

Chapter 3: Threshold requirements under section 35(5) of the South African Constitution

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A. Introduction

Chapter three consists of a discussion of four important threshold requirements: Firstly, it considers who the beneficiaries of section 35(5) are; secondly, it investigates the nature of the link between the violation and the discovery of the disputed evidence, since section 35(5) dictates that the evidence must have been 'obtained in a manner' that violates a fundamental right; thirdly, it explores the issue of who should bear the burden of proof in showing that a fundamental right has been infringed, including the procedural issue of when the section 35(5) dispute may be raised; and, fourthly, it considers the scope of the standing requirement contained in section 35(5). This is followed by a conclusion and suggestions on how the South African courts should approach the threshold requirements contained in section 35(5).

A court must be satisfied that all the threshold requirements have been satisfied before it proceeds to consider the substantive phase of the section 35(5) analysis. It is an established fact that judicial resources should not unnecessarily be overburdened as a result of superfluous claims. Threshold requirements serve the purpose of separating such claims from those that have merit. For this reason it is important to determine the nature and impact of the threshold requirements contained in section 35(5) on the rights of a person accused of having committed a criminal offence.

Section 35 of the South African Constitution guarantees due process rights ensuring procedural fairness to detained, arrested and accused persons, but not explicitly to suspects. A literal interpretation of section 35 would result in a suspect not being entitled to rely on the exclusionary remedy contained in section 35(5) of the Constitution, despite the fact that her constitutional rights

had deliberately been violated. This state of affairs is a matter for grave concern, because the status of most suspects is more often than not transformed to that of an accused person. The failure to protect suspects by means of the guarantees contained in the Bill of Rights could expose them to be vulnerable to abuse by police officials, thus leaving them without the protection deemed indispensable to protect the procedural rights of arrested, detained and accused persons. The South African case law on this aspect of the law is by no means harmonious. One of the purposes of this chapter is to determine whether suspects are entitled to the same protection as arrested, detained and accused persons, despite the fact that such protection is not explicitly provided for in section 35 of the Bill of Rights.

Section 35(5) contains a threshold requirement dictating that evidence qualifies for exclusion in the event that it had been '***obtained in a manner that violates any right contained in the Bill of Rights***'. This is also referred to as the 'connection' requirement. The Canadian Supreme Court initially adopted a causal nexus test when interpreting this phrase, but soon realised that this imposed too heavy a burden on the accused. A lower threshold requirement was adopted, enabling more accused persons the benefit of relying on section 24(2). The question as to who should bear the burden of proof to show that a right of the accused had or had not been infringed is of great consequence to litigants relying on section 35(5). Yet again, South African case law on this issue is contradictory. It is submitted that it would be necessary for South African courts to determine the nature of the connection requirement, since recent case law dictates that the burden of proof of showing that this requirement had been satisfied, falls to be established by the accused.

In addition to the aforesaid threshold requirements, a brief overview of the standing requirement is embarked upon. The standing requirement in Canada¹ and the United States² has prevented many accused persons from having the platform to dispute the admissibility of unconstitutionally obtained evidence in circumstances when their **own** constitutional rights were not directly violated. One of the purposes of this chapter is to ascertain whether the South African courts should adopt this narrow standing requirement or whether they should be amenable to a broader view of standing than that of the mentioned jurisdictions. It is argued that South African courts should declare their declination to follow the precedents set in Canada and the United States, more particularly relating to standing, and develop our own standing requirement. It is appropriate to first discuss the beneficiaries of the section 35(5) remedy before the other threshold requirements are considered.

¹ See for instance about standing in general, *R v Johnstone* (1990) CRR 308 (SCC), (“*Johnstone*”); *Borowski v Canada (Attorney-General)* (1989) 47 CCC (3d) 1, (“*Borowski*”). With regard to standing, more in particularly relating to section 24(2), see *R v Belnavis* (1996) 107 CCC (3d) 195 (Ont CA), (“*Belnavis*”); *R v Edwards* (1996) 104 CCC (3d) 136, (“*Edwards*”); Godin (1995) 53 *U T Fac Law Rev* 49; Fenton (1977) 39 *CLQ* 279, at 281-292.

² See, for example, *Alderman v US* (1996) 394 US 165, (“*Alderman*”) at 174-175: “The deterrent values of preventing incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of evidence which exposes the truth.” Sunstein (1998) 88 *Colu. L Rev* 1432; Godin (fn 1 above) at 80 where he concludes as follows after having made a comparative analysis of the standing threshold as applied in the USA Federal Court and the New York court: “Like the Supreme Court, the New York courts have decided [following *Alderman*] that deterrence is the primary purpose of the exclusionary rule, but the deterrence value of giving standing to ‘third parties’ whose legitimate expectations of privacy were not directly violated is insufficient to offset the harm to society”.

B. The beneficiaries of the exclusionary remedy

The Constitutional Court was called upon in *Kaunda and Others v President of the Republic of South Africa and Others*³ to determine whether the guarantees provided by the Bill of Rights extends to South African citizens, accused of having committed a crime beyond the borders of the Republic.⁴ Chaskalson P⁵ tersely answered this question as follows:⁶

³ 2005 1 SACR 111 (CC), ("*Kaunda*"). The factual background to this case was the following: The applicants were a group of South African citizens arrested in Zimbabwe on a number of charges. The applicants were concerned that they might be extradited to Equatorial Guinea, where they would stand accused of being mercenaries and of plotting a coup to overthrow the existing government. They contended that if this happened, their trial would be unfair. Moreover, once convicted, they feared that the death penalty might be imposed.

⁴ Per Chaskalson P at par 21, the President of the Constitutional Court formulated the issue as follows: "The relief they claim is in effect a *mandamus* ordering the government to take action at a diplomatic level to ensure that the rights they claim to have under the South African Constitution are respected by the two foreign governments".

⁵ Langa DCJ, Moseneke, Skewiya, Van der Westhuizen, and Yacoob JJ concurring.

⁶ *Kaunda* (fn 3 above) at par 37. However, compare the dissenting opinion of Ngcobo J, in *Kaunda*, at par 197, where argued as follows: "The right to a fair trial is a basic human right to which all those who are accused of a crime are entitled. The nature of the crime charged is irrelevant. It is a fundamental human right enshrined in both the African Charter and the ICCPR. A South African national who is facing a criminal charge in a foreign country is entitled to this most basic human right. When this right is threatened, the South African national affected has a constitutional right to seek protection from the government against such threat". Ngcobo J bases his argument on section 3(2)(a) of the Constitution, which confers a right to be exercised by South Africans to request diplomatic protection against infringements of fundamental rights. The judge concludes (at par 197), by asserting that the "government has a constitutional duty to grant such protection, unless there are compelling reasons for not granting it".

The bearers of the rights are people in South Africa. Nothing suggests that it [the Constitution] is to have general application, beyond our borders.

This approach of the Court was premised on the majority judgment of the Canadian Supreme Court in the case of *R v Cook*,⁷ where it was held that the Canadian Charter could not be construed as having extraterritorial effect, in defiance of the sovereignty of another nation state.⁸ The anomaly of the relief requested by the applicants was highlighted by the majority judgment when it pointed out that South African citizens cannot expect to compel their government to demand from a foreign nation state or its officials that they comply with 'rights that our nationals have under our Constitution'.⁹ Such a demand, Chaskalson P reasoned, would be 'inconsistent with the principle of State sovereignty'.¹⁰ Based on the approach of the Constitutional Court in *Kaunda*, it is evident that an accused, whose rights under section 35 of the South African Constitution had been violated in a foreign country, may not rely on the protection guaranteed by its provisions in such foreign country. Such an accused would, by the same token, not be entitled to rely on the exclusionary remedy contained in section 35(5). However, the court was not called upon to make a ruling on the admissibility of unconstitutionally obtained evidence procured by South African governmental agents in a foreign jurisdiction, intended for use in a South African court.¹¹

⁷ [1998] 2 SCR 597, ("*Cook*").

⁸ The court also relied heavily on the opinion of Dugard, the Special Rapporteur of the International Law Commission of the UN, who published its report during 2000. See paragraph 38 of the majority judgment in *Kaunda*.

⁹ *Kaunda* (fn 3 above) at par 44.

¹⁰ Loc cit.

¹¹ See *R v Harrer* (1995) 101 CCC (3d) 193, ("*Harrer*"), where the Supreme Court of Canada was called upon to decide this issue.

It is submitted that in such instances the South African Constitution would be indirectly applicable, with the result that an accused should be regarded as a beneficiary. This contention is based on the provisions of sections 7(2),¹² 8(1)¹³, 35¹⁴, 38,¹⁵ read with section 39(2) of the Constitution. Whether the Constitution would be directly applicable would depend on whether the accused was a beneficiary of a right when the infringement occurred. In order for the accused to qualify as a beneficiary, the infringement must have occurred within the national borders of South Africa.¹⁶ In the painted scenario, the infringement took place in a foreign country, with the result that the accused could not be said to meet the criteria set for the requirements of being a beneficiary of the provisions contained in section 35. In a word, the evidence was not 'obtained in a manner', within the meaning of section 35(5). As a result, section 35(5) would not be directly applicable.

However, the trial will take place in South Africa and the accused must surely, at that stage, be a beneficiary of the right to a fair trial, because **admission** of the evidence could arguably impair the fairness of the trial.¹⁷ The Constitutional Court in *Zuma* held that every accused is guaranteed a trial that complies with

¹² This subsection provides that the government has a duty to "respect, protect, promote and fulfil" the rights contained in the Bill of Rights.

¹³ This section provides that the Bill of Rights "applies to all law, and binds the legislature, the executive, the judiciary and all organs of state".

¹⁴ This section directs that trial fairness should be measured against the standard of "substantive fairness". See *S v Zuma* 1995 4 BCLR 401 (CC) at par 16, ("*Zuma*").

¹⁵ Section 38 provides as follows: "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed ... and the court may grant appropriate relief ...".

¹⁶ Currie & De Waal "Application of the Bill of Rights" in Currie & De Waal (eds) *The Bill of Rights Handbook* (5th ed, 2005) at 32.

¹⁷ Some might argue that this argument calls upon the Constitution to permit indirectly what it is not directly permitted to do, ie extend its reach beyond its borders.

notions of 'substantive fairness'.¹⁸ It follows that when the admission of evidence that could impair the fairness of the trial is in dispute, an accused should be entitled to an exclusionary remedy that is aimed at ensuring that the trial is substantively fair. The accused may, based on section 34, challenge the admissibility of the evidence obtained in this manner.¹⁹ Alternatively, the presiding officer may be called upon to exercise her common law discretion to exclude the disputed evidence. The question is: Should such a determination be based on the ground that the accused seeks "appropriate relief", in terms of section 34, or the common law exclusionary rule? This issue remains to be settled by the courts of South Africa and Canada.²⁰ When the Constitution is indirectly applicable, it entails that the common law or legislation must be applied to give effect to the values contained in the Bill of Rights.²¹

Yet, the common law exclusionary rule was not designed to protect the fundamental rights guaranteed by section 35. In this regard, section 39(2) of the Constitution further directs that when the common law needs to be developed, a court should enhance the 'spirit, purport and purposes' of the Bill of Rights. This

¹⁸ See *Zuma* (fn 14 above) at par 16.

¹⁹ For an analogous approach in Canadian context, see *Harrer* (fn 11 above). In *Harrer*, based on analogous facts, admissibility was determined in terms of section 24(1) of the Charter.

²⁰ In Canadian context, see *R v Therens* (1985) CCC (3d) 481, [1985] 1 SCR 613, ("*Therens*"), where it was held that s 24(1) should not be applied to exclude evidence obtained in violation of the Charter; see also *Harrer* (fn 11 above) at par 23-24, where the Supreme Court held that the common law exclusionary discretion should be deemed as being constitutionalised in order to "give effect to the Charter's guarantee of a fair trial"; compare the minority opinion delivered by McLachlin J (now McLachlin CJC) in *Harrer* (ibid), relying on s 24(1) – containing substantially similar provisions as s 34 of the South African Constitution; see further *R v White* (1999) 135 CCC (3d) 257 at par 89, ("*White*"), where it was observed that the Supreme Court agrees with the majority opinion in *Harrer*, but also agrees with the minority decision of McLachlin J that s 24(1) may be "employed as a discrete source of a court's power to exclude".

²¹ Currie & De Waal (fn 16 above) at 64.

would mean that the admissibility assessment, aimed at ensuring trial fairness should be determined in terms of the common law, steeped in the values contained in the Bill of Rights. It is submitted that the admissibility test suggested by Schwikkard is appropriate for such determinations,²² because the suggested test seeks to achieve a fine balance between due process concerns and the value of crime control, within the confines of the trial fairness framework. In this manner effect would be given to the dictates of section 39(2). In view of the above, it is submitted that admissibility assessments by means of the indirect application of the Bill of Rights, aimed at permeating the spirit of the Bill of Rights into the common law, should be undertaken by balancing the counter-veiling and equally important societal interests in due process concerns against societal concerns in crime control.²³

Read superficially and literally, section 35 of the Constitution could be taken to protect only the rights of detained, arrested and accused persons.²⁴ This would exclude suspects from relying on the provisions of the Constitution, especially entrenched to ensure that the trial of every accused complies with the due process values guaranteed in terms of the Bill of Rights. Against this background, the interpretation of section 35 is not only of academic interest, but also a very important practical issue. If suspects were not accorded the right to rely on the provisions of section 35, the remedy contained in section 35(5) of the Constitution may not be available to them during their subsequent trial²⁵ (when

²² "Arrested, Detained and Accused Persons" in Currie & De Waal (fn 16 above) at 794.

²³ For Canadian authority to this effect, see *Harrer* (fn 11 above); see also Davies (2000) 29 CR (5th) 225.

²⁴ See for example the heading of the section which reads: "Arrested, detained and accused persons".

²⁵ Section 35(5) is applicable only when evidence is obtained in a manner that ***violates rights contained in the Bill of Rights***. This would entail that if the suspect is not a beneficiary when the infringement occurs, she would have to rely on the common law exclusionary rule. See Van der Merwe "Unconstitutionally Obtained Evidence" in Schwikkard & Van der Merwe (eds)

their status would have changed to that of an accused): yet, the fact that fairness of the pre-trial procedure will, more often than not, be determinative of trial fairness.

When the South African courts have to determine this issue, the proper approach to the resolution of this problem would be to consider the position in terms of the common law, unaffected by the constitutional provisions and thereafter the constitutional interpretation should be performed.²⁶ This sequence will therefore be adhered to in this work. The common law position is considered first, before the constitutional position is explored.

1 The concept 'suspect' during the pre-constitutional era

The general rule of South African common law provides that all relevant evidence is admissible unless it resorts under a specific rule that would cause the evidence to be characterised as inadmissible.²⁷ The requirement that testimonial evidence by an accused be made freely and voluntarily had to be complied with. Thus, analogous to the law of England and Wales, the reliability requirement is of paramount importance in South Africa when admissibility is determined. Non-

Principles of Evidence (2nd ed, 2002) at 202. See also the writer's submission with regard to this round-about approach at par 6 below.

²⁶ *S v Melani* 1996 2 BCLR 174 (EC), ("Melani"); *S v Cloete* 1999 2 SACR 137 (C), ("Cloete"); *National Media Ltd and Others v Bogoshi* 1998 4 SA 1196 (SCA) at 1216, ("Bogoshi"). In *Zantsi v Council of State, Ciskei, and Others* 1995 4 SA 615 (CC), ("Zantsi"), Chaskalson P at par 3 cited *S v Mhlungu and Others* 1995 3 SA 867 (CC), ("Mhlungu"), where Kentridge AJ said : "I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed".

²⁷ *R v Trupedo* 1920 AD 58, ("Trupedd"); *S v Mabaso and Another* 1990 3 SA 185 (A), ("Mabasd").

compliance with this requirement would render such evidence inadmissible. The 1931 Judges' Rules²⁸ have been described as administrative guidelines to be observed by the police when questioning a suspect.²⁹ The aim of these Rules is to prevent police misconduct when statements are obtained from suspects or detainees while in a position of vulnerability. Failure to comply with the Judges' Rules was a factor to be taken into account when the admissibility of admissions and confessions have to be determined. However, failure to comply with the Judges' Rules did not *per se* create sufficient cause to render a statement or confession inadmissible. The Judges' Rules make provision that police officers should not question suspects without warning them that they are not obliged to answer.³⁰ Furthermore, leading questions should not be put to a suspect when interviewed by a police officer.³¹ Failure to warn a suspect according to the Judges' Rules was a factor to be considered when determining the fairness of the procurement of the statement. The purpose of the Judges' Rules was to provide greater protection to suspects than that provided by the common law.³² Sections 35(1)(a), (b) and (c) of the South African Constitution guarantee these rights to persons who have been **arrested**, but not to suspects. In addition, section 35 of the South African Constitution, viewed in its entirety, contains no specific constitutional guarantee for the protection of the rights of suspects.

However, section 39(3) of the Constitution provides that when South African courts interpret the rights contained in the Bill of Rights, they should be mindful of the fact that

²⁸ These Rules were adopted in 1931, at an international judges' conference held in Cape Town, South Africa.

²⁹ *R v Kuzwayo* 1949 3 SA 761 (A), ("Kuzwayo").

³⁰ Kriegler *Hiemstra: Suid-Afrikaanse Strafproses* (1993) at 557-558.

³¹ *Ibid* at 559.

³² *Mabaso* (fn 27 above).

[t]he Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

The Judges' Rules confirm and simultaneously aim to enhance the protection of the rights or freedoms of suspects, shielded in terms of the South African common law.³³ In addition, South African courts, in their interpretation of the provisions of sections 217 and 219 of the Criminal Procedure Act,³⁴ have incorporated the spirit of the Judges' Rules into their assessment of the admissibility of testimonial evidence and pointings-out.³⁵ Gihwala AJ, in a judgment delivered in the constitutional era, dealing with the rights of arrested and accused persons, held in *S v Van der Merwe*³⁶ that warnings in terms of the

³³ These rules are based on a set of rules formulated in England and Wales in the case of *R v Voisin* [1918] 1 KB 531, ("Voisin").

³⁴ Act 51 of 1977 (as amended), ("the Criminal Procedure Act").

³⁵ Statements obtained in substantial non-compliance with the Judges' Rules had rendered such statements inadmissible for want of compliance with section 217 of the Criminal Procedure Act. Compare *S v Mofokeng & Another* 1968 4 SA 852 (W), ("Mofokeng"); *S v Mpetha & Others* (2) 1983 1 SA 576 (C), ("Mpetha"); *S v Biko* 1972 4 SA 492 (O), ("Biko"); see *S v Sampson & Another* 1989 3 SA 239 (A), ("Sampson"), where Milne JA issued a firm warning that the fact that the Judges' Rules are administrative guide lines does not mean that it should be disregarded; see also *S v Mufuya & Others* 1992 2 SACR 370 (W), ("Mufuya"), where the accused was questioned while in custody and the informational content of the right to remain silent ignored, it was held that the accused had been unduly influenced to make such statement; however, compare *R v Mthlongo* 1949 2 SA 552 (A), ("Mthlongo"), where it was said that statements obtained in violation of the Judges' Rules are not *per se* inadmissible (it is but one factor which has to be considered to determine admissibility) - admissibility is determined by considering whether the statements had been made freely and voluntarily.

³⁶ 1997 19 BCLR 1470 (O) at 1474, ("Van der Merwe"): "Wanneer 'n persoon volgens regtersreëls gewaarsku word, word daar inderdaad in [sic] my siening, uiting gegee aan die bepalings van die Grondwet want die aard en omvang van daardie regtersreëls sal lei tot die behoorlike beskerming van die gearresterde en/of beskuldigde se regte". Loosely translated, this passage has the

Judges' Rules are deemed to be the equivalent of the informational warnings contained in the Constitution.³⁷ It is trite that the warnings in terms of the Judges' Rules are triggered when a person is **suspected** of having committed a criminal offence.³⁸ In the light hereof, it is submitted that the warnings in terms of the Judges' Rules are congruent with the values and principles underlying the South African Bill of Rights, more in particular sections 35(1)(a), (b) and (c), which serves the purpose of curtailing police misconduct and ensuring that **suspects** - presumed to be innocent until proven otherwise - are not tricked or unduly influenced to incriminate themselves during the pre-trial phase.

Against this background, it is submitted that in addition to the rights protected by the Judges' Rules, a suspect should be accorded the extended, corollary benefit of the constitutional protection of the right to legal representation. This should be the case, because the right to legal representation serves to prevent the unwarranted interference with a suspect's privilege against self-incrimination. This contention is fortified by the *dictum* of the Constitutional Court in *Zuma*,³⁹ to the effect that the right to a fair trial, conferred by section 25(3) of the Interim Constitution, 'is broader than the list of specific rights set out in paragraphs (a) to (j) of the subsection', for '[i]t embraces a concept of substantive fairness which is not to be equated with **what passed muster in our criminal courts before the Constitution came into force**'.⁴⁰

following meaning: When a person is warned in terms of the Judges' Rules, the informational warnings in terms of the Constitution, have in my opinion, in effect been complied with, because the nature and extent of the Judges' Rules do in fact give effect to the proper protection of the rights of an arrested or accused person (my translation).

³⁷ However, it should be added that arrested or accused persons have the additional constitutional protection of having to be informed about the right to legal representation.

³⁸ Kriegler (fn 30 above) at 174.

³⁹ Fn 14 above at par 16; see also *S v Dzukuda*; *S v Tshilo* 2000 2 SACR 443 (CC); 2000 4 SA 1079 (CC) at paras 9 and 11, ("*Dzukuda*").

⁴⁰ *Zuma* (loc cit). Emphasis added.

The failure to inform a suspect of the right to legal representation would have the effect of depriving suspects 'of their right to remain silent and not to incriminate themselves'. Such failure offends not only the concept of 'substantive fairness which now informs the right to a fair trial in this country but also the right to equality before the law'.⁴¹ Fairness during the pre-trial phase will, no doubt, in many instances, determine whether the trial is fair. This was emphasised in *Melani*,⁴² when Froneman J interpreted the right to counsel during the pre-trial phase purposively and generously, by highlighting the aim that the right seeks to achieve: to ensure that the accused has a fair trial. It is submitted that even though this case was decided in terms of the Interim Constitution, it remains an authoritative source when interpreting the provisions of section 35 of the 1996 Constitution.⁴³ Moreover, the 1996 Constitution contains substantially similar provisions as its precursor. The interpretation by Froneman J of the right by necessary implication included a suspect as a benefactor of the pre-trial right to legal representation. Froneman J reasoned as follows:⁴⁴

The purpose of the right to counsel and its corollary to be informed of that right (embodied in s25(1)(c) is thus to protect the right to remain silent, the right not to incriminate oneself and the right to be presumed innocent until proven guilty. Sections 25(2) and 25(3) of the [Interim] Constitution make it abundantly clear that this protection exists from the inception of the criminal process ... It

⁴¹ *Melani* (fn 26 above) at 347.

