a purpose an "unreasonable search and seizure" within the meaning of the Fourth Amendment of the Constitution? or, is it a legitimate proceeding?<sup>161</sup>

The Court took a comparative approach in order to answer this question and heavily relied on the English case of *Entick v. Carrington* as well as English statutes and court procedures.<sup>162</sup> In fact, *Entick* is understood as the case where

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158. *Id.* at 617-18.

159. *Id.* at 618.

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[B]ut [the statute] declares that if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production, for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of.

*Id.* at 621-22 (Justice Bradley for the Court, Justice Miller and the Chief Justice concurring).

161. *Id.* at 622.

162. *Id.* at 627 (Justice Bradley thought that in the nature of the things it would be desirable to 'quote somewhat largely' from this celebrated British decision.); *Entick v. Carrington*, 19 Howell's State Trials 1029 (*Entick v. Carrington* was described by Justice Bradley as "one of the permanent monuments of British Constitution."); *Boyd v. United States*, 116 U.S. 616, 623-24, 632 (1885).



the groundwork for all subsequent opinions was laid, a reality that is also evident upon a reading of the majority of subsequent cases and literature in this area that cite this case as an authority.<sup>163</sup> The Court in *Boyd* took the position that, while seizure of stolen property and seizure of goods forfeited for a breach of revenue laws is an old and accepted legal position both in England and the U.S., in the current case, an attempt to extort from a person his private papers to be used against such person in a Court was not something that was a part of the accepted common law tradition.<sup>164</sup> In *Entick* the issue arose, not so much from the Secretary of State's power to issue a general search warrant, but from the "manner in which" this power was exercised by him.<sup>165</sup> Lord Camden in *Entick*, held that obliging a man to accuse himself was a cruel and unjust practice not required by law.<sup>166</sup> Evidence obtained from a search conducted in a manner that amounts to trespass and invasion into a man's property should be disallowed on the same principle.<sup>167</sup> Lord Camden held that a compelled confession and evidence obtained (in that case, a man's private papers) by illegally invading into a man's privacy both stand at the same footing.<sup>168</sup> Accepting this as the true position of the drafters of the Fourth Amendment to the U.S. Constitution and finding a convergence in the Fourth and Fifth Amendment, the Court held:

[A]ny forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.... [F]or the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment.... [W]e have been unable to perceive that the seizure of man's private books and papers to be used in evidence against him is substantially different from compelling him to be

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163. Osmond K. Fraenkel, *supra* note 12 at 364.

164.

[T]he seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by the English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government.

*Boyd v. United States*, 116 U.S. 616, 623-624 (1885) (Internal footnotes omitted) (Justice Bradley for the Court, Justice Miller and the Chief Justice concurring, observing that, "Whereas, by the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property").

165. *Id.* at 627.

166. *Id.* at 629.

167. *Id.* at 627, 629.

168. *Id.* at 630.

a witness against himself.<sup>169</sup>

On these grounds, the Court held that the illegally seized evidence, which the lower court admitted, was void and that the practice of admitting illegally obtained evidence was unconstitutional.<sup>170</sup>

In the 1914 case of *Weeks v. United States*, considered by some as the first important case on the point, the petitioner was charged with the use of mail for the purpose of transporting coupons or tickets representing chances or shares in a lottery or gift enterprise in violation of the U.S. federal law.<sup>171</sup> The petitioner/defendant was arrested by the police without a warrant and his house was searched by the police and by a U.S. Marshal without a warrant.<sup>172</sup> Certain papers were recovered as a result of this warrantless search that were sought to be introduced into evidence during the trial, to which the defendant objected on the ground that they had been obtained in violation of the Fourth Amendment.<sup>173</sup> Two points from *Weeks* are worth noting for the purpose of this article, which

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169.

[A]s every American statesmen, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures.

*Id.* at 626-27, 630, 633 (Justice Bradley for the Court, Justice Miller and the Chief Justice concurring, the “monument of English freedom” that Justice Bradley is referring to is of course *Entick v. Carrington*).

