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**EVIDENCE ILLEGALLY PROCURED:  
ADMISSIBILITY AND SCOPE**

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## **ABSTRACT**

Criminal law is that facet of the law which indulges in social engineering through the legal lens with the purpose of safeguarding public interest by punishing offenders and deterring crime through its penal provisions. This paper aims to analyse and reflect upon the modus operandi adopted by those who guard the pillars of law in situations that mirror possibly unfair means to a supposedly ‘just’ end, i.e. trials where evidence is procured or gathered by unlawful means or by ways which are otherwise incongruous to rights of individuals as guaranteed by the Constitution.

The fundamental question arising is whether evidence procured through illegal means can be accepted in a court of law? Whether it is imperative that the applicability of substantive penal provisions be accompanied by a diligent adherence with procedural provisions? Whether adjudicators in criminal courts dispense justice objectively when the privacy of individuals is compromised to secure social interests of the community at large?

These questions entangle the judge in a cobweb of complexity as they throw open a grey area where social interests of the community run into conflict with social interests of an individual. The inherent incongruity and internal opposition in the realm of criminal law is where the complexity mentioned above is rooted. The purpose of criminal law is to maintain social order and deter crime. However, the social interest of the society and the social interests in the individual life many a times dart across as conflicting interests. Where does, then, judicial justice rest?

In this paper, I attempt to address this complex question through the prism of Constitutional dimensions in context of wire-tapping cases and throw light upon how the weight of public interest changes in varying contexts when judges discern in the criminal justice system.

## **PROLOGUE**

*“The law is the last result of human wisdom acting upon human experience for the benefit of the public.”* - Samuel Johnson

Natural law or ‘lex naturalis’ is that system of law which is embedded in and determined by nature, thus making such system of law universal. Such law is based on universally accepted moral principles, and is an amalgamation of nature and reason. Positive law, on the other hand, is



statutory man-made law that bestows certain privileges, responsibilities and reasonable limitations on people. The law is an instrument used by States to facilitate and maintain social order. Such social order aims to secure peace/ harmony in society, facilitate social justice and foster the interests of the people.

Criminal law is that facet of the law which indulges in social engineering through the legal lens with the purpose of safeguarding public interest by punishing offenders and deterring crime through its penal provisions. This paper aims to analyse and reflect upon the modus operandi adopted by those who guard the pillars of law in situations that mirror possibly unfair means to a supposedly 'just' end, i.e. trials where evidence is procured or gathered by unlawful means or by ways which are otherwise incongruous to rights of individuals as guaranteed by the Constitution.

The fundamental question arising is whether evidence procured through illegal means can be accepted in a court of law? The dilemma is whether the cause of securing public interest justifies sacrificing individual rights? Whether it is imperative that the applicability of substantive penal provisions be accompanied by a diligent adherence with procedural provisions? Whether adjudicators in criminal courts dispense justice objectively when the privacy of individuals is compromised to secure social interests of the community at large? How important is the free will of the wrong-doer and how urgently must the wronged be given legal respite? What is the legal obligation of the Courts and how much of illegally and/ or improperly obtained evidence can judicial justice encapsulate? These are questions that have surfaced contemporaneously with the fashion in which the courts function when the issue of illegally obtained evidence surfaces. These questions entangle the judge in a cobweb of complexity as they throw open a grey area where social interests of the community run into conflict with social interests of an individual. The judge is torn between striking a compromise between the two. However, this is not an easy task as the adjudicator, while adhering to the doctrine of Natural Justice must balance these conflicting interests by minimally denting the other interest. Ultimately, legal provisions providing protection to the accused sometimes run in conflict with public interest or the 'greater good'. The inherent incongruity and internal opposition in the realm of criminal law is where the complexity mentioned above is rooted. The purpose of criminal law is to maintain social order and deter crime. However,

the social interest of the society and the social interests in the individual life many a times dart across as conflicting interests.<sup>1</sup> Where does, then, judicial justice rest?

In light of the above, is it just to injure the accused by accepting evidence obtained illegally on grounds that he/she did injure society by exhibiting his/ her free will and acting anti-socially? And is it just to score off the individual rights of the accused to secure the interests of the larger community? Should the ‘presumption of innocence’, the golden thread of criminal jurisprudence which postulates that an accused is innocent until proven guilty also expand its applicability by seeking judges to strictly adhere to exclusionary rules of evidence despite the greater social cost involved?

With the rampant progress in telecommunications and the technological advancements of the 20<sup>th</sup> and 21<sup>st</sup> century, communication has become simpler and more convenient than ever before. These technological advancements, however, are increasingly exploited by criminals as we face a wide variety of technology-related crimes today. Organized anti-social elements and other criminals are broadening their exploitation of technological vulnerabilities,<sup>2</sup> which helps them to accelerate the process of planning the criminal activity. The continuous war between the state and anti-social elements is profoundly complicated. Though technology has created devices to prevent and pre-empt criminal activity, criminals haven’t failed in trying to find ways to annihilate and bypass what stands in their way. This is what is happening in context of modern communication means being increasingly used by criminals to facilitate their actions. Telephones, mobile phones and the internet seem to be harmless means of communication but they become essential tools for diabolic minds as soon as they become accessible to anti-social elements in pursuit of executing their mala fide intents.

In dealing with crimes facilitated through use of technology, the law deploys stringent methods such as phone-tapping/ wire-tapping, use of jammers in context of mobile phones and constant vigilance by state agents through various security measures to prevent crime in/through cyberspace. With crime through technological means on the rise, state agents track the communication records of suspects in order to prosecute such anti-social elements by gathering

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<sup>1</sup> Roscoe Pound, *The Future of Criminal Law*, 21 Columbia Law Review 10-12 (1921).

<sup>2</sup> See *Technology and Crime*, CRIMINAL INTELLIGENCE SERVICE CANADA, Annual Report (2005), [http://www.cisc.gc.ca/annual\\_reports/annual\\_report\\_2005/technology\\_and\\_crime\\_2005\\_e.html](http://www.cisc.gc.ca/annual_reports/annual_report_2005/technology_and_crime_2005_e.html)

evidence against them. Such tracking of communication activities in a discreet fashion by state agents is most successfully done in cases where telephones are used. This is because tracking communications on cell phones is a hard task as criminals using sophisticated technology use jammers and freeze networks for a temporary period, and later abandon the phones they use thus making it hard to trace them because there is barely any evidence found. In context of cybercrimes, anonymity and intense hacking as well as phishing scams are impediments in tracking communication.

