Dimitrios Giannoulopoulos, **Improperly Obtained Evidence in Anglo-American and Continental Law**, Oxford: Hart Publishing, 2018**,** xxxv + 292 pp, hb £65.

The tenor of *Dimitrios* Giannoulopoulos' *Improperly Obtained Evidence in Anglo-American and Continental Law* is encapsulated by a remark of the nineteenth century French jurist, Faustin Hélie, who wrote that '[j]ustice which, as Domat says, is itself the truth, must put truth in all its actions' (quoted 78). Giannoulopoulos might prefer to say that evidential rules governing improperly obtained evidence must put human rights in all their actions. It is a foundational principle of all systems of evidence that judicial verdicts should accord as closely as possible with the truth. However, Giannoulopoulos reminds us that 'the search for truth is not absolute' (201) as the truth might be best served if there were no evidentiary restrictions at all. He uses the examples of France, Greece, England and Wales, and the United States (US) to provide a unique comparative perspective on two main categories of improperly obtained evidence: evidence obtained in a manner that violates privacy and unlawfully obtained confessional evidence. These topics are at the heart of European human rights law, which in effect makes 'Europe' a fifth point of comparison. Giannoulopoulos' analysis builds up to a finale calling for a reinvigoration of what he terms the 'rights thesis', which places rights first and truth second.

Based on a doctoral thesis written in French, this is a thoroughly researched and comprehensively argued text. Giannoulopoulos impresses as a genuine authority in his area of expertise while showing a modest deference to experts that have come before him. He is highly skilled in comparative research methodology, taking care to explain the bases for comparison which may not at first sight seem obvious. The book's introduction helpfully provides a brief refresher on terminology and institutional procedures as background for analysis of the four domestic systems that serve as his 'comparative law pillars'. Whilst common law systems refer to the *exclusion* of improperly obtained evidence, their continental law counterparts employ the procedural sanction of *nullity*. Looking beyond terminological and conceptual differences between these two legal traditions, one of the book's goals and distinguishing features is to 'highlight the "constitutionalisation" and "internationalisation" of criminal evidence and procedure as a cause of rapprochement (or divergence) beyond the Anglo-American and Continental law divide' (15). Thus, Chapter 2 pits Greece and the US in productive dialogue while Chapter 3 identifies parallels

between France and England and Wales in their respective treatment of the right to privacy. These pairings reveal a key difference in regulatory policy, in that automatic exclusionary rules apply in Greece and the US while France and England and Wales recognise only a limited exclusionary discretion. Giannoulopoulos notes, however, that the Greek exclusionary rules are limited in practice to illegal wiretaps while the American exclusionary rule deriving from *Mapp v Ohio* (367 US 343 (1961)), which has search and seizure as its epicentre, has been heavily qualified by *Hudson v Michigan* (547 US 586 (2006)). England and Wales and France are characterised as adopting an 'all-encompassing discretion' (116) to admit evidence obtained in violation of the right to privacy, with appellate courts in both countries reducing this discretion to a reliability test. Giannoulopoulos criticises the 'open-ended concept of "fairness"' (116) in Section 78 of the Police and Criminal Evidence Act (PACE) 1984 and the judicial tendency to favour the public interest over individual rights in both England and Wales and France. Returning to consider the forces shaping convergence across legal traditions, he suggests that constitutionalisation of criminal procedure helps to explain the 'capacity to generate cross-cultural, rights-centred, exclusionary rule convergence' (122) illustrated by Greece and the US, while its absence may explain the reluctance to adopt a rights-centric approach in England and Wales and France.