⁴² Loc cit.

⁴³ *Dzukuda* (fn 39 above) at 471, par 52, where Ackermann J said in respect of section 25(3)(a) of the Interim Constitution: "Although *Sanderson* was concerned with the application of the interim Constitution ... which guarantees the 'right to a public trial before an ordinary court of law within a reasonable time of having been charged,' the principles enunciated in that judgment are of equal application to the right protected by s 35(3)(d) of the present Constitution".

⁴⁴ Fn 26 above at 150. Emphasis in original text.

[the protection] has everything to do with the need to ensure that an accused is fairly treated in the *entire* criminal process: in the 'gatehouses' of the criminal justice system (that is in the interrogation process) as well as in the 'mansions' (the court).

No doubt, when the 'interrogation process' ensues, the accused would be *suspected* of having committed a crime. She would therefore be a 'suspect'. This view is fortified by the fact that the passage relied upon by Froneman J stems from the principle of the 'absence of pre-trial obligation', as proclaimed by Ratushny.⁴⁵ In terms of this principle, a person should not be compelled to assist the prosecution in the evidence-gathering process, by locating or creating 'real' or testimonial evidence against herself, at the behest of governmental officials. For this reason, evidence obtained as a result of a failure to inform a suspect of her rights to remain silent, or her right to legal representation, for instance, would lead to any evidence obtained after the constitutional intrusion, to be susceptible for exclusion.

2 Brief comparative analysis of the concept 'suspect'

Sections 39(1)(a) and (b) of the Constitution dictate that South African courts must consider international law and may have regard to foreign law when interpreting the Bill of Rights. A comparative overview of the legal position on

⁴⁵Ratushny (1973) *McGill LJ* 1, ("Ratushny McGill"); see also Ratushny *Self-incrimination in the Canadian Criminal Process* (1979), ("Ratushny Self-incrimination"); see also Ratushny (1987) *CLQ* 312, ("Ratushny, *CLQ*"); Ratushny "The Role of the Accused in the Criminal Process" in Beaudoin & Ratushny (eds) *The Canadian Charter of Rights and Freedoms* (1989), ("Beaudoin & Ratushny"). The principle of the "absence of pre-trial obligation" is discussed in Chapter 4 of this thesis.

this issue in Canada, the United States, England and Wales, Australia, Germany, as well as treaty and non-treaty standards, is therefore apposite.

In *Therens*,⁴⁶ Le Dain J sitting on the bench of the Canadian Supreme Court held that a person is deemed to be 'detained', when she is deprived of her freedom; or when a policeman, by means of a demand or direction, assumes control over the movements of a person, having significant legal consequences, which as a result prevents access to legal representation; and when a person, as a result of psychological compulsion, reasonably perceives that her freedom of choice has been curtailed by a police officer, without the application or threat of the application of force.⁴⁷ L' Heureux-Dube J, dissenting in *Elshaw*,⁴⁸ wrote that the interpretation by Le Dain J placed an 'undue restraint on law enforcement agencies', and referred to various decisions handed down by the Canadian Courts of Appeal⁴⁹ where the dictum of Le Dain J was applied in a manner so as

⁴⁶ Fn 20 above at par 57.

⁴⁷ (1991) 67 CCC (3d) 97, [1991] 3 SCR 24, ("*Elshaw*"). L' Heureux-Dube J wrote a dissenting opinion in *Elshaw*.

⁴⁸ Ibid at 27-29 of the printed page (publication pages or paragraph numbers not available), accessed at <http://csc.lexum.umontreal.ca/en/1991/1991ecs3-24/1991rcs3-24.html>, on 15 April 2007.

⁴⁹ See, for instance, *R v Moran* (1987) 36 CCC (3d) 225 (Ont. CA), ("*Moran*"). Before the accused was connected to the murder of his girlfriend, the police did a routine check on her habits and called upon the accused to see them at the police station. At the first interview he told them about the affair. At the second interview, conducted because the accused wanted to go over his first statement, he placed himself in the company of the deceased on the day of her death. At the trial he sought to exclude this evidence, relying on s 24(2) and the *dictum* of Le Dain J in *Therens*. Martin JA laid down a list of criteria to determine whether the accused had been 'detained.' The court applied that criteria to the facts of the case and held that the accused had not been 'detained' in terms of s 10(b) of the Charter during the two interviews. See also *R v Espito* (1985) 24 CCC (3d) 88 (Ont. CA), ("*Espito*"); *R v Voss* (1989) 50 CCC (3d) 58 (Ont. CA), ("*Voss*"); however, compare the recently decided matter of *R v Janeiro*, (2003) CarswellOnt 5081, ("*Janeird*"). A police officer stopped the accused at 2:09 in the early morning after he

to limit the scope of the concept of 'detention'. In *R v Mann*⁵⁰ Iacobucci J mentioned obiter in a judgment written on behalf of the majority judgment that the police cannot be said to 'detain' every suspect they stop for purposes of identification or an interview. Therefore, it was observed, that delays that do not involve significant physical or psychological confinement does not trigger the protection guaranteed by sections 9 or 10 of the Charter.⁵¹ Stuart, in heads of argument filed in an appeal heard by the Supreme Court of Canada on 23 April 2008 in the case of *R v Grant*,⁵² argued that the focus on physical and psychological detention could encourage the police to avoid the activation of sections 9 and 10 of the Charter by delaying an arrest.⁵³ In order to avoid such unwarranted conduct, he suggests that the concept 'detention' should be

exceeded the speed limit. The officer detected a strong smell of liquor from the breath of the accused when he spoke to him. He asked the accused if he had consumed liquor earlier that morning and he admitted having consumed two beers. The officer thereupon contacted his dispatcher to send another vehicle with an approved screening device, to obtain a breath sample from the accused. Meanwhile the accused waited in his vehicle. Another officer arrived at the scene at 2:15 with the approved screening device. The approved screening demand was read to the accused at 2:17. He was arrested at 2:25 for failing to provide a breath sample for use in the approved screening device. The accused was informed of his right to legal representation after his arrest, which he declined to exercise. The issue to be decided was whether the officer was entitled to demand a breath sample before any realistic opportunity to consult counsel. It was held that the accused had been 'detained' while the officer waited for the screening device. However, s 254 of the Canadian Criminal Code creates a reasonable limitation on the right to counsel. The 8 minute detention, in absence of a demand for a breath sample or failure to inform the accused of his right to legal representation rendered the detention unlawful, and his right to counsel had accordingly been violated. However, had the demand been made at 2:10, the 6 minute delay would not have been unreasonable. The test results of the breath sample was excluded, since it compromised trial fairness concerns.

⁵⁰ (2004) 3 SCR 59, ("*Mann*").

⁵¹ Ibid at par 19.

⁵² (2006) 38 CR (6th) 58 (Ont CA), ("*Grant*").

⁵³ Stuart's Heads of Argument at 9. The Heads of Argument is annexed to this thesis and marked "Annexure D".

broadened to include both vehicle and pedestrian stops where the police 'have a suspicion which has reached the point that they are attempting to obtain incriminating evidence' against the suspect.⁵⁴

In the United States, *Miranda* warnings⁵⁵ have to be given when a person is 'taken into custody or otherwise deprived of his freedom by the authorities in any significant way'. This broad 'custody' requirement made it difficult for police officers to effectively perform their law enforcement duties. In *Berkemer v McCarthy*⁵⁶ the United States Supreme Court⁵⁷ qualified the 'custody' requirement triggering *Miranda*, by holding that a policeman who 'lacks probable cause', but whose observations leads him to 'reasonably suspect' that a person is committing a crime, may detain the suspect briefly to 'investigate the circumstances' that created suspicion.⁵⁸ The police officer may question the suspect to establish her identity and get information from the suspect to confirm or dispose of the original suspicion. Citing *United States v Serna-Barreto*,⁵⁹ L'Heureux-Dube J⁶⁰ approved of the position in the United States where the

⁵⁴ Ibid 9-10.

⁵⁵ Called thus because it was held in this case that the accused should be warned of her constitutional rights in *Miranda v Arizona* (1966) 384 US 436, ("*Miranda*"). For a discussion of the content of the Miranda warnings, see LaFave *Search & Seizure: A Treatise on the Fourth Amendment*, at 47; Van der Merwe (1992) 2 *Stell LR*. 173 at 196.

⁵⁶ *Berkemer v McCarty* (1984) 468 US 420, ("*Berkemer*").

⁵⁷ Per Marshall J.

⁵⁸ *Berkemer* (fn 56 above) at 439-440.

⁵⁹ (1988) 842 F. 2d 965 at 966, ("*Serna-Barreto*").

⁶⁰ In *Elshaw* (fn 47 above) at 33. Steytler *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa, 1996* (1998) at 49, is of the opinion that the same position is applicable in South Africa. Logic dictates this to be a sound approach. It is also in line with the provisions of section 41 of the Criminal Procedure Act, which allows the police to question a suspect and to obtain certain information from her in the event that it is established at a later stage that a crime was indeed committed. The information thus gathered would enable

Seventh Circuit Court of Appeals demonstrated that the solution ought to be found in striking a balance between two compelling, though, competing public interests:⁶¹

The reason for creating the intermediate category, the investigatory stop, is not merely the appealing symmetry of a 'sliding scale' approach – though that is relevant, since it is common sense that the Fourth Amendment is intended to strike a balance between the interest of the individual in being left alone by the police and the interest of the community in being free from the menace of crime, the less the interest of the individual is impaired the less the interest of the community need be impaired to justify the restraint. ***But beyond that, it is hard to see how criminal investigations could proceed if the police could never restrict a suspect's freedom of action, however briefly, without having probable cause to make an arrest.***

From this point of view, the police should, on the one hand and in the interest of public safety, not be unreasonably restrained from exercising their duties; while on the other hand, the citizen should not, in the protection of the public interest in the fortification of individual freedoms, be subjected to significant interference with her fundamental rights when the police conduct is not reasonably justifiable. Put differently: Detention, even for a relatively brief period, without just cause, is

the police to trace the suspect. Section 41 provides as follows: "A peace officer may call upon any person –

- (a) ...
- (b) Who is reasonably suspected of having committed or having attempted to commit an offence;
- (c) ...,

to furnish such peace officer with his full name and address ...".

⁶¹ Fn 47 above at 33. (Emphasis in original text).

synonymous to an infringement of the right to freedom and security of the person in Canada, but not in the United States.⁶²

However, one should not lose sight of the fact that the United States legal system follows a single-stage approach when interpreting their Bill of Rights, whereas the Canadian and South African Constitutions apply the two-stage approach when assessing the constitutionality of legislation.⁶³ In the case of the

⁶² See *Therens* (fn 20 above). Section 12 of the South African Constitution provides as follows: "Everyone has the right to freedom and security of the person, which includes the right –

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way."

Steytler (fn 60 above) at 61, argues that, in conformity with Canadian case law, there are South African cases which suggest that, even in the case of a non-schedule 1 offence committed in the presence of a police officer, there are judgments that suggest that a warrant should be obtained. See, in this regard, the case of *Ralekwa v Minister of Safety and Security* 2004 1 SACR 131 (T), but compare *Louw v Minister of Safety and Security* 2006 2 SACR 178 (T); see also *Jordi* 2006 *De Jure* 455.

⁶³ See *Zuma* (fn 14 above) at par 21; see also Currie & De Waal (fn 16 above) at 152, where the writers argue that the existence of a general limitations clause in the Constitutions of Canada and South Africa allow those courts to adopt a broad interpretation of the right, and thereafter require of the respondent to justify the violation. Such an approach, according to their argument, leads to the following: "Viewed in this light, the generous approach dictates that, when confronted with difficult value judgments about the scope of a right, the court should not expect the applicant to persuade it that a right has been violated. Instead, it should be prepared to assume that there has been a violation and call upon the government to justify its laws and actions." However, they are of the opinion that the Constitutional Court does not follow this approach. They arrive at this conclusion based on the approach of the Constitutional Court in *Ferreira v Levin NO* 1996 1 SA 984 (CC) ("*Ferreira*"). It is submitted that the approach in *Ferreira* was followed only because of the circumstances of the case and should be considered an exception, rather than a general rule of interpretation. If such an approach is adopted, then the

latter two countries, a broader interpretation of the constitutional right is called for, that may be qualified only at the second stage of the interpretation.⁶⁴ The United States Bill of Rights, by comparison, calls for a 'more flexible approach' to the interpretation of its provisions – the fundamental right is qualified during the only applicable stage of interpretation.⁶⁵ The exclusionary rule, as applied in the United States also, employs a deterrent rationale that has been characterised as an 'automatic' exclusionary rule.⁶⁶

In England and Wales, even after the enactment of section 78(1) of the Police and Criminal Evidence Act,⁶⁷ emphasis was laid on the reliability of evidence to determine its admissibility.⁶⁸ Non-compliance with Code C of the Codes of Practice would, in general, lead to the exclusion of the disputed evidence.⁶⁹ Lord Lane CJ, writing for a unanimous Court of Appeal, expressed his opinion on the importance of police compliance with the mentioned Codes when *suspects* are interviewed, as follows when he wrote:⁷⁰

notion of a generous interpretation would be acknowledged as having a significant role to play in the interpretation of the Constitution. However, compare Curie & De Waal (ibid at 153), where they conclude that by adopting the *Ferreira* approach as a general rule of interpretation, would necessarily imply that "the notion of [a] generous interpretation does not contribute much to constitutional interpretation".

⁶⁴ See *Zuma* (fn 14 above) at par 21.

⁶⁵ Loc cit.

⁶⁶ Roach *Constitutional Remedies in Canada* (1994) at 10-13, where he argues as follows: "Unlike American courts, the Supreme Court of Canada did not try to justify exclusion as necessary to deter constitutional violations in the future".

⁶⁷ Enacted during 1984, ("the PACE"). See chapter 2 above for a discussion of s 78(1) of this statutory provision.

⁶⁸ *R v Mason* [1998] 1WLR 144, ("Mason"); *R v Delaney* [1989] 88 Cr App R 338, ("Delaney"); *R v Chalkey and Jeffries* [1998] 2 Cr App R 79, ("Chalkey"); *R v Keenan* [1990] 2 QB 54, ("Keenan"); *R v Canale* [1992] All ER 683, ("Canale").

⁶⁹ *Canale* (ibid) at 190.

⁷⁰ Loc cit. Emphasis added.

This is the latest in a number of decisions emphasizing 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.***

Interviews with suspects must be noted contemporaneously, in accordance with Code C of the Codes of Practice, so as to ensure on the one hand, the reliability of its contents and on the other, to protect the rights of suspects. This, it is submitted, is important when the provisions of sections 58(4), (5), (6) and (8) of the PACE are considered. These sections make provision that the request by a suspect to gain access to legal assistance may be delayed for a period of up to thirty-six hours in the event that certain circumstances exist.⁷¹ What is important for purposes of this analysis, is the fact that *Miranda* warnings must be given to a 'suspect' when the police have 'grounds to suspect' that she has committed an offence.⁷² The PACE, read with the Codes of Conduct, further provide that the suspect should be informed of the availability of a duty solicitor.⁷³

The legal position in Australia is comparable to that of England and Wales on the issue at hand. In Australia, *Miranda* warnings must be given when the police have 'sufficient evidence' that a crime has been committed by the suspect, 'even if they have not decided to charge the suspect'.⁷⁴ The Australian legal position is

⁷¹ See chapter 2 above, fn 103, for the contents of these provisions. Section 58(4), read with subsections (5), (6) and (8) makes provision that access to legal representation may be delayed when the suspect is suspected of having committed a "serious arrestable offence".

⁷² Bradley (2001) 52 *Case W Res L Rev* 35 at 385.

⁷³ *Loc cit.*

⁷⁴ Bradley (fn 72 above) at 381, citing *Van der Meer v The Queen* (1988) 82 ALR 10, 18 (Austl).

based on sound policy considerations, and plausibly addresses some of the concerns held by South African judges,⁷⁵ namely that an over zealous police officer might be tempted to keep the suspect in the category of a 'suspect' with the aim of obtaining an admission or confession which she might not otherwise have been able to obtain had the suspect at that stage been an arrested, detained or accused person.

In Germany, warnings based on *Miranda* must be given to a suspect.⁷⁶ Bradley is of the opinion that a failure to warn a suspect of the right to remain silent leads to 'exclusion', which he categorises as 'mandatory'.⁷⁷

Not one of the Universal Declaration of Human Rights,⁷⁸ the International Covenant on Civil and Political Rights,⁷⁹ the Inter-American Convention,⁸⁰ the

⁷⁵ For example, Satchwell J in *S v Sebejan* 1997 8 BCLR 1086 (T), ("*Sebejan*").

⁷⁶ Fn 72 above at 390.

⁷⁷ Loc cit.

⁷⁸ Adopted by the General Assembly of the United Nations on 10 December 1948 in terms of Resolution 217(III), ("the UDHR"). Article 11(1) of the UDHR reads as follows: "Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence". The Union of South Africa (together with 7 other nation states) abstained to vote in favour of the adoption of the UDHR, see Patel & Watters *Human Rights: Fundamental Instruments & Documents* (1994) at 11; see also www.up.ac.za/chr.

⁷⁹ Passed by means of the General Assembly of the United Nations Resolution 220A(XI) of 16 December 1966, and came into force on 23 March 1976, after having been signed, ratified or accepted by means of accession by nation states, ("the ICCPR"). See Patel & Watters (ibid) at 21, for the text of the ICCPR. South Africa ratified this covenant on 24 January 1990, Heyns (ed) *Human Rights Law in Africa*, Vol 1, (2004) at 49; see also www.up.ac.za/chr.

⁸⁰ This convention was signed on 22 November 1969 and came into operation on 18 July 1978. It is binding at regional level among nation states which signed, ratified, or acceded to the instrument. Article 8 guarantees the right to a fair trial. This section provides that an accused has the right to legal representation "during the proceedings", i e the trial, as opposed to pre-trial

European Convention for the Protection of Human Rights and Fundamental Freedoms,⁸¹ the African Charter on Human and Peoples' Rights⁸² or the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights,⁸³ guarantee the right to legal representation during the pre-trial phase of the criminal investigation. However, the Human Rights Committee⁸⁴ and the European Court of Human Rights⁸⁵ have interpreted the right to a fair trial to include the right to legal representation during the pre-trial phase.⁸⁶ Furthermore, the United Nations Special Rapporteur

proceedings. See Patel & Watters (fn 80 above) at 94, for the text of the Inter-American Convention; see also www.up.ac.za/chr.

⁸¹ This convention was signed on 4 November 1950 and came into force on 3 September 1953, ("the European Convention"). It is binding at regional level among European member states that signed, ratified, or acceded to it. See Patel & Watters (ibid) at 111 for the text of the European Convention; see also www.up.ac.za/chr.

⁸² Hereinafter "the African Charter" or "the Banjul Charter". The African Charter was adopted by the Assembly of the Heads of State and Government of the Organisation of African Unity ("the OAU"), which has subsequently been replaced by the African Union ("the AU"). The African Charter was adopted on 27 June 1981 in Kenya and came into force on 21 October 1986. See Patel & Watters (ibid) at 141, for the text of the African Charter; see also Heyns (fn 79 above) at 134, for the text of the African Charter; Heyns & Killander *Compendium of Key Human Rights Documents of the African Union* (2007) at 29-40; see further Viljoen, unpublished LLD thesis, *Realisation of Human Rights in Africa through Inter-governmental Institutions*, (2004) for a discussion of the aims and functions of the African Commission on Human and Peoples' Rights ("African Commission"). Articles 6 and 7 of the African Charter guarantee the right to a fair trial.

⁸³ Hereinafter "the African Court Protocol" or the "Court Protocol". This Protocol was adopted during June 1998, in Addis Ababa and entered into force in January 2004, after 15 instruments of ratification or accession were deposited with the Secretary-General of the AU. The seat of the court is in Arusha, Tanzania. See Heyns & Killander (loc cit); see also www.africa-union.org.

⁸⁴ *Murray v UK* 28 Oct 1994 Series A no 300-A, ("Murray decision of the Commission").

⁸⁵ *Murray v UK* decision of 8 February 1996 of the European Court of Human Rights.

⁸⁶ It should be added that the African Commission has recommended at its 26th session, held in Kigali, Rwanda, from 1-15 November 1999, that member states should allow paralegals to provide legal assistance to indigent suspects at the pre-trial stage, Heyns (fn 79 above) at 587.

on the independence of judges⁸⁷ has asserted that it is 'desirable' that an accused has an attorney assigned to her during police interrogation. The rationale for such an approach being that the presence of a legal representative would serve as a safeguard against the abuse of power.⁸⁸ The provisions contained in the Guidelines on the Right to a Fair Trial in Africa⁸⁹ and the Basic

For the text of this resolution, see Heyns (ibid) at 584-589; see further Heyns & Killander (fn 82 above) at 288, for the text of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, ("Guidelines for a fair trial"), adopted by the African Commission during 2003. Pursuant to its 1999 Resolution on the right to a fair trial and legal assistance, and following the appointment of the Working Group on the Right to a Fair trial, the African Commission has adopted the Guidelines for a fair trial during 2003. In terms of guideline N(2) of the Guidelines for a fair trial, under the heading "Provisions applicable to proceedings relating to criminal charges", the accused is entitled to be informed of the right to legal representation of her choice, immediately after she had been "detained or charged", Heyns & Killander (ibid) at 301.

⁸⁷ Report on the Mission of the Special Rapporteur to the UK, UN Doc E/N 4 1998/39add 4 par 47, 5 March 1998.

⁸⁸ A similar recommendation was made by the Inter-American Commission in its report on the situation in Nicaragua. See, in this regard, the Report on the situation of Human Rights of a segment of the Nicaraguan Population of Mosquito Origin, OAE Ser L/V11. 62, Doc 10, rev 3, 1983.

