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Constitutional exclusion under section 35(5) of the Constitution of the Republic of South Africa, 1996

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Declaration

I, **Dave Ashley Vincent Ally**, declare that the work presented in this thesis is original. It has never been presented to any other University or Institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LLD Degree.

Signed…………………………………………….

Date……………………………………………….

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Date…………………………………………………

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SUMMARY/ OPSOMMING

This thesis examines the interpretation of section 35(5) of the Constitution of the Republic of South Africa, 1996, which empowers the courts to exclude unconstitutionally obtained evidence in criminal trials. A generous and purposive interpretation should be at the heart of the admissibility assessment.

This work explores the threshold requirements and the substantive phase of the interpretation of section 35(5). Given that this provision is manifestly modelled on the terms contained in section 24(2) of the Canadian Charter, the manner in which the courts of that country have grappled with the interpretation of section 24(2) has been accorded particular importance.

As a preliminary issue, the courts must consider whether the threshold requirements of section 35(5) have been satisfied. It is concluded that the courts of South Africa have interpreted the threshold requirements of section 35(5) in a broad manner, thereby making it less onerous to satisfy, compared to the threshold requirements contained in section 24(2).

The substantive phase of the admissibility assessment should consist of two legs that must be clearly separated from each other, for the reason that the assessment in each leg of the analysis serve to enhance different societal interests. The public interest in protecting the rights of the accused should be the central consideration during the first leg, while the societal interest in convicting the guilty should be contemplated during the second leg.

The **first leg** of the analysis is concerned with the effect that admission of the evidence would have on the fairness of the trial. It is suggested that the trial fairness requirement should be determined by means of a conscription analysis. The prosecution may rely on the 'discoverability' doctrine or on the 'independent source' exception. The admission of evidence based on these exceptions would not render the trial unfair. Such an infringement would, accordingly, not add to the seriousness of the violation. Conversely, although admission would tend to render the trial unfair, the evidence should **not** 'automatically' be excluded. However, such an infringement should be regarded as a serious violation, since section 35(5) was designed to prevent unfair trials.

The **second leg** is focused on the effect that either the admission or exclusion of the evidence would have on the integrity of the criminal justice system. It is concluded that the 'current mood' of society should not be determinative of the admissibility assessment.

The following overall admissibility framework is recommended: Despite the fact that admission would render the trial unfair, the courts should be allowed to consider police 'good faith' and other factors ordinarily considered during the second leg, in order to make an admissibility ruling. Differently put, a balancing exercise should be performed, in which the factors identified in the seminal case of *Collins* are considered and weighed at the end of the analysis. More importantly, the seriousness of the violation should be a significant factor in the overall admissibility assessment, since judicial condonation of serious infringements would generally impact negatively on the repute of the criminal justice system.

Hierdie tesis ondersoek die grondwetlik verskansde remedie wat Suid-Afrikaanse howe magtig om ongrondwetlik verkreë getuienis in strafsake uit te sluit. Dit word voorgestel dat 'n onbekrompte en doeldienende uitleg toegepas moet word ten einde betekenis aan artikel 35(5) te gee.

Die drempelvereistes en die substantiewe fase van artikel 35(5) word onder die soeklig geplaas. Aangesien artikel 35(5) onteenseglik geskoei is op die bepalings van artikel 24(2) van die Kanadese Handves van Regte, gee hierdie navorsing besonderse aandag aan verwikkelinge wat betrekking het op die uitleg van hierdie Kanadese bepaling.

Alvorens die meriete van 'n artikel 35(5) dispuut oorweeg mag word, moet daar bepaal word of die bepalings van die drempelvereistes nagekom is. In hierdie verband word konkludeer dat die Suid-Afrikaanse howe 'n onbekrompte uitleg volg, wat dit minder moeilik maak vir 'n beskuldigde om die vereistes van hierdie drempelvereistes na te kom, in teenstelling met iemand wat op artikel 24(2) sou steun.

Die substantiewe fase van die toelaatbaarheidsvraag bestaan uit twee bene, welke bene duidelik van mekaar onderskei moet word, omrede elke been die bevordering van 'n verskillende publieke belang onderskraag. Tydens die eerste been word die publieke belang in die beskerming van die regte van die beskuldigde oorweeg, terwyl die openbare belang in die bevordering van die publieke belang in die skuldigbevinding van skuldige partye gedurende die tweede been ondersoek word.

Die **eerste been** van die toelaatbaarheidsondersoek wentel om watter effek toelating van die getuienis op die billikheid van die verhoor het. Dit word voorgestel dat hierdie aspek bepaal moet word deur middel van 'n konskripsie-analise. Die staat mag steun op die feit dat die getuienis noodwendigerwys op 'n

grondwetlike wyse ('discoverability') of op grond van die 'independent source'-leerstuk verkry kon word. Toelating van getuienis wat op een van hierdie wyses verkry kon word, het nie 'n negatiewe effek op die verhoorbillikheidsvraag nie. Indien toelating van die gewraakte getuienis die verhoor onbillik sou maak, moet daardie getuienis **nie** 'outomaties' uitgesluit word nie. Inteendeel moet 'n skending wat 'n negatiewe impak op die verhoorbillikheidsondersoek het, as 'n ernstige inbreukmaking beskou word, aangesien artikel 35(5) ontwerp was om onbillike verhore te verhoed.

Die **tweede been** van die toelaatbaarheidsondersoek is gemoeid met die vraag of toelating of uitsluiting van die getuienis die regspleging nadelig sou tref. Daar word konkludeer dat daar nie besonderse gewig gehef moet word aan die 'huidige gemoedstemming' van die gemeenskap nie.

Die volgende algehele raamwerk waarbinne die artikel 35(5) analise behoort plaas te vind, word voorgestel: Ten spyte van 'n bevinding dat toelating van die getuienis 'n verhoor onbillik sou maak, behoort byvoorbeeld, die 'goeie trou' van die polisie oorweeg word, alvorens besluit word dat die getuienis toegelaat of uitgesluit word. Anders gestel, moet 'n balanseringsproses plaasvind aan die einde van die analise, waartydens die faktore wat in die Kanadese saak van *R v Collins* uitgelig is, evalueer word, ten einde vas te stel of die getuienis toegelaat of uitgesluit moet word. Die aard en erns van die betrokke inbreukmaking moet deurgaans 'n sentrale plek in die toelaatbaarheidsondersoek inneem.

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ABBREVIATIONS AND ACRONYMS

A

A or AD	Appellate Division of South Africa (now SCA)
All ER	All England Reports
ALR	Australia Law Reports
A-G	Attorney-General
Alta CA	Alberta Court of Appeal
ASSAL	*Annual Survey of South African Law*
AU	African Union
Alta CA	Alberta Court of Appeal

B

BCLR	Butterworths Constitutional Law Reports
BC CA	British Columbia Court of Appeal
BC PC	British Columbia Provincial Court
BCLR	Butterworths Constitutional Law Reports

C

CBR or *Can BR*	*Canadian Bar Review*
CCLA	Canadian Civil Liberties Association
CC	Constititutional Court
Can Crim LR	*Canadian Criminal Law Review*
Cr App R	Criminal Appeal Reports

Cr Law Rev	*Criminal Law Review*
CLQ	*Criminal Law Quarterly*
CkH	Ciskei Division of the High Court of South Africa
Col L Rev	*Columbia Law Review*
CR	Criminal Reports (2nd, 3rd, 4th, 5th, or 6th series)
CRR	Canadian Rights Reporter
Cr App R	Criminal Appeal Report
CILSA	*Comparative International Law Journal of Southern Africa*

D

DLR	Dominion Law Reports
DCJ	Deputy Chief Justice
DP	Deputy President of the Constitutional Court
DPP	Director of Public Prosecutions

E

E & P	*International Journal of Evidence and Proof*
EHRR	European Human Rights Reports

H

HL	House of Lords

I

IC	Interim Constitution of South Africa
ICCS	International Criminal Court Statute

ICCT	International Criminal Court
ICTY	International Criminal Tribunal for Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ICCPR	International Covenant on Civil and Political Rights
Israel LR	*Israel Law Review*

N

Nfld CA	Newfoundland Court of Appeal
NSCA	Nova Scotia Court of Appeal

O

Ont C (Gen Div)	Ontario Court General Division
Ont CA	Ontario Court of Appeal
Ont Prov Div	Ontario Provincial Division
Ont Prov Ct	Ontario Provincial Court

P

P	President of the Constitutional Court (South Africa)
PH	Prentice Hall Reports
PACE	Police and Criminal Evidence Act
Prov Ct J	Provincial Court Judge

Q

QB	Queen's Bench Division

S

SA	South African Law Reports
SACC	*South African Journal of Criminology and Criminal Law*
SACJ	*South African Journal of Criminal Justice*
SALJ	*South African Law Journal*
SAJH	*South African Journal of Human Rights*
SCA	Supreme Court of Appeal
Stell LR	*Stellenbosch Law Review*
SACR	South African Criminal Law Reports
Sask CA	Saskatchewan Court of Appeal

U

UT Fac LR	*University of Toronto Faculty of Law Review*
UDHR	Universal Declaration of Human Rights

Z

ZASCA	South African Supreme Court of Appeal

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Chapter 1: Introduction

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A. Background to research questions

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

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

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

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

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

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

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

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

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

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

[9] Schwikkard (fn 1 above) at 321-323.

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

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

Whenever relevant, this study compares the provisions of section 24(2) of the Canadian Charter with section 35(5) of the South African Constitution. Section 24(2) of the Canadian Charter of Rights and Freedoms[14] provides that when:

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

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

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

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

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

[14] Hereinafter "the Charter".

> proceedings would bring the administration of justice into disrepute.

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

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

The South African Supreme Court of Appeal and the High Courts,[15] including scholarly writers[16] have indicated that the provisions contained in the two

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

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

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

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

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

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

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

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

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

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

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

[21] Section 78(1) of the PACE.

[22] "The ICCS" or "the Rome Statute".

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

[24] The pertinent parts of section 7(4) reads as follows: "When an infringement of or threat to any right entrenched in this Chapter is alleged, any person … shall be entitled to apply to a competent court of law for appropriate relief …".

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

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

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

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

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

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

B. Research questions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[32] [1955] AC 197, ("*Kuruma*").

[33] (1970) 4 CCC (3d) 1, ("*Wray*").

[34] Fn 3 above.

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

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

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

[35] (1914) 232 US 383, ("*Weeks*").

[36] (1961) 367 US 643, ("*Mapp*").

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

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

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

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

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

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

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

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

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

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

[44] Fn 39 above.

[45] Fn 39 above.

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

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

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

During the **second leg** or phase of the section 35(5) assessment, the court must consider whether admission or exclusion of the disputed evidence would be 'detrimental to the administration of justice'. An important issue that has to be considered is whether the concepts 'disrepute' and 'detriment' have a comparable meaning. Bearing in mind the high crime rate in South Africa, should public opinion be considered as a factor in the assessment of the 'detriment' requirement? If so: to what extent? The notion of a justiciable Bill of Rights dictates that governmental power should be subjected to judicial scrutiny, through the application of the Constitution. More often than not, this would entail that courts, as guardians of the individual rights guaranteed in the Constitution, should, in order to fulfil its constitutional obligation, be duty bound ***not*** to heed the will of the majority. As demonstrated in *S v Makwanyane*,[49] this creates a tension between the will of the majority in instances when individual rights are judicially enforced. The concept of 'detriment to the administration of justice' is central at this stage of the inquiry. Would a consideration of public opinion not be inimical to the fundamental duty of the courts of South Africa to serve as guardians of the Constitution? The supremacy clause[50] dictates that

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

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

[50] Section 2 of the South African Constitution.

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

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

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

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

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

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

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

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

C. Terminology

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

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

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

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

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

D. Literature review

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

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

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

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

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

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

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

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

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

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

[59] (2000) 11 *Crim L Forum* 461.

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

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

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

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

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

[64] Fn 37 above.

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

[66] Mahoney (ibid).

[67] (2001) 44 *CLQ* 34.

[68] (2002) 46 *CLQ* 21.

[69] (2004) 48 *CLQ* 49.

The second phase of the admissibility assessment in Canada consists of a determination of whether admission or exclusion of the disputed evidence would cause 'disrepute' to the administration of justice. Hogg,[70] Roach,[71] Young[72] and Hession[73] have written on the interpretation of this phase of the section 24(2) analysis.

South African scholarly writers who have written on the admissibility of unconstitutionally obtained evidence in South Africa are notably De Jager,[74] Schwikkard,[75] Steytler,[76] Van der Merwe[77] and Viljoen.[78] Other commentators have also added to the discussion of section 35(5) of the South African Constitution.[79]

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[70] Fn 65 above.

[71] Fn 37 above.

[72] Young (1996) 39 *CLQ* 362.

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

[74] Fn 6 above.

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

[76] Steytler (fn 16 above).

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

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

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

E. Methodology

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

[80] 1996 2 SA 751 (CC).

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

> Comparative study is always useful, particularly where courts in exemplary jurisdictions have grappled with universal issues confronting us. Likewise, where a provision in our Constitution is ***manifestly modelled on a particular provision in another country's constitution***, it would be folly not to ascertain how the jurists of that country have interpreted their precedential provision.

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

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

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

[83] (2006) 123 *SALJ* 497 at 505.

F. Limitations

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

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

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

[84] See chapter 4 below.

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

[86] Fn 16 above at 209-210.

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

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

This study considers case law as at 31 March 2009. The cut-off date was initially set for an earlier date, but because of the importance of recent developments in England,[88] Canada[89] and South Africa,[90] the relevant date was extended.

G. Structure and overview of chapters

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

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

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

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

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

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

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

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

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

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

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

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

[92] Fn 22 above.

[93] Fn 15 above.

[94] Fn 42 above.

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

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

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

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

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

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

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

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

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

A. Introduction

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

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

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

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

[2] Hereinafter "the PACE", which came into force on 1 January 1986.

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

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

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

[3] Hereinafter "the European Convention".

[4] Hereinafter "the Interim Constitution" or "IC". The Interim Constitution came into force on 27 April 1994.

[5] Hereinafter "the Constitution".

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

B. The rationales for the exclusion of evidence

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

[6] Section 39(1)(b) of the Constitution dictates that South African courts "must" consider international law.

[7] *R v Leatham* 1861 Cox CC 498, ("*Leatham*").

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

extensive discussion by some commentators,[9] it is not discussed in detail in this chapter.

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

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

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

[11] The same criticism is leveled against the Canadian standing requirement in chapter 3 of this thesis.

[12] See chapter 3, under the heading "Standing to rely on section 35(5)".

[13] (1997) 113 CCC (3d) 321, 5 CR (5th) 1, 1 SCR 607, ("*Stillman*").

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

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

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

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

[16] Loc cit.

[17] *Constitutional Remedies in Canada* (1994) at 3-17; see also Paciocco (fn 1 above) at 322.

[18] Roach (loc cit).

[19] Ibid at 3-19.

provisions of the Constitution. Regulatory justice[20] does take into consideration the effects of the remedy upon the interests of society.[21]

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

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

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

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

the deterrence rationale and the judicial integrity rationale. Embedded in each rationale are their inherent weaknesses.[23]

1 The remedial imperative[24]

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

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

[24] Roach (fn 16) at 3-2, refers to this imperative as the corrective justice theory.

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

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

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

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

2 The deterrence rationale

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

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

[28] Fn 20 above.

[29] See also *Pillay*, (fn 21 above).

[30] Snyman *Criminal Law* (3rd ed, 1995) at 22-23.

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

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

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[32] Hereinafter referred to as "the Charter" or "the Canadian Charter".

[33] Paciocco (fn 1 above) at 340.

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

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

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

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

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

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

[39] Ibid.

[40] In terms of section 25(3)(e) of the Interim Constitution.

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

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

3 The judicial integrity rationale

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

[41] Fn 38 above at 739.

[42] See MacDougal (fn 10 above) at 663; Bryant et al (1990) 69 *CBR* 1 at 4; Paciocco (fn 1 above) at 336.

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

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

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

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

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

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

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

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

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

C. The common law inclusionary rule in England and Wales

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

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

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

[49] Zeffertt et al *South African Law of Evidence* (2006) at 630.

[50] 1997 1 SACR 546 (D) at 560, ("*Coetzee*").

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

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

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

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

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

[53] Act 51 of 1977 (as amended), hereinafter referred to as "the Criminal Procedure Act".

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

[55] Fn 7 above.

[56] Ibid at 501.

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

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

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

[58] Fn 7 above.

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

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

[61] Ibid at 239.

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

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

[62] [1980] A C 402, ("*Sang*").

[63] Ibid, per Lord Diplock at 291; see also Choo & Nash (1999) *Cr Law Rev* 929.

[64] May & Powles *Criminal Evidence* (5th ed, 2004) at 287; Choo & Nash (ibid).

[65] Loc cit.

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

D. The statutory law position in England and Wales

1 Introduction

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

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

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

[67] Emphasis added.

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

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

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[68] Howard et al *Phipson on Evidence* (14th ed, 1990) at 700.

[69] Loc cit.

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

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

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

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

(a) The onus

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

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

[72] Choo & Nash (fn 63 above) arrive at the same conclusion.

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

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

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

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

[75] Loc cit.

[76] Fn 70 above.

[77] Lords Rodger, Carswell and Brown concurring.

[78] Fn 70 above at 78.

[79] See their opinion at fn 73 above.

(b) The meaning of the concept 'fairness'

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

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

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[80] *Hughes* (fn 70 above); see also *Robb* (fn 70 above); see further Sharpe *The New Law Journal* (1996) at 1088.

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

[82] Fn 64 above at 306.

[83] *Walsh* (fn 70 above) at 163.

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

[85] *DPP v Godwin* (1991) RTR 303.

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

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

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

[86] *Walsh* (fn 70 above) at 163.

[87] Loc cit.

[88] Fn 70 above.

[89] This was said in *Cooke* (fn 70 above) at 328.

[90] Fn 70 above at 298.

[91] Fn 64 above.

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

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

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

[93] See the discussion of this factor in chapters 5 and 6 of this thesis.

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

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

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

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

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

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

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

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

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

[97] Fn 70 above; see also *Beales* (fn 70 above).

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

[99] Fn 70 above.

[100] *The Independent* 19 Jan 1990 at 1.

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

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

[101] Fn 70 above.

[102] Glidewell LJ and Rougier J concurring.

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

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

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

(7)…

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

(9)….

(10)….

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

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

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

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

[104] A serious arrestable offence is defined in section 116 and Schedule B. The Firearms Act of 1968 also creates such offences.

[105] Fn 70 above at 629.

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

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

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

[106] Ibid at 628.

[107] Ibid at 629.

[108] Fn 36 above.

[109] Ibid at 503-504.

[110] Ibid at 504.

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

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

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

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

[112] Fn 62 above.

[113] Fn 57 above.

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

[115] Fn 70 above.

[116] Mustill LJ and Potter J concurring.

[117] Ibid at 59.

[118] Ibid at 61.

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

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

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

[119] Ibid at 62-63.

[120] Ibid at 70.

[121] See *Mason* (fn 70 above).

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

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

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

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[123] Fn 61 above.

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

[125] Fn 70 above.

[126] Hutchison and Rougier JJ concurring.

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

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

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

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

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[127] (Fn 70 above) at 190 of the judgment.

[128] Fn 70 above.

[129] Ibid at 190.

[130] Ibid at 192.

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

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

4 The abuse of process doctrine

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

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

[132] *R v Bow Street Stipendiary Magistrate and Glogg* (1993) Crim L R 221, ("*Glogg*").

[133] *Attorney.-General's Reference (No 1 of 1990)* (1992) Q B 630, ("*A-G Ref (No 1 of 1990*").

[134] *Bennett* (fn 45 above); *R v Mullen* (1999) 2 Cr App. R143, ("*Mullen*").

[135] *Connelly v DPP* (1964) A C 1254, ("*Connelly*").

[136] Ibid; see also *Bennett* (fn 45 above).

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

> [a] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either
> (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial; or
> (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.

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

[137] Ibid.

[138] Ibid at 62.

[139] Ibid at 81.

[140] Loc cit.

[141] Ibid at 74-75.

[142] Fn 134 above.

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

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

[143] Fn 45 above.

[144] Rose LJ.

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

the application of the discretionary balance 'comes down decisively against the prosecution of this offence'.[146]

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

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[146] Ibid at 157.

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

[148] Fn 21 above.

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

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

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

[149] Buckley J concurring.

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

[151] Emphasis added.

[152] Fn 21 above. This case is discussed in detail in chapters 4 and 5.

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

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

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

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

[155] The difference between the nature of this discretion and the section 35(5) discretion is discussed in chapter 6 below.

[156] See *Connelly* (fn 135 above) at 62.

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

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

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

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

[157] Fn 63 above at 937.

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

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

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

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

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

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

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

[163] Section 2 of the Act. The European Commission was abolished in 1998 and the European Court is differently constituted.

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

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

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[165] *Nemetz v Germany* (1992) 16 EHRR 97, ("*Nemetz*"); see also *Lawless v Ireland*, Series A, No 28, par 68 (1978), ("*Lawless*").

[166] See MacDonald "The Margin of Appreciation" in MacDonald et al (eds) *The European System for the Protection of Human Rights* (1993), for a discussion of this doctrine.

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

[168] The relevant part of the section reads as follows: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing …".

[169] *Schenk* (fn 168 above) at par 47.

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

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

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

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

[171] May & Powles (ibid) at 393.

[172] Fn 70 above.

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

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

[175] Fn 70 above.

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

[176] See, for example, *Katz* (fn 14 above).

[177] Fn 167 above.

[178] Fn 57 above.

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

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

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

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

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

[181] Fn 174 above.

[182] Fn 81 above at 224.

[183] Loc cit. He ads that real evidence could be excluded when the charges are not of a serious nature. (Footnotes omitted).

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

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[184] (1997) 23 EHRR 313, ("*Saunders*").

[185] Ibid at par 71.

[186] Ibid.at par 69.

[187] (1993) 16 EHRR 297, ("*Funke*").

[188] Ibid at paras 44-45.

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

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

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[189] Application No 31827/96, decided on 3 May 2001, ("*JB*").

[190] Fn 95 above at fn 31 of the article.

[191] Fn 184 above.

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

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

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

[193] Fn 165 above.

[194] Both cases appear at fn 70 above.

[195] Evidence was excluded because the police deliberately violated the right to legal representation with the aim of obtaining a confession.

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

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

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

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[196] Breaches were held to be significant and substantial and the evidence obtained was excluded.

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

[198] *Samuel* (fn 70 above).

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

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

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

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

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

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

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

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

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

[202] 1995 2 SA 642 (CC) at par 19, ("*Zuma*").

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

[204] Fn 69 above.

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

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

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

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

[206] Fn 70 above.

[207] Fn 95 above at 2.

[208] Ibid at 5; see also Dennis *The Law of Evidence* (1999) at 81-82.

E Section 35(5) of the South African Constitution

1 Introduction

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

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

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[209] It is clear that the exclusionary remedy was also based on a combination of the corrective justice and the regulatory justice theories.

[210] See fn 15 above.

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

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

2 The Interim Constitution

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

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[212] See Annexure "A" hereto, which contains selective provisions of Chapter 3.

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

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

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

[214] Fn 21 above.

[215] Section 24(2) was also referred to with approval in *Melani* (fn 21 above).

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

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

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

[219] Fn 9 above at 195.

[220] *Shongwe* (fn 8 above) at 338.

[221] Fn 38 above; *S v Marx* 1996 2 SACR 140 (W), ("*Marx*"); *S v Mahlakaza* 1996 2 SACR 187 (C), ("*Mahlakaza*").

[222] *Yawa* (fn 38 above); *S v Maseko* 1996 2 SACR 91 (W), ("*Maseko*"); *Mathebula* (fn 216 above).

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

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[223] Ibid at 715.

[224] Emphasis added.

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

[226] *Samuel* (fn 70 above).

[227] See Van der Merwe (fn 9 above) at 175.

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

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

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

[228] Project 58 (1991) of the South African Law Reform Commission.

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

would inevitably have catered for a consideration of 'detriment' to the criminal justice system.[230]

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

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

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

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

[231] This requirement, together with other threshold requirements, is discussed in chapter 3 of this work.

[232] This requirement is explored in chapter 4.

[233] This assessment is discussed in chapter 5.

[234] See chapter 5, where this concept is explored.

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

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

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

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

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

[236] Fn 20 above at par 29.

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

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

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

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

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

In the seminal case of *Makwanyane*,[240] the Constitutional Court held that 'international law agreements, customary international law', and 'decisions of

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

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

[240] Fn 48 above.

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

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

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[241] Ibid at par 36-37.

[242] For example, the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights.

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

[244] See the minority opinion in *Pillay* (fn 21 above) at par 122-124.

[245] *Melani* (fn 21 above).

3.1 International law

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

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

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

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

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

> Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:
> (a) the violation casts substantial doubt on the reliability of the evidence; or
> (b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

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

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

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

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

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

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

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

[251] This is the argument of the writer in chapter 3 of this thesis.

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

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[252] IT-99-36-T, judgment handed down on 15 February 2002, ("*Brdanin*").

[253] Agius J presiding with Janu and Taya JJ concurring.

[254] Fn 252 above at 5, par 11.

[255] See also *Prosecutor v Zejnil Delalić* et al Case No IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence, where the same test was applied, ("*Zejnil*").

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

[257] "The impact of the European Convention on Human Rights on the International Criminal Tribunal of Yugoslavia", in Dixon, Khan & May (eds) *International Criminal Law* (2002) at 213-214.

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

The International Criminal Court was scheduled to take charge of its first trial during February 2008.[259]

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

[258] Fn 184 above.

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

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

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

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

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

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

3.2 Foreign law

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

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

[263] Viljoen (fn 260 above) at 570-571.

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

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

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

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

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

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

[267] Loc cit.; see also *Pillay* (fn 21 above) at par 91.

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

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

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

F. Conclusion

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

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

[270] In *Pillay* (fn 21 above) at 122.

[271] See sections 313 and 324 of the Criminal Procedure Act; see also *S v Moodie* 1962 1 SA 587 (A), ("*Moodie*"). See further Kriegler (fn 54 above) at 863.

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

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

[272] *Sang* (fn 61 above).

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

[274] See the dissenting opinion of Loucaides J in *Khan* (fn 167 above).

developed by the South African courts having due regard to the spirit, purport and objectives of the South African Constitution.[275]

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

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

[275] See chapter 4 below.

[276] Compare Choo & Nash (fn 95 above).

[277] Fn 70 above.

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

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

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

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[278] Choo & Nash (fn 95 above) at 5, arrive at a similar conclusion.

[279] *A and Others* (fn 70 above) at par 87.

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

[281] 1996 1 SA 984 (CC), ("*Ferreira*").

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

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

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

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

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

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

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

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

[285] See fn 261 above. Aricle 69(7) makes express provision for an exclusionary remedy in criminal proceedings.

[286] Hereinafter "the Guidelines on the Right to a Fair Trial". This resolution was adopted during 2003.

[287] Article 2(3) of the ICCPR reads as follows: "Each State Party to the present Covenant undertakes:

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

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

[288] Strydom et al *International Human Rights Standards* Vol I, (1997) at 3.

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

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

[289] Steytler (fn 27 above) at 36.

[290] Steytler (loc cit).

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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 Canada[1] and the United States[2] 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.

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[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 P[5] tersely answered this question as follows:[6]

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[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]

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[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], 35[14], 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 ***admisssion*** 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

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[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

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

[19] For an analoguous approach in Canadian context, see *Harrer* (fn 11 above). In *Harrer*, based on analoguous 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 trial[25] (when

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[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-

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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, ("*Trupedo*"); *S v Mabaso and Another* 1990 3 SA 185 (A), ("*Mabaso*").

compliance with this requirement would render such evidence inadmissible. The 1931 Judges' Rules[28] 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

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[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 gearresteerde 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]

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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

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[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

[45]Ratushny (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 Appeal[49] 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, ("*Janeiro*"). 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 pscychological 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* warnings[55] 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 Court[57] 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 J[60] 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

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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]

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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

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[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

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[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' Rights[82] 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 Committee[84] and the European Court of Human Rights[85] 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

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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 Pepoles' 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 Eurpean 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 judges[87] 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 Africa[89] and the Basic

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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 Moskito 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 Yugoslavia[92] 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 rule[96] as provided for in Rule 95[97] of the mentioned international criminal tribunals.

It is noteworthy that Rule 1 of the Rules of Procedure of the ICTY[98] defines a 'suspect' as[99]

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[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 Iuris* 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 Imprisonment[107] require that nation states keep proper records of interrogation[108] 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

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[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 Act[112] 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

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[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 involed 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 person[117] and added that a suspect does not know 'without equivocation or ambiguity or at all that she is at risk of being charged'.[118]

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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 J[122] 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 J[125] 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

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[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]

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[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 assited 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, unsilent, 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 police[134] 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 Congress[139] 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.

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[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 urgency[150] 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 categorization[153] – 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.

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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

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[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

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[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

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[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 aproach, 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

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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 Court[182] 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.

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[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

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[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.

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[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 Donavan (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]

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[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 hosts 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

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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

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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. Sopina 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,

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[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 assessment[211] 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

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[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 assessment[218] 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

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[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.

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[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

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[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 caasal 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 Apeal 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 olice 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] Seection 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

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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 benfited 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

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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]

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[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 Daubermenn 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

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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 seperation 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 untrammeled 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 119[259] and 121[260] 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 involutariness 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 evidence[264] 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]

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[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–trail 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

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[266] Fn 258 above at 366-367.

[267] Navsa, Van Heerden JJA, Erasmus and Ponnan 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.

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[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] He[275] 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]

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[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]

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[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, ("*Wiliams*"); *Collins* (fn 218 above) at par21, 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 *Quozelini v Minister of Law and Order and Another* 1994 3 SA 625 (EC), ("*Quozelini*").

[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), ("*Hugo*"); *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

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[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 Soci* (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 Division[290] 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]

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[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

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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 Candian 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.

Steytler[329] 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

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[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

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[336] In the recentlty 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).

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[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 Godin[342] 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 Merwe[343] 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

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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 Satchwell[344] and Bozalek JJ[345] are based on sound legal policy, and should, for that reason, be welcomed. The concerns of Satchwell J[346] 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 J[347] 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

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[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'? Steytler[348] 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 analoguous 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

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[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 acused 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

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guilt' and before the first questioning by 'an authority aware of the existence of such evidence'. 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 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] *Ntlantsi* (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.

Chapter 4: The first leg of the admissibility analysis: determining trial fairness under section 35(5)

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A. Introduction

This chapter is divided into four main parts: Part A consists of this introduction, while part B explores the fair trial requirement under section 24(2) in Canada. Part C, in turn, contains a discussion of the fair trial prong contained in section 35(5) of the South African Constitution, and part D consists of a conclusion and recommendations.

In *R v Collins*,[1] Lamer J suggested that a court should consider three categories of factors when determining whether exclusion of disputed evidence could bring the administration of justice into disrepute. The three categories identified are: the first group of factors deal with the effect of admitting evidence on the fairness of the trial; the second, with a determination as to whether admission of unconstitutionally obtained evidence would be tantamount to judicial condonation of unconstitutional conduct (also known as the seriousness of the violation); and the third group of factors are concerned with the effect of exclusion or admission of the evidence on the integrity of the justice system. When courts consider the first group of factors, it is also referred to as the first leg or phase of the admissibility analysis, and when the second and third goups of factors are considered, it is referred to as the second leg or phase of the analysis.

This chapter explores the first group of factors, also known as the effect of admitting the disputed evidence on trial fairness.[2] The Canadian Supreme Court further held in *Collins*[3] that the fair trial prong should be determined by assessing the following three factors: firstly, the nature of the evidence, or a conscription

[1] (1987) 33 CCC (3d) 1 (SCC); 38 DLR (4th) 508; (1987) 1 SCR 265; (1987) Can LII 84 (SCC), ("*Collins*").

[2] Ibid at 19-20.

[3] Loc cit.

analysis,[4] secondly a discoverability inquiry,[5] and thirdly, the nature of the right breached.[6] These three factors are analysed, having regard to the provisions of sections 24(2) and 35(5).

The Canadian position, both during the pre- and post-Charter era, is discussed in part B of this chapter. This discussion is undertaken, on the one hand, with the aim of establishing the scope and meaning of the conscription analysis under section 24(2) of the Charter. On the other hand, it serves the purpose of determining what impact the privilege against self-incrimination has on the right to a fair trial. The important question that needs to be explored here is: Does the common law privilege against self-incrimination adequately protect the fundamental right to a fair trial in a democratic society where courts must especially be concerned about the manner in which evidence had been obtained, regardless of its nature? Put differently, does the common law privilege against self-incrimination effectively protect constitutionally entrenched procedural rights designed to collectively enhance trial fairness values?

Following the *Collins* approach, a discoverability inquiry is discussed with the aim of establishing its function under the fair trial requirement. In addition to these

[4] Loc cit. Lamer J formulated the conscription analysis as follows: "However, the situation is very different with respect to cases where, after a violation of the Charter, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render a trial unfair, for … it strikes against one of the fundamental tenets of a fair trial, the right against self-incrimination". (The "first *Collins* fair trial factor").

[5] Loc cit. The judge referred to the discoverability inquiry as follows: "It may also be relevant, in certain circumstances, that the evidence would have been obtained in any event without the violation of the Charter". ("The second *Collins* fair trial factor").

[6] Loc cit. This requirement was identified by Lamer J as follows: "It is clear to me that the factors relevant to this determination will include … the nature of the right violated and not so much the manner in which the right was violated". ("The third *Collins* fair trial factor").

two factors, the third *Collins* factor (the nature of the right infringed) is considered.

The *Collins* fair trial directive was reoriented during 1997 in *R v Stillman*[7] and *R v Feeney*.[8] The reasons for the adaptation of the *Collins* test, as well as the impact that the refined fair trial requirement has had on the *Collins* fair trial test, are explored. The following important issues emerge: Would it be more onerous or undemanding to admit 'real' evidence obtained after a violation in terms of the *Stillman* fair trial requirement, when compared to the *Collins* fair trial test? Also, has the 'refined' fair trial directive discarded a consideration of the third *Collins* fair trial factor (the nature of the right violated) as an independent element in the fair trial assessment? A second attempt at remodelling the *Collins* fair trial framework was made by the Ontario Court of Appeal in *R v Grant*.[9] The Supreme Court of Canada heard argument in the appeal of *Grant* on 23 April 2008.[10] Judgment has been reserved and will be delivered in due course. The implications of the *Grant* fair trial assessment is analysed under 4.4 below, with the aim of establishing whether it best serves the goals sought to be protected by the fair trial assessment.

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[7] (1997) 113 CCC (3d) 321, 144 DLR (4th) 193, 5 CR (5th) 1, [1997] 1 SCR 607, 209 NR 81, 85 NBR (2d) 1, 472 APR 1, 42 CRR (2d) 189, 1997 CarwellNB 107, 1997 NB 108 (SCC), ("*Stillman*"). The *Stillman* fair trial assessment is also referred to in this work as the "refined" or "new" fair trial assessment.

[8] (1997) 115 CCC (3d) 129, 7 CR (5th) 101, [1997] 2 SCR 13, ("*Feeney*").

[9] (2006) 209 CCC (3d) 250, 143 CRR (2d) 223, 38 CR (6th) 58, (2006) CarswellOnt 3352, 81 OR (3d) 1, 213 OAC 127 (Ont CA), ("*Grant*").

[10] Stuart of the Faculty of Law, Queen's University, Ontario, represented the intervenor in this case, the Canadian Civil Liberties Association, in the Supreme Court of Canada. A copy of Stuart's Heads of Argument is annexed and marked "Annexure D".