Chapter 4 addresses all four comparative pillars together, finding more common ground in the area of improperly obtained confessional evidence. Here, France and Greece are closely aligned, adopting a rights-based procedural nullity approach to evidence obtained in violation of custodial interrogation rights. According to Giannoulopoulos, this reflects a shift in the understanding of suspects' rights from guarantees of individual interests towards values whose protection serves the public interest. Giannoulopoulos identifies similarities between the approaches in US and English law, according to which the voluntariness of the confession is paramount. In the US, the *Miranda* (384 US 436 (1966)) exclusionary rule effectively treated the privilege against self-incrimination as absolute, but the rule has since been watered down. The position in England and Wales is mixed, with confessions obtained by oppression or rendered hypothetically unreliable by something said or done being subject to an automatic exclusionary rule under section 76(2) of PACE, while outside this framework the law remains 'engrained in the discretionary logic' (148) of section 78. Nonetheless, the provisions in English law are regarded as extending further than Greek, French or US law in their protection against the use of unreliable confession evidence. Giannoulopoulos' analysis reveals that the section 78 discretion is exercised

more readily in this sphere than with respect to breaches of privacy. In conclusion, the chapter points to an 'emerging rapprochement on the importance of custodial interrogation rights and the risks inherent in the use of potentially unreliable evidence' (163).

Chapter 5 considers the symbiotic relationship between the European Court of Human Rights (ECtHR) jurisprudence, European Union (EU) law and domestic law as it concerns confessional evidence. Anticipating the objection that US procedural law has no relevance to this chapter, Giannoulopoulos presents *Salduz v Turkey* ((2008) EHRR 421) as the 'ECtHR's big *Miranda* moment' (172). He proceeds to hold up the *Salduz* jurisprudence as a torch-bearer for a 'rights theory', all the time being reluctantly aware that the Grand Chamber in *Ibrahim v UK* ([2016] ECHR 750) effectively reversed the key tenet of *Salduz*, namely that 'the interrogation of the suspect in the absence of a lawyer will irretrievably prejudice the rights of the suspect and result in a violation of the right to a fair trial' (166). With *Ibrahim*, the ECtHR returned to its earlier approach of considering the overall fairness of the proceedings. In other words, the violation of one of the underlying components of the right to a fair trial protected by Article 6 of the European Convention on Human Rights does not automatically render a trial unfair. Thus, it might be said that Article 6 is a package of rights, one or more of which can be sacrificed on the altar of truth-finding. Giannoulopoulos is strongly opposed to such an approach, regarding the balancing test introduced in *Ibrahim* as prioritising the public interest over human rights. His critique has three strands: the majority incorrectly interpreted *Salduz* as stating a rule that was strict but not absolute; the Court's comparative law methodology was flawed; and *Ibrahim* is distinguishable on its facts, permitting the ECtHR to revert to its original understanding in *Salduz*.

In Giannoulopoulos' view, *Ibrahim* leaves the law of improperly obtained confessional evidence in Europe in a 'perilous state' (196). He suggests that one way of distinguishing the case would be to limit its effect to terrorism prosecutions. However, this interpretation risks undermining other aspects of ECtHR jurisprudence. In *Ibrahim* itself the Grand Chamber reiterated that: 'The general requirements of fairness contained in Article 6 apply to all criminal proceedings, irrespective of the type of offence in issue' ([2016] ECHR 750, para. 252). Giannoulopoulos notes that the fair trial rights of the fourth applicant in *Ibrahim* were found to have been violated, pointing to the Court's ability to apply the 'overall fairness test' (184) appropriately, but he would prefer rule-bound legal certainty to ad hoc balancing. Amongst Giannoulopoulos' chief concerns is the

potential undoing of domestic reforms made in response to *Salduz* that provide for the right of access to a lawyer in custodial interrogations in many European countries. He fears this outcome notwithstanding complementary EU directives. In previous publications he has stressed 'the need for the ECtHR to view the reception of its jurisprudence from within the domestic jurisdictions it seeks to influence' (192). While presented parenthetically in this book, it is a remark that merits emphasis as underlining the potential influence of the author's wider body of work.

