Illegally obtained evidence

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Illegally obtained evidence: an analysis of new trends in the criminal justice system of The Netherlands

Preliminary observations

This contribution is about new trends and developments regarding illegally obtained evidence. The format of this paper is determined by the questionnaire that was circulated by the organiser of the workshop on this topic, prof. Teresa Armenta-Deu from the Universidad de Girona, Spain. In order to facilitate the general rapporteur adequate room for comparing the various jurisdictions – and to allow her to evaluate the presently obtaining discrepancies between these systems – I have followed the list of questions closely. However, in my ‘closing remarks’ I have taken the opportunity to reflect more broadly on the deeper meaning of the developments that are dealt with in the present contribution.

A. Legal system

1. Is there a positive-legal regulation of illegally obtained evidence in the legislation?
   Yes, there is a positive-legal regulation of illegally obtained evidence in Dutch legislation. As of November 2\textsuperscript{nd}, 1996, article 359a was introduced into the Code of Criminal Procedure (WvSv). The basic contents of the provision are as follows. If and when during the course of the preliminary investigation certain procedural rules have been violated, the court – during subsequent trial – has several options available. The first one is to correct the mistake that was made. An example of this is when the prosecutor has mistakenly refused to enter some exculpatory documents into the case-file. By adding these materials to the file, the defence no longer suffers any harm as a result of the omission. Secondly, the court can simply declare that some irregularity has taken place and refuse to attach any negative consequences to this ruling. This usually happens in instances of minor oversights or transgressions. The mechanism of simply declaring an infraction of a procedural provision was introduced in order to avoid an overly formalistic approach of criminal procedural law. In more serious situations, however, the court can – thirdly - determine that the sentence shall be reduced, if it deems such reduction appropriate compensation for harm or damage done by the violation. Alternatively, it can also – fourthly - exclude the results of the breach of procedural rules from the evidence to proof the charges (the exclusionary rule). Finally, in extreme circumstances, when the violation is deemed so serious that it essentially compromises a fair trial for the defendant, the charges of the prosecutor can be deemed inadmissible and the case will be dismissed.

   It is further stipulated in article 359a WvSv that in choosing between these options, the court shall take into account the interests served by the procedural rule which was involved, the seriousness of the violation and the harm caused by the violation.

2. If the response is negative, can a legal system for illegally obtained evidence be deduced from the case-law?

\footnote{This has resulted in the report Illegally obtained evidence. New trends in illegal evidence in criminal procedure, General Paper for the 13\textsuperscript{th} World Congress of the Internationale Association of Procedural Law, Salvador, Bahia (Brazil), September 2007.}
\footnote{J.M. Reijntjes, Minkenhof’s Nederlandse Strafvordering, 10th edition, Deventer: Kluwer 2006, p. 34.}
The adoption of article 359a WvSv in 1996 was to a large extent considered as a codification of the pre-existing case-law. This will be illustrated in response to the next question.

3. If the response to the first question is affirmative, has the jurisprudence integrated, developed or modified the legal regulations in any way?

Since 1962, a substantial body of case-law on this topic has been developed by – primarily – the Dutch Supreme Court. In 1990, a high-powered governmental advisory committee reported that the status of illegally obtained evidence is of such crucial importance for criminal procedure as a whole, that the rule of law in its proper sense requires that the obtaining case-law be codified. The legislative acted accordingly and adopted article 359a WvSv as referred to sub 1. A striking feature of the provision is that it leaves much room for the discretion of the court. The court can select any of the available options as it deems fit, “according to the circumstances of the case”. In doctrinal writings, many scholars have criticized the lack of strict guidance by the Code of Criminal Procedure.

According to the case-law, three kinds or types of illegally obtained evidence can be distinguished.

The first is where officials have acted contrary to a statutory provision governing criminal procedure. An example would be to interrogate a suspect without giving him prior notice that he is not under an obligation to answer the questions asked (article 29 WvSv).

A second kind of misbehaviour occurs when the official acts in the absence of any legal power to do so. This was for instance the case before random blood testing for motor vehicle drivers was introduced in our legislation during the 1970ies. The Supreme Court held that in the absence of a statutory basis such power could only be exerted with the consent of the suspect.

And finally, evidence can also be tainted when it is collected by not violating statutory provisions, but when unwritten general principles of procedural law have been ignored. Prominent examples are represented by the principles of proportionality and subsidiarity. For instance, when law enforcement authorities have a warrant to search a place, they will usually have to give the occupants an opportunity to let them in on a voluntary/cooperative basis before they can resort to the use of force to gain entry.

Apart from the kind of infraction or omission involved, there is always the requirement that the standard which was violated by law enforcement officials must have been intended to protect the interests of the accused. If this condition is not met, the defendant in the case has no standing in this respect, i.e. he can not invoke any of the remedies referred to in article 359a WvSv. A case in point is an illegal phone-tap of the line of subscriber A, which yields the police serious incriminating data against partner-in-crime B. According to the Supreme Court, this phone-tap should not be considered illegal in connection with the charges brought against B. In this situation, B is not protected by the rules and sanctions against improper gathering of evidence. Similarly, when the attic of homeowners X is searched in an irregular way, criminal procedural law offers no protection to person Y who uses this attic as a place to store heroin.

In academic discourse, a slightly amended criterion has been suggested to replace the one just mentioned. Ybo Buruma advocates a closer link with the case-law of the ECHR in Straatsbourg. In the Khan-case, the European Court held that the use of evidence acquired in violation of art. 8 of the European Convention (right to ‘private life’) does not by

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4 For references, see Embregts, op.cit. p. 97.
5 HR 26 june 1962, NJ 1962, 470 with comments by W. Pompe.
6 Embregts, op.cit. p. 50.
8 The is called the ‘doctrine of protective scope’. Under German law this is usually labelled as the ‘Schutznorm-Prinzip’.
9 As was the case in HR 18 October 1988, NJ 1989, 306.
10 Embregts, op.cit. p. 124.
definition affect the fairness of the trial. Extending this line of reasoning, Buruma argues that the criterion to be applied is whether the infraction fatally impairs the fairness of the trial as a whole.\textsuperscript{11}

As in any developing legal system, case-law of a later date has affected the statutory provisions in place. The relevant changes since 1996 will be discussed at the relevant stages in this country report (e.g. sub 10, 16 & 18).