The South African Supreme Court of Appeal, in *Pillay and Others v S*,[11] has embraced the *Collins* approach in its interpretation of section 35(5) of the South African Constitution. For this reason, the structure of the work followed in part C in the main mirrors that followed in the discussion of the Canadian position. The discussion commences with an analysis of the pre- and post-constitutional era, with the aim of assessing the values protected by the conscription analysis under section 35(5). The common law privilege against self-incrimination serves to protect important values in the South African criminal justice system, especially in the trial fairness assessment. Mindful hereof, the pre- and post-constitutional cpmparison is undertaken in order to determine whether the privilege against self-incrimination effectively protects the fair trial directive contained in section 35(5). Scott JA applied the *Stillman* fair trial framework in a dissenting minority opinion in *Pillay*. In *S v Tandwa*,[12] decided approximately four years after *Pillay*, the South African Supreme Court of Appeal did not follow the majority opinion in *Pillay*. Instead, the *Tandwa* court incorporated the exercise of a discretion into the fair trial assessment, which – though not identical to that applied in *Grant* – includes aspects of such fair trial framework. Two important questions arise: Should South African courts be guided by the *Collins*, *Stillman*, *Grant* or *Tandwa* fair trial analysis in section 35(5) challenges? If not, how should South African courts assess trial fairness in terms of section 35(5)?

Once more following the *Collins* approach, a discoverability or 'but for' inquiry is employed as a tool to determine trial fairness. Thereafter, the third *Collins* fair trial factor (the nature of the right infringed) is considered. The right to legal representation and the right to freedom and security of the person form part of this discussion, since infringements of these rights could frequently occur in section 35(5) challenges. While the infringement of other fundamental rights

[11] 2004 2 BCLR 158 (SCA) ("*Pillay*").

[12] [2007] SCA 34 (RSA), ("*Tandwa*")

may result more often than those discussed, it should be emphasised that this thesis is not aimed at a detailed discussion of the rights contained in section 35. Rather, the nature of the right infringed is discussed with the objective of demonstrating the characteristics of the fair trial assessment contained in section 35(5).

B. Determining trial unfairness under section 24(2) of the Canadian Charter

This part of the study begins with an overview of the common law privilege against self-incrimination in Canada as applied during the pre-Charter era, followed by the adaptation thereof during the post-Charter era. The issue of the admissibility of evidence in Canada and in South Africa display significant similarities, both before and after a justiciable Bill of Rights was introduced. To mention but a few: Both Canada and South Africa were at some stage under British rule; the law of England had a profound impact on the common law of both countries;[13] both countries emerged from a system of parliamentary sovereignty to constitutional states where fundamental fairness informs the right to a fair trial;[14] the Constitutions of both countries contain a general limitations

[13] See *S v Zuma* 1995 4 BCLR 401, 2 SA 642 (CC), 1 SACR 568 (CC) at par 25 ("*Zuma*"), where Kentridge AJ stated, having regard to the common law presumption of innocence: "In both Canada and South Africa the presumption of innocence is derived from centuries old principle of English law, forcefully restated by Viscount Sankey in his celebrated speech in *Wolmington v Director of Public Prosecutions* (1836) AC 462 (HL) at 481 … Accordingly I consider that we may appropriately apply the principles worked out by the Canadian Supreme Court …".

[14] *Collins* (fn 1 above) at 20, where Lamer J held that: "The use of self-incriminating evidence obtained following a denial of the right counsel will generally go to the very fairness of the trial and should generally be excluded;" compare s 35(5) of the South African Constitution which

clause[15] and, of importance for this study, an exclusionary provision, both of which are structured in a strikingly similar manner.[16] In the light hereof, the historic development of case law preceding the introduction of section 24(2), as well as those cases decided in terms thereof, is considered as a basis to inform the future development of the South African fair trial assessment in terms of section 35(5).

It was pointed out above that after the advent of the Charter, the factors to be considered in order to assess the fair trial directive were identified in *R v Collins*.[17] The South African Supreme Court of Appeal has endorsed the *Collins* approach.[18] According to *Collins*, the first factor to be considered to determine whether the trial is fair, is the nature of the evidence (whether it is real evidence or testimonial evidence). It was held that the admission of testimonial evidence obtained in violation of the Charter would generally render the trial unfair – conversely, the admission of real evidence obtained in the same manner would not readily render the trial unfair. The *Collins* court also referred to the concepts of 'self-incrimination' and 'conscription' interchangeably. Do these two concepts have the same meaning? It is in the light hereof that the scope and function of the common law privilege against self-incrimination as well as the concept 'conscription', and the nature of the evidence protected by each, becomes one of the focal points in this chapter.

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explicitly provides that "evidence … must be excluded if its admission would render would render a trial unfair …"

[15] Section 1 of the Charter; see also section 36 of the South African Constitution.

[16] See *S v Naidoo* 1998 1 SACR 479, 1 BCLR 46 (N), ("*Naidoo*"); and *Pillay* (fn 11 above); *S v Makwanyane* 1995 3 SA 391, 6 BCLR 665, where the Canadian approach to the interpretation of both sections 35(3) and 36 were embraced.

[17] Fn 1 above.

[18] *Pillay* (fn 11 above); see also Ally (2005) 1 *SACJ* 66.

The nature of the evidence obtained after a violation caused confusion both in Canada and in South Africa,[19] leading to the recent 'refinement' of the fair trial requirement in *Stillman*[20] and *Feeney*.[21] The *Stillman* and *Collins*[22] approach is rooted in the principle of the 'absence of pre-trial obligation', as developed by Ratushny.[23] By contrast, the approach adopted in *Grant*[24] favours reliability concerns and the extend of the infringement as the focal points of the fair trial assessment. The High Court of South Africa has, on the one hand, associated itself with the *Collins* approach. On the other hand, a number of judgments may be construed as being more inclined towards an approach analogous to that advocated in *Grant*. These conflicting approaches give rise to the important question: What test should South African courts embrace, having regard to the interests sought to be protected by the fair trial requirement under section 35(5)? This issue can only be meaningfully settled by responding to the following question: What values do the fair trial requirement, contained in section 35(5) of the South African Constitution, seek to protect? The issue presented here is not whether South African courts should follow the Canadian precedent, but rather: Does the fair trial directive under section 35(5) serve the same purpose as its Canadian counterpart? If so, does any compelling reason exist as to why

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[19] See, in this regard, the discussion of *S v M* 2002 2 SACR 411 (SCA), ("*M* (SCA)"); and *S v M* 2000 2 SACR 474 (N), ("*M*") at C 1.2.3 below.

[20] Fn 7 above.

[21] Fn 8 above.

[22] As amplified by case law thereafter.

[23] See Ratushny (1973) 19 *McGill LJ* 1, ("1973"); Ratushny *Self-incrimination in the Canadian Criminal Process* (1979), ("1979"); Ratushny (1987) 20 *CLQ* 312; Ratushny "The Role of the Accused in the Criminal Process" in Beaudoin and Ratushny (eds) *The Canadian Charter of Rights and Freedoms* (2nd ed, 1989), ("Beaudoin & Ratushny"); compare Paciocco (1989) 35 *McGill LJ* 74, ("Paciocco 1989"); Paciocco (1989) 32 *CLQ* 326; Paciocco (2001) 80 *Can BR* 433, ("Paciocco 2001"); Penney (2004) 48 *CLQ* 249.

[24] Fn 9 above.

Canadian precedent should not be followed? In other words, a purposive interpretation should be applied to resolve this issue.

The second factor to be considered under the *Collins* fair trial requirement is a discoverability analysis: The courts should establish whether the disputed evidence could have been discovered without a constitutional violation. In the event that it would not have been discovered except by unconstitutional means, admission of the evidence would render the trial unfair. This would be the case because the violation was essential to procure the evidence. According to this view, when evidence cannot be obtained in a constitutional manner, any attempt at obtaining it in an unconstitutional manner should not be regarded as a valid excuse. This approach enhances the fundamental concern of a justiciable Bill of Rights: Governmental power should be exercised within the ambit of the law and should not be incompatible with constitutional guarantees. This interpretation further conveys the message that the prosecution should not build its case against the accused in an unconstitutional manner.

The third factor to be considered under the trial fairness inquiry, is the nature of the right violated. The reason why this factor was identified in *Collins* is because certain rights inherently serve to protect identifiable fundamental values: The right to legal representation, the right to remain silent and to be informed of the consequences of not remaining silent, the privilege against self-incrimination and the right not to be compelled to make confessions or admissions all have the common aim of protecting an accused against unlawful self-conscription.

1 The nature of the evidence obtained after a violation: 'conscriptive' evidence in Canada

Each of the *Collins* fair trial factors, employed to determine whether the trial of an accused complies with the trial fairness directive, is discussed. In this part of this chapter, the focal point of the discussion is centred round the nature of the evidence obtained after a Charter violation.

1.1 The pre-Charter era: the privilege against self-incrimination and its impact on the right to a fair trial in Canada

For the reason that our courts frequently refer to Canadian case law for guidance on the interpretation of section 35(5), this chapter commences with a consideration of the admissibility of unlawfully obtained evidence during the pre-Charter era in Canada. This is done with the aim of gaining an improved understanding of their interpretation of section 24(2) of the Charter. In the light hereof, this chapter draws a parallel between the historic developments in Canada and South Africa. Many of the pre-Charter principles have shaped the present-day section 24(2) jurisprudence. Some of these principles have survived constitutional scrutiny, whereas others had to be adapted so as to reflect the spirit and purposes that the Charter seeks to achieve. In this regard, the common law privilege against self-incrimination, as applied in Canada and South Africa, is especially important.

For this reason, it is apt to refer briefly to the application of the privilege against self-incrimination in Canada prior to the Charter, because this would put the post-Charter Canadian cases, often quoted by the courts in South Africa, in their proper perspective.

The Canadian common law differentiated between instances when an accused had been forced to participate in the procurement of physical evidence against her and the case where she had been compelled to provide answers to charges leveled against her. The privilege against self-incrimination was applicable to instances where the accused was compelled to provide testimonial evidence against herself, but not when the compelled conduct resulted in the discovery of real evidence. As an illustration, in *R v Honan*,[25] betting slips (real evidence) were obtained by means of an illegal search warrant. The objection to its admission in evidence was dismissed by the Ontario Court of Appeal in the following terms:[26] '… it is still quite permissible to "set a thief to catch a thief".' This decision conveyed the message to police officers in general that they were 'empowered' to make use of illegal means whenever they were in search of real evidence. Real evidence obtained in this manner would regularly be admitted: in other words, the end of a conviction justifies illegal means.

The Canadian Bill of Rights was enacted by the federal parliament of Canada in 1960. However, this statute did not contain a justiciable Bill of Rights and its legal status was the same as any other parliamentary legislation.[27] It was not applicable to the provinces and had little effect on federal law.[28] The fact that the Bill of Rights was not applicable to provinces meant that provincial violations of the Bill of Rights were not justiciable.[29] As a consequence, the enactment of the 1960 Bill of Rights did not have an impact on the common law admissibility requirement. In fact, the common law privilege against self-incrimination had been preserved. Hogg points out that the 1980 version of the draft Canadian Charter contained a provision to the effect that no provision contained therein,

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[25] (1912) 6 DLR 276, ("*Honan*").

[26] Ibid at 280-281.

[27] See Roach *Constitutional Remedies in Canada* (1994) at 2-27, par 2.560.

[28] Hogg *Constitutional Law of Canada* (3rd ed, 1992) at 794, par 33.1.

[29] Ibid at par 32.1

except the privilege against self-incrimination, shall have an impact on the law relating to admissibility of evidence.[30] Any changes to the common law privilege against self-incrimination had to be effected in clear terms by means of legislation. This was demonstrated in the case of *R v Hogan*.[31] Ritchie J held that a violation of the right to legal representation cannot result in exclusion of real evidence 'on the American model which is in derogation of the common law rule long accepted in this country'.[32]

In *R v Wray*[33] the Supreme Court was required to rule on the admissibility of a confession, as well as real evidence derived from the confession.[34] The accused, at that stage a suspect on a charge of murder, was asked to accompany the police to their headquarters. While there he was in the company of the police from 10h00 until 19h18, when he signed a confession. A few minutes thereafter, the accused directed the police to a watery wooden area where he pointed out the place where he had thrown the murder weapon (a rifle). The police searched for and found the rifle the next day. Expert evidence was led, showing that the

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[30] Ibid at 932. He mentions that the October 1980 version of the draft Canadian Charter re-iterated the existing law, and read as follows: "26. No provision of this Charter, other than section 13 [the privilege against self-incrimination], affects the laws respecting the admissibility of evidence in any proceedings or the authority of the Parliament or a legislature to make any laws in relation thereto".

[31] (1974) 18 CCC (2d) 65, (1975) 48 DLR (3d) 427, ("*Hogan*").

[32] Ibid at 434; however, compare the dissenting dictum of Laskin J at 443 where he reasoned as follows: "… the more pertinent consideration is whether those [constitutional] guarantees, as fundamentals of the particular society, should be at the mercy of law enforcement officers and a blind eye turned to their invasion because it is more important to secure a conviction. The contention that it is the duty of the Courts to get at the truth has in it too much of the philosophy of the end justifying the means …".

[33] (1970) 4 CCC (3d) 1, ("*Wray*").

[34] The concept "derivative evidence" and its admissibility under the 'refined' fair trial directive was discussed in *Feeney* (fn 8 above) at par 70.

bullet located in the body of the deceased was fired from this rifle. Prior to the pointing-out being made, the attorney of the accused tried to telephonically get in touch with the police, left messages, but they deliberately chose not to return his calls. They conceded that they were aware of the possibility that after the accused had consulted with his attorney he would in all likelihood have refused to make a pointing-out.[35]

Martland, Fauteux, Abbott, Ritchie and Judson JJ, writing for the majority in *Wray*,[36] held that the admissibility of evidence in England and in Canada is governed by the dictum of Lord Goddard, as expressed in *Kuruma v R*.[37] The majority accordingly held the confession to be inadmissible in evidence against the accused, because the prosecution could not show that the confession had been obtained voluntarily. However, the pointing-out and the discovery of the rifle[38] were held to be admissible. This decision highlights the impact that the common law privilege against self-incrimination had on the right to a fair trial. Testimonial evidence obtained after a violation would be excluded, but real evidence obtained in the same manner would 'not readily be excluded.'[39] Cartwright CJC, in a dissenting judgment, was alive to the fact that the admission of illegally obtained evidence could be viewed by the public at large as judicial contamination of the criminal justice system. He advocated a change to Canadian law when he emphasised that courts should not be seen to associate themselves with the unlawful conduct of the police, because to admit evidence

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[35] Ibid at 4.

[36] Cartwright CJC, Hall and Spence JJ dissenting.

[37] [1955] AC 197 ("*Kuruma*"). Martland based his conclusion on the following dictum in *Kuruma*, at 13: "In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained".

[38] Martland J categorised the said evidence as being "relevant" and "of probative value".

[39] Lamer J appears to confirm this approach in the post-Charter case of *Collins* (fn 1 above) at 19.

obtained in this manner would 'bring the administration of justice into disrepute in the minds of right-thinking men'.[40] This formulation of the analysis for the admissibility of unconstitutionally obtained evidence would be adopted by the drafters of the Charter during 1982.

It should be underscored that in terms of the Canadian common law, the privilege against self-incrimination was not applicable to situations where the accused was compelled to participate in an identity parade[41] or forced to provide a breath sample.[42] Evidence of this nature was classified as real evidence, which existed independently from the violation. Real evidence is classified as anything tangible that existed as an independent entity.[43] In a nutshell, the common law

[40] Fn 33 above at 11; see also the dissenting judgment of Lamer J, delivered before the advent of the Charter, in *R v Rothman* (1981) 121 DLR (3d) 578 ("*Rothman*"), to the effect that evidence obtained by oppressive police conduct that would "shock community", ought to be excluded.

[41] *R v Marcoux* (2) (1972) 13 CCC (2d) 313, ("*Marcoux*"). The Saskatchewan Court of Appeal held, per Schroeder and Jessup JJA that: "The evidence in question is not inadmissible on the ground that it offends against the maxim *nemo tenetur se ipsum accusare*, by which no one is bound to incriminate himself. That privilege relates to the obtaining of oral confessions or statements from a prisoner. Here the evidence adduced to is conduct of the accused, not to something that he stated or did not state as to the charge against him".

[42] Fn 41 above.

[43] *Feeney* (fn 8 above) at par 76. In the South African context, see *S v M* (SCA) (fn 20 above) at par 31, where the Supreme Court of Appeal echoed this view, even during the post-constitutional era. Based on Schmidt & Rademeyer *Schmidt Bewysreg* (4th ed, 2000) at 326 and Hoffmann & Zeffertt *The South African Law of Evidence* (4th ed, 1988) at 404 and *Cross & Tapper on Evidence* (8th ed, 1995) at 48, the court held as follows: "Real evidence is an object which, upon proper identification, becomes, of itself, evidence (such as the knife, photograph, voice recording, letter, or even the appearance of a witness in the witness-box)". Compare *Tandwa* (fn 12 above) at par 125.

privilege against self-incrimination was limited in its scope to the protection of testimonial compulsion.[44]

Paciocco[45] is of the opinion that the distinction between the admissibility of real evidence and testimonial evidence lacks clear and convincing reasons.[46] However, he offers two reasons for the distinction between real evidence and testimonial evidence: Firstly, he is of the opinion that a reason for such a distinction could be traced back to the fact that real evidence is reliable (whereas the same cannot consistently be said about testimonial evidence). Secondly, he points out that testimonial evidence differs from real evidence, in that testimonial evidence does not exist before the witness communicates. In the case of testimonial compulsion, oppressive police conduct is a prerequisite for the incriminatory conduct.[47] Put differently: There exists a causal nexus between the compelling police conduct and the testimonial evidence. The witness would not have given the incriminating testimonial evidence 'but for' the force, duress or undue influence. However, real evidence has an independent existence. It does not exist 'but for' the duress or force, since it would 'inevitably' have been discovered in a lawful manner after diligent search by the police.

Some of these principles have found their way into section 24(2) Charter jurisprudence. For instance, it appears that the distinction between real evidence

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[44] Per L' Heureux-Dube J in *Stillman* (fn 7 above) at par 187, where she argued against the broadening of the scope of the privilege against self-incrimination to encompass real evidence. The judge reasoned as follows: "The question is this: what was the extent of the privilege against self-incrimination at common law? The privilege against self-incrimination at common law found expression in the confessions rule, the right to silence, and rules protecting witnesses from the use of their testimony against them in other proceedings. All these rules were concerned exclusively with testimonial evidence".

[45] Fn 23 above (1989) at 77, 86-87.

[46] Loc cit.

[47] Ibid at 87.

and testimonial compulsion was introduced into the fair trial assessment by *Collins*.[48] Correspondingly, a causation analysis between the compelling conduct and the discovery of the evidence was introduced into the section 24(2) fair trial assessment by *Collins*,[49] confirmed in *R v Black*,[50] and applied in a number of cases since.[51]

In summary, the common law privilege against self-incrimination, as developed in Canada, was limited in its scope to the protection of testimonial evidence. The dictum of Lord Goddard in *Kuruma*,[52] had a profound effect, both in Canada and South Africa, in respect of the admissibility of evidence. For the reason that real evidence has reliable characteristics, it deserved differential treatment: if it is relevant, it should be admitted no matter how it had been obtained. It is for this reason that the privilege against self-incrimination is not concerned with the manner in which real evidence has been obtained. The flaw of the privilege against self-incrimination, when applied to a trial that has to comply with a notion of substantive fairness, thus becomes apparent: It would be ineffective for the protection of fundamental rights, where courts must be especially

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[48] Fn 1 above at par 37, where Lamer J reasoned as follows: "Real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the Charter …. However, the situation is very different … where, after the violation of the Charter, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation …".

[49] Loc cit. Lamer J reasoned as follows: "It may also be relevant, in certain circumstances, that the evidence would have been obtained in any event without the violation of the Charter".

[50] (1989) 50 CCC (3d) 1, ("*Black*").

[51] See, for example, *R v Wise* (1992) 70 CCC (3d) 193, ("*Wise*"); *R v Mellenthin* (1993) 76 CCC (3d) 481, ("*Mellenthin*"); *R v Dersch* (1994) 85 CCC (3d) 1, ("*Dersch*"); *R v Burlingham* (1995) 28 CRR (2d) 244, ("*Burlingham*").

[52] Fn 37 above.

concerned about the manner in which evidence, regardless of its nature, had been obtained.

The dissenting opinion of Lamer J in *Rothman*[53] and the legal philosophy he supported in that case would ultimately have an impact in Canada, when it was incorporated into the provisions of section 24(2) of the Charter. The majority opinion in *Wray*[54] demonstrates that the disparity between the admissibility of the different kinds of evidence inescapably led to the regular admission of real evidence, without a consideration of the manner of its obtainment. This prompted the manifestly different line of reasoning by Cartwright CJC in *Wray* to the effect that, at times, the regular admission of evidence obtained by means of oppressive police conduct would 'bring the administration of justice into disrepute'.

1.2. The post-Charter era: self-incrimination or self-conscription during the pre-*Stillman* era

This part of the chapter starts off with an analysis of the *Collins* fair trial framework, within the context of *R v Therens*.[55] This is done in order to establish whether the common law privilege against self-incrimination or the concept of 'conscription' better serves the goals sought to be protected by the fair trial requirement. An important step is to determine the values sought to be protected by the fair trial requirement to determine its purpose, scope and meaning. The *Collins*, *Stillman* and *Grant* fair trial assessments are considered to determine the values sought to be protected by each approach.

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[53] Fn 40 above.

[54] Fn 33 above.

[55] (1985) 18 CCC (3d) 481, 45 CR (3d) 97, 1 SCR 613, ("*Therens*").

In addition, the conscription analysis is explored, having regard to the following issues: Firstly, what differences, if any, exist between the concepts 'self-incrimination' and 'conscription'? This exercise is undertaken in order to determine which of the two concepts best serves the goals sought to be achieved by the fair trial directive. Secondly, this part of the work considers the application of the principle of the 'case to meet' or the 'absence of pre-trial obligation' as a means to achieve the object of the trial fairness requirement

1.2.1 The Collins test

In the hallmark case of *Collins*,[56] Lamer J wrote as follows, thereby seemingly incorporating the common law principle of the privilege against self-incrimination into article 24(2) Charter jurisprudence:[57]

> ***Real evidence*** that was obtained in a manner that violated the Charter will ***rarely*** operate unfairly for that reason alone. The real evidence ***existed irrespective of the violation*** of the Charter and its ***use does not render the trial unfair***. However, the situation is very different with respect to cases where, after a violation of the Charter, the accused is ***conscripted*** against himself through a ***confession*** or ***other evidence emanating from him***. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against ***self-incrimination***. Our decisions in *Therens supra*, and *Clarksen v Queen* [1986] 1 SCR 383, are illustrative of this.

[56] Fn 1 above.

[57] Ibid at par 37. Emphasis added.

At a first reading of this dictum, it might appear that Lamer J restated the common law position that the privilege against self-incrimination had nothing to do with the manner in which real evidence had been obtained. Real evidence obtained in a manner that violated any right contained in the Charter, would in general, not render the trial unfair. However, testimonial evidence, obtained as a result of a Charter violation, falls to be protected under the shadow of the self-incrimination umbrella. This distinction between the nature of the evidence, 'real' or testimonial, is referred to in this work as either as the 'real evidence divide' or the 'real evidence distinction'. The nature of the evidence obtained determines whether it is protected by the privilege against self-incrimination. However, the privilege against self-incrimination was not the only test for the fair trial requirement, because Lamer J supplemented his comment with the phrase 'or other evidence emanating from him',[58] and referred to *Therens*.[59] For this reason it is important to consider the dictum of Lamer J in *Collins* within the context of *Therens*.

In *Therens* the accused was 'detained' and compelled to provide a breath sample without being informed of his right to legal representation and without having been provided the opportunity to retain and instruct a legal representative. The majority of the court ruled that the real evidence thus obtained should be excluded.[60] Lamer J held in *Therens* that the disputed evidence constituted compulsory ***self-incrimination***, because refusal to provide such samples would have been tantamount to committing a criminal offence.[61] Furthermore, the evidence (the breath sample) 'emanated' from the accused. In other words, the

[58] Did Lamer J have the unconstitutional taking of breath and blood samples, saliva, and fingerprints in mind when he used this phrase? See fn 61 below.

[59] Fn 55 above.

[60] Per Dickson CJC at par 4, Estey, Beetz, Chouinard and Wilson JJ concurring; Lamer J delivered a separate concurring judgment; McIntyre and Le Dain JJ delivered dissenting judgments.

[61] Per Lamer J at par 21.

bodily samples had been obtained through a process whereby the accused had been conscripted against himself. When the often-quoted opinion of Lamer J in *Collins*, cited above, is read within the context of *Therens*, it becomes evident that the privilege against self-incrimination he referred to in *Collins* ***does*** serve the purpose of protecting real evidence obtained in a manner that violates a right contained in the Charter,[62] since it 'emanated' from the accused.

In *Therens*, the manner in which the evidence had been obtained was at the heart of the section 24(2) assessment. The question that now emerges is the following: Was the privilege against self-incrimination adapted or was an exception created to cater for procedural fairness in the procurement of evidence? But before this is ascertained, it is imperative to ascertain the scope of the fair trial requirement. This, in turn, calls for a determination of the values that the right to a fair trial seeks to protect.

The *Collins* fair trial framework was applied and developed in a number of cases.[63]

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[62] In *R v Ross* (1989) 46 CCC (3d) 129, ("*Ross*"), the accused was called upon to participate in an identity parade without having had the opportunity to appoint counsel. The real evidence (the identity parade) was excluded in terms of article 24(2). Lamer J wrote at 139: "In *Collins* we used the expression 'emanating from him' since we were concerned with a statement. But we did not limit the kind of evidence susceptible of rendering the trial process unfair to this kind of evidence. I am of the opinion that the use of ***any*** evidence that could not have been obtained but for the participation of the accused in the construction of the evidence for the purposes of the trial would render the trial unfair". (Emphasis in original); see also *Therens* (fn 55 above); *R v Pohoretsky* (1987) 1 SCR 945 at par 5, where a blood sample of the accused was taken without his consent. The court held that it constituted an unreasonable search and concluded that the effect of the police conduct was "to conscript the appellant against himself".

[63] See, for example, *R v Manninen* (1987) 1 SCR 1233, ("*Manninen*"); *R v Trask* (1987) 2 SCR 304, ('*Trask*"); *R v Strachan* (1988) 46 CCC (3d) 479, ("*Strachan*"); *R v Dyment* (1988) 45 CCC (3d) 244, ("*Dyment*"); *R v Jacoy* (1988) 45 CCC (3d) 46, ("*Jacoy*"); *R v Racette* (1988) CCC (3d)

1.2.2 The values sought to be protected by the fair trial directive and the meaning of the concept 'conscription'

Although the discussion is focused on the pre-*Stillman* era, it is apposite to explore the values sought to be protected in terms of the three seminal cases of *Collins*,[64] *Stillman*[65] and *Grant*.[66] In addition, the meaning of the concept 'conscription' is demonstrated by means a discussion of the principle of the 'case to meet' or the 'absence of pre-trial obligation'.

The scope of a right or remedy[67] is determined by the goal it seeks to achieve, while not losing sight of the general purposes and values enshrined in the

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250, ('*Racette*"); *R v Legere* (1988) 43 CCC (3d) 161, ("*Legere*"); *R v Genest* (1989) 45 CCC (3d) 385, ("*Genest*"); *Thompson Newspapers Ltd v Canada* (1990) 54 CCC (3d) 417, ("*Thompson Newspapers*"); *R v Mellenthin* (fn 51 above); *R v Hebert* (1990) 57 CCC (3d) 97, ("*Herbert*"); *R v Kokesch* (1990) 61 CCC (3d) 207, ("*Kokesch*"); *R v Brydges* (1990) 1 SCR 190, ('*Brydges*'); *R v Elshaw* (1991) 67 CCC (3d) 97, ("*Elshaw*"); *R v Broyles* (1991) 68 CCC (3d) 308, ("*Broyles*"); *R v Dersch* (1994) 85 CCC (3d) 1, ("*Dersch*"); *R v Silveira* (1995) 97 CCC (3d) 450, ("*Silveira*"); *R v Black* (fn 50 above); *R v Law* (2002) 160 CCC (3d) 449, ("*Law*"); *R v Mooring* (2003) 174 CCC (3d) 54, ("*Mooring*"); *R v Buhay* (2003) 174 CCC (3d) 97, [2003] 1 SCR 63, ("*Buhay*"); *R v Buendia-Alas* (2004) 118 CRR 32, ('*Buendia-Alas*"); *R v Vu* (2004) 118 CRR (2d) 315, ("*Vu*"); *R v Symbalisty* (2004) 119 CRR (2D) 311, ("*Symbalisty*"), *R v Schedel* (2003) 175 CCC (3d) 196, ("*Schedel*"); *R v Manickavasagar* (2004) 119 CRR (2d) 1, ("*Manickavasagar*").

[64] Fn 1 above.

[65] Fn 7 above.

[66] Fn 9 above.

[67] In *Nelles v Ontario* (1989) 60 DLR (4th) 609, ("*Nelles*"), it was held that the scope of both rights and remedies should be determined in the same manner; see also Roach (fn 27 above) at 3-15.

Charter.[68] In the light hereof, it is important to determine what purpose the fair trial requirement under section 24(2) serves to protect. This issue leads to the important question: what values are to be protected by the fair trial directive?

In *Collins*, Lamer J intimated that the fair trial directive primarily serves the purpose of the prevention of unfair self-incrimination or conscription during the pre-trial phase.[69] What is the meaning of the concept 'conscription'?

The role played by the accused in the evidence-gathering process during the pre-trial phase would be central when she is, for example, forced to participate in an identity parade, to provide a blood or hair sample, to provide a statement, or when pressurised to make a pointing-out, admission or a confession. It is at this stage of the proceedings (but not limited thereto) when she would be at risk of

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[68] *R v Mills* (1986) 29 DLR (4th) 161, per Lamer J (dissenting) at 240, ("*Mills*"); *R v Gamble* (1988) 44 DLR (4th) 385, per Wilson J at 237, ("*Gamble*"); see also *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 385, at 395-396, ("*Big M Drug Mart*"), where the Supreme Court held as follows: "The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought, by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historic origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the context of the Charter. The interpretation should be, as the judgment in *Southam* emphasised, a generous rather than a legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection".

[69] According to Cory J in *Stillman* (fn 7 above) at par 73, the judge commented on the dictum of Lamer J in *Collins*, cited at fn 57 above, as follows: "It is apparent from this passage that the primary aim and purpose of considering the trial fairness factor in the s 24(2) analysis is to prevent an accused person whose Charter rights have been infringed from being forced or conscripted to provide evidence in the form of statements or bodily samples for the benefit of the state".

performing the conscriptive conduct that the fair trial directive seeks to protect. The reason why these protections should be available to an accused during the pre-trial phase is summarised as follows by Ratushny:[70]

> One approach to this question is to examine the procedural protections which are available to an accused at trial. The accused is given (a) a public trial (b) after a specific accusation including particulars (c) according to specific rules of procedure and evidence and (d) represented by counsel to ensure that all of these protections are provided. Moreover, the accused is (c) entitled to know the evidentiary case to meet before deciding whether or not to respond. In other words the accused hears all the Crown witnesses under oath before deciding whether to respond and, if so, in what manner and to what extent.
>
> All of these protections are present in the court room. They are absent during interrogation at the police station … How is a criminal justice system to be described if it jealously guards such protections at the trial stage while 'turning a blind eye' to the pre-trial stage? Such a system certainly would be inconsistent. It might be described as lacking in integrity – and perhaps even as hypocritical!

This view of Ratushny has been labeled the 'case to meet' principle.[71] This principle provides the rationale for the principle of the 'absence of pre-trial obligation'. In terms of the principle of the 'case to meet' or the 'absence of pre-trial obligation', the accused is under no obligation to respond to allegations made by the prosecuting authority until it has made out a *prima facie* case against her or established a 'case to meet'. The accused is, in other words, not compelled in a general sense (as opposed to the narrow testimonial sense in

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[70] Beaudoin & Ratushny (fn 23 above) at 462.

[71] Paciocco 1989 (fn 23 above) at 77.

court) to answer the allegations against her until the state established a 'case to meet'.[72] In view hereof, the principle of a 'case to meet' asserts that the accused should not be required to co-operate with the police in the creation of incriminating evidence against herself. In other words, the principle of a 'case to meet' essentially serves to protect the negative impact any unwarranted governmental confrontation might have on the freedom, privacy and dignity of a suspect, on the one hand, and to prevent any harm caused by the impermissible persuasion of vulnerable individuals providing incriminating evidence against themselves, on the other.[73] The principle of the 'case to meet' in effect serves to protect an accused from unfair conscription during the pre-trial phase. The most forceful proponent of the principle of the 'case to meet' or the 'absence of pre-trial obligation' in the Supreme Court of Canada was Lamer CJ.[74]

Ratushny concludes that the accused should therefore be treated fairly both in the 'gatehouses' of the criminal justice system (the interrogation phase) by protecting her from the effects of unwarranted conscription, as well as the 'mansions' (the court).[75] In a word, the right to a fair trial serves to guarantee that an accused is treated fairly during the pre-trial and trial phases, with the aim of ensuring that ill-repute does not befall the criminal justice system. If fairness

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[72] *R v P (MB)* (1994) 89 CCC (3d) 289 at 577, ("*P*").

[73] Penney (fn 23 above) at 255.

[74] Ibid at 264. Penney cites the following cases as examples of instances where Lamer CJ applied the principle: *R v Du Bois* (1985) 22 CCC (3d) 193, ("*Du Bois*"); *P* (fn 72 above). See, further for example, *Ross* (fn 62 above), a judgment written by Lamer J held that an identity parade (real evidence) held after a violation of the right to legal representation conscripted the accused against himself. The identity parade was for that reason excluded; see also Paciocco (2000) 5 *Can Crim L Rev* 63, confirming the view of Penney. Lamer J has since passed.

[75] Beaudoin & Ratushny (fn 23 above) at 462; see also Kamisar "Equal justice in the Gatehouses and Mansions of American Criminal Procedure" in Hall & Kamisar (eds) *Modern Criminal Procedure* (2nd ed, 1966), cited by Paizes (1981) *SACC* 122 at 131, where this metaphor was also employed.

related only to the treatment of the accused during the trial stage, then the elaborate provisions protecting an accused against unfairness during the trial would similarly be rendered ineffectual. In the premises, a failure to protect the accused from pre-trial conscription would be an affront to the integrity of the administration of justice.[76]

The *Stillman* court held that the fair trial directive serves the purpose of preventing an accused whose rights have been violated from being 'forced or conscripted to provide evidence in the form of statements or bodily samples for the benefit of the state'.[77] Added to these interests, the Supreme Court reasoned in *Stillman* that the 'compelled use of the body of the accused', as well as the unwarranted and significant invasion of human dignity meet the criteria of values worthy of protection under the fair trial requirement.[78] This categorisation of the values sought to be protected by the fair trial assessment often led to a 'pigeon-hole' approach, since the focus of the courts is directed to the three sources (statements, bodily samples or use of the body) that produce conscriptive evidence, rather than the manner in which the evidence had been obtained.[79]

The fair trial analysis proposed in *Grant* advocates that considerable weight should be attached to the truth-seeking function of the courts. The *Grant* approach suggests that, despite the fact that the accused had been conscripted against herself, the courts should inject into the equation factors like the reliability of the evidence and the extent of the infringement, to determine ***to what degree*** the trial would be rendered unfair.[80] A finding that trial fairness was not seriously compromised by the infringement would not result in the

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[76] Beaudoin & Ratushny loc cit.

