Analytical Essay on Integrity of the Justice System

This answer will look at whether relevant and reliable evidence should be excluded if there has been unlawfully obtained, and how compatible the law is with Article 6 of the European Convention on Human Rights (ECHR) which provides that a defendant has a right to a fair trial. There are two opposing attitudes towards the admissibility of unlawfully obtained evidence in a trial. McEwanagues for the approach of Bentham who argued for a system of free proof, which would admit all relevant evidence. This is the reliability principle. Choo and Ashworth argue that a stance should be adopted by the courts to deter police from abusing their powers against the rights of a defendant, to be achieved by automatically excluding such evidence. The integrity of the trial is undermined if those gathering evidence, particularly if they are state actors, have acted illegally or improperly

The legislation adopts the approach of excluding unlawfully obtained evidence in order to uphold integrity in the criminal justice system in s76(2)(a) Police and Criminal Evidence Act 1984 (PACE). However, the common law have traditionally been reluctant to exclude evidence because of some impropriety in the way it was obtained, on the grounds of public policy.

At common law, courts have a general discretion to exclude evidence, regardless of relevance, to protect the integrity of the fair trial process. In R v Sang the House of Lords broke down this procedure into two parts: 1) the exclusion of evidence if it would be likely to have a prejudicial effect outweighing its probative value, and 2) a more limited discretion to exclude unfairly or illegally obtained evidence. But the general rule of English law was that, apart from confession evidence, impropriety in obtaining evidence has no relevance to admissibility (Kuruma v R). In fact, the courts rarely exercised the common law discretion to exclude. However, Lord Diplock in R v Christous recognised that R v Payne is the only example of this whereby the evidence had been obtained by a trick.

The introduction of PACE, while preserving the common law discretion, introduced an additional statutory discretion in the form of s78, which enables evidence to be barred if it would not allow a fair trial. It must be highlighted that there is no automatic exclusion for impropriety, as there has to be a causal connection between the impropriety at the investigative stage fall into two groups. These are those concerned with alleged entrapment by the police and, secondly, those involving some breach of procedure, such as unauthorised surveillance or an illegal search.

Arguments in favour of maintaining an inclusionary approach to the admissibility can be categorised as follows: first, the evidence exists and if it is relevant it should be admitted. In R v Chalkley the trial judge admitted that evidence of secret tape recording was obtained in breach of PACE and the civil law of trespass and in violation of Article 8 ECHR, it was still however permissible as the evidence was highly relevant. This case supports the Benthamite argument about truth-seeking being the prime purpose of a trial. Similarly, in R v B (AG’s Reference (No 3 of 1999)) the House of Lords held in connection with retention of DNA samples, which was then unlawful, the sample could be used in the subsequent trial of the same defendant on another charge. Lord Hutton stated that it was necessary to consider the interest of the victim and the public as well as the defendant. Thus the key test was relevant. Laudan, upholds this argument: ‘it is perfectly clear that the exclusion of germane inculpatory evidence on account of

the way it was obtained, significantly increases the likelihood of false acquittals'. He gives two further reasons for privileging truth-seeking above other considerations, namely the economic waste of court time in deciding on admissibility and public perception of injustice over wrongful acquittals. It is also arguable that exclusion of evidence where the offence is a serious crime is a disproportionate response to police transgressions. Lord Nolan commented in R v Khan 'it would be a strange reflection on our law if man who had admitted his participation in the illegal importation of heroin should have his conviction set aside on the grounds ds his privacy has been invaded'. It is significant that the House of Lords' stance was supported by the Strasbourg Court which held that there had been no breach of Article 6 although there was a breach of Article 8. There was no absolute rule of exclusion.

Support for an inclusionary approach may also be based on the argument that if the objective is to discipline the investigative authorities, there are other means than exclusion of evidence to do this. These might include disciplinary proceedings against that police the police or civil suits on the part of the defendant. On the other hand, s67(10) PACE make it clear that a breach of the Codes of Practice will not of itself render the officer liable to criminal or civil proceedings. Finally, in favour of a flexible approach, it could be argued that an absolutist exclusionary approach avoids the difficulties faced in deciding whether minor improprieties should lead to evidence being excluded.