\textbf{B. Definition of illegally obtained evidence}

4. What elements are used to define illegal evidence?

The constituent elements to define illegally obtained evidence have been listed sub 3. They amount to:
- evidence acquired by violating a statutory provision during the preliminary investigation; or
- evidence gathered without any legal power to do so while violating constitutional rights of the suspect; or
- evidence collected within the framework of statutory powers, but in violation of unwritten general principles of criminal procedural law.

It is important to underline that in Dutch law the decision whether or not some actions (or omissions) with subsequent results do or do not qualify as ‘illegally obtained evidence’ is to a very large extent distinct and separated from the decision by the court whether this evidence can be used as a basis for conviction and/or any other type of sanction to be applied. Article 359a WvSw provides for three different sanctions which can be attached to the determination that evidence was illegally obtained. It follows that a fourth possibility is that the court will determine the nature of the infraction so minimal that no procedural consequences are deemed appropriate.\textsuperscript{12} On top of that, the doctrine of protective scope can also lead to the conclusion that the official conduct was illegal vis-à-vis a third party, but not illegal in connection with the individual rights of the defendant in the case.

5. Does the definition necessarily entail an infringement of a fundamental right?

According to the wording of the Code of Criminal Procedure, the definition of illegally obtained evidence does not necessarily entail an infringement of a fundamental right. Technically, violation of any kind of procedural rule or provision renders the results of that action as illegally obtained.

In academic doctrinal writings, this has given rise to interesting debates on the nature of illegally obtained evidence. Some writers have observed that the language used in describing and analysing this phenomenon obscures its true nature. Instead of referring to illegal conduct by law enforcement officials the Code of Criminal Procedure tends to use concepts like ‘neglecting to observe procedural rules’ as if these were mere formal – or even ‘formalistic’- requirements. Statutory vocabulary tends to understate the importance of failures to observe the standards by classifying them as ‘oversights’ which can or should or must be corrected or sanctioned at a later stage of the procedure.

By contrast, some researchers have emphasized that coercive powers during the preliminary stages are by definition established to legitimize infractions of constitutional rights of people suspected of having committed crime.\textsuperscript{13} In cases where the legal limits of these powers have not been respected, this should not be euphemized as a failure to observe a procedural formality, but it should be plainly recognized as a violation of basic constitutional rights. For these academics, all illegally obtained evidence ought to be regarded in the light of fundamental (human) rights. Seen in this light, it not only indicates the seriousness of


\textsuperscript{12} And as we have shown sub 1 above, some mistakes can simply be corrected during the trial stage.

\textsuperscript{13} J.B.H.M. Simmelink, \textit{De rechtsstaatgedachte achter art. 1 Sv}, Arnhem: Gouda Quint 1987.
transgressions of coercive powers; it also provides a legal foundation to accept the exclusionary rule as the most natural response to instances of illegally obtained evidence.\textsuperscript{14} Others have looked to the European Convention on Human Rights for justifying this rather robust position. The concept of ‘fair hearing’ in article 6 ECHR presupposes that the government does not exceed its statutory powers in investigating crime. If the limits to these powers are neglected, it is argued, this disturbs the ‘equality of arms’ between the parties involved. In order to preserve a fair trial as guaranteed by the Convention, the equality must be re-established in court by excluding the illegally obtained evidence.\textsuperscript{15}

Finally, there are those – including the present author - who have consistently argued that the case for excluding illegally obtained evidence should primarily be founded on the basic structure of the Code of Criminal Procedure\textsuperscript{16} and its connection with the constitution. Article 1 WvSv stipulates that criminal procedure shall only take place according to the provisions of the Code. As one famous American constitutionalist has claimed in the footsteps of Sophocles, nobody has a more sacred obligation to obey the law than those who make and enforce it.\textsuperscript{17}

Tribe then goes on to say:

“The so-called exclusionary rule has often been criticized for valuing the rights of criminals above those of law-abiding citizens. But those who wrote the Constitution’s limitations on how suspects may be pursued obviously knew that taking those limits seriously – that is, obeying them rather than flouting them – would necessarily prevent some guilty people from being apprehended and convicted. The exclusionary rule simply makes that result more dramatic and visible than might some other rules – rules that successfully prevent illegal searches from occurring in the first place. But whatever its price, the exclusionary rule plainly protects the liberties of all of us.”

In conclusion, the definition of illegally obtained evidence as such does not entail a restriction to violations of fundamental rights. Accordingly, it is understandable that art. 359a WvSv has created a flexible regime of responding to a finding that certain parts of the evidence have been acquired in violation of procedural rules. In legal doctrine, however, it has been argued that the discretionary power of the courts in this respect is too broad. Several foundations have been summarized for maintaining the exclusionary rule as the principal and most appropriate way to deal with illegal behaviour by law enforcement officials.

More recent case-law, though, has confirmed that applying the exclusionary rule more and more actually appears to become the exception rather than the rule. In a landmark decision, the Supreme Court held that excluding the evidence can only be considered when an important procedural provision or unwritten principle has been significantly violated by the conduct of law enforcement officials.\textsuperscript{18}

\textbf{6. Is it possible to infer that evidence is illegal from an infringement of rights not considered to be fundamental rights?}

It is possible to infer that evidence is illegal from an infringement of rights not considered to be of a fundamental nature, i.e. constitutional and human rights of the individual citizen. For instance, evidence will also be considered as illegally obtained when the acting law

\textsuperscript{14} Embregts, \textit{op.cit.} p. 323.
\textsuperscript{17} Laurence H. Tribe, \textit{God save this honorable Court. How the choice of Supreme Court justices shapes our history}, New York and Scarborough, Ontario: Mentor 1985, p. 7.
\textsuperscript{18} HR 30 March 2004, NJ 2004, 376 with comments by Y. Buruma.
enforcement official temporarily or permanently lacked competence to do so. This occurs, *inter alia*, when a certain rank is required to exercise a coercive measure and this rank is only conferred upon the official during a given shift of duty. Another example would be where an officer is only competent to report limited categories of crime and he moves on beyond this limit. Finally, instructions like the obligation to advise the suspect that he is under no obligation to answer the questions asked of him are to be considered as fundamental rights of the accused, while they probably do not count as protecting constitutional or human rights in the technical sense of the word.

