



Chapter 1: Introduction

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A. Background to research questions

During the early 1900's, the various Provincial Divisions of the South African High Court, on the basis of public policy, frequently excluded reliable real evidence obtained against the accused in an unlawful manner.¹ During this era, public policy dictated that the 'administration of justice shall be free of all suspicion' and courts should strive to prevent the perception that the 'Crown could avail itself of and connive at the commission of one crime to prove another'.² This approach was rendered without any legal force during 1941, in the matter of *Ex Parte Minister of Justice in re R v Matemba*.³ In *Matemba*, the Appellate Division of the South African Supreme Court drew a distinction between the procurement of compelled statements, on the one hand, and the admissibility of real evidence, on the other hand. Real evidence was held to be reliable, and therefore admissible, regardless of the manner of its obtainment.

¹ See, for instance, *R v Goopurshad* (1914) 35 NLR 87, ("*Goopershad*"); *R v Gama* 1916 EDL 34, ("*Gama*"); *R v Maleleke* 1925 TPD 491 ("*Maleleke*"); *R v B* 1933 OPD 139, ("*B*"). For an insightful discussion of the approach of the South African courts to the admissibility of unlawfully obtained evidence during this era, see Campbell (1968) 3 *SALJ* 246. Campbell suggests certain changes to the South African law on the admissibility of illegally obtained evidence, at 257; see also Schwikkard (1991) 4 *SACJ* 318 at 326, who fittingly summarised the approach of the South African courts during this era as follows: "To condone or ignore improper conduct on the part of the police would destroy the confidence of the community in the independence of the courts. To admit improperly obtained evidence is tantamount to accepting the principle that the court may condone one crime if it proves the commission of another"; see further Schmidt & Rademeyer *Schmidt Bewysreg* (4th ed, 2006) at 373-376, where the historic development of the common law discretionary exclusionary rule is discussed.

² Per Krause J in *Maleleke* (fn 1 above) at 536.

³ 1941 AD 75, ("*Matemba*"). In this case, the admissibility of a palm print, taken against the will of the accused, was at issue. The Appellate Division of the Supreme Court held the evidence to be admissible, as the police conduct did not result in **testimonial compulsion**.

Except for admissions,⁴ confessions,⁵ and pointings-out,⁶ the South African courts were, after *Matemba* and prior to 27 April 1994, not especially concerned with the manner in which evidence had been obtained.⁷ The rationale for the existence of the exceptions relevant to admissions, confessions and pointings-out is, in the main, a lack of voluntariness,⁸ as well as the reliability principle.⁹ The golden rule that applied was whether the evidence obtained was relevant to the issues, and, if the answer was in the affirmative, such evidence would be admissible.

⁴ See section 219A of the Criminal Procedure Act 51 of 1977 (as amended), (which throughout this work is referred to as “the Criminal Procedure Act”).

⁵ The admissibility of confessions is governed by section 217 of the Criminal Procedure Act.

⁶ For a discussion of the concepts of admissions, confessions and pointings-out, see Schwikkard (fn 1 above); De Jager et al *Commentary on the Criminal Procedure Act* (2005) at 24-50J – 24-82; Kriegler *Hiemstra: Suid-Afrikaanse Strafproses* (1993) at 541-568.

⁷ Zeffertt et al *South African Law of Evidence* (2003) at 630; De Villiers (ed) *The Truth and Reconciliation Commission of South Africa Report* (Vol 6, 2003) at 191, sets out police practice in obtaining admissions and confessions in South Africa during that period as follows: “Numerous applicants [police officers] admitted that psychological and physical coercion was routinely used in both legal detentions and unlawful custody”; and at 619 (ibid) the report concluded as follows: “It is accepted now that detention without trial allowed for the abuse of those held in custody, that torture and maltreatment were widespread and that, whilst officials of the former state were aware of what was happening, they did nothing about it”.

⁸ See *S v Januarie en Andere* 1991 2 SACR 682 (SE), (“*Januarie*”); *S v Sheehama* 1991 2 SACR 860 (A), (“*Sheehama*”); see further *S v Agnew* 1996 2 SACR 535 (C) at 538, (“*Agnew*”). The admissibility of admissions, confessions and pointings-out are subject to technical requirements developed by the courts in their interpretation of the relevant sections, with the aim of creating procedural safeguards developed for the protection of the accused. For a discussion of the requirements for admissibility of admissions, confessions and pointings-out, see De Jager et al (fn 6 above) at 24-50J to 24-82; Kriegler (fn 6 above) at 541-568. For the legal position in England on this issue, see section 76(5) of the Police and Criminal Evidence Act (“the PACE”), as well as the matter of *Lam Chi-ming v R* [1991] LRC (Crim) 416 at 422, (“*Lam Chi-ming*”).

⁹ Schwikkard (fn 1 above) at 321-323.

The introduction of a justiciable Bill of Rights by the Interim Constitution during 1993,¹⁰ and the provisions of section 35(5) of the Constitution of South Africa, 1996,¹¹ transformed this approach to the admissibility of evidence. The essence of the subsistence of a justiciable Bill of Rights is the notion that governmental power should be exercised within the ambit, and subject to the provisions of the Constitution.¹² The provisions of section 35, in general, and section 35(5), in particular, should be interpreted in the light hereof.

The common law exclusionary rule excludes evidence mainly on the grounds of relevance, unreliability, and in recent times,¹³ reverted to the 1900's consideration of public policy as a ground for the exclusion of unlawfully obtained evidence. Section 35(5) goes much further than the common law rule by permitting a court to exclude relevant evidence on a very specific basis, namely: whether the admission of the disputed evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

Whenever relevant, this study compares the provisions of section 24(2) of the Canadian Charter with section 35(5) of the South African Constitution. Section 24(2) of the Canadian Charter of Rights and Freedoms¹⁴ provides that when:

... a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the

¹⁰ Hereinafter "the Interim Constitution" or "IC".

¹¹ Hereinafter "the Constitution", or "the South African Constitution" or "the Bill of Rights".

¹² Currie & De Waal (eds) *The Bill of Rights Handbook* (5th ed, 2005) at 8.

¹³ *S v Motloutsi* 1996 1 SACR 78 (C), ("*Motloutsi*"); see also *S v Mayekiso* 1996 2 SACR 298 (C), ("*Mayekiso*"). These cases were decided in terms of the South African Interim Constitution.

¹⁴ Hereinafter "the Charter".

proceedings would bring the administration of justice into disrepute.

By comparison, section 35(5) of the South African Constitution, provides as follows:

Evidence obtained in a manner that violates any right contained 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.