170. *Id.* at 638 (There are two points that must be mentioned in passing, but are not directly relevant for our discussion. First, the court, in order to declare all these acts as unconstitutional, first needed to hold that a forfeiture proceeding was a criminal proceedings for the purposes for the Fourth Amendment, which it did. Second, the concurring opinion of Justice Miller, in which the Chief Justice concurred is not an entirely concurring opinion. There is a partial dissenting note in that opinion at page 641, where Justice Miller held: “I cannot conceive how a statute aptly framed to require the production of evidence in a suit by mere service of notice on the party, who has that evidence in his possession, can be held to authorize an unreasonable search or seizure, when no seizure is authorized or permitted by the statute.” Though a critique of this holding is beyond the scope of this article, it is submitted that Justice Miller has not given due consideration to the extreme adverse inference of a deemed confession that the statute of 1874 required the courts to draw should the defendant refuse or fail to produce his personal paper).

171. *Weeks v. United States*, 232 U.S. at 383, 386 (1914); Charles Alan Wright, *Must the Criminal go free if the Constable Blunders?*, 50 TEX. L. REV. at 736 (1972). (Professor Wright is of the view that the “exclusionary rule” was first announced by the U.S. Supreme Court in *Weeks v. United States*, 232 U.S. at 383 (1914). However, a review of several U.S. Supreme Court opinions discloses that the first case was *Boyd*, not *Weeks*); See also Osmond K. Fraenkel, *supra* note 12 at 366.

172. *Id.* at 386.

173. *Id.* at 388-89.

follow.<sup>174</sup>

First is what we can designate as a “constitutional dimension” of the criminal procedure. Relying on *Boyd* and *Entick*, it was first held that:

The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.<sup>175</sup>

The Court was of the view that allowing the use of letters and private documents that have been seized illegally in a criminal trial against the accused would make the Fourth Amendment protections meaningless.<sup>176</sup> The Supreme Court of India in *Baldev Singh*, speaking through Chief Justice Dr. Anand, expressed a similar view when it was observed that the means employed to achieve the results must always remain above question otherwise the legitimacy of the judicial process itself may come under question.<sup>177</sup> Both the U.S. Supreme Court and the Supreme Court of India stress that the use of illegally obtained evidence in a criminal trial will bring into question the legitimacy of the judicial process itself.<sup>178</sup>

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174. *Id.* at 384. (Note here that the holding in *Weeks* was restricted a bit by the U.S. Supreme Court in *Walder v. United States*, 347 U.S. at 62 (1954). In this case it was held that in order to impeach the testimony of the accused, offered under direct examination, the testimony of an officer who has participated in an earlier conducted unlawful search may be used. The unlawful search and trial in this case were not connected. the legal similarity with the Indian law here is noteworthy. as per section 162 of the Code of Criminal Procedure, 1973 in India, a statement given to a police officer, in India, is not admissible in the Court except in three situations, one of which is the use of the police statement by the defence to impeach a prosecution witness during cross-examination. The difference, of course, is that the *Walder* principle in India is applicable not to the accused but to all prosecution witnesses. The point is worth noting but a detailed elaboration of the same is beyond the scope of this article); *See also Harris v. New York*, 401 U.S. at 222 (1971) and *Oregon v. Hass*, 420 at U.S. 714 (1975).

175. *Id.* at 392.

176. *Id.* at 393.

177. *State of Punjab v. Baldev Singh*, (1999) 6 SCC 172, 1999 (India).

