

Prohibited Methods of Obtaining and Presenting Evidence

Israeli Report

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Introduction

Israeli law originates mainly from common law, which was introduced during the British Mandate, but it also retains an influence from the continental tradition, brought mainly through European legal scholars arriving in Israel before and after the Second World War. The influence of the continental tradition, however, did not extend to Israel's law of evidence, which is based primarily on adversarial common law rather than the inquisitorial continental systems.

Generally speaking, Israeli evidence law favours discretionary rules of weight over strict rules of inadmissibility. Rather than excluding illegally obtained evidence altogether, the approach usually preferred by the Israeli legislator and Supreme Court is to instruct the fact-finder (who is, in the Israeli justice system, a professional judge rather than a juror) to reduce the *weight* given to this evidence ('weight' is loosely defined as the ability of the evidence to establish the fact which it has been adduced to prove). Furthermore, in accordance with the general preference that the Israeli legal system holds for wide judiciary discretion over strictly defined rules, the rules of evidence governing the issue of illegally obtained evidence leave significant room for the judge to determine both the admissibility and the weight of such evidence. As a result of these general characteristics of the system, there are relatively few statutory and case-law provisions that render particular types of illegally obtained evidence inadmissible and the exclusion of evidence under these provisions is usually subject to judicial discretion.

In the context of the present Report, there are three relevant statutory exclusionary rules. Firstly, Section 12 of the Evidence Ordinance (New Version), 5731-1971 excludes involuntary confessions of criminal defendants. It covers mainly confessions obtained by the police by improper methods of investigation and interrogation, such as physical or psychological abuse of the suspect. Secondly, Section 13(a) of the Secret Monitoring Law, 5739-1979 excludes evidence obtained by illegal secret monitoring (wiretapping). Lastly, Section 32 of the Protection of Privacy Law, 5741-1981 excludes evidence obtained in violation of privacy. These exclusionary rules apply equally to both prosecution and defence. As for common law doctrines, the most important and relatively recent common law exclusionary provision of illegally obtained evidence was established by the Israeli Supreme Court in *CrimA 5121/98 Issascharov v. Chief Military Prosecutor et al.*¹ In *Issascharov*, the Supreme Court formulated an overarching exclusionary rule, which gives any court the discretion to exclude any illegally obtained evidence, if that court considers that its admission would

¹ [2006] (1) IsrLR 320, available at:

http://elyon1.court.gov.il/files_eng/98/210/051/n21/98051210.n21.htm (last accessed 25.2.2011).

substantially violate the defendant's right to due process. These statutory and common law rules are outlined in greater detail below.

1). Illegal methods of obtaining evidence:

- ***Section 12 of the Evidence Ordinance (New Version), 5731-1971 (involuntary out-of-court confessions):*** according to this provision, an out-of-court confession is admissible only if the court is persuaded, based on the evidence regarding the circumstances in which the confession was made, that the confession was given freely and voluntarily. The main purpose of this provision is to protect the defendant's right to physical and psychological integrity by discouraging law-enforcement authorities from obtaining forced confessions through the use of improper methods of interrogation, such as physical violence, threat of physical violence, psychological abuse, denial of medical care to ill suspects, and any other method that infringes the defendant's fundamental bodily rights. While this provision does not apply exclusively to law enforcement authorities (that is to say, an out-of-court confession may be made in the presence of any person), the courts assess the voluntariness of the confession with more scrutiny if it had been made in the presence of a law enforcement officer. In 1949, the Supreme Court also introduced a weak requirement of corroboration, stating that a defendant cannot be convicted if the only evidence against him is his own confession.

