ARTICLE:

THE USE OF ILLEGALLY OBTAINED EVIDENCE IN BELGIUM: A 'STATUS QUESTIONIS'

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Almost every law system has an exclusionary rule which causes evidence to be withheld from court. However, rules about the exclusion of illegally obtained evidence are not always beyond criticism: courts and commentators throughout the world struggle to find a middle ground between ensuring fundamental rights on the one hand and ensuring justice on the other hand,[1] or what could be called the costs and the benefits of the exclusionary rule.[2] Even in the United States, mostly referred to as the origin of the exclusionary rule,[3] it remains one of the most controversial doctrines in criminal procedure.[4] What is more, in many countries the last decade has shown interesting evolutions in jurisprudence concerning the exclusionary rule. Almost always, this evolution makes it easier for prosecutors to use evidence that has been obtained illegally or even unconstitutionally.[5] This has also been the case in Belgium. In this article, a short overview will be given about the evolution of Belgian jurisprudence concerning the exclusionary rule.

In Belgian criminal procedure, the use of illegally obtained evidence is in principle forbidden. In a decision of 12 March 1923, the Court of Cassation ruled that illegally obtained evidence may not be used as an element of proof against a person in a criminal case.[6] Evidence that was gathered because of earlier illegally obtained evidence is also the subject of exclusion. Based on a decision by the Court of Cassation of 13 May 1986,[7] it can be stated that the exclusionary rule as seen in Belgian jurisprudence is related to evidence gathered in three different ways: by an unlawful act,[8] by an act in violation of formal procedural rules, or by an act that is incompatible with the general principles of law.[9] However, this general rule has been put into a wider perspective by Belgian jurisprudence since 1990, and especially since 2003.

Since 1990, there has been a clear tendency in the jurisprudence of the Court of Cassation to limit, in a number of situations, the effect and the strict application of the exclusionary rule. This approach was applied specifically in cases where evidence was obtained as a result of an unlawful act by a person other than the investigating police officers or magistrates.[10] The present

1 *B. Naude, 'The inclusion of inevitably discoverable evidence', S. Afr. J. Crim. Just. 2008, 169 (168-185).*

2 *See W. M. Oliver, 'Toward a better categorical balance of the costs and benefits of the exclusionary rule', 9 Buff. Crim. L. Rev. 100 (2005), 201-271.*

3 *See C. Van den Wyngaert, Strafrecht en strafprocesrecht in hoofdlijnen, Antwerpen, Maklu, 2011 (8e ed.), 1203.*

4 *Yue Mae, 'Comparative analysis of exclusionary rules in the United States, England, France, Germany and Italy', Int. J. Police Strat. & Mgmt. Volume 22, issue 3 (1999), 280-303; M. W. Orfield jr., 'The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers', U. Chi. L. Rev. (1980), vol. 54, number 3, 1016-1069.*

5 *See for example about the evolution in the United States among many articles David A. Moran, 'Hanging on By a Thread: The Exclusionary Rule (Or What's Left of it) Lives for another Day', 9 Ohio St. J. Crim. L. (2011), 363-380; Craig M. Bradley, 'Is the exclusionary rule dead?', J. Crim. L. & Criminology volume 102, issue 1 (Winter 2012), 1-23; James J. Tomkovicz, 'Davis v. United States: The Exclusion Revolution Continues', 9 Ohio St. J. Crim. L. (2011), 400, 381-403; George M. Dery III, 'This Bitter Pill: The Supreme Court's Distaste For The Exclusionary Rule in Davis v. United States Makes Evidence Suppression impossible to Swallow', 23 Geo. Mason U. C.R. L.J. 1 (2012), 1-28; Yue Ma, 'The American Exclusionary Rule Is There a Lesson to Learn From Others?' International Criminal Justice Review (September 2012) vol. 22 no. 3, 309-325.*

6 *Cass. 12 March 1923, Pasicrisie 1923, I, 233.*

7 *Cass. 13 May 1986, Arresten van het Hof van Cassatie 1985-86, n° 558.*

8 *Such as evidence gathered in violation of professional secrecy, or the confidentiality of mail or as the result of illegal monitoring operations.*

9 *For example, evidence obtained in connection with a violation of the right to remain silent, the fairness of criminal proceedings, the privacy of citizens or the physical and psychical integrity of individuals.*