However, such searches are possible while tracking communications made through telephones. These discreet searches to gather evidence illegally are often contested by proponents of privacy and individual human rights. Such discreet searches are contested on grounds that they violate intrinsic rights such of the accused such as the right to privacy. Proponents of human rights state that such searches are illegitimate and therefore, must not be admissible in the court of law against the accused as they are conducted in violation of the right to privacy. They believe that the methodology adopted in conducting these searches to gather evidence against the accused is incongruous with individual's personal rights and thus, should not be made admissible in the courts of law. It is contested that the Courts in the process to dispense justice must admit fair means in order to accomplish a fair end. The question again boils down to whether the courts should attempt to strike a compromise between individual rights and public interest, or are they obliged to pronounce that public interest overshadows individuals' rights?

In this paper, I attempt to address this complex question through the prism of Constitutional dimensions in context of wire-tapping cases and throw light upon how the weight of public interest changes in varying contexts when judges discern in the criminal justice system.

## **SOCIAL INTERESTS OF THE PUBLIC AND SOCIAL INTERESTS OF THE INDIVIDUAL**

### **HOW JUDICIAL JUSTICE STRIKES BALANCE?**

‘Public Interest’ is a phrase the teleology of which is embedded in the ideal that welfare of the public or the community at large is paramount and must be secured. Since social interests of the

public sometimes conflict with those of the individual, there are competing accounts of the proper relationship between conflicting individual rights and public interest.<sup>3</sup> The most concrete living example of this comes from our statutes itself. The Constitution of Indian through Article 21 bestows upon all the fundamental right to Protection of Life and Personal Liberty. Rights such as the one mentioned above are aimed to protect the human rights of all individuals and to secure ‘individual interests’. Article 21 of the Constitution states that “No one shall be deprived of his life and personal liberty except for the procedure established by law”. Part III of the Indian Constitution confers upon individuals the fundamental rights which are basic human rights. Also, Article 20(3) of the Indian Constitution also grants protection to the accused people in criminal cases. This article bestows upon accused persons the Right against Self-Incrimination, i.e. no accused shall be made to testify against himself/herself in a manner that leads to his/her incrimination through self-made statements. However, the conflict between public and private interests is inherent in these articles itself. Article 21 does bestow upon individuals the most intrinsic fundamental right but simultaneously allows the general exceptions, such as “except for procedure established by law”, which allow the state to interfere with individual rights in pursuit of larger legitimate purposes, primarily of a collective nature.<sup>4</sup> This category is applied meticulously to case-by-case judgments to determine whether priority should be given to individual interests or public interests. Rights and liberties conferred by the Constitution are accompanied by escape clauses as mentioned above. Hence, the relationship between the “rule of law” and “democratic necessity” must be profoundly understood. The exercise of rights and liberties, therefore, can be made subject to restrictions (by State) prescribed by the law and constitute measures imperative for a democratic society for the protection of the general interest at large.<sup>5</sup> The legitimate purpose of the State is to maintain law and order, and to foster the general interests of the community at large do trump individual interests sometimes. However, this is only done when the State has to draw a compromise between the “greater good” and “private rights”. Even after clarifying the situations in which this compromise is made by the courts for legitimate purposes, the test of democratic necessity (due to its fluid nature) does not provide a lucid

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<sup>3</sup> Aileen McHarg, *Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*, 62 *Modern Law Review* 673, 671-696 (1999).

<sup>4</sup> *Ibid.*

<sup>5</sup> MIREILLE DELMAS-MARTY, *THE EUROPEAN FOR THE PROTECTION OF HUMAN RIGHTS: INTERNATIONAL PROTECTION VERSUS NATIONAL RESTRCITIONS* 322-325 (1992)

understanding of the relationship between rights and their exceptions.<sup>6</sup> Hence, the Courts need to protect both human rights as well as defend judgments written, respecting the democratic nature of the society. Judicial interpretations, therefore, provide the Courts with the flexibility to deal with this sensitive and conflicting issue on a case by case basis.

Social interests of the public have been advocated best by Jeremy Bentham, who promulgated the principle of utility. His construction of the principle of utilitarianism was based upon the ideal of accomplishing and facilitating the greatest good of the greatest number, i.e. facilitating the happiness of the maximum number of people. He prescribed the concept of utility and its consequence of doing the greatest good as the standard of right action on the part of governments and individuals. His principle approved State actions on the basis that the consequence of such actions was the giving happiness and pleasure to largest number of people.<sup>7</sup> Bentham deliberated upon the need for social reform and in quest for the same developed the principle of utility, bridging the gap between moral concerns and laws.<sup>8</sup> His principle of utilitarianism, thus, evaluates actions based upon their consequences. The relevant consequence is the overall happiness of the greatest number of people. There are different theories of public interest as postulated by scholars. Some of them are as follows –

**Preponderance theory<sup>9</sup>:** This theory proposes that aggregative conceptions find their episteme in a subjective definition of interests, where individuals are perceived to be the best judges of personal interests and reveal their respective preferences. Hence, the public interest has no independent content and is understood simply by aggregating all individual interests. This theory states that whatever is in the interest of the individuals is also in the best interest of the public.

**Unitary theory<sup>10</sup>:** This theory postulates that public interest is an overriding interest that transcends and reconciles conflicting individual interests. An objective version of interests is used where a person/group's interests is derived from what they ideally ought to want or what is good for them instead of their subjective preferences.

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<sup>6</sup> *Supra* note 3

<sup>7</sup> See *Jeremy Bentham – Utilitarianism*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY <http://www.iep.utm.edu/bentham/>

<sup>8</sup> Driver & Julia, *The History of Utilitarianism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, (*Summer 2009 Edition*), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/sum2009/entries/utilitarianism-history/>

<sup>9</sup> *Supra* note 3

<sup>10</sup> *Supra* note 3

**Common Interest theory<sup>11</sup>:** This school of thinkers refer to interests which all members of the community/public have in common. Common Interest theorists propose that actions are in people's interests or greater good if they increase their opportunities to get what they desire.