As stated before, the difference between violating fundamental rights and less fundamental rights is not primarily important in connection with the definition of illegally obtained evidence, but the distinction can make a decisive difference in determining the legal consequences of the misconduct.

7. Is it possible to infer that evidence is illegal from a breach of procedural rules regulating the gathering of said evidence?

It is possible to infer that evidence is illegally obtained from a breach of procedural rules regulating the gathering of said evidence. In actual fact, this is without any doubt the most common reason why evidence is considered to be tainted. It is precisely the omission to observe procedural rules on breaking and entering premises and of provisions of search and seizure which clouds the results attained in this way. The same holds for tapping confidential telecommunications and for interrogating a suspect without following the relevant rules (putting too much pressure on him; failing to allow an interpreter be present when the suspect does not understand the language, etcetera).

8. Does a definition of illegally obtained evidence entail the infringement of a fundamental right – or, where appropriate, of a lesser right – by the criminal prosecution authorities, or can the illegality also be derived from the activity of private subjects or of other public authorities not acting as criminal prosecution authorities?

The illegality of evidence gathering can – sometimes - also be derived from the activity of private subjects and of other public authorities not acting in a law enforcement capacity.

For governmental action the basic rule is that illegal conduct by any agency or official will usually contaminate the information gathered in this way. The prosecutors’ office cannot invoke a lack of involvement or a lack of prior knowledge as a ground for justification. The responsibility for the illegal nature of evidence gathering is even more obvious when the prosecutor actually did have a say in the illegal activity. A notorious example in the Dutch system is the police officer who pretended to be a criminal and had himself incarcerated with a suspect in pre-trial custody. The officer was able to obtain highly incriminating information by conducting quasi-confidential talks with the suspect. The Supreme Court had to pass judgement on the legality of this approach.\(^\text{19}\) It ruled that the acceptability is co-dependent on the seriousness of the crime involved and on the availability of other means of effectively investigating the case. The court held that considering the principles of proportionality and subsidiarity, and given the fact that in these circumstances the prohibition against improper compulsion during questioning is being violated, the exclusionary rule applies. The underlying rationale for this ruling is the deliberate belying of the trust placed by the suspect in the integrity of his ‘fellow detainee’.

In cases where fact finding takes place by private individuals with no involvement whatsoever by criminal justice authorities, the following applies. Individual citizens are not restricted by the provisions of the Code of Criminal Procedure. Instead, they are free to act as they seem fit. The standard to apply here is to be derived from tort law. When fact finding activity by private individuals constitutes tort, the Supreme Court has held that the resulting information can sometimes – depending on the circumstances of the case – be considered

as illegally obtained and can be subject to exclusion from the evidence in a subsequent criminal trial.\textsuperscript{20} There are three standards to determine whether private conduct constitutes tort. One is when the action violated a statutory provision. This is for instance the case when the individual stole documents from the suspect or from a witness. The second is where the conduct violates someone else’s property right or right to protection of a private life. The right to private life is closely linked with some other constitutional rights, such as the right to physical integrity and the right to be respected in your privacy. When a private citizen records confidential (telephone) conversations, hires private detectives, systematically follows the tracks of a suspect or intercepts letters or other sensitive documents, this may invade the privacy of the suspect to an extent which is not allowed by law. The third reason why private investigation can qualify as tort is when the actions taken are contrary to the due care criteria which apply in civil society. These are unwritten rules of conduct of a general nature, which govern inter-human relations at all times, even when there is no contractual relationship between the parties involved. An example appears from the verdict rendered by the Court of Appeal of Den Bosch.\textsuperscript{21} In this case, a teacher had reported ill but was suspected by his employer of performing similar duties elsewhere. The school board hired a detective agency to check on the man’s behaviour. Even though it could not be established that this constituted a clear violation of the teacher’s right to privacy, the Court nevertheless held the school liable because it had not acted consistent with the due care standards to be observed by a ‘good employer’. Consequently, hiring the detective agency constituted tort and the information it yielded was excluded from being used in a subsequent criminal trial against the fraudulent teacher.\textsuperscript{22}

9. Is a distinction made between illegally obtained evidence deriving from infringements committed when obtaining evidence and illegally obtained evidence derived from infringements committed during the trial?

There is a natural as well as a formal distinction between illegally obtained evidence in the pre-trial stage and during the trial in open court. The main provision of article 359a WvSv only concerns transgressions during the pre-trial stages. The general structure of this provision has been outlined above (in particular sub 1, 3 and 4). Two additional observations are pertinent.

The first one is that complaints about irregularities in arrest and pre-trial detention can only be dealt with according to specific provisions in the Code of Criminal Procedure. The Code offers detailed guidance as to the complaints procedure to be followed and to the opportunities for appealing some of the decisions on these matters during the pre-trial stage of the proceedings. The Supreme Court has consistently ruled that the Code is exhaustive in providing remedies. When it does not explicitly allow for an appeal, or when an existing opportunity for judicial review has not been used, the complaint about arrest and detention can not be successfully repeated during trial in open court.

Then there is the rather mysterious provision of article 256, section 2 WvSv, which holds that failures to observe procedural rules during the pre-trial stage can no longer serve as a basis to invoke nullities once the trial in open court has commenced. In The

\textsuperscript{20} HR 1 June 1999, AA 2000, p. 117-121 with comments by Y. Buruma. The Court added that this kind of tort by private citizens could never constitute sufficient grounds for dismissing the case altogether.

\textsuperscript{21} Court of Appeal Den Bosch 2 December 1992, NJ 1993, 327.