10 *Cass. 17 January 1990, Pasicrisie, 1990, I, n° 310, Rechtskundig Weekblad 1990-91, 463-464, comments by L. Huybrechts and Cass. 17 April 1991, Revue de droit pénal et de criminologie 1992, 94-107, comments by Ch. De Valkeneer. See also Cass. 4 January 1994, Arresten van het Hof van Cassatie 1994, n° 1 and Cass. 30 May 1995, Arresten van het Hof van Cassatie 1995, n° 267.*

position is that the Court of Cassation will accept the use of illegally obtained evidence in circumstances where neither the persons charged with the investigation, nor the informant has committed an unlawful act in order to obtain possession of the documents and when there is no connection between the theft of the evidence and the delivering of the documents to the prosecuting officers. Both of these conditions have to be met. In a well known judgement of 4 January 1994, the Court of Cassation had to decide once more on the effect of this exclusionary rule.[11] A hotel night watchman made copies of the unofficial accounts of the owner of the hotel during his employment and sent it anonymously to the judicial authorities. The owner of the hotel was prosecuted for fraud. However, the Court of Appeal decided to discharge the accused because the furnishing of proof was founded on irregularly obtained evidence, namely the information from the anonymous report. The members of the Court of Appeal took the view that the night watchman could only have obtained the information irregularly by misusing the relationship with his employer. In its judgement, the Court of Cassation confirmed the principle of exclusion of irregularly obtained evidence, and stated that the trial judge cannot convict a person for a criminal offence where the evidence presented was obtained irregularly or illegally by the official authorities charged with the investigation or prosecution, or by the person reporting the offence. However, the court decided that the information obtained by the night watchman could be used as evidence, since he had access to the information because of his employment, and he did not commit a criminal offence by copying the information sent to the authorities. That the employee had undoubtedly misused his right to obtain access to the information does not necessarily imply that he committed a criminal offence. In a later judgement, the Court of Cassation considered the furnishing of proof to be regular when the reporter of a criminal offence obtained the evidence by coincidence without committing an offence or an irregularity, by which the reporter of a fiscal fraud accidentally obtained charging documents that were, so he stated, pushed through his letterbox; the documents were not handed over to the judicial authorities immediately, but were hidden and given to a third person at a later time.[12] The defendant can use any evidence to prove their innocence, even when the evidence is obtained illegally.[13] The rationale for this derogation of the exclusionary rule is to guarantee the right of a fair trial.

Since 1998, Belgian law explicitly requires the public prosecutor's department and the investigating judge to ensure that evidence is gathered lawfully and fairly.[14] The law does not, however, prescribe specific sanctions where this obligation is not respected. According to the Court of Cassation, the public prosecutor's department is presumed to act correctly. This means that if the defence disputes the good faith of the prosecutor, it is for the defence to prove the allegation.[15] Since 2003 however, the Belgian exclusionary rule has been rewritten completely by the Court of Cassation.[16] A vehicle was searched unlawfully, which led to the finding of an illegal weapon. Despite the search being unlawful, the Court of Appeal convicted the accused based on the findings of the search. The Court of Cassation upheld this judgement,[17] and took the opportunity to reverse the exclusionary rule.[18] Since then, the use of illegally obtained evidence is accepted, with the following exceptions: where the legislation explicitly prescribes nullity as a sanction for the failure to comply with a relevant regulation, which is exceptional in Belgian criminal law;[19] the illegality or irregularity has made the evidence unreliable,[20] or the use of the illegally obtained evidence is not compatible with the principle of a fair trial. This last criteria has been the

11 *Cass. 4 January 1994, Arresten van het Hof van Cassatie 1994, n° 1.*

12 *Cass. 9 December 1997, Algemeen Juridisch Tijdschrift 1998-99, 297.*

13 *Cass. 3 November 1999, Revue de droit pénal et de criminologie 2000, 736 and Tijdschrift voor Strafrecht 2000, 255, with comments by J. Meese.*

14 *Article 28bis §3 and article 56 §1 CCP.*

15 *Cass. 30 October 2001,Arresten van het Hof van Cassatie 2001, 1815 and Tijdschrift voor Strafrecht 2002, 198.*

16 *For a more thorough review of this new jurisprudential development, see F. Deruyck, ' Wat krom is wordt recht. Over de bruikbaarheid van onrechtmatig verkregen bewijs' , in X. XXXIIe Postuniversitaire Cyclus Willy Delva, Mechelen, Kluwer, 2006, 201-231.*

