A Sense of Justice, the Rule of Law, and the Exclusionary Rule

Boštjan Zupančič*

My topic today is *Rochin v. California*,[1] a United States Supreme Court case I hope all of you know. There is a parallel case in the European Court of Human Rights called *Jalloh v. Germany*.[2] In *Rochin v. California*, police broke into the apartment of the accused to find drugs.[3] They found two capsules on the nightstand in this man's bedroom.[4] When he saw them enter the room, he grabbed the capsules, and he swallowed them.[5] The police took him to the hospital and made him vomit up the capsules.[6] At that time Justice Frankfurter pronounced something which I, as a young law professor, thought was completely useless. He said, "This is conduct that shocks the conscience."[7] Some of you might have heard of this "shocks the conscience" test in criminal procedure. I thought, at the time, that this pronouncement was completely uninformative. We as lawyers do not usually react emotionally. We pride ourselves on that. But perhaps there is more to Justice Frankfurter's statement than meets the eye.

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* Boštjan Zupančič, born in Slovenia, has served as a Justice on the European Court of Human Rights since 1998. He holds degrees from the University of Ljubljana, Slovenia and Harvard Law School. He has held faculty positions at universities throughout the world. He served as Judge at the Constitutional Court of Slovenia from 1993 to 1998. He also served as Vice-Chair of the United Nations Committee against torture (Geneva) from 1995 to 1998. This article is a transcript of the lecture presented by the author to a group of American students on July 8, 2009 through the European Centre for Law and Justice. The text and the footnotes of this article are the work of the students of Regent Journal of Law and Public Policy.

1. 342 U.S. 165 (1952).
2. 44 E.H.R.R. 32, 667 (2007).
3. *Rochin*, 342 U.S. at 166.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 172.

The next story is about Germany and about our Court. About two years ago, I was already present in Section Three of the Court, which included Germany among other countries.[8] This case came from one of the German Länders [federal states] in which police had an encounter with the defendant, Jalloh, a non-native speaker.[9] Jalloh was a so-called "mule," a transporter of cocaine that is packed in little plastic packages then swallowed. Law enforcement knows that this traffic goes on in airports.[10] They detect the possible carriers of cocaine and other drugs and then examine those individuals.[11] In Europe, the doctrine of probable cause is not very well developed. We only have one case in the European Court on probable cause, *Foxley v. United Kingdom*.[12] In a few of the German Länders, their habit was to force the drug mules to vomit.[13] For those of you who know something about medicine, this is not an easy thing to do. In *Jalloh*, the suspect had to be intubated and administered two kinds of emetics.[14] An emetic is a substance that goes to the brain and causes spasms in the stomach so that vomiting will occur.[15] This is precisely what occurred in *Jalloh*.[16] I want to emphasize that Germany had two lethal outcomes from these procedures.[17] They were, however, still performing them.[18] Four police officers had to hold the suspect on the table.[19] Then the emetic was introduced, and the suspect vomited the

8. European Court of Human Rights—The Court—Composition of the Sections, http://www.echr.coe.int/ECHR/EN/Header/The+Court/Introduction/Information+documents/ (from menu on the left-hand side, select the subheading "The Sections") (last visited Nov. 20, 2009).

9. 44 E.H.R.R. 32, 667 (2007).

10. . *See* Deborah Ramirez & Stephanie Woldenburg, *Balancing Security and Liberty in a Post-September 11th World: the Search for Common Sense in Domestic Counterterrorism Policy*, 14 TEMP. POL. & CIV. RTS. L. REV. 495, 499 (2005); ROBERT RAMSEY, 25 N.J. PRAC., MOTOR VEHICLE LAW & PRACTICE § 13:8 (4th ed., 2009).

11. RAMSEY, *supra* note 10.

12. 31 E.H.R.R. 25 (2001).

13. *Jalloh*, 44 E.H.R.R. 32 at 678 (2007).

14. *Id.* at 671.

15. JOHN MITCHELL BRUCE, MATERIA MEDICA AND THERAPEUTICS 464–65 (rev. ed. 1903) (1884).

16. *Jalloh*, 44 E.H.R.R. 32 at 671.

