

## Chapter 2: The rationales for exclusionary remedies; exclusion in England and Wales; and the birth of section 35(5) of the South African Constitution

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Before delving into the detail of section 35(5), which is discussed in chapters three, four, and five, this chapter explores the rationale for and historical background to this provision.

## **A. Introduction**

The first issue discussed in this chapter is the different rationales applicable to exclusionary remedies. Rationales for the exclusion of evidence are important, because the rationale of a remedy is likely to determine its impact and scope.<sup>1</sup> By exploring the rationales of an exclusionary remedy, the following issue is addressed: why should relevant evidence, in some instances, be excluded?

The second question covered in this chapter is an overview of the exclusionary rule, as applied in England and Wales. This overview is important, because the law of evidence as applied in England and Wales forms the bedrock of the South African common law of evidence. The value of a discussion of the English exclusionary rule will come to light especially when chapter four (the fair trial requirement under section 35(5)) is explored. In England and Wales, the reliability of the evidence is of paramount importance when the courts have to determine the issue of admissibility. An exception to this rule is that self-incriminating testimonial evidence is automatically excluded.

The third matter considered is the position in England and Wales after the enactment of section 78(1) of the Police and Criminal Evidence Act of 1984.<sup>2</sup> The

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<sup>1</sup> Paciocco (1989/1990) 32 *CLQ* 326 at 334, where he argues as follows: "Recent experience in the United States has demonstrated that the vitality of the exclusionary rule depends entirely on the purposes that are identified for exclusion".

<sup>2</sup> Hereinafter "the PACE", which came into force on 1 January 1986.

theme explored here is whether the enactment of this section had any significant impact on the common law inclusionary rule. Added to this, is the enquiry as to whether the admissibility determination under section 78(1) should be considered with the aim of disciplining the police. Is the rationale of the section founded on the remedial imperative, deterrence or judicial integrity rationale? In other words, do the courts in England and Wales consider what the effect of exclusion or admission would be on the administration of justice when section 78(1) is applied? It is clear that the courts do consider this factor when applying the abuse of process doctrine. In the light hereof, the question emerges as to whether the courts in England should, when interpreting section 78(1), also consider the effect of exclusion on the justice system. In other words, what is the nature of the discretion exercised by the courts under section 78(1)? This question should be answered bearing in mind the rationale of the section.

The fourth issue considered here is: What is the effect of the Human Rights Act on the national law of England and Wales, since the said Act provides that English national law should be interpreted in a manner compatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>3</sup>

The fifth topic discussed is the South African law position on the admissibility of unconstitutionally obtained evidence, during the period between the enactment of the Interim Constitution of 1993<sup>4</sup> and the incorporation of section 35(5) into the 1996 Constitution.<sup>5</sup>

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<sup>3</sup> Hereinafter "the European Convention".

<sup>4</sup> Hereinafter "the Interim Constitution" or "IC". The Interim Constitution came into force on 27 April 1994.

<sup>5</sup> Hereinafter "the Constitution".

The sixth idea explored is the relevance of international and foreign law as sources for the interpretation of section 35(5), since the Constitution<sup>6</sup> enjoins South African courts to consider international law when interpreting a provision contained in the Bill of Rights. The question that calls to be answered is the following: Why have the South African courts been conspicuous in their reticence to vigorously apply international law when interpreting section 35(5)?

## **B. The rationales for the exclusion of evidence**

Since 1861 the golden rule applied in jurisdictions of the British Empire to determine the admissibility of evidence was its relevance to the disputes at issue.<sup>7</sup> The trendsetter in the field of the development of an exclusionary rule was the United States. Subject to adaptation, their application of a rigid exclusionary rule (which includes a number of exceptions) did have an impact on the process of evidence procurement of other nation states.<sup>8</sup> For the reason that the subject matter of the United States exclusionary rule has been the topic of

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<sup>6</sup> Section 39(1)(b) of the Constitution dictates that South African courts “must” consider international law.

<sup>7</sup> *R v Leatham* 1861 Cox CC 498, (“*Leatham*”).

<sup>8</sup> Preller JA in *S v Shongwe en Andere* 1998 (2) SACR 321 (T), at 341, (“*Shongwe*”). The judge in this case raised the point that the American exclusionary rule was formulated by the American Supreme Court, only to be forced by the realities of life to be adapted with one exception after another so as to cover circumstances not foreseen when the rule was initially made; see also Bradley (1993) 14 *Michigan Journal of International Law* 171 at 219-220, where he convincingly argues that the legal systems of countries like Canada, England, Germany, Italy and Australia were influenced by developments in the American exclusionary jurisprudence.

extensive discussion by some commentators,<sup>9</sup> it is not discussed in detail in this chapter.

An added reason why it is not discussed in this work is because of the differences in the application of the United States exclusionary rule, when compared to the Canadian exclusionary provision. Some of the differences worthy of mention are the fact that the United States exclusionary rule does not effectively consider the following three factors to determine whether the trial is unfair: firstly, a conscription analysis, secondly, the seriousness of the violation, and thirdly, the nature of the right violated.<sup>10</sup> The United States courts have also opted for a narrow standing requirement.<sup>11</sup> It is argued below<sup>12</sup> that the South African Constitution favours a broad standing requirement. With regard to the 'nature of the right violated' factor, it is submitted the Canadian courts have, with the introduction of the 'refined' fair trial requirement in *Stillman*,<sup>13</sup> moved away from a consideration of this factor as an independent part of the fair trial assessment. In its place, the seriousness of the Charter violation is emphasised. Despite these differences, the United States approach to the exclusion of

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<sup>9</sup> See, for example, Van der Merwe "Unconstitutionally obtained Evidence" in Schwikkard & Van der Merwe *Principles of Evidence* (2002) at 168-203; Godin *UT Fac L Rev* (1995) 53 49; Bradley (fn 8 above); Bradley (ed) *Criminal Procedure: A Worldwide Study* (1999); Hart & Jensen (1982) 73 *Journal for Crim Law & Criminology* 916; Bradley (1989) 64 *Indiana LJ* 907; Wilkey (1978) *Judicature* 215.

<sup>10</sup> According to Godin (fn 9) at 73. MacDougal (1985) 76 *J Crim L & Criminology* 608 at 663, is of the opinion that : "Canada, through its section 24 procedure, has attempted to keep right and remedy analysis separate and this may limit the use of American judgments which do not distinguish between the two. Perhaps even more important is the constitutional federalism which has lurked behind every major American decision but which is not a Canadian issue".

<sup>11</sup> The same criticism is leveled against the Canadian standing requirement in chapter 3 of this thesis.

<sup>12</sup> See chapter 3, under the heading "Standing to rely on section 35(5)".

<sup>13</sup> (1997) 113 CCC (3d) 321, 5 CR (5<sup>th</sup>) 1, 1 SCR 607, ("*Stillmar*").

unconstitutionally obtained evidence remains a constructive tool when guidance is sought for the interpretation of the South African exclusionary provision.<sup>14</sup> It is apposite to discuss the underlying theories that inform the gist of exclusionary remedies.

Aristotle and Dicey have developed criteria for the nature of remedies.<sup>15</sup> Dicey, in his seminal work,<sup>16</sup> emphasised the inextricable linkage between the nature of a violated right and its concomitant remedy. Roach is of the opinion that Dicey's theory makes provision for a remedy that seeks to 'nullify the harms caused by the violation', and as such it can be classified as a theory seeking corrective justice.<sup>17</sup> In this manner, the effect of corrective justice is to deprive the wrongdoer of the advantage caused by the violation and 'the plaintiff is restored to the position (no more and no less) that he or she occupied before the violation'.<sup>18</sup> A limitation to the theory of corrective justice is that the interests of third parties and society at large are of secondary concern.<sup>19</sup> By contrast, a remedy with a regulatory aim is concerned with future compliance with the

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<sup>14</sup> See Van der Merwe (fn 9 above); see also Paciocco (fn 1 above) at 327, where he argues that the Canadian courts have accepted the same "political philosophy" of the courts of the United States when interpreting section 24(2); see further MacDougal (fn 10 above) at 662, where he writes as follows: "In the Canadian criminal rights area, American cases frequently are cited". He demonstrates his opinion by referring to the Canadian case of *Hunter v Southam* 11 DLR (4<sup>th</sup>) at 641, ("*Hunter*"), where the Canadian Supreme Court drew from the reasoning of *Katz v US* (1967) 389 US 347, ("*Katz*").

<sup>15</sup> *The Nicomachean Ethics* (1987), Book 5, Ch 2-4 at 111 and 115; Dicey *An introduction to the study of the Law of the Constitution* (10<sup>th</sup> ed, 1959) at 199.

<sup>16</sup> Loc cit.

<sup>17</sup> *Constitutional Remedies in Canada* (1994) at 3-17; see also Paciocco (fn 1 above) at 322.

<sup>18</sup> Roach (loc cit).

<sup>19</sup> Ibid at 3-19.

provisions of the Constitution. Regulatory justice<sup>20</sup> does take into consideration the effects of the remedy upon the interests of society.<sup>21</sup>

Aligned to these theories are the rationales or purposes for their existence. It is important to determine the rationale applicable to the remedy of exclusion, because the rationale will determine the scope and its impact.<sup>22</sup> The effect of each rationale will, more often than not, create a different end result. Three distinct rationales exist for the exclusion of evidence: the remedial imperative,

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<sup>20</sup> *R v Collins* (1987) 33 CCC (3d) 1 par 45, (“*Collins*”): “The cost of excluding the evidence would be very high: someone who was found guilty at trial of a relatively serious offence will evade conviction”.

<sup>21</sup> Roach (fn 16 above) at 3-27; see also *S v Melani and Others* 1996 1 SACR 335 (E), (“*Melani*”), where Froneman J reasoned as follows, thus embracing the regulatory justice theory: “At this stage the further breach of a fundamental right, the right to counsel, comes into play, both in regard to accused Nos 1 and 2. The longer term purpose of the Constitution, to establish a democratic order based on, amongst others, the recognition of basic human rights, will be better served in the long run by recognizing the rights of the two accused in the present instance, even though it might mean that the case against them is weakened”; see further *Pillay and Another v S* 2004 2 BCLR 158 (SCA) at par 94, (“*Pillay*”), where the majority judgment reasoned as follows: “In our view, to allow the impugned evidence derived as a result of a serious breach of accused 10’s constitutional right to privacy might create an incentive for law enforcement agents to disregard accused persons’ constitutional rights since, even in the case of an infringement of constitutional rights, the end result might be the admission of evidence that, ordinarily, the State would not have been able to locate. That result ... is highly undesirable and would, in our view, do more harm to the administration of justice than enhance it”.

<sup>22</sup> See Paciocco (fn 1 above) at 334, where he argues that the “vitality of the exclusionary rule depends entirely on the purposes that are identified for exclusion”; see also Roach (fn 16 above) at 3-7, par 3.150. However, compare Mahoney (1999) 42 *CLQ* 443 at 447, where he makes the following statement: “All this [the different rationales for exclusion] makes for fascinating classroom discussion. Yet it serves only to distract us from the true focus of enquiry into the proper application of s 24(2). ... But that sort of enquiry [the rationales for exclusion] has little relevance in Canada. Parliament has already told us the sole basis upon which tainted evidence is to be excluded, and that is the ‘disrepute’ test set forth in s 24(2)”.

the deterrence rationale and the judicial integrity rationale. Embedded in each rationale are their inherent weaknesses.<sup>23</sup>

## 1 The remedial imperative<sup>24</sup>

The rationale of the remedial imperative proceeds from the premise that constitutional rights cannot exist without effective remedies. Exclusion of unconstitutionally obtained evidence is the only means to ensure its protection.<sup>25</sup> The unfair advantage achieved by the prosecution, by violating the constitutional rights of the victim, must be undone by the removal of the effects of any such advantage.<sup>26</sup> This would result in a form of *restitutio in integrum*.<sup>27</sup> In effect, this

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<sup>23</sup> The flaw of the remedial imperative is that the remedy is not accessible when the unconstitutional conduct produces no evidence; the weakness of the deterrence rationale is that it is impossible to determine whether exclusion of evidence actually acts as a deterrent; and the drawback of the judicial integrity rationale is that it is based on unsupported assumptions that give effect to personal judgments of presiding officers – see Paciocco (fn 1 above) at 332-338; see also Van der Merwe (1992) 2 *Stell LR* 173.

<sup>24</sup> Roach (fn 16) at 3-2, refers to this imperative as the corrective justice theory.

<sup>25</sup> Paciocco (fn 1 above) at 332 restates the effect of this rationale as follows: “It has been argued that exclusion is the only effective remedy for redressing constitutional violations and that it is therefore necessary to exclude unconstitutionally obtained evidence”.

<sup>26</sup> See, for instance, the reasoning of Estey J in *R v Therens* [1985] 1 SCR 613, at par 11, (“*Therens*”), where the judge said the following: “Here the police authority has flagrantly violated a Charter right without any statutory authority for doing so. Such an overt violation as occurred here, must in my view, result in the rejection of the evidence thereby obtained. ... To do otherwise ... would be to invite police officers to disregard Charter rights of the citizens and to do so with impunity”. See also *Collins* (fn 20 above) at par 38, where Lamer J said the following: “In fact, their failure to proceed properly when that option was open to them tends to indicate a blatant disregard for the Charter, which is a factor supporting the exclusion of the evidence”.

<sup>27</sup> See *Pillay* (fn 21 above), at par 94, where this principle appears to be the gist of the court’s argument. See also Paciocco (fn 1 above) at 332, where he writes as follows: “The only way to set the clock back is to treat the parties as though the constitutional violation never occurred.” He continues by arguing that a remedy does not have to create a situation of *restitutio in*



rationale seeks to vindicate the avowed importance of fundamental rights. This rationale is applicable when the second group of *Collins*<sup>28</sup> factors are considered, where one of the issues to be considered is whether admission of the unconstitutionally obtained evidence would be tantamount to judicial condonation of unconstitutional conduct.<sup>29</sup>

## 2 The deterrence rationale

The deterrence rationale features prominently in the sentencing phase of a criminal trial, especially where aggravating circumstances are a prominent feature in the commission of the criminal offence.<sup>30</sup> According to this theory, potential offenders are generally deterred from acting unlawfully by the threat of possible punishment. In order for punishment or exclusion to serve as an effective deterrent, the consequence that will follow as a result of the unlawful conduct must be certain.<sup>31</sup> In other words, within the context of section 24(2) of

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*integrum*; see also Van der Merwe (fn 23 above) at 188, where he contextualises the effect of this rationale as follows: "An accused might very well, from his limited and egocentric perspective, gleefully view his acquittal as a *quid pro quo* for the fact that his constitutional rights had been violated during the pre-trial stage. But his acquittal and misguided personal perception must be tolerated. There is more at stake. The accused who has been acquitted ... is really a mere incidental beneficiary under the rule"; see also Steytler *Constitutional Criminal Procedure* (1998) at 34, where he argues that exclusion serves the purpose of preventing "the violator of the right from benefiting from the violation", and correctly adds "if it [the violation] would render the trial unfair or be detrimental to the proper administration of justice".

<sup>28</sup> Fn 20 above.

<sup>29</sup> See also *Pillay*, (fn 21 above).

<sup>30</sup> Snyman *Criminal Law* (3<sup>rd</sup> ed, 1995) at 22-23.

<sup>31</sup> See Van der Merwe (fn 23 above) at 189-190, for a discussion of the deterrence rationale. He is also of the view that the deterrence rationale is a 'by-product' of the judicial integrity rationale.

the Canadian Charter of Rights and Freedoms<sup>32</sup> and section 35(5) of the South African Constitution, a violation must necessarily lead to exclusion.<sup>33</sup> This rationale supports the argument that no room is left for the exercise of a discretion. Having regard to this feature of the deterrent rationale, it cannot be argued that it has exclusive application under section 24(2) of the Charter or section 35(5) of the South African Constitution. A court must, when applying sections 24(2) or 35(5), exercise its discretion within the parameters provided by each section.<sup>34</sup> The drafters of sections 24(2) and 35(5) evidently did not have the deterrence rationale in the forefront of their mind when they drafted the sections.

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<sup>32</sup> Hereinafter referred to as “the Charter” or “the Canadian Charter”.

<sup>33</sup> Paciocco (fn 1 above) at 340.