The South African Supreme Court of Appeal and the High Courts,¹⁵ including scholarly writers¹⁶ have indicated that the provisions contained in the two

¹⁵ See, for instance, the majority judgment in *Pillay and Others v S* 2004 2 BCLR 158 (SCA), (“*Pillay*”), where Mpati DP and Motata AJA wrote as follows at par 87, before applying s 24(2) of the Charter: “The issue whether real (or derivative) evidence would render a trial unfair has been the subject of a number of cases in Canada under section 24 of the Canadian Charter of Rights and Freedoms (the Charter). Section 24(2) of the Charter, though not in the same terms as section 35(5) of the Constitution, provides that where evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter such evidence ‘shall be excluded’ if it is established that, having regard to all the circumstances, its admission would bring the administration of justice into disrepute.” Again, the same court referred to and applied the second phase of the renowned Canadian case of *R v Collins* (1987) 33 CCC (3d) 1; 38 DLR (4th) 508; 1 SCR 265, (“*Collins*”) at par 91, when the majority opinion wrote as follows: “Although the wording of section 24(2) of the Charter differs from section 35(5) of the Constitution, it is again useful to consider the approach of of the Canadian courts to the concept ‘Bringing the administration of justice into disrepute’. The concept is not foreign to our law of evidence”; see also *S v Ntlantsi* [2007] 4 All SA 941 (C) at par 17, (“*Ntlantsi*”), where Yekiso J wrote as follows: “Since the early development of the exclusionary rule it had generally been accepted that the provisions of the exclusionary rule contained in section 35(5) of the Constitution are modeled on section 24(2) of the Canadian Charter of Rights & Freedoms ...”.

¹⁶ Steytler *Constitutional Criminal Procedure: a Commentary on the Constitution of the Republic of South Africa, 1996* (1998) at 34, where he states: “In structure and wording it [section 35(5)]

sections are strikingly similar.¹⁷ This is one of the reasons why the South African courts have, even prior to the advent of section 35(5)¹⁸ as well as thereafter, opted to follow the guidance provided by their Canadian counterparts.¹⁹ Mindful thereof, this study presents a detailed and comparative analysis of section 24(2) of the Charter and section 35(5) of the South African Constitution. The comparison with section 24(2) of the Charter is important, since the section has become an influential benchmark constitutional provision, providing for the exclusion of unconstitutionally obtained evidence when it had been procured in violation of fundamental rights.²⁰

is closely modeled on the Canadian Charter's exclusionary rule ..."; Van der Merwe, "Unconstitutionally Obtained Evidence" in Schwikkard and Van der Merwe (eds) *Principles of Evidence* (2002) at 200; Viljoen "The law of Criminal Procedure and the Bill of Rights" in Mokgoro & Tlakula (eds) *Bill of Rights Compendium* (2008) at 5B-50; see also Naude ((1998) XXXI *CILSA* 315 at 328, where he confirms the position as follows: "Given the similarity between section 35(5) and section 24(2) of the Canadian Charter of Rights and Freedoms, there can be little doubt that in applying section 39(1)(c) of the Constitution ... South African courts will seek guidance from Canadian jurisprudence".

¹⁷ Van der Merwe (ibid) at 200 at fn 231, highlights and briefly comments on the differences between the two sections as follows: "s 35(5) makes specific reference to a fair trial, whereas 24(2) does not (and had to be read into s 24(2) by the Supreme Court of Canada ... ; s 35(5) uses the criterion 'bring the administration of justice into disrepute' which, it is submitted, is a broader test than 'detrimental to the administration of justice' ... ; the words 'if it is established that' in s 24(2) do not appear in s 35(5) ... ; the words 'having regard to all the circumstances' appear in s 24(2) but not in s 35(5) - a difference which is of no consequence as a court which interprets and applies s 35(5) must of necessity take into account all the circumstances".

¹⁸ See *S v Melani and Others* 1996 2 BCLR 174, 1 SACR 335, 1996 1 SACR 335 (EC), ("Melani").

¹⁹ See the majority judgment of Mpati DP and Motata AJA in *Pillay* (fn 15 above) at par 87 and 91.

²⁰ Section 24(2) of the Charter has been used in comparative analyses with various exclusionary remedies in different jurisdictions. See, for example, Caldwell & Chase (1994) 78 *Marq L Rev* 45, consisting of a comparative analysis between section 24(2) and the exclusionary rules of the USA, England and Wales, the Australian exclusionary policy, and the New Zealand exclusionary practice; see also Bradley (2001) 52 *Case W Res L Rev* 375, whose study included a comparative

However, this study is not limited to a comparative study of these sections only. The exclusionary remedy, applicable in England and Wales, is also explored.²¹ In addition, reference is made to the exclusionary remedy contained in Article 68(7) of the International Criminal Court Statute,²² and to specific aspects of the exclusionary remedy in other common law jurisdictions where an exclusionary remedy is employed to ensure trial fairness.²³ Against this background, it should be underlined that the research in respect of the other common law jurisdictions – other than Canada and England and Wales – is selective instead of extensive, and referred to with the aim of comparing the implications of such an approach with the Canadian interpretation.

Section 35(5) of the Constitution was born of the desire by the South African courts to create an effective remedy in the event that a fundamental right of an accused has been violated. This is demonstrated by the application by the South African courts of section 7(4) of the Interim Constitution.²⁴ No exclusionary

analysis of section 24(2) and the exclusionary provisions of the following jurisdictions: Argentina, Australia, England and Wales, France, Germany, Israel, Italy, South Africa, and Spain. At 382 (ibid) he is of the opinion that “Canada has the most fully developed exclusionary law of any country studied outside of the United States”; see further Choo & Nash *E & P* (2007) 11(2) 75, (publication pages not available), where section 24(2) is employed as a comparative tool with the Australian section 138 of the Uniform Evidence Acts, the exclusionary principle in New Zealand, and section 78(1) of the PACE, applicable in England and Wales.

²¹ Section 78(1) of the PACE.

²² “The ICCS” or “the Rome Statute”.

²³ In chapter 3, for instance, a brief comparative analysis is made of the interpretation of the concept “suspect” by the courts of the USA, England and Wales, the European Court of Human Rights, the ICTY, ICTR and ICCT. Reference is also made to the exclusionary remedies in Australia and New Zealand.

²⁴ The pertinent parts 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 ...”.

remedy was explicitly provided for in that Constitution, but one was devised, albeit based on different approaches. It needs to be mentioned that the exclusionary rule applied by the South African courts in terms of section 7(4) of the Interim Constitution was notably broader than the common law exclusionary rule. It is assumed that the drafters of the 1996 Constitution were aware of the different approaches adopted by our courts in their application of an exclusionary remedy, caused by the omission of such remedy in the previous Constitution. As a consequence, an exclusionary rule modeled on section 24(2) of the Charter, was designed.