⁸⁹ Guideline M(2)(b) of the Guidelines for a fair trial, under the heading "Provisions applicable to arrest and detention", which resolution was adopted by the African Commission during 2003, reads as follows: "Anyone who is arrested or detained shall be informed, **upon arrest** ... of the right to legal representation ...". (Emphasis added). See Heyns & Killander (fn 82 above) at 298 for the text of paragraph M(2)(b) of the Guidelines for a Fair trial. See also Strydom et al *International Human Rights Standards* Vol I, (1997) at 3, where the authors explain the relevance of Guidelines, Resolutions, and Basic Principles as sources of international law as follows: "A common feature of these documents is the absence of their legal obligatory force; they lay down principles or general rules of conduct which lack a *per se* legally binding effect, hence the reference to them as 'soft law' or non-legal rules. However, there is a growing body of consensus that such documents embody some form of pre-legal, moral or political obligation and can play a significant role in the interpretation, application and further development of existing law".

Principles on the Role of Lawyers,⁹⁰ unanimously suggest, though, that the right to legal representation should be accessed soon after *arrest*.

In furtherance of its role as global standard-setter in international criminal law,⁹¹ the United Nations has established *ad hoc* criminal tribunals for the prosecution of human rights atrocities committed in Yugoslavia⁹² and Rwanda.⁹³ The Rules of

⁹⁰ Hereinafter "the Basic Principles". Principle numbers 5, 6 and 7 of the Basic Principles. The Basic Principles was adopted during 1985 in Milan, at the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders. Principle number 7 reads as follows: "Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention". See Strydom (ibid) at 56 for the text of the Basic Principles.

⁹¹ See, for example, the First Congress of the UN, held in 1955, when the Standard Minimum Rules for the Treatment of Prisoners was adopted (Economic and Social Council Resolution 663 C I(XXIV)); also at its Fourth Congress, held at Caracas, where the Code of Conduct for Law Enforcement Officials were adopted (General Assembly Resolution 34/169); see further at its Seventh Congress, held in Milan, during November 1985, when the General Assembly adopted, *inter alia*, the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New Economic Order; and the Basic Principles on the Independence of the Judiciary (General Assembly Resolution 40/32); during its Eight Congress, held during December 1990, the General Assembly adopted, among other resolutions, the Basic Principles on the Role of Lawyers, including the Guidelines on the Role of Prosecutors. (See UN Publication, Sales No E.92.IV.1 at vii-viii).

⁹² Hereinafter referred to as "the ICTY".

⁹³ Hereinafter referred to as "the ICTR". The ICTR was established as a result of the genocide committed in Rwanda after the death of President Habyarimana in a plane crash. The Tutsis were massacred in a general attack by the Hutus. The UN Security Council established a Commission of Experts to determine whether genocide had been committed. The Commission held that genocide was indeed committed and recommended that the Statute of the International Tribunal for Yugoslavia be extended to include crimes committed during the Rwandan massacre. For this reason, the Security Council adopted Resolution 955 on 8 November 1994, establishing the ICTR. See Mugwanya "Introduction to the ICTR" in (ed) Heyns (fn 79 above) at 60-81, for a brief history, the function and jurisdiction of the ICTR.

Procedure of the Rwandan and Yugoslavian International Criminal Tribunals provide that a **suspect** may not be questioned during the pre-trial investigation without the presence of a legal representative, unless this right had been expressly waived.⁹⁴ Absent any such waiver, questioning may not be proceeded with.⁹⁵ At a first reading of Rule 42(B) of the Rules of Procedure of both the ICTR and the ICTY, one cannot be faulted for assuming that it constitutes a plain incorporation of the dictates of *Miranda*, subject to a discretionary exclusionary rule⁹⁶ as provided for in Rule 95⁹⁷ of the mentioned international criminal tribunals.

It is noteworthy that Rule 1 of the Rules of Procedure of the ICTY⁹⁸ defines a 'suspect' as⁹⁹

⁹⁴ Rule 42(B) of the Rules of Procedure of both tribunals are identical in content and read as follows: "Questioning of a suspect shall not proceed without the presence of counsel, unless the suspect has waived the right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall only resume when the suspect has obtained or has been assigned counsel".

⁹⁵ Article 42(B) of the Rules of Procedure of the ICTY and the ICTR.

⁹⁶ As opposed to the American exclusionary rule; see the authorities cited in chapter 2 (fn 9), in this regard.

⁹⁷ 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.**" Emphasis added. The exclusionary provision of the ICCS is more precise in its definition of what types of evidence ought to be excluded – see chapter 2 above at par E 3.1. Compare guideline N(6)(g) of the Guidelines for a Fair trial (fn 86 above) passed by the African Commission, which provides as follows: "Evidence obtained by **illegal means** constituting a **serious violation of internationally protected human rights** shall not be used as evidence against the accused or against any other person in any proceeding, except in the prosecution of the perpetrators of the violations." Emphasis added.

⁹⁸ Adopted pursuant to Article 15 of the Statute of the Tribunal.

⁹⁹ Rule 2 of the Rules of Procedure of the ICCT contains an identical provision.

[a] person concerning whom the Prosecutor possesses reliable information which tends to show that the person may have committed a crime...

This provision clearly aims to protect suspects from being questioned under the pretence that they are witnesses for the prosecution. Therefore, when the possibility exists that the person subjected to questioning may be a suspect, the appropriate informational warning should be given forthwith, before the suspect is subjected to interrogation. Ostensibly with a similar goal in mind, the *Corpus Juris*¹⁰⁰ describes as the 'starting point' of the right to be treated as an accused and not as a witness, from the moment when 'any step is taken establishing, denouncing or revealing the existence of clear and consistent evidence of guilt' and before the first questioning by 'an authority aware of the existence of such evidence'.¹⁰¹ On this view, a person should be deemed a suspect when the police are in possession of evidence that implicates her in the commission of an offence, which prompts the police to question her with the aim of confirming whether she was involved or not in the commission of the offence. These two approaches serve to protect a similar purpose, since both provisions lay

¹⁰⁰ The *Corpus Juris* of the European community was drafted during 1997 and revised during the year 2000, with the aim of synchronizing the laws of criminal procedure of the 15 member states of the European community. Its aim is to establish a *jus commune* based on a combination of solutions as applied by the different member states in their criminal justice systems, while at the same time highlighting problems faced by member states in the field of fighting financial crime.

¹⁰¹ Article 29 of the *Corpus Juris* of the European community. The national *rapporteurs*, in conjunction with the *EU-experts* conducting the research into the compatibility of the criminal justice systems of member states with the *Corpus Juris* of the European community, concluded that the systems of most member states are compatible with article 29 of the *Corpus Juris*, except that of the Slovak Republic and Slovenia "where the police are not duty bound to inform a suspect of his rights before interrogation". (*Era-Forum* "Study on penal and administrative sanctions, settlement, whistle blowing and *Corpus Juris* in the candidate countries", Special Issue No 3 (2001) at 26.

emphasis on the police duty to disclose to a person suspected of having committed a crime that she is a suspect. The duty to disclose a person's status as a suspect was designed to prevent the suspect from unwittingly creating evidence against herself. This information duty arises, in respect of both provisions, whenever the police are in possession of information that might implicate the person in the commission of an offence.

Article 14(3)(g) of the ICCPR protects the right to remain silent during the pre-trial phase.¹⁰² In *Kelly v Jamaica*¹⁰³ the Human Rights Committee interpreted this provision by concluding that any direct or indirect physical or psychological pressure from the police must be nonexistent when an accused makes an admission or confession.¹⁰⁴ In *Imbrioscia v Switzerland*¹⁰⁵ Pettiti, De Meyer and Lopez Rocha JJ wrote separate dissenting, but convincing opinions. Lopez Rocha J pointed out that the existence of a pre-trial right to legal representation is justified, 'especially in the initial stages of the proceedings' when the accused is confronted 'on rather unequal terms' by the might of the government and the fact that an accused is accorded the right to legal representation during trial 'cannot effectively cure this defect'.¹⁰⁶

Evidently adopted by the United Nations General Assembly with the aim of preventing the abuse of power by governmental officials during the pre-trial phase, the rules contained in the Body of Principles for the Protection of All

¹⁰² It reads that no-one shall be compelled to "testify against himself or to confess guilt".

¹⁰³ Communication No 253/1987 (8April 1991) UN Doc Supp No 40 (A/46/40) at 241 (1991), ("*Kelly*").

¹⁰⁴ Ibid.

¹⁰⁵ 17 EHRR 441 (hereinafter referred to as "*Imbrioscia*").

¹⁰⁶ Ibid at 461.

Persons Under Any Form of Detention or Imprisonment¹⁰⁷ require that nation states keep proper records of interrogation¹⁰⁸ and that it be made available for inspection by the courts, without the detained person suffering the risk of any form of prejudice.¹⁰⁹ Moreover, the Body of Principles pertinently provides that evidence obtained in a manner that is incompatible with its provisions, may be excluded in proceedings against the accused.¹¹⁰

To summarise, the Rules of Procedure of the ICTR and the ICTY dictate that the right to legal representation is activated from the moment a person becomes a **suspect**. It is submitted that this intimation by a United Nations body of the commencement of constitutional protections, should be regarded as one of the most highly-developed international criminal procedural law standards for the protection of fundamental rights. The concept 'suspect' is defined in the Rules of Procedure of both the ICTY and the ICTR, including the *Corpus Juris*, in comparatively similar terms. That is, when a government official is in possession of evidence which tends to show that the suspect has committed a crime, and on that basis decides to question the suspect with the aim of establishing or discarding the initial suspicion of guilt. Similarly, comparative research undertaken in Europe has established that it is a fundamental rule in the criminal

¹⁰⁷ Hereinafter "the Body of Principles". The Body of Principles was adopted in terms of the UN General Assembly Resolution 43/173 of 9 December 1988. The last principle is entitled "General Clause". This clause provides that none of the principles contained in the Body of Principles should be construed as "restricting or derogating" the rights contained in the ICCPR.

¹⁰⁸ Principle 23(1) provides as follows: "The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogation as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law".

¹⁰⁹ Principle 33, read with principle 37.

¹¹⁰ Principle 27 reads as follows: "Non-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person".

justice systems of most member states that the police are legally bound to inform a suspect of her rights before proceeding with the interrogation.¹¹¹ The criminal justice system in Australia contains an analogous procedural safeguard.

However, regional human rights bodies advocate that the right to legal representation is enforceable only after an *arrest* had been affected. On the one hand, the legal position of the regional human rights bodies and that of the United States, on this issue, is firmly aligned. The position in Canada and the United States, on the other hand differ, in that in Canada the concept 'detained' is given a broad and generous meaning, while the United States opted for a narrower approach, by balancing two compelling societal interests.

Section 73 of the South African Criminal Procedure Act¹¹² states that the right to legal representation is activated immediately after arrest, but South African courts have interpreted this protection as extending to the interrogation phase.¹¹³ On the basis of such an interpretation, section 73 meets the terms of the provisions of the ICTY and the ICTR.¹¹⁴ In the light hereof, a suspect ought

¹¹¹ According to *Era-Forum* (fn 101 above) at 26.

¹¹² Fn 34 above.

¹¹³ *Ngqulunga v Minister of Law and Order* 1983 2 SA 696 (N), ("*Ngqulunga*"). In this case the Plaintiff was asked by the police to report to the police station. After having been questioned, he was told to remain at the station. After a while he asked leave to go home and this was refused. The Appellate Division held that the refusal to give the Plaintiff leave to go home constituted an arrest; *S v Du Preez* 1991 2 SACR 372 (Ck), ("*Du Preez*"). See also Kriegler (fn 30 above) at 174; see also De Jager et al *Commentary on the Criminal Procedure Act* (2005) at 112D-112E.

¹¹⁴ Section 73 has recently been amended. The relevant parts of the section read as follows: "(1) An accused who has been *arrested*, with or without warrant, shall, subject to any law relating to the management of prisons, be entitled to the assistance of his legal adviser as from the time of his arrest. (2A) An accused shall – (a) at the time of his or her arrest; ... be informed of his or her right to be represented at his or her own expense by a legal adviser of his or her own choice and if he or she own choice and if he or she cannot afford legal representation, that he or she

to be informed of the availability of the right to legal representation, so as to ensure firstly, that any incriminatory conduct is performed with the informed cooperation of the suspect and, secondly, that any waiver of the right to legal representation is not uninformed. When this is accepted, one may safely assume that the corollary warnings of the right to remain silent and the privilege against self-incrimination should be essential pre-trial warnings to ensure that the guarantee of a fair trial is an enforceable right for any person, suspected of being involved in a crime.

3 The concept 'suspect' during the post-constitutional era

In *S v Sebejan*,¹¹⁵ decided in terms of the 1996 Constitution, Satchwell J considered whether a statement made by one of the accused at a stage when it was alleged that she was a suspect, should be admissible for purposes of cross-examination. She was not informed before she made the statement that she was a suspect, or that she has a right to legal representation. As a result, she made the statement freely and voluntarily. Satchwell J defines a suspect as someone who 'may be implicated in the offence under investigation' and whose version of events is 'mistrusted or disbelieved'.¹¹⁶ The judge distinguished between a suspect and an arrested person¹¹⁷ and added that a suspect does not know 'without equivocation or ambiguity or at all that she is at risk of being charged'.¹¹⁸

may apply for legal aid and of the institutions which he or she may approach for legal assistance".

¹¹⁵ Fn 75 above.

¹¹⁶ Ibid at 1092 – I, (par 35).

¹¹⁷ The difference being that a suspect had not been taken into custody and had not been informed about the reason for her arrest.

¹¹⁸ Ibid at par 45.

Satchwell J characterised as 'inimical to a fair pre-trial procedure', the deception of a suspect that she is a state witness when, in actual fact, information is being sought to strengthen the case of the prosecution against her.¹¹⁹ With a regulatory aim in mind, and clearly with a view to provide an incentive to influence future police conduct, the judge reasoned as follows:¹²⁰

Surely policy must require that investigating authorities are not encouraged or tempted to retain potential accused persons in the category of 'suspect' while collecting and taking statements from the unwary, unsilent, unrepresented, unwarned and unenlightened suspect and only thereafter, once the damage has been done as it were, to inform them that they are now to be arrested. The temptation should not exist that accused persons who must *a fortiori* have once been suspects, are not advised of their rights to silence and to legal representation and never receive meaningful warnings prior to making statements which are subsequently tendered against them in their trials because it is easier to obtain such statements against them while they are still suspects who do not enjoy constitutional protections. The prospect exists that such statements tendered as evidence would always emanate from suspects and that the constitutional protections accorded to arrested persons prior to making statements or pointing out [sic] would become under-utilised anachronisms.

The reasoning of Satchwell J accords with a purposive interpretation. She clearly sought the values or interests that the fundamental rights contained in section 35 were meant to protect in a democratic society based on human dignity, equality and freedom, and subsequently preferred an interpretation that best

¹¹⁹ Ibid at par 46.

¹²⁰ Ibid at par 56.

serves to protect those values.¹²¹ MacArthur J¹²² distinguished *Sebejan* from *S v Langa*.¹²³ In *Langa* several accused were charged with theft, alternatively a contravention of section 36 of the General Law Amendment Act.¹²⁴ The admissibility of the evidence obtained against accused 1 is relevant for this discussion. Therefore, when reference is made to 'the accused', it refers to accused 1. The accused, a suspect at that stage, was confronted by the police with regard to a theft that had occurred at her place of employment. When approached about the items in dispute, she pointed it out to the police and admitted that she had stolen it from her employer.

MacArthur J¹²⁵ applied a literal and legalistic approach when he held that the accused could not rely on the right to legal representation or the right to remain silent at the relevant time, because she had not been 'arrested', nor 'detained' when she pointed-out the items and made the incriminating statement.¹²⁶ The judge refused to follow the interpretation of 'detained' as applied in Canada.¹²⁷ It

¹²¹ See *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321, at 395, ("*Big M Drug Mart*"); see further Currie & De Waal (fn 16 above) at 148-150, for a discussion of the purposive form of interpretation.

¹²² Sitting in the same Provincial Division of the High Court as Sacthwell J.

¹²³ 1998 1 SACR (T), 21 at 27, ("*Langa*").

¹²⁴ Act 62 of 1955.

¹²⁵ Mynhardt J concurring.

¹²⁶ *Ibid* at 26-27; see also *S v Ngwenya and Others* 1998 2 SACR 503 (W), ("*Ngwenya*"), where the same approach was followed. In *Ngwenya*, Leveson J held that s 25 of the Interim Constitution is divided into 3 parts – detention, arrest and trial. Section 25(1) deals with the rights of a **detained** person, while s 25(3) covers the rights of **accused** persons.

¹²⁷ *Loc cit*. However, see Schwikkard (1997) 3 *SAJHR* 446 at 455, who favours such an approach. She argues, referring to the facts of *Sebejan* (fn 75 above), that the broad interpretation of the concept of "detention" as applied in Canada, should not be regarded as irrelevant, because the facts of *Sebejan* demonstrates that "a person who is not technically a suspect feels compelled to answer questions put to them and consequently incriminates themselves".

was held that the confessional statement of the accused was made voluntarily. On this basis the evidence was admitted.

Judgment in the case of *Osman and Another v Attorney-General, Transvaal*¹²⁸ was delivered by the Constitutional Court approximately one month after *Langa*. One can safely assume that the approach of the court in *Langa* would have been different had *Osman* been reported earlier. The implications of the *Osman* case will be discussed below. However, it is important to note that MacArthur J did not consider or mention the *dictum* of Froneman J in the *Melani* case.¹²⁹ It is submitted that Froneman J was correct in his interpretation of the right to legal representation by construing the right to counsel and the right to a fair trial purposively and generously. The judgment of Froneman J could be read as suggesting that it should be irrelevant whether the accused was a suspect, detained or an accused person when her rights were violated.¹³⁰

¹²⁸ 1998 4 SA 1224 (CC), (*Osman*).

¹²⁹ Fn 26 above.

¹³⁰ Kriegler (fn 30 above) at 174, in an opinion written during the pre-constitutional era, arrived at the same conclusion in his seminal work, where he states: "Teen daardie agtergrond skryf subartikel (1) [of section 73 of the Criminal Procedure Act] dan voor dat 'n beskuldigde, ongeag die feit dat hy in hegtenis is, geregtig is op regsbystand van sy regsadviseur. Dit kom nie daarop aan of hy 'n 'aangehoudende,' 'verdagte,' 'beskuldigde' of iets anders genoem word nie – hy is geregtig op die bystand van sy regsadviseur." Loosely translated, this passage has the following meaning: In the light hereof, sub-section (1) [of section 73 of the Criminal Procedure Act] provides that irrespective of the fact whether the accused has been arrested, he is entitled to legal assistance. It is immaterial whether he was "detained", a "suspect", an "accused" or something else – he is entitled to be assisted by his legal adviser. Kriegler suggests (*loc cit*) that, bearing in mind the number of uneducated persons in South Africa, an accused, be she a suspect or however one prefers to refer to her, ought to be informed about the right to legal representation.

It is suggested that the focus of attention should rather be on the purpose or rationale that section 35(5) aims to achieve – being whether the evidence was '**obtained in a manner that violated the rights contained in the Bill of Rights**' (regardless of whether those rights accrued to a 'suspect,' 'detained' or 'accused' person); and whether **admission** of the evidence would render the trial unfair or otherwise be detrimental to the administration of justice. The suggested approach would ensure that 'investigating authorities are not encouraged or tempted to retain potential accused in the category of "suspect" while collecting evidence and taking statements of the unwary, unsuspecting, unrepresented, unwarned and unenlightened suspect' and only after they have achieved their unconstitutional purpose, to inform the suspects 'they are now arrested'.¹³¹

The issue as to whether a suspect may rely on the provisions of section 35 of the Constitution was revisited by Bozalek J in *S v Orrie and Another*.¹³² The brief factual background of the case was the following: The bodies of two prosecution witnesses, protected in a witness protection programme, were discovered at a so-called 'safe house' in Cape Town. A person or persons unknown to the prosecution had made a forced entry into the house and shot and killed the witnesses. A police officer patrolling the area, saw the parked and unattended vehicle of the accused in the vicinity of the 'safe house' on the day of the murders, recorded the registration numbers and letters and forwarded it to the investigating officers. The investigating officers were aware of the fact that the brother of the accused was an accused in a pending criminal matter in which the murdered witnesses were to be state witnesses. This was the reason why they had been placed in a witness protection programme. Two days after the

¹³¹ The dictum of Satchwell J in *Sebejan* (fn 75 above) at par 56.

¹³² 2005 1 SACR 63 (C), ("*Orrie*").

murders, the accused was stopped by the police while driving his motor vehicle. The accused was asked to accompany them to the local police station.

At the police station, the accused was questioned and a sworn witness statement was taken from him. The statement was not made on the standard form used when taking a statement from a suspect. In such a form provision is made for, *inter alia*, the following information to be conveyed to the suspect by the police official in charge of the interview, that:

1. the suspect be informed that information exists that indicates that she may have been involved in the commission of an offence;
2. the suspect be informed of the right to remain silent and the right to legal representation of choice or that one may be provided by the Legal Aid Board, which legal representative may be present during the interview;
3. the suspect be told that she is not compelled to make any statement or to answer any question and that any statement made or anything said would be reduced to writing and could be used as evidence against her in court.

It was common cause that at no stage was the accused arrested or detained when he was at the police station and that the accused had made the statement voluntarily. It was also not disputed that the accused left his vehicle at the police station at the request of the police.

Applying an objective test,¹³³ Bozalek J held that the accused was indeed deemed to be a suspect when questioned by the police¹³⁴ and for that reason it had been necessary to seek an explanation from him as to why his vehicle was

¹³³ Ibid at 68. The judge applied the reasonable man test to determine this issue. He reasoned that “[a]ny reasonable person of normal intelligence in the accused’s position would have realised that he was regarded as a suspect ...”

¹³⁴ Loc cit.

parked in the vicinity of the house where and at the relevant time when the murders took place, especially bearing in mind the fact that this happened when material witnesses in a case pending against his brother had been murdered.

Referring with approval to the reasoning of Satchwell J in *Sebejan*, Bozalek J concluded as follows:¹³⁵

I find the reasoning in *Sebejan* (*supra*) persuasive. I respectfully concur with the conclusion reached by Satchwell J that, no less than an accused, a suspect is entitled to fair pre-trial procedures.

An interpretation of the relevant provisions of s 35 which extends them to suspects is, to my mind, in keeping with a purposive approach which has regard to the interests which the rights were intended to protect.