178. *See Rahman, supra* note 65 (Commentary in India as well the United States has highlighted this point consistently). For Indian commentary on this point; *See e.g.*, A. M. Bhattacharjee, *Article 21 and “Due Process” and “Exclusionary Rule of Evidence”*, 3 S.C.C. (JOURNAL) at 32 (1983); Ashish Chugh, *A Reassessment of the Self-Incrimination Clause*, 8 S.C.C. (JOURNAL) at 19 (2006); Ashish Chugh, *The Exclusionary Rule of Evidence with the emergence of an analogous “Fourth Amendment” in the Indian Constitution*, 7 S.C.C. (JOURNAL) at 24, 25 (2009) (These articles attempt to make constitutional arguments by advocating for a constitutional right against admissibility of illegally obtained evidence by reading into the relevant provisions of

The issue, as it is often argued by the State in such cases, is presented as a conflict between the State's authority to catch and punish a person guilty of a crime versus the social cost of letting such a person go free.<sup>179</sup> Such position is often defended by the State, as it was in *Weeks*, by invoking the legal rule whereby the courts would not inquire into the manner in which the evidence has been obtained, so long as the evidence is relevant.<sup>180</sup> The Supreme Court of India in *Pooran Mal* came in favour of accepting such a view when it characterized search and seizure as weapons in the armoury of those whose duty it is to maintain social security in its broadest sense.<sup>181</sup> An argument similar to the one advanced by the State in *Weeks* was made by the State in *Pooran Mal* and, unlike *Weeks*, the argument was accepted.<sup>182</sup> In fact, from 1954 the view of the Supreme Court of India has been heavily in favour of the State.<sup>183</sup> However, after *Baldev Singh*, such a heavily State-deferential view has been rejected in favour of a view respectful of the fundamental rights of the people.<sup>184</sup>

Second is the application of this (first) principle of constitutional law to the facts of the case whereby it was held that the U.S. Marshal could only have invaded the house of the defendant "when armed with a warrant issued as required by the Constitution."<sup>185</sup> This is a position that has attracted scholarly criticism of the highest order.<sup>186</sup> Between the seemingly conflicting requirements of having every search accompanied by a constitutionally valid warrant and the search being reasonable, it has been very convincingly argued that while framing the Fourth Amendment the drafters intended to make the searches and seizures reasonable and not warranted.<sup>187</sup> In any event, the Court held that permitting the letters and private papers of the petitioner obtained consequent to a warrantless search in violation of the Fourth Amendment was prejudicial to the petitioner.<sup>188</sup>

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the Indian Constitution, most notably Article 20, an equivalent of the US Constitution's Fourth amendment. This attempt has been made before the Supreme Court of India at several occasions as well some of those cases are analyzed in detail in this article. This article however advocates for exclusions of illegally obtained evidence as a matter of legal right that comes out of the unfair operation principle, which is an existing part of Indian law of evidence, as distinct from reading into the fundamental rights provisions of the Constitution a right against admissibility of illegally obtained evidence).

179. See e.g., Charles Alan Wright, *Must the Criminal go free if the Constable Blunders?*, 50 TEX. L. REV. 736, at 737 (1972).

180. *Weeks v. United States*, 232 U.S. 383, at 394 (1914).

181. *Pooran Mal v. Director of Inspection*, (1974) 1 SCC 345, at 356 (India).

182. *Id.* at 363-364.

183. See *M. P. Sharma v. Satish Chander*, AIR 1954 SC 300 (India); *Commissioner of Commercial Taxes v. R. S. Jhaver*, AIR 1968 SC 59 (India).

184. *State of Punjab v. Baldev Singh*, (1999) 6 SCC 172, 198-199 (India).

185. *Weeks v. United States*, 232 U.S. 383, at 393 (1914).

186. Akhil Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. at 757 (1994).

187. *Id.* at 771, 774, 780.

188. *Weeks v. United States*, 232 U.S. 383, 398 (1914).