17. *Id.* at 678.

18. *Id.*

19. *Id.* at 671.

packages out.[20] Of course, the packages were used as proof against the defendant, just as they were in *Rochin v. California*.[21] The capsules were used as evidence against Jalloh, and he was condemned.[22]

Before a case can come to the European Court of Human Rights, applicants must exhaust their domestic remedies.[23] In Germany, you have to go to the Constitutional Court in Karlsruhe, which is only eighty-four kilometers from the European Court. The Constitutional Court did not see the issue because they had never heard of *Rochin v. California*.[24] The case did not shock their conscience. I am talking about a sense of justice. The case passed through the Constitutional Court, came to our Court and the Chamber I was in at the time.[25] The Chamber of seven judges can make the decision to release the case to the Grand Chamber.[26] Then the Grand Chamber of seventeen judges will pronounce judgment and make a precedent out of it.[27] The case did go to the Grand Chamber, they did pronounce judgment, and we have the case *Jalloh v. Germany*, which is a very important judgment regarding the distinction between inhumane and degrading treatment and torture.[28] It does not, however, have to do to a great extent with the privilege against self incrimination that is very important in maintaining the minimum level of standards of protections in criminal procedure.

Why on earth would the evidence be excluded or subject to the exclusionary rule? Why on earth should the criminal go free because of the constable's blunder? I have a book on this

20. *Id.*

21. *Id.* at 672; Rochin v. California, 342 U.S. 165, 166 (1952).

22. *Jalloh*, 44 E.H.R.R. 32 at 672.

23. Convention for the Protection of Human Rights and Fundamental Freedoms art. 35, cl. 1, Nov. 4, 1950, Europ. T.S. No. 005 [hereinafter Convention on Human Rights].

24. *See Jalloh*, 44 E.H.R.R. 32 at 673.

25. *Id.* at 667.

26. Eur. Ct. H.R., Rules of the Court, Rule 72(1) at 38, *available at* http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf.

27. *Id.* Rule 23 at 10.

28. 44 E.H.R.R. 32 at 667.

issue called *The Owl of Minerva*.[29] This is a constant debate in the United States.[30] In my own time this was a hot issue, and I have endeavored to figure it out. My theory is as follows. It goes back to Roman law. The first codification of Roman law was called *Leges Duodecim Tabularum*.[31] The laws were published so that people could read them.[32] It is interesting that the first rule is *Si in ius vocat, ito!*, "if you are called into the court of law, you must go."[33] It sounds as if they were talking about summons, but they were not. It is often like that when we deal with different areas of the law. We have to remove layers of nonsense before we get to the issue. Through the centuries, these layers have accumulated and made it more difficult to understand what the law was all about. Hobbes, for example, understood it. In *De Cive* he tells you explicitly that the initial purpose of the rule of law is to prevent the war of everyone against everyone, *"bellum omnium contra omnes."*[34]

The way to do that is composed of two very simple steps, be it when you establish power on some island in the pacific, in some imaginary situation, or in reality. The first piece of logic is clearly the establishment of law and order. You cannot have the rule of law without having law and order—meaning power has to be taken over by somebody—the police, an army organization, or the king. Once law and order in that broad sense of the word is established, the king's peace prevails. Things settle down. Law and order is established. It occurs all over the world. It is not so difficult to do. The well-organized army, the National Guard, and the Gendarmerie in France do not find it too difficult to impose peace.

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29. BOŠTIAN M. ZUPANČIČ & NANDINI SHAH, THE OWL OF MINERVA: ESSAYS ON HUMAN RIGHTS (Nandini Shah ed., 2008).

30. John B. Rayburn, *What is "Blowing in the Wind"? Reopening the Exclusionary Rule Debate*, 110 W. VA. L. REV. 793, 795 (2008); *see also* Lawrence Joseph Perrone, *Curing the Real Problem: Cleaning Up Fourth Amendment Jurisprudence by Altering Our Current Exclusionary Rule to Conform with an International Model*, 16 TULS J. COMP. & INT'L L. 67, 68 (2008).