[77] Fn 7 above at par 73.

[78] Ibid at par 89 and 91.

[79] Maric (1999) 25 *Queen's LJ* 95.

[80] *Grant* (fn 9 above) at paras 53 and 59.

'automatic' exclusion of the disputed evidence.[81] On this view, the *Grant* approach appears to be a reactionary response to the 'automatic' or 'near automatic' exclusion of reliable real evidence caused by the *Stillman* fair trial framework.[82]

To summarise, in *Collins* Lamer J gave as an example of the violation of the right to a fair trial, the obtainment of self-conscriptive evidence after the violation of the right to counsel, leaving the impression that the fair trial directive serves to protect only testimonial compulsion during the pre-trial phase.[83] It soon became clear that, unlike the common law privilege against self-incrimination, the fair trial directive equally serves to protect real evidence discovered after the accused had been conscripted against herself.[84] In actual fact, the fair trial directive primarily seeks to protect fundamental fairness towards the accused as well as the prevention of disrepute befalling the criminal justice system.[85]

The concepts 'compelled' or 'forced' is used to typify the unwarranted police conduct which causes an accused to 'conscript' herself. In other words, a person is 'compelled' to provide evidence (whether 'real' or testimonial) when she

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[81] Ibid at par 59.

[82] Ibid at par 50; see Stuart (2006) CR (6th) 58 (publication page references are not available for this document); Stuart (fn 10 above) at 3, where he argues that "[t]he problem here is of the *Stillman* majority's making in their over-inflated use of the phrase 'fairness of the trial'."

[83] Cory J referred to this example in *Stillman* (fn 7 above) at par 80 and added another frequently occurring example to it, as follows: "The traditional and most frequently encountered example of this type of evidence is a self-incriminating statement made by the accused following a violation of his right to counsel as guaranteed by s 10(b) of the Charter. The other example is the compelled taking and use of the body or bodily substances of the accused, such as blood, which lead to self-incrimination. It is the compelled statements or the conscripted use of bodily substances obtained in violation of Charter rights which may render a trial unfair".

[84] *Ross* (fn 62 above) at 139.

[85] Beaudoin & Ratushny (fn 23 above) at 462.

provides or creates evidence for use by the prosecution against herself, after a Charter violation.[86] The crucial difference between this concept and the common law privilege against self-incrimination, is that in the case of conscriptive evidence the nature of the evidence created or discovered – real or otherwise, is insignificant. Rather, the manner of its obtainment is of paramount importance.

A review of Canadian case law has revealed that the value protected by the fair trial requirement is a guarantee that an accused, while in a position of vulnerability, should not be forced or compelled to provide evidence against herself. The concepts 'conscription' and 'compulsion' in this context, means the obtainment of evidence without constitutional compliance[87] or statutory authority

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[86] *Mellenthin* (fn 51 above). The accused was stopped at a roadblock and the police officer asked him what was contained in a bag on the seat of his car. (The accused was this stage "detained"). The accused pulled the bag open, whereupon the officer saw a small bag in the bag situated on the seat. The officer, without reasonable grounds for the search (and in violation of s 9 of the Charter) proceeded to search the bag. The evidence was excluded on the basis that admission would render the trial unfair, because the accused had been compelled to participate in the discovery of the evidence. See also *Ross* (fn 62 above), where Lamer J said the following: "Any evidence obtained after a violation of the Charter, by conscripting the accused against himself through a confession or other evidence emanating from him would tend to render the trial unfair". See also *Black* (fn 50 above) discussed under the discoverability requirement. The right to legal representation was violated, as a result whereof the accused made certain inculpatory statements and pointed out the murder weapon (a knife) to the police. The incriminating statements were excluded on the grounds that she had been conscripted against herself because her right to legal representation had been violated: admission would render the trial unfair. However, with regard to the knife, Wilson J reasoned as follows at 21: "… the knife would undoubtedly have been uncovered by the police in the absence of the Charter breach and the conscription of the appellant against herself …".

[87] *R v Prosper* (1994) 92 CCC (3d) 353, ("*Prosper*"); *R v Pozniak* (1994) CCC (3d) 353, ("*Pozniak*"); *R v Bartle* (1994) CCC (3d) 289 ("*Bartle*"); *R v Cobham* (1995) 92 CCC (3d) 333, ("*Cobham*"); *Stillman* (fn 7 above); see also Hogg (fn 28 above), at 45-47, dealing more particularly with the unauthorised monitoring of telephone conversations, notes the following:

(should the legislation survive constitutional muster),[88] or the informed consent of an accused person.[89] In *Mellenthin* the trial court held that the impugned conduct of a police officer (the search of the suspect's bag took place without statutory authority) could be equated with the procurement of compelled ***testimony***,[90] which led to the discovery of the real evidence.[91] A similar approach was followed by the Natal Provincial Division of the South African High Court in *S v Naidoo and Another*.[92]

"When the Criminal Code's regime of judicial authorization is complied with, the wiretap, although obviously still a search and seizure, is not only lawful but is not unreasonable under section 8".

[88] *Racette* (fn 63 above); *Mellenthin* (fn 51 above) where it was held that random roadblocks constitutes a violation of s 9 of the Charter, unless justified under s 1 (the limitations clause). Cory J reasoned as follows: "It would surely affect the fairness of the trial should check stops be accepted as a basis for warrantless searches and the evidence derived from them was to be automatically admitted. To admit evidence obtained in an unreasonable and unjustifiable search carried out while a motorist was detained in a check stop would adversely and unfairly affect the trial process …"; Roach (fn 27 above) at 10-56, is of the opinion that the evidence in *Mellenthin* had been obtained "while the accused was forced to participate in a spot check …" or that the abuse of the roadblock procedure caused the "accused to participate in the search by opening the bag …"; *Pohoretsky* (fn 62 above).

[89] See, for instance, *Dyment* (fn 63 above); *Racette* (fn 63 above).

[90] Per Cory J in *Mellenthin* (fn 51 above) at 489-490, where he discussed the approach of the trial judge as follows: The trial judge held that the evidence " … would not have been discovered without the compelled testimony (the search) of the appellant".

[91] It was pointed out earlier that Roach (fn 27 above) at 10-57, reasons that the unlawful search was deemed to be compelled testimony because of the abuse of the roadblock procedure.

[92] Fn 16 above at 91A-C, where McCall J reasoned as follows: "To admit evidence provided by an accused against himself without his knowledge as a result of the unlawful monitoring of his conversation with someone else would offend against the notions of basic fairness in no less a measure than the admission of evidence of a confession or admission made by an accused person without having been informed of his right to legal representation, which has been held to result in an unfair trial …". A confession and admission is, more often than not, in the form of testimonial evidence. In the event, it was held that admission of the real evidence obtained after a violation of the right to privacy, would tend to render the trial unfair.

Admission of evidence obtained in a conscriptive manner would inevitably render a trial unfair. However, the protection granted by the principle of a 'case to meet' is broader in scope when compared to that identified in *Stillman*. While the *Stillman* analysis appears to limit the scope of protection in terms of certain identified categories, (for example testimonial evidence, the use of the body or bodily samples, including significant infringements to human dignity), the principle of the 'case to meet' is much broader since it is focused on the ***manner*** in which ***any*** evidence has been obtained.[93]

The *Grant* approach, with its focus on the reliability of the evidence, could lead to the regular admission of reliable real evidence, despite the fact that the accused had been conscripted against herself. This, in turn, could lead to patterns of infringements when the police are aware that real evidence was involved in the commission of crimes. Unlike the common law privilege against self-incrimination, the *Grant* fair trial assessment does consider the manner in which the evidence had been obtained, but it fails to attach adequate weight to the value of the prevention of conscription. Can it ever be said that such an approach adequately appreciates the values sought to be protected by the fair trial prong under section section 24(2) and the general purposes and values enshrined in the Charter?

The fact that the evidence had been obtained in a conscriptive manner does not put an end to the *Collins* fair trial assessment, because the case against the accused is not necessarily unfairly strengthened in that way. The underlying principle of the fair trial test is that the accused should not be forced to confront

[93] Compare the dictum of Lamer J in *Ross* (fn 63 above) at 139, when he wrote the following: "I am of the opinion that the use of ***any*** evidence that could not have been obtained but for the participation of the accused in the construction of the evidence for purposes of the trial would render the trial unfair". (Emphasis in original). See also Maric (fn 79 above).

evidence at trial that she would not have had to face if her Charter rights had been respected. This is the fundamental evil that the trial fairness prong of section 24(2) seeks to avert. A discoverability analysis is employed to achieve this aim. Does the *Grant* fair trial analysis seek to prevent the accused from having to face unconstitutionally obtained evidence she would not have had to face if her rights had not been infringed? Moreover, does the *Grant* approach encourage police officers to defer to the Charter rights of an accused when the procurement of real evidence is essential to their investigation of a crime?

The discoverability analysis is discussed below.

2. Discoverability or causation analysis as a means to determine trial fairness

Lamer J acknowledged the importance of this *Collins* factor in the fair trial assessment when he proclaimed that it would also be a relevant consideration to determine whether 'the evidence would have been obtained in any event without a violation',[94] thus intimating that in such events admission would not render the trial unfair. The rationale for this approach is the following: The accused is not in a worse position he would have been in had a violation not occurred.[95] Put

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[94] *Collins* (fn 1 above) at par 37.

[95] *Thompson Newspapers* (fn 63 above) at 553, where the court reasoned as follows: "In contrast, where the effect of the breach is merely to locate or identify already existing evidence, the case of the ultimate strength of the Crown's case is not necessarily strengthened in this way. The fact that the evidence already existed means that it could have been discovered anyway. Where this is the case, the accused is not forced to confront any evidence at trial that he would not have been forced to confront if his Charter rights had been respected"; see also Fenton (1997) 39 *CLQ* 279, at 304, where he confirms the view held in *Thompson Newspapers* as follows: "The central proposition underlying the liberal view of the doctrine is that trial fairness is

differently: When the prosecution can show that the evidence would have been discovered in any event by lawful means, admission of the impugned evidence would not render the trial unfair.[96] For the reason that the evidence would have been discovered in any event, the admission thereof would, in the eyes of a reasonable man, not adversely affect the outcome of the trial. This approach is closely aligned to the value of rights protection, which section 24(2) seeks to promote.

The doctrine of discoverability was introduced into the section 24(2) analysis in order to prevent the result caused by the application of the common law privilege against self-incrimination when ***real evidence*** was discovered after a Charter violation. In the event, the discoverability analysis under the *Collins* regime is limited to the discovery of real evidence.[97] In terms of this doctrine, the

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compromised, not only through self-incrimination, but rather any time it can be shown that 'but for' the Charter breach the evidence would not be discovered".

[96] *Black* (fn 50 above) at 20, where Wilson J reasoned as follows: "I have little doubt that the police would have conducted a search of the appellant's apartment with or without her assistance and that such search would have uncovered the knife"; and she continued at 21 as follows: "… the knife would undoubtedly have been uncovered by the police ***in the absence of the Charter breach*** and the conscription of the appellant against herself …". (Emphasis added). For criticism leveled against the doctrine of discoverability, see B 4.4 below.

[97] See *Mellenthin* (fn 51 above), where real evidence (narcotics) were excluded because it was held to be virtually undiscoverable without a Charter violation; *Black* (fn 50 above) a knife was excluded); see also Roach (fn 27 above) at 10-61, where he argues as follows: "Courts have only been willing to create an 'inevitable discovery' exception, when what is discovered is real evidence as opposed to statements or other self-emanating evidence". However, compare the *Stillman* fair trial directive, in terms whereof both testimonial and real evidence must be subjected to a discoverability analysis. For comment on the *Mellenthin* approach, see Mitchell (1996) 38 *CLQ* 26; Davison 35 (1993) *CLQ* 493; Delisle (1993) 16 CR (4th); Delisle (1987) 56 CR (3d); see further Paciocco (1996) 38 *CLQ* 26; Young (1997) 39 *CLQ* 406 at 411, where he argues as follows: "Finally, the discoverability doctrine in *Mellenthin* has been narrowed so as to apply only to real evidence which is discovered through the coerced participation of the accused".

court considers whether the police had any other constitutional means to procure the disputed real evidence, other than that used to obtain it. When the real evidence could have been discovered in the normal course of the police investigation and without the violation of any fundamental rights, its admission would not have a negative effect on trial fairness. By contrast, should it appear that the only means to obtain the disputed evidence would have been by unconstitutional means, the trial would be rendered unfair, should the evidence be admitted. The rationale behind this doctrine is that the government gained an unfair advantage it would not otherwise have had, had the rights of the accused not been violated.[98] This approach is aligned to the corrective justice theory. Hence, by excluding the disputed evidence, a form of *restitutio in integrum* is attained and the courts are simultaneously expressing their commitment not to be associated with the unconstitutional police conduct. In this manner, the courts are restoring the integrity of the administration of justice.

The leading Canadian case where the doctrine of discoverability was applied by the Supreme Court is *Black*.[99] The accused was informed that she faced a charge

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[98] *Wise* (fn 51 above; *Mellenthin* (fn 51 above). See also Davison (fn 97 above) at 503-504), who is of the opinion that the discoverability doctrine was applied in *Mellenthin*, but not mentioned. Ackermann J, in *Ferreira v Levin NO* 1996 1 SA 984 (CC) at par 112, ("*Ferreira*") quoted the dictum of La Forest J in *Thompson Newspapers* with approval, where the latter applied the same reasoning. La Forest J reasoned as follows: "A breach of the Charter that forces the eventual accused to create evidence necessarily has the effect of providing the Crown with evidence it would not otherwise have had. It follows that the strength of its case against the accused is necessarily enhanced as a result of the breach. This is the very kind of prejudice that the right against self-incrimination, as well as his rights such as that to counsel, are intended to prevent"; see also Ally (fn 18 above) at 69.

[99] Fn 50 above; see also *Silveira* (fn 63 above), where the police went to the residence of the accused without a search warrant. They "froze" the premises while waiting for a search warrant to be issued. The breach was serious, but self-conscription was not at issue. Applying the doctrine of discoverability, it was held that the police would have found the drugs in any event.

of murder, but was not given a reasonable opportunity to appoint a legal representative. After a failed attempt to get hold of her legal representative, the police started a conversation with the accused during which she made certain incriminating statements.[100] She was later escorted by two police officers, first to hospital where she was treated for her injuries (presumably inflicted by the deceased), and thereafter to her residence. Upon their arrival the accused went to the kitchen drawer, pulled out a knife and gave it to the officers, indicating it to be the murder weapon.[101] Considering the fair trial requirement, the court held that the accused's statements and her 'conduct and words in relation to the discovery of the knife' is inadmissible, because admission thereof would violate the accused's right against self-incrimination. The court added that under the prevailing circumstances this right 'could have been protected' had the accused been given the opportunity to consult her legal representative.[102] Admission of the inculpatory statement would render the trial unfair.[103] However, the court held that admission of the knife would not render the trial unfair – not because it is real evidence – but because it would have been discovered in any event.[104] The police would in all likelihood have obtained a search warrant to conduct a lawful search of her residence (the crime scene) and would have discovered the murder weapon in a lawful manner, without her co-operation.

The evidence was accordingly admitted. Fenton correctly concludes (fn 95 above) at 307 that excluding the evidence would have placed the state in a worse position it would have been in had the breach not occurred.

[100] Ibid at 6.

[101] Ibid at 7.

[102] Ibid at 17.

[103] Loc cit.

[104] Ibid per Wilson J at 21, where she notes: "... the knife would undoubtedly have been uncovered by the police in the absence of the Charter breach and the conscription of the appellant against herself".

The discoverability test makes clear that the admission of evidence that would not have been discovered in a ***constitutional*** manner would render a trial unfair. Admission of evidence thus obtained would indirectly encourage the police to violate constitutional rights. This clearly is not an aim that the Charter seeks to achieve; quite the opposite, section 24(2) seeks to protect fundamental rights.

In terms of the *Collins* fair trial directive, the court must, in addition to 'conscription' and discoverability inquiries, consider the nature of the right violated. This factor is explored hereunder.

3. The nature of the right violated as a factor determining trial fairness

Lamer J reasoned in *Collins* that the nature of the constitutional right violated is an important factor when determining the fair trial prong. The reason why this factor is considered is because certain rights have been designed to serve as a barrier against conscription. Rights that aim to achieve this purpose are, for example, the right to legal representation, the right to remain silent and to be informed of the consequences of not remaining silent, the privilege against self-incrimination and the right not to be compelled to make admissions or confessions. Lamer J said the following in *Collins*[105] with regard to this requirement:[106]

> It is clear to me that the factors relevant to this determination will include the nature of the evidence obtained as a result violation and

[105] Fn 1 above at 19.

[106] Emphasis added.

> ***the nature of the right violated*** and not so much the manner in which the right was violated.

Fundamental rights frequently infringed in the procurement of disputed evidence in Canada are the rights to legal representation and freedom and security of the person. Added to this, the Supreme Court often applied the principle of the 'absence of pre-trial obligation' when these rights were infringed. For these reasons, the mentioned rights are considered.[107]

3.1 The right to legal representation

As a general rule, a violation of the right to legal representation would tend to render a trial unfair.[108] This approach serves as an illustration of the application of the principle of the 'absence of pre-trial obligation', because the right to legal representation principally aims to protect the accused against unconstitutional conscription. Based on this premise, evidence obtained in the shadow of a violation of the right to legal representation would, more often than not, result in the accused being conscripted against herself.[109] Roach[110] is of the opinion that

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[107] See Roach (fn 27 above) at 10-60 to 10-65, for a discussion of other Charter rights under this group of factors.

[108] See *Collins* (fn 1 above) at 19, where Lamer J reasoned as follows: "… self-incriminating evidence obtained following a denial of the right to counsel will, generally, go to the very fairness of the trial …"; see also *Ross* (fn 62 above); *Prosper* (fn 87 above); *Manninen* (fn 63 above); *Elshaw* (fn 63 above); *Burlingham* (fn 51 above); *Feeney* (fn 8 above); *Stillman* (fn 7 above).

[109] *Collins* (fn 1 above) at 19; see also *Black* (fn 50 above) at 17, where Wilson J reasoned as follows, premised on *Collins*: "In my view, the admission of the appellant's inculpatory statement would adversely affect the fairness of the trial … since the admission of the statement would infringe on the appellant's right against self-incrimination …".

[110] Roach (fn 27 above) at 10-61. He bases his opinion on *Therens* (fn 55 above) and *Trask* (fn 63 above). In these cases the Supreme Court rejected the conclusion that the obtainment of legal advice would not have prevented the accused from being conscripted to provide

the courts of Canada would not apply the doctrine of discoverability when the right to legal representation had been violated. To be fair, this opinion of Roach was written before *Stillman* and *Feeney*.[111] The doctrine of discoverability was applied in these cases in instances where the right to legal representation had been violated. The issue would therefore be whether the evidence could have been discovered without a violation of the right to legal representation.[112] A saving mechanism has been included in favour of the prosecuting authority to show that the evidence could have been discovered in the absence of a violation of the right to legal representation or any other Charter right.[113]

In *Brydges*[114] it was held that an accused should be informed about the availability of duty counsel and applicable legal aid systems in the jurisdiction of the court where he or she has been arrested.[115] When applicable, the accused should further be informed about the availability of legal advice on a toll-free telephone number.[116] In addition, the police should also give the accused a

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conscriptive evidence. In *Trask*, the accused's right to legal representation had been violated and he was compelled to participate in the production of the evidence (a breathalyser test). The Appeal Court held that, under those circumstances, counsel would have advised the accused to submit to the test and also about the consequences of not complying. This reasoning was rejected by the Supreme Court.

[111] Roach appeared on behalf of the intervenor in *Stillman*.

[112] See *Feeney* (fn 8 above) at par 65, where Sopinka J expressed the view that the statements obtained from the accused in the trailer constituted conscriptive evidence, because it had been obtained in violation of the right to legal representation. He continued as follows: "Having found the statements conscriptive, the next question set out in *Stillman* is whether alternative legal means to obtain the conscriptive evidence existed". *In casu* it was held that the conscriptive statements were not "discoverable" without breaching the provisions of the Charter.

[113] Loc cit.

[114] Fn 63 above.

[115] See also *Pozniak* (fn 87 above).

[116] *Bartle* (fn 87 above).

reasonable opportunity to exercise her right to legal representation.[117] The purpose of the right to legal representation is determined by its scope and nature – it serves to allow an accused to obtain advice as to how she could effectively exercise the rights guaranteed by the Charter.[118] In a word, the right to legal representation protects an accused from being unconstitutionally forced to participate in the creation or discovery of incriminating evidence against herself. A violation of the right to legal representation would in effect result in a violation of at least the right to remain silent and any evidence thus obtained would result in the accused having been 'conscripted' against herself.[119]

3.2 The right to freedom and security of the person: freedom from unreasonable search and seizure

In *R v Greffe*,[120] the Supreme Court of Canada adhered to the overall structure of the admissibility assessment as introduced by *Collins* test. The accused in *Greffe* was charged with importing and possession of heroin. Customs officers searched him without informing him of his right to legal representation. After the search, he was handed over to the custody of the drug squad, who turned him over to a medical doctor for a rectal search. The rectal search was done under the pretence that the accused had been arrested for traffic offences. This search led to the discovery of heroin. The central issues in this case were, firstly, whether the evidence had been obtained in a manner that infringed his right to be secure from unreasonable search and seizure; and secondly, whether the evidence obtained in this manner ought to be admitted or excluded pursuant to section 24(2).

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[117] *Manninen* (fn 63 above); *Feeney* (fn 8 above); *Stillman* (fn 7 above).

[118] Ibid.

[119] See *Stillman* (fn 7 above); and *Feeney* (fn 8 above).

[120] 1 SCR 755, ("*Greffe*").

Despite the fact that the violation was labeled a 'serious' and 'flagrant'[121] intrusion of 'human dignity and bodily integrity', the court, following the *Collins* admissibility framework, declined to hold that its admission would tend to render the trial unfair. The evidence was excluded on the ground that its admission would be detrimental to the administration of justice.[122] This approach was modified in *Stillman*,[123] because the court incorporated the seriousness of the infringement as a factor in the fair trial assessment. It could, perhaps, be argued that the *Grant* court took its cue from this approach: In *Stillman*, the seriousness of the infringement was considered as an important factor that justified exclusion on the grounds of trial unfairness; conversely, the fact that the infringement in *Grant* was regarded by that court as non-serious, was considered under the trial fairness prong to demonstrate that the fairness of the trial was not seriously impaired. However, the *Grant* judgment did not refer to this approach in *Stillman*.

The nature of the right to bodily sanctity and integrity, contained in section 7 of the Charter was considered by the *Stillman* court[124] and interpreted to mean that everyone has the right not to be deprived of security of the person except in accordance with the principles of fundamental justice. That, in turn, means that any intrusion of the human body may only be allowed when valid statutory

[121] Ibid at 191, where the judge summarised the seriousness of the violation as follows: "Indeed it is the intrusive nature of the rectal search and considerations of human dignity and bodily integrity that demands a high standard of justification before such a search will be reasonable".

[122] Loc cit. Lamer J stated the following to highlight the seriousness of the infringement to bodily integrity: "It is imperative that the court, having regard to the long-term consequences of admitting evidence obtained in these circumstances, dissociate itself from the conduct of the police in this case, which, alwayson the assumption that they merely had suspicions, was a flagrant and serious violation of rights of the appellant".

[123] Fn 7 above.

[124] See also *Racette* (fn 63 above); and *Legere* (fn 63 above).

authority permits such conduct or when the individual gives her informed consent for the particular intrusion or police interference. Cory J, writing on behalf of the majority opinion, reasoned as follows:[125]

> In my view, police actions taken without consent or authority which intrude upon an individual's body in more than a minimal fashion violate s7 of the Charter in a manner that would as a general rule tend to affect the fairness of the trial.

The fair trial directive contained in section 24(2) was, according to Cory J, designed with the aim to prevent unlawful interference with a person's dignity. Admission of any evidence obtained as a result of a significant interference with a person's dignity would tend to render the trial unfair. In the event, it was held that admission of the evidence, crucial for a successful prosecution, would render the trial unfair. Declining to follow the approach followed in *Greffe*, by considering the admissibility of the disputed evidence under the second and third group of *Collins* factors,[126] the Supreme Court in *Stillman* deemed it necessary to convey the message to law enforcement officers that a significant infringement of an individual's body that significantly impinges on a person's dignity, is worthy of earnest protection by the courts. The fact that the approach followed in *Stillman* implies that the prosecution would have to justify legislation that allows bodily intrusion, did not convince Cory J to adhere to the *Collins* structure.[127]

To summarise: The rationale for the inclusion of the 'nature of the right' as a factor in the fair trial assessment, as formulated in *Collins*, is not without merit.

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[125] Fn 7 above at par 91.

[126] The second and third groups of factors were considered obiter, because it was held that admission of the evidence would render the trial unfair.

[127] *Stillman* (fn 7 above) at paras 91-92. Cory J held that he did not find such governmental justification "an unduly onerous requirement when dealing with bodily intrusions".

It serves as one of the indicators to both the prosecution and legal representatives as to whether police conduct impacted negatively on the trial fairness directive: In the event that the purpose that the right seeks to protect is the prevention of self-conscription, the more susceptible the evidence would be for exclusion. A serious violation of the right to bodily integrity or human dignity has been held as worthy of protection under the first group of *Collins* factors,[128] thus emphasising the importance of these values in a modern and civilized society. Admission of evidence obtained in such a manner would tend to render the trial unfair.

It was mentioned above that the fair trial directive was 'refined' by the Supreme Court of Canada in *Stillman*. The 'refined' fair trial was modified in *Grant*. The position in Canada, during this era, is considered next.

4. The post-*Collins* era: the *Stillman* and *Grant* fair trial directives in Canada

The dictum of Lamer J in *Collins*, to the effect that the admission of real evidence would rarely render a trial unfair occasionally caused confusion.[129] Besides, the judge acknowledged when he wrote that celebrated opinion in *Collins* that a test for section 24(2) would be developed in future.[130]

[128] Unlike the approach in *Collins* (fn 1 above) and *Greffe* (fn 120 above), where it was considered under the second group of factors (the seriousness of the violation).

[129] Roach (1993) *Israel LR* 607; Roach (1999) 42 *CLQ* 397, ("Roach 1").

[130] *Collins* (fn 1 above) at par 41, Lamer J wrote as follows: "I would agree with Howland CJO in *Simmons*, *supra*, that we should not attempt to substitute any other test for s 24(2) or attempt to substitute any other test for s 24(2). At least at this early stage of the Charter's development, the guidelines set out are sufficient and the actual decision to admit or exclude is as important as the statement of any test. Indeed, the test will only take on concrete meaning through our disposition of cases".

This part of the work begins with a discussion of the reasons for the adoption of the 'refined' approach, followed by a consideration of whether the 'real evidence' distinction had been discarded in *Stillman*. Thereafter, the case of *Grant*, which suggests that evidence should be admitted despite the fact that trial unfairness has – to an extend – been impaired, is discussed. This is followed by a critical analysis of the *Stillman* and *Grant* fair trial frameworks.

One of the issues explored in this part of the chapter is whether the *Stillman* fair trial assessment constitutes an 'automatic' or 'near automatic' exclusionary rule. Commentators have raised the objection that the *Stillman* fair trial framework fails to attach sufficient weight to the public interest in convicting the factually guilty. If so, should it for that reason be rejected? An issue intrinsically related to this, is whether the admission of unconstitutionally obtained 'real' evidence would 'not readily' render a trial unfair in terms of the *Stillman* fair trial test?[131] Put differently, would it, compared to the *Collins* fair trial requirement, be more onerous or less onerous for 'real' evidence to be admitted under the fair trial prong?

What is the content of the 'refined' fair trial framework? The Canadian Supreme Court, in *Stillman,*[132] reoriented the fair trial requirement by submitting that the following method should be applied when a fair trial assessment is undertaken:[133]

1. The evidence should be classified as either conscriptive or non-conscriptive, based on the manner in which it had been obtained. If the evidence was obtained in a conscriptive manner and the prosecution ***cannot*** show, on a

[131] See the dictum of Lamer J, quoted at fn 57 above.

[132] Fn 7 above.

[133] Ibid at par 119.

balance of probabilities, that it would have been discovered by constitutional means, its admission would render a trial unfair. The court would not have to consider the seriousness of the violation and the effect of exclusion on the justice system, because an unfair trial would *per se* be detrimental to the criminal justice system. [134]

2. However, if the prosecution ***can*** show that the evidence would have been discoverable by lawful means, admission of the evidence would not render the trial unfair. The court would proceed to consider the seriousness of the violation or the effect of exclusion on the repute of the criminal justice system.

3. If the evidence is classified as non-conscriptive, its admission would not tend to render the trial unfair. The court must proceed to consider the second phase of the analysis, being the seriousness of the violation and the effect of exclusion on the repute of the criminal justice system.

This 'refined' fair trial test, introduced by *Stillman*, was further 'refined' in *Feeney*, where the derivative evidence inquiry was added to the section 24(2) analysis.[135]

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[134] Compare the writer's recommendation in this regard in Chapter 6, par B below.

[135] In *Feeney* (fn 8 above) at par 67, it is explained that derivative evidence is a subdivision of conscriptive evidence. Derivative evidence involves the violation of a Charter right where the accused is conscripted against herself (generally by means of an inculpatory statement) that leads to the discovery of real evidence. The real evidence is derived from the incupatory statement. Evidence qualifies as derivative evidence when it "would not have been obtained but for the conscriptive evidence". Sopinka J, in *Feeney* (ibid) at par 70, distinguished between "conscriptive derivative" and "not conscriptive derivative" evidence by posing the following questions: Firstly, was the violation the ***necessary*** cause for the discovery of the evidence? Secondly, has the evidence been obtained as a product of the accused's mind or body? If the answer to the questions is in the negative, the evidence should be classified as "not consriptive derivative". The admision of "not conscriptive derivative" evidence would not render the trial unfair. Conversely, admission of "conscriptive derivative" evidence would render the trial unfair.

The 'refined' approach set the stage for the renewed dialogue between the Supreme Court of Canada and Canadian scholarly writers. Most scholars are forcefully opposed to the philosophy underlying the 'refined' fair trial framework.[136] The validity of these critiques are scrutinised under 4.4 below.

4.1 The reasons for the adoption of the new approach

During 1987, Lamer J indicated in *Collins* that the test applicable to section 24(2) proceedings should not be substituted at that early stage of the Charter's existence, because the guidelines that existed at that stage were adequate to resolve section 24(2) disputes. However, the judge hastened to add that such formulation should not be regarded as the ultimate formulation of the section 24(2) assessment, but that the relevant section 24(2) test would gradually 'take on concrete meaning'.[137] The modification of the fair trial assessment was left to Cory J in *Stillman*,[138] Lamer CJC concurring.[139]

Cory J reasoned in *Stillman* that the raison d'être for this 'new' approach[140] is twofold:

a) Firstly, the confusion caused by the differential treatment of different kinds of evidence:[141] There remained a 'misconception' that the concept 'real

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[136] For example, see Stuart (1996) 48 CR (4th) 351; Fenton (fn 95 above); Delaney (1997) 76 *CBR* 521; Brewer (1997) *Can Crim LR* 329; Paciocco (1997) 2 *Can Crim LR* 163; Moreau (1997) 40 *CLQ* 148; Pringle (1999) 43 *CLQ* 86; Mahoney (1999) 42 *CLQ* 443; Davies (2002) 46 *CLQ* 21. However, compare Pottow (2001) 44 *CLQ* 34; Tanovich (1999) 20 CR (5th) 233; Maric (fn 79 above).

[137] Fn 1 above at 21.

[138] Fn 7 above.

[139] Ibid at par 1.

[140] Ibid at par 119.

evidence', within the context of section 24(2), referred to anything tangible that existed as an independent entity, the admission of which would not ordinarily render the trial unfair.[142] Cory J continued by implementing the Ratushny principle as follows:[143]

> It is for this reason that blood, hair samples or the identity of the accused are often readily, yet incorrectly, classified as 'real evidence existing independently of the Charter breach'. Yet, it is key to their classification that they do not necessarily exist ***in a usable form***. For example, in the absence of a valid statutory authority or the accused's consent to take bodily samples, the independent existence of the bodily samples is of no use to the prosecution since there is no lawful means of obtaining it.

Put differently: In any instance when 'real' or testimonial evidence is obtained, the limitation or 'infringement' of any pre-trial right of the accused in the evidence-gathering process would not render the trial unfair when such limitation is authorised by a law of general application,[144] provided that the limitation satisfies the criteria contained in the limitations clause;[145] conversely, a limitation

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[141] Ibid at par 76; see also Roach (fn 129 above).

[142] Loc cit.

[143] Loc cit. Emphasis in original text.

[144] Section 1 of the Charter.

[145] Fn 7 above at paras 91-92, where Cory J argued as follows: "There must always be a reasonable control of police actions if a civilized and democratic society is to be maintained. In my view, police actions taken without consent or authority which intrude upon an individual's body in more than a minimal fashion violate s 7 of the Charter in a manner that would as a general rule tend to affect the fairness of the trial. Those opposed to this position may argue that it leads to the requirement that the state will have to justify legislation permitting bodily intrusion. Yet, I do not find that to be an unduly onerous requirement when dealing with bodily intrusions. … The security of the body should be recognized as being worthy of protection from state intrusion aimed at self-incrimination as are statements".

to the pre-trial rights of an accused would not render the trial unfair in instances when the accused gives her informed consent or waives the protection guaranteed by the pre-trial constitutional right. In respect of the latter, in most cases where the accused is uneducated, the assurance that such waiver is informed, would be best ensured by the protection guaranteed by the right to legal representation;

b) Secondly, that the police may use other forms of compulsion, involving a Charter violation, which forms of compulsion are not adequately protected by the common law privilege against self-incrimination.[146] Cory J poses the following rhetorical question, while at the same time highlighting the inadequacy of the protection granted by the common law privilege against self-incrimination with regard to modern practices in the evidence-gathering process:[147]

> For example, can there be any respect demonstrated for an individual if against their will women and men accused of a crime can be compelled to provide samples of their pubic hair to the police?

On this view, any reliance on the common law privilege against self-incrimination would be futile in those instances where the constitutional rights of the accused have been violated and real evidence (in this case pubic hair) is discovered as a result. Compelling an accused to provide samples of pubic hair intrudes upon a person's rights to privacy and human dignity. A failure to recognise the sanctity of the human body as worthy of protection from governmental intrusion – on the same basis as testimonial compulsion – would, as a general rule, impact negatively on trial fairness. Policy considerations underlying the common law privilege against self-incrimination dictate that the accused, relying on the trial fairness directive, would not be in a position to successfully attack the

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[146] Ibid at paras 81-89.

[147] Ibid at par 88.

admissibility of real evidence obtained in an unconstitutional and extremely intrusive manner.