Consequently the judgment of the lower court was reversed.<sup>189</sup>

Another celebrated U.S. Supreme Court opinion relevant for our discussion is 1961 decision given in *Mapp v. Ohio*.<sup>190</sup> This case is more famously known for extending the Fourth Amendment protections, heretofore available only in federal criminal trials, to State criminal trials by invoking the Fourteenth Amendment.<sup>191</sup> This federalism angle is not relevant for this Article; however, the blatant violation of law in which the police officers acted in this case is important. In *Mapp*, police officers forcibly opened the door of the petitioner and gained entrance into her house.<sup>192</sup> When she demanded a search warrant, a piece of paper purported to be a warrant was shown to her, which she “grabbed and placed in her bosom.”<sup>193</sup> It was subsequently recovered from her by use of force and never shown to the courts.<sup>194</sup> She retained a lawyer before police forcibly entered her house, but he was not allowed to meet her.<sup>195</sup> Subsequently, a search was conducted and certain obscene materials were recovered for which she was prosecuted under Ohio law.<sup>196</sup> The evidence obtained by police highhandedness in this case was described by the Court as “evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct.”<sup>197</sup> Regarding the age old question of ‘a criminal going free because of a policeman’s blunder’ the Court observed:

There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine ‘[T]he criminal is to go free because the constable has blundered.’ In some cases this will undoubtedly be the result. But as was said in *Elkins*, ‘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.*<sup>198</sup>

This most ringing endorsement by the U.S. Supreme Court of the duty of the courts of law, especially constitutional courts, to uphold the Constitution and the rule of law, and to ensure that the State is brought to task whenever it acts in violation of the very Constitution and the laws its officials are sworn to protect

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189. *Id.* at 399.

190. *Mapp v. Ohio*, 367 U.S. at 643 (1961).

191. *Id.* at 655-59.

192. *Id.* at 644.

193. *Id.*

194. *Id.* at 644-665.

195. *Mapp*, 367 U.S. at 643, 644

196. *Id.* at 645.

197. *Id.* at 655.

198. *Id.* at 659 (emphasis added) (internal footnotes omitted) (first quoting *People v. Defore*, 242 N.Y. 13, 21 (1926); then quoting *Elkins v. United States*, 364 U.S. 206, 222 (1960)).

and uphold, finds its exact equivalent in the unanimous five judge Constitution Bench of the Supreme Court of India of *Baldev Singh*.<sup>199</sup> On the comparative authority of *Mapp* and, before that, *Boyd* and *Weeks*, which finds an equivalent in *Baldev Singh*, the time has come to solidify an Indian equivalent of the Exclusionary Rule, which finds its most nascent manifestation in *Baldev Singh*.<sup>200</sup>

It must be emphasized that the conflict here is not between a criminal going free or securing a conviction based on evidence collected in violation of the constitution and the laws. The real conflict is between the courts allowing the use of illegally obtained evidence and therefore condoning the unlawful conduct of the State, and enforcing the constitution and the law and, consequently, not allowing the use of evidence that has been illegally obtained by the State. We may compare *Plymouth Sedan* with *Jhaver* and *Wazir Chand*.<sup>201</sup> Whereas in these two cases, articles recovered by the State, consequent to searches and seizures that were found by the Supreme Court of India to be illegal, were ordered to be recovered, in *Plymouth Sedan* the State had brought forfeiture proceedings to forfeit an automobile from which illicit liquor was recovered.<sup>202</sup> The petitioner contested these proceedings on the ground that the forfeiture proceedings were based on evidence obtained in violation of the Fourth Amendment.<sup>203</sup> The trial court accepted this challenge.<sup>204</sup> The U.S. Supreme Court held the Exclusionary Rule was applicable to forfeiture proceedings.<sup>205</sup> But, the Court also observed that the exclusionary rule did not require the State to return the illicit liquor that they had seized.<sup>206</sup> There is, therefore, some consolation to the State that the illegal contraband that they may seize consequent to an illegal search would still be in the safe custody of the State, removed from the streets and unable to cause harm. But to convict an accused on the basis of evidence of such illegally obtained contraband is an anathema to both the U.S. Supreme Court and the Supreme Court of India.

The conflict between the courts allowing the use of illegally obtained evidence and, therefore, condoning—perhaps even encouraging—unlawful conduct by the State and enforcing the Constitution and the law, and

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199. *State of Punjab v. Baldev Singh*, (1999) 6 SCC 172, 198-199 (India).