\textsuperscript{22} It is beyond the scope of this paper to give a detailed account of the special rules and regulations on the private security branch. More on this in the well referenced contribution by C. Fijnaut, ‘Bedrijfsmatig georganiseerde particuliere opsporing en (het Wetboek van) Strafvoordering’, in: M.S. Groenhijsen & G. Knigge (eds.), Dwangmiddelen en rechtsmiddelen. Derde interimrapport onderzoeksproject Strafvoordering 2001, Deventer: Kluwer 2002, p. 689-749.
Netherlands, no-one really understands the full meaning of this odd guideline.\textsuperscript{23} When taken literally, it precludes the defence of illegally obtained evidence as such, which – as we have seen – is the \textit{raison d’être} and the subject matter of article 359a WvSv. Furthermore, it has long been acknowledged that there are quite a few mistakes which yield evidential nullities in their own right, regardless of when or by whom the nullity is invoked. Examples are an affidavit which does not conform to legal requirements, or testimony provided in violation of procedural rules during the pre-trial stage.\textsuperscript{24} Hence, for practical purposes I would recommend not to pay too much attention to article 256 section 2 WvSv when examining the Dutch legal system with respect to the topic at hand.\textsuperscript{25}

Illegally obtained evidence derived from infringements committed during the trial are slightly more complicated to analyze. This issue can hardly be understood without some general information on the way criminal procedures are being conducted in The Netherlands. In our country, in the vast majority of cases the main part of the entire procedure consists of the pre-trial stage. It is the police investigation where evidence is collected: forensic samples are secured and statements by witnesses and by the suspect, all of which is recorded in formal protocols, signed by the police officer on the oath of his office. Similarly, in the more serious types of cases, an examining magistrate can play a role in procuring information to be used in subsequent proceedings. He can order entering private homes for the purpose of searching and seizing. Depending on circumstances, he has the power to interview witnesses under oath and he can direct an expert to prepare a report on contested issues in the case. All of this leads to a mass of documentary evidence, which is inserted in the case-file. After the trial in open court has started, the case-file plays a predominant role. The trial itself usually is of a very short duration. Serious crimes, carrying a penalty of several years of imprisonment, are commonly dealt with in an hour and a half by a bench consisting of three judges. Less serious crime, where a sentence of less than a year is expected, are usually handled by a single judge, who can dispose of over 20 cases a day. This special feature of Dutch criminal procedure can be explained by the fact that the trial stage is mainly meant to check if the evidence collected during the pre-trial stages is sufficient and convincing, and whether there are any special defences to decide on. In most cases, no witnesses are interviewed during the trial, since their previously recorded statements are considered to be sufficient.\textsuperscript{26}

Against this background, it is easy to understand why an ordinary trial in open court only rarely yields any significantly new evidence. Usually, the defendant – if present\textsuperscript{27} – is heard, but his statements quite often echo the ones he made to the police in earlier stages of the proceedings. Since it is so rare that the trial stage itself yields substantial new evidence, it is more or less obvious that there are no separate provisions – nor is there case-law - on the isolated topic of illegally obtained evidence during the trial stage. This entire issue is absorbed by the general rules governing the trial. If the relevant procedural rules are violated, the defence can bring it to the attention of the court and the court has discretion to decide on the complaint. The opinion of the court will be given either in an interim-judgement.

\textsuperscript{23} Maybe this assertion is slightly overstated. The most coherent analyses of this provision is provided by T. Kooijmans in A.L. Melai & M.S. Groenhuijsen e.a., \textit{Het wetboek van strafvordering}, Deventer: Kluwer (losbladig), commentary on art. 256 WvSv.
\textsuperscript{25} Kooijmans, \textit{op.cit.}, note 8, concludes that article 256 does have some theoretical significance for the distinction between the pre-trial and the trial stage of the procedure, but has little practical meaning.
\textsuperscript{26} This feature of Dutch criminal procedure, allowing for the statements of witnesses to be presented through police records, was only made possible after the Supreme Court ruled that – within certain restrictions – hearsay evidence can be acceptable (HR 20 December 1926, \textit{NJ} 1927, 85).
\textsuperscript{27} In The Netherlands, trials \textit{in absentia} are rampant.
or it will be included in the reasoning of the final verdict. In either case, the decision can only be challenged by filing an appeal with a higher court.

10. Does the “fruit of the poisonous tree doctrine” apply in the legislation? If the response is affirmative, does some type of legal or jurisprudential limitation exist?

The fruit of the poisonous tree doctrine has not been explicitly included in the Code of Criminal Procedure. The doctrine did find its way, though, into case-law. The rationale behind the doctrine is obvious. It is intended not to circumvent or bypass procedural rights of the accused. The right to remain silent, for instance, would be substantially compromised in the following situation. When a person admits guilt as a result of the government exercising excessive pressure during an interrogation, it is obvious that this confession must be excluded from the evidence. Should this guilty plea be the sole reason that the authorities subsequently find material evidence (an illegal weapon, narcotics), then it only makes sense to consider the latter material to be equally tainted. This line of reasoning has for a long time been accepted in Dutch case-law. The textbook case is the one tried in Amsterdam in 1979. The defendant was arrested and put in pre-trial custody. Defying all the rules in the book, police officers took the keys from his pocket, went to his home without any kind of warrant, searched the place and found an illegal fire-arm. Returning triumphantly to the police station with their discovery, it was easy to make him confess to possessing an illegal weapon. In the end, the court decided the confession was a direct result of the illegal search and seizure and should be dismissed as it is fruit of a clearly poisonous tree.

On the other hand, courts have introduced several limitations to the doctrine and appear to be more and more reluctant to apply it. The key to the question is the concept of causation. The doctrine only applies if the contaminated material is the direct result of the initial illegal government activity. That is to say: the illegally obtained evidence must be the sole source and cause of the ensuing evidentiary material. According to doctrine and recently developed case-law, there are four types of situations in which the causal link is considered to be insufficiently strong.