The admissibility or inadmissibility of unconstitutionally obtained evidence will often be of the utmost importance to both the accused and the prosecuting authority. In the light hereof, the impact of section 35(5) on the entire criminal justice system is of great consequence in seeking to achieve the constitutional goals of substantive fairness and maintaining the integrity of the criminal justice process. The high rate of serious crime in South Africa has resulted in public criticism and a loss of confidence in the criminal justice system.²⁵ Against this

²⁵ See, for instance, the article by Mashiqi in *Business Day*, 31 October 2006, entitled "Angry winds start to blow around SA's Constitution", accessed on 31 October 2006 at www.businessday.co.za/articles/opinion; see also the front page comments by Boyle in the *Sunday Times*, 3 December 2006, entitled "Fight crime, Africa tells SA". The analyst comments on the African Peer Review Mechanism report delivered to President Mbeki, suggesting that the high rate of violent crime might have a negative impact on the South African economy; see also the article by Hlongwa and others, published in the *City Press*, dated 4 December 2006, entitled "Vigilantes are cop-vol", commenting on the report by the SA Human Rights Commission, indicating that ineffective policing breeds vigilantism; see further the front page news article by Mapheto in the *Daily Sun*, dated 4 December 2006, entitled "The cops didn't come ... so the people took action". Compare Research Paper 18 of the South African Law Reform Commission, "Conviction rates and other outcomes of crimes reported in eight South African police areas", Project 82, <http://www.doj.gov.za/salrc/rpapers/rp>, at 82, accessed on 17 January 2008, which objectively concludes and highlight some of the reasons why the South African criminal justice

background, one of the primary aims of this work is to examine whether the high crime rate, in conjunction with the impact of public opinion, would tend to steer the South African courts towards an approach to the interpretation of section 35(5) in a manner that offers greater import to the admission of unconstitutionally obtained evidence that is essential for a conviction. On the one hand, due process concerns dictate that the regular admission of unconstitutionally obtained evidence, in a constitutional state founded on individual rights, would bring both the Constitution and the criminal justice system into disrepute. On the other hand, crime control concerns demand that reliable evidence, regardless of the means of its procurement, be received by the courts, so as to convict the factually guilty.²⁶ The exclusion of unconstitutionally obtained evidence is a subject that often generates a clash between two equally important societal views: Crime control protagonists are repulsed by the acquittal of those factually guilty; by contrast, fundamental rights activists condemn revisiting the 'old' South Africa, where governmental agents were empowered to use the might of the state machinery to oppress and convict its citizens in instances when their fundamental rights had been impaired in the process of procuring evidence against them.

system does not function effectively as follows: "There are numerous, well- documented problems in the South African criminal justice system that would account for low conviction rates. Such problems include under-trained and overworked detectives and prosecutors who have inadequate support staff and services. There are high levels of illiteracy in the police and problems with discipline and morale. The public also deserves a measure of blame for the poor performance of the criminal justice system with some people failing to cooperate with the police despite being witness to a crime or having evidence about a crime or suspected perpetrators".

²⁶ Van der Merwe (fn 16 above) at 177.

B. Research questions

Against the background outlined above, this thesis attempts to answer the following main question: How should section 35(5) be interpreted in order to achieve its aim of striking a satisfactory balance between rights protection and crime control interests, without sacrificing constitutional principle? Put differently: Would the application of this section achieve its primary goal of ensuring trial fairness as well as the preclusion of detriment befalling the criminal justice system? The questions asked below serves the purpose of seeking an answer to this central issue.

Throughout the process of answering these questions, a fundamental issue that needs to be addressed is whether section 24(2) Charter jurisprudence represents an appropriate guide for the interpretation of section 35(5). An important theme explored in this thesis is the rationale for exclusion under section 35(5). A right cannot exist without a remedy. For this reason the rationales for exclusion when admission would tend to render the trial unfair or otherwise be 'detrimental' to the administration of justice, are explored in the course of this thesis. Three rationales are considered in the interpretation of section 35(5): firstly, the remedial imperative, secondly, the deterrence rationale, and thirdly, the judicial integrity rationale.

It is also essential to investigate the threshold requirements applicable to section 35(5). Threshold requirements serve the important purpose of separating superfluous claims from those that have merit. An accused who cannot demonstrate that she has satisfied the threshold requirements contained in section 35(5) may not be allowed to enforce the exclusionary relief guaranteed by the section. This thesis considers four threshold requirements. The first threshold requirement relates to the question: who are the beneficiaries of section 35(5)? After 1994 South Africa became increasingly exposed to the global

economy. As a consequence, the mobility of people, goods and information entered and crossed the South African borders with immense rapidity. This upsurge in the mobility of people and articles could lead to the increased likelihood that criminal conduct, partially executed in one country being completed in another jurisdiction. It is against this background that the first issue relating to the beneficiaries of section 35(5) is considered. Would section 35(5) be applicable when the fundamental rights of South African citizens, contained in section 35 of the South African Constitution, have been violated in foreign jurisdictions by foreign government officials? An issue related to this is whether evidence obtained by South African governmental agents in violation of section 35 in a foreign jurisdiction would be admissible in a South African court. The second issue in relation to the beneficiaries of section 35(5) is the following: Section 35 of the South African Constitution does not make explicit reference to the rights of 'suspects'. The section explicitly mentions constitutional guarantees applicable to arrested, detained and accused persons. Does this mean that a person suspected of having committed a crime may not rely on section 35(5) for the reason that she was a 'suspect' when her rights had been violated? South African case law on this issue is contradictory.

The second threshold requirement poses the question: Should an accused show that the disputed evidence would not have been obtained 'but for' the constitutional infringement, or would the 'connection' requirement be satisfied when the court is convinced that the evidence had been obtained subsequent to the violation? In other words, should the phrase 'obtained in a manner' be interpreted as requiring from an accused to satisfy a strict causal connection between the infringement and the self-incriminatory conduct? The third threshold requirement is whether an accused person may rely on section 35(5) in instances when the rights of an innocent third party had been violated during the

procurement of the evidence with the aim of using it in the trial of the accused.²⁷ The fourth threshold requirement deals with who should bear the onus of showing that the disputed evidence had been 'obtained' as a result of a violation. Who should bear the onus of showing that a constitutional right of an accused had been infringed or not in the evidence-gathering process? South African case law is not harmonious on this issue.