200. *Id.* at 206 (Chief Justice Dr. Anand for the Court holding that, “If after careful consideration of the material on record it is found by the court that the admission of evidence collected in search conducted in violation of section 50 would render the trial unfair then that evidence must be excluded.”).

201. *Commissioner of Commercial Taxes v. R. S. Jhaver*, AIR 1968 SC 59 (India); *Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965); *Wazir Chand v. State of Himachal Pradesh*, AIR 1954 SC 415 (India).

202. *Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965).

203. *Id.* at 694-695.

204. *Id.* at 695.

205. *Id.* at 696, 701 (Justice Goldberg, speaking for the majority, found it “anomalous” to hold the same illegally obtained evidence inadmissible in a criminal proceeding but admissible in a forfeiture proceeding).

206. *Id.* at 699.

consequently not allowing the use of evidence that has been illegally obtained by the State has been described in terms of a cost-benefit analysis by the U.S. Supreme Court in *United States v. Ceccolini*.<sup>207</sup> In that case a uniformed police officer went to a flower shop and noticed an envelope on the cash-register, which he picked up, examined, and found some cash and policy slips inside.<sup>208</sup> He asked the lady operating the cash-register about the envelope and she said it belonged to her employer, the petitioner in the case.<sup>209</sup> The police officer in turn told this to the FBI.<sup>210</sup> After an investigation by the FBI, the petitioner was summoned before a grand jury and asked whether he had ever taken policy bets, which he denied.<sup>211</sup> He was charged with perjury and the said lady operating the cash-register was called to give evidence against the petitioner.<sup>212</sup> Petitioner moved to suppress her testimony on the ground that the same was obtained as a result of an illegal search.<sup>213</sup> Distinguishing between physical and verbal evidence, the Court held that the exclusionary rule is not applicable to a witness.<sup>214</sup> Chief Justice Burger's concurring opinion is particularly useful:

[I]t strikes me as evident that the permanent silencing of a witness, who, after all, is appearing under oath, is not worth the high price the exclusionary rule exacts. Any rule of law which operates to keep an eyewitness to a crime, a murder, for example, from telling the jury what that person saw has a rational basis roughly comparable to the primitive rituals of human sacrifice.<sup>215</sup>

The Court observed that since there are substantial costs attached to the Exclusionary Rule, the application of the rule has been restricted to only those situations where the remedy of excluding the illegally obtained evidence serves the "most efficacious purpose."<sup>216</sup> Disqualifying "knowledgeable witnesses" from giving relevant evidence at criminal trials would be a serious obstruction to the purpose of such a trial, which is ascertainment of truth, an obstruction that does not bear any relation to the purpose which the Exclusionary Rule was created in the first place.<sup>217</sup> The Exclusionary Rule is a remedial rule created to deter the State from unreasonably violating the Fourth Amendment protections of the

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207. *United States v. Ceccolini*, 435 U.S. 268 (1978).

208. *Id.* at 269-270.

209. *Id.*

210. *Id.*

211. *Id.* at 272.

212. *Ceccolini*, 435 U.S. at 272.

213. *Id.* at 273.

214. *Id.* at 276, 277, 279 (Justice Rehnquist, for the Court, held: "Witnesses are not like guns or documents which remain hidden from view until one turns over a sofa, or opens a filing cabinet. Witnesses can, and often do, come forward and offer evidence entirely of their own volition").

215. *Id.* at 285.

216. *Ceccolini*, 435 U.S. at 275.