31. ALLAN CHESTER JOHNSON ET AL., ANCIENT ROMAN STATUTES 9 (Clyde Pharr, ed., The Lawbook Exchange, Ltd. 2003) (1961).

32. *Id.*

33. *See id.*

34. THOMAS HOBBES, DE CIVE OR THE CITIZEN 29 (Sterling Lamprecht ed., Greenwood Press 1982) (1642).

We had riots here [in Strasbourg, France] recently. Some buildings were burned, but law and order was established in about twenty-four to forty-eight hours by the Gendarmerie.[35]

The question is what happens next to provide social stability? Even in biblical times, under Solomon and others, you have stories that imply that the power of the king is not just the power to maintain law and order but to impose his power or his peace on the rest of the population. Even under such circumstances, conflicts in society continue to bubble up and create unrest and instability. Remember the case of *Bush v. Gore*.[36] Gore, very elegantly, as the French would say, accepted the judgment of the United States Supreme Court.[37] This evaded an enormous amount of political instability and perhaps a constitutional crisis. The rule of the courts is not only to render justice but to do so efficiently, logically, persuasively and otherwise. The rule of the courts is also to maintain social stability. When people believe in justice, the stability of society as a whole is assured to a greater degree.

The United States and England have an enormous advantage with a tradition that goes back to 1215 and the Magna Carta—unlike the Continental jurisdictions of Germany and France where the rule of law did not exist until much more recently.[38] The purpose of the Convention, especially Articles 5 and 6, was to introduce elements of Common Law and Anglo Saxon tradition that did not exist in this area originally.[39] If you look at the preparatory works of the Court, the assumption was that perhaps World War II would not have

35. Stephen Castle & Steven Erlanger, *Riots Erupt Near Bridge that Links 2 Countries*, N.Y. TIMES, Apr. 4, 2009, http://www.nytimes.com/2009/04/05/world/europe/05protest.html.

36. 531 U.S. 98 (2000).

37. Albert A. Gore, 2000 U.S. Presidential Election Concession Speech (Dec. 13, 2000) (transcript available at http://www.americanrhetoric.com/speeches/algore2000concessionspeech.html).

38. *See* U.S. Nat'l Archives & Rec. Admin., Magna Carta and Its American Legacy, http://www.archives.gov/exhibits/featured_documents/magna_carta/legacy.html (last visited Feb. 15, 2010); Friedrich A. Hayek, *Decline of the Rule of Law*, MISES DAILY, Aug. 10, 2009, http://mises.org/story/3610.

39. Convention on Human Rights, *supra* note 23, intro., para. 6. "Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement . . . ." *Id.*

happened if this rule of law prevailed.[40] We have cases, for example, from Turkey, where some left-wing or right-wing extremists are simply erased from the political scene because of the clear and present danger that it would destabilize the country as a whole.[41] In any event, this is one of the main purposes of the Convention.[42] To go back to my main point, to maintain law and order and political stability in a country, you need justice. Not in some metaphysical sense of the word, but justice in terms of quick, efficient, logically persuasive decision-making by respected courts who can authoritatively speak on particular matters.

Why is this so? Why is this so important? What does this have to do with the rule from the Roman Twelve Tables *Si in ius vocat, ito!*, "if you are called into the Roman court you must go"? Well, the reason is very simple. I am glad I am talking to Americans because they demand answers that are very simple. My intent here is to present to you a simple formula which goes as follows.

The rule of the Twelve Tables is to prevent self-help. Self-help is usually a crime. I believe you have it in the Model Penal Code.[43] The proverb is to "live by the gun or die by the law." You resort to self-help to live by the gun. It happens often but not so much in the states. If self-help occurs, it is the antechamber of anarchy. The next situation is that everyone will seek through combat to advance or maintain his own interest.[44] It is a Hobbesian war of everybody against

40. *See* Elizabeth Heger Boyle & Melissa Thomson, *National Politics and Resort to the European Commission on Human Rights*, 35 LAW & SOC'Y REV. 321, 321 (2001).