4.2 The 'refined' approach: discarding the 'real evidence' classification?

During 1997 the Supreme Court adopted a new approach to the classification of evidence, the admission whereof would render a trial unfair. In *Collins* the court categorised heroine as 'real evidence', whereas in *Stillman*, and shortly thereafter in *Feeney*, the same class of evidence[148] was typified as 'non-conscriptive evidence'. The difference between 'conscriptive' and 'non- consciptive' evidence, and the inappropriateness of the 'real' evidence classification, was explained as follows by Cory J[149] in *Stillman*:[150]

> The crucial element which distinguishes non-conscriptive evidence from conscriptive evidence is not whether the evidence may be characterised as 'real' or not. Rather, it is whether the accused was compelled to make a statement or provide a bodily substance in violation of the Charter. Where the accused, as a result of a breach of the Charter, is compelled or conscripted to provide a bodily substance to the state, this evidence will be of a conscriptive nature, despite the fact that it may be 'real evidence.' Therefore, it may be more accurate to describe evidence found without any participation of the accused, such as the murder weapon found at the scene of the crime, or drugs found in a dwelling-house, simply

[148] A bloody shirt, the shoes, the cigarettes and money were regarded as non-conscriptive evidence, as opposed to "real evidence".

[149] Lamer CJC, La Forest, Sopinka and Iacobucci JJ concurring. L' Heureux-Dube, McLachlin and Gonthier JJ dissenting.

[150] Fn 7 above at 352. Emphasis in the original text.

> as ***non-conscriptive*** evidence; its status as 'real' evidence *simpliciter*, is irrelevant to the s 24(2) inquiry.

A plain reading of this dictum indicates that the 'real' evidence distinction has been discarded as an irrelevant factor in the trial fairness assessment. However, when Cory J referred to the concept 'derivative' evidence', he termed it 'conscriptive real' evidence or 'conscriptive derivative' evidence.[151] It therefore clearly transpires that the ***distinction*** between real evidence and testimonial compulsion has been discarded. In terms of the 'refined' fair trial test, real evidence, whether classified as 'conscriptive', 'not-conscriptive' or 'conscriptive derivative', remains a factor to be considered under the fair trial directive.[152] The following important question therefore arises: Would real evidence or 'conscriptive derivative' evidence be more readily admitted in terms of the 'refined' fair trial directive? More importantly, what criterion has to be relied upon to govern the admissibility of this category of evidence? What is the impact of this 'refined' test on the admissibility assessment? These issues are explored under 4.4 below.

This dictum of Cory J further makes clear that the principle of the 'absence of pre-trial obligation' was embraced by the Supreme Court of Canada. The common law ***distinction*** between 'real' evidence and testimonial evidence is irrelevant, because it caused confusion.[153] The fact that either 'real' evidence or

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[151] Ibid at par 99.

[152] However, compare Hession (1998) 41 *CLQ* 93 at 94.

[153] See Roach (fn 27 above) at 10-49; see also *Stillman* (fn 7 above) at 350, where Cory J explains as follows: "For example, confusion has arisen as to what constitutes 'real' evidence and in what circumstances its exclusion or admission would render the trial unfair"; and further, at par 76 (352), where he states: "There is on occasion a misconception that 'real' evidence, referring to anything tangible and exists as an independent entity, is always admissible. It is for this reason that blood, hair samples or identity of the accused are readily, yet incorrectly, classified as 'real evidence existing independently of the Charter breach'. Yet, it is key to their

testimonial evidence is produced as a result of the Charter violation should not be the cause of different outcomes in the section 24(2) determination. What is important is the ***manner*** in which the disputed evidence had been obtained, and not its nature and common law reliability.[154]

4.3 Admission despite trial unfairness: the *Grant* fair trial test

In *Grant*,[155] two police officers dressed in plain clothes saw the accused, an eighteen year-old Black male, walk past them in a manner they considered 'suspicious'. They asked an officer dressed in police uniform to 'have a chat' with the accused. (None of the three officers knew the accused from previous encounters).[156] The uniformed officer stood in the accused's path, instructed him to hold his hands in front of him and began questioning the accused. In response, the accused admitted that he had a small quantity of marijuana and a loaded revolver in his possession. The evidence was seized and the accused was promptly arrested. It was common cause that the gun would not have been discovered if the accused did not admit that it was in his possession. The accused challenged the admissibility of the gun in a *voir dire*.

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classification that they do not necessarily exist ***in a usable form***. For example, in the absence of a valid statutory authority or the accused's consent to take the samples, the independent existence of the bodily evidence is of no use to the prosecution since there is no lawful means of obtaining it".

[154] In *Burlingham* (fn 51 above) at 408, Iacobucci J wrote as follows, referring to *Herbert*, at 36: "In any event, even if the improperly obtained evidence were reliable, considerations of reliability are no longer determinative, given that the Charter has made the rights of the individual and the fairness and integrity of the judicial system paramount."

[155] Fn 9 above.

[156] Ibid at par 18.

Laskin JA held that, despite the fact that the evidence constituted 'conscriptive, not discoverable' real evidence, such a finding did not call for the 'automatic' exclusion of the evidence.[157] Asserting that section 24(2) directs the courts of Canada to consider 'all the circumstances' that may have an impact on the repute of the criminal justice system, the judge reasoned that even though the admission of conscriptive evidence may compromise trial fairness, 'its admission will not always bring the administration of justice into disrepute'.[158] In the light hereof, Laskin J reasoned, that the decision whether to admit conscriptive evidence should depend on 'the degree of trial unfairness and on the strength of the other two *Collins* factors'.[159] Factors that have an impact on the degree of trial unfairness are: Firstly, the effect of the police misconduct on the reliability of the evidence; and secondly, whether the police conduct that led to the discovery of the evidence seriously infringed the particular Charter right.[160] The less serious the infringement, the less serious would be the effect on trial fairness.

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[157] Ibid at par 49. Laskin JA based his finding on the dictum of Lebel J in *R v Orbanski* (2005) 196 CCC (3d) 481 (SCC) at 93, ("*Orbanski*"), where the following was said: "Our Court has remained mindful of the principle that the Charter did not establish a pure exclusionary rule. It attaches considerable importance to the nature of the evidence. It is constantly concerned about the potential impact on the fairness of a criminal trial of admission of conscriptive evidence obtained in breach of a Charter right. Nevertheless, while this part of the analysis is often determinative of the outcome, our Court has not suggested that the presence of conscriptive evidence that has been obtained illegally is always the end of the matter and that the other stages and factors of the process become irrelevant". See also *Buhay* (fn 63 above) at par 71, where Arbour J wrote on behalf of an unanimous Supreme Court, in respect of the third group of factors, as follows: "Section 24(2) is not an automatic exclusionary rule … neither should it become an automatic inclusionary rule …"; see further Stuart (2003) 10 CR (6th) 233, commenting on the implications of the *Buhay* judgment.

[158] *Grant* (ibid) at par 52.

[159] Loc cit.

[160] Ibid at par 53.

The court gave as an example, the case of *Burlingham* to demonstrate that conscriptive evidence obtained after an infringement of the right to legal representation would have a profound impact on trial fairness concerns, since the infringement in that case constituted a flagrant violation. By contrast, the infringement in the case at bar was described as 'not a flagrant case of police abuse'.[161] Against this background, Laskin JA held that, having regard to the reliability of the evidence and the extent of the infringement, that admission of the evidence 'would have some impact on trial fairness', but held that the effect it had on trial fairness is located at the 'less serious end of the scale'.[162] The judge explained that admission of the evidence would not have an impact 'so great that it precludes consideration of the other two *Collins* factors'.[163]

The *Stillman* and *Grant* interpretations of the fair trial requirement is critically analysed below.

4.4 A critical evaluation of the *Stillman* and *Grant* fair trial tests: Do these tests seek to achieve the purpose sought to be protected by the right to a fair trial under section 24(2)?

Having considered *Stillman* and *Grant*, it is apposite to consider the following key issues: Do the *Stillman* and *Grant* fair trial directives accord with the values that the Charter seeks to protect? Has the *Stillman* fair trial requirement broadened or limited the scope of protection guaranteed by the fair trial assessment under section 24(2)? Has the *Stillman* fair trial framework rendered the 'nature of the right violated', to be considered as an independent factor redundant? Would real

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[161] Ibid at par 58. This finding is based on the fact that the line between police questioning that gives rise to a detention, and questioning that does not, is not clear – see (ibid) at par 62.

[162] Ibid at par 59.

[163] Loc cit.

or derivative evidence be more readily admitted or excluded under the *Stillman* fair trial test, when compared to the *Collins* fair trial directive? Does the 'refined' fair trial requirement, introduced by *Stillman*, lean more favourably towards rights protection or crime control values? Is the derivative evidence inquiry, introduced by *Feeny*, unfairly geared towards the reception of unconstitutionally obtained real evidence? Should the doctrine of discoverability feature in a meaningful way in the fair trial assessment or should it be abandoned? Is there any merit in the criticism leveled by Canadian commentators that the 'refined' fair trial directive constitutes an automatic exclusionary rule? More importantly, should the approach favoured by the *Grant* judgment, suggesting that all three groups of *Collins* facors should be considered be adopted? In other words, should the presumption in favour of exclusion, when the evidence is labeled as 'conscriptive', be abandoned from the fair trial assessment?[164] Should a balancing exercise of the three groups of factors therefore be employed to determine the admissibility of disputed evidence?

It should be borne in mind that the *Grant* fair trial framework consists of two phases: The first phase consists of the *Stillman* fair trial framework, while the second phase proposes additional factors that should be included into the fair trial analysis.[165] In the light hereof, the criticism leveled against the *Stillman* fair trial framework (except that the *Stillman* fair trial requirement constitutes an 'automatic' exclusionary rule), is applicable with equal force to the first phase of the proposed *Grant* fair trial requirement.

[164] See Stuart (fn 10 above); the writer's recommendation in chapter 6.

[165] Fn 9 above at paras 47-52 contains the first phase, while the second phase of the trial fairness requirement was discusssed at paras 53-59.

Some might argue that the 'refined' approach,[166] applied to assess the trial fairness requirement in *Stillman*, is challenging,[167] or that it may be arbitrarily applied.[168] However, it cannot be denied that it provides better protection to an accused when compared to the previous fair trial test.[169] The category of self-incriminating evidence under section 24(2) was indisputably broadened to include evidence other than testimonial evidence. Furthermore, the differences in the outcome in the trial courts, when compared to that in the Supreme Court in *Stillman* and *Feeney*, serves as practical illustrations of this submission: In *Stillman*, for instance, the trial judge held that the hair samples, teeth imprints and buccal swabs were admissible – by contrast, the Supreme Court held that admission of the self-same evidence would render the trial unfair and, on this basis, it had been excluded.[170]

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[166] Paciocco 2001 (fn 23 above) at 452 asserts that it is based on the reasoning in *Collins*, but in different contexts.

[167] See Hession (fn 152 above) at 119, where she makes the following comment: "The test for trial fairness cannot be said to be simple". See also Mahoney (fn 136 above) at 449, who expresses his view on the *Stillman* analysis as follows: "The bias against 'conscriptive' evidence steered the enquiry down a cul de sac from which we are still seeking an exit – as evidenced by the complexity of the *Stillman* analysis"; he continues as follows (ibid) at 450 by making the following comments: "The most obvious explanation for the Supreme Court's resort to complexity is that it was a reaction to the court's fear that, in the eyes of the majority of Canadians (or, more pertinently, the trial judges purporting to act as the public's amanuensis) the repute of the administration of justice will not suffer by the admission of tainted evidence".

[168] See the comments by Lamer CJC in *Feeney* (fn 8 above) at par 2, where he states that he does not have a principled objection to the use of the 'new' approach, but is in disagreement with the practical application thereof to the facts in the case. He intimates that he would have arrived at a different conclusion, despite applying the self-same principles employed by the majority and minority opinions; see also Stuart (fn 10 above) at 2, par 7.

[169] See Hession (fn 152 above) at 119.

[170] Compare, however, *Buhay* (fn 63 above), where the application of the *Collins* analysis and the approach suggested in *Stillman* produced the same result: The trial court had to decide whether a warrantless search and seizure of marijuana, stored in a locker, accessible by the public,

The approach advanced in *Stillman* proclaimed the temporary[171] departure of the 'real evidence' ***distinction*** in the fair trial inquiry, including the associated confusion it created. It is also worth mentioning that the courts have discarded the concept 'self-incrimination' from their section 24(2) terminology, it having been replaced with 'conscription'.[172] The latter concept is not limited to 'real'

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violated the accused's right to privacy and, if so, whether the evidence discovered in this manner should be excluded in terms of section 24(2). The trial judge, (at par 13 and 51), held that the accused's right to privacy had been violated and proceeded to consider section 24(2), applied the 'real' evidence test as formulated in *Collins* and ruled that the admission of the 'real evidence' did not render the trial unfair. The Supreme Court, in a judgment written by Arbour J, (McLachlin CJC, Gonthier, Iacobucci, Major, Bastarche, Binnie, LeBel and Deschamps JJ concurring), at par 51, held that the marijuana was discoverable in the absence of a violation of any Charter rights and that the evidence constituted non-conscriptive, discoverable evidence, the admission whereof would not render the trial unfair.

[171] It is submitted that the *Grant* fair trial test favours the re-introduction of the real evidence distinction.

[172] See *Feeney* (fn 8 above) at for example par 62-72; *Stillman* (fn 7 above) at for example par 74-82, and 101; see also *Buhay* (fn 63 above) at 119, where Arbour J wrote as follows: "As Bastarche J noted, the leading case on this issue [of trial fairness] is *Stillman*, *supra*, which held that the admission of 'conscriptive' evidence, whether self-emanating or derivative would generally affect the fairness of the trial"; see also *Mooring* (fn 63 above) at 54; *Buendia-Alas* (fn 63 above) at 37, where the British Columbia Provincial Court, per Tweedale Prov Ct J held as follows: "Addressing the application under s 24(2) of the Charter, certainly this is not conscriptive evidence, so I look at the second and third *Collins* factors [*R v Collins* citation omitted], the seriousness of the violation and the impact of exclusion …"; see further *Vu* (fn 63 above) at 336, a decision of the British Columbia Court of Appeal, where Braidwood JA applied the fair trial assessment as follows: "Turning to the three factors in the s 24(2) analysis, the evidence found inside the Honda is clearly classified as non-conscriptive; thus, its admission would not render the trial unfair"; see also *Symbalisty* (fn 63 above) at 311, where the police on a regular bassis, entered the pawn shop of the accused without a warrant. This was deemed a serious violation. The statement made by the accused after the unlawful entry was held to be of a conscriptive nature, emanating from the accused during the unlawful search; it would further not have been discoverable in the absence of the unlawful search. Admission thereof, it was held, would render

evidence, as was the case with its common law counterpart. The concept 'conscription' refers to governmental conduct that unconstitutionally impinges upon the pre-trial rights of the accused, causing her to participate in the creation of the disputed evidence, intended to be used by the prosecution against her at her trial. This reading of the concept fair trial clearly alludes to the fact that the principle of the 'absence of pre-trial obligation' had been adopted by the Supreme Court.[173] In line with this principle, the central role played by the accused in the creation or discovery of the evidence forms the focus of the analysis.[174] It appeared as if the Supreme Court of Canada had settled the test for trial fairness: admission of 'conscriptive' evidence, it does not matter whether it is self-incriminating testimonial or real evidence, it would in general tend to render the trial of an accused unfair, if it could not have been discoverable by lawful means.[175] Can the *Stillman* and *Feeney* fair trial analysis be characterised as an automatic exclusionary rule? An issue related to this is, if so, should it for that reason be discarded?

Pottow is of the view that the *Stillman* fair trial framework can be construed as defying the dictates of section 24(2), in that the Supreme Court failed to consider 'all the circumstances' of the case, before arriving at its conclusion that the

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the trial unfair; however, compare *Manickavasagar* (fn 63 above), where the Ontario Court of Appeal made no mention of the conscriptive/non-conscriptive analysis. In a short judgment, Rosenberg, Borins and Feldman JJA held that the evidence was correctly admitted, since admission of the evidence did not affect trial fairness and the breach was not serious, but the charges were of a serious nature and the evidence was necessary for a successful prosecution.

[173] Pottow (fn 136 above) at 49-58, supports this submission. However, he refers to the principle of the 'absence of pre-trial obligation' as 'de facto compelled incrimination'.

[174] Hession (fn 152 above) at 109.

[175] *Law* (fn 63 above) at par 34; *Buhay* (fn 63 above) at par 49. However, compare the approach in *Grant* (fn 9 above).

disputed evidence should be excluded.[176] This could be argued, according to Pottow, because it was held that after the classification of the disputed evidence as conscriptive, non-discoverable, the admissibility of the evidence requires no further scrutiny under the seriousness of the violation or the effect of exclusion on the repute of the criminal justice system. In other words, conscriptive non-discoverable evidence would always, as a matter of law, be automatically excluded. Pottow provides an answer to criticism on this issue by arguing that *Stillman* could be read not as ignoring all the circumstances, but as having weighed and rejected all the other circumstances 'as a pre-determined matter of law'.[177] The majority judgment in *Stillman* nevertheless proceeded to consider (obiter, it must be mentioned) the seriousness of the violation and the effect of exclusion on the repute of the criminal justice system, after having classified the evidence as conscriptive, non-discoverable.[178]

The firm view held by Mahoney that the conscription analysis contained in *Stillman* should be abandoned,[179] is premised on the notion that the interpretation of section 24(2) of the Charter has to be fulfilled while having due

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[176] Fn 136 above at 46. See also Mahoney (fn 136 above) at 476; Stuart (fn 10 above) at 1, par 3(2).

[177] Ibid at 45.

[178] Fn 7 above at par 122, the court wrote that "something should be said of the seriousness of the violation which occurred in this case".

[179] Fn 136 above at 476, he concludes as follows: "The *Stillman* analysis should be abandoned and the decision of admissibility of tainted evidence should be made by focusing directly on the test set forth in s 24(2) of the Charter". At 445 Mahoney is of the opinion that the "refined" fair trial test should be replaced with the *Collins* test. However, (ibid) at 447, he acknowledges that "much work remains in identifying and refining factors that will cause the admission of tainted evidence to bring the administration of justice into disrepute". The Ontario Court of Appeal made such an attempt in *Grant*. See also Stuart (fn 10 above) at 2, par 4.

regard to the 'intent of Parliament'.[180] Based on this incorrect premise, he comments that section 24(2) of the Charter makes no provision that evidence should be excluded if its admission would render a trial unfair. This view would have been correct if the provisions of the Charter were to be interpreted literally.[181] However, he hastens to add that an unfair trial would have a negative effect on the repute of the criminal justice system.[182] His key concerns about the *Stillman* analysis are twofold: first, the nature of the evidence obtained after a violation; and, second, the classification of the evidence as either 'conscriptive' or 'non-conscriptive'.[183] In respect of his first objection, he argues in favour of the retention of the common law privilege against self-incrimination, which distinguishes between real evidence and testimonial compulsion: the admission of unconstitutionally obtained real evidence would not readily render a trial unfair because of its reliable qualities.[184] Support for this argument of Mahoney can be found in the *Grant* fair trial assessment. An argument against the retention of the common law privilege against self-incrimination, within the context of section 24(2), has been presented above and is therefore not repeated here.[185]

Turning to the second area of his concern, Mahoney attempts to demonstrate the weakness of typifying the evidence as either 'conscriptive or non-

[180] Ibid at 452, where he reasons as follows: "Section 24(2) must be applied with the integrity that comes from an adherence to the intent of Parliament as opposed to some hidden agenda based on a fear that Parliament drafted s 24(2) in error, or that the views [of the] Canadian public are an unworthy reference point".

[181] Compare the approach to interpretation of a constitutional provision as dictated by the Supreme Court of Canada in *Big M Drug Mart* (fn 68 above).

[182] Fn 136 above at 455.

[183] Ibid at 454-455, Mahoney responds to the conscriptive/non-conscriptive classification as follows: "I refuse to accept that a conclusion of unfairness flows merely from such an artificial labeling [conscriptive/non-conscriptive]".

[184] Ibid at 456; see also Stuart (fn 10 above) at 2.

[185] See the discussion under par B 1.2 above.

conscriptive', in terms of *Stillman*, as follows: A sample of the accused's hair is unlawfully taken from her brush in a search – the evidence would, according to him, be classified as non-conscriptive. Mahoney compares this scenario to that when a sample is unlawfully obtained by passing a gloved police hand through the hair of the accused – this evidence would, in his opinion be classified as conscriptive. Mahoney wished, by means of this comparison, to show that the *Stillman* analysis is inept. It is submitted that the demonstration of Mahoney is premised on an incorrect interpretation of *Stillman* and *Feeney*. The facts provided by Mahoney only serve to prevent one from meaningfully applying the *Stillman* analysis. It is, for example, not clear what results the discoverability analysis and derivative evidence inquiry would have engendered in the classification of the evidence, having regard to ***all*** the circumstances leading to the discovery of the evidence. The classification of the evidence as conscriptive or otherwise is but one factor of many to be considered during different phases of the admissibility analysis. A more meaningful example is presented by Pottow, calling for the application of the classification of the evidence, a discoverability analysis, as well as a derivative evidence inquiry.[186] He highlights the inconsistency that may be caused should different Charter rights of two accused be violated, the one in terms of section 7 and the other accused – in terms of section 8 of the Charter and where all other circumstances are virtually identical. However, he correctly notes that that inconsistency is caused by the approach of the *Feeney* court in ensuring the heightened protection of the right to human dignity that is not minimal in nature.[187]

Paciocco attacks the 'conscriptive' evidence approach, arguing that if conscriptive evidence is so distasteful, why does Parliament and, by implication society at

[186] Fn 136 above at 56-57.

[187] Loc cit.

large, allow laws that permit conscription.[188] Section 254 of the Canadian Criminal Code,[189] for example, permits the taking of a breathalyser test – with, or without the consent of the suspect. This argument was countered by Cory J in *Stillman* when he reasoned as follows:[190]

> It is for this reason that blood, hair samples or the identity of the accused are often readily, yet incorrectly, classified as 'real evidence existing independently of the Charter breach'. Yet, it is key to their classification that they do not necessarily exist ***in a usable form***. For example, in the absence of a valid statutory authority or the accused's consent to take blood samples, the independent existence of the bodily samples is of no use to the prosecution since there is no lawful means of obtaining it.

In other words, a limitation of rights that complies with the limitations clause cannot be construed as a violation. Any such challenge would not survive even the threshold requirement contained in section 24(2) that evidence must have been 'obtained in a manner' that violates a right contained in the Charter.[191]

Unlike the approach before *Stillman* and *Feeney*, the key issue should not be whether the evidence has reliable qualities and existed prior to the violation,[192]

[188] Fn 23 above (1989) at 77; see also Paciocco 2001 (fn 23 above) at 453.

[189] This section makes provision for the taking of blood or breath samples whenever a police officer has reasonable grounds to believe that a suspect has alcohol or a drug in her body while driving a motor vehicle.

[190] Fn 7 above at par 77. Emphasis in original.

[191] This requirement is discussed in chapter 3.

[192] In *Thompson Newspapers* (fn 63 above) at 256, La Forest J clarified the meaning of the requirement that the evidence "existed prior to the violation", by indicating that it means that the evidence would have been discoverable without a violation. He said the following: "The fact that evidence already existed means that it could have been discovered anyway"; compare the

but whether the manner of its procurement could be classified as conscriptive. A purposive interpretation of the fair trial requirement mandates such an approach. Furthermore, the refined fair trial requirement does not constitute an absolute exclusionary rule,[193] because the assessment is not finalised when the evidence is labeled conscriptive. On the contrary, automatic exclusion is subdued by means of a causation analysis geared in favour of either admission or exclusion, depending on the facts of each case: If the evidence would have been discoverable in a lawful manner, admission thereof would not render the trial unfair.[194] Conversely, if it would not have been discovered by legal means, its admission would tend to render the trial unfair. On this view, the *Stillman* fair trial analysis could be described as favouring 'near automatic' exclusion.[195]

However, the 'refined' fair trial directive, introduced by *Stillman*, cannot be described as exclusively promoting the deterrence rationale. Otherwise, why should the admission of conscriptive evidence that would inevitably have been discovered in an alternative ***constitutional manner***, not tend to render a trial unfair?

The discoverability analysis is of paramount importance throughout the *Stillman* and *Feeney* fair trial framework. It features during the fair trial assessment, the 'seriousness of the Charter violation' assessment, and even when the 'effect of

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approach in *Grant*, suggesting a return of the reliability characteristics of the evidence in the fair trial assessment.

[193] However, compare Hession (fn 152 above) at 119, where she summarises the impact of the "refined" test as follows: "We have today an absolute rule of exclusion built within the trial-fairness test based on how one classifies the evidence"; see also Pottow (fn 136 above) at 46.

[194] Compare, however, the view of Paciocco (1989) (fn 23 above) at 77, where he argues as follows: " … where evidence is obtained in the shadow of a Charter violation, it will be excluded almost automatically, as a matter of principle, whenever the evidence is the product of a pre-trial obligation imposed upon the accused by the state".

[195] *Grant* (fn 9 above) at par 50.

excluding the disputed evidence upon the repute of the justice system' is considered.[196] A number of Canadian commentators do not call for the abandonment of the doctrine of discoverability within the *Stillman* and *Feeney* fair trial requirement.[197] Davies advocates the submission that it should be totally discarded.[198] Mahoney suggests that it should be retained,[199] while also signifying that it should have a 'minor role to play when compared to such factors as the seriousness of the violation and the seriousness of the offence proffered against the accused'.[200] He correctly remarks that the discoverability analysis is founded on the corrective justice theory, to the extent that it is designed to ensure that the prosecuting authority is 'no better or no worse off' as a result of a Charter violation.[201] The thrust of his line of reasoning is located in the following passage, thus exposing his predilection in favour of crime control values:[202]

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[196] Mahoney (fn 136 above) at 464-465; Stuart (fn 10 above) at 3, par 9 argues that it should be abandoned. He points out that the doctrine would have no place in the section 24(2) analysis if the conscriptive/non-conscriptive analysis is abandoned.

[197] Brewer (fn 136 above); Moreau (fn 136 above); Delaney (fn 136 above); and Davison (fn 97 above).

[198] Davies (fn 136 above) at 38, where he concludes as follows: "Discoverability is a highly complex, unprincipled and speculative doctrine. It ought to have no place the s 24(2) analysis"; see also Stuart (fn 10 above) at 3, par 9, where he raises his objection as follows: "This adds an obtuse inquiry and does not make sense … Questions of legal remedy should turn on the evidence before the trier of fact, not on what might have been reality. Furthermore the fact that the police could have found the evidence without breaching the *Charter* makes the violation more serious and should therefore more likely result in exclusion".

[199] Fn 136 above at 471, where he states as follows: "I end up admitting that the discoverability principle itself may have a role to play, as will be obvious in some of the examples discussed shortly".

[200] Loc cit.

[201] Ibid at 467 (fn 55 of his contribution).

[202] Ibid at 473.

> Criminals must be detected and punished. If this result was about to occur in a particular case, the mere fact of a Charter breach should not be treated as a sufficient reason to interfere with that inevitability. But, in turn, the response to this argument is to ask, why then, ever bother to restore the parties to their respective 'advantage/disadvantage' positions as existed prior to the Charter breach? Why not make use of the evidence to convict, despite its tainted state?

Mahoney concedes that his argument could be viewed as a suggestive of the philosophy that the means justifies the end: a conviction justifies unconstitutional governmental conduct.[203] However, he submits that such a result would be countenanced by the 'reasonable, dispassionate Canadian' who would not view the governmental conduct as having a negative impact on the repute of the

[203] Ibid at 474 (fn 64), he contends that the *Stillman* fair trial framework likewise encourages unconstitutional police conduct, leaving the prosecuting in a ***better*** and no worse position. He argues that this would be the case when the police have sufficient grounds to obtain a warrant, but they consciously decide to conduct the search unlawfully, without a warrant. Drugs found on the premises, he contends, would be ***admissible*** because it would inevitably have been discovered by alternative, lawful means. It is submitted that this argument of Mahoney loses sight of the fact that the evidence would not be ruled ***admissible***, but would at that stage of the assessment be ruled not to affect trial fairness. Its admissibility would have to be further assessed during the second phase or leg. In other words, it should be determined whether the infringement was serious: for instance, a violation that is deliberate is deemed to be more serious – a factor that swings the pendulum in favour of exclusion; and what effect exclusion would have on the repute of the justice system. These two factors are discussed in chapter 5. However, section 529.3 of the Canadian Criminal Code has subsequent to the *Feeney* judgment, virtually neutralised the notion that a warrantless entry unto a dwelling-house is *prima facie* unreasonable. This was achieved by the inclusion of a lowered threshold of a reasonable suspicion and justifications that police conduct was aimed at preventing the destruction of evidence or imminent harm or death to an occupant, thus effectively overturning the *prima facie* unreasonable criteria in *Feeney* - see also Pringle (fn 136 above) at 108.

criminal justice system.[204] It is submitted that the difference between interpreting ordinary legislation – where the quest to determine the intent of the legislature[205] is of paramount importance - and a constitution,[206] provides an explanation why the opinion of Mahoney and the approach to this issue by the Supreme Court in *Collins*[207] are fundamentally irreconcilable.

Maric holds the view that the *Stillman* fair trial framework has caused two possible approaches that could lead to different outcomes.[208] It can be construed either broadly or narrowly. A broad interpretation would consider the full extent of the accused's participation in the creation or discovery of the evidence. By contrast, a narrow interpretation would focus solely on the nature of the evidence obtained, thereby confining courts to determine whether the evidence fits into one of the categories mentioned by Cory J in *Stillman*. In other words, the courts would be preoccupied with a determination as to whether the

[204] Mahoney (ibid) at 473-475.

[205] The argument of Mahoney is based on this approach. See Mahoney (ibid) at 452, where he reasons as follows: "Section 24(2) must be applied with the integrity that comes from an adherence to the intent of Parliament as opposed to some hidden agenda based on a fear that Parliament drafted s 24(2) in error, or that the views [of the] Canadian public are an unworthy reference point"; further (ibid) at 462, where Mahoney states: "Parliament, after all, did not frame s 24(2) in terms of assessing the effect of ***exclusion*** of tainted evidence on the repute of the administration of justice – quite the opposite" (emphasis in original text); see further (ibid) at 463, where Mahoney writes as follows: "Parliament may have had any one of a number of purposes in enacting s 24(2)".

[206] See the approach to the interpretation of the Charter as applied in *Big M Drug Mart* (fn 68 above).

[207] Lamer J stated in *Collins* at par 31-32, that "disrepute" cannot be measured by means of public opinion polls. He reasoned that public opinion would regularly lean towards admitting the disputed evidence. However, he continued by mentioning that it is the duty of the courts to protect the accused from the tyranny of the majority: one of the purposes the Charter was designed to achieve.

[208] Fn 79 above at 97-101.

evidence constitutes a statement, a bodily substance or involves the use of the body as evidence or whether the violation constitutes a significant infringement of the right to human dignity: Only evidence that falls within this categorisation would be considered worthy of consideration for possible exclusion under the 'refined' fair trial requirement.[209] He prefers a broad approach that gives effect to the principle of the 'absence of pre-trial obligation', by arguing that a court should consider the entire chain of events that led to the discovery of the evidence. This view is supported. The focus of attention should rather be on whether the evidence was obtained through a process of unfair conscription. In my view, such an approach gives effect to the phrase 'all the circumstances' contained in section 24(2), while also promoting a purposive and generous interpretation of the section.

In most cases a physical object (real evidence) is used to commit a crime. In most cases physical evidence, as for example, DNA evidence, fingerprints and blood samples would bear the most weight in establishing a link between the accused and the crime.[210] It would therefore be important for the prosecution to ensure that physical evidence that links the accused to the crime be admitted, provided that it does not 'strike at the heart of a fair trial'.[211] Mindful hereof, the Supreme Court of Canada could not ignore the importance of 'real' evidence that would on many occasions secure a conviction. This category of evidence is considered under the fair trial directive and also when courts consider 'the effect of exclusion on the repute of the criminal justice system'. However, before the admission of 'real' or derivative evidence could be ruled not to unfairly impact on the trial fairness imperative, the discovery of the evidence should not be linked

[209] Stuart (fn 10 above) at 2, par 6, submits that the courts of Canada apply the narrow categorisation test when the conscription analysis is undertaken.

[210] Davison (fn 97 above) at 495.

[211] The words of Lamer J in *Collins*.

to the unconstitutional participation of the accused in its creation.[212] The practical effect of this approach is important, especially for an accused: Unlike during the period when the *Collins* fair trial framework was misinterpreted,[213] the admissibility of 'real' evidence should not be assessed on the basis of its 'separate existence', but whether it could be linked to unconstitutional conduct. In other words, the issue should be whether the accused had been conscripted against herself.

Most importantly, the derivative evidence inquiry follows the conscription analysis. Put differently, the derivative evidence inquiry plays a secondary role in relation to the conscription analysis, since it may only be embarked upon ***after*** the conscription analysis. This approach has, no doubt, resulted in a noteworthy restructuring of the *Collins* test. On the one hand, the impact of this approach has rendered the statement of Lamer J in *Collins*, to the effect that 'real' evidence would 'rarely operate unfairly for that reason alone',[214] almost without any legal force. In a word, the admission of 'real' evidence obtained as a result of conscription would render a trial unfair. In this way the refined fair trial directive advances due process concerns by ensuring that the trial of an accused complies with notions of fundamental fairness. On the other hand, it favours crime control interests, because it makes it undemanding to admit 'real' evidence that was not obtained as a result of conscription. This is specifically the case when one considers the nature of the link that should exist between the unwarranted conduct and the discovery of derivative evidence.

The nature of the link between the unconstitutional participation of the accused and the discovery of derivative evidence noticeably serves crime control values:

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[212] *Feeney* (fn 8 above) at paras 64, 67 and 68.

[213] See Roach (fn 129 above).

[214] *Collins* (fn 1 above) at 19.

It is more difficult under the new fair trial directive to exclude derivative evidence than self-conscriptive evidence. The following two factors make it less onerous for the prosecution to seek the admission of real evidence: Firstly, in the case of derivative evidence, the accused must show that her unconstitutional participation was the ***necessary*** cause for the discovery of the evidence.[215] Secondly, it is not required of the prosecution to show that the evidence would have been discovered by ***constitutional*** means. It would be sufficient to demonstrate that the evidence would have been procured, even in an unconstitutional manner.[216] This approach, on the other hand, confirms the suggestion made by Lamer J in *Collins* that the admission of 'real' evidence would 'rarely operate unfairly for that reason alone'.[217] In this regard, the differential assessment of the nature of the link between 'conscriptive' and derivative evidence serves both due process and crime control values: a balance that was occasionally neglected by the courts when applying the *Collins* fair trial test. This approach also ensures that due consideration is accorded first of all to due process concerns, without a total disregard to the truth-seeking function of the courts.[218] By contrast, the *Grant* approach suggests that the admission of real evidence would rarely render a trial unfair, even if it was discovered through the compelled participation of the accused in creating the evidence. Moreover, this could be the case, regardless of the fact that the evidence would not have been discovered by lawful means. Against this background, the *Grant* approach encourages unconstitutional police conduct.

It should be emphasised that, unlike the position in common law jurisdictions, the fair trial assessment does not involve a weighing up of due process and

[215] *Feeney* (fn 8 above) at par 70.

[216] Loc cit.

[217] *Collins* (fn 1 above) at 19.

[218] However, compare Hession (fn 152 above) at 119 who argues that the new approach undermines the truth-seeking function of the courts.

crime control interests.[219] Rather, the *Stillman* fair trial framework is focused on three steps, firstly, a determination as to whether the accused had been conscripted against herself in the creation or discovery of the evidence; and secondly, whether the evidence would have been discoverable in a lawful manner; and thirdly, a derivative evidence inquiry.