Social interests of individuals are the personal (subjective and objective) interests of individuals. Social interests of individuals basically constitute all private rights or rights conferred by the State for the protection of individuals as well as for securing their best interest. The most substantive examples of State bestowed privileges to individuals are seen in the form of fundamental rights conferred on individuals by the Constitution of India and the Bill of Rights and Due Process, which secure private interests as enshrined in the Constitution of the United States of America. The quintessential nature of individual rights has been best voiced by social and political philosopher Immanuel Kant. He stated that every individual has a worth or a dignity that must be respected. This dignity makes it wrong for others to abuse us or to use us against our will. Kant expressed his idea through moral principles. He postulated that humanity ought to be treated as an end and not as a mere means.<sup>12</sup> He distinguished the two by stating that if people were understood as mere means, such would be done to use them for vested interests of others. However, in treating people as an end meant to respect the dignity of individuals by allowing them the freedom to choose for him/her. Kant's principle is often used to justify a fundamental moral right, the right to freely choose for oneself.<sup>13</sup> His principles are also used to justify 'negative rights', such as the right to privacy. These rights protect some form of human freedom or liberty. They are called so because a negative duty is imposed upon us by negative rights, such as the duty to not interfere with a person's activities in a certain area. Rights, then, play a central role in ethics. Hence, prioritizing rights ensures that freedom and well-being of each individual stand protected in cases where others threaten such freedom or well-being. Stated in a lucid fashion, Kant believed that if an individual has a moral right, then it is morally wrong to interfere with that right even if large numbers of people would benefit from such interference. It can be inferred from the above that Kant believed that individual rights, embedded in moral rights are sacrosanct and that they cannot be sacrificed. Through this approach, Kant attempted to strike an accord between the rule of law and moral virtues of individuals.

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<sup>11</sup> *Supra* note 3

<sup>12</sup> Claire Andre & Manuel Velasquez, *Rights Stuff*, MARKKULA CENTER FOR APPLIED ETHICS, SANTA CLARA UNIV., <http://www.scu.edu/ethics/publications/iie/v3n1/homepage.html>

<sup>13</sup> *Id.*

## **RELEVANT LEGISLATIONS AND INHERENT ESCAPE CLAUSES**

In order to tackle and deter crime, States have laws that identify criminal activities, law out provisions for the procedure to be followed to facilitate the prosecution of those guilty of committing anti-social activities. The three organs of the Government- the Executive, the Legislature and the Judiciary play their respective roles to tackle crime. The Legislature has enumerated adequate legislations/Acts that deal with the substantive, procedural and evidentiary aspects quintessential to facilitate criminal trials. The Executive implements policies in order to maintain law and order in society, and the police forces implement the laws (especially procedural laws) in order to assure efficient functioning of the legal system. The Judiciary, adhering to procedural, substantive and evidentiary laws examines the case down to the innermost intricate details and pronounces a judgment which is best in the interests of justice as well as the community at large.

In India, the substantive laws that recognize, enlist and enshrine penalties for crimes are embodied by the Indian Penal Code<sup>14</sup>. The laws that enlist all the procedural requirements to be followed in order to facilitate a fair criminal trial are enshrined in the Code of Criminal Procedure<sup>15</sup>. Lastly, laws dealing with evidentiary rules that prescribe the distinct kinds of evidence and rules for admissibility of the same are enshrined in the Indian Evidence Act<sup>16</sup>. Laws relating to evidence are procedural laws as they form part of the procedure followed prior to and during the criminal trial.

The ‘escape clauses’ or clauses expressly protecting interests of accused individuals in context of evidentiary rules are enshrined in various sections of the Evidence Act. Classic examples of such protection of individual rights despite the Courts having a larger “legislative purpose” are exclusionary rules in evidence law. The purpose of exclusionary rules is to prevent the government

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<sup>14</sup> The Indian Penal Code, 45 (6<sup>th</sup> October, 1860)

<sup>15</sup> The Code of Criminal Procedure, 2 (25<sup>th</sup> January, 1974)

<sup>16</sup> The Indian Evidence Act, 1 (15<sup>th</sup> March, 1872)

and Courts from using most evidence gathered in violation of fundamental human rights.<sup>17</sup> Such rules are found in provisions relating to confessions, admissions, illegally obtained evidence, etc through the Act. These sections along with many others in this Act inherently have barriers to criminalizing the accused on grounds that the fundamental human rights of the accused must not be violated. These exclusionary rules and admissibility of evidence illegally obtained will be discussed subsequently through case laws.

In the United States of America, exclusionary rules prevent State from using most evidence gathered in violation of the United States Constitution. It applies to evidence gained from an unreasonable or illegitimate search/seizure that is made in violation of various amendments to United States Constitution. The amendments relevant to the exclusionary rules are the first ten amendments, enshrined in the Bill of Rights<sup>18</sup> in the United States Constitution. The *Bill of Rights* is the collective name for the first ten amendments to the United States Constitution. Exclusionary rules relate to the Bill of Rights as these rights have been incorporated to protect the natural rights of individuals. Its purpose is to protect fundamental human rights against infringement by State.

Exclusionary rules in American jurisdiction command that if evidence which falls within the scope of the exclusionary rule has indeed led the law enforcement to other evidence, which would not have otherwise been located, then the exclusionary rule applies to the related evidence which has been found subsequent to the excluded evidence as well and that this subsequent discovery is also hit by the exclusionary rule.<sup>19</sup> Such subsequent evidence has been termed as “fruit of the poisonous tree” and is also rejected by the State. Exclusionary rules in the Indian jurisdiction are distinct in context of applicability. In India, if evidence which falls within the scope of the exclusionary rule has led law enforcement to other evidence, which would not have otherwise been located, then the exclusionary rule applies to the related evidence *only partly* and certain information received through subsequent discovery (based on such evidence) may be allowed and used against the

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<sup>17</sup> See *Exclusionary Rules: Overview*, LEGAL INFORMATION INSTITUTE, CORNELL UNIV. LAW SCHOOL, [http://www.law.cornell.edu/wex/exclusionary\\_rule](http://www.law.cornell.edu/wex/exclusionary_rule) (last updated August 19, 2010)

<sup>18</sup> USA CONST. Bill of Rights

<sup>19</sup> *Supra* note 19



accused.<sup>20</sup> This sensitive provision has been dealt with expressly through Sections 24-27 of the Indian Evidence Act.