17 *Cass. 14 October 2003, Rechtskundig Weekblad 2003-04, 814; Tijdschrift voor Strafrecht 2004, 129, with comments by Ph. Traest and Rechtspraak Brussel, Antwerpen, Gent 2004, 333, with comments by F. Schuermans.*

18 *Most of the time the Court follows the advice of the public department (openbaar ministerie). Mostly that advice is given orally. However, in important cases, there is a written advice (conclusion) that elaborates on the judicial question much more than the decision of the Court itself. Those written conclusions are mostly published with the decision of the Court and can also be found on the web site of the Court. But this does not solve everything: in many cases it is not so clear what exactly convinced the Court to decide one way or the other.*

19 *For an inventory, see M. Sterkens, ' De gewijzigde cassatierechtspraak met betrekking tot de onrechtmatige bewijsverkrijging en de weerslag ervan op het vooronderzoek, Tijdschrift voor Strafrecht 2005, 509.*

20 *Providing an example of such a situation is not simple. Some authors suggest provocation by police officers or statements that were made because of blackmail (F. Schuermans, ' De nieuwe cassatierechtspraak inzake de sanctionering van het onrechtmatig verkregen bewijs: doorbraak of bres?' , Rechtspraak Antwerpen Brussel, Gent 2004, n° 18, 346-347), but such examples are not convincing, since they suggest a breach of the right of a fair trial, which is the third reason for exclusion (F. Deruyck, o.c., n° 18, 215).*

subject of further explanation by the Court of Cassation,[21] in which the trial judge may take into account one or all of following circumstances:

1. the authorities have committed the illegality or irregularity on purpose;
2. the seriousness of the criminal offence outweighs the illegality or irregularity;
3. the illegally obtained evidence only proves the existence of a criminal offence, but does not prove who committed the offence, which can be the case where a body of a murdered person is found, for instance;[22]
4. the illegality did not affect the rights protected by the legal rule that has been violated;[23]
5. the mere formal character of the legal rule that has been violated.[24]

Recently, a new criterion was added: illegally obtained evidence cannot be used in court if the evidence was collected with a disregard of the competence of the court.[25] In this case, a search warrant was issued by a judge that was not competent to do so. It is not clear however, if this new criterion will be upheld and if that is the case, what trial judges will do with it.

Since the evolution in Belgian jurisprudence began ten years ago, illegally obtained evidence is rarely excluded. Most trial judges agree with the defence claim that evidence might have been obtained illegally, but after having concluded that the evidence is not unreliable and that the use of is not incompatible with the principle of a fair trial, they nevertheless can base their decision on the illegally obtained evidence. Illegally obtained evidence can even be used when the illegality is linked to the infringement of a fundamental individual or constitutional right, such as the right of protection of domicile: judges have accepted the use of evidence obtained by illegal searches, even though article 15 of the Belgian constitution provides that the domicile is inviolable and that no visit to the individual's residence can take place except as laid down by law and in the form prescribed by law. This interpretation was accepted by the Court of Cassation in 2004.[26] However, occasionally a trial judge will decide the opposite and exclude evidence that would in most cases be accepted. This happened recently in a pending criminal investigation against members of the Catholic hierarchy who are being blamed for not reporting sex abuse allegations to the legal authorities.[27] The case showed that there is a high risk for suspects or civil parties to be treated differently according to the nature of the case or the position of the trial judge towards the exclusionary rule. This risk is especially high since the trial judge is not obliged to evaluate whether the seriousness of the criminal offence outweighs the illegality or irregularity. Therefore he can for example, when the authorities have committed the illegality or irregularity on purpose, exclude the evidence without performing a balance check (which was the decision in the case against the members of Catholic hierarchy) or decide that the evidence can be used because of the seriousness of the crime.[28]

The Belgian approach to illegally obtained evidence can also be criticized since there is no longer any logic at all to be found in the exclusionary (or non-exclusionary) rule. For the logic to return, the legislator would have to define which breaches of formal regulations will be sanctioned by excluding the evidence.[29] At present, almost no breaches of formal regulations are sanctioned by excluding evidence, even though, in the main, they protect a far more important right or freedom than those few breaches of formal regulations that are sanctioned with nullity. The only regulations that, if breached, will mean evidence is excluded, are to be found in article