The derivative evidence inquiry appears to be loaded in favour of the inclusion of 'real' evidence. In terms of the refined test, the admission of 'real' evidence would not render the trial unfair even when ***unconstitutionally*** obtained, provided that the accused had not been compelled to create it.[220] However, in accordance with the values which the fair trial directive seeks to protect, the Supreme Court decision of *Stillman* has re-orientated the fair trial assessment by signifying that when evidence had ***not*** been obtained in a conscriptive manner, regardless of its nature, its admission would not render the trial unfair. Then again, the structure of the fair trial framework attenuates the effect of the derivative evidence inquiry, since the conscription analysis phase precedes the derivative evidence inquiry. Therefore, in the event that 'real' evidence had been obtained as a result of the accused having been conscripted against herself, admission thereof would render the trial unfair. A further finding that the evidence was non-discoverable would not require a derivative evidence inquiry.

Has the refined fair trial directive discarded the necessity for an independent assessment of the nature of the right violated? The Supreme Court has not clearly rejected this assessment. Mahoney[221] questions whether this factor could be meaningfully applied to the section 24(2) assessment.[222] His argument is

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[219] This appears to be the approach advocated in *Grant*.

[220] In such instances, the accused would be conscripted against herself.

[221] See also Delisle (1989) 67 CR (3d) 288 at 284.

[222] Fn 136 above at 458, formulating the rhetorical question as follows: "But is there any way to apply this factor in a meaningful way to the enquiry mandated by s 24(2)?"

properly founded on the fact that no hierarchy of rights has been established in the Charter.[223] It is further submitted that, in terms of the *Stillman* and *Feeney* fair trial analysis, a determination as to whether evidence had been obtained in a conscriptive manner cannot be determined without also considering the nature of the constitutional right violated. *Stillman* and *Feeney* confirm the fact that the fair trial imperative seeks to protect the following values: freedom from compelled conscription by means of a statement, use of the body or bodily substances or any significant breach of the inherent dignity of an accused.[224] Therefore, any Charter breach which involves a violation of any of these values is necessarily considered when the conscription analysis is undertaken.[225]

By and large, the 'refined' fair trial requirement has the important virtue of indirectly discouraging police officers from obtaining evidence in an unconstitutional manner. The same cannot be said of the *Grant* fair trial assessment.[226] As an integral part of the test, the derivative evidence inquiry functions as an effective tool in the truth-seeking task of the courts.

It was pointed out above that the *Grant* fair trial assessment consists of two phases and that the second phase introduces additional factors for consideration in the fair trial assessment. This approach of the *Grant* court, by attaching considerable weight to the seriousness of the infringement and the reliability of

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223 Loc cit. It is suggested that this argument should be applicable with equal effect to the South African s 35(5) provision.

224 Cory J defined conscriptive evidence in *Stillman* (fn 7 above) at par 80.

225 Rights triggered would be sections 7-10 of the Charter.

226 Stuart (fn 10 above) at 6, paras 17-18, highlights this effect of the *Grant* approach while discussing the second and third groups of *Collins* factors. He emphasises the general implications of the *Grant* approach to the interpretation of section 24(2) in a convincing manner when he argues as follows: "Where there are patterns of inclusion despite police breaches there will be less incentive for police to take the *Charter* seriously".

the evidence during the second phase, which in turn determines the degree of trial fairness, defies the principle of *stare decisis*. The case of *R v Ladouceur*[227] was not mentioned in *Grant*. In *Ladouceur*, the Ontario Court of Appeal held that the trial fairness assessment is[228]

> … ***unrelated*** to the ***seriousness of the violation***, and the trial will be fair or unfair ***to the same degree*** with admission of conscripted evidence.

This dictum in *Ladouceur* affirms the view that the fair trial prong contained in section 24(2) was designed, unlike the goal sought to be achieved by the *Wray* principle, to protect an accused from providing evidence for the benefit of the prosecution through a process of self-conscription. By attaching considerable weight to the reliability of the disputed evidence during the second phase of the fair trial analysis, the *Grant* court conveys the message that the unwarranted conscription of persons accused of having allegedly committed an offence, is not worthy of Charter protection when real evidence is in dispute. Such an approach does not make sound constitutional policy.[229] It is suggested that the focal point of the fair trial assessment should not be whether the evidence has reliable characteristics or whether the infringement is of a seriousness nature,[230] but

[227] (1990) 56 CCC (3d) 22, ("*Ladouceur*").

[228] Ibid at 44.

[229] Stuart (fn 10 above) at 5, par 15, makes a similar point, with regard to the *Grant* approach in relation to the second and third groups of *Collins* factors, when he argues as follows: "There cannot be a *de facto* two-tier system where one zone is *Charter*-free and the police ends always justify the means".

[230] See in this regard, the approach in *Bunning v Cross* (1978) 141 CLR 54 at 78-79, ("*Bunning*"), where the seriousness of the infringement and the effect of the violation on the cogency of the evidence are important factors in the admissibility assessment. In other words, the reliability of the evidence is of paramount importance in the admissibility assessment.

whether it was 'obtained in a manner' that is offensive to the purposes sought to be protected by the fair trial requirement.

Conscription should have the same effect on trial fairness, because the purpose of the trial fairness assessment is to avoid conscription, not to determine to what degree trial fairness has been compromised. A purposive interpretation of the fair trial requirement should therefore be determinative of whether admission of the evidence would render the trial unfair. It is suggested that a purposive interpretation of the trial fairness requirement dictates that when trial fairness has been impaired, that the violation that caused such harm should be regarded as a serious infringement.[231] It is difficult to appreciate how an infringement that results in conscription can nevertheless be typified as non-serious, when a purposive interpretation is undertaken.[232] The admission of conscriptive evidence will, in general, have a serious effect effect on trial fairness. Furthermore, based on the sound constitutional policy that the good faith of the police cannot convert an unfair trial into a fair trial,[233] the fact that the police officer did not 'grossly overstep the bounds of legitimate questioning',[234] should accordingly not be considered as a factor that transforms an unfair trial into a fair trial.[235]

A purposive interpretation of the trial fairness requirement indicates that the unfairness relates to the fact that the accused would have to confront evidence

[231] *Mellenthin* (fn 51 above) at 491; Roach (fn 27 above) at 10-78. See also the recommended overall approach suggested in chapter 6 par B 2.1, where the appropriateness of such an approach is embraced.

[232] This is the upshot of the *Grant* analysis – see par 47, where the court held that the acused had been conscripted against himself; see further par 59, where the impact on trial fairness was deemed to be "at the less serious end".

[233] *Hebert* (fn 63 above); *Elshaw* (fn 63 above); *Bartle* (fn 63 above).

[234] *Grant* (fn 9 above) at par 58.

[235] This is one of the implications of the *Grant* approach.

at her trial she would not otherwise have had to challenge if her Charter rights were respected. Moreover, the seriousness of the unfairness is contextualised when one bears in mind that the prejudice suffered by the accused would, in general, be caused by governmental agents overstepping the parameters of their authority, which is explicity designed to safeguard trial fairness. The trial fairness prong cannot, it is suggested, be determined by means of a consideration of the extent of the infringement and the reliability of the evidence, when section 24(2) directs the courts of Canada to focus on the manner in which the evidence had been obtained.

This does not mean that the seriousness of the infringement and the reliability of the evidence should be totally ignored. It is suggested that these factors should be considered under the second and third groups of *Collins* factors.

Having considered the functions of the conscription analysis, and the doctrine of discoverability, together with the derivative evidence inquiry, some might argue that the *Stillman* fair trial directive serves both the public interests in truth-seeking, on the one hand, and rights protection, on the other. The *Grant* fair trial assessment was designed to achieve a similar purpose, but it fails to take into account the purposes sought to be protected by the fair trial directive. By attaching considerable weight to the reliability of the evidence, it defies sound constitutional policy enunciated in seminal cases like *Collins*, *Ross*, *Mellenthin* and *Black*. In the light hereof, one cannot but conclude that the *Stillman* fair trial test better enhances the values sought to be protected by the fair trial directive, when compared to *Grant*. However, both approaches have inherent strengths and weaknesses.

To summarise, the 'refined' fair trial directive could be viewed as a response by the Supreme Court resulting from Canadian scholarly writers raising the following concerns in respect of the *Collins* fair trial framework:

1. the *Collins* fair trial directive serves as an automatic exclusionary rule once it had been established that the accused had incriminated herself as a result of a Charter violation.[236] In response, it was particularly emphasised in *Mellenthin* that more than 'conscription' is required to exclude evidence. *Stillman* confirmed the *Mellenthin* approach by confirming the appropriateness of a discoverability inquiry in order to determine trial fairness;
2. the *Collins* fair trial test leads to confusion and the incorrect admission of 'real' evidence solely because it is reliable[237] – in reply, the differential treatment of different kinds of evidence had been discarded;
3. the *Collins* fair trial requirement, as developed in subsequent cases, applied differential criteria to determine the nature of the link between the violation and the discovery of the evidence[238] – in reaction thereto, the nature of the link has been settled;

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[236] See Paciocco 1989 (fn 23 above) at 358; see also Sopinka, Lederman & Bryant (eds) in *The Law of Evidence in Canada* (1993) at 402-403.

[237] See *Ross* (fn 62 above); also *Dersch* (fn 51 above) at 6, where L'Heureux-Dube responded to the issue as follows: "… regardless of the nature of the evidence, real or self-incriminatory, if the impugned evidence could not have been discovered had the Charter violation not occurred, the fairness of the trial is effected and the evidence ought to be excluded pursuant to s24(2)"; see also Davison (fn 97 above) at 495, the scholarly writer highlights the danger of the different approaches to the admissibility of different kinds of evidence as follows: "The mechanical approach to the issue of 'physical evidence' employed by most courts since *Collins* has ignored the negative impact upon the fairness of the trial which might be occasioned by allowing the Crown to introduce improperly obtained evidence of 'location' which might lead to a conviction if other essential elements have also been proven"; also Delisle (fn 97 above) at 288 who suggests that the test should rather be whether any evidence, real or otherwise, was discovered as a result of a Charter breach. Compare Paciocco 1989 (fn 23 above) at 358-359.

[238] Roach (fn 27 above) at 10-52 to 10-53.

4. the discoverability analysis fails to distinguish between illegally obtained primary evidence and evidence derived from it, which would, more often than not, result in reliable real evidence being excluded.[239] In response, *Feeney* introduced a derivative evidence inquiry that distinguishes between the admissibility of primary and derivative evidence. It is argued below that the *Feeney* derivative evidence inquiry is loaded in favour of the admission of real, derivative evidence; and
5. the discoverability analysis is limited to real evidence discovered after a violation.[240] In response, the discoverability analysis was made applicable to any evidence discovered after a violation, including testimonial compulsion.

The criticism by Paciocco to the effect that the discoverability analysis is not based on legal principle and should therefore be discarded,[241] did not inspire the Supreme Court to abandon this concept. Rather, its function throughout the fair trial enquiry has been reinforced.[242]

The 'refined' fair trial requirement favours both the accused and the prosecution, because on the one hand, it does not limit the scope of its protection to the nature of the evidence discovered as a result of a violation. An additional effect

[239] Wiseman (1997) 39 *CLQ* 435 at 466-469. He demonstrates (ibid at 462-463), by referring to *Mellenthin*, that the marijuana resin found in the car of the accused was not derived from something created by the accused. In fact, the marijuana was found as a result of the unconstitutional search of the car. Since the marijuana found was not created, nor discovered as a result of anything the accused had said or done, he argues that the marijuana was in fact primary evidence and not secondary real evidence.

[240] Young (fn 97 above) at 411.

[241] Fn 23 above at 453; see also Stuart (fn 11 above) at par 9; compare Fenton (fn 95 above) at 307-308.

[242] The discoverability analysis is applicable during the three stages of the 'refined' fair trial assessment - see Mahoney, (fn136 above) at 464, fn 45 thereof.

of the 'refined' approach, is that it favours the accused when the evidence had been obtained in a conscriptive manner and would not have been discoverable – admission thereof would, in general tend to render the trial unfair. On the other hand, the 'refined' test favours the prosecution, because under the derivative inquiry, they do not have to demonstrate that the evidence would have been procured by constitutional means.

Stillman and *Feeney* discarded the real evidence ***distinction*** from the trial fairness inquiry, adopted due to a misinterpretation of *Collins*. The classification of the evidence (not as real or testimonial), but conscriptive and non-conscriptive is an important first step in the fair trial analysis. This classification ensures legal certainty, as it provides both the prosecution and legal practitioners with firm guidelines as to whether the disputed evidence constitutes either conscriptive, derivative or non-conscriptive evidence.[243] Penney[244] and Mahoney[245] argue that the fair trial approach of the Supreme Court is tantamount to the almost automatic exclusion of non-discoverable self-conscriptive evidence. This objection can be countered by the meaningful concession made by Mahoney, submitting that it is proper to conclude that 'permitting an unfair trial to proceed is likely to meet the section's threshold and bring the administration of justice into disrepute,'[246] but he hastens to add that such an 'elementary proposition'

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[243] Ibid at 470 Mahoney makes the following statement: "Lawyers respond to rules and appellate courts understandably seek to offer structured guidance for trial judges. In such climate, the intricate *Stillman* analysis and the 'no better/ no worse' rule are understandable".

[244] Fn 23 above at 252 argues that: "… the court's 'trial fairness' approach – which results in near-automatic exclusion of non-discoverable, self-incriminating evidence – should be abandoned".

[245] Fn 136 above at 451 he makes his point as follows: "The *Stillman* analysis, with its automatic exclusion of non-discoverable, conscriptive evidence, may be explicable as an attempt to ameliorate such result".

[246] Ibid at 455. He prefers an interpretation that focuses "directly on the phraseology of s 24(2)". In other words, he prefers a literal interpretation.

offers little assistance in the practical application of section 24(2). The *Stillman* and *Feeney* judgments suggest that an unfair trial would, by its very nature, be detrimental to the administration of justice. However, does this mean that 'all the circumstances' should be ignored?[247]

A number of Canadian commentators concur that the courts should continue to apply the discoverability analysis,[248] and it is submitted that it serves a significant purpose in the 'refined' fair trial analysis, since it enhances both the judicial integrity rationale and remedial imperative or corrective justice principle. It serves both rationales, because the discoverability analysis is undertaken to determine whether the evidence would have been obtained in a lawful manner: If not, the parties must be restored to the position they were in immediately before the violation (the remedial imperative), while by the same token, it conveys the message that the contaminated evidence is excluded because the courts do not want be associated with the unconstitutional conduct (the judicial integrity rationale). Exclusion for this reason is informed by the purposes of these rationales. Moreover, discoverability analysis seeks the important constitutional value of rights protection: It conveys the idea that when evidence cannot be procured in a lawful manner, the accused should be left alone. On this view, the concept of discoverability augments two fundamental interests: First, it underscores the fundamental concern that a justiciable Bill of Rights serves the function of ensuring that governmental power should be exercised within the ambit of the law and within the parameters of constitutional guarantees; and second, it accentuates the notion that the prosecution should not build its case against the accused in an unconstitutional manner.

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[247] See, in this regard, the recommendation in this thesis in chapter 6 par B.

[248] See the commentators listed in fn 197 above. However, compare Davies (fn 136 above) at 38; Stuart (fn 10 above) at 3, par 9. Stuart argues in favour of the abandonment of the conscriptive/non-conscriptive analysis. He points out that, with the abandonment of the conscriptive/non-conscriptive analysis, the doctrine of discoverability would be superfluous.

Mahoney is correct when he argues that a consideration of the nature of the right violated does not have a meaningful place in the trial fairness inquiry.[249] An approach that highlights the nature of the right infringed is vulnerable to the criticism that the Charter does not make provision for a hierarchy of fundamental rights. The same criticism would bear equal weight for the interpretation of section 35(5). Does this mean that 'the nature of the right violated' should completely disappear from the radar of the fair trial assessment? No, a purposive approach to the interpretation of the Charter, including section 24(2), demands that courts should determine the purpose sought to be protected by the right violated, while having proper regard to the rationale of section 24(2). What is important is the fact that neither the *Stillman*, nor the *Feeney* majority opinions applied this factor as an independent feature in their assessment of the fair trial requirement. This approach, applied in *Stillman* and *Feeney*, could be ascribed to the fact that the conscription analysis incorporates this factor during the first phase of the analysis.

In addition, *Feeney* and *Stillman* demonstrates that the modern concept of a fair trial is evidently not limited to the conduct of the trial itself, requiring of the courts simply to ensure that all the rules of evidence and criminal procedure had been complied with,[250] but in addition, it is also primarily aimed at preventing the prosecution from introducing evidence obtained by investigatory methods which, in the eyes of 'fair minded men and women' would be 'repugnant'.[251] It is submitted that the compelled incrimination of an accused in the shadow of a

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[249] Fn 136 above at 458-459, he argues as follows: "In a faithful application of the admissibility test set forth in s 24(2), the 'nature of the right' will only matter if it is possible to conclude that breach of certain rights in ss 7-10 will more readily bring the administration of justice into disrepute than will a breach of the remaining rights. Is this really a desirable line of enquiry?".

[250] Per Esson JA in *Schedel* (fn 63 above) at par 72.

[251] *Feeney* (fn 8 above) at par 89.

Charter violation should, particularly in a democratic society based upon the supremacy of the constitution, be considered as just as 'abhorrently' and 'insidiously unfair'[252] as compelling an accused to incriminate herself by means of a confession. If that were not to be the case, the Charter would, merely theoretically, be the supreme law. Surely, if courts were to condone governmental conduct that shows a clear disregard for Charter rights, 'fair minded men and women' would agree that section 24(2) of the Charter fails to fulfil the purpose it is called upon to serve: the protection of fundamental rights, including the avoidance of disrepute befalling the criminal justice system?

Paciocco is correct when he asserts that the *Stillman* fair trial framework is the equivalent of the *Collins* fair trial test, but in other contexts.[253] The *Grant* approach to the fair trial assessment can be regarded as a response by the Appeal Court of Ontario to the 'near automatic' exclusionary rule introduced by the *Stillman* fair trial requirement. To be sure, the proposed *Grant* fair trial structure proposes profound changes to the section 24(2) fair trial assessment. However, it is suggested that the Supreme Court of Canada should apply a purposive interpretation in section 24(2) challenges.

C. Determining trial unfairness under section 35(5) of the South African Constitution

This part of the thesis commences with a discussion of the 'nature of the evidence' in the admissibility assessment during the pre-constitutional era, covering the common law privilege against self-incrimination in South Africa and its bearing on the right to a fair trial. This is followed by a discussion of the

[252] Per Cory J in *Stillman* (fn 7 above) at par 81.

[253] Fn 23 above (2001) at 452.

admissibility inquiry during the constitutional era, focusing on the impact the Constitution has on the common law privilege against self-incrimination. The adoption of the *Collins* fair trial directive, as well as its implications played an important part in the interpretation of section 35(5). This issue, together with the implicit adaptation of the common law privilege against self-incrimination, is in turn scrutinised.

In accordance with the *Collins* fair trial directive and the approach followed under part B, this part of the chapter proceeds to consider the discoverability analysis as a factor to determine trial fairness in South Africa. After that, the discussion considers the 'nature of the right' that was violated. Next, three recent Supreme Court of Appeal cases are considered where the admissibility of real evidence under section 35(5) was at issue. The different approaches adopted by the Supreme Court of Appeal in these cases are discussed.

Van der Merwe is of the opinion that the courts of South Africa have interpreted the fair trial prong in such a manner that police failure to comply with the informational warnings may – to a degree – impact negatively on trial fairness, but that admission of the evidence obtained in this manner would not render the trial unfair within the meaning of section 35(5).[254] The validity of this argument is explored.[255]

Frequent reference is made here to judgments delivered in terms of the Interim Constitution. In my view, the approach followed in those judgements that is not inconsistent with the rationale of section 35(5) should be embraced when this provision is interpreted.

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[254] "Unconstitutionally obtained Evidence" in Schwikkard & Van der Merwe (eds) *Principles of Evidence* (2nd ed, 2002) at 215.

[255] See C 4 below.

The admissibility of unconstitutionally obtained evidence has featured in the South African courts in a number of cases,[256] and has frequently been subjected to scrutiny by South African scholarly writers.[257]

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[256] See, for example, *S v Motloutsi* 1996 1 SACR 78 (C), ("*Motloutsi*"); *S v Sebejan* 1997 1 SACR 626 (W), ("*Sebejan*"); *S v Nomwebu* 1996 2 SACR 396 (E), ("*Nomwebu*"); *S v Marx* 1996 2 SACR 140 (W), ("*Marx*"); *S v Mayekiso en Andere* 1996 2 SACR 298 (C), ("*Mayekiso*"); *S v Mathebula* 1997 1 BCLR 123 (W), ("*Mathebula*"); *S v Melani and Others* 1996 1 SACR 335 (E), ("*Melani*"); *Williams v S* [1997] 1 All SA 294 (NC), ("*Williams*"); *Khan v S* [1997] 4 All SA 435 (A), ("*Khan*"); *S v Shaba en Andere* 1998 1 SACR 16 (T), ("*Shaba*"); *S v Madiba* 1998 1 BCLR 38 (D), ("*Madiba*"); *S v Mphala and Another* 1998 1 SACR 388 (W), ("*Mphala*"); *S v Ngwenya and Others* 1998 2 SACR 503 (W), ("*Ngwenya*"); *S v Mokoena en Andere* 1998 2 SACR 642 (W), ("*Mokoena*"); *S v Aimes* 1998 1 SACR 343 (C), ("*Aimes*"); *S v Soci* 1998 3 BCLR 376 (E), ("*Soci*"); *S v Mfene* 1998 9 BCLR 115 (N), ("*Mfene*"); *Naidoo* (fn 16 above); *S v Gumede* 1998 5 BCLR 530 (D), ("*Gumede*"); *S v Malefo* 1998 1 SACR 127 (W), ("*Malefo*"); *S v Shongwe* 1998 9 BCLR 1170 (T), ("*Shongwe*"); *S v Mkhize* 1999 SACR 632 (W), ("*Mkhize*"); *S v Hoho* 1999 2 SACR 160, ("*Hoho*"); *S v Lottering* 1999 12 BCLR 1478 (N), ("*Lottering*"); *S v R* 2000 1 SACR 33 (W), ("*R*"); *M* (fn fn 19 above); *S v Mark and Another* 2001 1 SACR 572 (C), ("*Mark*"); *S v Monyane* 2001 1 SACR 115 (T), ("*Monyane*"); *M* (SCA) (fn 19 above); *Pillay* (fn 11 above); *S v Pitso* 2002 2 SACR 586 (O), ("*Pitso*"); *S v Mansoor* 2002 1 SACR 629 (W), ("*Mansoor*"); *S v Tsotetsi and Others* (3) 2003 2 SACR 648 at 651, ("*Tsotetsi*"); *S v Orrie and Another* 2005 1 SACR 63 (C), ("*Orrie*"); *Tandwa* (fn 12 above); *S v Mashumpa* 2008 1 SACR 126 (E), ("*Mashumpa*"); *Mthembu v S* (64/2007) [2008] ZASCA 51, ("*Mthembu*"). Although the judgments in, inter alia, *Motloutsi*, *Mayekiso*, *Marx*, *Mathebula*, and *Melani*, were not delivered in terms of section 35(5), but in terms of the Interim Constitution, it is submitted that those judgments do have significant persuasive value when section 35(5) is interpreted. See, in this regard, the discussion in chapter 2, under par E 2.

[257] For a general discussion of the fair trial requirement contained in section 35(5), see Van der Merwe (1992) 2 *Stell LR* 173 ("Van der Merwe 1"); Viljoen "The Law of Criminal Procedure and the Bill of Rights" in Mokgorro & Tlakula (eds) *The Bill of Rights Compendium* (2008); Meintjies-Van der Walt (1996) 3 *SACJ* 389; Schwikkard (1997) 13 *SAJHR* 446, ("Schwikkard 1"); Naude (1998) XXX *CILSA* 315, ("Naude 1"); Van der Merwe (1998) 2 *Stell LR* 129 ("Van der Merwe 2"); Van der Merwe (1998) 11 *SACJ* 462 ("Van der Merwe 3"); Skeen (1998) 3 *SACJ* 389; Steytler *Constitutional Criminal Procedure* (1998) 33-40; Schutte (2000) 13 *SACJ* 57; Naude (2001) 14 *SACJ* 38 ("Naude 2"); Zeffertt et al *South African Law of Evidence* (2003) 625-645; Van der

1. The nature of the evidence obtained after a violation: 'conscriptive' evidence

The nature of the evidence obtained after a violation of a fundamental right is considered under this heading, both in terms of the common law and during the constitutional era.

1.1 The pre-constitutional era: the common law privilege against self-incrimination and its impact on the right to a fair trial

The similarities between the legal developments in Canada and South Africa were discussed under part B of this chapter. This section of the work commences with a discussion of the admissibility of evidence in terms of the common law, and its impact on the right to a fair trial. Given the central role played by the privilege against self-incrimination in the admissibility assessment, this part of the chapter is focused on the impact the privilege had on the determination of trial fairness. The reason for the adoption of this approach is the following: When the courts of South Africa interpreted the right to a fair trial, they embraced the concept 'self-incrimination' from the Canadian Supreme Court when that court interpreted section 24(2). This leads to the following fundamental issue: Should the courts of South Africa apply the common law privilege against self-incrimination when they assess the trial fairness requirement under section 35(5)? More importantly, should the reliability of the evidence be considered at

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Merwe (fn 254 above); Schwikkard "Arrested, Detained and Accused persons" in Currie & De Waal (eds) *The Bill of Rights Handbook* (5th ed, 2005), ("Schwikkard 2"); De Jager et al *Commentary on the Criminal Procedure Act* (2005); Schwikkard "Evidence" in Woolman et al (eds) *Constitutional Law of South Africa* (Vol 1, 2nd ed, 2007), ("Schwikkard 3").

this stage of the admissibility assessment, since section 35(5) concerned with the manner in which unconstitutionally obtained evidence had been obtained?

The South African law of evidence, during the pre-constitutional era, was similar to that of England.[258] The law of evidence applicable in England on 30 May 1960,[259] governed the admissibility of evidence in South Africa.[260] The golden rule applicable to the admissibility of evidence in England and South Africa, on 30 May 1960, was that all relevant evidence is admissible, regardless the manner of its obtainment.[261] English case law reported after 1960 is not binding on South African courts. However, this does not mean that South African courts had to strike a pen through all English case law reported after 1960. On the contrary, even before the advent of the 1996 Constitution,[262] those decisions were deemed to bear considerable persuasive significance in South African law.[263] The Appellate Division[264] of the Supreme Court of South Africa,[265] for example, quoted with approval from the judgment written by Lord Hailsham in *Wong Kam*

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[258] For a discussion of the common law position in South Africa in general, see Kriegler *Hiemstra: Suid-Afrikaanse Strafproses* (5th ed, 1993) at 500; Van der Merwe "Sources of South African Law of Evidence and the Impact of Constitutional Provisions" in Schwikkard & Van der Merwe (eds) *Principles of Evidence* (2nd ed, 2002) at 24-31.

[259] This was the date immediately before the advent of South African independence from Britain.

[260] Van der Merwe 1 (fn 258 above) at 178-179.

[261] *R v Camane* 1925 AD 570, ("*Camane*"); *R v Matemba* 1941 AD 75, ("*Matemba*"); *Nkosi v Barlow NO en Andere* 1984 2 SA 148 (T), ("*Nkosi*"); *S v Nel* 1987 4 SA 950 (W), ("*Nel*").

[262] Section 39(1)(c) explicitly provides that South African courts "may" consider foreign law when interpreting the Bill of Rights.

[263] *S v Langa* 1963 4 SA 941 (N) at 944, ("*Langa N*"); see also *Van der Linde v Calitz* 1967 2 SA 239 (A) at 246, ("*Van der Linde*"); see further Kerr (1965) *SALJ* 169.

[264] Now known as the Supreme Court of Appeal.

[265] In *S v January; Prokureur-generaal, Natal v Khumalo* 1994 2 SACR 801 (A) at 807-808 ("*January*"); see also *Hoho* (fn 256 above).

Ming v The Queen[266] when judgment was delivered on the issue of the admissibility of a confession or admission.

Comparable to the position in Canada during the pre-Charter era, the admissibility of evidence in South Africa during the pre-constitutional era was premised on the dictum of Lord Goddard in *Kuruma*.[267] Relevant real evidence was, as a rule, admissible, no matter how it had been obtained. Admission thereof would not 'readily' render a trial unfair.

The benchmark South African common law case dealing with self-incrimination and the nature of the evidence it serves to protect, is *Camane*,[268] where Innes CJ wrote that the privilege against self-incrimination is a fundamental principle of South African law. The judge explained that this principle is applicable both during the pre-trial and trial phases. He further explained that in terms of the privilege no person may be compelled to give incriminating evidence against himself or herself. Innes CJ accepted that the privilege against self-incrimination was introduced to South African law by the English law of evidence and had become firmly rooted in our law. The judge emphasised that, regardless of its importance, its impact should be restricted according to the purpose it had been designed to serve. The scope of the privilege is determined by the nature of the

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[266] [1980] AC (PC), ("*Wong Kam Ming*"), where Lord Hailsham reasoned as follows in his reasons for judgment regarding the admissibility of confessions and admissions: "This [the exclusion of improperly obtained confessions and admissions] is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilsed society it is vital that persons in custody or charged with offences should not be subjected to ill-treatment or improper pressure in order to extract confessions". See also *Melani* (fn 256 above), where, *Whiteman v Attorney-General of Trinidad and Tobago and Others* (1991) LRC (Cons) 563 (PC), ("*Whiteman*"), a decision of the Privy Counsel was quoted with approval.

[267] Fn 37 above.

[268] Fn 261 above at 575.

evidence it seeks to protect. Against this background, the judge reasoned as follows:[269]

> What the rule forbids is compelling a man to give evidence which incriminates himself. 'It is not merely compulsion' says *Wigmore* (s2263) 'that is the kernel of the privilege, but ***testimonial compulsion***'. It is important to bear this in mind, because a man may be compelled when in Court, to do what he would rather not. His features may be of importance, and he may be made to show them, his complexion, his stature, mutilations or marks on his body, may be relevant points, and he may be compelled to show them to the Court. That is what *Wigmore* calls autoptic evidence (vol II, s1150) which is perceived by the Court itself, and which it has a right to see. In such cases the man is really passive. But he cannot be forced to go further and to give ***evidence against himself***.

This dictum was particularly influential in South African criminal procedural law. It also confirms that, like the pre-Charter position in Canada, the common law privilege is limited in its scope by the nature of the evidence it serves to protect. In effect, real evidence obtained as a result of compulsion fell outside the range of its protection.

Approximately two decades after *Camane*, Watermeyer JA further confined the privilege in *Matemba*,[270] by excluding the taking of palm prints of the accused, the taking of photographs, or her participation in an identity parade, from the protection granted by the privilege. The judge concluded that any such evidence, even when the accused had been compelled to provide it, would be admissible. The rationale for its admission is the fact that the accused, when participating in

[269] Loc cit. Emphasis added.

[270] Fn 261 above; see also *Nkosi* (fn 261 above).

the creation of this kind of evidence, is not compelled to 'give evidence or to confess'.[271] It is therefore necessary to determine what impact the common law privilege against self-incrimination had on the right to a fair trial.

The impact of this interpretation of the privilege against self-incrimination on the right to a fair trial was demonstrated in *S v Desai*.[272] Chaskalson SC[273] invited the court to embrace the notion of 'substantive fairness' into the scope of the right to a fair trial. Flemming DJP compared this suggestion to 'saddling an unruly horse'.[274] The judge reasoned that the exclusion of evidence, even if unfairly obtained, and which implicates the accused in the commission of a crime, would in general, be detrimental to the administration of justice.[275] He refused to develop the common law by expanding the scope of the right to a fair trial to

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[271] *Matemba* (fn 261 above) at 83.

[272] 1977 1 All SA 298 (W), ("*Desai*").

[273] In the post-constitutional era Chaskalson SC became the first President of the South African Constitutional Court.

[274] Fn 272 above at 30, when the judge stated: "During argument appellant's counsel changed tack. The submission was that a man may only be found guilty if the evidence which proves his guilt was obtained in a fair manner. This submission perhaps does not really suggest such a rule but states the impact of a somewhat different proposition: the court may exclude evidence which was unfairly obtained. As argument developed, it seemed that this was what counsel had in mind.

Again the improbability arises that responsible founding fathers of the new Constitution would prescribe a penal system which in part depends on such an unruly horse as 'impermissible unfairness' and in which those who willingly (even if reluctantly) and knowingly commit crime, go out as innocents. Such a state of affairs will certainly breed contempt for the law and for the legal system. Unless the discretion to exclude the truth is introduced by statute, these considerations should operate against developing the law in a way dissimilar to the position in English law as reflected in *Sang infra*".

[275] Loc cit.

include the concept of 'impermissible unfairness' into the assessment.[276] Flemming DJP held that criminal courts should only adhere to the principles of procedure as prescribed by the common law and the provisions contained in Acts of Parliament, because Parliament reigned supreme.[277]

At common law, the courts of South Africa, premised on *Kuruma*,[278] held that it had a discretion to exclude relevant evidence in two instances:

a) in the event that the prejudicial effect of the evidence is outweighed by its probative value; and
b) in cases where the evidence was improperly or unfairly obtained.[279]

The judge had to exercise her discretion as part of her duty to ensure that the accused is not deprived of a fair trial.[280] Despite the existence of this narrow exclusionary discretion, the South African courts were reluctant to exclude unlawfully obtained evidence on this basis.[281] This consequence could by and large be ascribed to the key role played by the inclusionary rule, inherited from English law. This, in turn, resulted in the immunisation of unwarranted police conduct from judicial scrutiny.

To summarise: During the pre-constitutional era, the scales weighed heavily in favour of the admission of unfairly obtained 'real' evidence, for the following reasons: Firstly, in most cases it would be ***relevant*** to the determination of guilt and consequently admitted; secondly, real evidence fell outside the scope of protection guaranteed by the common law privilege against self-incrimination; thirdly, the discretionary powers of the courts to exclude unfairly obtained

[276] Loc cit.

[277] Loc cit.

[278] Fn 37 above.

[279] See *Nel* (fn 261 above).

[280] Ibid.

[281] See *Desai* (fn 272 above).

evidence was sparingly exercised, because the frequent application thereof would have been construed as causing an affront to the 'golden rule' applicable to the admissibility of evidence – the relevance of evidence; fourthly, unlike the Constitutions of 1994 and 1996, the common law did not make provision for extensive procedural safeguards, collectively aimed at the protection of the right to a fair trial. It is assumed that the courts of South Africa were, for these reasons, reluctant to embrace the concept of the 'notions of basic fairness'[282] as a means of determining trial fairness. This development of South African law was left for the constitutional era, in a judgment delivered by the Constitutional Court in the high-ranking case of *Zuma*.[283]

1.2 The constitutional era

This part of the work starts off with a discussion of the adoption by the South African courts of the *Collins* fair trial framework, followed by a consideration of the scope and meaning of the concept 'fair trial' within the context section 35(5). The following critical issue is assessed: Does the concept 'fair trial' have the same meaning ascribed to it by our Canadian counterparts? More importantly, an issue intrinsically linked to this issue emerges: Should the principle of the 'absence of pre-trial obligation' be applied by our courts? It is argued that this principle has been adopted by the courts of South Africa, even in cases of identity parades, with the aim of preserving fundamental fairness in the entire criminal justice system – thus giving practical effect to the 'notions of basic fairness', rejected by South African courts during the pre-constitutional era.