Exclusionary Rules are a remedy created by the Court and not an independent constitutional right.<sup>21</sup> The purpose of creating these rules is to deter the police from obtaining or extracting evidence by unlawful means, as well as to prevent Courts from making such evidence admissible. However, such judicial creations and application of the same by Courts have not resolved the complex issue between the Individualist and the Collectivist schools<sup>22</sup> of legal thought. This is because there are no blanket rules to exclude evidence illegally obtained as it may become extremely detrimental to society if Courts exclude such evidence even when such exclusion outweighs the remedial benefits and social costs of the same.

## **EVIDENTIARY RULES AND THE CRIMINAL JUSTICE SYSTEM IN INDIA**

### **AN ANALYSIS THROUGH CASE LAW**

The legitimate purpose of legislations dealing with crime in India (such as the Penal Code, Criminal Procedure Code and Evidence Act as mentioned above) is to maintain law, order, peace and harmony as well as to secure the interests of the society as a whole. The Constitution of India guarantees to individuals the fundamental rights and these are sacrosanct with the exception that they can be compromised by the procedure established under the law. The legislative intent, therefore, of these legislations is to prosecute criminals, dispense justice, ensure a safer society and deter crime. The Indian Evidence Act (1872) is procedural and adjectival law as it works in consonance with the Criminal Procedure Code so as to efficiently facilitate the application of substantive law such as the Penal Code in India.

The philosophy of evidence law is embedded in engineering the criminal justice system. Hence, trials serve the purpose of determining the truth, and the law of evidence should therefore aim to

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<sup>20</sup> The Indian Evidence Act, 1 S. 27 (15<sup>th</sup> March, 1872)

<sup>21</sup> *Supra* note 19

<sup>22</sup> *Supra* note 1

maximise its ability to achieve this objective.<sup>23</sup> Though evidentiary rules also provide for protection of individual rights and prescribe rules regarding illegally obtained evidence, the purpose of evidence law philosophically is to secure the larger social goal, i.e. to make the criminal justice effective in operation in order to accomplish the ideals of social harmony and, law and order. The Indian approach to this dilemma between protections of individual rights as opposed to the larger social goal of evidence law is based on the legal relevance of evidence, and not on the means through which the same was procured. The judiciary has time and again concluded in context of admissibility of illegally obtained evidence that most of individual protections under the rules of evidence are unjust. It is believed that such individual protections should be abandoned in favour of something approaching a principle of free proof, which considers all legally relevant evidence with a possible exception for evidence the costs of (its admissibility) which exceed the remedial benefits.<sup>24</sup>

Tapping of telephones has been a major bone of contention with regard to evidentiary rules in India and while it is advocated by law enforcement officials, it is strongly contested by proponents of civil liberties. Indian Courts have attempted to chalk out a solution to this problem by juxtaposing the social and individual costs involved in the admissibility of such evidence that is obtained illegitimately through telephone tapping. However, the proposed solutions have also been unable to pacify this debate between community interests and the right to privacy. The Indian judiciary seems to be largely convinced by the upholding the social interests of the general public as opposed to the social interests of the individuals. This is because judges in India have followed too seriously the much contemplated and debated English precedent of *R v. Leatham*.

**R v. Leatham**<sup>25</sup> - This case had its contention embedded in the issue as to whether evidence procured illegally be made admissible or not. In this case, Crompton J. stated, “It matters not how you get it if you steal it even, it would be admissible in evidence.” Inferring from the case, it can be said that English law firmly basis admissibility of evidence procured illegally on the legal relevance of such evidence. This view seems to arise because the administration of justice will be

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<sup>23</sup> William E. O’Brian Jr., *A Philosophy of Evidence Law: Justice in the Search for Truth by Ho Hock Lai*, 72 *Modern Law Review*, 143-147 (2009).

<sup>24</sup> *Id.*

<sup>25</sup> *R. v. Leatham*, (1861) 8 Cox CC 498 at 501.

obstructed where otherwise relevant evidence would not be admissible in the court of law only on grounds that it has violated certain procedural protections granted to individuals who stand accused.<sup>26</sup> This precedent based on the statement of Crompton J. establishes legal relevance only as the test for the admissibility of evidence. The position of the English Courts on this issue has been further made concrete by another authority, wherein Lord Fraser stated, “The duty of the court is to decide whether the appellant has committed the offence with which he is charged and not to discipline the police for exceeding their powers”.<sup>27</sup>

**R v. Sang**<sup>28</sup> - In this case, Lord Scarman expressly stated, “Judges are not responsible for the bringing or abandonment of prosecutions and that save in the very rare situation, which is not this, of an abuse of the process of court, the judge is concerned solely with the process of trial”. In the prima facie case, the issue of the discretion of a trial judge to exclude evidence obtained through improper means was considered and it was held that in criminal trials at least, the judge while acceding to admissibility of evidence ought to focus only on his prime function to ensure that the fairness of the trial is maintained.<sup>29</sup> The issue of discretion in this judgment was dealt with the practice followed by courts of common law, where these courts were not conferred with the discretion powers to exclude illegally obtained evidence unless the probative value of the same was outweighed by its prejudicial effect. This position has been superseded and slightly altered by a successive legislation which allows courts to exclude evidence illegally obtained if the admission of the same would have an adverse effect on the fairness of the criminal proceedings.<sup>30</sup>

### Indian Case Law

**S. Pratap Singh v. State of Punjab**<sup>31</sup> - In this case the Supreme Court allowed the tape record of a telephonic conversation to be made admissible as evidence in order to corroborate the testimony of the witnesses who had stated that such a conversation had taken place and there was no doubt regarding the veracity of the same. The Apex Court through this judgment prescribed the following

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<sup>26</sup> Hugh McKay & Nicola Shaw, *Whatever Means Necessary*, [http://www.taxbar.com/documents/Whatever\\_Means\\_Nicola\\_Shaw.pdf](http://www.taxbar.com/documents/Whatever_Means_Nicola_Shaw.pdf)

<sup>27</sup> Fox v. Chief Constable of Gwent [1985] 3 All ER 392, 397

<sup>28</sup> R v. Sang (1980) AC 402

<sup>29</sup> *Ibid.*

<sup>30</sup> Police and Criminal Evidence Act, U.K., Sec 78- 82 (1984).