The substantive phase of section 35(5) consists of two legs or phases of interpretation. During the **first leg** or phase of the admissibility assessment, the court has to determine whether admission of the disputed evidence would render the trial unfair. This requirement gives rise to the question as to whether the fair trial directive, contained in section 35(5), is the equivalent of the common law concept of a fair trial. Section 35(5) serves the purpose of rights protection – an interest that did not form part of the fair trial assessment in terms of the common law.²⁸ Having identified a fundamental difference between the two concepts, one might ask how trial fairness should be assessed within the context of section 35(5). The central issue considered here is whether the common law privilege against self-incrimination, applied within the framework of section 35(5), adequately protects the procedural rights guaranteed by the South African Bill of Rights. Put differently: Does the common law distinction between real evidence and testimonial compulsion enhance the fair trial assessment, contained in section 35(5)? If not, should or has it been adapted by the courts of South Africa, within the context of section 35(5)?

²⁷ See *Mthembu v S* (64/2007) [2008] ZASCA 51 (10 April 2008), ("*Mthembu*"); see also Van der Merwe (fn 16 above) at 207, who is of the opinion that "standing" is not a prerequisite of s 35(5); see further Steytler (fn 16 above) at 35.

²⁸ As pointed out above, evidence could be excluded in terms of the common law, but that decision was not grounded in the protection of fundamental rights, but on prejudice an accused might suffer, read together with the provisions of Acts of Parliament and policy considerations.

It is submitted that the scope and contents of the fair trial requirement should be determined while having due regard to the purpose it seeks to achieve.²⁹ This leads to the question as to whether the rationales applicable to the trial fairness requirement in England and Wales, Canada and South Africa are comparable. The definition of trial fairness hinges on the purposes sought to be protected by the applicable exclusionary rule. Four different notions of the concept 'fair trial' have been identified by focusing on the purposes sought to be protected by the applicable exclusionary rule.³⁰ The concept 'fair trial' may be defined as verdict-centred, process-centred, balance-centred, or constitution-centred.

A verdict-centred trial is focused on the reliability of the verdict.³¹ All relevant evidence is admissible, regardless of the manner in which it had been obtained. The truth-seeking value is the fundamental concern of the courts. Exclusion may occur on a narrow and specified ground, based either on the unreliability of the evidence or the prejudice an accused might suffer as a result of its admission. The trials in the cases of *R v Kuruma*,³² *R v Wray*³³ and *Matemba*³⁴ would therefore be classified as verdict-centred.

A process-centred approach to trial fairness is focused on the fairness of the treatment of the accused from the pre-trial process to the actual trial. Its focus is not centred round the reliability of the verdict. Evidence that has unreliable

²⁹ *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 385 at 395-396, ("*Big M Drug Mart*").

³⁰ Davies (2000) CR (5th) 225 (publication pages of this article are not available) at 8 of the printed document, identifies two notions of the concept "fair trial", ie "verdict-centred" and "process-centred". The other two concepts have been added by the writer.

³¹ Choo & Nash (fn 20 above) at 3 are of the opinion that this is a fundamental characteristic of section 78(1) of the PACE.

³² [1955] AC 197, ("*Kuruma*").

³³ (1970) 4 CCC (3d) 1, ("*Wray*").

³⁴ Fn 3 above.

characteristics is excluded. When the prejudicial effect of the evidence is outweighed by its probative value, it is likewise excluded by an exclusionary rule. In addition, even reliable evidence may be excluded to ensure trial fairness. Exclusion serves the purpose of deterring police conduct that has resulted in the unfair treatment of the accused. The trials in the cases of *Weeks v US*³⁵ and *Mapp v Ohio*³⁶ are examples of process-centred trials.

Both the balance-centred and the constitution-centred approaches have rejected the extremes represented by the verdict-centred and the process-centred approaches. The balance-centred and the constitution-centred approaches have the following common characteristics: Both approaches are focused on the fair treatment of the accused during the pre-trial and trial phases; the exclusionary rule in both approaches exclude evidence obtained in a manner that casts doubt on its reliability and that have a prejudicial effect on the accused. Furthermore, the rationale for exclusion in respect of both approaches is not based on deterrence. However, there are fundamental differences between the balance-centred and the constitution-centred approaches.

The following are significant differences between the balance-centred and constitution-centred interpretations of the notion 'fair trial': Firstly, the source of the exclusionary rule in respect of the balance-centred approach is not always found in a constitutional provision,³⁷ while its source in a constitution-centred

³⁵ (1914) 232 US 383, ("*Weeks*").

³⁶ (1961) 367 US 643, ("*Mapp*").

³⁷ See for example the Australian Constitution of 1901, which contains no exclusionary provision. Mason (2005) 12 *Australian Journal of Administrative Law* 103 at 109, levels criticism at the fact that the Australian Constitution devotes considerable attention to the structure of governmental institutions but lacks a focus on fundamental rights. He describes the Australian Constitution as "a delineation of government powers rather than as a Charter of citizen's rights". See also Roach *Constitutional Remedies in Canada* (1994) at 10-16, par 10.140, highlighting the fact that the

approach is customarily embedded in a Constitution;³⁸ secondly, the balance-centred approach determines trial fairness by balancing the infringed rights of an accused against the interests of society, and as a result the 'current mood' of society is a significant factor in the assessment.³⁹ By contrast, the constitution-centred approach determines trial fairness by means of a purposive interpretation, with the focus on the protection of constitutional values that best seek to enhance the fairness of the trial – the 'current mood' of society is not a significant feature in the assessment.⁴⁰ However, the constitution-centred approach does not altogether ignore the 'current mood' of society – it features during the second phase of the analysis. Thirdly, the balance-centred approach tends to lean towards enhancing the truth-seeking values of society. This is borne out by the fact that the **reliability** of the evidence features as a significant factor in its trial fairness analysis.⁴¹ The constitution-centred approach, by comparison, makes this assessment by focussing on the **manner** in which the evidence had been obtained, by measuring the manner of its obtainment against police compliance with constitutional values.⁴² It is against this background that the rationales for the exclusionary remedies aimed at protecting 'trial fairness' are explored.

Australian exclusionary rule does not have a constitutional foundation: "Balancing of interests tests have been used in other countries without constitutional bills of rights, most notably Scotland and Australia".

³⁸ See section 24(2) of the Charter and section 35(5) of the South African Constitution.

³⁹ *Bunning v Cross* (1978) 141 CLR 54, ("Bunning"); see also the second phase of the approach in *R v Grant* 38 CR (6th) 58, 209 CCC (3d) 250, CRR (2d) 223, CarswellOnt 3352, ("Grant"); see further *S v Tandwa* [2007] SCA 34 (RSA), ("Tandwa").

⁴⁰ *Collins* (fn 15 above); *Pillay* (fn 15 above).