The Constitutional Court has yet to interpret section 35(5). However, the Supreme Court of Appeal has, on four occasions, had the opportunity to

[282] *Desai* (ibid).

[283] Fn 13 above.

determine the admissibility of unconstitutionally obtained evidence in terms of this provision.[284] In three matters real evidence were excluded, but the same category of evidence was admitted in *M*. The *Collins* test was approved in a number of South African cases, including the Supreme Court of Appeal in the case of *Pillay*. However, in *Tandwa*, the Supreme Court of Appeal adopted a different fair trial framework.

1.2.1 The adoption of the Collins fair trial directive and the introduction of the 'real' evidence distinction into South African exclusionary jurisprudence

In *Melani*[285] Justice Froneman made the comment, after having considered the applicable law in various jurisdictions, that the criteria applied in *Collins* is as 'practical and appropriate' an approach he could find.[286] *Collins* has been referred to, either independently or in conjunction with *Jacoy*,[287] with approval in a number of other South African reported cases.[288]

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[284] In *M* (SCA) (fn 19 above); *Pillay* (fn 11 above); *Tandwa* (fn 12 above); *Mthembu* (fn 256 above). In *M* (SCA), real evidence was admitted. In the three other cases, real evidence was excluded. In *Mthembu*, the Supreme Court of Appeal excluded real evidence (a motor vehicle and a metal box), not because its admission would render the trial unfair, but because admission would be "detrimental" to the administration of justice. For this reason, *Mthembu* is discussed in detail in chapter 5.

[285] Fn 256 above. *Melani* was decided in terms of the Interim Constitution.

[286] Ibid at 351; see also *Mansoor* (fn 256 above) at 631, where the judge made the following comments: "Dealing more pertinently with the test to be applied, it seems to me that the test expressed by the Canadian Supreme Court in *R v Collins* 1983 (5) CRR 122 at 136 is an appropriate one"; *Soci* (fn 256 above) at 298; see also *Shongwe* (fn 256 above).

[287] Fn 63 above.

[288] See for instance, *Mkhize* (fn 257 above); *Mansoor* (fn 256 above); *Tsotetsi* (fn 256 above) at 651; *Malefo* (fn 256 above) at 155; *R* (fn 256 above) at 41; *Orrie* (fn 256 above) at 75; *Naidoo* (fn 16 above) at 91F-J, 92A-E; *Soci* (fn 256 above); *Shongwe* (fn 256 above) at 342.

Most notably, the Supreme Court of Appeal confirmed the aptness of the *Collins* fair trial requirement in *Pillay*[289] and *M*.[290] Although the Supreme Court of Appeal, in the former case, mentioned that sections 24(2) and 35(5) are not indistinguishable in all respects,[291] both the majority and minority judgments proceeded to consider and apply the factors listed in *Collins*.[292]

However, a number of the South African High Courts, including the Supreme Court of Appeal, have (like their Canadian counterparts), erred by emphasising the importance to be attached to the nature of the evidence, in this manner misconstruing *Collins*.[293] These South African decisions have introduced the

[289] Fn 11 above at par 87, the majority judgment quoting Lamer J with approval, where he wrote as follows: "If the admission of the evidence in some way affects the fairness of the trial, then the admission of the evidence would ***tend*** to bring the administration of justice into disrepute and, subject to a consideration of the other factors, the evidence generally should be excluded". (Emphasis in the original text); see also par 91; see further par 92, where the majority opinion approved of the criteria as follows: "In *Collins* (supra) at 134, Lamer J says that the applicable test is 'whether the admission of the evidence would bring the administration of justice into disrepute'. … At 35 of the *Collins* judgment involves some element of community views and concludes that 'the determination of disrepute thus requires the judge to refer to what he conceives to be the views of the community at large'." See further the minority dissenting judgment in *Pillay* at par 123.

[290] (SCA) fn 19 above at par 31 referred to *Jacoy* with approval.

[291] *Pillay* (fn 11 above) at par 87, where the majority judgment made the following comments: "Section 24(2) of the Charter, ***though not in the same terms as section 35(5) of the Constitution***, provides that where evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter such evidence 'shall be excluded' if it is established that, having regard to all the circumstances, its admission would bring the administration of justice into disrepute". (Emphasis added).

[292] Ibid at paras 92-93; see also the minority judgment at par 122.

[293] A contextual reading of *Collins* together with *Therens* and *Ross* clearly indicates that Lamer J did not incorporate the common law privilege against self-incrimination into section 24(2) jurisprudence. In *Ross* Lamer J explained that the "use of ***any*** evidence that could not have been

factor of 'the nature of the evidence' procured after a constitutional violation, as a central feature in the fair trial assessment. The Canadian experience of this approach was explored by Davison, who arrived at the conclusion that 'the courts appeared to brush quickly over the "fairness of trial" factors set out in *Collins* on the basis that the use of pre-existing real evidence "could not" affect the fairness of the trial negatively for the accused', with the result that such evidence was frequently admitted.[294] In *Naidoo*,[295] for instance, McCall J referred to the dictum in *Collins* where reference is made to the nature of the evidence and the need to distinguish between 'real' and testimonial evidence.[296] Thereafter, the judge concluded that the unlawfully monitored telephone conversations could not be classified as 'real' evidence, but because it was obtained without consent, it constituted self-incrimination.[297] It was held that the admission of such evidence would render the trial unfair. This aspect of the judgment suggests that the nature of the evidence, whether 'real' or testimonial, is the determinative factor under the trial fairness enquiry. In other words, the admission of unconstitutionally obtained 'real' evidence, as opposed to testimonial evidence, would not in general render a trial unfair. By contrast, the admission of testimonial evidence obtained in an unconstitutional manner would, in general,

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obtained but for the accused in the construction of the evidence for the purposes of the trial would render the trial unfair". Emphasis in original text.

[294] Fn 97 above at 495.

[295] Fn 16 above at 90H; see also *R* (fn 256 above) at 43, where Willis J held, as a reason for the admission of DNA evidence: "The evidence is real evidence"; see further *S v Mkhize* (fn 256 above) at 637.

[296] *Naidoo* (ibid) at 90D-E.

[297] Ibid at 90H-J to 91A-B. The judge evidently applied the principle of the "absence of pre-trial obligation". The evidence was discovered after a violation of the right to privacy, which resulted in self-conscription. However, it is suggested that this should not have been the end of the fair trial assessment. A discoverabiity analysis would have revealed that the evidence was discoverable – see *Burlingham* (fn 63 above); see also *Pillay* (fn 11 above). Admission of the evidence would therefore not have rendered the trial unfair.

render a trial unfair. The reason why the trial would be rendered unfair is because evidence thus obtained would be classified as having been obtained as a result of self-incrimination.

The confusion caused by the distinction between 'real' evidence and testimonial evidence is demonstrated by a judgment in an appeal to the Natal Provincial Division of the High Court of South Africa in *S v M*.[298] The accused was convicted in the court below of having raped his six-year old daughter over a period of several months during 1990. She watched a television programme during 1996 on child abuse and thereafter reported the matter to the police. The accused was convicted. The accused thereafter brought an application in the High Court to reopen his case in order to call two further witnesses. The one witness stated in his affidavit, annexed to the application, that he had sexual intercourse with the complainant. Before the evidence of one of these witnesses was led, application was made for a special entry to be made, recorded on the record in terms of section 317 of the Criminal Procedure Act.[299] The special entry was recorded because the investigating officer unduly influenced the witness to change his statement before the trial was reopened. As a result of the undue influence, the witness made another statement to the effect that his previous statement was false.

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[298] Fn 19 above. This case preceded the Supreme Court of Appeal matter of *M* (SCA) (fn 19).

[299] This section makes provision that an accused may, during the proceedings in a High Court or within a specified period after she had been convicted, make application that a special entry be made on the record, specifying in what respect the proceedings are alleged to be irregular or not according to law. Unless the presiding officer is of the opinion that such application is frivolous, she may enter such an application on the record of proceedings. On appeal, the court of appeal will consider the merits or demerits of the issues contained in the special entry. See Kriegler (fn 258 above) at 849-862.

During the reopened trial it emerged that the accused wrote a letter to the witness, asking him to commit perjury. The admissibility of this letter became the focal point of the dispute. Nicholson and Theron JJ held that, because 'the evidence of the contents of the two conversations' in *Naidoo* 'did not constitute real evidence', the court reasoned that 'if the spoken word is not real evidence then it is difficult to see how the written word can be'.[300] The court was accordingly of the view that 'the letter, exh E2', found in the possession of the witness, 'does not constitute real evidence'. Premised on this finding, the court concluded that admission of the evidence would render the trial unfair.[301] This judgment suggests that the manner in which the letter was obtained constituted ***testimonial*** compulsion.

M[302] is an appeal to the Supreme Court of Appeal of the judgment delivered by the Natal Provincial Division of the High Court of South Africa. Referring to *Jacoy*, Heher AJA[303] proceeded with the assertion that 'real evidence', unconstitutionally obtained 'is generally more readily admitted than evidence so obtained which depends on the say-so of a witness'.[304] The reason for this general view is because real evidence 'does not "conscript the accused against himself" in the

[300] Fn 19 above at 493.

[301] Ibid at 489. It must be pointed out that Nicholson and Theron JJ held in the alternative that in the event that the letter does not constitute real evidence, admission of the evidence would be detrimental to the administration of justice because of the seriousness of the violation.

[302] (SCA) fn 19 above.

[303] Harms and Brand JJA concurring.

[304] (SCA) fn 19 above at par 31; compare *Tandwa* (fn 12 above) at par 124, where Cameron JA highlighted the fact that "in later decisions, Canadian jurisprudence has rejected a strict distinction between real and testimonial evidence", and referred to *Burlingham*. At par 125 Cameron JA warned that "focusssing, as the High Court did [in this matter], on the classification of the evidence (distinguishing between the nature of the evidence – testimonial or real) is misleading, since the question should be whether the accused was compelled to provide the evidence".

manner of a confessional statement'.[305] One might ask: What then, is real evidence? The court defined real evidence with reference to its common law meaning, as being 'an object which, upon proper identification, becomes, of itself, evidence (such as a knife, photograph, voice recording, letter, or even the appearance of a witness in the witness-box)'.[306] Based on this definition, the letter was classified as real evidence, the admission whereof would not have a negative impact on trial fairness.[307]

In *Mkhize*,[308] Willis J was called upon to make a ruling on the admissibility of real evidence (a gun) found in the locker of the accused, without his consent and without a search warrant. The judge commenced his judgment by asserting that the evidence discovered after a violation of the right to privacy was relevant evidence, thus re-iterating the common law position.[309] Referring to *Collins* and *Jacoy*, the judge reasoned that in both these matters it was stressed 'that the test for the admission of real evidence is less stringent than that for other evidence'. While relying on *Jacoy*, where it was said that 'the admission of real evidence "irrespective of the Charter violation" will "rarely render the trial unfair",' the basis for a ruling that favours the reception of the evidence had been established. The evidence was accordingly admitted, because admission thereof would not render the trial unfair.[310]

The distinction between the admissibility of real evidence and testimonial evidence originates from an incorrect interpretation of *Collins*. It soon appeared that Lamer J did not suggest that unconstitutionally obtained real evidence

305 Loc cit.

306 Ibid at par 31. The court relied on the authorities referred to in fn 43 above.

307 Loc cit.

308 Fn 256 above.

309 Ibid at 636.

310 Ibid at 638.

should, in general, be included.[311] The opposite of what Lamer J meant is by implication suggested in *Naidoo*,[312] *M*,[313] and *Mkize*.[314] The approach followed in *Naidoo*, *M* and *Mkhize* would be tantamount to the re-incarnation of the rule of automatic inclusion, on the same basis as the common law inclusionary rule. One effect such an approach would have, is that the courts would be completely debarred from even considering whether ***unconstitutionally obtained*** relevant evidence should be excluded. Surely, this is not a purpose that section 35(5) seeks to achieve? The values of rights protection would be conceived by the public at large as inferior to that of crime control interests.[315] In this regard, the South African courts should be alive to the criticism leveled by Davison to the effect that the real evidence distinction may lead to the prosecution introducing unconstitutionally 'obtained evidence of "location" which may lead to a conviction if other essential elements have also been proven'.[316]

Another undesirable effect of such an approach would be the implied encouragement of police officers to deliberately infringe constitutional rights when they are aware that real evidence was used in the commission of the crime.[317] This message should not be conveyed to the police, especially by the

[311] See *Ross* (fn 62 above); see also *Mellenthin* (fn 51 above); see also *Tandwa* (fn 12 above) at paras 124-125.

[312] Fn 16 above.

[313] (SCA) fn 19 above.

[314] Fn 256 above.

[315] Godin (1995) *U T Fac Law Rev* 49 at 66.

[316] Fn 98 above.

[317] See in this regard Ally (fn 18 above) at 69, where it is argued as follows: "This situation, it is submitted, would more often than not, and for obvious reasons, result in a trial that is not substantively fair. … If law enforcement agents knew that, for instance, a gun (real evidence) was used to execute a murder, they could consciously violate the constitutional rights of an accused, well knowing that the discovery of the weapon used would be admissible in court despite a deliberate violation of the Bill of Rights".

courts of South Africa. Ostensibly with the aim to eliminate the subsistence of any such message, the Supreme Court of Appeal in *Pillay*[318] declared that the admission of real evidence could compromise trial fairness if the accused had been compelled to participate in its creation or location and which would not have been discovered by lawful means.[319]

1.2.2 The meaning and scope of the concept 'fair trial' and the factors to be considered to make the assessment

The scope and content of the right to a fair trial should be determined by the goal it seeks to achieve, while having due regard to the general purposes and values enshrined in the Bill of Rights.[320] This approach to the interpretation of section 35(5) implies that presiding officers should correlate their findings with regard to the effect of unconstitutionally obtained evidence on trial fairness, to the broader purposes served by the Bill of Rights.[321] It is submitted that the primary purpose sought to be protected by the fair trial directive contained in

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[318] Fn 11 above.

[319] Ibid at par 89. In casu, it was held that the real evidence would have been discovered without the infringement. Trial fairness was therefore not compromised. See also *Tandwa* (fn 12 above) at paras 124-125.

[320] *Big M Drug Mart Ltd* (fn 68 above); see also *Makwanyane* (fn 16 above) at par 9; *Melani* (fn 256 above) at 347-348, where Froneman J reasoned as follows: "The purpose of the right to counsel and its corollary to be informed of that right (embodied in s25(1)(c) [of the Interim Constitution] 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". See also *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC), ("*Fose*") at par 195, where Kriegler J reasoned that the nature of a remedy is determined by the purpose it serves to protect. However, it must be mentioned that these South African cases were decided before the advent of section 35(5).

[321] *Makwanyane* (fn 16 above); *Mills* (fn 68 above); *Gamble* (fn 68 above); Roach (fn 27 above) at 3-15.

section 35(5), is the ***prevention of self-conscription*** and the need to ensure that an accused is treated fairly throughout the criminal justice process. Froneman J acknowledged this purpose in *Melani*,[322] when he reasoned that the rationale for the exclusion of evidence obtained as a result of an infringement of the right to legal representation is not to be found in its unreliability, but 'to ensure that the accused is treated fairly in the ***entire*** criminal process'.[323] Determining whether admission of the evidence would tend to render the trial unfair, the judge added to his reasoning as follows:

> In a very real sense these [the right to legal representation and to be informed thereof] are necessary procedural provisions to give effect and protection to the right to remain silent and the right to be protected against self-incrimination.

This passage explains, firstly, that ***the nature of the right*** violated is an important factor to be considered in the trial fairness assessment; and secondly, the reason why the failure to inform an accused of her right to legal representation impacts negatively on her right against self-incrimination and, inevitably the fairness of the trial. The gist of the judgment in *Melani* is that certain rights contained in the Bill of Rights inherently serve to protect an accused against self-conscription and are, for that reason, worthy of protection. In addition, the judgment points out that conscription inherently impacts negatively on trial fairness.

The admissibility of real evidence under section 35(5) was decided by the Supreme Court of Appeal in *Pillay*.[324] The majority judgment quoted with

[322] Fn 256 above.

[323] Ibid at at 348-349.

[324] Fn 11 above.

approval from the decisions in *Thompson Newspapers*[325] and *Burlingham*.[326] The Canadian Supreme Court reasoned in these cases (the reasoning of which was endorsed in *Pillay*), that the issue of the impact of unconstitutionally obtained evidence on trial fairness depended not on the nature of the evidence,[327] (real or testimonial) but whether the accused had been conscripted against herself.[328] Thus, in South African context, the prevention of conscription is at the core of the right to a fair trial. Embracing the ***discoverability analysis*** as a further requirement in the fair trial assessment,[329] the majority judgment in *Pillay* was of the opinion that the reasoning of the judges in the mentioned cases were 'apposite to the case at bar'.[330] However, this judgment did not put an end to the quest for the values that the fair trial imperative under section 35(5) seeks to protect. In the recently decided case of *Tandwa*,[331] the Supreme Court of Appeal revisited this issue and preferred an approach that allows for the exercise of a

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[325] Fn 63 above.

[326] Fn 63 above.

[327] Fn 11 above at par 88, where the majority judgment quoted with approval from *Burlingham* as follows: "However, I find that in jurisprudence subsequent to *Collins*, this court has consistently shied away from the differential treatment of real evidence". The court also found confirmation for this approach in *Colarusso* (1994) 19 CRR (2d) 193 at 216, where La Forest J said the following: " …. where it was noted that the mere fact that impugned evidence is classified as either real or conscriptive should not in and of itself be determinative".

[328] Loc cit. See also *Tandwa* (fn 12 above) at par 125.

[329] Loc cit. The majority judgment quoted with approval from *Thompson Newspapers*, where La Forest J reasoned as follows, explaining what the discoverability analyses entail: "The fact that the evidence already existed means that it could have been discovered anyway. Where this is the case, the accused is not forced to confront any evidence at trial that he would not have been forced to confront if his Charter rights had been respected. In such circumstances, it would exclusion rather than admission of evidence that would bring the administration of justice into disrepute".

[330] Loc cit.

[331] Fn 12 above. Judgment was delivered on 28 March 2007.

discretion, in terms whereof the competing societal concerns are to be weighed up to determine trial fairness.[332]

Cameron JA suggested that, based on *Key v Attorney-General, Cape Provincial Division*,[333] the severity of the rights infringement and the degree of prejudice suffered by the accused should be 'weighed against the public policy interest in bringing criminals to book'.[334] The judge explained that rights violations should be regarded as 'severe' when 'they stem' from police abuse. Conversely, rights infringements should not be regarded as severe, 'and the resulting trial not unfair, if police conduct was objectively reasonable and neither deliberate nor flagrant'.[335] The judge in turn considered the role of the prejudice factor: The prejudice suffered by an accused would be high 'when there is a close causal connection' between the infringement and the 'subsequent self-incriminating acts of the accused'.[336] By necessary implication, when the causal link between the infringement and the conscriptive conduct is remote, the degree of prejudice suffered by the accused would be trivial. Considering the public interest in crime control, Cameron JA pointed out that the admission of real evidence – 'however vital for ascertaining the truth' – obtained as a result of compulsion, or 'as a result of torture, violates the accused's fair trial right at its core'.[337]

The approach suggested by Cameron JA is analoguous to the *Grant*,[338] *Lawrie v Muir*,[339] and *Bunning*[340] analyses of the fair trial requirement. The courts in

[332] Ibid at par 117.

[333] 1996 4 SA 187 (CC) at par 13, ("*Key*").

[334] *Tandwa* (fn 12 above) at par 117.

[335] Loc cit.

[336] Loc cit.

[337] Ibid at par 120.

[338] Fn 9 above.

[339] (1950) SC 19 (HCJ), ('*Lawrie*').

Scotland and Australia follow what is termed the 'intermediate' approach to improperly obtained evidence.[341] In terms of this approach, the counterveiling public interest concerns are balanced in order to determine whether the trial of the accused would be fair. In both Scotland and Australia, exclusion of the disputed evidence hinges closely on the seriousness of the infringement.[342] In Scotland, the courts apply a presumption in favour of or against admission of the disputed evidence.[343] The Australian courts determine admissibility without taking any presumptions into account.[344] The judge exercises a broad discretion, guided by competing societal concerns. This is not the case in Canada and should likewise not be the case in South Africa. The criteria introduced by Lamer J in *Collins* serve to set out the scope, while it simultaneosly functions as a guide to Canadian courts as to how their discretion should be exercised.[345] It is

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[340] Fn 230 above.

[341] Skeen (fn 257 above) at 393; Zeffertt et al (fn 257 above) at 628

[342] In respect of the position in Scotland, see Skeen (loc cit), where he sums up the position as follows: "Whether an irregularity ought to be excused depends on the nature of the irregularity, the circumstances under which it was committed and whether it was deliberately committed to obtain the evidence"; for the Australian position, see *Bunning* (fn 230 above) at 78. Stephen and Aicken JJ considered the following factors in *Bunning* to decide the admissibility dispute: whether the infringement was committed deliberately or recklessly; the ease with which the law might have been complied with; the nature of the offence charged; and the interests that the legislature aimed to protect in imposing limits on policing authority.

[343] *Lawrie* (fn 339 above); see also Zeffertt (fn 257 above) at 628.

[344] *R v Ireland* (1970) 126 CLR 321 (Aust HC), ("*Ireland*"); *Bunning* (fn 230 above).

[345] *Collins* (fn 1 above) at 137; see also *Therens* (fn 55 above) at 654, where Le Dain J described the nature of the section 24(2) discretion in the following terms: "Section 24(2) involves the application of a broad test or standard, which necessarily gives a court some latitude, but that is not, strictly speaking, a discretion. A discretion exists where there is a choice to do one thing or another, not merely because what is the application of a flexible standard. Under the terms of s. 24(2) where a judge concludes that the admission of the evidence would bring the administration of justice into disrepute, he or she has a duty, not a discretion, to exclude the evidence. This

submitted that this criteria should serve a similar function in the interpretation of section 35(5). For this reason and the reasons mentioned elsewhere,[346] it is submitted that Cameron JA erred when he relied on *Key* to determine the fair trial prong under section 35(5). Most importantly, the approach adopted in *Collins* indicates that, in order to faithfully give effect to the terms of section 35(5), this provision should be interpreted in a purposive manner. It is further suggested that the approach applied by the *Pillay* court, unlike that employed in *Tandwa*, enhances the goals sought to be protected by the fair trial requirement.[347]

The *Tandwa* approach suggests that, despite a finding that an infringement compromised fundamental rights aimed the prevention of conscription (that is, the trial fairness test in terms of the *Pillay*), the evidence may nevertheless be admitted on the ground that the prejudice sufferred by the accused was marginal and the infringement should therefore not be regarded as serious. This may be the case even in instances where the accused had been conscripted against herself, because the 'good faith' of the police is considered as a relevant factor, even at this stage of the analysis. Furthermore, a consideration of the

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distinction is of some importance, of course, with reference to the scope of review of a determination under s. 24(2)".

[346] See chapter 6 par A 3.1 and A 3.3 below. The admissibility assessment applied in common law jurisdictions was followed in *Motloutsi* (fn 256 above), *Madiba* (fn 256 above), and *Shongwe* (fn 256 above). In these matters the counterveiling public interests were balanced to determine trial fairness. It was correctly held in *Naidoo* (fn 16 above), that since the date that section 35(5) came into effect, the "wide discretion" relied upon in *Motloutsi* should not be applied.

[347] Compare Schwikkard 2 (fn 257 above) at 794. Schwikkard suggests that the approach followed in *Lawrie* (fn 339 above) be applied when the courts of South Africa interpret section 35(5). Such an approach is comparable with the approach followed in *Tandwa*. However, compare Steytler (fn 257 above) at 36-37, who is of the view that trial fairness should be considered having regard to the listed and unlisted rights contained in section 35(3), as well as the prevention of conscription. This approach of Steytler is supported.

'current mood' of society[348] at this stage of the analysis is suggestive of the notion that the normative value of fundamental rights aimed at protecting trial fairness concerns should be diluted in order to accommodate crime control interests. In other words, if an infringement did not taint the reliability of the evidence, such as a confession obtained as a result of torture, there would be a strong likelihood that admission of the evidence would not render the trial unfair within the meaning of section 35(5). In the case at bar, the fact that the evidence had been derived from incriminatory conduct arising from torture, saved it from admission. The obtainment of evidence by means of torture is not justifiable to any degree in a democratic society based on human dignity.[349] The problem is that the *Tandwa* judgment suggests that, in principle, the infringement of any other fundamental right should be determined by considering the extent of the prejudice caused by the infringement in relation to factors associated with the public interest in crime control. This assessment would inevitably lead to findings that although trial fairness has been impaired – which is, per se, 'detrimental' to the justice system – that the reception of the evidence could nevertheless not be equated with trial unfairness within the meaning of section 35(5).[350]

The argument that an infringement may lead to a degree of trial unfairness was raised in the Canadian case of *R v Meddoui*,[351] but rejected. Pottow correctly argues that once it is understood that an infringement 'diminishes' or 'affects'

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[348] *Tandwa* (fn 12 above) at par 121.

[349] See *Mthembu* (fn 256 above) at par 32, where Cachalia JA explained as follows, relying on Article 12 of the Convention Against Torture (ratified by South Africa on 10/12/1998): "The absolute prohibition on the use of torture in both our law and in international law therefore demands that 'any evidence' which is obtained as a result of torture must be excluded 'in any proceedings'."

[350] See Van der Merwe (fn 254 above) at 215.

[351] (1990) 2 CR (4th) 316 at 319, ("*Meddoui*"). See Pottow (fn 136 above) at 43, fn 33.

trial fairness, it 'seems difficult to accept that a free and democratic society will countenance a "somewhat" unfair trial' when a person's freedom is at stake.[352] Would the fact that the courts are prepared to shut their eyes to a 'partly' unfair trial caused by constitutional infringements that conscripted an accused against herself, not be harmful to the reputation of the criminal justice system? More importantly, the danger of such an approach is that it may lead to the regular admission of real evidence, despite the fact that the accused had been conscripted against herself.

What factors should be considered within the context of the South African fair trial requirement under section 35(5)?[353] The relevant factors can be summarised as follows: a) the fair trial requirement evidently seeks to protect an accused whose constitutional rights had been violated, from being compelled to participate in the creation of evidence against herself, at the behest of the state.[354] In this regard, a conscription analysis must be applied; b) a discoverability analysis should be undertaken to determine whether the evidence could have been discovered in any event by constitutional means;[355] c) the nature of the right violated should be taken into account;[356] and d) a significant infringement of the right to human dignity could be considered as a factor to

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[352] Loc cit.

[353] The Supreme Court of Appeal has suggested two conflicting approaches to determine trial fairness. This work follows the approach applied in *Pillay*. See the recommended overall approach, discussed in chapter 6

[354] See the minority judgment in *Pillay* (fn 11 above) at par 125. The minority and majority judgments were not in conflict in this regard. Scott JA correctly reasoned as follows: "But implicit in this reasoning is the requirement that the original infringement involves the creation of evidence that would otherwise not have existed, ie an infringement involving self-incrimination". This approach confirms the fact that the primary value that the fair trial requirement seeks to protect is the prevention of conscription. See the majority opinion at par 88.

[355] Ibid at par 88.

[356] *Melani* (fn 256 above) at 348-349.

determine trial fairness. A consideration of the last factor is based on the reasoning of Ackerman J in *S v Dzukuda*; *S v Thilo*.[357] The judge made the heedful remark that the courts of South Africa should frequently remind themselves that the right to a fair trial should be understood while having due regard to the values sought to be enhanced by the Constitution.[358] These values are ***human dignity***, freedom and equality.[359] In the light hereof, some might be enticed to reason that, similar to the present-day section 24(2) jurisprudence,[360] the South African courts should be vigilant in protecting especially the value of human dignity when the trial fairness prong contained in section 35(5) is determined. However, it is ***not*** suggested that the courts of South Africa should follow Canadian precedent that dictates that in instances of the violation of the right to human dignity that – where the infringement cannot be classified as negligible – admission of the evidence thus obtained would render a trial unfair.[361]

In the premises, the meaning and scope of the right to a fair trial, within the context of section 35(5), serves an analogous purpose as that of its Canadian counterpart.[362]

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[357] 2000 (2) SACR 443 (CC) ("*Dzukuda*").

[358] Ibid at par 9-11.

[359] Section 1 of the South African Constitution; see also section 36, where these values are re-iterated.

[360] See *Stillman* (fn 7 above) and *Feeney* (fn 8 above).

[361] Ibid. See Van der Merwe (fn 254 above) at 225-226, who, in another context, holds the view that the courts of SA should not adopt the *Stillman* fair trial directive, because it would "disturb the well-settled distinction between self-incriminating testimonial communications and incriminating non-communicative real evidence" obtained from the body of the accused. He suggests that evidence obtained in this manner should be considered during the second phase of the section 35(5) assessment. See the writer's recommendation in this regard in chapter 6.

[362] See the reasoning of both the majority and minority judgments in *Pillay*.

To summarise, the *Collins* fair trial directive has been embraced by a number of South African courts. It has also emerged that the scope and meaning of the concept 'fair trial', within the context of section 35(5), coincides with the meaning assigned to that concept by the Supreme Court of Canada. This conclusion is confirmed by the combined effect of the judgments of Ackerman J in *Dzukuda*, read with the judgment of Froneman J in *Melani*, as well as the majority and minority opinions in *Pillay*. In a word, the rationale of the *Collins* and *Stillman* fair trial requirements is premised on the protection of the presumption of innocence and the right to remain silent. Based on these key pillars of the right to a fair trial, the prosecution may only deprive the accused of her liberty by proving its case against her without compelling her to testify because she had been forced to create evidence against herself during the pre-trial phase.[363] The *Tandwa* fair trial requirement is likewise concerned with the manner in which the evidence had been obtained. However, in determining trial fairness by balancing competing societal interests tend to lean towards crime control values and some might view this approach as verdict-centred. It would be regarded as verdict-centred because trial fairness is measured based upon whether the verdict is proper or unsafe. This explains why the 'good faith' of the police and the 'current mood' of society are included as factors in the assessment. Such an approach allows for exclusion only when the disputed evidence is unreliable or highly prejudicial.[364] By contrast, the approach adopted in *Pillay* is process-centred, since it is focused on the treatment of the accused by government agents, rather than the soundness of the verdict.[365]

Against this background, the following issue is considered next: Does the common law privilege against self-incrimination enhance the spirit, purport and

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[363] Pottow (fn 136 above) at 50; Wiseman (fn 239 above) at 440; Fenton (fn 95 above) at 303.

[364] Davies (2000) 29 CR (5th) 225 at 8.

[365] Loc cit.

objects of the fair trial directive contained in section 35(5)? If not, should it or has it been adapted?

1.2.3 The conscription analysis: adoption of the principle of the 'absence of pre-trial obligation'

Collins has proclaimed a conscription analysis as one of the factors to be considered when courts have to determine whether admission of the disputed evidence would render a trial unfair. Of paramount importance to this determination is the issue as to whether an accused had been compelled to incriminate herself. *Collins* mentioned the conscription analysis, while also referring to a privilege against self-incrimination. In a number of subsequent decisions it would appear that Canadian courts were under the impression that Lamer J had the common law privilege against self-incrimination in mind when he wrote that real evidence should be treated differently when compared to testimonial evidence. This confusion was not limited to the courts of Canada. It is argued in this work that the South African Supreme Court of Appeal similarly erred in *S v M*.[366] It is further contended that the common law privilege against self-incrimination has been developed or adapted by the courts of South Africa, in similar fashion as our Canadian counterparts. In addition, it is maintained that the approach adopted by the Supreme Court of Appeal in *M* is flawed and should for that reason be discarded.

Moseneke DP held in *Thebus and Another v S*[367] that the need to develop the common law arises in at least two instances: Firstly, when a rule of the common law is 'inconsistent with a constitutional provision'; and, secondly, even when it is

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[366] (SCA) fn 19 above. See *Tandwa* (fn 12 above) at par 125, confirming this view.

[367] 2003 10 BCLR 1100 (CC) at par 28, ("*Thebus*").

'not inconsistent with the Constitution, but may fall short of its spirit, purport or objects'.[368] In such instances the common law must be adapted, with the aim of cultivating it to grow within the 'objective normative value system' established by the Constitution.[369]

This part of the work considers whether the common law privilege against self-incrimination, within the context of the fair trial requirement contained in section 35(5), has been adapted or developed, firstly by the South African High Court, and secondly the Supreme Court of Appeal.

(a) The Provincial Divisions of the High Court and the adaptation of the common law privilege against self-incrimination as a means to determine trial fairness

Under this heading, judgments delivered in terms of the Interim Constitution are often referred to. This approach is followed for two reasons: Firstly, to demonstrate that the High Courts of South Africa must have appreciated, at an early stage, the fact that the common law privilege is not capable of effectively protecting infringed fundamental rights whenever real evidence is in dispute; and, secondly, that the approach followed in these judgements which are not incompatible with the rationale of section 35(5), should be embraced when this section is construed. It was submitted under C 1.2.2 above that the primary rationale of the fair trial prong contained in section 35(5) is the prevention of

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[368] Loc cit.

[369] Loc cit. However, see *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another Amici Curiae)* 2007 2 SACR 435 (CC); 2007 5 SA 30, ("*Masiya*"), where it was held that the development of the common law should not offend the principle of legality.

conscription. It is further submitted that these judgments seek to enhance comparable values.

S v Yawa and Another,[370] a matter decided in terms of sections 73[371] and 217 of the Criminal Procedure Act, may be construed as an example of the application of the principle of the 'absence of pre-trial obligation', even though it had not been mentioned. Nepgen J developed the interpretation of section 217 so as to ensure that the trial of the accused was not rendered unfair. In so doing, the judge disregarded the doctrine of *stare decisis* when he overruled the authoritative Appellate Division precedent in *S v Mabaso and Another*.[372] In *Yawa*, the accused was not informed of his right to legal representation after his arrest. At a later stage the accused made certain pointings-out, the admissibility of which was disputed by the defence on the grounds that the accused was unduly influenced and not informed of his right to legal representation. Nepgen J considered the judgment of Hoexter JA in *Mabaso*,[373] where the latter wrote:[374]

> There is much to be said for the view that a person should be informed of this right [the right to legal representation] immediately upon arrest, and perhaps this is a matter which might enjoy the attention of the Legislature. But to the best of my knowledge it has never been suggested that a failure to so inform an accused may render inadmissible an admission made by an accused to the police; or a pointing-out by him; or a confession made by him to a magistrate.

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[370] 1994 2 SACR 709 (SE), ("*Yawa*").

[371] This section provides for the statutory right to legal representation.

[372] 1990 3 SA 185 (A), ("*Mabaso*").

[373] Ibid.

[374] Ibid at 209.

Nepgen J considered several subjective factors which probably had an effect on the accused before he made the pointings-out; this, together with the fact that he had not been informed about his statutory right to legal representation, led the judge to conclude that the accused was 'unduly influenced' to make the relevant pointing-out.[375] Even though section 35(5) did not form the basis for the decision in this case, it could be read to signify that the compelled participation of the accused in the creation of evidence against herself after a violation of the right to legal representation, had an adverse impact on trial fairness. It is accordingly submitted that Nepgen J applied the principle of the 'absence of pre-trial obligation' (without mentioning it), because he focused on all the circumstances that led to the accused's participation in creating the evidence. Despite the fact that *Mabaso* directs that a failure to inform an accused of her right to legal representation does not authorise South African courts to exclude evidence, Nepgen held that evidence obtained in this manner warrants exclusion.