<sup>31</sup> S. Pratap Singh v. State of Punjab, AIR 1964 SC 72

provisions to be followed in order to allow admissibility of tape- recorded evidence of conversations on telephone. The criteria to admit such evidence by recording telephonic conversations require that, (i) the voice of the speaker must be duly identified by the maker of the record or by others who recognize his voice. (Where the maker has denied the voice it will require very strict proof to determine whether or not it was really the voice of the speaker), (ii) the accuracy of the tape recorded statement must be proved by the person who has made the record either by direct/circumstantial evidence, (iii) every possibility of tampering with the or erasure of the part of a tape recorded statement must be ruled out otherwise it may render the said statement out of context, making it inadmissible, (iv) the statement must be relevant according to the rules of evidence, (v) the recorded cassette must be carefully sealed and kept in safe or official custody, (f) the voice of the speaker should be clearly audible and not lost or distorted by other sounds. This test of admissibility of evidence obtained through phone tapping has been affirmed by the Supreme Court in the case of Ram Singh v. Colonel Ram Singh.<sup>32</sup>

Contrary to the judicial approach in India, tapping of telephone/telegraph lines for recording conversations in a discreet manner is prohibited under the Indian Telegraph Act.<sup>33</sup> The Act enshrines through Section 25 prohibits the intentional damaging or tampering with telephones and telegraphs. It provides that if any person, intending (a) to prevent or obstruct the transmission or delivery of any message, **(b) to intercept or to acquaint himself with the contents of any message**, (c) to commit mischief, damages, removes, tampers with or touches any battery, machinery, telegraph line, post or other thing whatever, being part of or used in or about any telegraph or in the working thereof, such person **shall imprisoned for a term that may extend up to a period of three years, or he/she may be imposed with fine, or he/she may be punished with both the above mentioned punishment/penalty.**

**Yusufalli Esmail Nagree v. State of Maharashtra**<sup>34</sup> - In the prima facie case, a conversation recorded using a tape recorder was made admissible as evidence. The appellant in this case was alleged to have offered a bribe to a municipal clerk. The clerk informed the police who later devised a plan and laid a trap at his residence when a voice recording apparatus was placed

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<sup>32</sup> Ram Singh v. Col. Ram Singh, AIR 1986 SC 3

<sup>33</sup> The Indian Telegraph Act, S. 25 (No. 13 of 1885).

<sup>34</sup> Yusufalli Esmail Nagree v. State of Maharashtra, AIR 1968 SC 147: 1967 SCR (3) 720

discreetly in the room where the bribe amount was to be paid. Conversations recorded subsequently by the apparatus were admitted as evidence to corroborate the clerk's testimony in court. The Supreme Court held that if a photograph (clicked without the knowledge of the person who was photographed) became admissible, then the same principle would apply to tape-record of which the people conversing were not aware of. Hence, the evidence obtained through illegal or improper recording of conversations using a voice recording machine was made admissible in the court in order to convict the accused.

**R. M. Malkani v. State of Maharashtra**<sup>35</sup> - Through this case, the Supreme Court of India pronounced a landmark judgment that created the most valued precedent in context of admissibility of illegally procured evidence. The Court stated that conversations recorded electronically through phone tapping were to be made admissible as evidence in the court of law. This admissibility, however, is drawn in adherence with provisions prescribed in the Indian Telegraph Act which require that the conversation be relevant to the issue and the voice be identified by people known to the accused, and that the accuracy of the recorded conversation is proved by eliminating the possibility of erasure/addition/manipulation. **The Supreme Court, in this judgment further held that a contemporaneous electronic recording of a relevant conversation through phone tapping is a relevant fact and holds as much value as a photograph of a relevant incident. Hence, such electronic recording is admissible as evidence.**

**State v. Navjot Sandhu alias Afsan Guru**<sup>36</sup> - This was a case where the accused were alleged to have indulged in terrorist activity as they had attacked the Indian Parliament. In the prima facie case, Navjot Sandhu alias Afsan Guru was convicted and sentenced to death. The substantive proof and evidence leading to his conviction lay in electronic records of telephonic conversations that were admitted as evidence. He appealed to the Supreme Court but the Apex Court dismissed the appeal and affirmed the sentence. The Court, in affirming the death sentence held that it was justified to flout procedural requirements of the law in order to prosecute high-profile criminals such as the appellant, who had attacked the Indian Parliament at New Delhi and was an accomplice in the murder of nice people as well. The Court reasoned that in order to serve the purpose of

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<sup>35</sup> R.M. Malkani v. State of Maharashtra, AIR 1973 SC 157

<sup>36</sup> State (N.C.T. of Dlehi) v. Navjot Sandhu, (2005) 11 SCC 600: 2005 SCC (Cri) 1715

justice and to secure the best interests of the community at large, it was necessary to prosecute the appellant and to impose such a harsh punishment on him. The judgment of the Court condoned the flouting of procedural obligations since the accused were challenging the order of High Court on grounds that the evidence obtained against them was done illegally as it violated provisions relating to admissibility of evidence as well as individual protection rights conferred on accused by the Evidence Act itself. The flouting of procedural laws in acquiring electronic evidence by tapping the telephone records of the accused was justified by the Court in this particular case on grounds that it served the legitimate purpose of the law, and led to the incrimination of the said criminals.

**People’s Union for Civil Liberties v. Union of India**<sup>37</sup>- In the prima facie case, a petition was filed in the form of a public interest litigation (PIL) under Article 32 of the Indian Constitution. The petition was filed by People’s Union for Civil Liberties, a voluntary organization that has been working on highlighting incidents of illegal/improper telephone tapping in India. The petitioners in this case had challenged the constitutional validity of Section 5, Indian Telegraph Act,<sup>38</sup> which authorizes Central/State Governments to tap telephones special circumstances that are mentioned in the statute. The writ petition was filed as a response to the tapping of politicians’ telephones by the Central Bureau of Investigation (CBI) of India. The Supreme Court held in this case that telephone tapping was indeed a serious infringement on the privacy rights of individuals (privacy implied to be a right under the right to “life and personal liberty” enshrined under Article 21 of the Indian Constitution). The Apex Court held that telephone tapping was grossly in violation of an individual’s right to privacy and that such tapping should not be resorted to.

However, the Court stated that telephone tapping was legitimate in case where a situation of public emergency arose or where safeguarding public safety required the tapping of telephones to be done. Hence, the Court did lay down conditions under which telephone tapping is allowed but tapping is only justified under these conditions in order to safeguard the social interests of the larger community. Only through such conditions does has the Court allowed for telephone tapping.