After having analysed the evidence, Bozalek J held that the prosecution did not prove that the accused had been warned of the consequences of making the relevant statement, or that he was informed of his right to be represented by a legal representative appointed and paid for by the Legal Aid Board. Consequently, it was held that admission of the witness statement made by the accused would render the trial unfair. The court reached this judgment based on the fact that the accused had not been warned that the statement he made (when he was a suspect) could be used against him at his trial. What is especially important about this judgment is the fact the judge reached this conclusion despite the fact that the statement was seemingly not of a

¹³⁵ Fn 132 above at 69.

confessional nature.¹³⁶ Support for the *Sebejan* and *Orrie* analyses can be found in the obiter statement of Van der Merwe J in *S v Zuma*.¹³⁷

In *Zuma 2*,¹³⁸ the recently elected president of the African National Congress¹³⁹ of South Africa was accused of having committed the crime of rape, allegedly perpetrated at his home on 2 November 2005. On 10 November the Commissioner of Police in Gauteng, who assisted the investigating officer in this matter, went to the house of the accused together with the investigating officer, with the aim of obtaining a warning statement.¹⁴⁰ On their arrival at the home of the accused, the attorney of the accused was also present. There, the police officers were provided with a previously prepared statement of the accused. The Commissioner nevertheless informed the accused of his constitutional rights.¹⁴¹ A 'statement regarding interview with suspect', was then completed, read to the accused and thereafter signed by him. On 15 November the two police officers, together with a photographer and other officers, met the accused and his attorney at the alleged crime scene. The Commissioner informed the attorney of the accused that this was a 'follow up meeting'. On this occasion the accused was not informed that he has a right to remain silent and that he is not obliged to make any pointing-out, which may be used against him in court. According to the Commissioner, a repetition of the informational warning was not necessary, because the accused's attorney was present and could have advised his client

¹³⁶ Ibid at 76.

¹³⁷ 2006 3 All SA 8 (W), ("*Zuma 2*").

¹³⁸ In this discussion, only facts relevant to the admissibility of pointings-out and accompanying statements made by the accused are relevant.

¹³⁹ Also known as "the ANC".

¹⁴⁰ A warning statement is a statement given by a suspect after she had been warned or informed of her rights.

¹⁴¹ Fn 137 above at 41e.

not to perform any self-incriminatory act.¹⁴² The attorney of the accused had also failed to draw the attention of the accused to these rights.¹⁴³

When the police entered the guest room, the Commissioner asked the accused whether that was the room 'where it happened', in response to which the accused gave a positive answer.¹⁴⁴ Upon entry into the accused's bedroom, the Commissioner asked the accused what happened there. The accused indicated that nothing happened in his bedroom.¹⁴⁵ The admissibility of the pointing-out and accompanying statements made by the accused were challenged at trial. Van der Merwe J characterised the evidence of the Commissioner as a 'lie'.¹⁴⁶ As to the admissibility of the disputed evidence on constitutional grounds, the court held that the questions put to the accused in the guest room and in his bedroom were designed to 'trap' the accused.¹⁴⁷ The judge proceeded with his analysis and held that the Commissioner should have 'warned the accused again which he is expected to do whenever he puts questions to or interviews a "**suspect**".'¹⁴⁸ Against this background it was held that the police conduct constituted 'a clear breach of the accused's constitutional rights'. On this view, it is enticing to assume that the court accepted that a suspect is entitled to rely on the constitutional rights, in the same way as persons who are arrested, detained and accused.

¹⁴² Ibid at 42d-f.

¹⁴³ Ibid at 42e.

¹⁴⁴ At this stage, the Commissioner must have been aware of the fact that the complainant mentioned in her statement that she was allegedly raped in the guest room. (Ibid at 43g-h).

¹⁴⁵ Ibid at 42g.

¹⁴⁶ Ibid at 81c-d.

¹⁴⁷ Ibid at 81f-g.

¹⁴⁸ Ibid at 81f. Emphasis added.

The undesirable consequences of the United States' exclusionary rule will not be a pertinent concern when the approach of *Satchwell J* is applied, because of the text and rationale of section 35(5). The concerns of *L'Heureux-Dube J* will not cause substantial unease in South African jurisprudence, because a violation of a fundamental right would not necessarily entail that the disputed evidence should automatically be excluded – the courts must perform a balancing exercise of all three groups of factors, having regard to all the circumstances, before a ruling on the admissibility of the disputed evidence should be made.¹⁴⁹ Some of the factors to be considered would be whether the violation was serious, the result of a *bona fide* error or committed on the grounds of urgency¹⁵⁰ or whether the evidence would have been discovered without an infringement. Added to these factors, it is suggested that the particular history and socio-economic circumstances of South Africa should make us especially sensitive to the protection of the rights of suspects during the pre-trial phase.

This was the approach of the Constitutional Court in *Osman*,¹⁵¹ decided in terms of the Interim Constitution, where the prosecution argued that the fundamental rights of the accused contained in section 25(2)(c) had not been violated, because they were not 'under arrest', but merely 'suspects'.¹⁵² Applying the historic and purposive tool of interpretation when interpreting this provision – thus, by necessary implication, refusing to accept the invitation by the prosecution to interpret this section in a legalistic and literal manner by adopting their suggested categorization¹⁵³ – Madala J wrote on behalf a unanimous court as follows:¹⁵⁴

¹⁴⁹ See, in this regard, the writer's recommendations in chapter 6 at par B.

¹⁵⁰ These factors are discussed in chapter 5.

¹⁵¹ Fn 128 above.

¹⁵² *Ibid* at par 9.

¹⁵³ Although not explicitly rejected by the court, the Constitutional Court reached its judgment by proceeding to consider whether section 25(2) and (3) had been violated, without considering

The right [against self-incrimination] is of particular significance having regard to our recent history when, during the apartheid era, the fundamental rights of many citizens were violated. ... Police interrogations were often accompanied by physical brutality and by holding accused in solitary confinement without access to the outside world – all in an effort to extract confessions from them. Our painful history should make us especially sensitive to unacceptable methods of extracting confessions. It is in the context of this history that the principle that the State should always prove its case and not rely on statements extracted from the accused by inhuman methods, should be adhered to.

Citing *R v Director of Serious Fraud Office, Ex Parte Smith*¹⁵⁵ with approval, Madala J adopted, on behalf of the Constitutional Court, the notion that a 'person under **suspicion** of criminal responsibility'¹⁵⁶ may rely on a 'specific immunity' while being interviewed by the police 'from being compelled on pain of punishment to answer questions of any kind'. The Constitutional Court was, regrettably, not asked to determine in this matter whether a suspect may rely on the right to legal representation.¹⁵⁷ However, the judgment of *Osman* can be read as suggesting that the right to remain silent and the privilege against self-incrimination are triggered from the moment when a person becomes a suspect.

whether the accused were "suspects" or "arrested". It is submitted that this approach, by necessary implication, implies that the rights of an accused may be violated at a stage when she is a "suspect" and that such categorisation is meaningless when determining whether the right to a fair trial had been violated. Whether the trial would be unfair can only be determined when the court considers the effect of admitting such evidence upon trial fairness.

¹⁵⁴ Fn 128 above at par 10.

¹⁵⁵ [1993] AC 1 [HL], ("*Smith*").

¹⁵⁶ Emphasis added.

¹⁵⁷ Compare *Langa* (fn 123 above).

Miranda-type warnings should therefore be given from the moment that the police suspect that a person could be involved in a crime they are investigating.

In *S v Mfene and Another*,¹⁵⁸ the admissibility of a pointing-out made by the accused was challenged on the ground that the accused was not informed that if he cannot afford an attorney, one would be provided by the government without any charge. It was common cause that the police officer did not inform the accused of this right. There was no evidence before court that established whether or not the accused had been **arrested** when the pointing-out was made.¹⁵⁹ McCall J was of the view that it would be in the interests of justice to allow the prosecution and the accused the opportunity to reopen their respective cases, in order to lead evidence on this issue. The prosecution failed to lead 'any further evidence in the trial within a trial', and as a result the judge held the pointing-out to be inadmissible.¹⁶⁰ This judgment could be read as signifying that the status of the accused (whether he was a 'suspect', 'detained', 'arrested' or an 'accused' person), when he performed the pre-trial incriminatory conduct, is not of the essence. Rather, it is the fairness of the subsequent trial that is of paramount importance. Support for the *Sebejan* and *Mfene* approach can be found in the seminal work of Kriegler,¹⁶¹ where he asserts that the status of an accused when the inculpatory conduct is performed should not be the key issue, but rather the fairness of the trial.

To summarise, the protection granted persons suspected of having committed criminal offences in the different Commonwealth jurisdictions are activated at an early stage of the police investigation. When the police, in England and Wales, and Australia, have sufficient evidence implicating a person in the commission of

¹⁵⁸ 1998 9 BCLR 115 (N), ("*Mfene*").

¹⁵⁹ *Ibid* at 1168.

¹⁶⁰ *Loc cit*.

¹⁶¹ See fn 30 above at 174.

an offence she must be informed, in compliance with the dictates of *Miranda*, that she has the right to remain silent; that whatever she says may be used in evidence against her; and that she has a right to legal representation – if she cannot afford one, the government will appoint a legal representative at their expense.¹⁶² A suspect, arraigned before the ICTY, ICTR and the ICCT, is entitled to the same protection.¹⁶³ It is submitted that the approach adopted by the South African High Court in *Sebejan* and *Orrie* is harmonious with that applied in England and Wales, Australia, the ICTY, the ICTR and the ICCT.¹⁶⁴

Bradley correctly observes that *Miranda* warnings must be given in the jurisdictions of England and Wales and Australia 'somewhat earlier than they are required in the United States', where these warnings are triggered only after the accused had been '**arrested**'.¹⁶⁵ The difference is important to an accused person: In terms of the approach adopted in England and Wales and Australia, the fundamental protection guaranteed by the privilege against self-incrimination, as well as the informational warnings to be provided by government officials, commences at the initial stages of the police investigation. The likelihood of the police strengthening its case against a suspect by means of her compelled cooperation is, in this manner, meaningfully reduced. An additional advantage of this approach is the fact that it will certainly decrease the

¹⁶² This is also the position in Germany.

¹⁶³ See Rule 1 of the Rules of Procedure of the ICTY and the ICTR; see also Rule 2 of the Rules of Procedure of the ICCT.

¹⁶⁴ Compare Schwikkard (fn 127 above) who favours the Canadian approach applied in *Therens*; see also Steytler (fn 60 above) at 49, where he argues that the *Therens* test is "similar to the South African common law. The test is objective: has a person subjected himself or herself to the control of the police because of the imminent threat of lawfully sanctioned force?" This test was applied in *Orrie*.

¹⁶⁵ Fn 72 above at 381-386. Emphasis added.

prospect of police abuse during this crucial stage when the might of governmental power is brought to bear on a suspect.

In South Africa, it is suggested, that a person suspected of having committed a crime should be informed of the rights to legal representation and the corollary rights entrenched in section 35 (1) and (2) of the Constitution from the moment she becomes a suspect, to ensure that she is not conscripted against herself and to ensure that her eventual trial is fair, that she be permitted to rely on the due process rights contained in the Bill of Rights.¹⁶⁶ Such an approach accords with a generous and purposive interpretation of the concept 'fair trial'. The benefit of this approach can be illustrated by the following example.¹⁶⁷ The police suspect that X committed a crime, currently investigated by them. They request X, who at that stage is the only suspect, to attend the police station at a specified time on the same day. She voluntarily complies by driving to the police station in her car, without appointing a legal representative, because the police are not constitutionally obliged to inform her of that fundamental right when they 'requested' her to go to the police station for an 'interview'. At this stage, she could not be deemed to be 'detained' or 'arrested', since in terms of South African common law, she was not physically restrained or subjected to psychological compulsion.¹⁶⁸ During the interview, she makes no attempt to leave, and unwittingly makes an incriminating statement. There would therefore

¹⁶⁶ A similar suggestion is made by Kriegler (fn 30 above) at 174, during the pre-constitutional era; see also Schwikkard in Currie & De Waal (fn 16 above) at 740-742, who suggests two alternatives aimed at protecting a "suspect" during the pre-trial phase: the first alternative is to embrace the *Sebejan* approach; the second is to adopt the Canadian concept of "detained"; see further Schwikkard (fn 127 above) at 454.

¹⁶⁷ See Beaudoin & Ratushny (fn 45 above) at 454-455, and 464-465, who argue along the same lines. The facts of *Sebejan* are also comparable.

¹⁶⁸ Steytler (fn 60 above) at 49. He correctly points out that, in terms of the common law, both elements must be satisfied in order to give effect to an arrest.

be no facts, objectively considered, substantiating the allegation that she was prevented from leaving. Since she attended the police station unaccompanied by the police, the element of psychological compulsion to be there, would be difficult, if not impossible, to establish.¹⁶⁹ This should be understood, bearing in mind that in terms of the common law position, an objective test has to be applied to determine whether the two elements have been satisfied.¹⁷⁰ However, Schwikkard accurately notes that, when determining the element of psychological compulsion in Canada, a subjective test is employed.¹⁷¹

It is submitted that the application of the common law position to the mentioned facts reveals its inadequacy, when compared to the approach adopted by the *Sebejan* court.¹⁷² In terms of *Sebejan*, the accused should be entitled to rely on the constitutional guarantees contained in the Bill of Rights, because she was a suspect at the crucial stage.¹⁷³ By contrast, when the accused relies on the

¹⁶⁹ Loc cit, where Steytler correctly relies on *Isaacs v Minister van Wet en Orde* 1996 1 SACR 314 (A), ("*Isaacs*"), and points out that, in terms of the common law, the accused is in the following circumstances excluded from relying on the fact that she has not been subjected to the control of the police: when the police approach someone with the aim of questioning; and when they request someone to attend a police station without "police accompaniment".

¹⁷⁰ Ibid at 49, where Steytler concludes as follows: "The test is objective".

¹⁷¹ Fn 127 above at 455. She argues, referring to the facts in *Sebejan*, that a person who is not a suspect in a legal-technical sense, may feel compelled to answer questions put to them. See also *Therens*, where Le Dain J held that the third category of detention includes the following: A person may be deemed to be "detained" even if she was not threatened with the application of physical restraint if she submits in the limitation of her freedom and reasonably believes that she has no choice to leave; see also Beaudoin & Ratushny (fn 45 above) at 463-464.

¹⁷² However, a subjective test, as pointed out by Schwikkard (fn 127 above) would provide broader protection than the common law position.

¹⁷³ For an analogous decision in Canadian context, see *R v Rodenbush* (1985) 21 CCC (3d) 423 (BCCA), ("*Rodenbush*"). The accused were asked by customs officials to accompany them to a room, where requested to wait for their luggage, to be inspected in another room. A customs officer, who was in the room with the accused, was called aside by his superior and told that

common law approach, the applicable test would make it difficult for her to convince a court that she was psychologically compelled to be at the police station and, more importantly, to make a statement. These divergent consequences would result, despite the fact that both the *Orrie* and the common law approaches employ an objective test.¹⁷⁴ Yet, it could be argued that the *Orrie* and *Zuma 2* courts relied heavily on the subjective view of the police officers to determine whether the person was regarded by them as a suspect. In both cases, the police officers were in possession of information which tended to show that the suspects have committed crimes. Armed with such information, the police attempted to 'trap' the suspects with the aim of obtaining incriminatory statements from them.¹⁷⁵ Against this background, it is submitted that both a subjective and an objective analysis should be employed to determine whether the accused was a suspect.¹⁷⁶ The subjective belief of the

cocaine was discovered in the luggage of the accused, but that he should not arrest them immediately. He was commanded to question them about their luggage. They (the accused) lied about their luggage, whereafter they were arrested and only then informed of their right to have access to legal representation. The court held that the conduct of the customs office superior constituted a "flagrant infringement of the appellant's constitutional rights", at 427. Beaudoin & Ratushny (fn 45 above) at 467, makes the comment that the fundamental question in *Rodenbush* was not whether the accused were "**legally** arrested but whether their circumstances cried out for legal counsel". Based on *Rodenbush*, Ratushny suggests (ibid at 467) that in the same way that the subjective view of the "suspect" should be taken into account in terms of *Therens*, the subjective perception of the governmental officer should be taken into account to determine whether there was an "arrest". Emphasis in original.

¹⁷⁴ Fn 132 above at 68; see also Steytler (fn 60 above) at 49.

¹⁷⁵ See *Zuma 2* (fn 137 above) at 81f-g; *Orrie* (fn 132 above) at 68; *S v Seseane* 2000 2 SACR 225 (O), ("*Seseane*"), where the police officers adopted a *modus operandi* of not advising the suspect of his rights before he made a statement, in the hope of obtaining incriminating information. In this case Pretorius AJ held, at 228, that the police conduct was designed to trap the suspect. The statement made by the suspect was held to be inadmissible. (Ibid at 230).

¹⁷⁶ Beaudoin & Ratushny (fn 45 above) at 467, make the same suggestion in Canadian context; see also Stuart (fn 53 above) at par 28.

police officer, based on information at her disposal, should thus be taken into account as a factor when determining whether the accused was indeed regarded as a suspect. A similar approach is followed by the ICTY, the ICTR and in Europe.

Moreover, the *Sebejan* approach is in conformity with a purposive and generous interpretation, embraced by the Constitutional Court in *Zuma*.¹⁷⁷ In the light hereof, the following question emerges: Is it necessary to determine the point at which a person becomes a 'suspect'? Kriegler, in an opinion written during the pre-constitutional era - and with the aim of broadening the protection granted an accused by the Criminal Procedure Act - is of the view that, to rely on the right to legal representation, an accused does not have to be 'arrested'; it is irrelevant whether the accused is a 'suspect', 'detained' or 'an accused'. He is of the view that what indeed matters is the fact that the trial of an accused should be fair.¹⁷⁸ In a word, a suspect is entitled to *Miranda*-type warnings. A comparative law review has revealed that the ICTY,¹⁷⁹ ICTR,¹⁸⁰ the Canadian Supreme Court,¹⁸¹ the South African High Court¹⁸² and South African commentators,¹⁸³ have opted for a definition as an indicator of the point at which a person should be deemed a suspect.

¹⁷⁷ Fn 39 above.

¹⁷⁸ Fn 30 above at 174. Such an approach is in conformity with a generous and purposive interpretation, proclaimed in the *Zuma* judgment (fn 27 above).

¹⁷⁹ Rule 1 of the Rules of Procedure of the ICTY.

¹⁸⁰ Rule 1 of the Rules of Procedure of the ICTR.

¹⁸¹ *Therens* (fn 46 above); *Janeiro* (fn 49 above).

¹⁸² *Sebejan* (fn 75 above) at 1092I, par 35.

¹⁸³ See Schwikkard (fn 127 above) at 455.

The meaning of the concept 'suspect' is crucial, firstly, to prevent the police from retaining a potential accused person in the category of 'suspect'¹⁸⁴ or 'state witness',¹⁸⁵ while obtaining incriminating evidence against her without the need of informing her of her constitutional guarantees;¹⁸⁶ secondly, it serves as an unequivocal guide to law enforcement agencies as to when the informational duties, created by the Constitution, should be activated during the interrogation process. In a word, the classification of the concept 'suspect' serves the purpose of determining the scope and ambit of the rights guaranteed by section 35 of the Constitution,¹⁸⁷ thus indicating exactly when the threshold to the 'gate house' of the criminal justice system has been passed.¹⁸⁸

It is submitted that the definition of the concept 'suspect' in the ICTY, ICTR and the *Corpus Juris* of the European community coincides with the definition of the same concept when the following South African High Court judgments are read together: *Sebejan*, *Orrie* and *Zuma 2*.

This argument is reinforced by the following alternative line of reasoning: It is trite that suspects had, in terms of South African common law, the benefit of relying on the right to remain silent and the privilege against self-incrimination.¹⁸⁹ The Bill of Rights does not deny the existence of the right to

¹⁸⁴ *Sebejan* (fn 75 above) at par 56; see also Article 29 of the *Corpus Juris* of the European community, referred to in fn 101 above.

¹⁸⁵ *Orrie* (fn 132 above).

¹⁸⁶ *Sebejan* (fn 75 above) at par 56.

¹⁸⁷ Schwikkard in Currie & DeWaal (fn 16 above) at 740.

¹⁸⁸ See *Melani* (fn 26 above) at 349, where Froneman J wrote as follows: "It has everything to do with the need to ensure that an accused is fairly treated in the entire criminal process: in the 'gatehouses' of the criminal justice system (that is the interrogation process) as well as in the 'mansions' (the court)".

¹⁸⁹ *R v Magoetie* 1959 2 SA 322 (A), "*Magoetie*"; see also Kriegler (fn 30 above) at 557-559; see further Schwikkard (1998) 11 *SACJ* 270 at 273-274.

remain silent and the privilege against self-incrimination; by contrast, it entrenches the mentioned rights. Against this background, suspects may not be deprived of the relevant rights.¹⁹⁰ These common law rights should be developed by South African courts, by incorporating the right to legal representation which serves the purpose of effectively protecting the right to remain silent and the privilege against self-incrimination.¹⁹¹ Such an interpretation would give effect to the dictates of section 39(2) of the Bill of Rights,¹⁹² and likewise enhance the values that ensure the right to a fair trial.¹⁹³ In this regard, the *Sebejan* judgment should be followed. In accordance with its approach, the focal point of attention should therefore be whether:

- (a) there is a sufficient link between the violation and the discovery of the evidence, irrespective of whether the accused was a 'suspect', 'detained' or an 'accused' person when her rights were violated; and
- (b) admission of the evidence thus obtained, would render the trial unfair or otherwise be detrimental to the administration of justice.

Accordingly, the link between the violation and the discovery of the evidence is discussed in the next section of this work.

¹⁹⁰ See section 39(3) of the Constitution.

¹⁹¹ See the approach in *Sebejan* (fn 75 above); see also the convincing argument of Schwikkard, (fn 127 above) in this regard.

¹⁹² Section 39(2). The pertinent parts of the section provide: "When interpreting any legislation ... every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".

¹⁹³ See *Dzukuza* (fn 39 above) at par 9 and 11, where these values are underscored.

C. The link between the violation and the discovery of the evidence: the 'connection' requirement

In this part of the thesis, the Canadian approach to the interpretation of the phrase 'obtained in a manner', contained in section 24(2) of the Charter is compared to the interpretation of a similar phrase contained in section 35(5) of the South African Constitution.

1 The 'connection' requirement in Canada

In Canada, an accused seeking the exclusion of evidence under section 24(2) must show that the evidence had been '**obtained in a manner**' that violated any right contained in the Charter. Put another way: The accused must demonstrate a sufficient link between the violation and the discovery of the disputed evidence. Failure to demonstrate this requirement would result in the accused being debarred from relying on exclusion of the evidence in terms of section 24(2).