⁴¹ See *Bunning* (fn 39 above); for an example in England, see *R v Khan* [1996] 3 All ER 289, ("Khan"); see also in Canadian context, *Grant* (fn 39 above); in South African context, see *Tandwa* (fn 39 above).

⁴² *Collins* (fn 15 above); *R v Ross* (1989) 46 CCC (3d) 129, ("Ross"); *R v Black* (1989) 50 CCC (3d) 20, ("Black"). In South African context, see *Melani* (fn 18 above); *Pillay* (fn 15 above).

The South African Supreme Court of Appeal, in *Pillay*, has adopted the *Collins* fair trial rationale (as developed by subsequent case law). Both the *Collins* and the *R v Stillman*⁴³ fair trial analyses have been criticised as constituting the equivalent of 'automatic' exclusionary remedies once trial fairness has adversely been affected. Such criticism has led to the adoption of a modified trial fairness assessment in *Grant*.⁴⁴ Seemingly holding a similar view as that of the *Grant* court, the Supreme Court of Appeal of South Africa has recently adopted an alternative approach to trial fairness in *S v Tandwa*.⁴⁵ The important issue that emerges is whether the purposes sought to be protected by the *Grant* and *Tandwa* approaches seek to protect, like the *Collins* approach, the presumption of innocence and the right to remain silent. Two issues related to this question are explored in this work: Firstly, is the *Grant* approach based on sound constitutional policy, since it supports the view that even though the admission of evidence would impair trial fairness, the evidence should nevertheless (depending on the extent of the infringement) be admitted?⁴⁶ An issue inherently related to this question is: Should the courts of South Africa apply a balancing exercise analogous to that applicable in common law jurisdictions, when they determine the trial fairness requirement under section 35(5)? Commentators do not agree on this issue.⁴⁷ Secondly, should the presumption in favour of exclusion once trial fairness had been impaired, (embraced by the *Grant* and

⁴³ (1997) 113 CCC (3d) 321, 5 CR (5th) 1, 1 SCR 607, ("*Stillmar*").

⁴⁴ Fn 39 above.

⁴⁵ Fn 39 above.

⁴⁶ Van der Merwe (fn 16 above) at 215-219 supports a similar point of view, but in a different context.

⁴⁷ Schwikkard "Arrested, Detained and Accused Persons" in Currie & De Waal (eds) (fn 12 above) at 795 refers to the case of *Lawrie v Muir* 1959 SC (J) 16, ("*Lawrie*"), thus suggesting that the discretion closely aligned to that applied in common law jurisdictions should be applied in the interpretation of the fair trial requirement under section 35(5); compare Schutte (2000) 13 *SACJ* 57 at 66.

Tandwa courts), be discarded? In other words, should a court, after a finding that admission would render the trial unfair, nevertheless consider the second leg of the assessment to determine whether exclusion would, for reasons other than trial fairness, be 'detrimental to the administration of justice'?⁴⁸

During the **second leg** or phase of the section 35(5) assessment, the court must consider whether admission or exclusion of the disputed evidence would be 'detrimental to the administration of justice'. An important issue that has to be considered is whether the concepts 'disrepute' and 'detriment' have a comparable meaning. Bearing in mind the high crime rate in South Africa, should public opinion be considered as a factor in the assessment of the 'detriment' requirement? If so: to what extent? The notion of a justiciable Bill of Rights dictates that governmental power should be subjected to judicial scrutiny, through the application of the Constitution. More often than not, this would entail that courts, as guardians of the individual rights guaranteed in the Constitution, should, in order to fulfil its constitutional obligation, be duty bound **not** to heed the will of the majority. As demonstrated in *S v Makwanyane*,⁴⁹ this creates a tension between the will of the majority in instances when individual rights are judicially enforced. The concept of 'detriment to the administration of justice' is central at this stage of the inquiry. Would a consideration of public opinion not be inimical to the fundamental duty of the courts of South Africa to serve as guardians of the Constitution? The supremacy clause⁵⁰ dictates that

⁴⁸ Van der Merwe (fn 16 above) at 201, argues that the courts have a "duty to exclude if admission would have one of the consequences identified in the section". He suggests that once trial fairness has been impaired, the evidence "must" be excluded. It must be emphasised that Van der Merwe does not support the theory of "automatic" exclusion as it is applied in Canada. See also Steytler (fn 16 above) at 36. See further the writer's argument and recommendation in this regard in chapter 6.

⁴⁹ 1995 2 SACR 1 (CC), (*"Makwanyane"*).

⁵⁰ Section 2 of the South African Constitution.

courts should uphold the provisions of the Constitution, a duty they should jealously defend without fear or favour.

Would the exclusion of evidence, essential for a conviction on a serious charge, be detrimental to the administration of justice in the event that the constitutional violation could be categorised as 'serious'? Does section 35(5) dictate what should be the result in such circumstances? If exclusion should be the result, could it ever be said that exclusion would be detrimental to the administration of justice? May judges, who are not politically accountable to the majority, ignore what they perceive to be the perception of society at large in the exercise of their discretion? Should the court not, while making meaningful allowances for the rationale of section 35(5), ultimately decide whether the admission or exclusion of the disputed evidence would be detrimental to the administration of justice? Does the judicial integrity rationale not dictate that courts should mould public opinion rather than be a slave to it?

One of the factors to be considered by both Canadian and South African courts to determine whether admission or exclusion of the evidence would be 'detrimental to the administration of justice', is the seriousness of the constitutional violation (also known as the second group of factors). How should the seriousness of a violation be determined? Should this be determined by means of an assessment as to whether police conduct was deliberate? What other factors should be taken into account, if any? Factors that would be indicative of the seriousness of the violation are whether the violation occurred in good faith, inadvertently or deliberately, wilfully, or flagrantly, or whether it could be classified as of merely a technical nature. It is also important to determine whether there was an urgent need to preserve the evidence or to prevent impending danger to members of the public. In addition to these factors, would the courts of South Africa, like their Canadian counterparts, be called upon to consider whether the evidence could have been procured in a constitutional

manner? Would the 'good faith' of the police be considered as a factor that diminishes the seriousness of the infringement? A related question is how should the 'good faith' of the police be determined? What purpose would a consideration of the 'good faith' of the police fulfil in the overall admissibility assessment? Should it, in a similar manner as its function in Canadian section 24(2) jurisprudence, be applicable only with regard to 'non-conscriptive' evidence? In other words, should the courts of South Africa consider the 'good faith' of the police only in instances when trial fairness has not been adversely affected by the police conduct?