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<sup>37</sup> P.U.C.L. v. Union of India, AIR 1997 SC 568

<sup>38</sup> *Supra* note 35

The Supreme Court also laid down prima facie the procedure<sup>39</sup> to be followed if the State taps telephones. The conditions require that the order for telephone tapping be issued only by the home secretary of State/Union governments. In urgent cases, however, the power can be delegated to an officer below the joint secretary. It is imperative that reasons be recorded for such order and the order can only continue for two months unless extended, the term of which shall also not exceed six months. This order is made subject to examination by a review committee. The review is required to be completed within 2 months of the order of interception. The Court stated that invasion of individual privacy must be minimum. This judgment on admissibility of evidence obtained through phone-tapping is a breakthrough and will provide some level of procedural protection to the accused since provisions are now prescribed to conduct tapping of telephones for recording of evidence.

## **EXCLUSIONARY RULES AND DUE PROCESS IN USA**

### **AN ANALYSIS THROUGH CASE LAW**

*“We must consider the two objects of desire both of which we cannot have and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the government should not itself foster and pay for other crimes when they are the means by which the evidence is to be obtained. We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.”* – Justice Holmes

**Olmstead v. United States**<sup>40</sup> – In this case, the dissenting words of Justice Holmes as mentioned above have been conducive in setting forth the spirit and purpose behind the doctrine that evidence obtained through unlawful searches and seizures is inadmissible in the Federal courts.<sup>41</sup> Illegal searches and seizures are matters of Constitutional Law in United States more than

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<sup>39</sup> Sanjay Parikh, *Phone Tapping: Violation of Constitutional, Human Rights*, ECONOMIC TIMES, (April 28, 2010), <http://indialawyers.wordpress.com/2010/04/28/phone-tapping-violation-of-constitutional-human-rights/>

<sup>40</sup> *Olmstead v. United States*, 277 U.S. 438, 470 (1928)

<sup>41</sup> Lawrence L. Lieberman, *Admissibility of Evidence Obtained by Unlawful Searches and Seizures*, 2 William

they are of evidence law. This is because the Bill of Rights in the Constitution of USA lays down the most intrinsic natural and fundamental rights, thereby bestowing sacrosanct protection of personal rights upon individuals. Constitutional violations, therefore, does not only give rise to civil/criminal/equitable sanctions but also gives the privilege of excluding evidence obtained in a manner that has breached Constitutional rights.<sup>42</sup> The Fourth Amendment enshrined in the Bill of Rights protects the right to privacy of individuals and protects them against illegal searches or seizures. The Fifth Amendment in the Bill of Rights bestows upon the accused the right against self-incrimination, i.e. an accused cannot be compelled to testify against him/her own self. These two amendments constitute the backbone of fundamental rights that individuals enjoy in USA. The 4<sup>th</sup> and 5<sup>th</sup> Amendments are usually read along with the Fourteenth Amendment which is an equivalent of Article 21 in the Indian Constitution.

Pertaining to the above, it is stated that United States of America favours the exclusionary rule of evidence, observed far more strictly in federal courts. This approach is more protective of the right to privacy enshrined in its Constitution. American citizens seem to be resilient toward State intervention and solicit protection of their civil liberties. In USA, telephone tapping is not illegal in cases where the Court has granted a prior sanction to do the same for the sake of protecting the general interests of the people. This, however, is a rarity. Under American law, exclusionary rules of evidence apply. These are subject to certain exceptions. Exclusionary Rules may be defined as those rules that prevent the government from using most evidence, which has been gathered in violation of the United States Constitution.<sup>43</sup>

These rules are invoked most in cases where evidence has been obtained in a manner that violates the rights incorporated in the Bill of Rights. This is because rights enshrined therein are fundamental rights granted and guaranteed to the citizens. Exclusionary rules, however, do not apply to civil cases. Exclusionary rules commands that if evidence obtained falls within the scope of the exclusionary rules, and such evidence has led the law enforcement mechanism to discover other evidence (which would have not otherwise been discovered) then the exclusionary rule

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& Mary Review Va. L. 133 (1955), <http://scholarship.law.wm.edu/wmrval/vol2/iss2/8>

<sup>42</sup> *Evidence Obtained Illegally or Improperly*, LAW COMMISSION OF INDIA NINTY-FOURTH REPORT, (1983), <http://lawcommissionofindia.nic.in/51-100/Report94.pdf>

<sup>43</sup> *Supra* note 19



applies to the related evidence also that was found subsequent to the excluded evidence. This evidence found subsequently from the excluded evidence has been called “fruit of the poisoned tree”. This is because it has been obtained in furtherance of an illegitimate source, i.e. evidence that was hit by the exclusionary rule. Hence, subsequent evidence is also hit by this rule under American federal law on grounds that the means to find such evidence were in violation of the Bill of Rights of the American Constitution.

Another facet of American jurisprudence is found in the phrase, “Due Process of Law”. It basically refers to the diligent practice of regularity, fairness, equality, and justice both in procedural and substantive spheres of law. The U.S. Constitution guarantees due process because it's designed to be a living document that expands freedom of its citizens.<sup>44</sup> It is understood as the exercise of governmental power with respect to the rule of law, with strict adherence to the principles of fundamental fairness and rights of individuals. Due Process in procedure caters to the just nature of the law; it is decided through the balancing tests of interests and the social cost of error, directly related to the concept of legitimacy of procedure. Due Process in substantive law caters to the reasoning as to why the law is just. It is related to the concept of legality; and is decided through Fundamental Rights. Substantive due process is usually construed as a continuation from life and liberty.<sup>45</sup> Due Process clause has been incorporated in the 4<sup>th</sup> and 14<sup>th</sup> Amendments to the American Constitution that deal with right against self-incrimination and right to life and personal liberty respectively.

Exclusionary rules are embedded in the principle that it is one of the most fundamental functions of the courts to encourage lawful action by the government machinery or the State agents. All fifty states in USA have their own respective Constitutions and laws relating to issues like phone tapping. However, the federal laws such as the Crime Control and Safe Streets Act enacted in 1968 prohibit the wilful interception of telephone communication by any means. Federal laws in USA require only the consent of one of the parties involved as a pre-requisite to legitimately conduct phone tapping. Though American States have their own laws independent of federal laws, 38 States in America have incorporated the one-party condition in cases of phone tapping. However, despite the incongruity of federal laws with those of different states, any evidence through phone

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<sup>44</sup> *Due Process of Law: Procedural and Substantial Issues*, <http://faculty.nwc.edu/mstevens/410/410lect06.htm>

<sup>45</sup> *Id.*

tapping (if gathered in violation of Federal/State law) shall be rendered inadmissible in almost all instances.