There are counter-arguments to those outlined earlier. In relation to entrapment there has been an increased adoption of the exclusionary approach deplored by Bentham. Thus in R v Smurthwaite, the Court of Appeal considered applying s78 to exclude evidence of a police 'sting' but decided on the facts not to do so. Here Article 6 considerations also prompt exclusion of evidence or stay of prosecution as in Texeria de Castro v Portugal. The leading case in this area is R v Looseley, whereby the judge stayed the proceedings on one case on the grounds that the police had incited the commission of the offence and that otherwise the accused would have denied his right to a fair hearing under Article 6(1). The stay was lifted, the prosecution offered no evidence, and the accused was acquitted. The AG referred to the Court of Appeal the question whether in cases of entrapment the judicial discretion conferred by s78 PACE and the power to stay proceedings as an abuse of process had been modified by Article 6(1) ECHR. The Court of Appeal held that it had not and that trial judge had been wrong to stay the proceedings. The defendant in the first case appealed and reference was made from the Court of Appeal in the second. The House of Lords stated that the court must ask the central question which was whether the actions of the police were so seriously improper as to bring the administration of justice into disrepute. If there was an abuse of state power then the appropriate remedy was a stay of the indictment, rather than exclusion of evidence. The appeal of the defendant in the first case was dismissed since the undercover officer did no more than present himself as an ordinary customer to a drug dealer. The judge had been correct in the second case to stay the proceedings. The decision of the Court of Appeal was reversed in part. The test was the integrity of the justice system.

It is significant that a number of academics applaud this principled approach. Dennis supports this principled approach to exclusion as he sees the overriding reason to be that of protecting the moral legitimacy of the verdict. Ashworth argues from an underlying principle of obedience to legal values which should guide the exercise of exclusionary discretion. He identifies particularly the importance of compliance with Convention rights under the Human Rights Act 1998. He states 'the right to trial on evidence not obtained in violation of a fundamental right' as one of the procedural rights for persons accused of potentially serious crime. There are

indications that this principled approach is being increasingly embraced by Strasbourg as well as the English courts. Examples are Allan v UK and the landmark judgment of A v Secretary of State for the Home Department (No 2). Evidence obtained by torture abroad, including that by non-state actors, may be contaminated and should not be admitted.

Nonetheless it is arguable that the Benthamite inclusionary approach is still more the norm than exclusion on grounds of impropriety although it is more difficult to identify a coherent approach by the courts. Breaches of the Regulation of Investigatory Powers Act 2000 (RIPA) for example, rarely lead to exclusion. Warren v AG of Jersey held that illegal surveillance had not been influenced the defendants' behaviour and a stay had not been ordered. Stays are, on the other hand, however, apparently now applied in some cases where the 'trick' is perpetrated by a non-state actor. In Council for the Regulation of Health Professionals v GMC sufficiently gross misconduct by a non-state agent was potentially an instance where the use of evidence could be in breach of Article 6. Such developments are significant in view of the increased involvement of lay people and individuals in forensic activity through social networking and the growth of what O'Flonin and Ormerod call 'private entrapment'.

In conclusion, it is acknowledged that there are powerful moral arguments in favour of excluding improperly obtained evidence and that Bentham's utilitarian stance is ethically unattractive. Bronitt and Roche argue that the consequence of tolerating abuse of the criminal justice process is the erosion of the rights of citizenship. Doubtless there is a need for undercover policing but there are dangers in upholding the view that secrecy and lack of accountability are paramount objectives, or ends justify the means. Hyland and Walker give a very full account of serious abuses by undercover police leading to miscarriages of justice. An exclusion of evidence gathered in violation of human rights encourages public participation in the criminal justice process, a necessary ingredient of a healthy democracy.