<sup>34</sup> In *Collins* (fn 20 above), the nature of the discretion to be exercised in terms of s 24(2) was formulated at par 34 as follows: “The decision is not left to the untrammelled discretion of the judge. In practice, ... the reasonable person test is there to require of judges that they ‘concentrate on what they do best: finding within themselves, with cautiousness and impartiality, a basis for their own decisions, articulating their reasons carefully and accepting review by a higher court where it occurs.’ It serves as a reminder to each individual judge that his [or her] discretion is grounded in community values, and, particular, long term community values. He [or she] should not render a decision that would be unacceptable to the community when the community is not being wrought with passion or otherwise under passing stress due to current events”; see also *Pillay* (fn 21 above) at par 92, where the South African Supreme Court of Appeal adopted the criteria of *Collins* to determine the s 35(5) discretion. The majority opinion wrote the following: “Whether the admission of evidence will bring the administration of justice in disrepute requires a value judgement, which inevitably involves considerations of the interests of the public. ... At 35 of the *Collins* judgment (*supra*) Lamer J reasons that the concept of disrepute necessarily involves some element of community views and concludes that ‘the determination of disrepute thus requires the judge to refer to what he conceives to be the views of the community at large.’”

The purpose of this rationale is to deter the future unconstitutional conduct of law enforcement officers.<sup>35</sup> Its general aim is to prevent or reduce the violation of constitutional rights, because emphasis is laid on the disciplinary function of the courts.<sup>36</sup> Viewed in this light, the deterrence rationale seeks to infuse rights protection as its ultimate goal.<sup>37</sup> Several South African cases demonstrate the application of this rationale.<sup>38</sup> The South African case of *Mgcina v Magistrate, Lenasia and Another*,<sup>39</sup> Stegmann J was called upon to interpret the phrase 'where substantial injustice would otherwise result'.<sup>40</sup> In this decision, the deterrence rationale was not directed at law enforcement agencies, but at magistrates. The judge held that any magistrate who has to adjudicate a matter where an indigent person appears before her without legal representation, must

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<sup>35</sup> Snyman (fn 30 above) at 22-23, is of the opinion that the weakness of this theory is the fact that it assumes that all men are reasonable beings, who will not act illegally on pain of possible suffering; see also Paciocco (fn 1 above) at 332, who echoes this view.

<sup>36</sup> See *Fose v Minister of Safety and Security* 1997 7 BCLR 851 (CC) at par 96, ("*Fose*"), where Kriegler J, writing a separate concurring judgment, dealt with an applicable remedy under section 7(4)(a) of the Interim Constitution, and reasoned as follows, having regard to the application of the deterrence rationale: "Our object in remedying these kinds of harms should, at least, be to vindicate the Constitution, and to *deter* its further infringement". (Emphasis added). See also *S v Mphala* 1988 1 SACR 388 (W), ("*Mphala*") at 400; see also Van der Merwe (fn 23 above) at 189-190, where he argues as follows: "... the exclusionary rule ... does ***in passing*** provide an ***incentive*** to law enforcement officers to perform their duties with due regard for the constitutional rights and liberties of citizens". (Emphasis in original).

<sup>37</sup> However, compare *Shongwe* (fn 8 above) at 345, where Preller AJ was of the opinion that rights protection should not be a priority in that case, because the community where the crime had been committed was not aware of the existence of fundamental human rights – for that reason, the judge reasoned, the recognition of fundamental rights would have a counter-productive effect on a culture of human rights.

<sup>38</sup> See, for instance, *Mgcina v Magistrate, Lenasia and Another* 1997 2 SACR 711 (W) at 739, ("*Mgcina*"); see also *S v Yawa* 1994 2 SACR 709 (SE), ("*Yawa*").

<sup>39</sup> *Ibid.*

<sup>40</sup> In terms of section 25(3)(e) of the Interim Constitution.

be aware that a sentence of direct imprisonment without the option of a fine would in all probability be the subject of an appeal. He continued by reasoning that when that occurs, magistrates will in future be careful not to impose sentences of direct imprisonment, because the High Court would in all probability find that the rights of an accused had been violated.<sup>41</sup>

The United States' exclusionary jurisprudence is primarily premised on this rationale.<sup>42</sup> It is also argued below that, despite a strenuous denial that the courts in England do not apply a deterrence rationale under section 78(1) of the PACE, it is often the dominant rationale in their decisions.

### 3 The judicial integrity rationale

This is the principal rationale for exclusion under section 24(2) of the Charter<sup>43</sup> as well as section 35(5) of the South African Constitution.<sup>44</sup> The aim of this

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<sup>41</sup> Fn 38 above at 739.

<sup>42</sup> See MacDougal (fn 10 above) at 663; Bryant et al (1990) 69 *CBR* 1 at 4; Paciocco (fn 1 above) at 336.

<sup>43</sup> See *Collins* (fn 20 above) at par 31, where Lamer J wrote as follows: "It is whether the admission of the evidence would bring the administration of justice into disrepute. Misconduct by the police in the investigatory process often has some effect on the repute of the administration of justice, but s 24(2) is not a remedy for police misconduct, requiring the exclusion of the evidence if, because of his misconduct, the administration of justice was brought into disrepute. ... Rather, the drafters of the Charter decided to focus on the admission of the evidence in the proceedings, and the purpose of s 24(2) is to prevent having the administration of justice brought into further disrepute by the admission of the evidence in the proceedings. This further disrepute will result from the admission of that would deprive the accused of a fair hearing or from judicial condonation of unacceptable police conduct by the investigatory and prosecutorial agencies".

<sup>44</sup> See *Pillay* (fn 21 above) at par 92, where the majority judgment quoted with approval from *Collins*; see also *S v Hena and Another* 2006 2 SACR 33 (SE), ("*Hena*"), a judgment delivered by

rationale is to convey a clear message that the judiciary does not want to be tainted with the unconstitutional conduct of the police and to ensure all potential victims of constitutional violations that the government would not gain any advantage by violating the rights of individuals.<sup>45</sup> The courts therefore have a moral responsibility not to be associated with the constitutional violations caused by the police when investigating a case against an accused. Exclusion is seen as a step taken by the courts to protect their own integrity.<sup>46</sup> The act of exclusion serves the purpose of fashioning public opinion, and not adhering to it.<sup>47</sup> Therefore, by excluding evidence that would taint the integrity of the criminal justice system, the educational role of the courts becomes a prominent feature.<sup>48</sup>

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Plasket J. The judge reasoned as follows at 41: "Central to the role of the judiciary is the protection of the integrity of the criminal justice system and the promotion of proper and acceptable police investigation techniques." He continued, at 42-43, as follows: "It would undermine both the Constitution and the integrity of the criminal justice system to allow this systemic abuse to go unchecked".

<sup>45</sup> Paciocco (fn 1 above) at 332-333; see also Van der Merwe (fn 23 above) at 192, where he is of the opinion that the judicial integrity rationale "does not grant the exclusionary rule the status of a personal remedy, and it does fit in most neatly with the application of the principle of self-correction". The judicial integrity rationale is the principal rationale for an order of a stay of prosecution, based on the doctrine of abuse of process, in England. See *R v Horseferry Road Magistrates, ex Parte Bennett* [1994] 1 AC 42, ("Bennett").

<sup>46</sup> This was clearly the approach in the majority opinion of the South African Supreme Court of Appeal in *Pillay* (fn 21 above) at par 97, where Mpati DP and Motata AJA reasoned as follows: "The police, in behaving as they did, i e charging accused 10 in spite of the undertaking, and **the courts sanctioning such behaviour**, the objective referred to will in future be well nigh impossible to achieve." (Emphasis added.)

<sup>47</sup> Paciocco (fn 1 above) at 333-334; see also *S v Soci* 1998 2 SACR 275 (E), ("Soci"), at 295, relying on *S v Nomwebu* 1996 2 SACR 396 (E), ("Nomwebu").

<sup>48</sup> This argument was presented by Erasmus J in *Nomwebu* (ibid) at 648d-f as follows: "Not that a court will allow public opinion to dictate its decision (*S v Makwanyane and Another* 1995 (3) SA 391 (CC) at 431C-F), ("Makwanyane"). The court should in fact endeavour to educate the public to accept that a fair trial means a constitutional trial, and *vice versa*. ... It is therefore the duty of the courts in their everyday activity to carry the message to the public that the Constitution is not

The application of these theories and rationales to the remedy of constitutional exclusion will be explored throughout this thesis.

### C. The common law inclusionary rule in England and Wales

It is trite knowledge that the South African law of evidence is based primarily on the law applicable in England.<sup>49</sup> Thirion J endorses the fact that English law played an important role in the South African law of criminal procedure in *Coetzee v Attorney-General, Kwazulu-Natal*<sup>50</sup> and expressed the view that the South African law of criminal procedure would have been aligned to developments in English law, if the occasion had presented itself. The judge expressed himself as follows:

In our country, judgments of the English courts on matters of criminal procedure have always had persuasive force and I have no doubt that had the opportunity presented itself, our courts would have developed the principles relating to a fair trial along lines similar to English law ... .

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a set of high-minded values designed to protect criminals from their just deserts; but is in fact a shield which protects all citizens from official abuse. They must understand that for the courts to tolerate invasion of the rights of even the most heinous criminal would diminish **their** constitutional rights. In other words, the courts should not merely have regard to public opinion, but should mould people's thinking to accept constitutional norms using plain language understandable to the common man". (Emphasis in the original text).

<sup>49</sup> Zeffertt et al *South African Law of Evidence* (2006) at 630.

<sup>50</sup> 1997 1 SACR 546 (D) at 560, ("*Coetzee*").

Moreover, sections 206<sup>51</sup> and 252<sup>52</sup> of the Criminal Procedure Act<sup>53</sup> provide that the law of England shall be applicable in criminal proceedings, not covered by South African law.<sup>54</sup> It is therefore fitting to consider the principles relating to a fair trial, applied by the courts in England, as a starting point to this discussion

English authority on the admissibility of evidence can be found as early as 1861 in the case of *Leatham*.<sup>55</sup> In this case the defence objected to the admission in evidence of a letter written by the accused, because its existence only became known after he was questioned at an inquiry held in terms of the Corrupt Practices Prevention Act of 1854. The relevant Act provided that the prosecution may not use answers given by the accused at the inquiry, against him at a subsequent trial. The Queen's Bench held that such answers could not be used against him, but added that if other evidence was discovered as a result of such answers, nothing prevents the prosecution from using the newly discovered evidence. Crompton J made the often-quoted, brief and concise remark concerning the law in England, when he said the following:<sup>56</sup>

It matters not how you get it; if you steal it even, it would be admissible.

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<sup>51</sup> This section reads as follows: "The law as to the competency, compellability or privilege of witnesses which was in force in respect of criminal proceedings on the thirtieth day of May, 1961, shall apply in any case not expressly provided for by this Act or any other law".

<sup>52</sup> It provides as follows: "The law as to the admissibility of evidence which was in force in respect of criminal proceedings on the thirtieth day of May, 1961, shall apply in any case not expressly provided for by this Act or any other law".

<sup>53</sup> Act 51 of 1977 (as amended), hereinafter referred to as "the Criminal Procedure Act".

<sup>54</sup> For a discussion of the implications of these "residuary" sections, see De Jager et al *Commentary on the Criminal Procedure Act* (2005) at 23-53; see also Kriegler *Suid-Afrikaanse Strafproses* (5<sup>th</sup> ed, 1993) at 500-501.

<sup>55</sup> Fn 7 above.

<sup>56</sup> *Ibid* at 501.

This dictum was influential. It pronounced that the relevance of evidence is of paramount importance when its admissibility is assessed. The dictum further indicated that any unlawful police conduct in the procurement of the evidence should not be frowned upon by the courts. The remark by Crompton J further, by necessary implication, defied the view that unwarranted police conduct would in the eyes of reasonable men or women, taint the integrity of the criminal justice system. In a word, that remark creates the perception that the end of a conviction is justified by unlawful means.

This issue of the admissibility of unlawfully obtained evidence was revisited by the Privy Council in 1955 in the case of *Kuruma Son of Kaniu v R*.<sup>57</sup> The judgment, written by Lord Goddard CJ, confirmed the earlier opinion of Crompton J in *Leatham*<sup>58</sup> to the effect that all relevant evidence is admissible and the methods used to obtain the evidence does not concern the court.<sup>59</sup> In this case, the accused was arrested in Kenya for the unlawful possession of ammunition (constituting real evidence). The arresting officer did not have legal authority to conduct a search of the accused in terms of the applicable law. The Privy Council held that the evidence was correctly admitted by the court *a quo* because it was relevant. Referring to *Noormohamed v R*,<sup>60</sup> the court confirmed that courts may exercise the common law discretion to exclude evidence 'if the strict rules of admissibility would operate unfairly towards the accused'.<sup>61</sup> However, Lord Goddard hastened to add that the exclusionary discretion does not serve a disciplinary purpose.

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<sup>57</sup> [1955] 1 All E R 236 at 239, ("*Kuruma*").

<sup>58</sup> Fn 7 above.

<sup>59</sup> Ibid at 239; see also *Jeffrey v Black* [1978] 1 QB 490, ("*Black*").

<sup>60</sup> [1949] 1 All E R 370, ("*Noormohammed*"); see also *Harris v Public Prosecutions Director* [1952] 1 All E R 1048, ("*Harris*").

<sup>61</sup> Ibid at 239.



In *R v Sang*<sup>62</sup> the House of Lords re-affirmed that the nature and extent of the common law discretion empowers the courts to exclude improperly obtained evidence so as to ensure that criminal trials are not rendered unfair. The discretion could be exercised only in cases where the impropriety had a negative impact on the **reliability** of the evidence or when the right against **self-incrimination** had been violated. For evidence to be considered for exclusion it had to emanate from the accused 'after the offence'<sup>63</sup> had been committed. The reason for this qualification is because the purpose of the exclusionary discretion is analogous to that of excluding unfairly obtained confessions.<sup>64</sup> May<sup>65</sup> is of the opinion that the rationale underlying this approach is the privilege against self-incrimination: A person should not be unfairly or improperly led into providing evidence against herself, at the behest of governmental officials, for the benefit of the prosecution.

To summarise, the common law inclusionary rule enjoyed the status of 'the golden rule' in respect of the admissibility of evidence in England. Relevant evidence, subject to the limited exclusionary discretion available to the courts, is admissible, no matter how it had been obtained. Put in another way, admissibility is determined by the nature of the evidence obtained. Reliable evidence is regarded as being relevant and, because of its reliable qualities, the evidence would be admissible. Thus it was held that the exclusionary discretion was applicable only in the limited instances when the police are guilty of 'trickery', when the accused has been 'misled', when the police conduct can be described as 'oppressive', 'unfair', or when they behave in a 'morally

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<sup>62</sup> [1980] A C 402, ("*Sang*").

<sup>63</sup> *Ibid*, per Lord Diplock at 291; see also Choo & Nash (1999) *Cr Law Rev* 929.

<sup>64</sup> May & Powles *Criminal Evidence* (5<sup>th</sup> ed, 2004) at 287; Choo & Nash (*ibid*).

<sup>65</sup> *Loc cit*.

reprehensible' manner.<sup>66</sup> However, real evidence obtained after a violation is not considered to 'emanate from an accused after the offence', because it existed independent from the violation. As a consequence, whenever real evidence had been discovered, even after a violation, the real evidence would not be regarded as emanating from an accused. Therefore, the employment of the limited discretion would not be applicable under those circumstances. In most cases real evidence would establish a link between the accused and the crime committed and as such, its probative value would steer a presiding officer to ignore, rather than consider the manner of its obtainment. Its relevance is of paramount importance. The prejudice suffered by an accused under these circumstances would be outweighed by the probative value of the evidence.

## D. The statutory law position in England and Wales

### 1 Introduction

The PACE came into force on 1 January 1986. The pertinent provision of the PACE that deals with the admissibility of unfairly obtained evidence is section 78(1). This section provides as follows:<sup>67</sup>

In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, ***including the circumstances in which the evidence was obtained***, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

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<sup>66</sup> *Brannon v Peek* [1948] 1 KB 68, ("*Brannon*").

<sup>67</sup> Emphasis added.

The courts of England and Wales follow three stages of enquiry when section 78(1) has been triggered.<sup>68</sup> During the first stage, regard must be had to 'all the circumstances' which led to the discovery of the evidence. During the second stage, the court must consider whether admission of the disputed evidence would have such an adverse impact on trial fairness that permits its exclusion. During the third phase, the court may exercise its discretion whether to exclude or receive the evidence.<sup>69</sup>

Section 78(1) was applied by the courts of England in a number of cases.<sup>70</sup> Before the interpretation by the courts of this provision is considered, it is apposite to observe that the phrase highlighted above in italics might lead one to conclude that section 78(1) embraces a due process model. This is the case

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<sup>68</sup> Howard et al *Phipson on Evidence* (14<sup>th</sup> ed, 1990) at 700.

<sup>69</sup> Loc cit.