**Weeks v. United States**<sup>46</sup> - In the prima facie case, police entered the home of Weeks and seized papers which were later used to convict him of transporting lottery tickets through the mail. This was done without a search warrant. Weeks sued against the police, demanding the return of his private possession. The contention was whether the search had violated the 4<sup>th</sup> Amendment. The Supreme Court of USA held that the seizure of items from Weeks' residence directly violated his constitutional rights. It was further held that the government's refusal to return his possessions violated the 4<sup>th</sup> Amendment. It was reasoned that allowing private documents to be seized through an illegal search and then be held as evidence against citizens would nullify the purpose of the 4<sup>th</sup> Amendment. This judgment was the first application of what eventually developed as the “exclusionary rule”. This case disseminates the Supreme Court's interpretation stating that the logical interpretation of the 4<sup>th</sup> Amendment not only disallows unreasonable searches and seizures, but also prohibits the employing of forbidden fruits of evidence procured through unlawful means.

**Katz v. United States**<sup>47</sup> - In this case the petitioner was convicted and the evidence used to draw the conclusion was electronic evidence overheard by FBI agents who attached an electronic listening/ recording device outside of the telephone booth from which the calls were made. The Court of Appeals affirmed the conviction on grounds that the 4<sup>th</sup> Amendment was not violated since there was no physical intrusion of the area occupied by Katz. The accused, Katz, petitioned the Supreme Court of USA where the judgment was reversed on grounds that the 4<sup>th</sup> Amendment governs the seizure of tangible items and also extends the recording of oral statements as well as to intangible searches and seizures.<sup>48</sup> The USA Supreme Court expanded the horizon for the applicability of the 4<sup>th</sup> Amendment and through judicial interpretation stated that the concerned amendment was enacted to protect people and not mere places. The Court interpreted that intrusion

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<sup>46</sup> *Weeks v. United States*, 232 U.S. 383 (1941).

<sup>47</sup> *Katz v. United States*, 389 U.S. 347 (1967)

<sup>48</sup> *Silverman v. United States*, [365 U.S. 505, 511.](#)

was possible even of intangible spaces. The doctrine of tangible trespass in the Olmstead case was over-ruled.

Besides cases of phone tapping where illegal tapping has been disregarded as evidence by the Federal Courts in USA, there are various other kinds of illegal searches. The Courts have read the Bill of Rights into these cases to give a comprehensive meaning of fundamental rights and civil liberties to citizens, and in process have not admitted such evidence procure through illegitimate means. A landmark judgment of the United States Supreme Court has been the judicial pronouncement in the case of *Mapp v. Ohio*<sup>49</sup>, where, the USA Supreme Court reversed the decision of the State Court on grounds that the evidence gathered against the accused was illegal as it was obtained without a warrant, which was a gross violation of the 4<sup>th</sup> Amendment of the accused.

Another federal protection of civil rights and liberties has surfaced in the form of “Miranda Rights”, which were formulated in the wake of the judgment in the case of *Miranda v. Arizona*.<sup>50</sup> The Supreme Court of America reversed the Arizona Court's decision and granted the accused a new trial, where his confession was not admitted as evidence with regard to the protection under the 5<sup>th</sup> Amendment. The Court further established the "Miranda" rights of accused people and held that the right to remain silent and the right against self-incrimination were fundamental rights.

## **CONCLUSION: THE IDEAL APPROACH?**

### **PHILOSOPHY OF EVIDENCE LAW, LEGISLATIVE INTENT AND PURPOSE OF CRIMINAL JUSTICE VERSUS HUMAN RIGHTS**

In the contemporary world, we inhabit a society where crime is rampant, and despite all subsequently progressive legislations, we only wake up to learn that criminal activities are increasingly disseminating. The civilian population of our nation today is profoundly resilient towards anti-social activities as these dart across every strata of society and inflict some form of harm on almost everyone. Thus, people seek conviction of those who are indeed guilty but

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<sup>49</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961)

<sup>50</sup> *Miranda v. State of Arizona* [384 U.S. 436 \(1966\)](#).

Constitutional injunctions (such as the Right against Self-Incrimination in the Indian Constitution) itself impede the procedure and purpose of criminal justice, i.e. to prosecute the guilty, deter crime and safeguard the interests of the entire community. This is because these rights, though enacted to protect interests of the accused do tend to surface as hindrances during the investigation and trial processes as they conceal necessary evidence that would have otherwise been procured had there not been Constitutional safeguards such as the Right against Self-Incrimination.

Also, the provisions relating to confessions in the Indian Evidence Act such as Sections 25-26 that do not allow confessions made to police to be proved against the accused at trial as well as the Miranda rights of the accused under the exclusionary rule have resulted in the concealing of some quintessential evidence imperative to the trial. This position of the law is intended to protect the human rights of the accused while he/she is in police custody and also to deter the police from extracting evidence by unlawful means such as torture. However, given the protection of the accused through statutory rights, it is inevitable to note that these provisions prevent admissibility of such confessions (made to the police) on mere grounds of technicality of the procedure. This acutely dents the proceeding of a “fair trial” because in some cases, such confessions are the only evidence available against the accused, and the law many a times reduces the credibility of a free and fair trial by excluding such evidence only to comply with such technicalities.

Though it is imperative to have Constitutional and other legislative safeguards that protect human rights, judicial creations such as the ‘exclusionary rule’, when interpreted/applied beyond its own scope plays a detrimental role and does not serve the legitimate purpose of the law. The question bounces back to the same avenue, are fundamental rights so intense that the people begin to seek a libertarian (Minarchist or Anarchist) state, where the liberty of the people is absolutely sacrosanct and there is an absolute absence of state control? Should the ‘presumption of innocence’ be given such wide powers of applicability that it defeats the truth? Or should the state continue to function in a protective fashion, aiming to strike the right balance between social and individual interests? The truth being that the state has unable to accomplish the perfect balance that would genuinely promote state welfare and minimally injure human rights.

Given that the objective of evidence law is to recreate the story with veracity of facts, why then does a protection like the ‘exclusionary rule inherently defeat the purpose of evidence law? If the legislative intent of the laws pertaining to the criminal justice system is to deter crime by gathering

evidence which is directly and legally relevant, why then do State protected measures haunt the Indian criminal justice system with the conviction rates being abysmally low? The answer lies in the weight given to the technicalities of procedure by the Courts instead of focussing on the actual issue at hand.