41. *See e.g.*, Martin van Brulnessen, *Turkey's Death Squads*, 26 MIDDLE E. REP. 20, 20 (Spring 1996) (recounting the assassinations of prominent political figures by "unknown actors"); *see also* Melik Duvakli, *JITEMS illegal actions cost Turkey a fortune*, TODAY'S ZAMAN, Aug. 27, 2008, http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=151355.

42. Convention on Human Rights, *supra* note 23, intro., para. 5 (preamble stating in part: "Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend . . . .").

43. MODEL PENAL CODE. § 3.04 cmt. 3(a). "To the extent the law can encourage conduct on this point, it is believed to be entirely sound that the encouragement be in favor of judicial resolution of the legality of the arrest, rather than self-help." *Id.*

44. *See* Boštjan M. Zupanèiè, *From Combat to Contract*, EUR. J. L. REFORM 59, 59–60 (1999).

everybody.[45] Therefore, the rule of law is a corollary to law and order. In the short run, law and order can be maintained through force. In the long run, you have to have the rule of law. Social conflicts between individuals or political parties have to be consistently, quickly, persuasively, logically, and finally resolved so that they will no longer destabilize social relationships.

As in *Rochin v. California*[46] or *Jalloh v. Germany*,[47] you have situations which are very peculiar and not really consistent with the rule of law. The purpose of judicial decision-making is to maintain a situation in which combat is excluded from the law. The purpose of the rule of law is to keep combat out of law and use only logical reasoning to determine outcomes. There is combat through words in a court but not physical combat. If you resort to physical force in a procedural setting, the rule of law has been subverted. It goes directly to the core purpose of maintaining the rule of law: to throw out physical force or combat as a means of prevailing with your interests over someone else. The rule of law in adjudication is nothing but logical compulsion of the judge and jury to side with you over the other party. The use of force to obtain a confession only happens in criminal trials; it would never be acceptable in civil trials because you have two equal parties, two individuals confronting one another. In criminal trials you have the all-powerful state, the police, and law and order on one hand versus the individual on the other. If the law enforcement agency uses physical force to obtain a confession or to obtain the evidence—the fruit of the poisonous tree—then the main purpose of the rule of law is subverted because it is then the physical force that resolves the conflict rather than the rule of law.[48]

The next question is what to do when that happens. If the contaminated evidence is not excluded from use in the trial and helps the jury or judicial panel arrive at a conclusion about the guilt or innocence of a party, then the verdict and the process is also contaminated. The verdict and process

45. HOBBES, *supra* note 34.

46. 342 U.S. 165 (1952).

47. 44 E.H.R.R. 32, 667 (2007).

48. *See* Rochin v. California, 342 U.S. 165, 172–74 (1952).

have been subverted at the most basic level. The only way to prevent that effect is through the exclusionary rule.[49] You have probably heard that the right and the remedy are mirror images of one another; the remedy is a reflection of the right, and no remedy exists without a right.[50] But, the remedies in our Court come after a violation has already occurred. Through the exclusionary rule, you can prevent the jury from ever seeing the contaminated evidence.[51] The exclusionary rule prevents the subversion because the final decision-maker will not be privy to that information.[52] The exclusionary rule does not come from criminal or civil procedure but from the rules of evidence.[53] It has, however, transformed itself into what some see as procedural sanctioning of a deterrent device concerning police behavior sometimes known as the Rehnquist doctrine.[54]

But it is really not that. It is a question of intellectual honesty, legitimacy, or integrity of constitutional and criminal procedure when physical evidence, like the capsules in *Jalloh*, is obtained by force in a situation which pretends to be under the rule of law and without the use of force. The exclusionary rule is phenomenal because it is preventative. It prevents the contaminated information from getting to those who are making the decision.[55] Through it, the rule of law is maintained. In the long run, honesty is always the best policy. If the judicial system is, in that sense, honest and legitimate, it will have a very important impact on the normative integration.[56] The exclusionary rule is not a remedy

49. *See id.* at 173.