Three tests have been identified to determine whether the 'connection' requirement had been satisfied: a causal connection, a temporal proximity and a temporal sequence test.¹⁹⁴ A causal connection requirement entails that a causal link must exist between the infringement and the discovery of the evidence.¹⁹⁵ In

¹⁹⁴ See, in this regard, *Therens* (fn 46 above) and *R v Upston* (1998) 42 CCC (3d) 564, ("*Upston*"), where a causal connection test was applied; compare *Strachan* (1988) 46 CCC (3d) 479, ("*Strachan*"), where a causal connection requirement was rejected. For a discussion of these contrasting approaches, see Donovan (1991) *UT Fac L Rev*, 233 *et seq*; Hogg *Constitutional Law of Canada* (1992) at 93; Mitchell (1996) 38 *CLQ* 26; Paciocco (1989/90) 32 *CLQ* 326.

¹⁹⁵ *Therens* (fn 46 above); Hogg (*ibid*) at 933-934; Mitchell (*ibid*) at 168.

other words, the accused must demonstrate that the disputed evidence would not have been discovered by the police, 'but for' the violation.¹⁹⁶ Such an approach did not escape the criticism of the Canadian Supreme Court.¹⁹⁷ *Strachan* was followed in several subsequent reported Canadian Supreme Court decisions.¹⁹⁸ The second test is a temporal proximity test or the 'same transaction' theory. To satisfy the requirements of this test, an accused must demonstrate that the violation of a Charter right and the discovery of the disputed evidence is sufficiently close to each other in time. The third test is the temporal sequence test, which requires of an accused to demonstrate that a Charter infringement merely preceded the discovery of the evidence.¹⁹⁹

¹⁹⁶ *Therens* (ibid).

¹⁹⁷ A strict causal connection requirement was criticised as follows by Dickson CJC in *Strachan* (fn 194 above) at 496: "In my view, reading the phrase 'obtained in a manner' as imposing a causation requirement creates a host of difficulties. A strict causal nexus would place the courts in the position of having to speculate whether the evidence would have been discovered had the Charter violation not occurred. Speculation on what might have happened is a highly artificial task. Isolating the events that caused the evidence to be discovered from those that did not is an exercise in sophistry. Events are complex and dynamic. It will never be possible to state with certainty what would have taken place had a Charter violation not occurred. Speculation of this sort is not, in my view, an appropriate inquiry for the courts." Dickson CJC was also of the view that a strict causal nexus would lead to the courts having to "focus narrowly on the actions most directly responsible for the discovery of the evidence rather than on the entire course of events leading to its discovery. This will almost inevitably lead to an intellectual endeavour essentially amounting to 'splitting of hairs' between conduct that violated the Charter and that which did not".

¹⁹⁸ See, for example, *R v Ross* (1989) 46 CCC (3d) 129, ("Ross"); *R v Black* (1989) 50 CCC (3d) 20, ("Black"); *R v Brydges* (1990) CCC (3d) 330, ("Brydges"); *R v Kokesch* (1990) 61 CCC (3d) 207, ("Kokesch"); *R v Grant* (1994) CCC (3d) 173, ("Grant 2"); *R v Plant* (1993) 84 CCC (3d) 203, ("Plant"); *R v Wiley* (1993) 84 CCC (3d) 161, ("Wiley"); *R v Bartle* (1994) 92 CCC (3d) 309, ("Bartle"); *R v Goldhart* (1996) DLR (4th) 502, ("Goldhart").

¹⁹⁹ *Strachan* (fn 194 above) at 498, where Dickson CJC wrote as follows: "... the first enquiry under s 24(2) would be to determine whether a Charter violation occurred in the course of obtaining the evidence. A temporal link between the infringement of the Charter and the

Canadian precedent further illustrates the importance of the nature of the connection requirement.²⁰⁰ A causal connection between the violation and the discovery of the evidence would be too onerous to be satisfied by an accused.²⁰¹ The Canadian Supreme Court decided in *Strachan* that, requiring from an accused to satisfy a causal link, would, in general, advance a 'restrictive approach to the rights and freedoms guaranteed by the Charter'.²⁰² The importance of this statement in relation to the fair trial requirement is discussed in chapter four of this work. Requiring from an accused to demonstrate a causal connection between the violation and the discovery of the evidence would inevitably result in rights protection playing an inferior role when compared to police control.²⁰³ The Supreme Court of Canada opted for a temporal sequence connection as adequate compliance with the requirement that evidence must have been 'obtained in a manner'.²⁰⁴ In other words, where the violation

discovery of the evidence figures prominently in this assessment, particularly where the Charter violation and the discovery of the evidence occur in the course of a single transaction"; see also *Goldhart* (ibid) at 53; see also Mitchell (fn 194 above) at 26-27; Donavan (fn 194 above) at 249.

²⁰⁰ See, for instance, *Strachan* (fn 194 above).

²⁰¹ Per Le Dain J in *Therens* (fn 46 above). This approach of Le Dain J was approved by the majority of the court in *Strachan* (fn 194 above).

²⁰² Ibid at 497.

²⁰³ Roach (fn 66 above) at 5-22, par 5. 450.

²⁰⁴ See *Therens* (fn 46 above) at 498-499, where Dickson CJC reasoned as follows: "In my view, all of the pitfalls of causation may be avoided by adopting an approach that focuses on the entire chain of events during which the Charter violation occurred and the evidence was obtained. Accordingly, the first inquiry under s 24(2) would be to determine whether a Charter violation occurred in the course of obtaining the evidence. A temporal link between the infringement of the Charter and the discovery of the evidence figures prominently in this assessment, particularly where the Charter violation and the discovery of the evidence occur in the course of a single transaction. The presence of a temporal connection is not, however, determinative. Situations will arise where evidence, following the breach of a Charter right, will be too remote from the violation to be 'obtained in a manner' that infringed the Charter. In my view, these situations

preceded or occurred in the course of obtaining the evidence, provided the discovery of the evidence is not too remote in time from the violation, this requirement will have been satisfied.²⁰⁵ During 1996, the Canadian Supreme Court was called upon to apply the connection requirement to the unique factual background in the case of *Goldhart*.²⁰⁶

In *Goldhart*, the accused shared accommodation with one Mayer. The police suspected that Goldhart was operating a hydroponic dagga garden on the premises. However, they did not have sufficient grounds to obtain a search warrant. The police went to the premises, knocked at the doors, but their knocks were not answered. The officers decided to walk around the property. While walking, they smelled marijuana coming from inside the premises. Based on what they smelled, the police obtained a search warrant, authorising them to search the premises. The warrant was executed, and Goldhart and Mayer, who were on the premises at the time, were arrested and charged with cultivating and possession of narcotics for the purpose of trafficking. A few weeks thereafter, Mayer became a 'born again' Christian. He contacted the investigating officer and voluntarily made a statement that was, for all intents and purposes, a confession. A few months thereafter, Mayer pleaded guilty and offered to testify for the prosecution in their case against Goldhart. During the trial of Goldhart, the marijuana plants discovered as a result of the search was excluded, because the police trespassed in order to gain information to obtain the search warrant. The prosecution therefore attempted to prove its case against Goldhart by means of the *viva voce* testimony of Mayer. The defence's application to exclude

should be dealt with on a case by case basis. There can be no hard and fast rule for determining when evidence obtained following a Charter right becomes too remote".

²⁰⁵ *R v Ross* (fn 198 above) at 139; see also *Morissette* (1984) 29 *McGill LJ* 521 at 527; however, compare the criticism of this approach by *Paciocco* (fn 194 above) at 346, who favours a causal connection requirement.

²⁰⁶ Fn 198 above.

the testimony of Mayer was unsuccessful. The issue before the Supreme Court was whether the testimony of Mayer was sufficiently connected to the warrant, so as to qualify as having been 'obtained in a manner'.

The Supreme Court held that the connection requirement had not been satisfied, because the testimony of Mayer was not sufficiently linked to the Charter infringement. Sopinka J wrote the judgment for the majority opinion and reasoned that a 'temporal link will often suffice', but is not 'always determinative'.²⁰⁷ The judge explains that the temporal link would not suffice when the infringement and the discovery of the evidence is remote. When is the link remote? This, according to Sopinka J, would be the case when 'the connection is tenuous'.²⁰⁸ The judge proceeded in his reasoning by highlighting the fact that the concept of 'remoteness relates not only to the temporal connection but to the causal connection as well'.²⁰⁹ The reason for the judgment was thus formulated:²¹⁰

If both the temporal connection and causal connection are tenuous, the court may very well conclude that the evidence was not obtained in a manner that infringes a right or freedom under the Charter. On the other hand, the temporal connection may be so strong that the Charter breach is an integral part of a single transaction. In that case, a causal connection that is weak or even absent will be of no importance.

This dictum by Sopinka J disregarded the criticism leveled by Dickson CJC in *Strachan* against the use of a causal connection requirement to determine whether the disputed evidence was 'obtained in a manner'. By the same token,

²⁰⁷ Ibid at 53.

²⁰⁸ Loc cit.

²⁰⁹ Loc cit.

²¹⁰ Loc cit.

this pronouncement elevates causation analysis to one of the primary tools in the section 24(2) assessment. A causation analysis is a central feature in the fair trial assessment²¹¹ and plays a significant role when courts have to determine whether exclusion of the disputed evidence would have an adverse effect on the repute of the justice system.²¹²

In addition, Sopinka J highlighted the difference between physical evidence discovered following a Charter breach and the testimony of a witness discovered after unwarranted police conduct. Witnesses often volunteer their testimony. When a suspect is arrested and charged, but decides to volunteer evidence for the prosecution, the discovery of the person 'cannot simply be equated with securing evidence from that person'.²¹³ For, the judge reasoned, a person charged 'has the right to remain silent', and the prosecution has no assurance that the person 'will provide any information let alone sworn testimony that is favourable to the Crown'.²¹⁴ On this basis, the connection between the Charter breach and the testimony of Mayer was not sufficient to satisfy the requirement that evidence must have been 'obtained in a manner'.

2 The 'connection' requirement in South Africa

The relevant phrase of section 35(5) of the South African Constitution provides that '... evidence obtained in a manner that violates any right contained in the Bill of Rights ...', must be excluded, provided that its admission would cause the results forbidden in terms of the section. The mentioned phrase is couched in

²¹¹ See the discussion of the cases of *R v Stillman* (1997) 113 CCC (3d) 330, ("*Stillman*") and *R v Feeney* (1997) 115 CCC (3d) 138, ("*Feeney*") in chapter 4.

²¹² See the discussion of *Stillman* (ibid) and *Feeney* (ibid) in chapter 5.

²¹³ *Goldhart* (fn 198 above) at 496.

²¹⁴ Loc cit.

strikingly similar terms when compared to the phrase contained in section 24(2) of the Charter.²¹⁵ For this reason, Canadian precedent dealing with this requirement would be of benefit as a means of interpreting this threshold requirement.²¹⁶ The phrase referred to, requires that a link or relationship between the violation and the discovery of the disputed evidence should exist as a precondition precedent in order to have access to challenge the admissibility of evidence during the substantive phase. Following the precedent established by our Canadian counterparts,²¹⁷ it should be emphasised that this assessment concerns only a preliminary assessment that may thereafter (depending on the outcome of the preliminary assessment) be followed by the substantive phase which is divided into a two-phased analysis. The preliminary phase of the inquiry or the threshold assessment²¹⁸ would be concerned with the determination as to whether a Bill of Rights violation occurred that is connected or related to the procurement of the evidence. Absent such link, the accused would be precluded from relying on the exclusionary remedy.

In the South African case of *Soci*,²¹⁹ the accused made a pointing-out to a police officer and later that day, made a statement to a magistrate. The admissibility of

²¹⁵ Compare the Canadian version, which reads as follows: "... evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter ...".

²¹⁶ This approach was advocated by the Supreme Court of Appeal in *Pillay and Others v S* 2004 2 BCLR 158 (SCA) at par 87 and 91, ("*Pillay*"); see also *S v Soci* 1998 2 SACR 275 (E) at 293-294, ("*Soci*").

²¹⁷ *Bartle* (fn 198 above); *Strachan* (fn 198 above); the dissenting opinion of Le Dain J in *Therens* (fn 46 above).

²¹⁸ The second phase of the inquiry is concerned with balancing several factors, contained in the three groups of factors identified in *Collins* (1987) 33 CCC (3d) 1 (SCC) at 19-20, to determine whether admission of the disputed evidence would render the trial unfair or otherwise be detrimental to the criminal justice system. These factors are discussed in chapters 4 and 5. See the contention of the writer in chapter 6, regarding the balancing of these groups of factors.

²¹⁹ Fn 216 above.

these self-incriminatory acts of the accused was disputed in a trial-within-a-trial. The accused contended that both the pointing-out and the statement should be excluded because he had not been informed of his right to legal representation before both the pointing-out and the statement had been made. Referring to section 35(5), Erasmus J (as he then was) rejected a causation requirement, asserting that such a requirement would be inimical to the interpretation of a Constitution:²²⁰

If one were dealing with an ordinary statute, one would - on the basis of the introductory sentence of the provision - probably reason that the Lawmaker, being aware of the conflicting judgments and the outcome of some of them, intended that the exclusion be confined to cases where there is a causal connection between the violation and the self-incriminatory acts. Such an interpretation would be in accordance with the plain meaning of the words 'obtained in a manner' where they appear in ss (5).

Confirming the essence of the dissenting judgment of Le Dain J in *Therens*, without explicitly alluding to it, Erasmus J proceeded and reasoned that a literal interpretation would constrain the scope of section 35(5) to such instances when evidence had been obtained as a consequence of 'an unconstitutional search, (or relevant here)', when an accused 'would not have performed the self-incriminatory acts but for' a preceding constitutional violation. The judge reasoned that a strict causation analysis would lead to the anomaly that 'non-causal infractions' would have to be assessed by applying a 'general discretion', based on public policy.²²¹

²²⁰ Ibid at 293.

²²¹ Loc cit.

The approach of Erasmus J is correct when he adopted a purposive interpretation of the phrase instead of a literal one and, by doing so, prevented the situation where our section 35(5) jurisprudence would be entrapped in the dilemma occasioned by the Canadian Supreme Court in its interpretation of this phrase. Concluding that a purposive interpretation is of primary importance when interpreting this phrase, he held as follows:²²²

But the Constitution – needless to say – is no ordinary statute. I shall therefore assume that on a purposeful interpretation thereof, the evidence contemplated in the phrase ‘(e)vidence obtained in a manner that violates any right contained in the Bill of Rights’ encompasses all acts performed by a detainee subsequent to the violation of his/her rights in the course of pre-trial investigations. Only on such basis can the evidence of the pointing-out and the statement by the accused be said to have been ‘obtained in violation of a right contained in the Bill of Rights’ even in the absence of a causal connection between the violation and the subsequent self-incriminating acts by the accused. On such basis prejudice would not be a consideration in establishing the presence of the jurisdictional fact that the evidence was ‘obtained’ in a manner that violates the Bill of Rights.

The judge in *Soci* set out a broad test for the requirement that evidence that is ‘obtained in a manner’ and was unwavering in his refusal to over-emphasise a causal nexus requirement. This approach deserves to be followed by our courts when this threshold requirement is determined. Unlike the uncertainty that prevails in Canada about this threshold requirement, the judgment of Erasmus J on this issue has provided a firm foundation for the development of the South African section 35(5) jurisprudence.

²²² Loc cit.

In the recently reported case of *S v Ntlantsi*,²²³ the magistrate presiding over the bail proceedings failed to inform the accused in terms of the proviso to section 60(11B)(c) of the Criminal Procedure Act,²²⁴ of his right to remain silent and the privilege against self-incrimination. In terms of the relevant provisions, the magistrate had to inform the accused of these rights and the consequence that the contents of such bail proceedings could be used against him during the trial, before he elected to testify in the bail proceedings. When the charges were put to the accused, he pleaded not guilty. The prosecutor in the subsequent trial cross-examined the accused about certain incriminatory statements he had made during the bail application. Yekiso J formulated the issues as follows: Firstly, whether 'a reference by the State Prosecutor, in the course of cross-examination of the accused at trial, to bail proceedings which are *prima facie* irregular does not constitute a violation of accused's right to a fair trial'; and, secondly, 'whether evidence arising from such cross-examination constitutes improperly obtained evidence' in terms of section 35(5).²²⁵ The second issue is pertinent to the present discussion.

The court in *Ntlantsi* applied a temporal sequence test when it held that the connection requirement had been satisfied. Yekiso J reasoned that 'it is clear that the evidence emanating from the cross-examination of the accused **was obtained in a manner** that violates the accused's right to remain silent and the

²²³ 2007 4 All SA 941 (C), (*"Ntlantsi"*).

²²⁴ The relevant provision reads as follows: "The record of the bail proceedings, excluding the information given in paragraph (a), shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that, if the accused elects to testify, during the course of the bail proceedings, the court **must** inform him/her of the fact that anything he/she says may be used against him/her at his/her trial and such evidence becomes admissible in any subsequent proceedings". Emphasis added.

²²⁵ Fn 223 above at par 9.

right against self-incrimination'.²²⁶ A clear temporal connection was evident, because the incriminating answers were elicited from the accused specifically after he was cross-examined about his statements made during the bail application.²²⁷

The South African Supreme Court of Appeal, in *Pillay*,²²⁸ had the opportunity to determine the nature of the link between the violation and the discovery of the evidence. Despite the fact that the Supreme Court of Appeal did not refer to *Soci*, it applied a similar test - a temporal sequence requirement was deemed to be sufficient for the purposes of this threshold requirement, when the majority opinion held that:²²⁹

There is no doubt that the money found in the ceiling of the house of accused 10 was ***found as a result of a violation***, first, of her constitutional right to privacy (section 14 of the Constitution) in that her private communications were illegally monitored following the unlawful tapping of her telephone line and second, her right to remain silent and her right against self-incrimination (section 35 of the Constitution) in that she was induced to make ***the statement that led to the finding of the money in the ceiling*** of her house.

The phrase 'found as a result of a violation' makes plain that a causal nexus requirement had been considered. The test was therefore whether the money

²²⁶ Ibid at par 16. Emphasis added. In addition, it should be mentioned that the causal connection between the infringement and the discovery of the evidence was not tenuous.

²²⁷ Ibid at par 5, where the facts were summarised as follows: "The accused maintained this position (pleading not guilty and relying on a complete denial) until at some point in the course of cross-examination when a reference was made ... to the bail proceedings".

²²⁸ Fn 216 above.

²²⁹ Ibid at par 85. Emphasis added.

would have been discovered 'but for' the violation – indicative of the application of a clear causal nexus requirement. However, when one considers that the court held that the 'statement led to the finding of the money', it clearly emerges that a temporal sequence test was indeed approved and applied. The court was satisfied that the violations preceded the discovery of the evidence and, one must add, the connection between the violations and the discovery of the evidence was not remote. Both the temporal sequence and the causal connection between the infringement and the discovery of the evidence were strong. It is plain from the above that both a causal nexus requirement and a temporal sequence test have a place in the connection requirement under section 35(5). However, both *Ntlantsi* and *Pillay* demonstrate the significance that should be attached to the temporal sequence test, when determining the 'connection' requirement. The 'connection' requirement was a pertinent issue before the Supreme Court of Appeal in the recently reported case of *Mthembu v S*.²³⁰

In *Mthembu*, the chief state witness ("the witness") against the appellant was arrested on 19 February 1998 and tortured, thereafter he led the police to evidence, essential for the conviction of the appellant. The witness testified against the accused some four years after he led the police to the incriminating evidence. The evidence in dispute in this case was on the one hand, a metal box and a Hi Lux motor vehicle and a statement made by the witness that incriminated the appellant in the commission of the crimes, on the other hand. Before the witness testified, he was warned by the presiding officer in terms of section 204 of the Criminal Procedure Act.²³¹ Although the testimony of the

²³⁰ (64/2007) [2008] ZASCA 51 (10 April 2008), ("*Mthembu*").

²³¹ Section 204 makes provision that an accomplice may testify against an accused, ie, "turn State's evidence". In terms of this section, a person criminally associated with the accused becomes a compellable witness who must be warned by the presiding officer to answer all questions put to her honestly and frankly, regardless of the fact that she may incriminate herself in the commission of an offence. If the court is satisfied that she testified in this manner, the

witness was given 'under statutory compulsion', he did not testify under duress.²³² The court had to decide whether the evidence had been 'obtained' within the meaning of section 35(5).²³³

Cachalia JA considered this issue with regard to the real evidence first and a strong causal connection between the infringement and the discovery of the evidence is recognisable in his assessment when he wrote as follows:²³⁴

But these discoveries were made as a result of the police having tortured Ramseroop [the witness]. There is no suggestion that the discoveries would have been made in any event.

Turning to consider whether the 'connection' requirement had been satisfied in respect of the statement made by the witness, the court observed that the witness made the statement 'immediately after the metal box was discovered at his home following his torture'. It is submitted that a strong temporal connection existed at that stage.²³⁵ The court reasoned that the fact that the witness testified voluntarily at the trial of the appellant did not detract from the fact that the information contained in the statement pertaining to the vehicle and the metal box 'was extracted through torture'.²³⁶ This reasoning of the court, it is submitted, confirms that despite the lapse of time between the making of the statement and the testimony in court, the causal link between the torture and the testimony was not interrupted. In the light hereof, including the warning in

court may grant the witness an indemnity from being prosecuted for the particular offence. See De Jager et al (fn 113 above) at 23-50B to 23-50E for a discussion of this section.

²³² Fn 230 above at par 21.

²³³ Loc cit.

²³⁴ Ibid at par 33.

²³⁵ Ibid at par 34.

²³⁶ Loc cit.

terms of section 204 before he testified, the witness must have realised – so the court reasoned – that if he departed from such statement, he could face serious consequences. In the result, the court concluded the ‘connection’ requirement with regard to the statement as follows:

In my view, therefore, there is an inextricable link between his torture and the nature of the evidence that was tendered in court. The torture has stained the evidence irredeemably.

This approach followed by Cachalia JA is comparable to the Canadian approach. In this case, the temporal connection was not strong, since a period of four years had elapsed from the initial making of the statement and the actual testimony of the witness in court. However, a strong causal connection existed between the torture and the testimony given by the witness in court. The fact that the witness testified ‘voluntarily’ could not separate the contents of his testimony from its tainted genesis. The different outcomes in *Goldhart* and *Mthembu* were caused by the differences in the facts of the respective cases.