It is similarly suggested that Van Deventer J applied the principle of the 'absence of pre-trial obligation' in *S v Mhlakaza en Andere*,[376] where the disputed evidence was in the form of an identity parade. In this case, the accused objected to the parade being held in the absence of their legal representatives. They were, despite their protestations, compelled to participate in the parade. It is patently evident from the judgment that the court preferred not to apply the common law privilege against self-incrimination, because the reliability of the identity parade was not in dispute.[377] In fact, the privilege against self-incrimination was not

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[375] See the comment by Froneman J in *Melani* (fn 256 above), at 343 on the possible basis for this judgment being police impropriety. If this assumption of Froneman J is correct, then one would not be faulted in concluding that Nepgen J unwittingly applied the doctrine of the "absence of pre-trial obligation".

[376] 1996 2 SACR 187 (C), ("*Mhlakaza*").

[377] Ibid at 197: "Gevolglik was dit moontlik om as gevolg daarvan, soos aangevul deur die transkripsies en die getuienis van Luitenant Barkhuizen, enige potensieële geskille uit te skakel

mentioned. Under these circumstances, a strict application of the 'real evidence' distinction would have resulted in the reception of the evidence of the identity parade, because it constitutes real evidence and its flawless reliability characteristics would have outweighed its prejudicial effect.

Further, in terms of the common law privilege against self-incrimination, the participation of the accused in an identity parade would not have been regarded as 'testimonial evidence emanating from him'.[378] Nonetheless, the court held that admission of the identity parade evidence would render the trial unfair. The right to a fair trial is ensured by legal representation during the pre-trial phase – in this case, the identity parade.[379] It is suggested that a sound principled basis for

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ten aansien van die feite-kompleks waarop die beskuldigdes se advokate hul besware teen die uitkenningsgetuienis gebaseer het." Loosely translated by the writer, this means: It was consequently possible to eliminate any factual disputes with regard to which counsel for the accused based their objections in respect of the the identity parade. A ruling on the admissibility of the identity parade could, in other words, be made by considering the court record and the evidence of Lieutenant Barkhuizen.

[378] *S v Huma* (1995) 2 SACR 411 (W), ("*Huma*"); *S v Maphumulo* 1996 2 SACR 84 (N), ("*Maphumulo*"), where Combrink J, like Claasen J in *Huma*, quoted *Schwerber v California* with approval. Combrink J held at 89, in respect of the compulsory taking of fingerprints, "… whether it be voluntary given by them, or taken under compulsion in terms of the empowerment thereto, provided in s 37(1), would not constitute evidence given by the accused in the form of testimony emanating from them, and as such would not violate their rights as contained in s 25(2)(c), or 25(3)(d) of the [Interim] Constitution".

[379] Ibid at 199, where Van Deventer J reasoned as follows: "… aangesien die Hof van mening was dat 'n verdagte in Suid-Afrika tans konstitutisioneel geregtig is om aan te dring op regsbystand tydens 'n uitkenningsparade soos voorgeskryf deur reël 5 (*supra*) tensy die Staat die Hof miskien tevrede kan stel dat daar goeie redes was waarom regsbystand nie bekombaar was nie en dat die beskuldigde se regte, meer in besonder sy reg op 'n regverdige verhoor, geensins benadeel kon wees het deur die afwesigheid van 'n regsverteenwoordiger nie". Loosely translated, this reads as follows: Since the court is of the view that a suspect in South Africa is presently constitutionally entitled to a right to legal representation at an identity parade as dictated by rule 5 (above) unless the prosecution can possibly satisfy the court that good reasons exist as to why

the exclusion of the evidence of the identity parade would be that the accused has been compelled to participate in the creation of the evidence as a result of the constitutional breach. Therefore, admission of the evidence would tend to render the trial unfair. This principled approach was acknowledged by Van Rensburg J in *S v Hlalikaya and Others*,[380] where the judge reasoned as follows:[381]

> As I see the situation it [the right to legal representation] only extends to pre-trial procedures where … the State seeks the co-operation of the accused in order to protect the accused against an infringement of his rights.

The approach of Van Deventer J in *Mhlakaza* coincides with the rationale of the principle of the 'absence of pre-trial obligation' as well as the judicial integrity rationale: Reliable real evidence, obtained in violation of a pre-trial procedural constitutional guarantee, was excluded with the aim of ensuring that the accused is guaranteed a fair trial. It is suggested that the court also indicated that it would not be associated with the unconstitutional conduct of the police by admitting the disputed evidence. In this regard, the exposition of the principle of 'absence of pre-trial obligation', applied by Lamer J,[382] adds force to the reasoning of Van Deventer J in *Mhlakaza*, where Lamer J reasoned that an identity parade should not be regarded simply as pre-existing 'real evidence'. Instead, one should consider the purpose of an identity parade and how it could affect the fairness of the trial of an accused: He or she would be confronted with this evidence at the trial and probably has to respond to the evidence created as

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a legal representative could not be secured and that the rights of the suspect, more particularly the right to a fair trial, has not been compromised by the absence of a legal representative.

[380] 1997 1 SACR 613 (SE), ("*Hlalikaya*").

[381] Ibid at 615.

[382] In *Ross* (fn 62 above) at 139.

a result of his or her unconstitutional participation. Lamer J applied a purposive interpretation when he explained the implications of the participation of the accused under these circumstances as follows:[383]

> But secondly, and most important to the discussion here, the procedure of a line-up is designed to reinforce the credibility of identification evidence. In this sense the object of the line-up is to construct evidence that the accused was picked out from among a similar group of people, by a witness who was not prompted in any way to make that choice, and to settle the memory of the witness for purposes of the trial. When participating in a line-up, the accused is participating in the construction of credible inculpating evidence.

Froneman J added to this articulation of the principle of the 'absence of pre-trial obligation' in *Melani*,[384] where the court had to determine whether certain pointings-out made by the accused were admissible.[385] In *Melani* three accused

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[383] Loc cit.

[384] Fn 256 above.

[385] It is submitted that Claasen J applied the principle of the 'absence of pre-trial obligation' in *Mathebula* (fn 256 above), holding that the accused's rights to legal representation and the right not to be compelled to make an admission or confession, had been violated. The judge held (ibid at 132) that whenever the State wishes to embark on any pre-trial procedure that seeks the co-operation of the accused, and which could result in an erosion of or encroachment upon her rights, any such procedure would have to be preceded by a repetition of the warning of all his constitutional rights. The judge based this reasoning on the dictum contained in *Melani*, where reference was made to Ratushny. See also *Soci* (fn 256 above) at 298, where reference is made to Ratushny, and the principle of the 'absence of pre-trial obligation' was applied. It is further suggested that the Ratushny principle was applied in *Motloutsi* (fn 256 above) although not explicitly mentioned, because real evidence was discovered as a result of conscription (the right to privacy was infringed). However, compare the reasoning in *Gumede* (fn 256 above), where a Full Bench, in an opinion written by Magid J, while following a literal interpretation of the

were charged with murder, robbery, theft and the unlawful possession of fire-arms and ammunition. The identity of the culprits who allegedly committed the offences, were in dispute. The pointings-out by the accused were essential evidence connecting them to the alleged offences. The admissibility of these pointings-out were contested by the accused on two grounds: firstly, based on the common law, the accused alleged that such pointings-out were involuntarily made; secondly, that a number of the constitutional rights of the accused were violated and that the evidence thus obtained should be excluded. Froneman J considered the admissibility issue firstly in terms of the common law position, unaffected by the Constitution, and ruled the pointings-out made by accused 3 to be inadmissible. The pointings-out made by accuseds 1 and 2 were held to have been freely and voluntarily made and could therefore not be ruled inadmissible on the same grounds. The court thereafter considered whether the pointings-out made by accuseds 1 and 2 constituted violations of any of their constitutional rights guaranteed by sections 25(1)(c), (2)(a), (c), and (3)(d) of the Interim Constitution.[386]

In the absence of a constitutional exclusionary rule, Froneman J developed an exclusionary ***rationale*** based primarily on section 24(2) of Canada, in this way embracing the principle of the 'absence of pre-trial obligation' into South African jurisprudence, when he wrote:

> The original value served by the exclusion of involuntary admissions and confessions as evidence in a criminal trial was the removal of the potential unreliability of that evidence. Evidence obtained in breach of the fundamental rights embodied in the specific

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provisions of the Constitution, held that an accused does not have to be informed of her right to legal representation at every stage of the investigative process. See also *Shaba* (fn 256 above); *Shongwe* (fn 256 above) at 338.

[386] See Annexure "A", which contains selected sections of Chapter 3 of the Interim Constitution.

> provisions of ss 25(1), 25(2) and 25(3) already referred to, may well lie in preserving the fairness of the criminal justice system as a whole and not only the fairness of the actual trial itself. Insofar as the common law may not have fully recognised this additional basis for the exclusion of improperly obtained evidence, the relevant provisions of s 25 of the Constitution in my view puts the matter beyond doubt (cf *S v Zuma and Others* (*supra* at 586c-588d) (SACR), 658-9 (SA)[paras 30-3]).

Citing[387] Ratushny,[388] the leading proponent of the principle of the 'absence of pre-trial obligation',[389] Froneman J was of the opinion that the rationale for exclusion should be based on the preservation of the fairness of the entire criminal justice system – from the pre-trial phase, including the trial.[390] The fairness of the entire criminal justice system is predicated upon recognition of the fact that the accused should be treated fairly. Fairness to the accused during the pre-trial phase, in turn, is ensured by the constitutional guarantee of the right to legal representation, because '[t]he right to consult with a legal practitioner during the pre-trial procedure and especially the right to be informed

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[387] Fn 256 above at 348-349.

[388] Beaudoin and Ratushny (fn 23 above) at 462; see also the following cases where Ratushny was cited with approval: *Sebejan* (fn 256 above) at par 52; *Mathebula* (fn 256 above) at 131.

[389] According to Paccioco 1989 (fn 23 above) at 75.

[390] This argument is based on the view held by Beaudoin and Ratushny (fn 23 above) at 462. Froneman J elaborated as follows: "The purpose of the right to remain silent and its corollary to be informed of that right (embodied in s 25(1)(c)) is thus to protect the right to remain silent … Sections 25(2) and 25(3) of the Constitution make it abundantly clear that this protection exists from the inception of the criminal process, that is on arrest, until its culmination up to and during the trial itself. This protection has nothing to do with a need to ensure the reliability of the evidence adduced at the trial. It has everything to do with the need to ensure that an accused is treated fairly in the ***entire*** criminal process: in the 'gatehouses' of the criminal justice system (that is the interrogation process), as well as in its 'mansions' (the trial court) (see Beaudoin and Ratushny at 462". (Emphasis in original).

of this right', is intimately linked to the 'presumption of innocence, the right of silence and the proscription of compelled confessions'.[391] Froneman J proceeded with his reasoning by emphasising that the purpose of the right to legal representation during the pre-trial phase has nothing to do with the 'need to ensure that the evidence adduced at trial is reliable', but serves to 'protect the right to remain silent, the right not to incriminate oneself and the right to be presumed innocent until proven guilty.'[392] To be concise: besides ensuring that the accused is not compelled to participate in the construction of evidence against herself, the right to legal representation furthermore serves to guarantee that she is treated fairly during the entire criminal process.

Put in a different way: The right to legal representation ensures that the constitutional rights of the accused are not violated during the pre-trial phase, thus preventing her to participate in the creation of any evidence against herself – the prosecution should prove the guilt of the accused without her unconstitutional participation in the creation or procurement of such evidence. For that reason, when the evidence is the product of a pre-trial obligation 'impose[d] upon the accused by the State,'[393] the evidence should be susceptible for exclusion.

In *Naidoo*,[394] McCall J referred with approval to *Melani*, holding that the violation jeopardised the 'right against self-incrimination'.[395] It has been noted above that the common law privilege against self-incrimination is limited in its scope to the exclusion of ***testimonial*** evidence obtained as a result of ***compulsion***. However, the conversations in the relevant case were not the product of

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[391] Ibid at 347.

[392] Ibid at 348.

[393] Paccioco 1989 (fn 23 above) at 77.

[394] Fn 16 above.

[395] Ibid at 527.

compulsion, in the sense required by the common law. The telephone calls of the accused were intercepted by the police without the knowledge of the accused. By referring to 'the right against self-incrimination' McCall J could therefore not have purported to refer to the common law privilege against self-incrimination, because he held that[396]

> To admit evidence provided by an accused person against himself without his knowledge as a result of the unlawful monitoring of his conversation with someone else would offend against the notions of basic fairness in no less a measure as than the admission of evidence of a confession or admission made by an accused person without having been informed of his right to legal representation, which has been held to result in an unfair trial in, for example, *S v Melani and Others* (*supra*) and *S v Marx and Another* 1996 2 SACR 140 (W).

It is submitted that the judge, by referring to *Melani* and the 'notions of basic fairness', as the basis for arriving at the conclusion that admission of the disputed evidence would render the trial unfair, is indicative of the fact that he had in mind the principle of the 'absence of pre-trial obligation'. The court in effect reasoned that the evidence had been obtained as a result of a serious pre-trial impropriety[397] (the right to privacy was violated), perpetrated by the police in the evidence gathering process, which caused the accused to produce the disputed evidence. The evidence was excluded on the basis that admission would render the trial unfair.[398] McCall J arrived at this conclusion by equating the unlawful monitoring of the telephone conversations with the reception of

[396] Loc cit.

[397] It is submitted that this factor is not applicable at this phase of the assessment, but during the next phase, discussed in Chapter 5 of this work.

[398] Fn 16 above at 527.

confessions or admissions in the shadow of a violation of the right to legal representation. A similar approach was adopted by the trial judge (but not in the Supreme Court) in *Mellenthin*.[399] It is suggested that the conclusion reached in *Naidoo* was incorrect. The evidence was indeed obtained after a violation of the constitutional right to privacy. The accused were therefore conscripted against themselves.[400] However, the court failed to, in addition, apply a discoverability analysis.

(b) The Supreme Court of Appeal and the adaptation of the common law privilege against self-incrimination as a means to determine trial fairness

The facts in the decision of *M*[401] is discussed under C 1.2.1 above. Heher AJA[402] had to consider whether the trial of the appellant complied with the 'notions of basic fairness', contained in section 35 of the Constitution. The Natal Provincial Division of the High Court had held that a letter written by the accused to a potential defence witness cannot be classified as real evidence.[403] The Supreme Court of Appeal disagreed, holding that the letter constitutes real evidence.[404]

Heher AJA held that the disputed evidence did not 'conscript the accused against himself', because the letter 'predated the threat and owed nothing to it'.[405] The point was made earlier that this approach is an example of the misconceived interpretation of the dictum of Lamer CJ in *Collins*. Heher AJA determined the

[399] Fn 51 above.

[400] See Part B 1 above for a discussion of the conscription analysis.

[401] (SCA) fn 19 above.

[402] Harms and Brand JJA concurring.

[403] *M* (SCA) fn 19 above.

[404] Ibid at par 31.

[405] Loc cit.

trial fairness requirement based on the real evidence divide – thus erring as did a a number of Canadian courts[406] by assessing the trial fairness directive without having due regard to the purpose the exclusionary rule was designed to serve: the exclusion of unconstitutionally obtained evidence if it ***had been obtained in a manner that violated a constitutional right***. The manner in which the evidence had been obtained should therefore be a key consideration. In the result, the nature of the evidence determined its admissibility, while disregarding 'whether it was obtained through a process of unfair self-incrimination'.[407] Concluding the trial fairness directive, the court held that despite the fact that the letter had been 'improperly obtained', its admission did not impact negatively on the trial of the appellant. The reason for this finding is that it had been unfairly obtained from a third party.[408] The effect of such an interpretation unduly limits the scope of the protection of fundamental rights, and should be discarded. It was argued in chapter three that section 35(5) aims to prevent the ***admission*** of unconstitutionally obtained evidence, regardless whether the rights of an innocent third party or that of the accused had been violated. The impact that this narrow interpretation, proclaimed by the Supreme Court of Appeal in *M*, might have on the repute of the justice system was demonstrated in chapter three and merits brief repetition: By limiting the scope of the protection guaranteed by section 35(5) to instances when the rights of the accused had been violated, the courts of South Africa would indirectly encourage the police to infringe the rights of the innocent in order to convict the 'guilty'. To

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[406] See Roach (fn 129 above) at 623; Roach 1 (fn 129 above). He notes that a number of Canadian appeal courts distinguished between real evidence and testimonial evidence (despite the dictum of Lamer J in *Ross*), holding that the admission of real evidence would not 'readily' render a trial unfair.

[407] Roach (fn 27 above) at 10-47, par 10.1040.

[408] (SCA) fn 19 above at par 31f-g; compare *S v Hena and Another* 2006 2 SACR 33 at 40, ("*Hena*"), where Plasket J, expounding section 12(1)(c) of the Constitution correctly held that it binds both the State and private persons.

allow the means to justify the end would inevitably be indicative of a judiciary that is amenable to condone unconstitutional police conduct. The correctnesss of this view held by the writer was confirmed by the Supreme Court of Appeal in the recently reported case of *Mthembu*.[409]

It was argued by the prosecution in *Pillay*, that the common law distinction between real evidence and testimonial evidence should be maintained when section 35(5) is interpreted.[410] This case is the sequel to the *Naidoo* case.[411] For the reason that this case is important in the South African section 35(5) jurisprudence, it warrants detailed discussion. SBV Services in Durban was robbed by a group of seven people of a sum of R31 million. The perpetrators used mobile phones during the course of the execution of the robbery. Armed with this information, the police approached the cell phone providers, who gave them information about the users of the mobile phones in the area where and when the robbery was committed. The police monitored the telephone lines of the suspects in terms of section 2 of the Interception and Monitoring Prohibition Act[412] after having obtained an order granting them permission to monitor the telephone calls. However, the order was illegally obtained, because the founding affidavit submitted to a judge in chambers contained false information. It was therefore common cause that the monitoring was, for this reason, illegal and violated the right to privacy of the suspects.

As a result of the monitoring of the telephone conversations of the suspects, the police knew that some of the money robbed from SBV was kept in the house of the accused. The police had reason to believe that the money was about to be removed from the house of the accused and that any delay on their part to seize

[409] Fn 256 above. Judgment was delivered on 10 April 2008.

[410] Fn 11 above at par 88.

[411] Fn 16 above.

[412] Act 127 of 1992.

it, would defeat the purpose of their search. They also suspected that the firearms used in the execution of the robbery might be on the premises. On the night in question, some 12 members of the SAPS, without warning, and without a search warrant, broke down the front door of the accused and entered.

The members of the police told the accused that she would not be prosecuted if she co-operated with them. This prompted her to tell the police that the money was hidden in the ceiling. The police recovered the sum of five million rand.

The Deputy Attorney-General and the legal representatives of the accused reached an agreement that the accused or one of her family members would be called to testify as state witnesses against Naidoo and his co-accused.[413] In return, neither the accused nor any of her family members would be prosecuted. However, neither the accused, nor a family member was called as state witnesses in the Naidoo trial. This was the case, because the *Naidoo* court held that the evidence of the illegal monitoring of conversations was inadmissible. As a result, the prosecution could not prove the guilt of the Naidoos, even in the event that the accused or her family members were called as state witnesses in that trial. The prosecuting authority therefore decided to prosecute the accused in the present trial and proved its case in the court *a quo* by relying on section 218(1) of the Criminal Procedure Act, showing that the real evidence (the money) was discovered in the ceiling of the accused.

On appeal, the defence contended that the court *a quo* erred by admitting the evidence of the discovery of the money, because of: a) the breach of the undertaking not to prosecute; b) the 'inadmissible confession' made by the accused about the location of the money. In deciding the latter issue, the judges

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[413] The full citation of the reported case in which she and a family member had to testify against Naidoo appears at fn 16 above.

writing the majority opinion and the judge writing the dissenting opinion, considered the provisions of section 35(5) of the Constitution.

The first factor considered by the court was a determination whether the admission of the evidence would render the trial unfair. Counsel for the prosecution, relying on *Collins*, contended that the discovery of the money did not render the trial unfair, because it was real evidence that existed independently from the violation of the accused's constitutional rights.[414] This contention was not followed, in view of the fact that the majority opinion held that 'the Canadian Supreme Court has since moved away from such an approach'.[415]

Considering whether admission of the evidence would render the trial unfair, the court answered this issue in the negative,[416] but it should be emphasised that such ruling was not based on the fact that the evidence was 'real evidence'. The majority opinion arrived at their conclusion by relying on *Burlingham*,[417] where Iacobucci J articulated the conscription analyses under section 24(2) as not being dependent 'on its nature as real or testimonial', but rather on 'whether or not it would only have been found with the ***compelled assistance of the accused***'.[418] Unlike the common law privilege against self-incrimination, where the nature of the evidence, 'real' or testimonial, is the focal point of the

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[414] Ibid at par 88. Counsel acting for the prosecution relied primarily on the following passage of the judgment delivered by Lamer J: "Real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the Charter". In addition, counsel based his contention on *R v Jacoy* (fn 63 above) and a passage in *Thompson Newspapers* (fn 63 above).

[415] Ibid at par 88; see also *Tandwa* (fn 12 above) at par 124-125.

[416] Ibid at par 90.

[417] Ibid at paras 88-89.

[418] Ibid at par 88. Emphasis added.

assessment, the Supreme Court of Appeal embraced – in its stead – the principle of the 'absence of pre-trial obligation'. This approach confirms the primary purpose that the fair trial directive seeks to achieve: the prevention of conscription. The trial of an accused would in general be rendered unfair in the event that she has to confront evidence in court, created by her compelled participation, which evidence she would not have had to face had her rights not been violated.[419]

It is suggested that the *Pillay* court, by necessary implication, was alive to the fact that the common law privilege against self-incrimination is not sufficiently geared to protect fundamental rights. By contrast, the majority opinion opted for a purposive interpretation of the right to a fair trial by seeking the goals this right seeks to achieve. Another implication of the adoption of the principle of the 'absence of pre-trial obligation', is that the differential treatment of real evidence – as opposed to testimonial evidence – has finally come to an end. However, the nature of the evidence should still be considered, with the aim of determining whether it could be classified as 'conscriptive' or 'non-conscriptive'.[420] Key to such a determination is the manner in which the evidence had been obtained.

To summarise, the primary purpose of section 35(5) is to safeguard the procedural rights guaranteed to an accused to ensure trial fairness concerns. The common law privilege against self-incrimination serves the exclusive purpose of the prevention of ***testimonial*** compulsion. The scope of application of the common law privilege falls short of effectively protecting the fair trial rights of an accused, especially in instances where the admissibility of real evidence is in dispute. Based on the dictum in *Thebus*,[421] the common law privilege against

[419] This reasoning was followed by the majority opinion, relying on *Thompson Newspapers* (at par 88 of *Pillay*).

[420] Fn 12 above at par 125.

[421] Fn 367 above.

self-incrimination – within the limited context of the section 35(5) fair trial requirement – does not adequately complement the spirit, purport and objects of the Bill of Rights.

The common law privilege falls short of effectively protecting an accused whose guaranteed rights have been violated when real evidence was discovered as a result. In this regard, it is suggested that the common law privilege fails to satisfactorily protect the fair trial right of an accused, guaranteed under section 35(5), since its protection is limited by the nature of the evidence obtained as a result of a constitutional violation. This preferential treatment of real evidence could encourage the violation of constitutional rights when police officers are aware that physical evidence had been used to perpetrate an offence. Surely, the latter result would militate against the spirit, purport and objects of the Bill of Rights? In the light hereof, the opinion of the majority judgment in *Pillay*, discarding the real evidence distinction from a determination of the fair trial directive, should be welcomed. The *Pillay* judgment has, in effect, adapted the common law privilege against self-incrimination, within the context of section 35(5).

However, the approach adopted by the Supreme Court of Appeal in *Tandwa* to determine trial fairness is in conflict with the approach followed in *Pillay*. This inconsistency should be resolved by the Constitutional Court rather sooner than later.

The *Collins* fair trial assessment calls for a discoverability analysis to determine whether admission of the disputed evidence would render the trial unfair. The doctrine of discoverability is discussed next.

2. Discoverability analysis as a means to determine trial fairness under section 35(5)

The High Court of South Africa applied the doctrine of discoverability in a number of cases.[422] In *Naidoo*, inculpatory real evidence was obtained in an unconstitutional manner. The court reasoned that admission of the evidence would render the trial unfair, since the accused created the evidence – for the benefit of the prosecution – in circumstances under which it would not otherwise have been lawfully discoverable.[423] In *Soci*, the police failed to inform the accused of his right to legal representation before he made the pointing-out, but was informed accordingly by the magistrate who took the confession. Considering whether the violation would have a negative impact on trial fairness, the court reasoned that the accused would be prejudiced if there was a causal connection between the violation and the discoverability of the evidence.[424] As such a connection existed, the evidence of the pointing-out had an adverse effect on the fairness of the trial and the evidence was accordingly excluded.[425] Since a causal connection between the violation and the confession was absent, admission thereof would impact negatively on trial fairness. The confession was therefore admitted.[426] The primary reason why the pointing-out was excluded was because the prosecution should not be seen to benefit from unlawful police conduct. A discoverability analysis has resulted in the parties being restored to the position they were in immediately before the violation.

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[422] See, for example, *Naidoo* (fn 16 above); *Soci* (fn 256 above); *Mphala* (fn 256 above); *Mfene* (fn 256 above); *Pillay* (fn 11 above); *Tandwa* (fn 12 above).

[423] *Naidoo* (ibid) at 90-91.

[424] Fn 256 above at 392.

[425] Ibid at 395.

[426] Ibid at 294; see also *Tandwa* (fn 12 above), where the Supreme Court of Appeal followed a similar approach.

The Supreme Court of Appeal has adopted a discoverability analysis as part of the fair trial assessment under section 35(5).[427] The majority judgment in *Pillay* endorsed the approach followed in *Burlingham*.[428] Applying the doctrine of discoverability to the facts of the case, the majority judgment held that the information gathered as a result of the illegal monitoring, did not constitute 'conscriptive' evidence;[429] and the money would have been discovered by the police in the ceiling, even in the absence of a violation of the constitutional rights of the accused.[430] In the light hereof, the prosecution either successfully demonstrated or the judges writing the majority judgment understood that the money would probably have been discovered because the police would have searched the house, even without a warrant. Furthermore, photographs which were handed in as exhibits clearly depicted that the bags containing the money could be seen immediately upon opening the trap door of the ceiling.[431] To come to the point, the majority decision held that the money would have been discovered in a lawful manner.[432] In the result, it was held that admission of the evidence would not render the trial unfair.[433] It should be emphasised that the

[427] *Pillay* (fn 11 above), at par 89; see also *Hena* (fn 408 above) at 42, where Plasket J applied a discoverability analysis during the ***second phase*** of the analysis, thus demonstrating the seriousness of the infringement as follows: "Finally, there was no evidence on record on which it could be concluded that the evidence of Lucas would have been discovered in any event".

[428] Fn 51 above.

[429] Fn 11 above at par 89.

[430] Ibid at paras 89-90.

[431] Ibid par 90. Compare Schwikkard 2 (fn 257 above) at 794.

[432] The majority judgment did not expand on this hypothetical or factual finding. However, section 22 of the Criminal Procedure Act provides that a police officer is authorised to search any person, container or premises without a warrant if the officer, on reasonable grounds believes that a search warrant would be issued if he or she applied for one, but the delay in obtaining it would defeat the object of the search. This could be one of the reasons for such a finding. Yet, should this be the case, the important issue would have been whether the police had "reasonable grounds". Compare Naude (2008) 2 *SACJ* 168 at 175-179.

[433] Fn 11 above at par 90.

majority opinion did not rule that admission of the evidence would not render the trial unfair because of the nature of the evidence – their ruling[434] was premised on the fact that the real evidence would inevitably have been discovered.[435] Put in another way, and to paraphrase the dictum in *Feeney*, the illegal monitoring and the confessional conduct of the accused was held as not constituting the '***necessary***' cause for the discovery of the money. Adhering to the approach in the Canadian case of *Mellenthin,* the court inquired whether the evidence would have been discovered 'but for' the violation. Adding to the *Mellenthin* approach, the court also determined whether the evidence would have been discovered in the absence of the violation.[436]

Scott JA, writing the dissenting minority judgment in *Pillay*, warned that a rigid application of the discoverability doctrine might lead to astonishing consequences. He mentions the often-quoted example that a murderer might have to be acquitted because evidence of the discovery of a concealed corpse (real evidence) would render the trial unfair in the event that the accused made a self-incriminating statement as a result of a violation of her rights.[437] What is important is the fact that Scott JA, echoing the opinion of the writers of the majority judgment, held that the discovery of the money did not render the trial unfair. He arrived at this conclusion because 'it is difficult to see how real evidence having an independent existence can ***ever*** be said to render a trial unfair',[438] unless it exists as a result of compulsion or it is derived from a violation of a right contained in the Bill of Rights that leads to self-incriminatory evidence that would not otherwise have come to light.

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[434] Compare *Black* (fn 50 above), where the same result was achieved, based on the principle of the 'absence of pre-trial obligation'.

[435] *Pillay* (fn 11 above) at par 90.

[436] Loc cit.

[437] Fn 11 above at par 124.

[438] Ibid at par 125. Emphasis added.

It is submitted that the afore-mentioned reasoning of Scott JA is tantamount to an endorsement of the principle of the 'absence of pre-trial obligation' into the South African section 35(5) jurisprudence: The judge is of the opinion that real evidence discovered as a result of compulsion, that would not otherwise have been discovered, would render the trial unfair. Applying the said principle in the matter before court, Scott JA concluded that the real evidence would inevitable have been discovered, with the result that the trial fairness directive had not been adversely affected. This view is supported.

The third *Collins* factor to be considered to assess the trial fairness requirement, is 'the nature of the right' infringed.

3. The nature of the right violated

Under this heading, the rights to legal representation and privacy are discussed, because these rights have regularly been the subject of section 35(5) challenges. The right to legal representation is discussed first, followed by the right to freedom and security of the person. The discussion of the individual rights is not comprehensive, since the primary aim of this work is to explore the structure of the section 35(5) fair trial framework.

3.1 The right to legal representation

The right to legal representation is contained in section 73[439] of the Criminal Procedure Act and sections 35(2)(b),[440] (c), 35(3)(f) and (g)[441] of the South African Constitution. This discussion does not deal with the right to legal representation at state expense[442] and during the trial phase.[443] For the reason that conflicting views have been expressed by the different jurisdictions of the High Court in regard to the scope of the right to legal representation at identity parades, this issue forms the central part of this section of the work.

The nature of the right infringed has been identified in *Collins* as an important factor in the determination of the fair trial requirement.[444] The fairness of most criminal trials becomes suspect whenever the right to legal representation has been violated. This does not mean that trial fairness may not adversely be affected when any of the other guaranteed right was violated. Rather, a

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[439] The relevant part of section 73 reads as follows: "(1) An accused who has been arrested … shall … be entitled to the assistance of his legal adviser as from the time of his arrest".

[440] Section 35(2)(b) and (c) provides as follows: "(2) Everyone who is detained, including every sentenced prisoner, has the right – (a) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly; (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly".

[441] Section 35(3)(f) and (g) provides as follows: "(3) Every accused person has a right to a fair trial, which includes the right – (f) to choose, and to be represented by, a legal practitioner, and to be informed of this right promptly; (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly".

[442] For a discussion of this aspect of the right, see *S v Vermaas* 1995 3 SA 292 (CC), ("*Vermaas*").

[443] See Steytler *The Undefended Accused Before Court* (1988); Kriegler (fn 258 above) at 176-177; De Jager et al (fn 258 above) at 11-2C to 11-14A; also 18-7 to 20-8; and 22-9 to 22-28C.

[444] Fn 1 above at par 37, where Lamer J reasoned as follows: "It is clear to me that the factors relevant to this determination will include the … nature of the right …".

purposive approach, bearing in mind the goals that the fair trial directive seeks to achieve, should be determinative in such an assessment.[445]

The fact that an accused is entitled to a fair trial suggests that she be represented by a legal representative when she faces serious charges.[446] The right to legal representation has been described as a fundamental right that could be construed as virtually an absolute right.[447] The right to legal representation is important, because its purpose is to prevent an accused from being conscripted against herself. A violation of the right to legal representation impacts negatively on a cluster of rights, collectively aimed at the prevention of conscription: the right to remain silent, the privilege against self-incrimination, as well as the presumption of innocence.[448] Froneman J,[449] in search of the purpose and meaning of the right to legal representation in South African context, was of the opinion that a failure to inform an 'accused of his right to consult with a legal adviser during the pre-trial stage' is tantamount to denying 'especially the uneducated, the unsophisticated and the poor, of the protection of their right to

[445] See *Fose* (320 above) per Kriegler J at par 197, where a purposive approach was suggested when the court had to determine the meaning of "appropriate relief". The judge suggested the following: "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"; see also *Melani* (fn 256 above) at 347; Roach (fn 27 above) at 10-60.

[446] *S v Ngwenya* 1998 2 SACR 503 (W) at 507, ("*Ngwenya*").

[447] Per Kruger and Cillié JJ in *Pitso* (fn 256 above) at par 20, where the court said the following: "Die reg op regsverteenwoordiging is 'n fundamentele reg. Na my mening is dit die reg wat die naaste aan 'n absolute reg is in die Handves van Menseregte." My translation of this dictum is the following: The right to legal representation is a fundamental right. In my opinion, it is a right contained in the Bill of Rights that is the closest to an absolute right. In *S v Du Preez* 1991 2 SACR 372 (Ck), ("*Du Preez*"), decided before the constitutional era, it was held that a denial of the right to legal representation was tantamount to an abuse of power.

[448] Per Froneman J in *Melani* (fn 256 above) at 347.

[449] Loc cit.

remain silent and not to incriminate themselves'.[450] In the light hereof, the judge concluded that violations that result in an accused 'being conscripted against himself' would 'strike at one of the fundamental tenets of the right to a fair trial, the right against self-incrimination'.[451] Furthermore, an accused should be afforded a reasonable opportunity to obtain legal representation, otherwise the right would be meaningless.[452]

Does the scope of the right to legal representation extend to identity parades? This issue was answered in the affirmative in *Mathebula*,[453] and *S v Mhlakaza*.[454] Furthermore, in *S v Hlalikaya and Others*,[455] the court mentioned that the right to legal representation extends to pre-trial procedures where the prosecution

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[450] To demonstrate the seriousness of a violation of the right to legal representation, it is argued in chapter 5 that the infringement of more than one fundamental right only adds to the seriousness of the violation. In cases where the right to legal representation has been violated, it necessarily impacts on a cluster of associated rights.

[451] Ibid at 352.

[452] See section 73(2B) of the Criminal Procedure Act; see also *Tsotsetsi* (fn 256 above); *S v Radebe*; *S v Mbonani* 1998 1 SA 191 (T), ("*Radebe*") a matter decided before the constitutional era, where it was held that a presiding officer should allow an accused a reasonable opportunity to obtain legal representation, and should actually encourage her to appoint one when the charge against her is of a serious nature. Compare *S v Vumase* 2000 2 SACR 579 (W), ("*Vamuse*"), where a Full Bench held that a police officer is not duty-bound to encourage an accused to exercise the right to legal representation when affecting an arrest. This, it was said, should be the case, because the police and the accused are in an adversarial relationship: the rules of fairness differ; see also *S v Ngwenya* 1998 2 SACR 503 (W), ("*Ngwenya*") at 506, where it was held as follows: "… it was not the duty of the State to guard him [accused] against the exercise of his own volition".

[453] Fn 256 above. This case was decided in terms of the Interim Constitution, but it is submitted that the rationale applied is applicable to the interpretation of section 35(5).