21 *Cass. 23 March 2004, Rechtspraak Brussel, Antwerpen, Gent 2004, 1061, with comments by F. Schuermans.*

22 *This distinction has been criticised, since it is not clear how to deal with illegally obtained evidence that proves not only the criminal offence, but also the person that committed the offence (see F. Deruyck, o.c, n° 21c, 220).*

23 *Cass. 2 March 2005, Rechtspraak Brussel, Antwerpen, Gent 2005, 1161, with comments by S. Berneman.*

24 *Cass. 12 October 2005, Tijdschrift voor Strafrecht, 2006, 25-31, with comments by F. Verbruggen.*

25 *Cass. 24 April 2013, n° P.12.1919.F.*

26 *Cass. 16 November 2004, Tijdschrift voor Strafrecht 2005, 285, with comments by R. Verstraeten and S. De Decker.*

27 *See Cass. 28 May 2013, n° P.13.0066.N. This decision is also interesting because the Court of Cassation explicitly rejected the theory of the inevitable discovery (for more about this theory among other publications, see William M. Cohn, 'Sixth Amendment – Inevitable Discovery: A Valuable but Easily Abused Exception to the Exclusionary rule', 75 J. Crim. L. & Criminology, (1984), 729-754; S. P. Grossman, 'The doctrine of inevitable discovery: a plea for reasonable limitations', Dick. L. Rev. (1988), 313-361; R. B. Lanberth, 'The inevitable discovery doctrine: procedural safeguards to ensure inevitability', Baylor L. Rev. (1988), 129-148; R. M. Bloom, 'Inevitable Discovery: An Exception Beyond the Fruits', 20 Am J. Crim L. (Fall 1992), 79-103). Recently, this doctrine was accepted in some countries, such as South Africa (B. Naude, 'The inclusion of inevitably discoverable evidence', S. Afr. J. Crim. Just. 2008, 168-185) and Brazil (see art. 157 Código de Processo Penal, as changed in 2008).*

28 *See for example Cass. 31 October 2006, n° P.06.1016.N, Vigiles 2007, 3, 93.*

29 *Ph. Traest, 'Onrechtmatig verkregen doch bruikbaar bewijs. Het Hof van Cassatie zet de bakens uit', Tijdschrift voor Strafrecht 2004, 136-137.*

61quinquies CCP,[30] article 86bis CCP,[31] article 90quater CCP[32] and in article 40 of the law of 15 June 1935 on the use of languages in judicial affairs.[33] It is unfortunate that the Belgian legislator has failed to draw any conclusion out of the new approach taken by the Court of Cassation regarding illegally obtained evidence. What is more, in the near future the Belgian legislator is likely to adopt a law about the exclusionary rule, but this legal rule will probably be nothing more than the existing rule created by the Belgian Court of Cassation.[34]

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30 *Article 61quinquies CCP provides the right for the defendant and the injured party to request for additional investigations during the pre-trial investigation. The investigating judge must grant or dismiss such a request within a month after it has been filed. If the request is granted after the term of one month has expired, all evidence gathered hereunder has to be excluded (M. Sterkens, l.c., 512).*

31 *Article 86bis CCP provides the possibility for the investigating judge to interrogate a witness without having to state his or her identity (anonymous witness). The order of the investigating judge has to be reasoned, signed and dated, and has to make mention of the application of the relevant sections of article 86bis CCP as well as the manner upon which the investigating judge has examined the reliability of the witness. If one of these regulations has not been met, the interrogation of the witness has to be declared null.*

32 *This article prescribes that a surveillance order issued by an investigating judge shall be reasoned, dated and signed, and shall make mention of a series of elements required by law. If one of these regulations has not been met, the surveillance order has to be declared null, as well as all evidence gathered via the surveillance.*

33 *Wet van 15 juni 1935 op het gebruik der talen in gerechtszaken. According to this law, legal proceedings have to run in the appropriate language (in Dutch in Dutch-speaking regions, in French in French-speaking regions and in German in German-speaking regions). A warrant from an investigating judge in the Dutch-speaking regions for example, shall be declared null when it is written in French.*

34 *See 'Wetsontwerp tot wijziging van de voorafgaande titel van het Wetboek van Strafvordering wat betreft de nietigheden' ('draft of law concerning the adaptation of the preliminary title of the Code of Criminal Procedure concerning nullities'), Parlementaire Stukken, Kamer (Chambre), 2012-2013, n° 0041.*