The ‘international dialogue’²³⁷ between the South African High Courts and the Canadian Supreme Court on the interpretation of the phrase ‘obtained in a manner’ has benefited the courts of South Africa in interpreting this threshold requirement. Erasmus J adopted a purposive and generous approach when interpreting this threshold requirement in *Soci*. South African courts should embrace this approach because it is based on sound policy considerations. By rejecting a causal nexus requirement as mandatory, and applying a temporal sequence test, Erasmus J adopted a broad view of the relationship between the violation and the discovery of the evidence. The approach adopted in *Mthembu*

²³⁷ For a discussion of this concept, see Udombana (2005) 5 *AHRLJ* 47. He argues that comparative constitutionalism is imperative and legitimate when courts think globally to interpret local constitutional instruments.; see also Sibanda (2006) *De Jure* 102.

further confirms that either a temporal sequence or a causal connection test should be applied, whichever is the stronger, to determine the 'connection' requirement.

South African courts have accepted the judicial integrity rationale as the primary rationale of section 35(5).²³⁸ In the light hereof, the courts of South Africa have been wise to hold that an accused should not be prevented from relying on the exclusionary remedy contained in section 35(5) because she could not show that a causal relationship exists between the violation and the discovery of the evidence. Overstressing a causal connection would inevitably narrow the application of section 35(5), thus leaving many of the accused without the benefit of the constitutional exclusionary remedy, despite the fact that their fundamental rights have been violated. Such a result could only detrimentally affect the administration of justice - an effect which section 35(5) was designed specifically to avoid.

²³⁸ See the majority opinion of Mpati DP and Motata AJA in *Pillay* (fn 216 above) at 187D-F and 188E-G, where they formulated the rationale as follows: "Although it may cause some concern that a perpetrator like accused 10 might go free as a result of exclusion of evidence which would have secured her conviction, what needs to be borne in mind is that the objective of seeking co-operation from such a person is to facilitate a conviction for an even worse and serious offence. The police, in behaving as they did, ie charging accused 10 in spite of the undertaking, and the courts sanctioning such behaviour, the objective referred to will in the future be well nigh impossible to achieve. To use the words of section 35(5) of the Constitution it will be detrimental to the administration of justice".

D. Raising the section 35(5) issue and procedural matters

1 Raising the issue: the duties of the parties and the nature of the ruling

Unlike the Canadian courts,²³⁹ the courts in South Africa do not insist that a litigant inform the court in advance of an impending Bill of Rights challenge. In most jurisdictions of the South African High Court, the accused were allowed to raise the issue during the trial, immediately before the prosecutor or prosecutrix gave notice of his or her intention to lead evidence about pointings-out, admissions, confessions or statements.²⁴⁰ The accused may also raise the issue in his written plea explanation in terms of section 115 of the Criminal Procedure Act.²⁴¹ In *Mfene*,²⁴² McCall J noted that when the issue of admissibility was argued, counsel for the prosecution was not fully aware of the implications of section 25(1)(c) of the Interim Constitution and the exclusionary remedy

²³⁹ See Roach (fn 66 above) at 5-27, relying on *R v Kutynec* (1990) 57 CCC (3rd) 507, ("*Kutynec*"), he mentions that accused who do not "raise the Charter claims at the outset of their trials, do so at their peril". He quotes the relevant part of the judgment as follows: "In the interests of conducting a proper trial, the trial judge is entitled to insist, and should insist, that defence counsel state his or her position on possible Charter issues either before or at the outset of the trial. All issues of notice to the Crown and the sufficiency of disclosure can be sorted out at that time. Failing timely notice, a trial judge, having taken account all relevant circumstances, is entitled to refuse to entertain an application to assert a Charter remedy". However, citing *R v Loveman* (1992) 71 CCC (3d) 123, ("*Loveman*"), he reveals that trial courts do have a discretion to hear late applications for exclusion during later stages of the trial. It must be emphasised that in trials by jury, which is not applicable in South Africa, it should be accepted practice to deal with the admissibility issue in a *voir dire*, so as to prevent the jury from hearing any inadmissible evidence. A failure to do so would have a negative impact on the fairness of the trial.

²⁴⁰ *S v Mphala and Another* 1998 1 SACR 388 (WLD), ("*Mphala*").

²⁴¹ *S v August and Others* [2005] 2 All SA 605 (NC), ("*August*").

²⁴² Fn 158 above.

contained in section 35(5) of the South African Constitution.²⁴³ In the light thereof, the judge was of the view that before he finally ruled on the admissibility of the disputed evidence, 'it would be in the interests of justice to allow the State, should it so wish, to reopen its case in the trial within a trial', so as to lead evidence about the relevant issues.²⁴⁴ In some instances a belated notice of an objection to the admission of unconstitutionally obtained evidence was allowed, so as to prevent the accused from suffering any prejudice.²⁴⁵

However, in *S v Zwayi*,²⁴⁶ a belated objection to the admission of an identity parade on the grounds of a denial of the right to legal representation led to the court drawing a negative inference against the accused. The alleged flaw in the identity parade was only raised during the stage of the presentation of argument.²⁴⁷ Despite considering the objection raised, the court reasoned that on the probabilities it is 'most improbable that a crucial issue' such as an alleged tainted identity parade would not have been raised as the 'focal point of the accused's defence at the appropriate stage of the trial'.²⁴⁸ By the same token, a legal representative acting on behalf of the accused must raise the basis for objecting to the admissibility of the evidence in clear terms. Failure to do so may result in the presiding officer drawing a negative inference against the accused.²⁴⁹

The prosecutor has a duty to determine the surrounding circumstances of the self-incriminatory conduct of the accused in the event that he or she suspects

²⁴³ Ibid at 1168.

²⁴⁴ Loc cit.

²⁴⁵ *S v Madiba and Another* 1998 1 BCLR 38 (D) at 40, ("*Madiba*").

²⁴⁶ 1997 2 SACR 772 (CKH), ("*Zwayi*").

²⁴⁷ Ibid at 782.

²⁴⁸ Loc cit.

²⁴⁹ *S v Malefo en Andere* 1998 1 SACR 127 (W) at 155-187, ("*Malefo*").

that a violation of a constitutional right preceded such conduct.²⁵⁰ This would especially be important in the case when the accused is unrepresented. The reason why this should be done needs no explanation – the court must be informed about any such circumstances before evidence of the self-incriminatory conduct may be led. This would enable the court to inform the accused about her right to challenge the admissibility issue by calling relevant witnesses.

A ruling on the admissibility of evidence in terms of section 35(5) is of an interlocutory nature,²⁵¹ unless the issue is decided after all the evidence had been heard.²⁵² In the event that new evidence emerges during the trial which changes the basis upon which the court made an initial ruling in a trial-within-a-trial, the parties could be permitted to approach the court with the request to reconsider its previous ruling.²⁵³

²⁵⁰ For two reasons: First, bearing in mind the fact that the 'connection' requirement should be determined by the court and not the prosecutor; and, second, to ensure that the accused has a fair trial. The prosecutor should be burdened with this duty, especially when the accused is undefended, since she has access to the police statements in the police docket and has a duty to consult with prosecution witnesses before the trial ensues.

²⁵¹ See *Melani* (fn 26 above) at 339, where the court was called upon to reconsider its previous ruling in light of new circumstances.

²⁵² See Roach (fn 66 above) at 5-28, where he mentions that this is the general rule in Canada. He demonstrates that the mentioned rule is based on sound policy considerations, when he quotes from *R v De Sousa* (1992) 95 DLR (4th) 595, at 603, ("*De Sousa*"), Sopinka J reasoning that the trial judge should have regard to two policy considerations, which favours the finalisation of applications for exclusion at the end of the case: "The first is that criminal proceedings should not be fragmented by interlocutory proceedings which take on a life of their own ... The second, which relates to constitutional challenges, discourages adjudication of constitutional issues without a factual foundation ..."

²⁵³ See *Melani* (fn 26 above), at 339: "During argument in the main trial Mr Daubermann once again invited me to reconsider my ruling in respect of accused No 1 in view of the fact that we now had the benefit of hearing accused No 1's evidence, an advantage denied to us in the earlier

2 Trial-within-a-trial; establishing the basis for the issue by means of facts:
the 'threshold onus'

In Canada, the admissibility issue is separated from the assessment of the criminal liability of the accused. It is an established rule of practice that the admissibility of evidence is decided by means of a *voir dire* (pre-trial motion to exclude the disputed evidence).²⁵⁴

The South African practice is comparable to that of its Canadian counterpart, in that the issues of admissibility and criminal liability of an accused are separated to ensure that the rights to be presumed innocent, to remain silent and not to testify during the trial proceedings are protected.²⁵⁵ For this reason, the courts of

admissibility trial. This portion of the judgment therefore deals with the ...reconsideration of the admissibility of the evidence relating to accused No 1's alleged pointing-out".

²⁵⁴ See, for instance, *Ross* (fn 198 above); *Black* (fn 198 above); *Brydges* (fn 198 above); *Kokesch* (fn 198 above); *Grant 2* (fn 198 above); *Plant* (fn 198 above); *Wiley* (fn 198 above); *Bartle* (fn 198 above); *Goldhart* (fn 198 above); *Stillman* (fn 211 above); *Feeney* (fn 211 above); *Rv Buhay* (2003) 1 SCR 631; *R v Buendia-Alas* (2004) 118 CRR (2d) 32; see also Fenton (fn 1 above) at 296.

²⁵⁵ It was held in *S v Mashumpa and Another* 2008 1 SACR 128 (E), ("*Mashumpa*") that the defence may not, during a trial-within-trial, demand a ruling on the admissibility of a statement before deciding whether to call the accused to testify. Froneman J reasoned as follows at 137: "In a s 174 situation the underlying consideration for a discharge is that a person should not be prosecuted in the absence of a minimum of evidence merely in the expectation that he or she might at some stage incriminate him-or herself, or perhaps too because a failure to discharge an accused in that kind of situation would compromise the constitutional presumption of innocence, the accused's right to remain silent and not to testify, and the incidence of the onus of proof. These considerations do not normally arise in a trial-within-a-trial determining the admissibility of an alleged voluntary statement ...".

South Africa decide the admissibility issue by means of a trial-within-a-trial.²⁵⁶ This clear separation of the different proceedings ensures that the accused is entitled to testify during the trial-within-a-trial, without fear of being cross-examined about the contents of her testimony led during the admissibility enquiry, during the main trial. The accused may, in the main trial, exercise her right to remain silent, when her criminal liability is to be considered.

It is trite law that, in the event of factual disputes, the admissibility issue should be determined by means of a trial-within a trial.²⁵⁷ The Supreme Court of Appeal demonstrated the importance of this procedural rule in *Director of Public Prosecutions, Transvaal v Viljoen*.²⁵⁸ The accused was charged with the murder

²⁵⁶ See, for example, *S v Motloutsi* 1996 1 SACR 78 (C), ("Motloutsi"); *S v Hoho* 1999 2 SACR 159 (C), ("Hoho"); *Soci* (fn 216 above); *Madiba* (fn 245 above); *S v Shongwe en Andere* 1998 9 BCLR 1170 (T), ("Shongwe"); *S v Gumede & Others* 1998 5 BCLR 530 (D), ("Gumede"); *Sebejan* (fn 63 above); *S v Mathebula and Another* 1997 1 BCLR 123 (W), ("Mathebula"); *Melani* (fn 26 above); *S v Ndhlovu and Others* 2001 1 SACR 85 (W), ("Ndhlovu"); *S v Mayekiso en Andere* 1996 2 SACR 298 (C), ("Mayekiso"); *S v Cloete and Another* 1999 2 SACR 137 (C), ("Cloete"); *Malefo* (fn 249 above); *S v Gasa and Others* 1998 1 SACR 446 (D), ("Gasa"); *S v R and Others* 2000 1 SACR 33 (W), ("R"); *August* (fn 241 above); *Mphala* (fn 240 above); *Van der Merwe* (fn 36 above); *Mashumpa* (fn 255 above).

²⁵⁷ See the cases cited at fn 256 above.

²⁵⁸ [2005] 2 All SA 355 (SCA), ("Viljoen"). See also *S v Langa* 1996 2 SACR 153 (N), ("Langa 2"), where Magid J had to make a ruling on the admissibility of a certified copy of the proceedings which took place in the magistrate's court in terms of the provisions of section 119 of the Criminal Procedure Act. It was common cause that the accused were not informed of their rights to legal representation and to remain silent before they tendered pleas of guilty. The judge noted that he is bound by the majority decision in *Mabaso* (fn 27 above), but mentioned obiter that the reasoning of the minority judgment is preferable in a democratic society. Milne JA (dissenting) reasoned in *Mabaso* (ibid) at 211-J to 212-C as follows: "I cannot, with respect, agree that there is any difference in principle between the witness who is not warned of his right not to answer incriminating questions and the accused who is not advised of his right to legal representation. True, the choice between a plea of guilty and a plea of not guilty is an untrammelled one, but in the case of an unlettered and unsophisticated layman, the choice is a totally uninformed one."

of his wife. During proceedings in terms of section 119²⁵⁹ and 121²⁶⁰ of the

While the standard of literacy in the Republic is no doubt increasing, a great many people who come before the courts are illiterate and unsophisticated. This is recognised by the Legislature. The primary object of questioning an accused person who pleads guilty at s 119 proceedings is to protect him from the consequences of an incorrect plea of guilty. It can and frequently does happen that an unrepresented accused pleads guilty when, on his version, he should have pleaded not guilty". These warnings clearly serve to protect the privilege against self-incrimination.

²⁵⁹ Section 119 provides that when an accused pleads not guilty, the court shall deal with the matter in terms of section 115 of the Criminal Procedure Act. Section 115 reads as follows: "115(1) Where an accused at a summary trial pleads not guilty to the offence charged, the presiding Judge, regional magistrate or magistrate, as the case may be, may ask the him whether he wishes to make a statement indicating the basis of his defence.

115(2)(a) Where the accused does not make a statement under ss (1) or does so and it is not clear from the statement to what extent he denies or admits the issues raised by his plea, the court may question the accused in order to establish which allegations in the charge are in dispute.

115(2)(b) The court may in its discretion put any question to the accused in order to clarify any matter raised under ss (1) of this subsection, and shall enquire from the accused whether an allegation which is not placed in issue by the plea of not guilty, may be recorded as an admission by the accused of that allegation, and if the accused so consents, such an admission shall be recorded and shall be deemed to be an admission under s 220".

²⁶⁰ Section 121 reads as follows:

"(1) Where an accused under section 119 pleads guilty to the offence charged, the presiding magistrate shall question him in terms of the provisions of paragraph (b) of section 112(1).

(2)(a) If the magistrate is satisfied that the accused admits the allegations stated in the charge, he shall stop the proceedings. (b) if the magistrate is not satisfied as provided in paragraph (a), he shall record in what respect he is not so satisfied and enter a plea of not guilty and deal with the matter in terms of section 122(1): Provided that an allegation with reference to which the magistrate is so satisfied and which has been recorded as an admission, shall stand at the trial of the accused as proof of such allegation. (5aA) The record of proceedings in the magistrate's court shall, upon proof thereof in the court in which the accused is arraigned for summary trial, be received as part of the record of that court against the accused, and any admission made by the accused shall stand and form part of the record of that court unless the accused satisfies the court that such admission was incorrectly recorded".

Criminal Procedure Act, he pleaded guilty at the section 119 plea proceedings,²⁶¹ furnishing details of how the crime was committed. After the plea proceedings, he applied to be released on bail, which application was unsuccessful. In terms of section 60(11B)(c) of the Act, portions of the bail proceedings formed part of the trial record. The bail record included a document containing details of a pointing-out and an annexure containing a confession; and a document containing the heading 'notice of rights in terms of the Constitution', including a document marked with the header 'waarskuwingsverklaring deur verdagte'.²⁶²

At the trial in the court below, the accused tendered a plea of not guilty and the prosecution requested that a trial-within-a-trial be held so as to determine whether the pointing-out and confession that formed part of the bail record, had been made freely and voluntarily. The same would apply to the plea proceedings. As a result of confusion between the presiding officer, the

²⁶¹ The combined effect of sections 119 and 121 is the following: the accused is asked to plead in a matter to be tried in the High Court. (Section 119). When he pleads guilty, section 121 is applied. In other words, the accused may be questioned by the Magistrate in the same manner as provided for in section 112 of the Criminal Procedure Act. When he pleads not guilty, section 122 is applied. The Magistrate reduces the plea to writing and the matter is postponed to obtain instructions from the Director of Public Prosecutions. (Section 122(2)). When proven in terms of section 235, the record of the plea proceedings forms part of the evidentiary material before the High Court. Any statement made by the accused during these proceedings would be admissible against her in the High Court trial. Any admissions made by the accused and recorded in terms of section 220 may severely prejudice an uninformed and unrepresented accused. The importance of the warnings to be given to an accused before he is called upon to plead, is therefore significant to ensure that she does not, in violation of the rights contained in the Constitution, incriminate herself, thereby potentially rendering the trial unfair. In *Mabaso* (fn 27 above), a pre-constitutional case, where the unrepresented accused were not informed about the right to legal representation before a plea in terms of sections 119 and 121, the trial of the accused was held to be *ipso facto* unfair, but the court held that despite this, the failure to so inform them did not result in a failure of justice.

²⁶² A warning statement made by a suspect.

prosecution and the defence, the attorney representing the accused addressed the court *a quo* on the admissibility of the section 119 proceedings, arguing that when these proceedings are contested on the basis of the involuntariness of the disputed self-incriminatory conduct of the accused, a trial-within-a-trial should be held; by contrast, thus the attorney argued, when the admissibility is challenged on the basis that the accused's fundamental rights had been violated, the latter issue had to be dealt with first.²⁶³

The attorney then proceeded to argue the issue of the constitutional exclusion of the section 119 proceedings (contending that the accused was not warned of his right to remain silent), the confession and the pointing-out, by referring to the bail record. The bail record was entered into evidence²⁶⁴ and the prosecution argued that the court *a quo* should not decide the issue of admissibility without first hearing evidence that establishes the facts. The application by the prosecution to have the admissibility issue determined by means of a trial-within-a-trial was dismissed. The court *a quo* held that the trial judge had a discretion to deal with the admissibility of the constitutional issue first, before proceeding with a trial-within-a-trial.²⁶⁵

²⁶³ It is assumed that the attorney and the judge *a quo* formed an incorrect opinion of the judgment of Chaskalson P in *Zantsi* (fn 26 above) at par 4, where he held that in exceptional circumstances only and, where a matter cannot be disposed of without the constitutional issue being resolved, and subject further to the condition that it would be "in the interests of justice" to do so, a constitutional matter may be "decided first, where there are compelling reasons that this should be done". It is submitted that it does not appear from the discussion of the case by the Supreme Court of Appeal that compelling reasons existed to follow this route in the court *a quo*. With respect, the judgment of Chaskalson P clearly states that in instances when a dispute could be decided without considering a constitutional matter, this should be the course to follow.

²⁶⁴ See *S v Gabriel* 1971 1 SA 646 (RA), ("*Gabriel*"), for the effect thereof.

²⁶⁵ However, compare, *Zantsi* (fn 26 above) where Chaskalson P, at par 3 arrived at a different conclusion.

The judge in the court *a quo* ruled that the section 119 proceedings, the confession as well as the pointing-out was unconstitutionally obtained and held that the admission thereof would render the trial unfair and would likewise be detrimental to the administration of justice. The prosecution reluctantly closed its case and the accused was acquitted.

The prosecution reserved the following questions of law for consideration by the Supreme Court of Appeal:²⁶⁶

1. Was the judge in the court below entitled to make factual findings based on inferences drawn from documents forming part of the bail proceedings and to make a ruling on the admissibility of evidence without a trial-within-a-trial being held.
2. Was the judge in the court below correct in holding that the question of admissibility of a confession, challenged by the accused and disputed by the State, could not be resolved by means of a trial-within-a trial, but should instead be dealt with before such trial-within-a-trial is held.
3. Did the failure to inform the accused of his right to remain silent during the section 119 and 121 proceedings of the Criminal Procedure Act, constitute a violation of the accused's rights, rendering the answers given by the accused at such proceedings, by that very fact, inadmissible at his trial?

In a unanimous judgment written by Streicher JA,²⁶⁷ the Supreme Court of Appeal answered these questions of law, in the sequence above, as follows:

1. The judge *a quo* was not entitled to make factual findings, based on the record of the bail application, without a trial-within-a-trial having taken

²⁶⁶ Fn 258 above at 366-367.

²⁶⁷ Navsa, Van Heerden JJA, Erasmus and Ponnar AJJA concurring.

- place. The record of the bail application, for purposes of the trial, constituted hearsay evidence.²⁶⁸
2. The reasons why a trial-within-a-trial should be held to determine the disputed voluntariness of a confession, is also applicable when the admissibility of a confession is disputed on the grounds that a fundamental right of the accused had been violated in the course of obtaining the disputed evidence. The judge *a quo* accordingly erred in holding that the constitutional issue should not be dealt with in a trial-within-a-trial.²⁶⁹ He further erred in holding that the constitutional dispute should be held before the trial-within-a-trial, which would have been limited to the issue of the voluntariness of the pointing-out and the confession.²⁷⁰
 3. Referring to section 35(3)(h) of the Constitution, the court reasoned that the accused is entitled to rely on the right to a fair trial, which includes the right to remain silent – not the right to be informed of the right to remain silent. Citing *Director of Public Prosecutions, Natal v Magidela*,²⁷¹ the Supreme Court of Appeal held that an accused should nevertheless be informed of the right to remain silent (to ensure that when she waives such right, an informed decision is made). This approach, the court continued, is preferred, because failure to inform an uninformed accused about the right to remain silent may result in an unfair trial. Unfairness in the trial process may only result, the Supreme Court of Appeal reasoned, when the accused places evidence before the court of the fact that she was not aware of her constitutional right to remain silent and therefore had to be informed accordingly. In this case, the accused failed to place

²⁶⁸ Ibid at par 32.

²⁶⁹ This holding is a clear application of the ruling of Chaskalson P in *Zantsi* (fn 26 above).

²⁷⁰ Ibid at par 33-34.

²⁷¹ 2000 1 SACR 458 (SCA) at par 18, ("*Magidela*").

any such evidence before court. In the premises, the court below erred in holding that the right to remain silent had been violated.²⁷²

The third question of law was framed in such fashion suggesting that the Supreme Court of Appeal is invited to respond to the question whether section 35(5) constitutes an automatic exclusionary rule. However, the Supreme Court of Appeal reached its judgment without having to resolve the issue on that basis. This judgment could be read as suggesting that the burden of proof settled the admissibility issue. The court was at pains to show that an accused should convince a court that she is entitled to the exclusionary relief guaranteed by section 35(5). In other words, it was held that the proper procedure for establishing an entitlement to rely on section 35(5) was not satisfied by the accused, because an adequate foundation for the reliance on section 35(5) had not been established.