Other factors considered by the Canadian Supreme Court to determine whether exclusion or admission of the evidence would result in 'disrepute', are the seriousness of the charges brought against the accused and the importance of the evidence for a successful prosecution (also known as the third group of factors). The nature of the evidence (whether real or testimonial) is significant at this stage of the inquiry. Should the nature of the disputed evidence be determinative of the seriousness of the infringement? In other words, would the courts of South Africa be more amenable to classify the violation as serious when the evidence constitutes testimonial compulsion as opposed to real evidence?

A review of Canadian case law reveals that the third group of factors has not attracted much judicial scrutiny. The third group of factors, it is submitted, tilts the balancing process in favour of inclusion. The judicial inaction of the Canadian courts to vigorously apply the third group of factors during this phase of the analysis could be ascribed to the fact that the judicial integrity rationale has been acknowledged as the fundamental rationale for the interpretation of section 24(2). Should the South African courts embrace the Canadian approach when this group of factors is considered, or would they be inclined, having regard to the high rate of serious crime, to lean towards a robust application thereof? Should this be the case, would an over-emphasis of the seriousness of the

charges against the accused and the importance of the evidence for a successful prosecution, not make unjustifiable inroads on the presumption of innocence? Put differently, would the courts of South Africa, by attaching considerable weight to the 'current mood' of society, possibly encroach upon the presumption of innocence? An issue related to this question is whether factual guilt should be considered during the admissibility assessment. The jurisprudence of the South African Supreme Court of Appeal on this issue has been somewhat contradictory. This issue is explored, and recommendations are made to resolve this problem by seeking guidance in the applicable rationale of section 35(5).

The issues mentioned above form the core concerns explored in this study.

C. Terminology

This study consists of a comparative analysis of mainly three different jurisdictions employing an exclusionary remedy.⁵¹ As such, the terminology employed in the different jurisdictions is not uniform in all cases. In England and Wales, for instance, the powers of the police to search and seize are closely regulated by the PACE and the accompanying Codes of Practice.⁵² Failure by the police to adhere to these provisions would, depending on the facts, activate the exclusionary remedy. Evidence obtained in violation of the PACE and its accompanying Codes is characterised as illegally or improperly obtained evidence. By contrast, in Canada and South Africa, the procedural guarantees of

⁵¹ As pointed out above, other common law jurisdictions are also included in this thesis. However, this study is not a detailed study of such jurisdictions.

⁵² MacDougal (1985) 76 *Crim L & Criminology* 608 at 622 defines police conduct which violates the PACE and Codes of Practice, the common law and a constitution as "illegally obtained evidence". He characterises evidence obtained unfairly or by improper trickery as "improperly obtained" evidence.

an accused person are contained in a Charter or Bill of Rights. Therefore, evidence obtained in violation of the Charter or Bill of Rights is classified as unconstitutionally obtained. Against this background, the reader is informed that the concepts 'illegally obtained' or 'improperly obtained' and 'unconstitutionally obtained', being descriptive of the manner in which the evidence had been obtained, are used interchangeably in this work.

Terminology like the "United Kingdom" and "Great Britain" is inappropriate, in view of the fact that Scotland and Northern Ireland have different criminal procedural systems, compared to that of England and Wales. The correct terminology is "England and Wales". Therefore, the expression England and Wales is used throughout this work, and where reference is made to "England", it refers to the law applicable in England and Wales.⁵³

D. Literature review

Scholarly writers who have commented on the admissibility of evidence under section 78(1) of the PACE are Choo and Nash,⁵⁴ May and Powles,⁵⁵ and Turpin.⁵⁶ Choo and Nash are the leading proponents calling for the broadening of the scope of section 78(1), while having due regard to the guarantees provided by provisions of the European Convention. There are other commentators who have

⁵³ Bradley (fn 20 above) at fn 76 of his contribution.

⁵⁴ See, for instance, Choo & Nash (1999) *Cr Law Rev* 929; and Choo & Nash (fn 20 above).

⁵⁵ May & Powles *Criminal Evidence* (2004).

⁵⁶ Turpin *British Government and the Constitution: Text, Cases and Materials*, (2005).

made important contributions to the interpretation of section 78(1), and are referred to in chapter two of this work.⁵⁷

Cassese has made a significant contribution on the effect that the European Convention has on the International Criminal Tribunal of Yugoslavia.⁵⁸ In this work, he discusses the admissibility of improperly obtained evidence in the relevant tribunal. The case law of the European Court of Human Rights on the admissibility of real evidence obtained after a violation of a Convention right is contradictory. This conflict is explored by Butler.⁵⁹ The doctrine of a 'margin of appreciation' plays an important role in the application of the provisions contained in international instruments to national law. This doctrine is relevant in the relationship between the European Convention and the PACE. Among other contributions, the work of MacDonald forms part of the research material explored with regard to this doctrine.⁶⁰

The admissibility of evidence under section 35(5) of the Constitution essentially consists of one test: an assessment of whether exclusion or admission of the disputed evidence would be detrimental to the criminal justice system.⁶¹ However, two legs or phases of the admissibility assessment have been

⁵⁷ For instance, Howard et al *Phipson on Evidence* (1990); Feldman (1990) *Crim L Rev*, 452; Bradley (1993) *Michigan Journal of International Law* 121; Sharpe (1996), *The New Law Journal* 1086; Caldwell & Chase (fn 20 above); Bradley (fn 20 above).

⁵⁸ "The impact of the European Convention on Human Rights on the International Tribunal of Yugoslavia" in Dixon et al *International Criminal Law* (2002).

⁵⁹ (2000) 11 *Crim L Forum* 461.

⁶⁰ MacDonald "The Margin of Appreciation" in MacDonald et al (eds) *The European System for the Protection of Human Rights* (1993).

⁶¹ Steytler (fn 16 above) at 36 he convincingly argues as follows: "It should be noted that there is principally one test – whether the admission of the would be detrimental to the administration of justice. The test relating to the fairness of the trial is a specific manifestation of this broader enquiry ...".

developed. The first phase of the test is concerned with the fair trial assessment. Ratushny is a prominent Canadian scholarly writer who has on various occasions written with regard to the interpretation of the concept 'trial fairness' under section 24(2) in Canada.⁶² He favours a broad and purposive interpretation of the concept 'fair trial' that expands the scope of the common law 'privilege against self-incrimination' to encompass the protection of 'real evidence'. Diametrically opposed to Ratushny's view is that of Paciocco,⁶³ a devoted protagonist of the retention of the scope of the common law privilege against self-incrimination, which distinguishes between the admissibility of 'real' evidence and testimonial compulsion. In his view, 'real' evidence, unconstitutionally obtained, should in general be admitted. One of the eminent Canadian scholars who support the views of Ratushny is Roach,⁶⁴ while others prefer the opinion proclaimed by Paciocco.⁶⁵ The 'refined' fair trial requirement, introduced by *Stillman*, has elicited fervent response from Canadian commentators. Significant contributions in this regard were made by Mahoney,⁶⁶ Pottow,⁶⁷ Davies,⁶⁸ and Penney.⁶⁹

⁶² His contributions are the following: Ratushny (1973) *McGill LJ* 1; Ratushny *Self-incrimination in the Canadian Criminal Process* (1979); Ratushny (1987) 20 *CLQ* 312; and Ratushny "The role of the Accused in the Criminal Process" in Beaudoin & Ratushny (eds) *The Canadian Charter of Rights and Freedoms* (1989).