<sup>70</sup> See *R v Fox* [1985] All ER 392, ("*Fox*"); *R v Delaney* (1989) 88 Cr App R 338, ("*Delaney*"); *R v Robb* [1990] 91 Cr App R 161, ("*Robb*"); *R v Nathaniel* [1995] 2 Cr App R 565, ("*Nathaniel*"); *R v Cooke* [1995] 1 Cr App R 328, ("*Cooke*"); *R v Quinn* [1995] 1 Cr App R 387, ("*Quinn*"); *R v Raphaie* [1996] Crim L R 812, ("*Raphaie*"); *R v Khan* [1997] Crim L R 508, ("*Khan*"); *R v Hughes* [1988] Crim L R 519, ("*Hughes*"); *R v Hughes* [1994] 99 Cr App Rep 160, ("*Hughes 2*"); *R v Samuel* [1998] 87 Cr App R 232, ("*Samuel*"); *R v O'Leary* [1988] 87 Cr App R 387, ("*O'Leary*"); *R v Chalkey and Jeffries* [1998] 2 Cr App R 79, ("*Chalkey*"); *R v Sam* [1998] QB 615, ("*Sam*"); *R v Mason* [1998] 1 WLR 144, ("*Mason*"); *DPP v Marshall* [1988] 3 All ER 683, ("*Marshall*"); *R v Allardice* [1998] 87 Cr App R 380, ("*Allardice*"); *R v Walsh* [1990] 91 Cr App R 163, ("*Walsh*"); *R v Keenan* [1990] 2 QB 54, ("*Keenan*"); *R v Canale* [1990] 2 All ER 187, ("*Canale*"); *R v Beales* [1991] Crim L Rev 118, ("*Beales*"); *R v Kirk* [2000] 1 Cr App R 400, ("*Kirk*"); *Attorney-General's Reference (No 3 of 1999)* [2001] 1 Cr App R 475, ("*A-G Reference No 3/99*"); *R v Loveridge* [2001] 2 Cr App R 591 ("*Loveridge*"); *R v Togher* [2001] 1 Cr App R 33, ("*Togher*"); *Attorney-General's Reference (No 3 of 2000)* [2002] 1 Cr App R 29, ("*A-G Reference No 3/2000*"); *R v Banghera* [2001] 1 Cr App R 299, ("*Banghera*"); *A & Others v Secretary of State for Home Affairs* [2006] 2 AC 221; [2005] UKHL 71, ("*A and Others*").

when one considers the plain meaning of the words contained in the phrase.<sup>71</sup> It suggests that reliable evidence may be excluded if it was obtained with disregard to the procedural safe guards of an accused. Contrary to the *dictum* of Lord Goddard, in *Kuruma*, it would appear that the methods used by the police in the evidence gathering process, would be a factor to be considered when a ruling on the admissibility thereof is to be made.<sup>72</sup> Do the courts agree with this observation or do they determine admissibility based on the reliability of the evidence? Before this issue is explored, it is convenient to consider who bears the onus in section 78(1) challenges; thereafter the meaning of the concept 'fair trial' within the context of section 78(1) is considered. This discussion is followed by a brief analysis of English case law.

## 2 The onus; the meaning of the concept 'fair trial' under section 78(1); and the nature of the discretion under section 78(1)

The following topics are discussed here: who bears the onus in section 78(1) disputes, the meaning of the concept 'fair trial', including the nature of the discretion exercised by a court when section 78(1) is interpreted.

### (a) *The onus*

Section 78(1) makes no reference to a burden of proof: both parties must persuade a court as to what the consequences of exclusion or admission would have on the trial fairness directive.<sup>73</sup> However, Sharpe is of the opinion that the

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<sup>71</sup> See *Sam* (ibid) at 621, quoting *Attorney-General v Milne* [1914] A C 765, ("*Milne*").

<sup>72</sup> Choo & Nash (fn 63 above) arrive at the same conclusion.

<sup>73</sup> May & Powles (fn 64 above) at 308; see also Howard et al (fn 68 above) at 701, where it is argued as follows: "If the judge does hear evidence, the section is silent, unlike section 76, about

accused ultimately has a duty to convince the court that admission of the evidence would render the trial unfair.<sup>74</sup> The prosecution does not have to show that admission would **not** render the trial unfair.<sup>75</sup> This issue was authoritatively decided by the House of Lords in *A and Others v Secretary of State for the Home Department*.<sup>76</sup> In this matter, the Special Immigration Appeals Commission had to decide whether statements obtained by means of torture by non-English governmental officials was admissible in appeals to the Commission. The Secretary of State argued that the onus rests on the party seeking exclusion. Lord Hope held<sup>77</sup> that once a detainee has raised the issue of unlawful governmental conduct, the onus to investigate such conduct rests on the Commission. When the Commission is satisfied, on a balance of probabilities, that the evidence was obtained by means of torture, the evidence should be excluded. By contrast, when the Commission is not swayed one way or the other, the disputed evidence should be admitted.<sup>78</sup> This case, in effect, establishes that both parties should present factual grounds to enable the presiding officer to decide the issues on a balance of probabilities, thus confirming the view held by May and Powles.<sup>79</sup>

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a burden or standard of proof. It is submitted that no burden arises"; compare Caldwell & Chase (1994) 78 *Marq L Rev* 45 at 64, who raise the point that in Australia the accused bears the onus when seeking to exclude evidence.

<sup>74</sup> May & Powles (fn 64 above) at 296-297; Compare Tapper *Cross and Tapper on Evidence* (2004) at 212, who argues, based on the decision in *Re Saifi* [2001] 4 All ER 168, that "the less onerous burden of negating the factual basis for triggering the discretion [is] now recognised to rest on the prosecution".

<sup>75</sup> Loc cit.

<sup>76</sup> Fn 70 above.

<sup>77</sup> Lords Rodger, Carswell and Brown concurring.

<sup>78</sup> Fn 70 above at 78.

<sup>79</sup> See their opinion at fn 73 above.

(b) *The meaning of the concept 'fairness'*

The concept of 'fairness' of proceedings does not make explicit reference to 'fairness to the accused'. The courts have accordingly interpreted it to mean fairness to both the accused and the prosecution.<sup>80</sup> These two interests must be balanced to determine whether admission of the disputed evidence would render the trial unfair.<sup>81</sup> May and Powles<sup>82</sup> are of the opinion that the balancing process would be a relevant consideration, but add that the primary concern should rather be whether admission would render the trial unfair. The concept 'fairness' further refers to a standard of fairness created by Parliament – not the courts – to protect the procedural rights of the accused. Failure on the part of the police to adhere to the provisions of the PACE and the Code amounts to the standard of fairness fashioned by Parliament, being *prima facie* violated.<sup>83</sup>

The rationale for exclusion is not to discipline law enforcement officers,<sup>84</sup> because it is not a requirement for the exercise of the section 78 discretion that the police or prosecuting authority acted in bad faith or made themselves guilty of oppressive conduct.<sup>85</sup>

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<sup>80</sup> *Hughes* (fn 70 above); see also *Robb* (fn 70 above); see further Sharpe *The New Law Journal* (1996) at 1088.

<sup>81</sup> Tapper (fn 74 above) at 543 where he argues as follows: "There have even been signs of its transformation into an inclusionary discretion, perhaps influenced by increasing stress on account being taken of fairness to the prosecution as well as to the defence".

<sup>82</sup> Fn 64 above at 306.

<sup>83</sup> *Walsh* (fn 70 above) at 163.

<sup>84</sup> *Mason* (fn 70 above) at 144; compare *Alladice* (fn 70 above) at 386, where Lord Lane CJ was of the opinion that when the police acted in bad faith, the court would be reluctant to admit the evidence.

<sup>85</sup> *DPP v Godwin* (1991) RTR 303.

Analogous to the Canadian position, a *bona fide* mistake by police officers resulting in a 'significant and substantial' breach, will not change a trial that is unfair into a fair trial. In such instances exclusion will in all probability follow, for the reason that the standard of fairness as determined by Parliament would not have been complied with.<sup>86</sup> However, this does not mean that exclusion will automatically follow whenever a breach is held to be 'substantial and significant'.<sup>87</sup> The court emphasised this approach in *Walsh*,<sup>88</sup> when it held that in the event it is found that admission would impact negatively on trial fairness, the court should, in addition, consider whether it would be in the interests of justice to exclude the evidence.

(c) *The nature of the discretion under section 78(1)*

It has been said that section 78(1) has given the courts a wider discretion than that of the *Sang*<sup>89</sup> court. May and Powles are of the opinion that public opinion plays a prominent role in the exercise of the discretion by the courts whether to exclude or admit evidence.<sup>90</sup> The accurateness of their opinion is demonstrated by the approach of the Court of Criminal Appeal in *Attorney-General's Reference (No 3 of 1999)*.<sup>91</sup> In this case the court had regard to public attitudes, especially those of the victim and the family of the victim, in the section 78(1) assessment. This 'wide discretion' has been criticised because it is 'unstructured' and leads to uncertainty as well as unpredictability 'into decision making [by the police and

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<sup>86</sup> *Walsh* (fn 70 above) at 163.

<sup>87</sup> *Loc cit.*

<sup>88</sup> Fn 70 above.

<sup>89</sup> This was said in *Cooke* (fn 70 above) at 328.

<sup>90</sup> Fn 70 above at 298.

<sup>91</sup> Fn 64 above.

the courts] and into judicial endorsement of [unwarranted] police activity'.<sup>92</sup> This in turn would entail that by receiving the disputed evidence, the courts themselves would be contaminating the judicial process. It is submitted that the courts, as independent members of the judiciary, do have a moral duty to uphold the law. Therefore, by receiving the disputed evidence, the public would view the reception of the contaminated evidence as judicial condonation of unlawful police conduct. To be sure, modern society would hold the view that the reception of evidence obtained after a serious violation of fundamental rights would result in judicial contamination.

Unlike section 24(2) of the Canadian Charter, the discretion of the courts in England and Wales is limited, since they are not explicitly authorised by section 78(1) to consider the effect of exclusion or admission of the evidence on the integrity of the justice system.<sup>93</sup> Section 78(1) of the PACE empowers the courts to consider only whether admission of the unfairly obtained evidence would render the trial unfair. In this regard, not even the balancing approach, applicable in Ireland and Australia, may be applied by the courts of England and Wales.<sup>94</sup> Harmonious with the common law inclusionary rule, section 78(1) is a provision that authorises the courts, in the exercise of their discretion, to

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<sup>92</sup> Sharpe (fn 80 above) at 1088, demonstrates the validity of this criticism by referring to the contradictory findings in *H* [1987] Crim LR 47, and *Jelen and Katz* [1990] 90 Cr App R 456, ("*Jelen & Katz*"). See also *Attorney-General's Reference (No 3 of 1999)* (fn 70 above) and *Nathaniel* (fn 70 above). The disputes were primarily the same, but different results were reached; see also *May & Powles* (fn 64 above) at 296-297. Auld J made the following remark in *Jelen and Katz* (ibid) at 465, thus reaffirming the concerns of Sharpe (fn 80 above), when the judge said the following: "... judges may well take different views in the exercise of their discretion even where the circumstances are similar".

<sup>93</sup> See the discussion of this factor in chapters 5 and 6 of this thesis.

<sup>94</sup> See, for example, the discretion applied in the case of *The People (A-G) v O'Brien* [1965] IR 142, ("*O'Brien*"); and *Lawrie v Muir* 1950 SC (J) 16, ("*Lawrie*").



primarily **admit** evidence obtained as a result of unwarrantable police conduct, provided its admission would not render the trial unfair.<sup>95</sup>

Furthermore, the presiding officer is the sole arbiter of the circumstances he or she considers when exercising a discretion whether to exclude or admit evidence.<sup>96</sup>

### 3. English case law: illustrations of the factors considered to determine trial fairness

The courts of England and Wales have yet to identify categorically the factors to be taken into account in the exercise of their discretion, as well as the weight to be attached to each. In this work an attempt is made to categorise the factors considered by the courts when applying section 78(1).

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<sup>95</sup> See Tapper (fn 74 above) at 543, where he writes as follows: "There have even been signs of its [section 78(1)] transformation into an inclusionary discretion ...". See also Choo & Nash (2007) *E & P* 11(2) 75 at 3 of the printed page (publication pages are not available for this article), who express their dissatisfaction as follows: "Indeed it has been suggested that s 78(1) should not be used to exclude relevant, highly probative non-confession evidence unless its quality may have been affected by the manner in which it was obtained". However, it should be emphasised that section 78(1) endows the courts with a broader discretion than the common law discretion to exclude unlawfully obtained evidence.

<sup>96</sup> See *Jelen and Katz* (fn 92 above). Howard et al (fn 68 above) at 70, citing *Samuel* to show that the Court of Criminal Appeal is not in favour of setting out factors for the general guidance of the exercise of the section 78(1) discretion; Choo & Nash (fn 95 above) at 3 of the printed version (publication page references are not available for this article), they argue as follows: "Despite the extensive jurisprudence on s 78(1), the courts have provided minimal guidance on specific factors that inform a decision on whether improperly obtained evidence should be excluded in any particular case"; see also Hunter (1994) *Crim LR* 558.

(a) *PACE and tricks played by the police: exclusion of self-incriminating evidence*

Soon after the PACE was enacted, the Court of Criminal Appeal was called upon to interpret section 78(1) in the case of *Mason*.<sup>97</sup> The police deceived the appellant as well as his attorney to believe that the appellant's fingerprint was found at the scene of the crime – whereas in fact this was not the case – leading to the appellant incriminating himself. The court held that the violation was 'most reprehensible'<sup>98</sup> and excluded the disputed confession in terms of section 78(1). A reasoned judgment as to why it was excluded is lacking, but one can only assume that it was excluded because it was obtained in a manner that impacted negatively on the right to a fair trial because the accused had been conscripted against himself or that the evidence failed the reliability test. The court was at pains to emphasise that the evidence was not excluded to discipline the police. In the case of *Delaney*,<sup>99</sup> the Court of Criminal Appeal excluded a confession where the police officer interviewing the accused and 'down played the seriousness of the offence' with the intention not to scare the accused away from confessing his guilt. This prompted the accused to make the confession. The reason why the confession was excluded was because its reliability was suspect.<sup>100</sup>

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<sup>97</sup> Fn 70 above; see also *Beales* (fn 70 above).

<sup>98</sup> Compare *R v Christou and Wright* [1992] All ER 559, ("*Christou*"), where the court of the Queen's Bench held that not every trick would result in an unfair trial.

<sup>99</sup> Fn 70 above.

<sup>100</sup> *The Independent* 19 Jan 1990 at 1.

*(b) PACE and non-compliance with the right to legal representation: exclusion of self-incriminating evidence*

In *Samuel*<sup>101</sup> Hodgson J, writing the unanimous decision for the Court of Appeal,<sup>102</sup> had to rule on the admissibility of a confession made while the accused was denied the right to exercise his right to legal representation. During the first interview the accused denied having participated in the robbery. When asked during the second interview about the masks discovered at his house, he indicated that he wanted to see his legal advisor before he would answer anything else. The interview was stopped and his request was referred to the Superintendent, who, in terms of section 58 of the PACE,<sup>103</sup> refused to allow the

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<sup>101</sup> Fn 70 above.

<sup>102</sup> Glidewell LJ and Rougier J concurring.

<sup>103</sup> It reads as follows: "58(4) If a person makes such a request [for legal assistance], he must be permitted to consult a solicitor as soon as is practicable except to the extent that delay is permitted by this section.

(5) In any case he must be permitted to consult a solicitor within 36 hours from the relevant time, as defined in section 41(2) above.

(6) Delay in compliance with a request is only permitted -(a) in the case of a person who is in police detention for a serious arrestable offence; and (b) if an officer of at least above the rank of superintendent authorises it.

(7)...

(8) An officer may only authorize delay where he has reasonable grounds for believing the exercise of the right [to legal representation] conferred by subsection (1) above at the time when the person detained desires to exercise it - (a) will lead to interference with or harm the evidence connected with a serious arrestable offence or interference with or physical injury to other persons; or (b) will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or (c) will hinder the recovery of any property obtained as a result of such offence.

(9)....

(10)....

accused the right to exercise his right to legal representation. The interviews continued. The next day, an attorney instructed by a relative of the accused, made several attempts to speak to someone in authority, but his attempts were unsuccessful.

Late during that afternoon, the accused was charged with two counts of housebreaking (unrelated to the robbery). The attorney phoned again at about 16h45 and was informed that his client had been charged with the housebreaking offences and that he was still being denied to exercise his right to legal representation. The accused was interviewed again thereafter and made a confession in respect of the robbery charge. About an hour thereafter, the attorney went to the police station and consulted with his client.