The first one is where it can credibly be argued that a causal relationship is absent. An example is when an arrest was made in violation of the relevant statutory provisions, and the suspect subsequently makes a confession while in police custody. The confession could also have taken place had the arrest been perfectly legal. The second restriction occurs when the causal chain is weakened or interrupted. This is for instance the case when a suspect confesses the crime in a police interrogation which was not preceded by the required (‘Miranda-like’) notice that he is not obliged to answer any questions, and he moves on to repeat the same admission of guilt in later stages of the proceedings after having been duly alerted to this right to silence and in the presence of legal counsel. The required causal link can also be weakened or broken by consent of the accused. When a suspect who has been illegally arrested agrees to his home being searched, the results of that police action – e.g. the seizure of narcotics – can be used as evidence against him in court. The third situation which has been removed from the realm of the poisonous tree doctrine is labelled as ‘alternative causation’. This is present when the evidence is not only the result of the tainted material, but is also the product of another independent source. Typically, this is the case if identical information was procured in a legal as well as in an illegal way. The court may accept it as evidence since it has also been collected in a procedurally proper way. Fourthly and finally, causation is insufficient in cases which are in the USA referred to as

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29 HR January 26, 1988, NJ 1988, 818. Similarly – but probably yet another step further – the Supreme Court held in a recent ruling (HR 13 November 2007, NJ 2008, 116) with comments by M.J. Borgers) that a confession which was made in the police station in the absence of legal counsel to which the accused was entitled, was nevertheless admissible as evidence.
30 As was the case in HR 8 February 2000, NJ 2000, 316.
'inevitable discovery'. This means that the relevant evidence was actually obtained by illegal means, but could also have been acquired in a legal way. If consulting a number of data bases (DNA-profiles, fingerprints) is standard routine when a person is suspected of having committed a specific type of crime, the resulting information would qualify as 'inevitable discovery'.

Another recent case in which the Dutch Supreme Court limited the scope of the ‘fruit of the poisonous tree-doctrine’ dealt with a situation in which the defendant had admitted guilt after having been confronted with the results of an illegal telephone-tap and an equally illegal search of his home. This confession was not regarded as an exclusive result of the improper use of coercive powers, because the statements were repeated in court where the accused was duly advised of his right to silence and was assisted by defence counsel.31

C. Procedural treatment of illegally obtained evidence

11. At what point in the trial and in what way can evidence be declared illegal?
Evidence can in general32 only be declared illegally obtained after the trial when the court pronounces its verdict.33 The provisions in article 359a WvSv (see sub 1 supra) pertain to violations of legal standards during the pre-trial stages of the procedure. If the court would detect an irregularity having taken place during the trial-stage, the only remedy would be to correct the mistake.34

The Code of Criminal Procedure does not provide for a separate procedure prior to the trial in which complaints about the way evidence has been collected can be filed and decided on. In doctrinal writings, this is a contested issue. Some writers have argued that illegally obtained evidence should be removed from the case-file at the earliest possible moment.35 The main reason supporting this position is to ensure that the trial judges will not have any knowledge of this contaminated information and that they cannot even subconsciously be affected by it. However, this point of view has never prevailed. A prestigious governmental advisory committee, charged with reassessing the basic structure of the criminal procedure, considered the matter and offered various arguments not to change the existing state of affairs. It held that (a) a separate pre-trial procedure could never offer guarantees that the trial judges would really not face the excluded evidence; (b) the existence of such a special procedure could never deny the defendant the right to complain during the trial about illegal police conduct; (c) a pre-trial procedure does not offer a solution for cases in which the trial judge finds ex officio that certain evidence is illegally obtained; and (d) it would delay the procedure.36

All in all, the prevailing view is that assessing the legality of the way evidence was collected is best placed in the hands of the trial judge. This kind of monitoring and evaluating of investigative actions is assumed to contribute to the legitimacy of the verdicts of the courts.

12. Who can declare that evidence is illegal? Can the court do it of its own motion? Can the public prosecutor’s office do it? Can it be done at the request of one of the parties involved?
As was mentioned sub 11 supra, the court is the principal authority to declare that evidence was obtained in an illegal way. According to the wording of article 359a WvSv – taken

31 HR 14 June 2005, LJN AS8854.
32 Exceptions to this principle will be explained sub 12-15 infra.
33 Van Woensel, op.cit. p. 167.
34 See sub 9 supra. If the court would fail to notice the problem, its verdict can be appealed.
literally – the court can do so only of its own motion. However, this interpretation of the said provision would be misleading. Both the prosecutor and the accused (or his defence lawyer) can call the attention of the court to evidence they regard as tainted. If they do so in an explicit and well reasoned way, the court can only use the contested material if it properly argues in the verdict why it considers the evidence as legally obtained (article 359, section 2 WvSv).\(^{37, 38}\)

In some cases it is not clear during the trial what exactly happened during the investigation stage. If there remains significant doubt as to the legality of the coercive powers used during the preliminary stages, the court can order an additional inquiry into the matter. This inquiry will be conducted by an examining magistrate (article 347 WvSv, article 316 WvSv).

13 and 14. *Can the illegality of the evidence be declared when taking investigation measures?* *Is it possible to prevent said evidence from being included in the proceedings?*

*Can the illegality of the evidence be declared during the investigation stage?* *Is it possible to prevent said evidence from being included in the trial?*

The illegality of evidence can be declared in specific circumstances during the pre-trial stages. The first opportunity is when the accused is detained in pre-trial custody. According to the *habeas corpus principle* pre-trial detainees can invoke judicial review of decisions on incarceration. When exercising this right, they can also claim irregularities in the conduct of the authorities affecting the legitimacy of the deprivation of their liberty.\(^{39}\)

The second example of decisions on the illegality of evidence is when an accused is formally informed that he will be indicted (articles 244/245 WvSv) and during the so-called ‘committal proceedings’.\(^{40}\) In both these situations a court is called upon to judge whether the prosecutor has sufficient evidence to warrant prosecution. The defendant can complain about serious violations of his rights with the aim of having the resulting evidence discarded.\(^{41}\)

Finally, it has to be observed that in Dutch criminal procedure the preliminary investigation is supervised by the public prosecutor. He has the authority to direct the police and is responsible for their activities. It follows that in cases of blatant police misconduct the prosecutor has the power to exclude the resulting incriminating evidence from the case-file. In order to promote transparency and accountability in situations like this, the prosecutor will have to make a formal report of what went wrong and what kind of information was considered illegally obtained. This account will be inserted in the case-file to enable the court to have a complete picture of the pre-trial stages of the proceedings.