217. *Id.* at 277, 279.

people.<sup>218</sup> The Court held that the cost of “permanently silencing” a competent witness was speculative and negligible.<sup>219</sup>

The competing goals of deterring police misconduct and protecting the people from unreasonable invasions of privacy once again came to the fore in *United States v. Leon*.<sup>220</sup> The question of law in *Leon* was whether the exclusionary rule is applicable to the prosecution’s use of evidence recovered by the police while acting in “reasonable reliance” on a search warrant issued by a “neutral magistrate,” but which has been ultimately found unsupported by probable cause.<sup>221</sup> In this case, a “facially valid” search warrant was issued by a State Superior Court Judge that resulted in the recovery of large quantities of drugs and other evidence at the residences of the respondents.<sup>222</sup> A motion to suppress this evidence was filed and granted in part by the District Court on the ground that the affidavit was insufficient to establish probable cause.<sup>223</sup> The “substantial cost” related to the Exclusionary Rule was noted as a source of concern, and the Court correctly noted that “an indiscriminate application of the exclusionary rule” will also generate disrespect for law and administration of justice.<sup>224</sup> Allowing too many guilty people to go free will call the judicial process into question, just as the indiscriminate condonation of police lawlessness is bound to raise questions about the independence of the judges.<sup>225</sup> Engaging in a cost-benefit analysis of suppressing physical evidence seized by the police relying on a warrant issued by a neutral magistrate, the Court held: “[T]he marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.”<sup>226</sup> The traditional rationale behind the Exclusionary Rule was deterring police misconduct. In line with this rationale it was held: “Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth.”<sup>227</sup>

Based on the facts, the U.S. Supreme Court held that the police officer’s reliance on the magistrate’s determination of probable cause was objectively reasonable, and thus, there was no reason to apply the “extreme sanction” of the

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218. *Id.* at 280.

219. *Id.*

220. *United States v. Leon*, 468 U.S. 897, 900 (1984).

221. *Id.*

222. *Id.* at 902.

223. *Id.* at 903.

224. *Id.* at 907; *Leon*, 468 U.S. at 908.

225. *Leon*, at 910, 911, 917; *See* Akhil Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 773 (1994) (however, the Court found the “magistrate shopping” point, also stressed by Professor Amar in his article, to be “speculative”).

226. *Leon*, 468 U.S. at 913, 922.

227. *Id.* at 923.



Exclusionary Rule in this case.<sup>228</sup> Taking this logic forward, in *Illinois v. Krull*, evidence obtained consequent to a search performed by a police detective objectively relying on state law (a provision of the Vehicle Code of Illinois) that was later found unconstitutional by a federal court was held admissible.<sup>229</sup> Like the Court in *Leon*, the Court's analysis was informed by a cost-benefit analysis.<sup>230</sup> Would exclusion of evidence recovered consequent to a search conducted by the authority of a statute subsequently found unconstitutional have any deterrent effect on the legislators?<sup>231</sup> The greatest deterrent effect on legislators, the Court reasoned, was the authority of the courts to declare statutes unconstitutional and not extending the exclusionary rule to situations like *Krull*.<sup>232</sup>

In addition, there a number of inclusionary rules whereby the government can avoid the exclusion of illegally obtained evidence at trial.<sup>233</sup> The good-faith exception to the warrant requirement, for example, whereby evidence obtained consequent to a warrant subsequently found to be constitutionally invalid is admissible.<sup>234</sup> The inapplicability of Fourth Amendment protections to whatever is knowingly exposed to the public is another example.<sup>235</sup> The objective of these rules is to check possible or potential abuses of power by the police. If the warrant was not patently unconstitutional so as to make reliance not entirely unreasonable, the evidence obtained ought to be admitted because the police officers acting on the authority of such a warrant did not in fact abuse their powers. Preservation of the truth-seeking function of the criminal trial is not the avowed purpose of the good-faith exception—preventing police misconduct and abuses of power by police officers is. The inevitable discovery exception whereby illegally obtained evidence that the police would have inevitably discovered by lawful means falls into the same category.<sup>236</sup> If circumstances were such that the police would have discovered the impugned evidence by lawful means, the discovery of the evidence cannot be said to be the result of the police abusing

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228. *Id.* at 926.

229. *Illinois v. Krull*, 480 U.S. 340, 342-344, 359 (1987).

230. *Id.* at 347 (Justice Blackmun for the Court, observed that, “As with any remedial device, application of the exclusionary rule properly has been restricted to those situations in which its remedial purpose is effectively advanced”).

231. *Krull*, 480 U.S. at 352.