The court held that the delay in allowing access to legal representation after 16h45 was unlawful, because the accused had, at this stage, been charged with a serious arrestable offence<sup>104</sup> (two counts of housebreaking). One could also argue that the fact that he had been charged with having allegedly committed the two offences triggered section 58(11) of the PACE, because the reason for authorising the delay, at that stage had ceased to exist. It is also clear that the refusal to grant access to legal representation was not a *bona fide* mistake. On the contrary, the court classified it as an improper denial of 'one of the most important and fundamental rights of a citizen'<sup>105</sup> and also concluded that 'whoever made the decision to refuse Mr Warner [accused's attorney] access at 4.45 pm was very probably motivated by a desire to have one last chance of

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(11) There may be no further delay in permitting the exercise of the right [to legal representation] conferred by subsection (1) above once the reason for authorising delay ceases to subsist".

<sup>104</sup> A serious arrestable offence is defined in section 116 and Schedule B. The Firearms Act of 1968 also creates such offences.

<sup>105</sup> Fn 70 above at 629.

interviewing the appellant in the absence of a solicitor'.<sup>106</sup> This is a clear indication that the violation was motivated by malice and therefore deemed serious enough to justify exclusion. The judge mentions that a violation of any of the rights listed in the Code prompts the operation of the discretion contained in section 78(1).<sup>107</sup> A powerful analogy can be drawn between this case and the South African case of *S v Mphala*,<sup>108</sup> where the legal representative of the accused was deliberately misled by the investigating officer that his clients would be taken to a magistrate to make confessions later that afternoon, when they were in fact taken to the magistrate earlier.

Moreover, there was an arrangement between the investigating officer and the attorney in *Mphala*, that the accused should not make any statements before having consulted with him. The investigating officer failed to inform the accused that a legal representative had been appointed to act on their behalf; that he was on his way to consult with them; and that they should not make any statements before having consulted with him.<sup>109</sup> This conduct of the investigating officer was evidently designed to prevent the accused from having access to legal representation before the confessions had been obtained. The disputed evidence was accordingly excluded, on the ground that the accused had been unduly influenced to make the confessions.<sup>110</sup>

The reason for exclusion in *Samuel* was that the provisions of the PACE, containing procedural safe guards against police abuse of power had not been

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<sup>106</sup> Ibid at 628.

<sup>107</sup> Ibid at 629.

<sup>108</sup> Fn 36 above.

<sup>109</sup> Ibid at 503-504.

<sup>110</sup> Ibid at 504.

complied with.<sup>111</sup> It is noteworthy to mention the fact that the court did not refer to, nor apply the ratio in *Sang*<sup>112</sup> or *Kuruma*.<sup>113</sup> The judge took note of the possible implication his ruling (exclusion) would have had on the investigation and prosecution of the case - the effect of removing any unfair advantage the police might have had, had the rights of the appellant not been violated.<sup>114</sup> The court nullified the harm caused by the violation and thus applied the corrective justice theory. Both parties have been restored to the position they would have been in had the violation not occurred. The impact that exclusion would have on public opinion was not explicitly considered.

*(c) PACE and police non-compliance with contemporaneous noting of interviews: exclusion of self-incriminating evidence*

In *Keenan*<sup>115</sup> Hodgson J, again writing for an unanimous but differently constituted Court of Criminal Appeal,<sup>116</sup> held that ignorance by members of the police about the provisions of the PACE some eighteen months after it had been enacted, was 'appalling'<sup>117</sup> and hoped that after 'this judgment no police officer will display the ignorance of even the existence of the important provisions in issue in this case as these officers did'.<sup>118</sup> This remark of the judge could be

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<sup>111</sup> (Fn 70 above) at 629, the penultimate paragraph: "...the judge failed properly to address his mind to the point in time which was most material and did not in terms give consideration to what his decision would have been had he ruled in favour of the defence on this more fundamental issue".

<sup>112</sup> Fn 62 above.

<sup>113</sup> Fn 57 above.

<sup>114</sup> Fn 70 above at 629, where he states: "Such a decision [exclusion] would, of course have very significantly weakened the prosecution case (the failure to charge earlier ineluctably shows this)".

<sup>115</sup> Fn 70 above.

<sup>116</sup> Mustill LJ and Potter J concurring.

<sup>117</sup> Ibid at 59.

<sup>118</sup> Ibid at 61.

construed as evidence that the court intended the judgment to serve as a deterrent for future police misconduct. Therefore, one could not be faulted for concluding that the disciplinary function of the court was forcefully communicated in this judgment.

The charge against the appellant was that he was in unlawful possession of an offensive weapon, described in the charge sheet as a spear. He was arrested after a high-speed car chase and taken to the charge office. His car was searched in his absence, leading to the discovery of the weapon. Several provisions of the PACE and Code C (dealing with the rules relating to the contemporaneous noting of interviews held by the police) were ignored when the police investigated the charge against the appellant.<sup>119</sup> The court held that the breaches in this case were 'significant and substantial', warranting exclusion in terms of section 78(1) of the PACE.<sup>120</sup>

It is important to note that serious breaches of the procedural safeguards of an accused would in all probability lead to exclusion, not with the goal to discipline the police<sup>121</sup> or to protect the integrity of the criminal justice system, but because the impropriety had a negative impact on the **reliability** of the evidence.<sup>122</sup> The court was of the opinion that the PACE and Codes serve two

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<sup>119</sup> Ibid at 62-63.

<sup>120</sup> Ibid at 70.

<sup>121</sup> See *Mason* (fn 70 above).

<sup>122</sup> Ibid at 63, quoting with approval from *Delaney* (fn 70 above), a judgment delivered by Lane CJ, *The Times*, 30 August 1988 reported as follows: "By failing to make a contemporaneous note, or indeed any note, as soon as practicable, the officers deprived the court of what was, in all likelihood, the most cogent evidence as to what did indeed happen during these interviews and what did induce the appellant to confess. To use the words of Mr Hunt [acting for the accused] to the court this morning, the judge and the prosecution were pro tanto disabled by the omission of the officers to act in accordance with Codes of Practice, disabled from having the full knowledge upon which the judge could base his decision".

main concerns. First, they protect detained persons from improper police conduct. Second, it provides safeguards against the inaccurate recording or inventing of words by the police when a person is being interviewed. In this manner, the evidence provided in court, based on the contemporaneously recorded information, will be the most cogent version of events. This approach, some might argue, was the first step backwards towards the re-incarnation of *Sang*.<sup>123</sup> Others might argue that this practice complies with the provisions of the Body of Principles, adopted by the General Assembly of the United Nations, which require that nation-states keep proper records of the interrogation of suspects and to make such records available for judicial scrutiny.<sup>124</sup>

In *Canale*,<sup>125</sup> Lord Lane CJ wrote the judgment for a unanimous Court of Appeal.<sup>126</sup> The appellant was charged and convicted in the court *a quo* on one count of conspiracy to commit robbery and one count of transferring a firearm to another. The appellant was initially charged with theft of a motorbike, but after one of his co-accused made certain admissions during his interview with the police about a planned robbery, the appellant was also questioned about it. The appellant made admissions about the planned robbery in two separate interviews: one on the 4<sup>th</sup> of March and the other on the 5<sup>th</sup> of March. None of these admissions were contemporaneously recorded, but another interview followed each unrecorded interview, which was thereafter recorded. The appellant was requested to repeat the admissions he allegedly made in the earlier unrecorded interviews. The argument before the appeal court was confined to possible breaches of the PACE. His Lordship ushered in the judgment

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<sup>123</sup> Fn 61 above.

<sup>124</sup> Principle 22 of the Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment, adopted by the General Assembly of the UN in terms of Resolution 43/173 of 9 December 1988, ("the Body of Principles").

<sup>125</sup> Fn 70 above.

<sup>126</sup> Hutchison and Rougier JJ concurring.



with the following stern warning,<sup>127</sup> suggesting that the objective of the judgment (and seemingly section 78(1) of the PACE) is to discipline the police:

This case is the latest in a number of decisions emphasising the importance of the 1984 Act. If, which we find it hard to believe, police officers still do not appreciate the importance of the Act and the accompanying Codes, then it is time that they did. The Codes of Practice, and in particular Code C relating to interviews and questioning of suspects, are particularly important.

The court referred to *Keenan*<sup>128</sup> with approval,<sup>129</sup> applied it and again emphasised the object of the requirement of contemporaneous noting of interviews. The court described the breaches of the Code as 'flagrant', 'deliberate and cynical'.<sup>130</sup> As a result of the casual attitude of the police towards the provisions contained in the Code, the admissions contained in the recorded interviews were declared inadmissible. Here, again, the ratio for exclusion was the fact that the interviews failed the reliability test. The court in this case, leaned towards a regulatory aim when it stated 'it is time they did', suggesting that the judgment is based on the court's disciplinary function to ensure that the police in future comply with the Code and PACE.

To summarise, it is clear from the case law reviewed above that the courts in England do not consider what effect the exclusion or admission of the disputed evidence might have on the integrity of the administration of justice,<sup>131</sup> within

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<sup>127</sup> (Fn 70 above) at 190 of the judgment.

<sup>128</sup> Fn 70 above.

<sup>129</sup> Ibid at 190.

<sup>130</sup> Ibid at 192.

<sup>131</sup> Bradley (fn 8 above), disagrees with this contention, at 188-191. He refers to the English law of evidence undergoing a "criminal law revolution". However, he does not refer to the cases

the context of section 24(2) of the Charter, when they apply section 78 of the PACE. However, they do consider this factor when the doctrine of abuse of process is applied. For this reason it is apposite to briefly consider their application of this doctrine as a remedy in the criminal justice process, as this doctrine could become a basis for the future development of an exclusionary remedy.

#### 4 The abuse of process doctrine

The primary value that this doctrine seeks to protect is, in general, the integrity of the criminal justice system. This doctrine has been invoked by the English courts in instances when the criminal justice system was being used with ulterior motives;<sup>132</sup> the undue delay in the prosecution of a case;<sup>133</sup> pre-trial prosecutorial or police impropriety;<sup>134</sup> and, in cases where it was claimed that the accused would be subjected to double jeopardy.<sup>135</sup> The burden of proof is on the accused to show that the Executive or its agents knowingly abused the criminal justice system.<sup>136</sup> When determining whether the relief claimed should be granted, the courts apply a balancing exercise by weighing up the countervailing public interests of protecting an accused from the unwarranted intervention with her rights and the equally important public interests in ensuring that criminals be brought to book. The protection of the integrity of the courts is a key factor when exercising the discretion to grant the necessary relief.

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discussed above, or to primary sources. His conclusion is based on an opinion by Feldman in (1990) *Crim L Rev* 452.

<sup>132</sup> *R v Bow Street Stipendiary Magistrate and Glogg* (1993) *Crim L R* 221, (“*Glogg*”).

<sup>133</sup> *Attorney-General's Reference (No 1 of 1990)* (1992) *Q B* 630, (“*A-G Ref (No 1 of 1990)*”).

<sup>134</sup> *Bennett* (fn 45 above); *R v Mullen* (1999) *2 Cr App. R*143, (“*Mullen*”).

<sup>135</sup> *Connelly v DPP* (1964) *A C* 1254, (“*Connelly*”).

<sup>136</sup> *Ibid*; see also *Bennett* (fn 45 above).

In *Bennett*,<sup>137</sup> the House of Lords held that the abuse of process doctrine could be successfully invoked when the police failed to initiate legal extradition procedures, but instead convinced the government to which the accused fled to, to deport him to England. The House of Lords held that the courts should not 'countenance behaviour that threatens either basic human rights or the rule of law'.<sup>138</sup> Lord Lowry reasoned that the courts need to protect their own integrity in cases of serious abuse of process. He reasoned as follows:<sup>139</sup>

[a] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either

(1) because it will be impossible (usually by reason of delay) to give the accused a fair trial; or

(2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.

Lord Lowry acknowledged that a stay of proceedings might have the added result of discouraging the police from the involvement in similar future conduct,<sup>140</sup> thus seemingly enforcing a deterrence rationale, linked to a regulatory purpose. However, he was emphatic in his assertion that the purpose of a stay is not to discipline the police,<sup>141</sup> but to protect the integrity of the criminal justice system. In *Mullen*,<sup>142</sup> the appellant was alleged to have assisted members of the IRA. The appellant left England with his girlfriend and child with the intention to evade the criminal process. With the assistance of the

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<sup>137</sup> Ibid.

<sup>138</sup> Ibid at 62.

<sup>139</sup> Ibid at 81.

<sup>140</sup> Loc cit.

<sup>141</sup> Ibid at 74-75.

<sup>142</sup> Fn 134 above.

government of Zimbabwe, the appellant was arrested in that country and returned to England in violation of international law, as well as the law of Zimbabwe. His return to England could not have been achieved should the normal legal channels, in compliance with international law and the law of Zimbabwe, have been followed. An arrangement was made that the involvement of the United Kingdom in the said dealings had to be concealed at all costs (presumably because of the judgment in *Bennett*).<sup>143</sup> It was further arranged that the appellant should not be allowed to have access to an attorney after his arrest, to avoid any application for the review of the deportation proceedings. This information about the planned deportation of the accused was not disclosed to the defence before the inception of the accused's trial.

The Court of Criminal Appeal<sup>144</sup> applied a balancing exercise as suggested by Lord Steyn in *R v Latief*.<sup>145</sup> The following countervailing values were balanced against each other in order to determine whether a stay would be the appropriate relief: The public interest in ensuring that those charged with the alleged commission of serious crimes should be tried in a court of law and the similarly important countervailing public interest that a court should not be perceived to adjudicate matters 'tainted' by the conduct of the Executive branch of government, thereby embracing the notion that the end justifies the means. Applying this balancing exercise to the facts of the case, the court concluded that

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<sup>143</sup> Fn 45 above.

<sup>144</sup> Rose LJ.

<sup>145</sup> (1996) 2 Cr App R 92 at 101, (*Latief*), where Steyn LJ wrote: "The law is settled. Weighing countervailing considerations of public policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed ... But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those who are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means".

the application of the discretionary balance 'comes down decisively against the prosecution of this offence'.<sup>146</sup>

Yet again, a strong analogy can be drawn between *R v Croydon Justices, ex parte Dean*<sup>147</sup> and the South African case of *Pillay*.<sup>148</sup> However, the two cases were decided on different legal bases and as a result, the relief granted differs. In *Dean*, the accused, as well as two of his co-accused were arrested on a charge of murder. The accused was not a perpetrator, but he went to the scene after the murder had been committed, assisting the two co-accused to destroy the car of the deceased. When interviewed by the police, he made statements incriminating the main perpetrator. The accused agreed to be a prosecution witness and was released from police custody, despite the fact that his statement provided the police with sufficient evidence to charge him for a different offence. During an interview that took place at a later stage, the police indicated that he is regarded by them to be a prosecution witness. He went to the crime scene with the police and described how the car of the deceased was destroyed. The Crown Prosecution Service subsequently decided to prosecute the accused on a charge of assisting in the destruction of the car of the deceased, well knowing it to be evidence, with the intention to obstruct the arrest or prosecution of his co-accused. The police failed to inform him about the decision that he would be prosecuted. Before he was charged, he made further statements assisting the police in their investigation. Based on these facts, the accused applied for judicial review to have his committal to the Crown Court nullified.

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<sup>146</sup> Ibid at 157.

<sup>147</sup> [1993] 3 All ER 129, ("*Croydon Justices*" or "*Dean*").

<sup>148</sup> Fn 21 above.

In the judgment written by Staughton LJ,<sup>149</sup> the judge cited the opinion of Lord Diplock in *Hunter v Chief Constable of West Midlands*<sup>150</sup> with approval, where the latter referred to the impact the police conduct might have on the perception by the public of the courts. He wrote that courts do have:<sup>151</sup>

... the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would ***otherwise bring the administration of justice into disrepute*** among right-thinking people.

The highlighted phrase of the quotation from this judgment is contained in section 35(5) of the South African Constitution. The mentioned phrase is discussed in chapter five of this thesis. The statement by Staughton LJ in *Hunter* makes clear that courts should not condone unlawful conduct of one of the litigants before it, for such condonation might be perceived by right-minded people as conduct that undermines the integrity of the criminal justice system and the rule of law. Staughton LJ ruled that the conduct of the police constituted an abuse of process and stayed the proceedings against the accused. A stay of the prosecution was the appropriate relief granted, because by allowing the accused to be prosecuted, the courts would be perceived as condoning the unwarranted police conduct. In *Pillay*,<sup>152</sup> an arrangement had been made with the prosecution that the accused would not be prosecuted. It was a term of the agreement that she would be called as a prosecution witness against the main perpetrator. (The right to privacy of the accused was also infringed in the

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<sup>149</sup> Buckley J concurring.