The *Viljoen* judgment, by necessary implication dictates that an accused has to establish, by means of admissible evidence, some connection or relationship between the alleged violation and his self-incriminatory conduct. The failure of the accused to testify or lay a foundation to the effect that the evidence had been 'obtained in a manner' that violated his fundamental rights, gave the court reason to conclude that his constitutional rights were not violated. *Viljoen* therefore suggests that the burden of proof will generally require the establishment of a factual basis,²⁷³ including proof of facts about the conduct of parties - or lack thereof - relevant to the dispute in issue. Bearing in mind the importance of the burden of proof in deciding *Viljoen*, it is appropriate to consider this issue.

²⁷² Fn 258 above at par 43. The opinion of Steytler (fn 60 above) at 14, was confirmed by the approach of the court in respect of this question of law.

²⁷³ However, compare, *Pillay* (fn 216 above), where a trial-within-trial was not held, because the parties argued the matter based on a statement of agreed facts.

The issue considered here is who, if any, bears the burden of showing that a constitutional right of the accused has been violated or that the evidence has been obtained in a constitutional manner. Differently put, should an accused bear the burden of showing a constitutional infringement or should the prosecution show that the evidence has been obtained in a constitutional manner? This is a threshold requirement that must be satisfied before the court considers the substance of the accused's allegation that section 35(5) should be applicable. The burden of proof applicable during the substantive stage of the section 35(5) assessment differs from that concerning the preliminary threshold inquiry. For that reason the burden of proof relevant to the substantive assessment is not discussed under this heading. Van der Merwe is correct when he argues that a burden of proof is not applicable during the substantive stage of the section 35(5) analysis, given that the court has to determine the admissibility issue by means of a value judgment.²⁷⁴ He²⁷⁵ is further of the opinion, correctly, one might add, that there exists a 'great deal of confusion' in section 35(5) jurisprudence in respect of the burden of proof.²⁷⁶ A value judgment should be employed to determine whether the admission of the evidence would render the trial unfair or otherwise be detrimental to the administration of justice.²⁷⁷ This cannot be determined by means of a burden of proof.²⁷⁸

²⁷⁴ Fn 25 above at 245; see also Steytler (fn 48 above) at 36.

²⁷⁵ Loc cit.

²⁷⁶ Loc cit, he refers to the different approaches adopted by the courts of South Africa in, for example, *S v Naidoo* 1998 1 SACR 479 (N), ("*Naidoo*"); *Gumede* (fn 256 above); *Soci* (fn 216 above); *Mathebula* (fn 256 above).

²⁷⁷ See *Nomwebu* 1996 2 SACR 396 (E), ("*Nomwebu*"); *Soci* (fn 216 above).

²⁷⁸ Steytler (fn 48 above) at 35; Van der Merwe (fn 25 above) at 246.

In the leading case of *Collins*, the Canadian Supreme Court held that an accused bears the burden of showing that her fundamental rights had been violated.²⁷⁹ In the same vein, *Viljoen* could be read as suggesting that an accused seeking to have the disputed evidence excluded in terms of section 35(5) of the South African Constitution must show, on a balance of probabilities, that her fundamental rights had been violated, which entitles her to the relief guaranteed by section 35(5).²⁸⁰

²⁷⁹ *Collins* (fn 218 above) at par 21, where Lamer J wrote that the accused: "... bears the onus of persuading the court that her Charter rights or freedoms have been infringed or denied".

²⁸⁰ *Viljoen* (fn 258 above). In respect of the Canadian position, see *R v Williams* (1992) 78 CCC (3d) 72 at 93-95, ("*Williams*"); *Collins* (fn 218 above) at par 21, where Lamer J said that the accused bears the onus of persuading the court that her Charter rights or freedoms have been infringed or denied. The judge reasoned it "appears from the wording of s24(1) and (2), and most courts which have considered the issue have come to that conclusion ... The standard of persuasion required is only the civil standard of the balance of probabilities ... ". In other words, the party relying on a breach of the Bill of Rights must first establish that a violation did in fact take place. The analysis consists of two stages: during the first stage (this would also be the first phase of the section 35(5) analysis) the applicant must show that the governmental conduct has unlawfully breached her fundamental rights. Steytler (fn 60 above) at 14-18, sets out the factors that should be taken into account to determine whether legislation is in breach of a right, as follows: (a) the court must determine the content of the right, bearing in mind whether the accused is a bearer of the right and what duties are imposed by the right; (b) the meaning of the legislation; and (c) whether the governmental conduct is in conflict with the right. This was the approach of the Supreme Court of Appeal in *Viljoen* (fn 258 above). The second stage is the justification stage. (It might be added that this stage, in section 35(5) matters, is only relevant when the governmental conduct falls within the parameters of a law of general application, as prescribed by section 36 of the South African Constitution. The onus in respect of most of the issues at this stage of the inquiry rests on the government). In the event that the Act of Parliament, which is held to be of general application, does not comply with the requirements of section 36, the second phase of the section 35(5) analysis would be considered, i e would the admission of the evidence render the trial unfair or otherwise be detrimental to the administration of justice? For a similar approach, see *Therens* (fn 46 above) per Le Dain J at 506; *Bartle* (fn 198 above); *Strachan* (fn 198 above); see also Steytler (fn 60 above) at 36.

It is important to distinguish between situations when an accused, on the one hand, challenges the constitutionality of legislation, a provision of the common law or customary law, compared to, on the other hand, when she relies on section 35(5), asserting that her rights have been violated by governmental conduct.²⁸¹ When the accused contests the constitutionality of legislation, a common law rule or customary law practice, the two-phased approach must be followed. In such circumstances, the accused bears the burden of showing that her rights were violated by an Act of Parliament, the common law or customary law.²⁸² The respondent bears the burden of showing that the limitation is justifiable.²⁸³ The incidence and nature of the burden, in such disputes, was decided by the South African Constitutional Court in a number of reported decisions.²⁸⁴ However, the Constitutional Court has yet to decide on the incidence and nature of the burden, if any, in section 35(5) challenges. It is submitted that the South African Supreme Court of Appeal has decided this issue erroneously in *Viljoen*, by saddling the accused with an onus of showing that her constitutional right had been violated. Like the Supreme Court of Appeal, Ebrahim AJ failed to differentiate between the two situations mentioned above when he decided on the admissibility of evidence in *Zwayi*.²⁸⁵ In *Zwayi*, the admissibility of evidence in terms of section 35(5) was in dispute. The judge held, relying on *Quozeleni*,²⁸⁶ that the accused bore the burden of proving, on a

²⁸¹ See the Full Bench decision of *S v Mgcina* 2007 1 SACR 82 (T) at 94, (“*Mgcina*”).

²⁸² See *Quozeleni v Minister of Law and Order and Another* 1994 3 SA 625 (EC), (“*Quozeleni*”).

²⁸³ Currie & De Waal (fn 16 above) at 165-188.

²⁸⁴ *Du Plessis v De Klerk* 1996 3 SA 850, (“*De Klerk*”); *S v Mbatha* 1996 2 SA 464 (CC), (“*Mbatha*”); *S v Bhulwana* 1996 1 SA 388 (CC), (“*Bhulwana*”); *President of the RSA v Hugo* 1997 4 SA 1 (CC), (“*Hugd*”); *Larbi-Odam v MEC for Education (North-West Province)* 1998 1 SA 745 (CC), (“*Larbi-Odam*”); *August v Electoral Commission* 1999 3 SA 1 (CC), (“*Electoral Commission*”).

²⁸⁵ Fn 246 above; see also *Mathebula* (fn 256 above).

²⁸⁶ Fn 282 above.

balance of probabilities, that a fundamental right relied upon by the the accused, had been infringed.²⁸⁷

One of the noteworthy differences between section 35(5) of the South African Constitution and section 24(2) of the Charter, is the fact that section 35(5) does not contain the phrase '*if it is established*'. It is submitted that the omission of this phrase from section 35(5) is of paramount importance when interpreting this section. The omission of the mentioned phrase from section 35(5) is indicative of the fact that the drafters of the South African Constitution did not deem it appropriate to saddle an accused with a burden of proving that a constitutional right she relies upon had been infringed.²⁸⁸

In terms of the common law, the prosecution bears the burden of showing that a confession was freely and voluntarily made.²⁸⁹ The accused does not have to

²⁸⁷ Ibid at 782b; see also Steytler (fn 48 above) at 36.

²⁸⁸ See *S v Brown en 'n Ander* 1996 2 SACR 49 (NC), at 73, ("*Brown*"); *Mayekiso* (fn 256 above). The courts in both matters held that the prosecution bears the burden of proving that the evidence had been obtained in a constitutional manner. However, compare *Zwayi* (fn 246 above) at 782, where Ebrahim AJ decided as follows: "The *onus* rests on the accused to show, on a balance of probabilities, that there has been a violation of his constitutional right to legal representation ..."; compare *Nomwebu* (fn 276 above) at 420e-i, where Erasmus J was of the opinion that the ordinary rules relating to a burden of proof do not apply. See also *S v Soti* (fn 216 above) where Erasmus J confirmed his earlier opinion in *Nomwebu*.

²⁸⁹ *Mgcina* (fn 281 above) at 95. The Full Bench relied on the dictum of Kentridge AJ in the judgment delivered by the Constitutional Court in *Zuma* (fn 39 above) and reasoned that the rights contained in section 35(2) forms part of the "golden thread". In terms of the precursor of section 217 of the Criminal Procedure Act, (section 244), the prosecution bore the burden of proving, beyond reasonable doubt, that the confession was freely and voluntarily made. (Kriegler, fn 18 above at 543). However, section 217(1)(b) shifted the burden unto the accused when the confession was reduced to writing in the presence of a justice of the peace or magistrate. This sub-section was declared unconstitutional in *Zuma* (fn 39 above). For the position before *Zuma*, see *S v Lebone* 1965 2 SA 837 (A), ("*Lebone*"); *S v Radebe* 1968 4 SA 410 (A), ("*Radebe*").

show that the admission or confession was made involuntarily. By analogy of this approach, the Full Bench of the Transvaal Provincial Division²⁹⁰ in *Mgcina*,²⁹¹ held that the prosecution bore burden of proving that evidence had been obtained in a constitutional manner. This approach is correct, since it accords with a generous and purposive interpretation of section 35(5). Furthermore, it relieves an accused from having to satisfy a burden based on facts that might, more often than not, be within the particular knowledge of the police. The rationale behind this approach is based on the protection guaranteed by the right to remain silent, the privilege against self-incrimination, the presumption of innocence and the principle that the prosecution must prove the guilt of the accused beyond reasonable doubt.²⁹² Consequently, there appears to be even more reason why the accused should **not** bear the burden of showing that her rights had been violated in the procurement of the evidence, since the right to remain silent, the privilege against self-incrimination and the presumption of innocence has nowadays been elevated to constitutionally protected guarantees.²⁹³

Furthermore, by placing the burden of proof on an accused would imply that the accused were better protected in terms of the common law than in terms of section 35(5). However, a contextual reading of section 35(5) with section 39(3) of the South African Constitution is indicative of the fact that the common law

²⁹⁰ In a judgment written by Du Plessis J, Basson and Preller JJ concurring; compare *Soci* (fn 216 above) at 289, where Erasmus J was of the opinion that “there is no *onus* on the State to disprove the fact of an alleged violation of an accused’s rights under the Constitution”.

²⁹¹ Fn 281 above at 95.

²⁹² *Ibid* at 94; see also *S v Zuma* (fn 39 above) at par 33.

²⁹³ See sections 35(1)(a), (b), (c), 35(2)(b), (c), 35(3)(h), (j), which collectively serve to protect the mentioned rights.

position,²⁹⁴ on this question, should be extended to section 35(5) challenges. Section 39(3) preserves the common law, provided it is not in conflict with the provisions of the Bill of Rights. Section 35(5) is silent on the issue of the incidence of a 'threshold burden of proof'. In the light hereof, it cannot be argued that the common law is, in this regard, in conflict with the Bill of Rights. It follows that the common law position, on this issue, should be applicable to section 35(5) disputes.

Against this background, one can confidently assume that the drafters of the Bill of Rights were wary of the position in Canadian section 24(2) jurisprudence and for that reason, consciously omitted the phrase 'if it is established' from the provisions of section 35 (5). Accordingly, in section 35(5) disputes, once the accused asserts that the evidence had been unconstitutionally obtained and that the admissibility thereof is disputed, the prosecution should bear the burden of proving, beyond reasonable doubt that it had been obtained in a constitutional manner.²⁹⁵

²⁹⁴ Section 39(3) of the South African Constitution reads as follows: "The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill". In terms of section 217 of the Criminal Procedure Act, an accused does not have to show that the confession was involuntarily made.

²⁹⁵ *Mgcina* (fn 281 above) at 95, the Full Bench based its reasoning on the dictum contained in *Zuma* (fn 39 above) where Kentridge AJ remarked that the right to remain silent, not to be compelled to make a confession and not to be a compellable witness against oneself, forms the necessary "reinforcement of Viscount Sankey's 'golden thread'," and reasoned as follows: "As sodanig is die regte in art 35(2)(b) ook deel van die onderhou van die 'golden thread' waarna Kentridge Wn R verwys het. Vir dieselfde redes waarom die bewyslas gemeenregtelik op die Staat is om te bewys dat 'n bekentenis vrywillig gemaak is, is die bewyslas ook op die Staat om te bewys dat die beskuldigde se fundamentele regte nie geskend is om die bekentenis (of erkenning of ander getuienis) te bekom nie. Daar is geen bewyslas op die beskuldigde om te bewys dat sy of haar fundamentele regte geskend is om die bekentenis te bekom nie". My translation of this passage of the judgment is the following: In the light hereof, the rights

The last threshold requirement, discussed below, is that of the standing requirement which enables an accused to rely on section 35(5).

E. Standing to rely on section 35(5)

The standing requirement determines whether the accused may rely on the remedy contained in section 35(5). In Canada and the United States the accused may not rely on the exclusionary remedy in the event that *her* constitutional rights were not violated during the evidence-gathering process.²⁹⁶ In the event that the evidence had been procured as a result of the violation of the rights of a third party, the accused would have no standing to challenge the admissibility of the evidence at her trial. In Canada, the accused who wants to rely on the exclusionary remedy must demonstrate that she is 'sufficiently affected by a

contained in section 35(2)(b) forms part of the "golden thread" referred to by Kentridge AJ. For the same reason that, in terms of the common law, the onus rests on the prosecution to show that a confession was voluntarily made, the onus rests on the prosecution to show that the confession, admission or any other evidence was not obtained as a result of the infringement of a fundamental right. No onus rests on an accused to show that her fundamental rights have been infringed in the course of obtaining the disputed evidence. This point of view is confirmed by Van der Merwe (fn 25 above) at 245.

²⁹⁶ For the position in the USA, see for instance, *Katz v US* (1967) 389 US 347, ("Katz"); *Alderman* (fn 2 above); *Rakas v Illinois* (1978) 439 US 128, ("Rakas"); *US v Fortna* (1986) 479 US 950, ("Fortna"); *US v Hawkins* (1986) 479 US 850, ("Hawkins"). In respect of the Canadian position, see *R v Leany and Rawlinson* (1987) 38 CCC (3d) 263, ("Leany"); *R v Lubovac* (1989) 52 CCC (3d) 551, ("Lubovak"); *R v Fraser* (1990) 55 CCC (3d) 551, ("Fraser"); *R v Wong* ((1990) 60 CCC (3d) 460, ("Wong"); *R v Montoute* (1991) 62 CCC (3d) 481, ("Montoute"); *R v Pugliese* (1992) 71 CCC (3d) 295, ("Pugliese"); *R v Sandhu* (1993) 82 CCC (3d) 295, ("Sandhu"); *Rv Paolitto* (1994) 91 CCC (3d) 75, ("Paolitto"); *Edwards* (fn 1 above); *R v Wijesinha* (1995) 100 CCC (3d) 410, ("Wijesinha"). For a comparative study of the standing requirement in the USA Federal Court, the court of New York and Canada, see Godin (fn 1 above).

Charter breach so as to ensure that a justiciable controversy can be presented to the court'.²⁹⁷

The obiter comments made by Lamer J in *Collins*²⁹⁸ to the effect that an accused might not be entitled to rely on the exclusionary rule in the event that the rights of a third party – and not that of the accused – had been violated, had a profound impact on Canadian section 24(2) jurisprudence. Canadian courts, in subsequent judgments, followed this dictum without considering the rationale of the exclusionary rule.²⁹⁹ An eminent Canadian commentator has remarked that the effect of such a narrow standing requirement may 'immunize governmental action from review'³⁰⁰ by the courts. The influence of the courts of the United States on the Canadian section 24(2) jurisprudence, more particularly with regard to standing, also played a significant role in this regard.³⁰¹

The benchmark Canadian case on the issue of standing to rely on section 24(2) of the Charter is *Edwards*.³⁰² The police suspected the accused of dealing in

²⁹⁷ Fenton (fn 1 above) at 281.

²⁹⁸ Fn 218 above at par 19.

²⁹⁹ In *Pugliese* (fn 296 above) for example, at 302, the court held that: "An accused person's right to challenge the legality of a search and seizure depends upon whether he has first discharged the burden of satisfying the court that *his* personal constitutional rights have been violated". Emphasis added. See also the Canadian cases cited at fn 296 above.

³⁰⁰ Roach (fn 66 above) at 5-20.

³⁰¹ In *Edwards* (fn 1 above) at 150, Cory J admitted that the US jurisprudence on standing has an influential impact on Canadian law, when he wrote as follows: "A review of the recent decisions of this court and those of the United States Supreme Court, which I find convincing and properly applicable ..."; see also Godin (fn 1 above) at 78, where he states the following: "As the discussion of the [US Federal Court], New York [Court] and [the courts of] Canada will show, all three jurisdictions have similar problems, as well as conflicts between the rationale for their exclusion [sic] rule and the operation of the standing rule".

³⁰² Fn 1 above.

drugs. He was arrested for driving a vehicle while his driver's license was suspended. The police did not have reasonable grounds to obtain a search warrant, but nevertheless gained access to his girlfriend's apartment where a search was conducted. They discovered drugs in the apartment. The accused wanted to challenge the admissibility of the disputed evidence at his trial on the grounds that his rights guaranteed by section 8 of the Charter had been violated. In a judgment written by Cory J, it was held that the accused could not rely on section 24(2) on the basis that he failed to satisfy the threshold requirement of standing.³⁰³ Put differently, despite the fact that the rights of the girlfriend of the accused had been violated by means of 'constitutionally impermissible, and arguably abusive investigative techniques',³⁰⁴ the accused could not challenge the admissibility of the evidence at his trial, because the police conduct infringed the rights of someone other than his rights.

It is submitted that the standing requirement should be determined while having regard to the scope and purpose of the exclusionary rule.³⁰⁵ If its purpose were premised on corrective justice, then the violation of the rights of third parties in the evidence gathering process may not be raised by the accused.³⁰⁶ The argument, when developed to its logical conclusion, would mean that only the third party may rely on section 35(5), for it would be her rights - and not those of the accused - that would have been infringed. The violation suffered by the third party would be the only wrong that needs to be remedied. The third party may, however, not intervene in the criminal trial of the accused in order to challenge the admissibility of the disputed evidence, because the dispute would be a live issue between the prosecuting authority and the accused - not the third

³⁰³ Ibid at 150, the judge wrote that: "A claim for relief under s 24(2) can only be made by the person whose Charter rights have been infringed ...".

³⁰⁴ Fenton (fn 1 above) at 285.

³⁰⁵ Roach (fn 66 above) at 5-19.

³⁰⁶ Loc cit.

party and the state.³⁰⁷ However, if sections 24(2) of the Charter and 35(5) of the South African Constitution were to serve a regulatory purpose, its application would be broader, allowing an accused to rely on exclusion even though the constitutional right of a third party had been violated and the prosecution intends using the evidence thus obtained at the trial of the accused.³⁰⁸

In view of the above, it is contended that the standing requirement contained in section 35(5) should be determined by means of its rationale.³⁰⁹ In *Fose*³¹⁰ Kriegler J suggested, obiter, it might be added as section 7(4) of the Interim Constitution was interpreted, that the nature of a remedy should be determined by the purpose it serves to protect. He continued by reasoning that a harm caused by a constitutional infringement does not only impact on the rights of the victim, but it affects society as a whole.³¹¹ He maintained that a rights violator infringes not only the rights of the victim, but 'the fuller realisation of our constitutional promise'. The judge completed his reasoning with the following remark:³¹²

Our object in remedying these kinds of harms should, at least, be to vindicate the Constitution and to deter its further infringement ...
Once the object of the relief in section 7(4(a)) has been determined, the meaning of 'appropriate relief' follows as a matter of course.

It is suggested that the comments made by Kriegler J is relevant to the standing requirement contained in section 35(5). The approach adopted by Kriegler J

³⁰⁷ *Edwards* (fn 1 above).

³⁰⁸ See *Montoute* (fn 296 above).

³⁰⁹ *Fose v Minister of Safety and Security* 1997 7 BCLR 851 (CC), ("*Fose*").

³¹⁰ *Ibid* at par 195.

³¹¹ *Loc cit*.

³¹² *Ibid* at paras 196-197.

further takes into account one of the primary purposes that section 35(5) seeks to protect: defending the integrity of the criminal justice system. By 'disqualifying' an accused to challenge the admissibility of evidence at her trial when the rights of a third party had been violated, would be detrimental to the criminal justice system. Admission of the evidence thus obtained would certainly cause harm to society as a whole, because by allowing the police to violate the rights of innocent law abiding citizens in order to convict the guilty, South African courts would be seen to sanction, as well as providing an incentive for the continuation of such unlawful police conduct. By the same token, the rights of every law-abiding citizen would therefore be at risk of being violated in order to achieve the disreputable goal of a conviction 'at any cost'. Section 35(5) clearly aims to prevent this outcome. The administration of justice would, no doubt, suffer even further disrepute should the accused be convicted as a result.

It should be emphasised that the rationale of the exclusionary rule should determine the nature of the standing threshold requirement.³¹³ It is therefore pertinent to consider the rationale of section 35(5) of the South African Constitution. The South African Supreme Court of Appeal, in *Pillay*,³¹⁴ formulated the rationale of the section 35(5) exclusionary provision as follows in the majority opinion, written by Mpati DP and Motata AJA:³¹⁵

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

³¹³ Roach (fn 66 above) at 5-19; Godin (fn 1 above) at 84.