15. *Can the illegality of the evidence be declared during the trial? Before the evidence is presented? After it is presented?*

\(^{37}\) Of course, the court can also decide for one of the other options allowed by article 359a WvSv, as elaborated sub 1 supra.

\(^{38}\) The exact requirements for the court to explicitly respond to a defence concerning the legality of the available evidence have been specified in the previously mentioned ruling in HR 30 March 2004, *NJ* 2004, 376 with comments by Y. Buruma. More on this sub 16 infra.

\(^{39}\) It must be noted, though, that when the judge accepts this claim of the defence, the appropriate remedy usually is release rather than exclusion of any evidence.

\(^{40}\) That is to say, in criminal procedure in the United Kingdom this is called the committal proceedings. In The Netherlands, it concerns the situation when the accused is served a summons to appear in court; he has the right to challenge this summons on the ground that the prosecution is obviously and blatantly ill-founded. These remedies are governed by articles 250 and 262 WvSv respectively.

As stated sub 11 supra, the general rule is that the court declares the illegality of evidence when it pronounces its final verdict. During the trial, the parties can argue whether or not parts of the available evidence have been obtained in an illegal way. Sometimes, there is a dispute on this issue between the defence and the prosecutor. Usually, the court will not give a ruling on this until the trial is over. In exceptional circumstances, though, it may be possible for the defence to ask for an early interim-ruling on this issue. In the Code of Criminal Procedure, this is referred to as a preliminary defence. It must be added that this can only occur when the conduct of the officials is claimed to have been so extremely unlawful that the trial has to be aborted instantly and the charges will have to be dismissed. The court can then adjourn the trial. After the matter has been decided, the trial will either be resumed in the normal way or the proceedings shall be halted. I have to add, though, that this possibility is hardly ever used. So for practical purposes, it is mostly a theoretical option.

16. If illegally obtained evidence is denounced in the trial, does the court have the obligation to explain in its decision if it considers the evidence to be illegal and to take it into consideration or not?

If evidence is challenged during the trial, the court does not always have to explain why it considers the relevant information acceptable. The obligations of the court depend on the circumstances of the case.

In a decision of the Supreme Court in 1978, it was held that every defence concerning the legality of the way evidence has been gathered has to be either accepted or explicitly responded to by the court. This no longer applies. In a landmark decision in 2004, the Supreme Court offered significantly stricter guidance on this issue. The Supreme Court first stipulates (as mentioned before, sub 5 supra) that illegally obtained evidence shall only be excluded when the illegal conduct of the law enforcement official violated an important procedural rule or general principle of law and when the violation was of a substantial nature. The next step in the ruling is that the cases where the lower court has to explain in its decision that it considers the evidence acceptable are limited to the ones where the defence clearly, articulately and in a well reasoned way argues that the italicized criterion has been met. This is a very powerful requirement. In academic writings, many authors have complained that this ruling by the Supreme Court has made it extremely difficult for the defence to successfully invoke illegal police conduct as a ground for the exclusion of the resulting evidence. If a defence of this kind does not meet the standard referred to, the lower court does not even have to verify the accuracy of the facts that – according to the accused – constituted illegal behaviour.

17. Generally, does the legislation regulate special cases to declare the illegality of evidence? Is additional evidence allowed to be included to demonstrate the illegality of evidence?

Dutch legislation includes several specific provisions pertaining to the legality of the gathering of evidence. In areas such as road traffic regulation, environmental crime and economic crime there are detailed statutes concerning the way samples may be taken that can be used as evidence in court. One example is the breathalyser, which is used in order to determine the alcohol level in a car drivers’ body. There are extensive sets of rules rules on how this equipment is to be operated, what quality standards apply, how to calibrate it, how

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44 As of January 1, 2005, the Code of Criminal Procedure was amended on the topic of how judicial decisions have to be argued and reasoned. A general provision was inserted in article 359, section 2 WvSv, which instructs the court to always explain when and why its decision deviates from expressly substantiated positions taken by one of the parties in the trial. Subsequent case-law on the interpretation of the wording of ‘expressly substantiated positions’ have made it clear that the standard set by NJ 2004, 376 has not been seriously changed.
monitoring is to be secured, etc. If one of these rules is violated, it automatically follows that
the evidence is excluded.45 A similar example concerns the tachograph, a device which is
being used, inter alia, to check the working hours of truck drivers. The rules on installing the
device, its technical specifications, requirements on periodical testing and many more items
are so complex that they comprise a total of 252 pages in print. Again, if these provisions are
not complied with, the evidence is inadmissible. In environmental law and in the area of
economic crime, the same applies when the authorities have to take samples in order to
prove an illegal composition of liquids or other commodities. Detailed administrative rules
govern the equipment which can be used to collect and analyse the samples, and any failure
to comply with these standards makes the exclusionary rule applicable.

Is additional evidence allowed to be included to demonstrate the illegality of
evidence? Yes, in the sense that every source of knowledge is admissible to substantiate
the defence that evidence was gathered in an illegal way. It has to be noted, though, that the
accused does not have to establish improper governmental conduct according to the same
standard (‘beyond reasonable doubt’) as applies for the prosecutor when he has to prove the
defendants guilt. The criterion to apply here comes closer to the ‘balance of probabilities’.