<sup>150</sup> [1981] 3 All ER 727 at 729, ("*Hunter*").

<sup>151</sup> Emphasis added.

<sup>152</sup> Fn 21 above. This case is discussed in detail in chapters 4 and 5.

evidence-gathering process). Despite this agreement, she was thereafter prosecuted and convicted in the court *a quo*. The majority opinion of the Supreme Court of Appeal held that should a court permit this to happen, it would be associating itself with the unwarrantable police conduct. Public policy considerations, among other factors, convinced the court to exclude real evidence<sup>153</sup> that firmly linked the accused to the commission of the offence.<sup>154</sup>

To summarise, the integrity of the justice system becomes a prominent consideration when the courts in England apply the doctrine of the abuse of power. A wide discretion, applicable in the common law jurisdictions of Ireland and Australia when the admissibility of evidence is determined,<sup>155</sup> is applied to the assessment as to whether a stay should be granted. The courts strive to strike a balance between ensuring that perpetrators of serious crimes are brought to book and preventing detriment to the administration of justice by preventing a perception that the end of a conviction justifies unlawful means. The nature of the discretion differs materially when compared to the discretion in terms of section 78(1). What is more, when a stay of prosecution is considered, the courts regard the protection of fundamental rights as its primary concern.<sup>156</sup>

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<sup>153</sup> Ibid at par 94, where Mpati DP and Motata AJA reasoned as follows: "In our view, to allow the impugned evidence derived as a result of a serious breach of accused 10's constitutional right to privacy might create an incentive for law enforcement agents to disregard accused persons' constitutional rights since, even in the case of an infringement of constitutional rights, the end result might be the admission of evidence that, ordinarily, the State would not have been able to locate".

<sup>154</sup> It should be mentioned that more than one constitutional right of the accused had been violated, which convinced the court that the violation was serious.

<sup>155</sup> The difference between the nature of this discretion and the section 35(5) discretion is discussed in chapter 6 below.

<sup>156</sup> See *Connelly* (fn 135 above) at 62.

Choo and Nash<sup>157</sup> contend that the purpose of a stay of proceedings is to prevent the reliance by the prosecuting authority on the 'fruits of pre-trial police impropriety'.<sup>158</sup> They argue that one and the same fundamental principle is applicable when evidence is to be excluded as a result of the same impropriety. They continue their argument by adding that consistency dictates that, by means of analogy, improperly obtained but reliable evidence ought to be excluded on the same grounds.

The primary basis for the protection of human rights was introduced into English law by the enactment of the Human Rights Act. This Act incorporated the European Convention into the national law of England. It is therefore important to consider what impact this Convention has on the procedural rights of an accused person in English national law.

## 5 The Human Rights Act of 1998 and the case law of the European Court of Human Rights: its impact on the admissibility of evidence in England

In terms of the law of England a treaty signed and ratified by the Executive is binding on it at international level, but it will only become binding at domestic level when incorporated into national legislation.<sup>159</sup> Courts may therefore only

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<sup>157</sup> Fn 63 above at 937.

<sup>158</sup> Loc cit.; see also Choo & Nash (fn 95 above) at 5 conclude after their discussion of the decision of *A and Others* (fn 70 above), that there may be circumstances when the courts "should be prepared 'on moral grounds'," to exclude reliable real evidence because of the manner in which it had been obtained.

<sup>159</sup> This is referred to as the "dualist tradition", which is applicable in most Anglophone African states. South Africa adopted a hybrid approach, incorporating a dualist mechanism, which simultaneously caters for the automatic incorporation of "self-executing" provisions of international agreements that are not inconsistent with the provisions of the Bill of Rights. See



apply a treaty or convention after Parliament had passed legislation that contains the content of the treaty.<sup>160</sup> The Human Rights Act came into force on 2 October 2000.<sup>161</sup> It incorporated the European Convention into English national law. As a consequence, evidence obtained in violation of the rights contained in the European Convention may be susceptible for exclusion in terms of section 78(1) of the PACE.<sup>162</sup> An added important consequence of the Human Rights Act is the fact that the courts in England have to consider relevant case law of the European Court and opinions of the European Commission,<sup>163</sup> when interpreting the Act.<sup>164</sup>

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Viljoen, "Introduction to the African Commission" in Heyns (ed) *Human Rights Law in Africa* (Vol 1, 2004) at 413-414.

<sup>160</sup> Dugard "Public International Law" in Chaskalson et al (eds) *Constitutional Law of South Africa*, [Revision Service 3, 1998] 13-3; also Viljoen loc. cit.

<sup>161</sup> Commencement No 2, Order 2000 (SI 2000/1851); see also May & Powles (fn 64 above) at 369; Turpin *British Government and the Constitution, Text, Cases and Materials* (5<sup>th</sup> ed, 2005) at 141.

<sup>162</sup> See *R v Khan* [1996] 2 Cr App R 440, ("*Khan*"). Despite the fact that the Human Rights Act was not incorporated when judgment was delivered in this decision, the court considered a breach of the European Convention as a relevant factor in the exercise of its section 78(1) discretion. The court held that the European case law on the issue of admissibility of evidence obtained in violation of the right to privacy was the same as the law of England. The disputed evidence was admitted; see also May & Powles (fn 64 above) at 306.

<sup>163</sup> Section 2 of the Act. The European Commission was abolished in 1998 and the European Court is differently constituted.

<sup>164</sup> May & Powles (fn 64 above) at 374, are of the opinion that the courts in England may consider the South African approach to the exclusion of evidence, based on the opinion of Lord Nicholls, delivered in *R (Anderson) v Secretary for the Home Department* [2003] 2 WLR 1389 ("*Anderson*"), where he said the following: "... every system of law stands to benefit by an awareness of the answers given by other courts and tribunals to similar problems".

A general rule of interpreting the European Convention is that the rights guaranteed by it are to be interpreted generously and purposively.<sup>165</sup> Nonetheless, the prosecuting authority of member states is allowed a margin of appreciation<sup>166</sup> in respect of the procurement and admissibility of evidence in criminal trials.<sup>167</sup> In terms of the doctrine of a margin of appreciation, the sovereignty of nation-states are respected, for member states are aware of factors that are important to sustain the fabric of their societies. Put another way: Nation states that have ratified international instruments are given a margin of discretion as to how they comply with the provisions of international instruments. In this regard, the European Court held that Article 6(1) of the European Convention<sup>168</sup> empowers it to determine whether a trial is fair. It does not allow the court to replace its own view of what the rules of evidence or requirements for admissibility of member states should be. However, this does not detract from the duty of the European Court to consider whether the criminal trial as a whole is fair.<sup>169</sup> What then, is the impact of the Human Rights Act on

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<sup>165</sup> *Nemetz v Germany* (1992) 16 EHRR 97, (“*Nemetz*”); see also *Lawless v Ireland*, Series A, No 28, par 68 (1978), (“*Lawless*”).

<sup>166</sup> See MacDonald “The Margin of Appreciation” in MacDonald et al (eds) *The European System for the Protection of Human Rights* (1993), for a discussion of this doctrine.

<sup>167</sup> *Schenk v Switzerland* (1991) 13 EHRR 242, par 46, (“*Schenk*”); see also *Teixeira de Castro v Portugal* (1998) 28 EHRR 101, par 34, (“*Teixeira*”); *Khan v UK* (2001) 31 EHRR 45, (“*Khan*”), at par 34, where the European Court for Human Rights held: “While article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. It is not the role of this court to determine, as a matter of principle, whether particular types of evidence - for example, unlawfully obtained evidence - may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair”.

<sup>168</sup> The relevant part of the section reads as follows: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ...”.

<sup>169</sup> *Schenk* (fn 168 above) at par 47.

the exclusionary discretion of the courts of England when they exercise the discretion provided for in terms of the common law and section 78(1) of the PACE?

Section 8 of the Human Rights Act provides that when a 'public authority'<sup>170</sup> acts in a manner that violates a complainant's Convention rights, a court may grant a remedy that it considers 'just and appropriate'. This includes an order for the exclusion of evidence for want of compliance with Convention rights.<sup>171</sup> Section 78(1) is considered a remedy that is 'just and appropriate', when evidence is excluded after a violation of a Convention right. This was the opinion of the House of Lords in *Khan*,<sup>172</sup> even before the Human Rights Act was enacted.<sup>173</sup>

The courts of England and Wales made rulings on the admissibility of evidence in a number of cases subsequent to the enactment of the Human Rights Act.<sup>174</sup> In *A-G's Reference (No 3 of 1999)*<sup>175</sup> a DNA sample (real evidence) was retained in an inadvertent violation of section 64 of the PACE. The use of this sample led to

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<sup>170</sup> Section 6(3) of the Human Rights Act defines a public authority as a court or tribunal or any person whose functions are of a public nature. This would include a police officer, public prosecutor, immigration officer, customs officer and others acting in a public capacity - see *May & Powles* (fn 64 above) at 371.

<sup>171</sup> *May & Powles* (ibid) at 393.

<sup>172</sup> Fn 70 above.

<sup>173</sup> *Ibid* at 583, where Lord Nicholls said the following: "The discretionary powers of the trial judge to exclude evidence march hand in hand with Article 6(1) of the European Convention on Human Rights. Both are concerned to ensure that those facing criminal charges receive a fair hearing. Accordingly, when considering the common law and statutory discretionary powers under English law, the jurisprudence on Article 6 can have a valuable role to play".

<sup>174</sup> *A-G's Reference (No 3 of 1999)* (fn 70 above); *R v Chesterfield Justices, ex p Bradley* [2001] 1 All ER 411 ("Bradley"); *R v Sanghera* [2001] 1 Cr App Rep 299 ("Sanghera"); *R v Loveridge*, (fn 70 above), ("Loveridge"); *R v P* [2001] 2 Cr App R 121, ("P"); *R v Togher*, (fn 70 above); *R v Loosely* [2001] 4 All ER 897, ("Loosely").

<sup>175</sup> Fn 70 above.

the taking of a new sample that the prosecution intended to use in evidence against the accused. Section 64(3)(B) explicitly prohibits the use of the retained sample in evidence or in the investigation of any crime. The accused argued that the new sample could not be used in evidence against him, because it had been obtained as a result of the improperly retained sample, used for purposes of investigation. This argument relied heavily on the 'fruit of the poisonous tree' doctrine, applicable in the United States.<sup>176</sup> Relying on the decision of the European Court of Human Rights in *Khan*<sup>177</sup> and the common law principle enunciated in *Kuruma*,<sup>178</sup> the House of Lords rejected this argument. It was held that the limitation of the right to privacy was justifiable under Article 8(2) of the European Convention.<sup>179</sup> The dissenting opinion of Loucaides J in *Khan*<sup>180</sup> favours the judicial integrity rationale, while the approach preferred by the majority opinion in the *A-G's Reference (No 3 of 1999)* court is rooted in the common law inclusionary rule. Loucaides J reasoned that the term 'fairness', within the context of the European Convention, implies respect for the rule of law and fundamental rights. He, correctly in my view, concluded that evidence obtained as a result of unlawful police conduct inevitably renders a trial unfair. The

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<sup>176</sup> See, for example, *Katz* (fn 14 above).

<sup>177</sup> Fn 167 above.

<sup>178</sup> Fn 57 above.

<sup>179</sup> Article 8(2) reads as follows: "There shall be no interference by a public authority with the exercise of this right [privacy] except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country ... or for the protection of the rights and freedoms of others".

<sup>180</sup> Mr Justice Loucaides at par O-14, said the following: "I cannot accept that a trial can be 'fair', as required by Article 6, if a person's guilt for any offence is established through evidence obtained in breach of the human rights guaranteed by the Convention. It is my opinion that the term 'fairness', when examined in the context of European Convention of Human Rights, implies observance of the rule of law and for that matter it presupposes respect of the human rights set out in the Convention. I do not think one can speak of a 'fair' trial if it is conducted in breach of the law".

approach proclaimed by Loucaides J is fundamentally based on the judicial integrity rationale, because it is premised on the prevention of judicial contamination with unconstitutional conduct. In *Bradley*, potentially privileged documents were removed from the premises after a search, for purposes of 'sifting' elsewhere.<sup>181</sup> The excluded evidence in *Bradley* was real evidence. However, Tapper is of the view that the courts of England are reluctant to exercise their discretion in terms of section 78(1) to exclude real evidence.<sup>182</sup> He makes the following observation:<sup>183</sup>

It seems that the exclusion of real evidence by reference to this discretion [section 78(1)] will still be exercised relatively rarely in serious cases. Purely technical, or even numerous and culpable breaches of the Codes of Practice, or even of the European Convention on Human Rights after 1998, seem unlikely alone to suffice, sometimes not even in the case of a young person. Indeed, the use of physical force or its threat, has been insufficient.

Section 2 of the Human Rights Act makes provision that the courts of England should interpret the Act, having due regard to the case law of the European Court of Human Rights. It is therefore important to consider the case law of the European Court so as to determine the future development of the law of England on the admissibility of evidence obtained in violation of Convention rights. Three seminal cases are considered, where conflicting judgments on the admissibility of unlawfully obtained evidence were delivered.

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<sup>181</sup> Fn 174 above.

<sup>182</sup> Fn 81 above at 224.

<sup>183</sup> *Loc cit.* He adds that real evidence could be excluded when the charges are not of a serious nature. (Footnotes omitted).

In *Saunders v United Kingdom*<sup>184</sup> the applicant was interrogated by inspectors of the Department of Trade and Industry in terms of the provisions of the Companies' Act. These provisions compelled the applicant to provide answers to questions put to him. The prosecution used the transcripts made during the interrogation against the accused during the trial. The European Court of Human Rights held that the use of the transcripts rendered the trial unfair, in breach of Article 6 of the Convention.<sup>185</sup> The Court distinguished between 'real' evidence and testimonial evidence by highlighting the fact that the 'right not to incriminate oneself' is primarily concerned with 'the will of an accused person to remain silent'. By contrast, the Court continued, the mentioned right does not extend to evidence obtained from the accused 'through the use of compulsory powers but which [evidence] has an existence independent of the will of the suspect' such as 'documents acquired pursuant to a warrant, breath, blood and urine samples'.<sup>186</sup> This approach of the Court to the different treatment of 'real' evidence and testimonial evidence is in direct conflict with its earlier decision in *Funke v France*.<sup>187</sup> In *Funke*, customs officers searched the house of the applicant and found evidence that he had foreign bank accounts. They issued orders to the effect that he must produce detail of such bank accounts, failing which he would be prosecuted. The applicant was accordingly prosecuted for his failure to supply the required documents. The European Commission held that the right to a fair trial had not been violated under Article 6 of the Convention. By contrast, the European Court held that the applicant's right to remain silent as well as the privilege against self-incrimination had been violated, which in turn rendered the trial unfair. A breach of Article 6 had therefore occurred.<sup>188</sup> In the case of *JB v*

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<sup>184</sup> (1997) 23 EHRR 313, ("*Saunders*").

<sup>185</sup> *Ibid* at par 71.

<sup>186</sup> *Ibid.* at par 69.

<sup>187</sup> (1993) 16 EHRR 297, ("*Funke*").

<sup>188</sup> *Ibid* at paras 44-45.

*Switzerland*,<sup>189</sup> decided during 2001, and cited by Choo and Nash,<sup>190</sup> the Court favoured the interpretation applied in *Funke*. It is important to note that the *Funke* and *JB* courts have held the rights to silence and the privilege against self-incrimination to be applicable to the production of real evidence (documents). Surely, these documents had an existence independent of the will of the accused or applicant?

To summarise, the distinction drawn between real and testimonial evidence in the *Saunders*<sup>191</sup> is inclined towards the aims of crime control, whereas the approach of the *Funke* and *JB* courts<sup>192</sup> primarily prefer the aims of rights protection. The *Saunders* court indirectly encourages the violation of fundamental rights, with the ultimate aim of securing a conviction. This statement can be illustrated by means of the following example: When the police are aware of the fact that, for instance, a gun (real evidence) had been used to commit a crime, they would indirectly be empowered by the *Saunders* judgment to deliberately violate the rights of the accused to procure the evidence, well knowing that it would be admitted in evidence. This result would, incidentally, be viewed by reasonable men and women as being detrimental to the administration of justice. Why? Because the police, whose primary task it is to uphold the law, acted unlawfully in obtaining the evidence and the court, whose primary duty it is to act as an independent arbiter, chooses to condone unlawful police conduct by admitting the tainted evidence: the end justifies the means. By contrast, the *Funke* and *JB* courts did not base the outcome of the admissibility enquiry on the nature of the evidence, but rather on the manner of its

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<sup>189</sup> Application No 31827/96, decided on 3 May 2001, ("*JB*").