Detailing the improper methods which render a confession inadmissible, the Supreme Court provides the following guideline (first formulated in CrimA 168/82 *Moadi v The State of Israel*² and confirmed in essence in *Issascharov*). If the improper method degrades the suspect's dignity, humiliates him, or grossly violates his bodily rights, the confession will be rendered inadmissible automatically. However, these are extreme cases, and in most cases, the confession will be excluded only if it was given *as a result* of the use of the improper method. Hence, there is usually a requirement for a causal connection between the improper method and the confession, such as would also affect its credibility. In *Issascharov*, the court ruled that failure to inform a suspect of his right to counsel does not render his subsequent confession inadmissible, because the absence of counsel did not degrade him or violate any of his fundamental bodily rights. The court further pointed out that the confession was admissible because there was no causal connection between the absence of counsel and the confession, given that the defendant had already been informed of his right to remain silent by the interviewing officer.

- ***Section 13(a) of the Secret Monitoring Law, 5739-1979 (evidence obtained through unlawful wiretapping):*** Section 1 of the Law defines secret monitoring as listening to, receiving or recording a conversation through the use of a device, without the consent of the conversation participants (conversations secretly recorded by one participant without the knowledge of another do not come under this legislation). Under Sections 4 and 6 of the Law, conducting a secret monitoring requires a permit either from a government minister (if the secret

² IsrSC 38 (1) 197.

monitoring is required in the interest of national security) or from the President or Vice-President of a District Court (if required for the purpose of investigating or preventing 'a crime', defined as an offence punishable by three or more years of imprisonment). Secret monitoring is unlawful when conducted without a proper permit, and evidence obtained thereby is inadmissible under Section 13(a), subject to two exceptions. Firstly, under Section 13(a)(1), the evidence is admissible in criminal proceedings for violations of the Secret Monitoring Law itself (unlawful secret monitoring is made a criminal offence in Section 2). Secondly, under Section 13(a)(2), in criminal proceedings for 'serious crimes' (defined as offences punishable by seven or more years of imprisonment), the court presiding over the proceedings has discretion to admit the evidence if convinced that, in the circumstances of the specific case, the public interest in discovering the truth outweighs the private interest of privacy. However, this exception does not apply to unauthorised secret monitoring conducted by a person or an authority which could have obtained a valid permit but failed to do so, unless the unauthorised secret monitoring was conducted while believing in good faith that it was properly authorised.

- ***Section 32 of the Protection of Privacy Law, 5741-1981 (evidence obtained in violation of privacy):*** Under Section 2 of the Law, a violation of privacy consists of acts such as stalking or harassing a person, photographing a person in a private domain, and copying or using the contents of a letter, or of any other written material not intended for publication, without permission from the addressee or the writer. Under Sections 4 and 5, a violation of privacy is a civil tort and a criminal offence, punishable by up to five years of imprisonment. However, Section 19 exempts law enforcement authorities and security agencies from criminal and civil liability for violations of privacy made in the course of reasonably performing their duties. Under Section 32, evidence obtained in violation of privacy cannot be admitted in court without the consent of the person whose privacy was violated. However, Section 32 also includes two exceptions. Firstly, the court may decide to admit the evidence for reasons that have to be specified in its decision (there is no further limitation on the court's discretion, other than the need to specify the reasons for its decision). Secondly, the evidence can be admitted if the violator is a party to the proceedings and has a defence or an exemption under the Law.
- ***CrimA 5121/98 Issascharov v. Chief Military Prosecutor et al:*** the *Issascharov* ruling was handed down by the Israeli Supreme Court in 2006 and addressed the question of the admissibility of a confession given without the defendant having been informed of his right to counsel. As mentioned, failure to inform the suspect of his right to counsel does not, in and of itself, negate the voluntariness of the confession required by Section 12 of the Evidence Ordinance (New Version), 5731-1971 (see above). However, in *Issascharov*, the Supreme Court ruled that such a confession may be excluded under a common law exclusionary rule which the court termed 'the judicial exclusionary doctrine'. Under this doctrine, the lower court has the discretion to exclude any illegally obtained evidence if admitting such evidence would substantially violate the defendant's right to due process. In reaching its decision, the lower court has to consider three factors: firstly, the nature and gravity of the illegality involved in obtaining

the evidence; secondly, the degree to which the illegality affects on the probative value of the evidence; and lastly, the cost and the benefit to society of excluding the evidence (within this third factor, the main considerations are the importance of the evidence in proving guilt and the nature and gravity of the offence for which the defendant is being tried). However, other than specifying the factors to be considered by lower courts when making the decision, the Supreme Court has not provided the lower courts with more concrete guidelines on how to balance both the conflicting interests and the different values which are at stake in these decisions.