D. Consequences of illegally obtained evidence

18. What consequences are there to a judicial decision stating that evidence is illegal? Do
they vary according to the moment in the trial in which it is declared illegal?
The range of consequences of a judicial decision to the effect that evidence is obtained in an
illegal way has in general been described sub 1 supra.46 In summary, the court has the
discretionary power to
a. correct the mistake;
b. include a declaration of irregularity in the verdict without attaching any further
consequences;
c. reduce the sentence imposed;
d. exclude the resulting evidence;
e. declare the charges by the prosecution inadmissible.
The Supreme Court has issued some guidelines on the circumstances in which these
options should be considered appropriate.47

Option b should be chosen when the doctrine of protective scope applies, i.e. when
the procedural rule which was violated does not purport to protect the interests of the
accused in the criminal trial.48 Reduction of the sentence, option c, is the preferable one when the accused suffered
harm because of the violation and the effects can suitably be restored by a diminished
sentence. An additional condition is that the reduction of sentence must also be justified in
view of the weight of the violated procedural rule and the seriousness of the violation.
As explained above, exclusion of evidence (option d) is only allowed when an
important procedural rule or unwritten principle has been violated in a significant and
substantial way.49

45 ‘Automatically follows’, meaning that the judge does not have any discretionary power in this
respect.
46 This follows from article 359a WvSv.
47 The most pertinent case is HR 30 March 2004, NJ 2004, 376 with comments by Y. Buruma,
already discussed sub 16 supra.
48 Thus the Dutch Supreme Court in the ruling presently under discussion. Sub 4 supra it has
been explained that the same result can be arrived at through a different line of reasoning,
allowing for the infraction to be deemed illegal vis-à-vis a third party, but not in the case of the
accused.
49 A coherent exposition of ius constitutendum on the range of sanctions to be applied and on the
way the legislative should provide guidance in this respect is provided by Y.G.M. Baaijens-van
Option e is an instrument of last resort. It can only be contemplated in exceptional circumstances, when the authorities have seriously breached principles of a decent procedure and have consciously undermined the possibility of a fair trial for the defendant.

Do the consequences vary according to the moment in the trial in which it is declared illegal? As explained before, the usual routine is to only formally declare evidence as tainted in the final verdict of the court. If, however, in the rare case where for instance the prosecutor finds that police activity has been improper, he may decide to apply the exclusionary rule even when the infraction was less serious as has been described in connection with option c.

19, 20 & 21. Can the decision of a judge declaring that evidence is or is not illegal be appealed?
Can a decision be appealed alleging that it was based on illegal evidence?
Can a decision be appealed alleging it did not take into account supposedly illegal evidence whose legality is asserted by the appellant?
The most frequently used moment to declare a decision on the illegality of evidence is in the final verdict of the court. It is highly exceptional – bordering on the theoretical – to have this decision at an earlier stage in the procedure. Since this decision is an intrinsic part of the reasoning of the final verdict, it is only logical that it can be appealed in exactly the same way as all the other component parts of the verdict. The decision of the court of first instance can – with very few exceptions, like in petty cases with very minor sentences – be challenged at the Court of Appeal. Subsequently, a decision of the Court of Appeal can be subjected to review at the Supreme Court, which can only rule on legal questions and in principle not decide on factual issues.

When the outcome is a conviction, these rules of appealing the decision and its underlying justification apply to both the defence and the prosecutor. In case of an acquittal, there is no remedy available for the defendant (‘point d’interêt, point d’action’), but the prosecutor can contest the ruling on the illegality of the evidence in the same ways as in cases of conviction. If the prosecutor appeals against an acquittal, he can do so alleging that the lower court mistakenly did not take into account incriminating evidence the legality of which was asserted by the prosecutor.

22. Is the person who obtained the illegal evidence criminally liable?
Depending on the circumstances, an official who obtains evidence in an illegal way can be criminally liable. The obvious example of course is the officer who deliberately forges an official document, like an affidavit. That would constitute fraud, pure and simple.

Interestingly, there is an entire chapter in the Dutch Criminal Code (hereafter: WvSr) dedicated to crimes which can only be committed by persons in their capacity as public servants (abuse of office). Quite a few of these crimes are typically applicable on misconduct by office holders charged with law enforcement. The most significant are the following:

Article 365 WvSr criminalizes the public servant who by abuse of authority vested in him compels another person to act, to refrain from acting or to submit to anything. This could be applicable if a police officer manifestly and deliberately exceeds his powers in, for instance, search and seizure. The maximum penalty provided for is a prison sentence of two years.

Article 370 WvSr is about illegally entering and/or searching the home or premises of a suspect. A public servant who, exceeding the limits of his authority or not observing the requirements specified by law, enters into a dwelling, an enclosed room or premises in use by another, against the person’s will, or who, remaining there unlawfully, does not remove

himself forthwith upon the demand or on behalf of the person entitled, is liable to a term of imprisonment of one year maximum.\textsuperscript{50}

Similarly, article 371 WvSr stipulates that a public servant who, exceeding the limits of his authority, causes to be submitted to him or seizes a letter, post card, postal packet or parcel entrusted to any public entity for its conveyance, or a telegraph message held by a public servant of the telegraph services or by other persons charged with the operation of a telegraph facility intended for the use of the general public, is liable to a sentence of one year maximum imprisonment.\textsuperscript{51} It is obvious that various ways of illegally obtaining evidence come under the ambit of these provisions.

It has to be observed, though, that in actual practice prosecutions in these matters are extremely rare. The same holds for the formal application of disciplinary measures. It is very exceptional for a law enforcement officer who has collected evidence in an illegal way to be subjected to formal disciplinary sanctions.

23. \textit{Is any type of civil redress provided for those who have been unfairly judged due to illegal evidence?}

Is any type of civil redress provided for those who have been unfairly judged due to illegal evidence? This question can be interpreted in various ways.

If a person is convicted and it can later be established beyond doubt that the conviction was based on illegally obtained evidence, there is the possibility of initiating a civil lawsuit against the government, based on tort law. However, this option looks rather theoretical. The burden of proof is high and civil proceedings are both costly and lengthy.\textsuperscript{52}

The question can also be interpreted in another way. Does the criminal procedure offer opportunities for financial remedies for illegally obtained evidence? The answer is basically negative. The consequences of violating procedural rules are listed in article 359a WvSv and were cited sub 1 and sub 18 above. Financial compensation is not included in the list. This has been a deliberate choice, based on the recommendations of a government advisory committee.\textsuperscript{53} However, there still is a general provision on compensation in cases which do not have a conviction as an outcome (article 591a WvSv). In such instances the former defendant can receive restitution for travel expenses, costs for lodging, for legal counsel and for time wasted during presence at trial. However, the practical relevance of this provision for the question under consideration appears to be close to zero. As explained in previous parts (sub 16), tainted evidence is only excluded if special conditions are met, and even then usually there is enough unrelated evidence left to warrant a conviction. In the rare cases where the illegal nature of the evidence does lead to an acquittal, the court has a margin of appreciation in applying article 591a WvSv. In actual practice it is likely that when the defendant has been acquitted because the evidence was obtained in an illegal way, there will be circumstances in the case which will allow the court – despite the formal

\textsuperscript{50} The punishment is also applicable to a public servant who on the occasion of a search, exceeding the limits of his authority or not observing the requirements specified by law, examines or seizes documents, books or other papers.