<sup>190</sup> Fn 95 above at fn 31 of the article.

<sup>191</sup> Fn 184 above.

<sup>192</sup> Fn 187 and fn 189 above, respectively. Howard et al (fn 68 above) at 718 are of the opinion, based on *R v Beveridge* (1987) 85 Cr App R 255, ("*Beveridge*") and *R v Gall*, that identification evidence may be excluded in terms of section 78(1).

procurement. This approach, it is submitted, reinforces the judgment of *Nemetz*,<sup>193</sup> where it was held that a generous and purposive interpretation should be applied when interpreting Convention rights. What are the values that Article 6 of the European Convention was designed to protect? Surely, to protect the procedural rights of an accused which collectively ensure that her trial complies with section 6 of the European Convention. One such procedural right is the right not to provide evidence against oneself, at the behest of the prosecution: Therefore, the manner of procuring the evidence – and not its nature - is a crucial consideration to ensure that the trial of the accused complies with the dictates of Article 6.

To review the main points: The application of section 78(1) has been reviewed in respect of 'tricks' played by the police, non-compliance with the right to legal representation and police non-compliance with their duty to contemporaneously note interviews. The rationale for exclusion appeared to be the unreliability of the evidence and not a concern that admission would be detrimental to the administration of justice. By endorsing this approach, the courts in England and Wales are only adding force to the common law rule that reliable evidence should be admitted, since the courts view their primary function as that of determining of guilt. However, what is important, is the fact that derivative or real evidence obtained as a result of breaches of the PACE and the Code was excluded in *Bradley and Nathaniel*.<sup>194</sup> It is suggested that this was done so as to discipline the police, despite claims that section 78(1) does not serve this purpose. The undeniable central task fulfilled by the deterrence rationale in section 78(1) of the PACE proceedings, is further illustrated by the judgments in *Samuel*,<sup>195</sup> *Keenan*,<sup>196</sup> and *Canale*.<sup>197</sup> Self-incriminating evidence obtained as a

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<sup>193</sup> Fn 165 above.

<sup>194</sup> Both cases appear at fn 70 above.

<sup>195</sup> Evidence was excluded because the police deliberately violated the right to legal representation with the aim of obtaining a confession.



result of the non-compliance with the provisions of the PACE and the Code would, in general, be excluded.<sup>198</sup> The same applies to instances when the evidence is obtained as a result of a 'most reprehensible' trick. Like the position in Canada, a *bona fide* mistake is not an excusing ground when admission would render the trial unfair. When the police acted in bad faith, this would be a factor that weighs heavily in favour of exclusion.<sup>199</sup> The test to determine whether the police acted in good faith, is the same as the approach in Canada, an objective one.

Nevertheless, the courts have, in their interpretation of the PACE, not entirely discarded the common law rationale<sup>200</sup> when determining the admissibility issue. In a word, relevance determines admissibility. This common law rule has, to an extent, been weakened by the provisions of the PACE and the Code: Nowadays, evidence is not admitted, no matter how it has been obtained. Where the provisions of the Code and the PACE have been deliberately ignored by the police, the courts have chosen to exclude the evidence: not to discipline the police, but, in the main, because the evidence failed the reliability test.

The doctrine of the abuse of process serves an important societal interest, ensuring that unwarranted police conduct does not bring the administration of

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<sup>196</sup> Breaches were held to be significant and substantial and the evidence obtained was excluded.

<sup>197</sup> In this case Lord Lane CJ held that the casual attitude of the police officers towards the PACE and its Codes when procuring evidence was 'cynical'. The judge warned that it is time that the police are conversant with the relevant provisions, thus controlling future unlawful police conduct.

<sup>198</sup> *Samuel* (fn 70 above).

<sup>199</sup> *Mason* (fn 70 above) where the deception of the accused as well as his attorney was clearly done in bad faith.

<sup>200</sup> Public opinion is of importance when section 78(1) is applied. See *Attorney-General's Reference (No 3 of 1999)*, (fn 69 above); see also Choo and Nash (fn 95 above) at 3, where they write as follows: "The fact that non-confession evidence is usually reliable is a strong factor affecting its admissibility".

justice into disrepute in the eyes of reasonable men and women. Perhaps it is timely for the courts in England to consider the appeal by Choo and Nash to engage the principles contained in the doctrine of abuse of power in their assessment of the admissibility issue. Such an approach is more attuned to rights protection, the protection of the integrity of the criminal justice system, as well as the general purposes that the European Convention seeks to achieve.

The difference in treatment between 'real' and testimonial evidence originates from the common law privilege against self-incrimination. This privilege is limited in its scope to the protection of *testimonial* compulsion. Should the scope of this privilege remain intact when one deals with the protection of fundamental rights? Does the distinction serve the purpose of broadening the right to a fair trial or does it unjustifiably limit the right? It is suggested that it only serves the latter purpose. Moreover, it was not consistently applied by the European Court. It is accordingly suggested that the *Funke* approach be adopted by the European Court, as well as the courts of England and Wales, so as to give to persons suspected of having committed a crime, the full measure of protection guaranteed by Article 6 of the Convention. Such an interpretation of the article would do justice to the approach previously proclaimed by the same court in *Nemetz v Germany*.

The nature of the discretion exercised by the courts of England and Wales under section 78(1) of the PACE, limits the scope of exclusionary remedy. Because the courts of England and Wales have not interpreted the concept 'fair trial' while having due regard to the values sought to be protected by it, they have confined its scope to its common law meaning.<sup>201</sup> Kentridge AJ warned against this form

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<sup>201</sup> Choo & Nash (fn 95 above) at 2 conclude as follows: "The common law exclusionary discretion is narrow and has generally been limited to excluding evidence of questionable relevance or improperly obtained confessions. The statutory discretion provided by s 78(1) is also

of interpretation in the South African case of *S v Zuma*.<sup>202</sup> In effect, the doctrine of a margin of appreciation serves as a means to prevent a generous and purposive interpretation of the right to a fair trial under section 78(1). As a result, the general rule applicable to the admissibility of evidence remains that real, unlawfully obtained evidence is readily admissible in evidence in England.<sup>203</sup>

The introduction of the Human Rights Act has resulted in the provisions of the European Convention being introduced into the law of England. The cases of *Fox* and *Hughes*,<sup>204</sup> where the courts of other jurisdictions would have characterised the police conduct as a significant affront to human dignity,<sup>205</sup> justifying

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narrowly applied. This narrow application is due mainly to the courts' restrictive interpretation of the concept of a 'fair trial.'" (Footnotes omitted).

<sup>202</sup> 1995 2 SA 642 (CC) at par 19, ("*Zuma*").

<sup>203</sup> Tapper (fn 74 above) at 547 arrives at the same conclusion when he argues as follows: "In the case of real evidence obtained by an illegal search, the position seems to be that, while the discretion may be taken into account, it is exceedingly difficult to persuade a court to exercise it". He gives as an example the case of *Fox* (fn 70 above), since the specimen had been obtained without inducement, threat, a trick or other form of impropriety. Likewise, evidence obtained as a result of the forcible interference with the suspect's breathing, caused by the accused's mouth being disgorged to obtain the disputed evidence, was admitted in *Hughes* (fn 70 above). However, compare *Nathaniel* (fn 70 above), where a DNA profile was voluntarily given, but the police breached an undertaking given to the accused that it would be destroyed, as well as the provisions of the Code – the real evidence was excluded; see also Choo & Nash (fn 95 above) at 3, where the writers observe as follows: "A distinction has been drawn between compelled statements and the production of a pre-existing document or real evidence. While it is considered objectionable that to use evidence which the accused was coerced into creating, using compulsory powers to require the production of evidence that was already in existence is considered less likely to present a problem". (Footnotes omitted).

<sup>204</sup> Fn 69 above.

<sup>205</sup> See, for example, the Canadian case of *Collins* (fn 20 above); see also *Stillman* (fn 13 above), where the accused discarded a used tissue into a waste basket at a police station. Bodily samples taken by the police after the accused objected to its taking were excluded, because its taking

exclusion, were decided before the incorporation of the Human Rights Act. In *Hughes*, for instance, the mouth of the accused was disgorged and his breathing was forcibly blocked in order to obtain the disputed real evidence. The evidence was admitted. However, in the case of *A and Others*,<sup>206</sup> decided after the Human Rights Act had been integrated into the national law of England, the House of Lords held that evidence obtained by means of torture could not be admissible in evidence. Choo and Nash are of the view that the 'Law Lords clearly assumed that their ruling would cover any evidence',<sup>207</sup> and concludes that the decision could be interpreted as an 'acknowledgement that there may be circumstances in which a court should be prepared, "on moral grounds", to exclude reliable evidence because of the manner in which it had been obtained'.<sup>208</sup> Against this background, one is but inclined to suggest that the outcome of the cases in *Fox* and *Hughes* might have been different had it been decided after the enactment of the Human Rights Act. Perhaps this could be viewed as a step in the right direction – an acknowledgement that a rigorous application of the common law inclusionary rule could render a trial unfair. The case law of the European Court of Human Rights on this point is contradictory, leaving sufficient room for the courts of England and Wales to either confine the scope of the right to a fair trial to its common law roots or to develop it to give broader protection to an accused person.

The discussion is next focused on the South African position on the admissibility of unconstitutionally obtained evidence.

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was characterised as a serious violation of the Charter. The tissue was admitted because it was discoverable; see further *R v Feeney* (1997) 115 CCC (3d) 129, ("*Feeney*").

<sup>206</sup> Fn 70 above.

<sup>207</sup> Fn 95 above at 2.

<sup>208</sup> *Ibid* at 5; see also Dennis *The Law of Evidence* (1999) at 81-82.

## **E Section 35(5) of the South African Constitution**

### 1 Introduction

While the South African common law position is discussed in chapter four of this work, this part of the study is focused on the period between the Interim Constitution and the adoption of the 1996 Constitution, leading to the incorporation of section 35(5) into the South African Constitution. The common law position is discussed in chapter four, since the common law privilege against self-incrimination forms an integral part of the concept of trial fairness.

This part of the chapter starts off, firstly, with a discussion of the exclusionary remedy developed by South African courts, brought about by a combination of the remedial imperative, corrective justice, as well as the judicial integrity rationale.<sup>209</sup> The South African courts had to develop an effective remedy, because the Interim Constitution lacked a specific exclusionary provision. Based on Dicey's theory that a right cannot exist without a remedy,<sup>210</sup> (although it was not specifically mentioned), the South African courts created an effective remedy based on section 7(4).<sup>211</sup> However, the South African courts applied different rationales when interpreting section 7(4) of the Interim Constitution. This lacuna in the Interim Constitution necessitated the incorporation of section 35(5) into the 1996 Constitution.

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<sup>209</sup> It is clear that the exclusionary remedy was also based on a combination of the corrective justice and the regulatory justice theories.

<sup>210</sup> See fn 15 above.

<sup>211</sup> The relevant part of section 7(4) reads as follows: "When an infringement of or threat to any right entrenched in this Chapter is alleged, any person ... shall be entitled to apply to a competent court of law for appropriate relief ...".

Secondly, this discussion considers the application of international law and foreign law to the interpretation of section 35(5). Applying section 39(1)(b) of the South African Constitution, the exclusionary provision contained in Article 69(7) of the ICCS is considered, bearing in mind that South African courts are enjoined to apply international law when interpreting the Bill of Rights. The following question emerges: Why have the South African courts been reluctant to consider Article 69(7) of the ICCS when interpreting section 35(5)? The discussion next proceeds to consider, on the basis of section 39(1)(c) of the South African Constitution, foreign law as a source of the interpretation of section 35(5).

## 2 The Interim Constitution

On 27 April 1994 the Interim Constitution became the supreme law in South Africa. This Constitution contained a Bill of Rights in Chapter Three, comprising a detailed list of rights guaranteed to suspects, arrested and accused persons.<sup>212</sup> The Constitution, however, lacked an explicit exclusionary remedy.<sup>213</sup> In their interpretation of the Interim Constitution, the courts of South Africa were alive to the fact that a right could not exist without an accompanying and effective remedy. Consequently, a remedy, albeit rooted in several different legal bases, was created by the South African courts.

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<sup>212</sup> See Annexure "A" hereto, which contains selective provisions of Chapter 3.

<sup>213</sup> Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* (1994) at 177-178, mention that several members of the Technical Committee on Fundamental Rights were in favour of the inclusion of a discretionary exclusionary rule in the Bill of Rights that was to read as follows: "Section 25(3) Every accused person shall have the right to the exclusion of evidence during his or her trial of evidence which was obtained in violation of any right entrenched in this Chapter: Provided that the court must be convinced that the admission of such evidence will bring the administration of justice in disrepute".

The following approaches demonstrate the creative quest by the courts of South Africa to develop an effective remedy, even though none was specifically provided: In *Melani*<sup>214</sup> Froneman J based the exclusionary remedy on section 7(4) of the Interim Constitution in order to principally apply section 24(2) of the Canadian Charter.<sup>215</sup> Claasen J determined whether evidence should be excluded by applying the limitations clause, contained in section 33(1) of the Interim Constitution.<sup>216</sup> The Cape Provincial Division of the High Court applied the residual common law discretion.<sup>217</sup>

Most of the decisions over this period were based on non-compliance with the requirements of the right to a fair trial.<sup>218</sup> Van der Merwe<sup>219</sup> and Preller J<sup>220</sup> are of the opinion that the judgment in *S v Yawa*<sup>221</sup> was based on the application of the rigid exclusionary rule as applied in the United States of America.<sup>222</sup> However, it is submitted that the court in that case did not refer to, nor apply the rigid exclusionary rule as applied in the United States of America. In this case the

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<sup>214</sup> Fn 21 above.

<sup>215</sup> Section 24(2) was also referred to with approval in *Melani* (fn 21 above).

<sup>216</sup> *S v Mathebula* 1997 (1) SACR 10 (W), ("*Mathebula*"); see also *S v Sebejan and Others* 1997 (8) BCLR 1086 (T) at 1088, ("*Sebejan*").

<sup>217</sup> *S v Motloutsi*, 1996 1 SACR 78 (C), ("*Motloutsi*"); *S v Mayekiso* 1996 2 SACR 298 (C), ("*Mayekiso*"). Compare *S v Agnew* 1996 2 SACR 535 (C), ("*Agnew*"), where exclusion was based on non-compliance with the fair trial requirement.

<sup>218</sup> *S v Hammer* 1994 2 SACR 496 (C), ("*Hammer*"); *Agnew* (fn 216 above); *S v Mphela* 1998 1 SACR 388 (W), ("*Mphela*"); *S v Kidson* 1999 SACR 338 (W), ("*Kidson*"); *S v Gumede* 1998 5 BCLR 530 (D), ("*Gumede*").

<sup>219</sup> Fn 9 above at 195.

<sup>220</sup> *Shongwe* (fn 8 above) at 338.

<sup>221</sup> Fn 38 above; *S v Marx* 1996 2 SACR 140 (W), ("*Marx*"); *S v Mahlakaza* 1996 2 SACR 187 (C), ("*Mahlakaza*").

<sup>222</sup> *Yawa* (fn 38 above); *S v Maseko* 1996 2 SACR 91 (W), ("*Maseko*"); *Mathebula* (fn 216 above).

accused was not informed of the right to legal representation before a pointing-out was made. The judge held<sup>223</sup> that the state had 'failed to discharge the onus of proving that accused number 1 was not ***unduly influenced*** to make the pointing-out.'<sup>224</sup> The court, it is submitted, interpreted section 217(1) of the Criminal Procedure Act, more particularly the phrase 'unduly influenced', having due regard to the 'spirit, purport and objectives' of the Bill of Rights.<sup>225</sup> The consequence of such an interpretation resulted in the exclusion of the confession. It is submitted that the same result would have been achieved had section 78(1) of the PACE been applied to the same factual situation in England. This would have been the case because it could be argued that the police conduct amounted to an improper denial of 'one of the most important and fundamental rights of a citizen'.<sup>226</sup> In effect, the finding by the court in *Yawa* can be construed as indicating that the confession did not comply with the provisions of the Criminal Procedure Act, as amplified by constitutional values. This approach is aligned to the remedial imperative, since the judgment emphasises that constitutional rights cannot exist without an effective remedy: A position of *restitutio in integrum* was achieved by excluding the admission of relevant evidence. Viewed in this light, the approach of the court could also be categorised as the endorsement of the deterrence rationale.<sup>227</sup> This would be the case because the judgment of the court could be interpreted as a deterrent aimed at law enforcement agents to refrain from future violations of the right to

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<sup>223</sup> Ibid at 715.