50. Marbury v. Madison, 5 U.S. 137, 147 (1803). "It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." *Id.*

51. Terry v. Ohio, 392 U.S. 1, 15 (1968). "When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials." *Id.*

52. FED. R. EVID. 104(a).

53. *Id.*

54. *See* M.K.B. Darmer, *Scalian Skepticism and the Sixth Amendment in the Twilight of the Rehnquist Court*, 43 U.S.F. L. REV. 347, 347, 358–60 (Fall 2008).

55. *Terry*, 392 U.S. at 15.

56. *See* Boštjan Zupanèiè, *Criminal Law and its Influence upon Normative Integration*, 7 ACTA CRIMINOLOGICA 53, 55–64 (1974); *see also* Robert K. Merton, *Anomie*, *in* 1 CRIME AND JUSTICE: THE CRIMINAL IN SOCIETY 442 (Leon Radzinowicz & Marvin E. Wolfgang eds., 1971).

but a preventative device. The case law of the European Court does not really understand this.[57] They mix different things. The English tend to see the presumption of innocence and the exclusion of contaminated evidence as a right to silence, which is a completely different doctrine.[58] I wrote an article entitled *From Combat to Contract*.[59] After *Jalloh*, we had another case concerning the threat of torture by a German police officer in Hamburg,[60] a situation which was very similar to that in *Brewer v. Williams*,[61] an Iowa case. In *Brewer v. Williams*, a family went to the YMCA on Christmas Eve in Des Moines and their daughter disappeared.[62] A boy saw somebody carrying a body wrapped in a blanket and putting it into the trunk of a car.[63] The vehicle was found abandoned, two hundred miles away, in Davenport.[64] Two days later, Williams telephoned his lawyer.[65] He said he would turn himself in in Davenport, but he wanted his lawyer to be present when he was questioned by the police.[66] The lawyer was in Des Moines, 200 miles away.[67] The lawyer spoke to the police and told them that his client would speak to them on the condition that they would not interrogate him before returning him to Des Moines.[68] The police agreed to these terms but then questioned Williams in the car between Davenport and Des Moines.[69] The police knew that the suspect was a religious fanatic so during the drive they gave him the Christian burial speech.[70] He told the suspect that the

57. Jalloh v. Germany, 44 E.H.R.R. 32, 667, 704–05 (2007) (Zupancic, J., concurring).

58. *See* Stanley Z. Fisher & Ian McKenzie, *A Miscarriage of Justice in Massachusetts: Eyewitness Identification Procedures, Unrecorded Admissions, And A Comparison with English Law*, 13 B.U. PUB. INT. L.J. 1, 17–18 (2003).

59. Zupanèiè, *supra* note 44.

60. Gafgen v. Germany, App. No. 22978/05, Eur. Ct. H. R. (2008).

61. 430 U.S. 387 (1977).

62. *Id.* at 390.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 390–91.

70. *Id.* at 392. "I want to give you something to think about while we're traveling down the road . . . . I feel that you yourself are the only person that knows

parents of the girl were devastated and that, because the next day was Christmas, perhaps the defendant could at least tell them where the body was.[71] The suspect then told police where the body was and implied that he was the one who had committed the crime.[72] The case went to the United States Supreme Court, and they threw it out.[73] It was a question of *Miranda* and a question of psychological pressure.[74] It is not part of European culture. Remember the phrase from *Casablanca*, "Gather up the usual suspects." This portrays the attitude of those not used to a requirement of probable cause.[75]

In the end, what is culturally embedded in your culture and in the English culture is not embedded in the continental culture—the skeptical attitude towards authority, government, and the executive branch. It is an integral part of your culture. The judicial precedents that derive from your courts, especially the United States Supreme Court, are an emanation of that very basic attitude. Frankfurter said in *Rochin v. California* that it "shocks the conscience" that the police would be capable of that sort of behavior.[76] The French are very much into psychoanalysis. There is a very sophisticated series of insights concerning what is called by Freud "the sense of justice."[77] It is not an intuition. Intuition is arbitrary. The sense of justice has to be articulable. It is what judges are paid for. Justice Douglas typically had it. The sense of justice is something very obvious when you deal with a situation like in *Jalloh v. Germany* in a Chamber of sixteen judges. Judges react from a certain, not moralistic or ethical, but really quite cognitive technical point of view. At the gut feeling level you see that they have convictions rather than just opinions. They will stick to something because it derives

where this little girl's body is . . . and if you get snow on top of it you yourself may be unable to find it . . . . I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl . . . ." *Id.*

71. *Id.* at 392–93.