Chapter 6 attempts to place the 'rights thesis' back on the agenda. Taking as its starting point familiar Anglo-American rationales for excluding improperly obtained evidence (reliability, deterrence, judicial integrity and rights protection), Giannoulopoulos makes a strong argument in favour of the protective rationale, principally attributed to Andrew Ashworth. According to this theory, 'improperly obtained evidence is excluded so that we can protect, vindicate and restore the rights of the defendant' (212). Those rights are broadly defined as constitutional and international human rights. Giannoulopoulos recognises that his rights thesis would not necessarily cover evidence obtained by tricks or deception, albeit that Article 6 ECHR already extends to entrapment. To the extent that some forms of procedural impropriety might not constitute rights violation, judicial integrity could fill the void. Giannoulopoulos is not unduly concerned that the rights thesis may require supplementation, being satisfied that it has a 'unique ability to provide a solid normative justification for the exclusion of improperly obtained evidence' (222) in the context of violations by state officials of the defendant's rights to privacy and custodial legal assistance. In other words, it is sufficient for the particular issues examined in the book, but the story is to be continued.

It is surprising that sustained normative analysis comes as late as Chapter 6, considering that the rights thesis figures in earlier chapters. Coupled with this, the second half of the book is quite strongly focused on confessions and does not consider in any depth the relationship between rights within the wide scope of constitutional and international human rights law. The book therefore lacks a full analysis of the ECtHR's approach in cases that allege a breach of the Article 6 right to a fair trial tied to the violation of a separate right under the ECHR. English law is presented in Chapter 3 as displaying a notably lukewarm attitude towards Article 8 ECHR protecting the right to respect for private and family life, home and correspondence. Giannoulopoulos discusses *R v Khan (Sultan)* ([1997] AC 558 (HL)), noting that its effect was to

concede almost no significance to the fundamental right to privacy. However, the subsequent decision of the ECtHR in *Khan v United Kingdom* ((2001) 31 EHRR 45) receives comparatively little attention. In that case the ECtHR found a breach of Article 8 but accepted that the trial overall had been fair. An assessment of this reasoning seems important for the development of the rights thesis as it would help answer the question raised in Chapter 6 as to whether evidence should be excluded to protect rights, and if so what sort of rights (211). Torture is barely mentioned in this context but provides an example of a violation of rights that is regarded domestically and internationally as warranting automatic exclusion of tainted evidence. Is this a reflection of the prohibition on torture's higher normative value, or should the same principle apply with respect to any breach of a fundamental human right?

Chapter 6 concludes with a brief comparative analysis that goes beyond the four original pillars. This overview demonstrates that although the rights-based argument for evidentiary exclusion is alive and well in most systems, it is easily diluted by competing considerations. The book's Epilogue concludes that the link between constitutionalisation or internationalisation and automatic exclusion tends to fluctuate to reflect 'constantly changing socio-political conditions, transformations of institutional structures and the increasing politicisation of debates around criminal justice' (251). While Giannoulopoulos demonstrates the tangible influence of human rights jurisprudence on the 'exclusionary rule debate', he is cognisant of the 'range of countervailing factors' with the capacity to offset the impact of the rights thesis (251).

The law and practice of the International Criminal Court (ICC) and other international criminal tribunals increasingly features in comparative procedural scholarship. Giannoulopoulos observes that 'important convergence mechanisms' in such tribunals 'are now pushing the common law and Continental law traditions closer together' (5). As a negotiated system, the ICC's rules of procedure and evidence draw on the 'best' of both traditions. Article 69(7) of the ICC's Statute directly applies the reliability and integrity rationales to the exclusion of evidence 'obtained by means of a violation of this Statute or internationally recognized human rights'. Giannoulopoulos notes with approval that this provision places special emphasis on human rights and earmarks it as a future case study for the rights thesis. It must be observed, however, that international criminal courts and tribunals are deeply concerned with truth-finding, which they

view as being achievable within a framework that upholds the strictest fair trial standards, and that they also place emphasis on the victims' right to truth.

Giannoulopoulos calls on procedural scholars to help fill the gaps in comparative and cosmopolitan legal thinking. This book is testament to the fact that he has gone a significant distance in this direction himself. The law of evidence is a practical subject and susceptible to pragmatism. While *Improperly Obtained Evidence in Anglo-American and Continental Law* leaves some questions unanswered, the most important one, perhaps, is addressed to the four representative pillars themselves: 'Ultimately, legal systems must ask themselves whether they are serious about protecting rights' (216).

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