\textsuperscript{51} Again, the same applies to a public servant who, exceeding the limits of his authority, allows himself to be informed, by a public servant of the telephone services or by other persons charged with the operation of a telephone facility intended for the use of the general public, of any communication which has been transmitted through that facility.

\textsuperscript{52} Embregts 2003, \textit{op.cit.} p. 121-122.

\textsuperscript{53} The previously mentioned Moons-committee (see its 9th report, \textit{Recht in vorm}, \textit{op.cit.} p. 55. In case-law preceding the introduction of article 359a WvSv a right to financial compensation has been recognised very rarely. A more frequent use of this remedy has sometimes been advocated in academic writings, e.g. by Th.W. van Veen, ‘Over misslagen, vormverzuimen en nietigheden van het stratproces’, \textit{RM Themis} 1991, p. 219.
acquittal – to use its discretionary power to either mitigate or altogether deny an award of compensation.\textsuperscript{54}

\textit{Closing remarks}

It has often been observed that the main trends in criminal procedure in many ways resemble the swing of the pendulum. On the one hand there is the obvious interest of effectively fighting crime. On the other end of the spectrum, it is equally self-evident that we want to protect the integrity of the criminal justice system while engaging in this primary objective. In a way, these interests are constantly competing. The tension between the interests has been repeatedly identified as the engine which provides the impetus for ongoing reform of the way criminal procedure is being shaped and criminal justice is being administered.\textsuperscript{55} The system is never completed; it is in constant motion; guiding this motion requires a balancing act.

The issue of how to deal with illegally obtained evidence is a textbook-example of how the criminal justice system in The Netherlands performs in this respect. Generally speaking, there have been periods of time in which the interest of crime control was more prominently visible in legislative trends than the attention for the individual civil liberty rights of defendants. In other era’s the opposite was the case, when the concept of due process of law was conspicuously valued. To be more specific, the pre-war decade of last century is considered by most as a time when the former perspective clearly dominated the debate (and the outcome of the debates). During the 1960ies and 1970ies, the human rights angle became very powerful in reform efforts of the criminal justice system. And finally, since the middle 1980ies the pendulum has swung back into the direction of a more repressive climate. In the opening years of the 21\textsuperscript{st} century, this has been reinforced rather than diminished, by the global fight against terrorism.

These general observations are clearly mirrored in the developments concerning the legal problem of how to assess illegally obtained evidence. This can be demonstrated by three key examples.

One. When the current Code of Criminal Procedure went into force (1926), it included no provisions concerning the issue under consideration. Only in 1962, the Supreme Court ruled that a bloodsample taken from a car driver could only be used as evidence in court, if either the driver cooperated on a voluntary basis or there was a statutory power to oblige the driver to cooperate (see sub 3 supra). In the absence of both, the Court held the available evidence to be inadmissable, thus establishing the Dutch equivalent of the exclusionary rule. With hindsight the timing of this decision is not quite accidental, since – as I have just pointed out - the sixties and seventies were the period in which human rights for defendants ranked particularly high on the agenda. In 1996, in the middle of times when attention had shifted in the direction of more effective crime control strategies, the principle that illegally obtained evidence cannot be used in court was fundamentally abandoned with the introduction of article 359a WvSv. Since then, exclusion of evidence is only one of several available options when the law has been violating when collecting evidence. In 2004, in the same spirit, the Supreme Court held that this remedy should only be applied when an \textit{important} procedural rule or unwritten principle has been violated in a \textit{significant and substantial} way.

\textsuperscript{54} The technicalities of this arrangement are discussed by N.J.M. Kwakman, \textit{Schadecompensatie in het strafprocesrecht}, diss. Groningen, Groningen 2003. A draft-bill providing for a completely new system of granting compensation has now been circulated by the government for consultation by the various interest-groups (het (voor)ontwerp van de ‘Wet schadecompensatie strafvorderlijk overheidsoptreden’ d.d. 17 Oktober 2007).

\textsuperscript{55} Herbert L. Packer, \textit{The limits of the criminal sanction}, 1968.
The second example concerns the obligation of a Court to respond to a defence claiming that evidence has been illegally obtained. During the late 1970ies, when the priority awarded to individual civil liberties was virtually at its peak, the Supreme Court decided that each and every defence of this nature should either be accepted, or – if the lower court wants to include the contested evidence in its verdict – be rejected with explanation of the reasons for doing so. Some three decades on, when the general mood had shifted dramatically, the case law became much more restrictive. As was explained in the above (sub 16), two powerful restrictions were introduced. According to the 2004 ruling of the Supreme Court the obligation to respond is now only present in cases where the defendant a. clearly, articularly and in a well reasoned way argues, that b. the important rules/principles have been violated in a serious way.

The final example is about the ‘fruit of the poisonous tree doctrine’ (sub 10 supra). Again, during the high days of attention for procedural rights for defendants in a due process of law, case law tended to be supportive of this doctrine (I mentioned a pinpoint case of 1978). Later on, when the pendulum had swung, the Supreme Court insisted on more restrictions in this respect (we referred to the new standard set in 2005).

It follows that a clear pattern has emerged. The fate of illegally obtained evidence apparently rides on the waves of the tide. This observation in its own right suffices to explain why it is impossible to fully evaluate the merits and demerits of this part of the current criminal justice system in a few brief paragraphs. The way any system deals with the phenomenon of illegally obtained evidence is indicative of many more parts of criminal procedure. Since the overall picture will be constantly changing – adapting to circumstances – the only safe conclusion is that the same applies to the topic of this contribution.