<sup>224</sup> Emphasis added.

<sup>225</sup> It is submitted that this was the case, despite the fact that the court did not refer to section 35(3) of the Interim Constitution. The pertinent part of this section reads as follows: "In the interpretation of any law ... a court shall have due regard to the spirit, purport and objectives of this Chapter".

<sup>226</sup> *Samuel* (fn 70 above).

<sup>227</sup> See Van der Merwe (fn 9 above) at 175.



legal representation when the accused is being interrogated during the pre-trial process.

It does not matter how ingenious these different approaches of the courts might have been, the fact remains that the application of these wide-ranging bases for the exclusion of unconstitutionally obtained evidence did not contribute to legal certainty. The rationale of an exclusionary remedy determines its scope. Therefore, depending on the remedy applied (the rigid exclusionary rule; the common law residual discretionary exclusionary rule; the limitations provision; or the constitutionally entrenched exclusionary remedy) the result might be different, despite the fact that the same factual situation had to be judged. For this reason it became of the utmost importance to draft a constitutionally entrenched exclusionary rule that would be applicable throughout South Africa.

The drafters of the 1996 Constitution were aware of the different approaches by the courts to this issue and it is assumed that this, together with developments that occurred in international and in foreign jurisdictions, played an important role in the drafting of the existing constitutionally enshrined exclusionary provision. Article 7(d) of the South African Law Reform Commission's Interim Report on a Draft Bill of Rights<sup>228</sup> contained an exclusionary provision that was textually vastly different from the provisions of section 35(5).<sup>229</sup> Van der Merwe concluded that the exclusionary remedy contained in the Draft Bill of Rights

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<sup>228</sup> Project 58 (1991) of the South African Law Reform Commission.

<sup>229</sup> That provision provided as follows: "Every accused person has the right not to be convicted or sentenced on the ground of evidence so obtained or presented as to violate any of the rights under this Bill of the accused person or of the witness concerned or of any other person, unless the court, in the light of all the circumstances and in the public interest, otherwise orders".

would inevitably have catered for a consideration of 'detriment' to the criminal justice system.<sup>230</sup>

Section 35(5) of the Constitution of the Republic of South Africa Act, 1996, provides as follows:

Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

This provision clearly incorporates the following features: Firstly, a threshold requirement that the evidence should have been 'obtained in a manner' that violates a right guaranteed by the Bill of Rights;<sup>231</sup> secondly, that evidence 'must be excluded' if its 'admission' would render the trial unfair;<sup>232</sup> and thirdly, it should be considered whether admission or exclusion of the evidence would be 'detrimental to the administration of justice';<sup>233</sup> fourthly, the use of the word 'detriment' is indicative of the exercise of a discretion;<sup>234</sup> fifthly, it suggests that two separate tests<sup>235</sup> should be applied to determine whether: a) admission of

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<sup>230</sup> Van der Merwe (fn 23 above) at 204, where he argues as follows: "The jurisprudential validity of a 'constitutional exclusionary rule' which allows room for considerations of public policy – be it 'public interest' or 'disrepute' - is unassailable ...".

<sup>231</sup> This requirement, together with other threshold requirements, is discussed in chapter 3 of this work.

<sup>232</sup> This requirement is explored in chapter 4.

<sup>233</sup> This assessment is discussed in chapter 5.

<sup>234</sup> See chapter 5, where this concept is explored.

<sup>235</sup> See Schwikkard & Van der Merwe (fn 9 above); Zeffertt et al (fn 49 above) at 635. Compare Steytler (fn 27 above) at 36, who argues that the admissibility assessment essentially consists of one test, that is, whether exclusion would be detrimental to the justice system: an unfair trial is a

the evidence would render the trial unfair, or b) admission or exclusion would otherwise be detrimental to the administration of justice.

The words of Seaton JA, quoted with approval in *Collins*,<sup>236</sup> are apposite to the South African exclusionary remedy, and it therefore deserves to be paraphrased: Section 35(5) rejects extremities. On the one hand, no longer is all evidence admissible, no matter how it was obtained. Nor, on the other hand, is all unconstitutionally obtained evidence inadmissible. A compromise was achieved, but not the compromise of a broad general discretion based on, for instance, the case of *The People v O' Brien*.<sup>237</sup>

Despite the fact that section 35(5) was not applied when the judgments were delivered in terms of in the Interim Constitution, it must be emphasised that the incorporation of this section did not nullify the legal force of those decisions in instances when those judgments are not in conflict with the rationale of section 35(5). It is for this reason that reference is made throughout this thesis to judgments which were delivered in terms of the Interim Constitution.

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specific manifestation of what would be “detrimental” to the justice system. This argument of Steytler is employed as one of the fundamental tools in the interpretation of section 35(5).

<sup>236</sup> Fn 20 above at par 29.

<sup>237</sup> Fn 94 above. McCall J was of the same view, when he held as follows in *S v Naidoo* 1998 1 SACR 479 (N) at 127: “... I am of the view that it is more helpful to interpret the provisions of s 35(5) with reference to the Canadian decisions than those South African cases dealing with a more general discretion based on the decision of *People v O' Brien*”.

### 3 The impact of international and foreign law on section 35(5)

Section 39 of the South African Constitution provides guidelines to South African courts when they interpret the provisions of the Bill of Rights. Section 39(1)<sup>238</sup> of the Constitution<sup>239</sup> dictates that when they interpret the Bill of Rights, the courts of South Africa:

- a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- b) must consider international law; and
- c) may consider foreign law.

This section draws a clear distinction between the use of international law and foreign law as sources of interpretation. In the case of international law, it 'must' be considered; whereas, in the case of foreign law, it 'may' be taken into account when interpreting the Bill of Rights. In the case of the former, courts are compelled to consider international law. By contrast, in the case of the latter, no such command exists.

In the seminal case of *Makwanyane*,<sup>240</sup> the Constitutional Court held that 'international law agreements, customary international law', and 'decisions of

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<sup>238</sup> Section 35 (1) of the IC contained a similar provision that provided as follows: "In interpreting the provisions of this Chapter [the Bill of Rights] a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law".

<sup>239</sup> Section 39 (2) reads as follows: "When interpreting any legislation, and when developing the common law or customary law, every court ... must promote the spirit, purport and objects of the Bill of Rights".

<sup>240</sup> Fn 48 above.

tribunals dealing with comparable instruments' such as the South African Bill of Rights, as well as 'reports of specialised agencies', provide a framework within which the Bill of Rights can be interpreted.<sup>241</sup> The International Criminal Court is an international tribunal, created by the United Nations that deals with similar instruments<sup>242</sup> as the South African Bill of Rights and, as such, its decisions on the admissibility of unlawfully obtained evidence *must* be considered by the South African courts when interpreting section 35(5).

The South African courts have been reluctant to follow foreign case law.<sup>243</sup> This has been the case even when section 35(5) of the South African Constitution had to be interpreted.<sup>244</sup> However, a comparative analysis between section 24(2) of the Canadian Charter and section 35(5) of the South African Constitution was undertaken by the High Court, even before the incorporation of section 35(5) into the Constitution.<sup>245</sup>

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<sup>241</sup> Ibid at par 36-37.

<sup>242</sup> For example, the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights.

<sup>243</sup> See, for instance, *Park-Ross v Director, Office of Serious Economic Offences* 1995 2 SA 148 (C) at 160, ("*Park-Ross*"), where it was held that "the different contexts within other constitutions were drafted, the different social structures and milieu existing in those countries as compared with those in this country, and the different historical backgrounds against which the various came into being", should be considered before embracing foreign law; *Langemaat v Minister of Safety and Security* 1998 3 SA 312 (T); compare the following dictum by Kriegler J in *Bernstein v Bester NO* 1996 2 SA 751 (CC) at par 133: "Comparative study is always useful, particularly where courts in exemplary jurisdictions have grappled with universal issues confronting us. Likewise, where a provision in our Constitution is **manifestly modelled on a particular provision in another country's constitution** it would be folly not to ascertain how the jurists of that country have interpreted their precedential provision". (Emphasis added). This dictum explains why a comparative analysis of section 24(2) of the Charter is at the heart of the interpretation of section 35(5) in this thesis.

<sup>244</sup> See the minority opinion in *Pillay* (fn 21 above) at par 122-124.

<sup>245</sup> *Melani* (fn 21 above).

### 3.1 International law

Section 35(5) is strategically located in the Bill of Rights and forms part of the rights guaranteed to arrested, detained and accused persons. It guarantees to beneficiaries of those rights, a remedy of the exclusion of unconstitutionally obtained evidence. Section 39(1)(b) of the South African Constitution dictates that our courts are duty-bound to consider international law, even when section 35(5) is interpreted. However, South African courts, with notable exceptions, have given scant consideration<sup>246</sup> to international law standards.<sup>247</sup> Why is this

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<sup>246</sup> Compare *Melani* (ibid) at 347-348, where Froneman J said the following: "The right to be informed at the pre-trial stage of one's right to legal counsel has been recognized by tribunals dealing with human rights instruments. The United Nations Committee on Human Rights has expressed the view that art 14 (3) of the International Covenant on Civil and Political Rights is violated where persons pending trial are given no access to legal counsel (Paul Sieghart *The International Law of Human Rights* Clarendon Press, Oxford 1983) at 300). The European Court of Human Rights has also held that there is nothing in art 6(3)(c) of the European Convention to prevent it from applying to pre-trial proceedings and that this right forms an element of the concept of a fair trial in criminal proceedings (*Imbrioscia v Switzerland* 17 (1994) EHRR 441 at 445, paras 36 and 37)". Yet, no reference was made to Rule 95 of the Rules of Procedure and Evidence (hereinafter "Rules of Procedure") of the Yugoslavian Criminal Tribunal or the Rwandan Criminal Tribunal.

<sup>247</sup> See *Melani* (fn 21 above) at 345 where Froneman J cites *Makwanyane* (fn 48 above) at par 35, where Kentridge AJ stated: "Customary international law and the ratification and accession to international agreements is dealt with in s 231 of the [Interim] Constitution, which sets the requirements for such law to be binding in South Africa. In the context of s 35 (1), public international law would include non-binding and binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter 3 [now Chapter 2 of the 1996 Constitution] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights and the European Court of Human Rights, and, in

the case when the drafters of the Constitution clearly had in mind that section 39(1)(b) must be applied in respect of *all* the rights contained in the Bill of Rights?

Substantial structural similarities exist between section 35(5) and Rule 95 of the Rules of Procedure and Evidence of the ITCY and ICTR,<sup>248</sup> as well as Article 69(7) of the ICCS. Article 69(7) of the Rome Statute provides as follows:

Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

- (a) the violation casts substantial doubt on the reliability of the evidence; or
- (b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

This provision, similar to section 35(5) of the South African Constitution, makes provision for the exclusion of evidence on two specified grounds: firstly, when admission of the evidence would render the trial unfair; and, secondly when admission or exclusion would undermine the integrity of the proceedings. Thirdly, it contains a judicial discretion to exclude evidence obtained in a manner defined in the provision.

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appropriate cases, reports of specialized agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of Chapter 3 [now Chapter 2]”.

<sup>248</sup> The Yugoslavian and Rwandan Criminal Tribunals, (hereinafter referred to as the “ICTY” and “ICTR”, respectively). Rule 95 of the Rules of Procedure of both Tribunals provide as follows: “No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings”.

The general, introductory component of Article 69(7) of the ICCS covers the right to a fair trial when reference is made to evidence procured in violation of 'this Statute' or 'internationally recognised human rights'. Internationally renowned fundamental human rights instruments that deal with the right to a fair trial and that could be incorporated into a reading of the mentioned phrase, are the Universal Declaration of Human Rights,<sup>249</sup> the International Covenant on Civil and Political Rights,<sup>250</sup> and the European Convention. Additional confirmation of the incorporation of the right to a fair trial into this provision is the test of admissibility which commands that admissible evidence should not be 'antithetical' to the proceedings. As an alternative ground, evidence could be excluded if admission 'would seriously damage the integrity of the proceedings'. This phrase could without difficulty be reconciled with that of section 35(5), where the latter section pronounces that admission of the disputed evidence should not be 'detrimental to the administration of justice.' One could argue that the South African section 35(5) provision *prima facie* contains matching criteria for the exclusion of relevant, but unconstitutionally obtained evidence, when compared with Article 69(7) of the ICCS.

It is assumed that the South African section 35(5) has broader application than Article 69(7) of the Rome Statute. This could be argued because the reach of section 35(5) encompasses the entire criminal justice system,<sup>251</sup> whereas Article 69(7) unambiguously refers to the integrity of the 'proceedings'. Again, it could be argued that the word 'proceedings' refers to the criminal trial and not the pre-trial proceedings. However, one could argue that it is the **admission** of unlawfully obtained evidence that would render a trial unfair under Article 69(7)

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<sup>249</sup> See Articles 2, 3, 5, 7, 8, 9, 10, 11, 12, which collectively serve the purpose of protecting the right to a fair trial.

<sup>250</sup> See Articles 2(3)(a), 6, 7, 8, 9, 10, 14, 15, which, read contextually, serve to guarantee the right to a fair trial.

<sup>251</sup> This is the argument of the writer in chapter 3 of this thesis.



– therefore, the result would be the same under both section 35(5) and Article 69(7). Nevertheless, in *Prosecutor v Brdanin and Another*,<sup>252</sup> the ICTY<sup>253</sup> interpreted Rule 95 of the Rules of Procedure and formulated the ‘most important rule’ with regard to the admissibility of evidence as ‘one that favours the admissibility of evidence provided it is relevant and has probative value’.<sup>254</sup> On this view, the approach followed is profoundly aligned to the common law jurisprudence on the admissibility of evidence.<sup>255</sup> Despite the fact that the provisions contained in the Rules of Procedure of both the ICTR and the ICTY are couched in different terms when compared to that of Article 69(7) of the ICCS, it appears that the latter will nevertheless be interpreted in the same manner.<sup>256</sup> This view is echoed by the former President of the ICTY, Cassese J,<sup>257</sup> who argues that the European Court of Human Rights case law is of great significance to international criminal tribunals, because the European Court has, on several occasions, interpreted Articles 5 and 6 of the European Convention (which collectively guarantees the right to a fair trial). He is of the opinion that, although the nature of the decisions of the European Court is distinguishable from that of international criminal courts, the judges of those courts take guidance from the European Court decisions. Against this background, the *Brdanin* decision serves

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<sup>252</sup> IT-99-36-T, judgment handed down on 15 February 2002, (“*Brdanin*”).

<sup>253</sup> Agius J presiding with Janu and Taya JJ concurring.

<sup>254</sup> Fn 252 above at 5, par 11.

<sup>255</sup> See also *Prosecutor v Zejnil Delalić et al* Case No IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence, where the same test was applied, (“*Zejnil*”).

<sup>256</sup> Per Bohlander (ex senior legal officer of Trial Chamber II of the ICTY) in a paper entitled “Evidence”, delivered at a conference: *The International Criminal Court: Experiences and Future Challenges*, held in Trier, Germany, from 20-21 October 2005, hosted by the Academy of European law.

<sup>257</sup> “The impact of the European Convention on Human Rights on the International Criminal Tribunal of Yugoslavia”, in Dixon, Khan & May (eds) *International Criminal Law* (2002) at 213-214.

as confirmation that the Strasbourg case of *Saunders*<sup>258</sup> will in all probability be followed when the International Criminal Court has to make an assessment on the admissibility of evidence. *Saunders*, in turn, is attuned to the admissibility assessment generally applied by the courts of England.

The International Criminal Court was scheduled to take charge of its first trial during February 2008.<sup>259</sup>

The African region for the protection of human rights has,<sup>260</sup> on several occasions,<sup>261</sup> urged state parties to the African Charter of Human and Peoples' Rights<sup>262</sup> to ratify the ICCS and to align their national law with its provisions.<sup>263</sup>

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<sup>258</sup> Fn 184 above.

<sup>259</sup> According to Monuc, a UN Body established in terms of Chapter VII of the UN Charter, information accessed on 04/05/2008, at <http://www.monuc.org/News.aspx?newsID=11574>, in the matter of Thomas Lubange, an alleged Congolese warlord, who is accused of conscripting children to fight as members of his armed forces. The children were allegedly trained to kill members of opposition tribes. However, this case was postponed to January 2009, [www.icc-cpi.int/cases/Hearings-Schedule.html](http://www.icc-cpi.int/cases/Hearings-Schedule.html), accessed on 22 November 2008. The case of Germain Katanga and Another, case number ICC-01/05-01/07, was scheduled for hearing from 27 November 2008, [www.icc-cpi.int/cases/Hearings-Schedule.html](http://www.icc-cpi.int/cases/Hearings-Schedule.html), accessed on 22 November 2008.