72. *Id.* at 393.

73. *Id.* at 405–06.

74. *Id.* at 402–03.

75. CASABLANCA (Warner Bros. 1942).

76. 342 U.S. 165, 172 (1952).

77. MARKUS DIRK DUBBER, THE SENSE OF JUSTICE: EMPATHY IN LAW AND PUNISHMENT 27 (2006).

from a deeper layer of their persuasion, their character, and their moral autonomy. This is what the judicial branch is made of. If it is not, it is not going to be so persuasive. It changes over time. Some people have more of it, some people have less of it. But it is essentially a level of moral development. It is mentioned as a requirement in the preamble of the Convention of the European Court of Human Rights that judges must be of a certain moral stature.[78] Very few people understand what that means. People who come to be judges at the European Court are at the end of a political process of selection, and they still have to be elected here. But very often you see that there is a deep sense of justice that is nevertheless transformed into words which are logical and persuasive on a completely different level.[79]

The deep instinct, the outrage at injustice, is what Frankfurter was talking about. It did shock his conscience. That is a very important message that has to be delivered to law students. Namely, law is not just logic but has to do with a sense of fairness and justice cognitively equipped. It requires a minimal level of intelligence, but intelligence in itself is not enough. Iceland was at the forefront of the financial crisis. They elected a prime minister, a lady named Johanna Sigurdardottir.[80] One of the first pronouncements that she made about the financial crisis was that it was an ethical question.[81] There was an article in the *Village Voice* by James Leiber, a lawyer, saying the recent financial crisis might not have happened.[82] He explores the situation in detail. In New York, the crisis might not have happened were it not for the relative inactivity of the prosecutorial services in New York.[83] Whether it is true or not, I do not know. In other words, justice is a foundational component of a stable

78. Convention on Human Rights, *supra* note 23, art. 21(1). "Judges shall be of high moral character . . . ." *Id.*

79. *Id.* arts. 22–24.

80. Ian Traynor, *Icelandic caretaker government wins general election*, GUARDIAN, Apr. 26, 2009, http://www.guardian.co.uk/world/2009/apr/26/iceland-election-government.

81. *See id.*

82. James Lieber, *What Cooked the World's Economy? It Wasn't Your Overdue Mortgage*, THE VILL. VOICE, Jan. 28, 2009, http://www.villagevoice.com/2009-01-28/news/what-cooked-the-world-s-economy.

83. *Id.*

society. Also, the key to the immune system of society is the prosecutor, the body politic, who fights against the opportunistic bacteria that would otherwise contaminate it.

A sense of justice derives very much from one's convictions—not opinions but convictions. It derives from having the courage of convictions rather than mere opinions when everything is relative, everything is negotiable, and everything is for sale. A sense of justice is not something you will learn in law school. It has been given to you by your mother, but more importantly by your father, as a carrier of societal norms.[84] If that does not happen, you have a problem. The name of the game is transgression, flying around the candle so close that it might burn you. I do not think it has only to do with prosecutorial inactivity in the state of New York City. It has to do with a larger ethical problem that you and your generation of lawyers will have to deal with mechanically. The less inner respect for law, fairness, and justice, the more mechanical reinforcement of law is necessary to maintain the rule of law.

84. *See* U.S. DEPT. OF HEALTH & HUMAN SERVS., THE NICHD STUDY OF EARLY CHILD CARE AND YOUTH DEVELOPMENT 23–26 (2006), http://www.nichd.nih.gov/publications/pubs/upload/seccyd_051206.pdf.