Again, the admissibility of improperly obtained evidence is largely a matter of discretion of the Courts under the Indian jurisdiction. The judiciary has attempted (through the case of R.M. Malkani as discussed above) to reconcile two incongruous positions where the judiciary is perplexed between admissibility of illegally obtained evidence (since there exists a blanket rule that such evidence is inadmissible), and the fact that improper/illegal means of gathering evidence should not be encouraged. This is because admission of such evidence will defeat the purpose of the exclusionary rule as well as that of the legislative protections granted to accused for protection of his/her human rights.

I personally argue in favour of the Indian approach where the judiciary has courageously built up the appetite to admit even illegally procured evidence in context of phone tapping on the sole basis of its legal relevance. This approach is best to serve the interests of justice. Though it is quintessential for both substantive and procedural laws to be followed coherently in order to ensure an efficient and transparent criminal justice system, it is argued that allowing the procedural to override the substantive is socially suicidal as it will not only mar the general interests of the society by letting criminals go scot free but will also fragment our justice system beyond recognition. The wise approach, therefore, is to construe the substantive as weightier than the procedural so that the purpose of the legal system survives. This can be best explained by juxtaposing the cases of R.M. Malkani<sup>51</sup> with that of Agnoo Nagesia<sup>52</sup>. Both were similar in context of the admissibility of evidence. While the Supreme Court in the former decided progressively stating that evidence gathered by illegal phone tapping was admissible only where it fostered furtherance of public interest and social justice, the Apex Court's ruling in the latter case was bad law as the Court let an accused (who confessed to have committed the murder of four family members) walk free on the mere procedural technicality of Section 25 of the Evidence Act which disallows confessions made to a police officer to be proved against the accused in a court of

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<sup>51</sup> Supra note 35

<sup>52</sup> *Agnoo Nagesia v. State* (AIR 1966 SC 119)

law. The Court’s strict application of this section as well as Article 20(3) of the Indian Constitution defeated the purpose of justice when our nation saw a murderer earn an acquittal only because of technical adherence to the laws of procedure.

## **FINDING THE TRUTH TO DO JUSTICE VERSUS JUSTICE IN FINDING THE TRUTH**

Give the ruling of the Supreme Court in the case of R.M. Malkani as an effective precedent in context of admission of illegally obtained evidence, it is imperative to note that there still is no blanket rule that concretely lays down situations where illegally procured evidence should be admitted. Though ‘public interest’ is a progressive and necessary determinant to decide admissibility of such evidence, it must also be noted that the interpretation of the same can be expanded beyond what is so required and in such cases there might be a possibility that human rights are brutally compromised. What then, should be the ideal rule? Is it justified to place Agnoo Nagesia and Afsan Guru or a criminal caught under the entrapments of the Armed Forces (Special Powers) Act, 1958 on the same footing? Where does public interest weigh heavier? Do differing circumstances call for different application of the laws?

Again, there is a perpetual debate between the “Rule of Law” test and the “Democratic Necessity” test<sup>53</sup>. While the former has been designed to prioritize human rights conferred by legislations by voicing hurdles that States must overcome in order to claim public interest defences, the latter is embedded in the principle that requires a purely factual inquiry and is based on the premise that ‘factual necessity’ alone ensures a fair trial.

In furtherance of the confusion as stated above, it has been contended that the most appropriate way of striking a balance between promoting public interests while also shielding interests of the individual, is by determining the nature and content of the deliberative responsibility that the role and purpose of the law ought to fulfil.<sup>54</sup> Observations of the criminal justice system have witnessed that often values other than the truth have to be respected since these are form an intrinsic part of

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<sup>53</sup> Aileen McHarg, *Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*, 62 *Modern Law Rev.* 685, 671-696 (1999).

<sup>54</sup> H.L. HO, *A PHILOSOPHY OF EVIDENCE LAW: JUSTICE IN THE SEARCH OF TRUTH* (2008).

the nature and purpose of the trial. However, it is contended that a party does not merely have a right that the substantive law be correctly applied to objectively true findings and that the case is tried under rationally structured rules, the party is also entitled to a just verdict, where justice must be understood to incorporate a moral evaluation of the process which led to the outcome.<sup>55</sup> Therefore, it has been argued that the best way to accomplish this balance is by devising a methodology where the Courts, while promoting public interest by finding the truth in order to do justice, must also strive to do justice in the manner of finding the truth.

Given the modus operandi of the law enforcement officials (police) especially in India, it is definitely an imperative requirement to make the procedural process and those who exercise it more sensitive towards ensuring protecting human rights, thereby ensuring procedural certainty. The judiciary must encourage procedural certainty but should not let it defeat the larger purpose that is to dispense justice and protect public interest. The judiciary must guard the trial system against error but it must not come at a social cost that is higher than the remedial benefits of the same.

Drawing from the above, it can be stated that there no clearly cogent doctrinal solution to chalk out a solution in order to reduce the perplexity of the courts when they are torn between individual interests and public interest. However, in attempting to determine the test for admissibility of illegally procured evidence, I believe that public interest should trump individual rights when it comes the accomplishing the legitimate purpose. I believe that evidentiary barriers to the justice system are only a form of cosmetic legislation as they propound to safeguard individual rights but end up hampering interests of the community interests of which, every individual is a part of). Though protection of individual human rights is an imperative duty of the state, such protection should not come with a social cost as high as having the lowest conviction rates in the world while having one of the highest crime rates in our nation today, both of which exist simultaneously. It is stated that in the interest of the public and in the interest of justice, legally relevant evidence based on factual necessity alone must be made admissible so as to facilitate a fair trial. With the rules of natural justice (such as the right to fair hearing) overarching common law legislations, it is time that the Courts uphold public interest as the overriding phenomenon and admit evidence obtained illegally in order to draw nearer to the larger purpose of the law, i.e. promoting harmony and

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<sup>55</sup> Id.

safeguarding public interest. Through this approach, the courts will be able to uphold their judicial legitimacy as they will convict the accused who is found genuinely guilty, consequently investing in public service by catering to the general interests of the community. Therefore, exclusionary rules should be overlooked as these are the most intense form of internally apprehensive elements in the criminal justice system, which unfortunately defeat the ‘legitimate purpose’ as well as the ‘greater good’.