³¹⁴ Fn 216 above.

³¹⁵ Ibid at 187D-F.

been able to locate. (Cf *R v Burlingham (supra)* at 265). That result – of creating an incentive for the police to disregard accused persons’ constitutional rights, particularly in cases like the present, where a judicial officer was misled – is highly undesirable and would, in our view, do more harm to the administration of justice than to enhance it.

The majority opinion continued in their development of the rationale, after endorsing the rationale for exclusion in *Collins*, declaring that although it might cause some concern that an accused ‘might go free as a result of the exclusion of evidence which would have caused her conviction’, what is important is the fact that the objective of seeking the cooperation of the accused was ‘to facilitate a conviction for an even more serious offence’. The rationale of section 35(5) becomes evident when the majority opinion held that the police, ‘in behaving as they did, i e charging accused 10 in spite of an undertaking, **and the courts sanctioning such behaviour**, the objective referred to will in future be well nigh impossible to achieve’. The court concluded that the condonation of the police conduct under these circumstances would be ‘detrimental to the administration of justice’.³¹⁶

The cited passage is indicative of the fact that one of the primary rationales of section 35(5) is to thwart detriment befalling the administration of justice. The Supreme Court of Appeal refused to be associated with police conduct that flies in the face of the values sought to be protected by the Bill of Rights. The evidence was excluded not only with the aim of protecting the rights of the accused, but the court also had a regulatory purpose in mind when it issued a warning to police officials that such conduct will, in future, not be condoned by the courts of South Africa. Added to this long-term goal, the futuristic aim of

³¹⁶ Ibid at 188E-G. Emphasis added.

exclusion was designed at achieving the legitimate governmental purpose of effectively reducing the 'rampant crime rate'.³¹⁷

The majority judgment referred with approval to the dictum of Lamer J in *Collins* that the purpose of the subsection is not to discipline the police, but acknowledged the fact that in some instances, misconduct in the investigatory process might have a negative impact on the repute of the administration of justice.³¹⁸ Some commentators might argue that this aspect of the judgment suggests that a deterrence rationale is a corollary aim of section 35(5).

Against this background, it has been established that the primary rationale of section 35(5) of the South African Constitution is the protection of judicial integrity, while simultaneously serving a regulatory purpose by aspiring to influence future police conduct. Logic therefore dictates that in achieving the purpose of preventing future unconstitutional police conduct 'it may be necessary to exclude evidence obtained through serious violations, even if an accused's rights have not been violated',³¹⁹ but those of a third party. Surely, detriment to the administration of justice does not depend on who the subject of the violation is. The text of section 35(5) suggests that the disputed evidence must be excluded if its **admission** - irrespective of whose rights had been violated in the procurement of the evidence (that of a third party or the accused) could cause the forbidden results mentioned in the section. Such an approach enhances a contextual interpretation of section 35, especially when one considers that section 35(5) guards against the **admission** of evidence obtained in an unconstitutional manner. The validity of these submissions made in this thesis

³¹⁷ Ibid at 158I-J and 159A.

³¹⁸ Ibid at 186B-D.

³¹⁹ Roach (fn 66 above) at 5-19.

has been reinforced by the recently reported unanimous judgment of the Supreme Court of Appeal in *Mthembu*.³²⁰

In *Mthembu*, the chief prosecution witness against the appellant implicated him in several serious crimes through testimonial and real evidence. However, it transpired that the witness (who at some stage was an accomplice) testified at the trial of the appellant that he (the witness) had been tortured by the police through the use of electric shock treatment. The torture of the witness led to the discovery of evidence that linked the accused to the relevant crimes. The issue before court was whether the evidence discovered in this manner had been 'obtained' within the meaning of section 35(5).³²¹ Confirming the rationale of section 35(5), Cachalia JA wrote that courts should take note of the nature of the violation and the impact that admission of the evidence would have on the 'integrity of the administration of justice in the long term'.³²² Against this background, the judge made the following concise statement with regard to the standing requirement contained in section 35(5):³²³

A plain reading of s 35(5) suggests that it requires the exclusion of evidence ***improperly obtained from any person, not only from an accused***. There is, I think, no reason of principle or policy not to interpret the provision in this way. It follows that the evidence of a third party, such as an accomplice, may also be excluded, where the circumstances of the case warrant it. This is so even with real evidence. As far as I am aware, this is the first case since the advent of our constitutional order where this issue has pertinently arisen.

³²⁰ Fn 230 above.

³²¹ Ibid at par 21.

³²² Ibid at par 26.

³²³ Ibid at par 27. Emphasis added.

In the final analysis, it was the effect that admission of the evidence would have on the integrity of the criminal justice system that was determinative of the standing requirement. However, some might argue that this was not the first case where this issue had arisen.³²⁴

To summarise, the difference in the text of section 24(2) of the Canadian Charter and the South African section 35(5), is indicative of the fact that the South African courts should not adopt the narrow standing rule employed by the Canadian courts. The Canadian standing requirement is based on the text of section 24(1) of the Charter,³²⁵ which requires that one should show that **her own** rights were directly violated.³²⁶ Section 35(5) of the South African Constitution does not contain a sub-section that is couched in similar terms as that of section 24(1) of the Charter. A further reason why the narrow Canadian standing precedent should not be followed in South Africa, is the fact that detriment to the administration of justice must only be determined in the second phase of the section 35(5) inquiry:³²⁷

In Canada, a categorical standing rule is even harder to justify because the only way to **know** if the administration of justice is

³²⁴ The court in *S v Hena and Another* 2006 2 SACR 33 (SE), ("*Hena*"), was faced with a similar issue when it excluded the **testimony** of a prosecution witness who was assaulted, forced into the booth of a car and compelled, on pain of suffering further assaults, to lead the anti-crime committee members to the accused. The *Hena* court therefore, by necessary implication, held that the accused had standing. In spite of this, the statement of Cachalia JA is accurate, because the issue of standing was not explicitly raised by counsel in *Hena*.

³²⁵ This section reads as follows: "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances".

³²⁶ Godin (fn 1 above) at 84.

³²⁷ Loc cit. Emphasis in original.

brought into disrepute is to **do** a s. 24(2) balance. The present standing law prevents one from ever getting to that stage.

In *Gumede*³²⁸ the court decided the issue of admissibility based purely on the provisions of the Criminal Procedure Act. The issue of standing was not raised in the matter.

Steytler³²⁹ is of the opinion that the standing requirement should be interpreted contextually, having due regard to the provisions of section 38 of the Constitution.³³⁰ This point of view was by necessary implication endorsed by the *Mthembu* judgment.

It is submitted that disrepute to the administration of justice may be suffered by the admission of evidence even when a fundamental right of the **accused** has not been violated in the evidence-gathering process – if such unconstitutionally procured evidence is admitted at the trial of the accused. By disallowing an accused the opportunity to raise the issue of admissibility at his trial, the courts of South Africa would be perceived as sanctioning the unwarranted police conduct – an effect that would adversely impact on integrity of the criminal justice system.

³²⁸ Fn 256 above.

³²⁹ Fn 60 above at 35.

³³⁰ See *Ferreira* (fn 63 above) as an example of the broad standing threshold requirement in respect of section 38.

F. Conclusion

Section 35(5) of the South African Constitution contains an effective remedy against the abuse of government authority. The granting of an order of exclusion of relevant, but unconstitutionally obtained evidence, is primarily the task of our courts. What matters, is not the existence of an exclusionary remedy, but its effectiveness in protecting the fundamental rights of vulnerable members of society. This goal cannot be achieved should the accused not be able to overcome the hurdle of first satisfying the threshold requirements inextricably linked to section 35(5). As such, the existence of threshold requirements can frustrate the efficiency of the exclusionary remedy contained in section 35(5).

The impact of the threshold requirements on the efficacy and availability of the exclusionary remedy should consequently not be underestimated. This is borne out by the fact that the courts in Canada and the United States have refused access to the remedy of exclusion to the selfsame persons their constitutions aim to protect, if she cannot show that *her* rights had been violated. The criticisms by various scholarly writers regarding the application of a narrow standing requirement are justified.³³¹ Kriegler J warned in *Sanderson v Attorney-General, Eastern Cape*³³² that the application of foreign precedent 'requires circumspection and acknowledgement that transplants require careful

³³¹ Roach (fn 66 above) at 4-2, cites Borchard *Declaratory Judgments*, (2nd ed, 1941), (preface from 1st ed) who wrote: "...while 'procedure should be the handmaid of justice' a 'means to an end' it too frequently became 'rigid, stereotyped, and over-technical, an end in itself, often seemingly oblivious to the practical needs of those whose ills it is designed to minister...Substantive rights often become the incidents of procedural fencing".

³³² 1998 1 SACR 227 (CC), at par 26, ("*Sanderson*").

consideration'.³³³ This heedful remark is followed throughout this thesis. Mindful hereof, it is suggested that the courts of South Africa take note of the criticism leveled by Canadian scholarly writers with the aim of avoiding the pitfalls encountered by the courts of the United States and Canada when developing our section 35(5) standing requirement.

The South African Constitutional Court has yet to rule on the standing requirement applicable to section 35(5) of the Constitution. Admittedly, the rationale of an exclusionary rule should determine the standing threshold requirement. The South African Supreme Court of Appeal has further confirmed that one of the primary aims of section 35(5) is the protection of the morality of the administration of justice. The Supreme Court of Appeal has affirmed that it will not be associated with any unconstitutional police conduct that takes place in the evidence-gathering process. Evidence obtained in this fashion will in future be excluded because its admission would have a negative impact on the administration of justice.³³⁴ The deterrence rationale was, however, not explicitly rejected. The aim of the latter rationale is to deter future police misconduct. By relying primarily on a judicial integrity rationale, the Supreme Court of Appeal has indicated that the exclusionary rule contained in section 35(5) is not an automatic exclusionary, nor an automatic inclusionary rule – sometimes unconstitutionally obtained evidence may be admitted even when the police conduct deserves censure.³³⁵ Detriment to the administration of justice will surely result when the courts condone a serious violation of a third party's constitutional right, without allowing an accused the opportunity to dispute the admissibility

³³³ See also the comments made by Kriegler J in *Ferreira* (fn 63 above) at 108, where he states the following: "In particular I would require to be persuaded the differences between South Africa on the one hand, and the foreign jurisdictions used as loadstars, on the other, are not so great that a local departure is not warranted".

³³⁴ *Mthembu* (fn 230 above).

³³⁵ *Godin* (fn 1 above).

thereof at her trial. To be sure, the administration of justice would suffer even further disrepute if the accused would be convicted under those circumstances.³³⁶

By adopting a narrow standing requirement, thereby not allowing an accused the right to dispute the admissibility of evidence unconstitutionally obtained from an innocent third party, our courts would be seen as having turned a blind eye to a violation of a constitutional right it was meant to protect, and that 'procedural fencing'³³⁷ prevented it from performing its constitutional obligation. This, it is submitted, would be characterised as a failure by our courts to conform to the moral standards aspired to by the South African Constitution. The long-term goal of establishing a human rights culture would not benefit by the inclusion of evidence obtained in this manner, since the courts would consequently be viewed as denying an accused an entitlement to challenge its admissibility. More importantly, inclusion of evidence thus obtained would encourage law enforcement officials in future, to deliberately violate the constitutional rights of innocent third parties, well knowing that the admissibility of the disputed evidence cannot be challenged by the accused at her trial.

It is submitted that the violation of the rights of an innocent third party is even more serious than violating the rights of the accused. The government has a constitutional obligation to promote, respect and fulfill the rights of innocent

³³⁶ In the recently reported case of *Mthembu* (fn 230 above) at paras 36-37, Cachalia JA confirmed this view held by the writer when he reasoned as follows: "To admit Ramseroop's testimony ... would require us to shut our eyes to the manner in which the police obtained this information from him ... This can only have a corrosive effect on the criminal justice system ... Without this evidence the remaining evidence that the State presented is insufficient to secure convictions ..."

³³⁷ See Roach (fn 66 above) at 4-2, where this term is used to describe the effect procedural law could have on substantive law.

third parties, guaranteed by the Bill of Rights.³³⁸ Innocent, law-abiding citizens should be protected from unconstitutional police conduct and are entitled to 'be left alone'.³³⁹ By indirectly encouraging the police to violate the rights of innocent third parties with the aim to attain the disgraceful goal of ensuring the conviction of an accused 'at any cost', would run counter to the values that the South African Constitution aims to protect. If one accepts this contention, then it is difficult to avoid the conclusion that our courts would not deny an accused standing to challenge the admissibility of evidence, obtained as a result of the violation of the rights of a third party. The standing threshold requirement of section 35(5) should not be determined by whether the constitutional rights of the accused had been directly violated, but rather whether the **admission** of the evidence would render the trial unfair or otherwise be detrimental to the administration of justice.³⁴⁰

An additional argument as to why the courts of South Africa should not adopt the narrow standing requirement applicable in Canada, is the dissimilarities in the different national constitutional instruments. The text of section 24(1) of the Charter has been interpreted literally, to denote that when a personal constitutional right of the accused was not directly violated, she may not rely on the exclusionary remedy contained in section 24(2). This approach has evoked fervent criticism by eminent Canadian scholars.³⁴¹ The South African section 35(5) provision does not contain a standing provision similar to section 24(1).

³³⁸ Section 7(2) of the Constitution.

³³⁹ See the comments by Ackermann J in *Ferreira* (fn 63 above) at paras 89-90.

³⁴⁰ Godin (fn 1 above) at 84, arrives at the same conclusion in respect to the Canadian provision; compare Fenton (fn 1 above) at 289, who summarises the Canadian position as follows: "Charter rights ... cannot be litigated vicariously".

³⁴¹ Godin (ibid) at 80 states: "Such an approach, however, seems to conflict with the underlying rationale of the exclusionary rule in Canada; apparent condonation of the violation of third party

The conclusion reached above is further fortified by the forceful argument of Godin³⁴² to the effect that an accused would be unduly prejudiced by a narrow standing requirement because the courts may only determine the detriment requirement at the second stage of the admissibility inquiry. Van der Merwe³⁴³ argues, correctly it might be added, that logic dictates that there appears to be no reason why, when the courts determine the admissibility issue, they should apply section 35(5) when the fundamental rights of the accused had been violated, but when the constitutional rights of a third party have been violated, the common law exclusionary rule should be employed. Surely, the application of the common law exclusionary rule under those circumstances would result in a circuitous application of the provisions of section 35(5). The application by South African courts of the provisions of section 39(2), read with the provisions of sections 8 (3)(a) and (b) of the Constitution, would entail their having to 'apply or develop' the common law exclusionary rule 'to give effect' to the provisions of section 35(5).

The constitutional guarantees contained in section 35 may be relied upon by a 'suspect'. An overview of the legal positions in open and democratic societies has revealed that suspects may rely on the relevant constitutional guarantees. It is further not the status of the person who performed the inculpatory conduct that determines admissibility, but the text of section 35(5) unambiguously dictates that courts should consider whether the *admission* of unconstitutionally obtained evidence would render the trial unfair or 'otherwise be detrimental to the administration of justice'. When this is accepted, it would therefore not be

rights is as inconsistent with saving the administration of justice from disrepute as it is with the American rationale of deterrence".

³⁴² Godin (fn 1 above).

³⁴³ Fn 25 above at 207-208. The convincing opinion of Steytler (fn 60 above) at 35 complements this argument.

essential whether the accused was 'arrested', or 'detained' when the evidence was obtained. Trial fairness and the coexistent disrepute to the administration of justice should be the determining factors when the effect of the admission of the disputed evidence is considered. In this regard, the judgments of Satchwell³⁴⁴ and Bozalek JJ³⁴⁵ are based on sound legal policy, and should, for that reason, be welcomed. The concerns of Satchwell J³⁴⁶ when she reasoned that policy must require that investigating officers should not be encouraged to keep potential accused persons in the category of 'suspect' while obtaining evidence from the said 'unwary, unsilent, unrepresented, unwarned and unenlightened suspect', would, in view of the above, be adequately addressed. Bearing this in mind, the purposive interpretation of the right to legal representation by Froneman J in *Melani* is appreciated. His interpretation of the right to legal representation was determined by the purposes it seeks to protect in the entire criminal justice system. As a result it was held that this right can be enforced 'from the inception of the criminal justice' system, including the interrogation process, with the object of ensuring that the constitutional promise of the right to a fair trial has practical meaning to an accused.

The literal interpretation by MacArthur J³⁴⁷ of the provisions of section 35, to the effect that the accused could not rely on the right to legal representation because at the stage when she made the statement she was not 'arrested' or 'detained', should not be sustained. The literal and legalistic interpretation of a Constitution, in general, has the effect of preventing the beneficiaries of fundamental rights from relying upon it. The provisions of the Judges' Rules, to a certain extent, protected the right against self-incrimination of suspects during the pre-constitutional era. The failure to adhere to its provisions was a factor to

³⁴⁴ In *Sebejan* (fn 75 above).

³⁴⁵ In *Orrie* (fn 132 above).

³⁴⁶ Fn 75 above at par 56.

³⁴⁷ In *Langa* (fn 123 above).

be considered by our courts in the determination of the fairness of the trial. The classification in the Bill of Rights of defined rights accruing to certain categories of persons, defined according to their status during the different stages of the criminal justice system, should not be construed as an internal limitation (or qualifier) serving the purpose of exclusively protecting those categories of persons individually listed in the subsections. Such an approach would prevent suspects - whose status will more often than not, as the criminal investigation progresses, change from a 'suspect' to an 'accused' - from relying on the right to a fair trial. The purpose of section 35 of the Constitution is clearly to achieve a standard of 'substantive fairness' during the pre-trial, trial and post-trial phases of the criminal justice system.

The Constitutional Court, in *Osman*, by necessary implication rejected the literal approach adopted by MacArthur J in *Langa*. The Constitutional Court was, unlike the *Langa* court, not asked to make a ruling on whether the accused would be entitled to rely on the right to legal representation at a stage when she was a 'suspect' or whether she was 'detained' when she made the disputed statement. Was MacArthur J correct in declining to adopt the Canadian interpretation of the concept 'detained'? Steytler³⁴⁸ submits that the Canadian interpretation is consistent with the South African common law position, but hastens to add that in South Africa, approaching a person for purposes of questioning would not constitute a 'detention'. This qualification would allow the police to start an initial investigation by stopping a person, obtaining her identity particulars,³⁴⁹ without having to perform the informational warnings contained in section 35. Schwikkard is of the view that *Sebejan* does not make the Canadian approach to the concept 'detention' irrelevant in South African context.³⁵⁰ She argues that

³⁴⁸ Fn 60 above at 49.

³⁴⁹ See section 41 of the Criminal Procedure Act.

³⁵⁰ Fn 127 at 454.

there may be circumstances when a person could not 'technically' be regarded as a suspect, but feels compelled to respond to police questioning, thereby incriminating herself. Stuart argued in the appeal of *Grant*³⁵¹ that the Canadian approach based on *R v Mann*³⁵² is vulnerable to police abuse, since the police may delay arrest in order to obtain inculpatory evidence from a person thereby obviating the activation of sections 9 and 10 of the Charter.³⁵³ To prevent such unwarranted conduct, he suggests that the concept of 'detention' should be broadened to include an approach analogous to that followed by the ICTY, ICTR and in members states of the European Union where the applicability of the *Corpus Juris* was explored. In other words, a person should be regarded as being 'detained' when the police take steps to establish, denounce or reveal the existence of inculpatory evidence for use against the person being interviewed, without focusing solely on the duration of the restraint.³⁵⁴

By necessary implication, the subjective view of the police should be taken into account to determine whether the person was regarded by them as a suspect. Both a subjective and objective analyses should be employed to determine whether a person was regarded as a suspect. This analysis was followed in *Orrie* and *Zuma 2*. In other words, when the police have sufficient evidence to form a suspicion that the person may have been involved in the commission of a crime and, based on such information, take steps to obtain incriminating evidence from her. A comparable approach is applied by the ICTY, the ICTR and the majority of the members of the European Union.³⁵⁵ There appears to be no principled reason

³⁵¹ Fn 52 above.

³⁵² (2004) 3 SCR 59.

³⁵³ Fn 53 above at paras 27-28.

³⁵⁴ Loc cit.

³⁵⁵ Fn 101 above. The *Corpus Juris* of the European community describes as the 'starting point' of the right to be treated as an accused and not as a witness, from the moment when 'any step is taken establishing, denouncing or revealing the existence of clear and consistent evidence of

as to why this approach should not be followed in South Africa. The foundation for such an approach has been established by the judgments in *Sebejan* and *Orrie*, as well as the obiter statement in *Zuma 2*.

An accused in South Africa does not have to establish a 'connection' requirement or the link between the violation and the discovery of the evidence.³⁵⁶ In *Soci*, Erasmus J adopted a purposive and generous approach when he interpreted this requirement. South African courts should embrace this approach, because it is founded on sound policy considerations. By rejecting a strict causal relationship and applying a temporal sequence test, the courts of South Africa have adopted a broad view of the relationship between the violation of the right and the procurement of the evidence.

In Canada, the accused bears the onus of showing that the evidence had been obtained in an unconstitutional manner. The accused must further show that admission of the evidence would render the trial unfair or otherwise be detrimental to the administration of justice.³⁵⁷ This approach is based on the text of section 24(2). The phrase 'if it is established' contained in section 24(2), prompted Lamer J to interpret the section as creating an onus that must be satisfied by an accused. However, this phrase has, assumedly by design, been omitted from section 35(5) of the South African Constitution. Primarily for this

guilt' and before the first questioning by 'an authority aware of the existence of such evidence'. The national *rappoteurs* in conjunction with the *EU-experts* conducting the research into the compatibility of the criminal justice systems of member states with the *Corpus Juris* of the European community, concluded that the criminal justice systems of most member states are compatible with article 29 of the *Corpus Juris* of the European community, except that of the Slovak Republic and Slovenia.

³⁵⁶ *Ntantsi* (fn 223 above) at par 16. The presiding officer, having regard to 'all the circumstances', has to determine this issue.

³⁵⁷ *Collins* (fn 218 above) at par 29-30.

reason, section 35(5) does not place any such onus on an accused. In the light hereof, the approach adopted by the Full Bench in *Mgcina*, to the effect that the onus of showing that the disputed evidence had not been obtained in an unconstitutional manner, rests on the prosecution, should be welcomed.