⁶³ (1989) *McGill LJ* 74; Paciocco (1996) 38 *CLQ* 26; Paciocco (2000) *Can Crim LR* 63; and Paciocco (2001) 80 *CBR* 443.

⁶⁴ Fn 37 above.

⁶⁵ See, for example, Mahoney (1999) 42 *CLQ* 44; Delaney (1997) 76 *CBR* 521; Hogg *Constitutional Law of Canada* (1992).

⁶⁶ Mahoney (ibid).

⁶⁷ (2001) 44 *CLQ* 34.

⁶⁸ (2002) 46 *CLQ* 21.

⁶⁹ (2004) 48 *CLQ* 49.

The second phase of the admissibility assessment in Canada consists of a determination of whether admission or exclusion of the disputed evidence would cause 'disrepute' to the administration of justice. Hogg,⁷⁰ Roach,⁷¹ Young⁷² and Hession⁷³ have written on the interpretation of this phase of the section 24(2) analysis.

South African scholarly writers who have written on the admissibility of unconstitutionally obtained evidence in South Africa are notably De Jager,⁷⁴ Schwikkard,⁷⁵ Steytler,⁷⁶ Van der Merwe⁷⁷ and Viljoen.⁷⁸ Other commentators have also added to the discussion of section 35(5) of the South African Constitution.⁷⁹

⁷⁰ Fn 65 above.

⁷¹ Fn 37 above.

⁷² Young (1996) 39 *CLQ* 362.

⁷³ (1989) 41 *CLQ* 93; see also Gold (1989) 31 *CLQ* 260; Whyte & Lederman *Canadian Constitutional Law: Cases, Notes and Materials* (1992); Sopinka, Lederman & Bryant *The Law of Evidence in Canada* (1993); Davison (1993) 35 *CLQ* 493; Delisle (1993) 16 CR (4th) 286; Mitchell (1993) 35 *CLQ* 433; Mitchell (1980) 30 *CLQ* 165; Donovan (1991) *U T Fac L Rev* 233; Mcleod et al (eds) *The Canadian Charter of Rights: The Prosecution and Defence of Criminal and Other Statutory Offences* (Vol 3, 1996); Mitchell (1996) 38 *CLQ* 165; Stuart (1996) 49 CR (4th) 387; Delisle (1996) 42 CR (4th) 61 Fenton (1997) 39 *CLQ* 86; Godin (1996) 54 *U T Fac Law Rev* 107; Delaney (fn 65 above); Brewer (1997) *Can Crim LR* 329; Pringle (1999) 43 *CLQ* 86; Mahoney (fn 65 above); and Choo & Nash (fn 20 above).

⁷⁴ Fn 6 above.

⁷⁵ Fn 1 above; Schwikkard in Currie & De Waal (eds) (fn 12 above); see also Schwikkard "Evidence" in Woolman et al (eds) *Constitutional Law of South Africa* (Vol 1, 2nd ed, 2007).

⁷⁶ Steytler (fn 16 above).

⁷⁷ Van der Merwe (fn 16 above); Van der Merwe (1992) *Stell LR* 173; and Van der Merwe (1998) 11 *SACJ* 462.

⁷⁸ Viljoen (fn 16 above); Viljoen (1994) *De Jure* 231.

⁷⁹ Most notably, Zeffertt et al (fn 7 above); Naude (fn 16 above); Schutte (fn 47 above); Naude (2001) 14 *SACJ* 38; see also Ally (2005) 1 *SACJ* 66.

E. Methodology

The approach adopted in this work consists of a comparative methodology, with the focus mainly on the exclusionary provisions applicable in England, Canada and South Africa. This approach is followed for the following reasons: One of the common features of the jurisdictions mentioned is the fact that they are common law countries, where the privilege against self-incrimination is one of the basic tenets of the right to a fair trial. These jurisdictions, as such, share a common legal-historic past. Furthermore, these jurisdictions have integrated an exclusionary provision into their legal systems that serves to protect fundamental rights. England and Wales have, during October 2000, by means of the Human Rights Act of 1998, incorporated the European Convention of Human Rights into their national law. It is against this background that the impact of the Human Rights Act on the admissibility of evidence in England and Wales is explored. The relevance of a study of the legal position in England and Wales has thus been established. The relation between section 24(2) of the Charter and section 35(5) of the South African Constitution has been set out under A above. Suffice to state that the similarities between section 24(2) and section 35(5) are remarkable. In the light hereof, the following dictum by Kriegler J in *Bernstein v Bester NO*,⁸⁰ confirms the appropriateness of the comparative analysis followed in this thesis:⁸¹

⁸⁰ 1996 2 SA 751 (CC).

⁸¹ Ibid at par 133. (Emphasis added). See also the following argument by O'Regan J in *Key v Minister of Safety and Security* 2005 9 BCLR 835 (CC) at par 35: "It would seem unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems' grappling with issues similar to those to which we are confronted".

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.

However, the fact that the provisions contained in section 24(2) and section 35(5) are couched in a strikingly similar manner does not mean that the Canadian model should be embraced without having proper regard to the political, educational, and socio-economic differences between the two countries.⁸² Conversely, Ackermann cautions that an over-emphasis of cultural relativism (legal and otherwise) and political differences should not be used as an excuse to prevent 'the benefits of comparative legal usage'.⁸³ Rather, he argues, these cultural and political differences should be contextualised instead of used to entirely discredit the advantages of legal comparativism.

This work consists of an analytical study of the following primary sources: the exclusionary provisions contained in the PACE and the Human Rights Act within the jurisdiction of England and Wales, section 24(2) of the Canadian Charter, and section 35(5) of the South African Constitution, including relevant case law in these jurisdictions. In addition, secondary sources, in the form of scholarly writings relevant to these jurisdictions, have been explored.

⁸² *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 1 SA 984 (CC) at par 133.

⁸³ (2006) 123 *SALJ* 497 at 505.