232. *Id.*

233. Steiker, *supra* note 142, at 2504. *See also* Slobogin, *supra* note 127, at 19-21 (listing several “exigency exceptions” to the Exclusionary Rule).

234. Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2512 (1996).

235. *Katz v. United States*, 389 U.S. 347, 351 (1967) (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protections”). *See also* *Oliver v. United States*, 466 U.S. 170 (1984) (discussing the open field doctrine) *accord* *United States v. Dunn*, 480 U.S. 294 (1987).

236. *See, e.g., Wong Sun v. United States*, 371 U.S. 471 (1963).

their powers.<sup>237</sup> The rationale behind the Unfair Operation Principle, the Indian equivalent of the Exclusionary Rule is the same.

### CONCLUSION

The admissibility of illegally obtained evidence has been questioned in India by invoking the protections given to criminal defendants under Article 20 of the Indian Constitution. While Article 20 does provide substantial protections to criminal defendants by protecting them from *ex post facto* laws, self-incrimination and double jeopardy, it is silent on illegally obtained evidence. A textual equivalent of Section 24(2) of the Canadian Charter or the Fourth Amendment of the U.S. Constitution is absent from Article 20 of the Indian Constitution. Attempts to read into Article 20 constitutional protections of the sorts that may be found in Canada and the U.S. have been made on several occasions before the Supreme Court of India, but have failed. It remains to be fully clarified—though some attempts have been made—whether or not the Indian Constitution, as a matter of fundamental rights, protects criminal defendants from admissibility of illegally obtained evidence. Instead, this Article articulated a legal position whereby illegally obtained evidence is inadmissible; not as a matter of fundamental rights, but as a matter of legal rights under Indian evidence law.

In order to do this, this Article invokes a very old judicially accepted principle, the Unfair Operation Principle, that is applicable to an illegally obtained evidence situation. The article first locates the Unfair Operation Principle as a part of general principles of admissibility under Indian evidence law. It then invokes the philosophy of Professor Ronald Dworkin and argues that having illegally obtained evidence excluded at trial is a part of the general principles of admissibility of evidence at Indian law. The claim of inadmissibility of illegally obtained evidence, therefore, is a sound legal claim based on traditionally established and long standing general principles of evidence. The Article then analyzes the legal reasons upon which illegally obtained evidence is admitted and finds that these legal reasons are not consistent with the general principles of admissibility of evidence (of which the Unfair Operation Principle is a part). It then offers a Dworkinian argument and provides the legal basis whereby illegally obtained evidence is inadmissible by the operation of the Unfair Operation Principle. Additional support for this legal position is derived from judicial authority in the U.S., Australia and Canada.

Independent of the Dworkinian analysis, the article also compares the leading Indian judicial authority on the point with the U.S. Constitution Fourth Amendment jurisprudence and argues that, even though the Indian Constitution might not have a textual equivalent to the Fourth Amendment, a closer analysis of the U.S. Supreme Court's leading judicial authority on the point and its comparison with its Indian counterpart certainly show that the ends that both courts wish to achieve are remarkably similar. Under the circumstances, the

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237. Steiker, *supra* note 142, at 2515.

existence of a legal right to have illegally obtained evidence excluded, as the Dworkinian analysis demonstrates, becomes even more important for the Indian Supreme Court. Notwithstanding the existence of a fundamental right under the Indian Constitution that protects the criminal defendant against the use of illegally obtained evidence at the trial, the general principles of admissibility in Indian evidence law provide ample legal support to have illegally obtained evidence excluded. This is the fundamental point that this Article attempts to highlight and articulate, and is something that the previous commentary on the subject has not attempted. It is this author's position that the availability of the judicially recognized, long-standing Unfair Operation Principle that is a part of the general principles of admissibility in Indian evidence law provides a much stronger legal basis for making the case for an Indian Exclusionary Rule (whereby illegally obtained evidence as a matter of legal right is to be excluded) compared to a similar claim based on a fundamental right under the Indian Constitution.