The *Issascharov* ruling was initially hailed as an Israeli version of the *Miranda* rule and as a significant shift in favour of the human rights of suspects and defendants. Yet, to date, it seems that exclusions of evidence under the 'judicial exclusionary doctrine' have been rather rare. Furthermore, in *Issascharov*, the court emphasised that the American doctrine known as 'the fruits of the poisonous tree' is not applicable in Israel. Accordingly, it is yet to be seen whether *Issascharov* will make a significant contribution and practical difference in this area of law.

2). Illegal methods of presenting evidence

Israeli evidence law prohibits the presentation of certain types of evidence in court, including evidence based on conjecture or opinion, hearsay, the defendant's prior convictions, and the results of a polygraph test. One commonly cited justification for these exclusionary rules is the dubious credibility of these types of evidence. However, these exclusionary rules are accompanied by several categories of exceptions, and both the rules and their exceptions are fairly similar to the rules operating in other common law systems. For example, the hearsay rule is riddled with exceptions, some of which are listed in Sections 9-12 of the Evidence Ordinance (New Version), 5731-1971, and include, among many others, excited utterance, dying declaration, declarant unavailability and inconsistent or conflicting prior statement by a witness testifying in court. The common thread linking these exceptions to the hearsay rule is the presumed reliability of out-of-court statements made in the circumstances described in the provisions: for instance, a person on her death bed is considered credible because she is likely to use her last words to try to reveal the truth rather than to lie intentionally. Such exceptions are in addition to the out-of-court confession exception, discussed above. Similarly, written hearsay evidence may be admitted if both parties agree to its use, and if the defendant is represented by counsel. Another example of an exception is in the case of prior convictions, where the evidence may be admitted under the similar fact exception.

A particularly significant exception to the hearsay rule is defined in Section 10A of the Evidence Ordinance (New Version), 5731-1971. This statutory exception is given in response to the phenomenon common to criminal cases, especially ones involving organised crime, whereby prosecution witnesses either recant prior incriminating statements which they have given to the police, or suspiciously disappear right before they are scheduled to testify. The Section comprises two separate exceptions. Section 10A(a) contains the inconsistent statement exception, which gives the court the discretion to admit a prior out-of-court statement made by a witness

testifying in court, if, in the court's opinion, the testimony substantially contradicts the prior statement. Section 10A(b) is the unavailable witness exception, which allows the court to admit an out-of-court statement made by a person who is not a witness in the trial, if the court is persuaded that improper or illegal means served to dissuade or prevent that person from testifying (regardless of whether these means were exercised, directly or indirectly, by the defendant). However, the section also includes a corroboration requirement: under Section 10A(d), a defendant cannot be convicted if the sole piece of evidence against him is an out-of-court statement admitted under Sections 10A(a) and 10A(b).

Under Section 56 of the Evidence Ordinance (New Version), 5731-1971, even if inadmissible evidence has inadvertently been presented at trial, this fact on its own does not invalidate the judgment automatically. The judgment will be quashed only if the conviction could not have been secured without the inadmissible piece of evidence which was admitted by mistake. It is important to emphasise, however, that the exclusionary rules described in this report belong mainly to the conviction stage of the trial, and accordingly some of the rules may not be applicable at other stages of the criminal process, such as arrest, remand, or sentencing proceedings.