<sup>260</sup> Three regions for the protection of human rights exist: the European, Inter-American and the African region. See Viljoen "The African Commission of Human and Peoples' Rights: Introduction to the African Commission and the Regional Human Rights System" in Heyns (ed) *Human Rights Law in Africa* (Vol 1, 2004) at 386.

<sup>261</sup> See the Preamble of the Resolution on the Ratification of the Treaty on the International Criminal Court, reprinted in Heyns (ed) (fn 260 above) at 577. The Preamble records that this issue was considered during the 67<sup>th</sup> Ordinary Session of the OAU Council of Ministers at Addis Ababa in February 1998; and also during the 34<sup>th</sup> Assembly of Heads of State and Government of the OAU, held in Ouagadougou in June 1998.

<sup>262</sup> The African Charter on Human and Peoples' Rights ("the African Charter") was adopted in 1981 by the Assembly of Heads of State and Government. It entered into force on 21 October 1986. The African Commission on Human and Peoples' Rights ("the Commission" or "African

South Africa has ratified the ICCS on 27 November 2000<sup>264</sup> and, it is submitted, section 35(5) adequately complies with the provisions contained in Article 69(7) of the ICCS.

Despite the fact that there are structural similarities between section 35(5) and Article 69(7), they do not have a comparable practical impact: The one weighing heavily in favour of rights protection, while the other is robustly associated with common law rules in respect of the admissibility of evidence. Mindful hereof, it cannot be gainsaid that South African courts would not readily consider Article 69(7) of the ICCS when they interpret section 35(5) of the South African Constitution.

### 3.2 Foreign law

Section 39(1)(c) of the South African Constitution states that our courts *may* consider foreign law.<sup>265</sup> The South African courts applied this subsection of the

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Commission”), which functions as the supervisory body of the African Charter, had its first session on 2 November 1987. For a general overview of the African Charter and the African Commission, see Viljoen (fn 260 above); see further the unpublished LLD thesis of Viljoen *Realisation of Human Rights in Africa through Inter-Governmental Institutions* (1997).

<sup>263</sup> Viljoen (fn 260 above) at 570-571.

<sup>264</sup> Heyns (fn 260 above) at 94-95. According to Nsereko (2004) 4 *AHRLJ* 256 at 257, the Southern African Development Community (“the SADC”), has adopted “Principles of Consensus on the Court” in 1997. In 1999 the governments of Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe adopted the Pretoria Statement of Common Understanding on the ICC, confirming their commitment to implement the ICCS process.

<sup>265</sup> The IC contained a similar provision. Froneman J in *Melani* (fn 21 above), referred to *Makwanyane* (fn 48 above) at par 37 to highlight the importance of foreign law as a source of interpreting the rights contained in Chapter 3 (now Chapter 2 of the 1996 Constitution), but also to warn against the pitfalls of using it, as follows: “Comparative ‘bill of rights’ jurisprudence will

Constitution more frequently than subsection (1)(b) when interpreting section 35(5).<sup>266</sup> No doubt, there is a striking similarity between sections 35(5) of the South African Constitution and 24(2) of the Canadian Charter. This was noted in *Naidoo*,<sup>267</sup> while Van der Merwe enumerated the differences between these provisions.<sup>268</sup>

The Canadian section 24(2) jurisprudence has played and will unquestionably play an important role in the interpretation of section 35(5),<sup>269</sup> but Scott JA, in

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no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw. Although we are told by s 35(1) that we 'may' have regard to foreign case law, it is important to appreciate that this will not necessarily offer a safe guide to the interpretation of Chapter 3 [now Chapter 2] of our Constitution".

<sup>266</sup> See, for example, *Naidoo* (fn 237 above) at 527g, where McCall J stated: "Having regard to the similarity between s 35(5) of the New Constitution and s 24(2) of the Canadian Charter (but bearing in mind the differences between the two enactments), also the provision in s 39(1)(c) that when interpreting the Bill of Rights, a court may consider foreign law, I am of the view that it is more helpful to interpret the provisions of s 35(5) with reference to the Canadian decisions than to those South African cases dealing with a more general discretion based on the decision in *People v O'Brier*".

<sup>267</sup> Loc cit.; see also *Pillay* (fn 21 above) at par 91.

<sup>268</sup> Fn 9 above at 200, fn 231 of his work. He mentions the differences as being the following: s 35(5) makes explicit provision for the requirement of a fair trial, whereas s 24(2) does not; s 35(5) uses the phrase "detrimental to the administration of justice", whereas s 24(2) uses "bring the administration of justice into disrepute"; the words "if it is established" appears in s 24(2), but not in s 35(5); and the phrase "having regard to all the circumstances" appears in s 24(2) but not in s 35(5). However, he points out, that the last-mentioned difference is of no significance, because courts must in any event consider all the circumstances before they arrive at a conclusion whether to exclude or not.

<sup>269</sup> See *Ally* (2005) 1 *SACJ* 66 at 74. The applicability of Canadian jurisprudence for guidance on South African law was also confirmed by the Constitutional Court in respect of reverse onus provisions and the presumption of innocence in *Zuma* (fn 202 above) at par 25, where Kentridge AJ stated: "In both Canada and South Africa the presumption of innocence is derived from the

*Pillay*, has expressed serious reservations about the full-scale adoption of the Canadian approach to the exclusion of unconstitutionally obtained evidence in South Africa. His contention is based upon the difference in the law of criminal procedure in the two countries and not the scope and application of section 35(5). The judge observed that the Canadian Supreme Court has broader powers than its South African counterparts when a ruling of exclusion is made at the appeal phase of the proceedings.<sup>270</sup> The judge reasoned that the Canadian Supreme Court is empowered, after a finding that the disputed evidence be excluded, to refer a matter back to the trial court, ordering that the trial be started *de novo*. Such orders have been granted by South African criminal courts even before the enactment of section 35(5).<sup>271</sup> In terms of sections 313 and 324 of the Criminal Procedure Act, courts of appeal are granted the authority to order that trials be started *de novo* when there was an irregularity in the procedure which precludes a valid consideration of the merits. In the light hereof, such orders could, depending on the circumstances, be extended to section 35(5) challenges. If not, this shortcoming should receive the attention of the South African Law Reform Commission.

## F. Conclusion

Since 1861, when *Leatham* had been decided, the relevance of evidence was the only test applied to determine the admissibility of evidence in Commonwealth

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centuries old principle of English law, forcefully restated by Viscount Sankey in his celebrated speech in *Woolmington v Director of Public Prosecutions* (1836) AC 462 (HL) at 481 ... Accordingly I consider that we may appropriately apply the principles worked out by the Canadian Supreme Court ... ”.

<sup>270</sup> In *Pillay* (fn 21 above) at 122.

<sup>271</sup> See sections 313 and 324 of the Criminal Procedure Act; see also *S v Moodie* 1962 1 SA 587 (A), (“*Moodie*”). See further Kriegler (fn 54 above) at 863.

countries. Canada and South Africa also inherited this rule from England and Wales. As a result of this rule, the focus of the courts was on the quest for the search of the evidential truth, thereby demoting the manner in which evidence was gathered to the realm of irrelevance. The courts soon realised that this rigid inclusionary rule would, in certain circumstances, unreasonably encroach on the right to a fair trial and relaxed it to make provision for instances when the 'strict rules of admissibility would operate unfairly towards the accused'.<sup>272</sup> The rationale for this rigid inclusionary rule is twofold: First, to prevent testimonial self-incrimination; and second, to ensure that the evidence is reliable. Exclusion did not serve the purpose of protecting the integrity of the criminal justice system.

The common law inclusionary rule plays a pivotal role in the procedural law of England. Perhaps it is for that reason that the concept of 'fairness' has been interpreted very narrowly when the courts interpreted this notion in the PACE, when compared to the meaning of the very same concept in Canada. In England (and South Africa prior to 1994) 'fairness' to an accused is determined by weighing up the potential prejudice an accused might suffer – as a result of the admission of the disputed evidence – against the probative value thereof.<sup>273</sup> Therefore, if the probative value of the evidence outweighs any prejudice an accused might suffer as a result of the admission of the contested evidence, it must be included, no matter how it had been obtained. Such an approach inevitably dictates that admissibility must be determined by considering the **reliability** of the evidence.<sup>274</sup> This common law rule, it is suggested, has been

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<sup>272</sup> *Sang* (fn 61 above).

<sup>273</sup> Howard et al (fn 68 above) at 698, note the following: "However, there is no doubt that *R v Sang* confirmed the existence of a general discretion to exclude evidence if in the judge's opinion its prejudicial effect outweighed its probative value and of a discretion to exclude confessions which were admissible as a matter of law".

<sup>274</sup> See the dissenting opinion of Loucaides J in *Khan* (fn 167 above).

developed by the South African courts having due regard to the spirit, purport and objectives of the South African Constitution.<sup>275</sup>

Having reviewed the application of the exclusionary rule in the jurisdictions of England and South Africa before the incorporation of section 35(5) of the Constitution, it is clear that the courts in both jurisdictions grappled with issues of public policy: Should a person who is evidently guilty of committing an offence, be acquitted when state agents obtained crucial evidence against the perpetrator in an unlawful manner? Or should the manner in which such evidence had been obtained be disregarded as being irrelevant? In England and Wales the common law dictated that all relevant evidence, no matter how it had been obtained, is admissible. However, after the incorporation of the European Convention into national law, England and Wales have, to a limited extent, broadened the exclusionary discretion of their courts.<sup>276</sup>

However, the integrity of the courts of England and Wales is at issue in instances of abuse of process and in only such cases may the courts weigh different public interests against each other in order to reach judgment. Choo and Nash are advocates for a broad interpretation of section 78(1) that would enable the courts in England and Wales to harmonise their jurisprudence with that of the European Court of Human Rights by either merging the discretion for the abuse of process into section 78(1) or incorporating a new section into the PACE. Was the answer provided by the introduction of the Human Rights Act? The recently reported case of *A and Others*,<sup>277</sup> suggests that the impact of the Human Rights Act has adapted the approach of the courts of England and Wales with regard to the assessment of the admissibility of evidence. The courts of England and Wales

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<sup>275</sup> See chapter 4 below.

<sup>276</sup> Compare Choo & Nash (fn 95 above).

<sup>277</sup> Fn 70 above.

may be inclined, as a result of *A and Others*, to exclude reliable evidence because of the manner in which it was procured.

More importantly, the case of *A and Others* could be construed as the courts of England and Wales asserting that they do not want to be associated with 'immoral' executive conduct in the evidence-gathering process.<sup>278</sup> The judicial integrity rationale dictates that the courts of England and Wales should approach the issue of admissibility of improperly obtained evidence in this manner. The fact that the judicial integrity rationale played a prominent role in the outcome of *A and Others* is evidenced by the reasoning of Lord Carswell when he argued that the courts have a duty not to admit evidence obtained by means of torture, for to admit it would 'shock the conscience, abuse or degrade the proceedings and involve the state in moral defilement'.<sup>279</sup>

A close analogy can be drawn between the case of *Saunders v UK*<sup>280</sup> and the South African case of *Ferreira v Levin*,<sup>281</sup> confirming the similarity between the laws of England and South Africa on the impact of pre-trial testimonial compulsion upon the right to a fair trial. Both courts held that evidence thus obtained does not *per se* render the subsequent trial unfair. However, it should be emphasised that section 35(5) of the South African Constitution was not applied in *Ferreira*, because the case was decided under the Interim Constitution. Both courts held that the trial court would be best placed to determine

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<sup>278</sup> Choo & Nash (fn 95 above) at 5, arrive at a similar conclusion.

<sup>279</sup> *A and Others* (fn 70 above) at par 87.

<sup>280</sup> See also *R v Allen* [2001] 4 All ER 768; and *Allen v UK* (2002) 35 EHRR CD 289, where the argument of supplying information under compulsion to the government to calculate income tax constituted a violation of Article 6 of the European Convention, was rejected by the House of Lords and the European Court of Human Rights subsequently refused to accept the application for review.

<sup>281</sup> 1996 1 SA 984 (CC), ("*Ferreira*").



admissibility at the trial phase and that, unlike the provisions of Article 5 of the European Convention, no residual due process principle exists during the pre-trial inquiry. However, much cannot be read into the remainder of the analogous judgments written in the jurisdictions of England and South Africa, since the decisions were based on different legal sources and principles.

By drafting a Bill of Rights without an explicit exclusionary remedy, the drafters of the South African Interim Constitution created legal uncertainty about the legal basis for the exclusion of unconstitutionally obtained evidence. The varied approaches adopted by our courts to extend a remedy to the victims of fundamental rights violations indicated to the drafters of the 1996 Constitution the need for an explicit exclusionary rule. Between 1994 and 1996 the South African courts in general referred to section 24(2) of the Charter with approval and applied it to protect the rights contained in the Bill of Rights. It would only be a question of time before the substance of section 24(2) was introduced into the South African Constitution.

The South African courts are enjoined to apply section 39(1)(b) of the Constitution when interpreting section 35(5). Nevertheless, after a consideration of the provisions of the Rules of Procedure of the ICCTY and its jurisprudence, it has emerged that South African courts would find scant guidance from a consideration of Article 69(7) of the ICCS.

Regional and international treaties played a role in the development of section 24(2) of the Charter.<sup>282</sup> Correspondingly, it is assumed, that the ratification of international and regional instruments must have played a similar role in the

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<sup>282</sup> Roach (fn 17 above) at 2-34, par 2.690, he argues as follows: "Canada's adherence to both of these instruments [the ICCPR and the American Convention on Human Rights] were advanced as reasons why the Charter should have explicit provisions for remedies".

creation of section 35(5). Section 35(5) came into being after South Africa ratified the ICCPR<sup>283</sup> and acceded to the African Charter.<sup>284</sup> The African Commission has passed two Resolutions that could, together with the ratification of the ICCPR, have had an impact on the inclusion of section 35(5) into the South African Constitution. The African Commission has passed a Resolution calling on member states to ratify the ICCS,<sup>285</sup> and adopted a Resolution on the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.<sup>286</sup> Of particular importance for purposes of this study is the fact that the provisions of the ICCPR and the Guidelines on the Right to a Fair Trial contain one distinctive feature: it dictates that member states should provide effective remedies in the event that fundamental rights have been violated.<sup>287</sup> Although the resolutions adopted by the African Commission may be considered as 'soft law', it does create a form of 'pre-legal, moral, or political obligation' on member states to harmonise their existing law with the values promoted by such regional standards.<sup>288</sup>

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<sup>283</sup> South Africa ratified the ICCPR on 10 December 1998 (see Killander "Introduction to the United Nations and Human Rights in Africa" in Heyns (ed) *Human Rights Law in Africa* (2004) at 48-49.

<sup>284</sup> Accession took place during 1996. See Viljoen (fn 260 above) at 417. However, he is of the opinion that the lack of reliance by our courts on the African Charter could be ascribed to the fact that international law had been relegated to an inferior status by the South African Constitution.

<sup>285</sup> See fn 261 above. Article 69(7) makes express provision for an exclusionary remedy in criminal proceedings.

<sup>286</sup> Hereinafter "the Guidelines on the Right to a Fair Trial". This resolution was adopted during 2003.

<sup>287</sup> Article 2(3) of the ICCPR reads as follows: "Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy ...".

Guideline C (a) of the Guidelines for a Fair Trial provides as follows: "Everyone has the right to an effective remedy ... for acts violating the rights granted by the constitution ...".

<sup>288</sup> Strydom et al *International Human Rights Standards* Vol I, (1997) at 3.

In a like manner that the Canadians inherited the exclusionary rule - with adaptations, from the United States - the drafters of the South African Constitution, in turn, have incorporated substantive parts of section 24(2) of the Charter into section 35(5) of the South African Constitution. However, there are differences in the text of the two sections. One important difference, the inclusion of the phrase 'or otherwise' in section 35(5), is discussed in chapter four. For the reason that the two exclusionary provisions are remarkably comparable, Canadian section 24(2) jurisprudence should play an important role in the interpretation and application of section 35(5) of the South African Constitution.

Section 35(5) of the South African Constitution essentially seeks to achieve one primary goal: to determine whether exclusion of the disputed evidence would be 'detrimental' to the criminal justice system.<sup>289</sup> However, the Canadian Supreme Court, in *Collins* and cases reported thereafter, developed two separate tests that should be kept separate.<sup>290</sup> Such an approach forms the central theme of the argument in this thesis. Chapter four covers the fair trial requirement under section 35(5), while chapter five deals with the 'detriment' requirement.

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<sup>289</sup> Steytler (fn 27 above) at 36.

<sup>290</sup> Steytler (loc cit).