F. Limitations

The issues addressed in this work deal with the impact of fundamental rights on aspects of both criminal procedural law and the law of evidence, but it should be underscored that the focal point of this study consists of the scope, application and interpretation of section 35(5) as a constitutional remedy when fundamental rights have been violated. As such, this work does not contain a detailed analysis of the provisions of the Criminal Procedure Act, or the constitutionality of any of its provisions, save section 225(2).⁸⁴ Reference is made to other sections of the Criminal Procedure Act, although the discussion thereof is not comprehensive; on the contrary, it is selective, with the purpose of elucidating the procedural rights applicable to the admissibility of evidence under section 35(5).

Canadian scholars have undertaken empirical studies to determine whether the exclusion of reliable, but unconstitutionally obtained evidence, would, in the eyes of a reasonable person, bring the administration of justice into 'disrepute'.⁸⁵ Such an approach is not followed in this work. By contrast, the determination of 'disrepute' or 'detriment' is considered from a legal point of view, and not from a socio-political point of view. This does not mean that empirical studies of the impact of the criminal justice system on society should altogether be ignored. Rather, an empirical study is not undertaken in order to limit the scope of this work.

A discussion of the limitations clause and its relation with section 35(5) has been dealt with by Van der Merwe.⁸⁶ The approach suggested by him is supported. As a result, this work does not deal with this issue expansively;

⁸⁴ See chapter 4 below.

⁸⁵ Bryant et al (1990) 2 *CBR* 1; and Gold et al (1990) 1 *Supreme Court LR* 555.

⁸⁶ Fn 16 above at 209-210.

rather, it is referred to selectively to demonstrate its function in the admissibility assessment when evidence has been obtained in violation of section 35(5).

For the reason that section 35(5) is not applicable to civil matters,⁸⁷ a discussion of the admissibility of evidence in such matters have been omitted.

This study considers case law as at 31 March 2009. The cut-off date was initially set for an earlier date, but because of the importance of recent developments in England,⁸⁸ Canada⁸⁹ and South Africa,⁹⁰ the relevant date was extended.

G. Structure and overview of chapters

This study consists of six chapters. A brief overview of the chapters, starting from chapter two, is provided below.

Chapter 2 introduces the different rationales applicable to exclusionary remedies. The rationale for exclusion plays a pivotal role in determining the scope of the exclusionary remedy. It then proceeds to consider the application of the exclusionary remedy in the jurisdiction of England and Wales, more particularly the remedy contained in section 78(1) of the PACE, as well as the impact that the Human Rights Act of 1998,⁹¹ and the case law of the European

⁸⁷ Ibid at 249; see also Currie & De Waal *The Bill of Rights Handbook* (4th ed, 2001) at 287.

⁸⁸ Judgment was delivered in *R v Ibrahim and Others* on 23 April 2008, and published on 8 May 2008 in *The Times OnLine*, accessed on 14 May 2008 at business.timesonline.co.uk/tol/business/law/reports/article.

⁸⁹ The appeal in *Grant* was argued before the Supreme Court of Canada on 23 April 2008.

⁹⁰ Judgment was delivered in *Mthembu* (fn 26 above) on 10 April 2008.

⁹¹ Section 3 of the Human Rights Act, 1998 ("the Human Rights Act") incorporated the European Convention into national law in England and Wales.

Court of Human Rights had on the common law inclusionary rule. South African law during the periods between the Interim Constitution of 1993 and the enactment of the Constitution of 1996 is thereafter explored. In addition, chapter two considers the provisions of Article 69(7) of the ICCS,⁹² having regard to the dictates of sections 39(1)(b) and 39(1)(c) of the South African Constitution.

The following phrase of section 35(5) is central to the discussion in **chapter 3**: 'evidence obtained in a manner that violates any right contained in the Bill of Rights'. In analysing this phrase, chapter three outlines and critically reviews, among others, the following issues:

- the beneficiaries and other threshold requirements relating to section 35(5); and
- procedural matters relevant to section 35(5).

Chapter 4 consists of an analysis of the **first leg** or phase of the substantive phase of the admissibility assessment (also referred to as the first group of factors). This chapter is divided into the following three main sections, including an introduction:

- The first part is focused on the interpretation of the concept 'fair trial', as expounded by the Canadian Supreme Court in *Collins*,⁹³ which was subsequently 'refined' in *Stillman*⁹⁴ and recently modified in *Grant*.
- The second section deals with the interpretation of the concept 'fair trial' by the courts of South Africa.

⁹² Fn 22 above.

⁹³ Fn 15 above.

⁹⁴ Fn 42 above.

- The third part consists of a conclusion and suggestions as to how the South African courts should interpret the concept 'fair trial', bearing in mind the purposes sought to be protected by section 35(5).

Chapter 5 considers the **second leg** or phase of the substantive phase of the admissibility analysis. This leg of the analysis consists of the following two groups of factors which, it is submitted, should, while having due regard to the outcome of the assessment of the first group of factors,⁹⁵ be considered and weighed by the courts to determine whether either exclusion or admission of the evidence would be 'detrimental to the administration of justice':⁹⁶

- the seriousness of the violation (or judicial condonation of unconstitutional police conduct); and
- the effects of exclusion or admission on the repute of the criminal justice system.

⁹⁵ As mentioned in the summary above, in my view, the presumption in favour of exclusion whenever trial fairness has been impaired (or 'automatic' exclusion), should – as it is applied in Canada – not be followed by the courts of South Africa. Against this background, it is argued in chapter 6 that an infringement that impacts negatively on trial fairness should, more appropriately, be regarded as a serious violation, the effect whereof should be taken into account under the second group of *Collins* factors. If, after having considered this group of factors during the second leg of the assessment, the seriousness of the infringement has not been attenuated by for example, police good faith, the constitutional directive that evidence obtained in violation of fundamental rights 'must be excluded' has been triggered. Admission of evidence obtained after a serious infringement would always be detrimental to the integrity of the justice system. Such an approach is strongly aligned to the principal rationale of section 35(5) which dictates that judicial condonation of serious constitutional violations would be harmful to the integrity of the justice system.

⁹⁶ One of the recommendations made in chapter 6 of this thesis, is that a court should consider "all the circumstances" before it makes a ruling in terms of section 35(5). In other words, all three groups of factors (trial unfairness, the seriousness of the infringement and the effect of exclusion) should be weighed and balanced to determine whether either exclusion or admission would be "detrimental" to the justice system.

Additionally, this chapter considers the role of public opinion or the 'current mood' of society when the courts make the admissibility assessment in terms of section 35(5).

Chapter 6 consists of conclusions and recommendations, including concluding remarks relating to the possible impact that current events may possibly have on the integrity of the South African criminal justice system.