[454] Fn 376 above. This case was also decided in terms of the Interim Constitution, but it is submitted that it is likewise applicable to the interpretation of section 35(5).

[455] Fn 380 above. This case preceeded section 35(5).

seeks 'the co-operation of the accused in order to protect the accused against an infringement'. To state the obvious, an identification parade meets the criteria of such a pre-trial procedure.[456]

In contrast to these decisions, Borchers J reasoned in *Monyane*,[457] that a legal representative can only, in the interests of the accused, make suggestions about the line-up procedure;[458] and that the police officer in charge of an identity parade has a duty to ensure that the line-up proceedings is fair.[459] This argument cannot be accepted for two reasons: Firstly, lack of legal representation at an identity parade may impact negatively on the right of the accused to meaningfully cross-examine the witnesses testifying against her.[460]

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[456] *Ross* (fn 62 above); *Feeney* (fn 8 above); *Stillman* (fn 7 above).

[457] Fn 256 above; see also *S v Langa and Others* 1998 1 SACR 21 (T), ("*Langa*"), where it was held that an accused is not entitled to legal representation when she has not been "detained"; *S v Hena* 2006 2 SACR 33 (SE), ("*Hena*"); *S v Zwayi* 1997 2 SACR 772 (CkH), ("*Zwayi*"), where it was held that an accused is not entitled to the right to legal representation at a photographic identity parade; *S v Vumase* (fn 452 above) where it was held that a police officer has a duty to inform an accused of the right to legal representation, but does not have to encourage the accused to appoint one; *Ngwenya* (fn 452 above), where Leveson J held that the right to legal representation does not extend to pre-trial procedures like the participation of the accused in an identity parade. In essence, it was held that the concept "fair trial" does not extend to pre-trial proceedings; *Shaba* (fn 256 above), where it was held that an accused is not entitled to be informed of the right to legal representation at every pre-trial step when incriminating evidence might be obtained against her; compare *Marx* (fn 256 above).

[458] Fn 256 above at 131.

[459] Loc cit.

[460] *United States v Wade* (1967) 338 US 218 at 1157, ("*Wade*"). Van der Merwe 2 (fn 257 above) at 131, echoes this view. This argument was specifically rejected in *Monyane*. The court held that the officer in charge has a duty to ensure that the proceedings are fair, thereby intimating that legal representation is not necessary at an identity parade.

Secondly, it ignores the accurate observation made by the full bench in *Vamuse*[461] to the effect that, unlike a judicial officer who acts as an umpire to ensure the fairness of proceedings, 'the police are in an adversarial position *vis-á-vis* an accused and as such the rules of fairness differ'.[462] It is submitted that the reasoning of Tebutt J in *Park-Ross v Director: Office for Serious Economic Offences*,[463] should extend to identity parades. In *Park-Ross*, section 6 of the Serious Economic Offences[464] was held to be unconstitutional, because it empowered the Director of the Office for Serious Economic Offences to issue warrants. The gist of the reasoning was that the Director could not be perceived as an impartial umpire. In light of the remark made in *Vamuse*, the same can be said of a police official in charge of an identity parade. Therefore, in order to ensure that an identity parade is performed in compliance with those 'notions of basic fairness' that informs the right to a fair trial,[465] it is desirable that an accused should be entitled to rely on the right to legal representation at identity parades.

The belief that police officers take on the role as impartial umpires at identity parades is a risky assumption.[466] Santoro asserts that it is 'neither practical, nor realistic to expect the police to take notes that are sufficient to allow proper assessment' by presiding officers.[467] He argues that there is strong evidence indicating that police officers are unwilling to, for instance, 'capture defects' in a

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[461] Fn 452 above.

[462] Ibid at 581.

[463] 1995 2 BCLR 198 (C), ("*Park-Ross*").

[464] Act 117 of 1991.

[465] *Zuma* (fn 13 above).

[466] Santoro (2007) 52 *CLQ* 190 at 196 and 202. Although his argument relates to photo identity parades, it is submitted that this argument is also applicable to line-up identity parades.

[467] Ibid at 196.

witness identification of a suspect 'thought to be guilty'.[468] Added to this, he continues, are attitudinal obstacles, like 'tunnel vision'[469] or 'noble cause corruption'[470] that increases the unreliability of police note-taking.[471]

The *Monyane* judgment could be read to postulate that, on the facts, the prosecution had shown that the discovery of the evidence (a positive identification of the accused at the parade) was 'inevitable.' In other words, the 'real' evidence would have been discovered even if the accused had exercised his right to legal representation, because a legal representative may only make suggestions at such proceedings. A consideration of this factor would have been an important issue under the trial fairness directive. However, the court reasoned that the evidence of an identity parade constitutes 'real' evidence – as opposed to testimonial evidence.[472] The judge continued by asserting that the common law privilege against self-incrimination[473] does not extend to identification

[468] Ibid at 201.

[469] This is defined as follows by the Morin Commission, Toronto: Ministry of the Attorney-General of Ontario, (1998), at 1211, as "the single minded and overly narrow focus on an investigation or prosecutorial theory so as to unreasonably colour the evaluation of information received and one's conduct in response to the information".

[470] Citing MacFarlane, QC (2006) 31 *Man LJ* 403, at 441, he explains that this is the case when the police "believe that it is justifiable to fabricate or artificially improve evidence, or in some other fashion bend the rules to secure the conviction of someone they are satisfied is guilty".

[471] Fn 466 above at 203. He mentions that MacFarlane adds (loc cit) that "this philosophy ***affects*** police services all over the world and has the capacity to ***infect*** virtually any criminal investigation". (Emphasis in original).

[472] Fn 256 above at 130.

[473] The court relied on *Matemba* (fn 261 above) at 82, where the admissibility of a palm print was in dispute. The Appellate Division argued that when a palm print is being taken, the accused is "entirely passive", and not "being compelled to give evidence or to confess", any more than "where he is put upon an identification parade".

procedures.[474] In the event, it was held that the right to legal representation was not infringed.[475]

It is suggested that the common law distinction between 'real' and testimonial evidence results in a narrow interpretation of the right to legal representation, which – in effect – unduly limits the purpose it was designed to protect.[476] It is submitted that the interpretation of the right to legal representation by Froneman J in *Melani*, is to be preferred above that of the *Monyane* court. The reasons for this suggestion are three-fold: Firstly, the adversarial nature of our criminal justice system demands that the interests of an accused be protected, especially at the crucial stage when she is in custody. This is necessary to ensure that she is treated fairly both at the 'gatehouses' and 'mansions' of the criminal justice system;[477] secondly, it was accepted practice even before 1994 that an accused has a right to legal representation at identity parades;[478] and thirdly, because the Supreme Court of Appeal, in *Pillay* and *Tandwa*, rejected the 'real' evidence distinction in their determination of the fair trial requirement contained in section 35(5). Therefore, evidence of an identity parade should not be classified as real evidence that should for that reason be 'readily' admitted. This category of evidence should, in terms of the *Tandwa* judgment,[479] be classified as 'conscriptive' if it had been obtained in violation of the right to legal representation.

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[474] Loc cit.

[475] *Monyane* (fn 256 above) at 135.

[476] Per Froneman J in *Melani* (fn 256 above) at 352.

[477] Ibid at 349; see also Beaudoin & Ratushny (fn 23 above).

[478] In *Monyane* (fn 256 above) at 132, the court acknowledged that the right to legal representation is contained in the standard from SAP329; and that it is police practice to read this to the suspect before the parade starts. The practice existed for several years.

[479] Fn 12 above at par 125.

To summarise, the introduction of a justiciable Bill of Rights during 1994, which presently includes the remedy contained in section 35(5) of the South African Constitution, has created significant changes to the admissibility of evidence in South Africa: governmental power should be exercised within the ambit of the provisions of the Constitution. Mindful hereof, the drafters of the Constitution created procedural guarantees to ensure that every accused person is entitled to a fair trial. One of the mechanisms created to achieve that goal, is the constitutional guarantee of the right to legal representation. For this reason, the right to legal representation should be interpreted generously and purposively, instead of being 'cut down' to coincide with its common law meaning.[480] In fact, even before 1994, an accused could rely on the right to legal representation at identity parades.

One of the interests that the right to legal representation serves to protect is to ensure that the accused is not unfairly conscripted against herself during the pre-trial phase. An identity parade is, in the same way as a confession or pointing-out, in many instances a necessary pre-trial procedure conducted at the behest of the police, with the aim of obtaining evidence against the accused.[481]

During the trial the accused would have to face this evidence. This evidence would be presented against the accused with the aim of convincing the presiding officer of the reliability of the identification by the prosecution witnesses. During the trial, the accused would have to provide an answer to this evidence, created by herself, at the behest of the police. Do the constitutional values of 'freedom', 'human dignity', 'openness' and the notion of 'substantive fairness' not dictate

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[480] *Zuma* (fn 13 above).

[481] See in this regard, *Stilman* (fn 7 above) at par 94, where Cory J reasoned as follows: "The compulsion which results in self-incrimination by … the use of the body itself may arise in a number of ways such as the forced participaption in a line-up identification"; see also Van der Merwe 2 (fn 257 above).

that she ought to be represented by a legal representative at this crucial stage of the proceedings? Or should fundamental rights be downgraded for the benefit of expediency? It is submitted that such an approach solely favours crime control interests.

During the pre-constitutional era public policy dictated that an accused had a right to legal representation when she participated in an identity parade. It is submitted that the Constitution did not strike a pen through the continued existence of the right to legal representation within this context.[482] The *Monyane* approach should be discarded and the judgments in *Mathebula* and *Mahlakaza* should be adopted, as the latter judgments give effect to the spirit, purport and objects of the Constitution.

In South Africa, where the criminal justice system is based on an adversarial system and many of the accused are poor, uneducated and uninformed of their rights, the long-term values of the establishment of a human rights culture would be difficult to achieve if the scope of the right to legal representation were not extended to identity parades. An accused should be entitled to rely on the right to legal representation at an identity parade.

The next fundamental right considered is the right to freedom and security of the person.

3.2 Freedom and security of the person: right to bodily integrity

The right to freedom and security of the person is guaranteed by section 12 of the Constitution.[483] Section 12(1) protects a person's freedom and security of the

[482] It is submitted that section 39 of the Constitution provides for the existence of this right.

[483] Section 12 of the Constitution provides as follows:

person, while subsection (2) protects the right to physical and psychological integrity of an accused person.[484] However, subsection (1)(c), which guarantees the right to freedom from violence from governmental agents, should be read in conjunction with the provisions of subsection (2).[485] Section 12(1)(c) places both a positive and a negative duty on government. The positive duty is for government to put measures in place (for example legislation), that will prevent the unjustifiable infringement of the right to be free from violence from either public or private sources. The negative duty placed on government is an obligation to refrain from perpetrating acts of violence by its officials on a person suspected or accused of having committed a crime.[486] During the pre-trial phase, when police officers gather evidence against a suspect or accused person, section 12(2), which protects the public interest of security in and control over the body, features prominently. This would be the case when the police want to search or interrogate a suspect. With regard to the search or interrogation of a person, unwarranted police conduct may, depending on the circumstances,

"12(1) 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 a 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.

(2) Everyone has the right to bodily and psychological integrity, which includes the right –

(a) to make decisions concerning reproduction;

(b) to security in and control over their body; and

(c) not to subjected to medical or scientific experiments without their informed consent".

[484] Currie & De Waal (fn 257 above) at 292.

[485] Ibid at 304.

[486] See *Tandwa* (fn 12 above) and *Mthembu* (fn 257 above), where real evidence obtained as a result of torture were excluded in terms of section 35(5).

infringe a cluster of rights: for instance, the right to privacy,[487] freedom and security of the person,[488] and human dignity.[489]

The intrusiveness of a search of the person may vary from a pat down search to the seizure of an object, like hair, skin or bodily fluids from the body of the suspect.[490] The constitutionality of section 225(2) of the Criminal Procedure Act has to date not been challenged. This section provides that evidence of a bodily mark, finger-print or blood test result or other related evidence obtained from the body of the accused even without consent, shall not be inadmissible on the basis that it was ***not*** obtained in accordance with the provisions of section 37. Section 225(2) in effect immunises unconstitutional police conduct committed during the evidence-gathering process from constitutional scrutiny.[491] Section 37 is a law of general application that circumscribes the scope of policing authority in the evidence-gathering process, and it is not disputed for purposes of this discussion that it would survive constitutional muster. It is therefore submitted that any police conduct that exceeds the ambit of section 37, would amount to a *prima facie* violation of a fundamental right. Section 225(2), in turn, is a law of general application that seeks to protect such *prima facie* violations from judicial scrutiny. In other words, its exclusive function is to remove unlawful police conduct that defies the provisions of section 37, from the radar of section 35(5). By contrast, section 35(5) seeks to protect the right to a fair trial and the

[487] See for instance, *Motloutsi* (fn 256 above).

[488] *Minister of Safety and Security and Another v Xaba* 2004 1 SACR 149 (D), ("*Xaba*").

[489] *Tandwa* (fn 12 above) at par 127.

[490] Section 37(1)(a) of the Criminal Procedure Act authorises a police officer to take palm-prints or finger-prints from a person who has been arrested; section 37(5) dictates that the finger-prints or palm-prints be destroyed in the event that the accused is acquitted or a conviction is set aside or when the accused has not been prosecuted; section 37(2)(a) authorises a medical officer of any prison to take a blood sample to determine if the body of the suspect has any mark, characteristic or distinguishing feature or shows any condition or appearance.

[491] According to Van der Merwe 1 (fn 257 above) at 179.

integrity of the justice system, because one of its primary functions is to ensure that an accused is treated fairly both in the 'gate houses' as well as the 'mansions' of the criminal justice system.[492] Put in another way, section 35(5) permits the procurement of evidence in accordance with the provisions of section 37, while by the same token its function is to exclude evidence obtained in a manner that would render a trial unfair or would otherwise be detrimental to the justice system.

It is submitted that the obtainment of evidence in violation of section 37 of the Criminal Procedure Act is one of the consequences that section 35(5) was designed to protect.[493] On the assumption that the provisions of section 225(2) do not exist, evidence obtained outside the ambit of section 37 would, to borrow the concept from *Feeney*, not be available to the prosecution in ***usable*** form.[494] In the light hereof, the provisions of section 225(2) is in conflict with the provisions of at least sections 12, 14 and 35(2) and (3) of the Constitution. It follows that section 225(2) constitutes a *prima facie* violation of these rights. Thus, the first phase of the limitations clause analysis will have been satisfied.[495]

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[492] *Melani* (fn 256 above) at 349; Beaudoin & Ratushny (fn 23 above) at 462.

[493] See *Stillman* (fn 7 above) par 49.

[494] Fn 8 above at par 67.

[495] Section 36(1) of the South African Constitution provides as follows:

"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant facors, including –

(b) the nature of the right;

(c) the importance of the purpose of the limitation;

(d) the nature and extent of the limitation;

(e) the relation between the limitation and its purpose; and

(f) less restrictive means to achieve the purpose".

During the second phase of the analysis the court would consider the nature of the right limited[496] and the prosecution would, among other factors, have to convince the court of the importance of the purpose sought to be protected by section 225(2) and that alternative, less restrictive means to achieve that purpose do not exist.[497] In addition, the prosecution would have to show that the effect of the limitation on the right to a fair trial is proportionate to the benefits sought to be achieved by section 225(2).[498] What benefit does section 225(2) seek to achieve? Relevant evidence should be admitted, no matter how it had been obtained.[499] Section 225(2) fails to consider whether the manner in which the evidence had been obtained impinges upon the constitutional values of human dignity, equality and freedom. Surely, the procurement of evidence in a manner not prescribed by section 37 would have a negative impact on a person's freedom, because if convicted, the accused would be incarcerated or be burdened by a criminal record, having an effect on her dignity.[500] Again, evidence obtained without a person's consent would regularly violate her innate human dignity. The end (a conviction) does not justify the means (a violation of

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[496] Depending on the circumstances, the rights contained in section 35 or the rights to privacy, freedom and security of the person and human dignity may be infringed. It is suggested that the right to human dignity is important in an open and democratic society. The prosecution would have to provide compelling reasons why these rights should be limited – see Currie & De Waal (fn 257 above) at 178.

[497] The purpose of the limitation is the protection of the public interest in establishing the truth. DNA analysis has the benefit of establishing the guilt or innocence of suspects with a high degree of certainty. In view hereof, the section serves the important public interest of the detection and prosecution of crime. Does alternative means exist to obtain the evidence? Yes, in terms of the common law, the informed consent of the accused is required and section 37 of the Criminal Procedure Act provides lawful, less drastic means of obtaining the evidence.

[498] Section 225(2) serves the purpose of the successful prosecution of crime.

[499] The common law rule on the admissibility of evidence seeks a similar goal. However, its disadvantage is that it fails to protect fundamental procedural rights, which may impact negatively on trial fairness within the context of section 35(5).

[500] See the dictum of Ackermen J in *Dzukuda* (fn 357 above) at par 9-11.

human dignity, the value of a fair trial, freedom and security of the person, and the associated protection of freedom from violence, and physical and psychological integrity). Other constitutional means are available to achieve the end:[501] Evidence should be obtained in a lawful manner, within the confines of the provisions of section 37 and without infringing the democratic values of human dignity, equality and freedom. In view hereof, it is submitted that it is highly unlikely that the justifiability hurdle would be overcome, and it is accordingly submitted that section 225(2) would not survive constitutional muster.

Furthermore, the continued existence of section 225(2) of the Criminal Procedure Act – in a constitutional democracy – upholds the following innate, and no doubt, profound implications: On the one hand, Parliament, in breach of the doctrine of separation of powers,[502] dictates to the courts that despite the infringement of fundamental rights, evidence obtained as a result thereof should, regardless any taint connected to its procurement, be admitted; this state of affairs cannot be otherwise classified but as the return to both the supremacy of parliament and the re-incarnation of the common law inclusionary rule. On the other hand, section 225(2) in effect unjustifiably usurps the constitutional mandate of the courts to rule on the inadmissibility of unconstitutionally obtained evidence,[503] as dictated by section 35(5).

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[501] For example section 37 or informed consent.

[502] See the case of *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 3 SA 1151 (CC), ("*Kyalami Ridge Environmental Association*"), where this doctrine was applied to determine the ambit and scope of governmental authority.

[503] It is submitted that this would be the upshot, since evidence that has not been obtained in accordance with the provisions of section 37, would be classified as "unconstitutionally obtained evidence".

One of the research questions posed in the introduction was whether the view held by Van der Merwe that the courts of South Africa are prepared to interpret trial fairness in such a manner that unconstitutionally obtained evidence should, despite a finding that its admission would tend to render the trial unfair, nevertheless be received since it could not be regarded as an impairment of trial fairness within the meaning of section 35(5). This issue is considered below.

4. Admission of conscriptive evidence despite trial unfairness; and the presumption in favour of exclusion

This part of the work considers the observation made by Van der Merwe that the courts of South Africa are prepared to interpret the trial fairness prong of section 35(5) in a manner that allows for the admission of evidence in the face of a finding that police non-compliance with the informational warnings contained in the Constitution has a negative impact on trial fairness. Thereafter, it proceeds to explore whether a ruling that admission of evidence would render the trial unfair should preclude a consideration of the second and third groups of *Collins* factors.

It must be emphasised that a two-phased approach is endorsed in this thesis: Trial fairness should be determined during the first leg or phase and the effects of admission or exclusion on the integrity of the justice system should be considered in the second leg or phase. The factors employed to assess each leg of the analysis should be kept separate. Van der Merwe, by contrast, favours an approach to trial fairness that allows for a consideration of factors relevant to the second leg of the *Collins* admissibility framework.

4.1 Admission of conscriptive evidence depite trial unfairness

Van der Merwe holds the view, based on the facts in *Lottering*,[504] that the courts have adopted an approach to the interpretation of the fair trial requirement under section 35(5) that suggests that police failure to comply with the informational warnings may – to an extent – taint trial fairness, but that admission of the evidence thus obtained would not in itself, render the trial unfair, within the context of section 35(5).[505] This approach deserves to be explored. However, it must be mentioned at the outset that it is submitted in this thesis that these factors mentioned by Van der Merwe should be considered during the second phase of the section 35(5) analysis. The reasons why such an approach should be followed are explained below.[506]

In *Lottering*, the accused, a young man, stabbed a person (who soon thereafter died) and ran into a night club. A witness informed a police officer that the accused ran into the night club. The witness accompanied the officer into the night club and identified the accused by pointing him out to the officer. The officer approached the accused, arrested him[507] and demanded information about the whereabouts of the knife which was used to commit the crime. At no time during this confrontation was the accused informed that he has a right to legal representation; that he does not have to answer any questions; and the consequences thereof, should he choose to respond. The accused acquiesced to the demand by disclosing that the weapon was in his friend's possession. Against this background, the accused must have believed that he had no choice but to

[504] Fn 256 above.

[505] Van der Merwe (fn 254 above) at 215-217.

[506] See also chapter 6 par A 3.3 A 3.4 below.

[507] The superior power of the government was thereafter brought to bear on the accused – *Herbert* (fn 63 above).

incriminate himself.[508] It can also not be disputed that the questioning by the officer, in this atmosphere, invited an inculpatory response from the accused ***after he had been arrested***. Levinsohn J recounted that the 'police and other persons who have rights of arrest and detention should not simply pay lip service these [constitutional] rights but should at all times meticulously observe them'.[509]

Referring to Steytler, the court confirmed the view held by the scholarly writer that evidence obtained without consent from the accused could, if admitted, render the trial unfair.[510] Without applying the fair trial prong to the facts of the case, the court proceeded to consider the 'detriment' requirement.[511] Van der Merwe submits that the finding by the court that admission of the evidence would not detrimentally affect the criminal justice system, 'clearly implies that the court was also satisfied that admission would not have rendered the trial unfair'.[512] He suggests that the urgency of locating the knife, together with the fact that the officer did not 'deliberately' fail to inform the accused of his constitutional rights, should have been considered as excusing factors that removed the taint of unfairness.[513] Whether the police conduct was flagrant is debatable. It could be argued that the police officer was not even aware of the scope of his informational duties in terms of the Bill of Rights.[514] If the courts of

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[508] Ibid at 1482 it was held that the accused "incriminated him in the commission of the crime".

[509] Ibid at 1483.

[510] Loc cit.

[511] Loc cit.

[512] Fn 254 above at 216. In my view, the application of the *Collins* or *Stillman* fair trial framework would have shown that admission would render the trial unfair. However, the approach suggested by the *Tandwa* judgment makes provision for the consideration of factors mentioned by Van der Merwe. It should be emphasised that he makes this contention within this context.

[513] Ibid at 217. Van der Merwe, in the vein of the approach followed by the *Grant* court, highlights the fact that the detention lasted for a relatively short period.

[514] See *Kokesch* (fn 63 above) at 321, where Sopinka J wrote for the majority and reasoned that despite the honest belief of the police officers that they could proceed to search without a search

South Africa take rights protection seriously, urgency should not be regarded as an 'at large' excuse for police failure to inform an accused of his rights that are designed to protect him or her from conscription.

The focus should be on the effect that the police conduct had on the trial of the accused, rather than an attempt to show that such conduct 'does not deserve criticism'.[515] Added to this, it is not clear from the judgment whether the need to urgently question the accused about the location of the knife was also related to police safety or public safety concerns. If those concerns were pertinent the officer could have searched the accused, thereby rendering the urgency of such questioning unnecessary.[516] Can it ever be said that the police conduct was reasonable, having regard to the fact that he accorded greater importance to the ***immediate*** recovery of the knife, rather than complying with the informational duty created by the Constitution?

Van der Merwe further argues that the accused voluntarily made the statement, which could have been taken into account as an additional saving factor.[517] It is correct that the accused was not forced or threatened to conscript himself, within the context of, for example, section 217 of the Criminal Procedure Act. However, this does not mitigate the fact that the accused was not informed of at least the right to remain silent and the consequences of not remaining silent. A purposive interpretation of these rights informs that the decision to cooperate with the police and assist them in their investigation against oneself must be an

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warrant, one of two scenarios materialised, either they 'knew they were trespassing, or they ought to have known'. In other words, the police acted either deliberately or negligently.

[515] Roach (fn 27 above) at 10-66.

[516] Section 40 of the Criminal Procedure Act authorises an arrest without warrant, if certain requirements are satisfied; section 23 authorises an official to search an arrested person without a warrant.

[517] Fn 254 above at 216.

informed one. A waiver of rights should be a voluntary, but informed decision. This explains why the informational warnings have been included in the Bill of Rights.[518]

It is suggested that urgency, determined in a purposive manner – for police safety or public safety, or to prevent the destruction of evidence ***essential*** for a conviction – should, on this narrow ground, be regarded as a justifying factor in the second phase of the admissibility assessment.[519] The consideration of urgency as an excusing factor during the fair trial assessment is analogous to the approach suggested by the *Tandwa* judgment. Such an approach suggests that the rights of the accused should be balanced against the societal interests in crime control. By contrast, the *Pillay* judgment ensures that the fair trial guarantee is not 'balanced' away against the public interests in crime control. The strengths and weaknesses of such an approach were highlighted under C 1.2.2 above.

[518] *Hebert* (fn 63 above) at 36; see also Steytler (fn 257 above) at 112, who explains this contention, while also confirming the aptness of the principle of the "absence of pre-trial obligation" in such circumstances as follows: "The right against compelled confessions and admissions … seeks to ensure that where an accused chooses to cooperate in the investigation by giving testimony, it is done voluntarily and with a full appreciation of the right not to do so … The importance of these two rights [to remain silent and the right against compelled self-incrimination] during pre-trial investigations is apparent when seen in the context of proceedings as a whole … The right to a fair trial, including the right against self-incrimination, would be rendered meaningless if the conviction could be effectively secured at the pre-trial stage". (Footnotes omitted).

[519] Steytler (ibid) at 36 confirms this view when he asserted that "section 35(5) has created two tests which should be kept separate". It must be mentioned that, unlike the approach endorsed in this thesis, a two phased interpretation which seperates the first leg from the second – Van der Merwe favours a flexible approach, allowing a court to consider either the first or second leg. When the first leg is determined, he advocates that factors relevant to the second leg may be infused into the first.

4.2 The presumption in favour of exclusion

Should evidence, the admission of which would render a trial unfair, be excluded without a consideration of the second and third groups of factors? In other words, must evidence that would tend to render a trial unfair, be 'automatically' excluded without considering the second leg or phase of the section 35(5) analyses? It appears as if Steytler, relying on *Naidoo*, has answered this question in the affirmative.[520] This approach of a presumption of exclusion once trial fairness has been impaired is based on the phrases 'or otherwise' and 'must be excluded', contained in section 35(5). It is assumed that this interpretation prompted the courts of South Africa to attenuate the impact of such an approach in one of the following ways: the trial fairness assessment was bypassed and the second leg or phase of the section 35(5) analysis considered;[521] alternatively, the excusing factors that should be considered under the second and third groups of factors, were added into the trial fairness prong.[522]

The majority opinion in *Pillay* held that section 35(5) should be read as incorporating the phrase 'all the circumstances', which forms an important part of section 24(2).[523] There is an emerging body of consensus in Canada regarding the meaning of this phrase. Canadian judges and commentators are of the opinion that the phrase means that courts should consider and balance all the

[520] Loc cit; see also Van der Merwe (fn 254 above) at 201, citing *Soci* as authority.

[521] See, for example, *Lottering* (fn 256 above); *Hena* (fn 457 above). In *Mthembu* (fn 256 above), the Supreme Court of Appeal held at par 36 that admission would be "detrimental" to the administration of justice, "irrespective of whether such evidence has an impact on the fairness of the trial".

[522] *Tandwa* (fn 12 above). In Canadian context, see *Grant* (fn 9 above). It can be argued that Steytler (fn 257 above) at 36, does not support this approach.

[523] Fn 11 above at par 93.

factors listed by Lamer J in *Collins* to determine the admissibility issue.[524] In other words, factors having a bearing on the fairness of the trial should be balanced and weighed against the seriousness of the infringement and the effect of exclusion on the repute of the justice system to determine whether the evidence should be received or excluded.[525] For the reason mentioned above, it is submitted that the courts of South Africa should follow such an approach. Moreover, this view is fortified by the inclusion, in section 35(5), of the phrase 'or otherwise'. In other words, the presumption in favour of exclusion should be abandoned and the courts of South Africa should consider all the factors mentioned in *Collins* to make the admissibility assessment.

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[524] See for example *Grant* (fn 9 above) at par 67. It is submitted that this approach surfaced even before *Grant*. The Supreme Court considered all the *Collins* factors and performed a balancing exercise in for example, *Jacoy* (fn 63 above) and in *R v Tremblay* (1987) 37 CCC (3d) 565. In *Tremblay*, ***conscriptive*** evidence that should have been excluded because its admission would have tended to render the trial unfair, was ***excluded*** because its admission would cause disrepute to the justice system. The correctness of this approach was recently confirmed in *R v Orbanski* (2005) 196 CCC (3d) 481 at par 93, ("*Orbanski*"), where the Supreme Court asserted that it did not suggest in its previous judgments that "the presence of conscriptive evidence that has been obtained illegally is always the end of the matter and that the other stages and factors of the process become irrelevant". See also the arguments of the following scholars: Pottow (fn 136 above) at 42-43; Mahoney (fn 136 above); Delaney (fn 136 above) at 522 expresses his disapproval of the fact that the presumption in favour of exclusion precludes the courts of Canada from considering the following factors in the admissibility assessment: the "good faith" of the police; the seriousness of the charges; and the importance of the evidence for the prosecution; Stuart (2003) 10 CR (6TH) 233 (publication pages not available) at printed page 2.

[525] See *Collins* (fn 1 above) at par 35, and *Ross* (fn 62 above) at 138, where this approach was suggested by Lamer J. In *Collins*, the judge said the following: "In determining whether the admission of evidence would bring the administration of justice into disrepute, the judge is directed by s 24(2) to consider 'all the circumstances'. The factors which are to be ***considered and balanced*** have been listed by many courts in the country …". (Emphasis added). Lamer J continued by listing the various factors listed under the first, second, and third groups of factors. See further Pottow (loc cit); Stuart (fn 10 above) tends to lean in favour, it is submitted, of such an approach when he recommends a return to the principles enunciated in *Collins*.

Zeffertt concedes that section 35(5) could be read in this manner, but is of the view that such an interpretation would be implausible. He reasons as follows:[526]

> We are told that evidence has to be excluded if its admission 'would render the trial unfair or otherwise be detrimental to the administration of justice'. There are at least two different ways of reading this phrase. Probably, it was intended to mean that evidence will be inadmissible if it ***either*** renders a trial unfair ***or*** its reception would be detrimental to the administration of justice. But the cumulative effect of the omission of the word 'either', together with the inclusion of word 'otherwise', may warrant a different interpretation: evidence will not be [in]admissible merely because it renders a trial unfair but only if, by doing so, it would, in addition, be detrimental to justice. Is it conceivable, however, that the admission of evidence rendering a trial unfair would not also be detrimental to justice?

It is submitted that the facts in for example, *Malefo*,[527] decided in terms of the Interim Constitution, suggests that such an interpretation is in fact feasible. If applied to the fair trial assessment suggested in *Pillay* or *Stillman*, the following would have been the outcome: An infringement that caused the accused to be conscripted against himself, led to the discovery of the evidence. The evidence would not have been discoverable without the infringement. Therefore, admission of the evidence would have tended to render the trial unfair. However, because the violation occurred before the advent of the Interim Constitution, exclusion of the conscriptive evidence would have been 'detrimental' to the administration of justice, for the following reason: At the time the 'infringement'

[526] 1996 *ASSAL* 803 at 804-805. (Emphasis in original).

[527] Fn 256 above; see also, in Canadian context, *Jacoy* (fn 63 above); and *Tremblay* (fn 523 above) Pottow (fn 136 above) at 42-43.

occurred, the right to legal representation was not constitutionalised. In fact, the police conduct complied with the provisions of existing law when the 'infringement' took place. However, in terms of the judgment in *S v Mhlungu*,[528] the accused was deemed a beneficiary of the rights guaranteed by the Interim Constitution. Would the exclusion of the evidence under these circumstances not be detrimental to the administration of justice, having regard to the factors listed under the second leg of the admissibility analysis?[529]

It is further submitted that the core of the view held by Steytler, to an extent, supports the contention favoured in this thesis.[530] Steytler suggests that the

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[528] 1995 3 SA 867, 1995 2 SACR 277 (CC), ("*Mhlungu*").

[529] See also the facts of *Lottering*. Conscription rendered the trial unfair, but the seriousness of the infringement, it could be argued, was mitigated on grounds of urgency (as suggested by Van der Merwe in his discussion of this case in 4.1 above). However, urgency and other relevant factors are to be considered during the second leg of the assessment, to determine the possible 'detriment' that might be suffered by the justice system as a result of exclusion. Whether it should be received, should be determined by means of a value judgment, by assessing and balancing all three groups of *Collins* factors. Furthermore, during the second phase, the assessment is concerned with different factors, compared to the first phase. The first phase is concerned with the interests of the accused, while the second phase is focused on the interests of society. The case of *S v R* (fn 256 above) could likewise have been considered on this basis. Since the seriousness of the infringement is of paramount importance during the second phase, the good faith of the police should likewise be accorded a prominent role during this phase. The good faith of the police should therefore be a significant consideration calling for the reception of the evidence in instances when the evidence is essential for a conviction on a serious charge, while the infringement could not be regarded as serious. Difficult decisions will have to be taken when, in such circumstances, the infringement is also deemed serious. However, the rationales of section 35(5) and the purposes sought to be achieved by the Bill of Rights in general, should be important factors in such circumstances.

[530] Fn 257 above at 36, he is of the view that: "It should be noted that there is principally one test – whether the admission of evidence would be detrimental to the administration of justice. The test relating to the fairness of the trial is a specific manifestation of this broader enquiry; to have an unfair trial is demonstrably detrimental to the administration of justice. Having said this,

section 35(5) analysis should be undertaken to achieve primarily one goal: whether admission of the disputed evidence would be detrimental to the justice system. This argument of Steytler is supported. Taken to its logical conclusion, it is submitted that the peremptory instruction that the evidence 'must be excluded', should be based on a value judgment that should be made after 'all the circumstances' have been considered and balanced in the end of the analysis. It was mentioned above that the phrase 'all the circumstances' refers to the factors that have to be assessed during the first and the second leg of the *Collins* admissibility framework. Moreover, it is submitted that the plain meaning of the phrase 'or otherwise', within the context of section 35(5) means 'when such exclusion may be detrimental to the justice system, the evidence may (on different grounds, like, for example, police 'good faith' or urgency), be admitted'.[531] It is accordingly submitted that section 35(5) has created primarily

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it should be emphasised that section 35(5) has created two tests which should be kept separate; rules applicable to one are not necessarily applicable to the other".

[531] Fowler & Fowler *The Concise Oxford Dictionary of Current English* (8th ed, 1990, reprinted 1991) at 841; see also Brown (ed) *The New Shorter Oxford English Dictionary on Historic Principles* (Vol 2, 1991) at 2032; Black, Nolan & Connolly *Black's Law Dictionary* (4th ed, 1993) at at 1101; Bullon *Longman Dictionary of Contemporary English* at 1164-1165, explains the meaning of the phrase as follows: "used to refer to the opposite of what has just been mentioned"; *South African Oxford School Dictionary* (2nd ed, 2004) at 313-314. Whether the evidence would be received, should be determined by means of a value judgment, by assessing and balancing all three groups of *Collins* factors. Furthermore, during the second leg, the assessment is concerned with different factors, compared to the first leg. The first leg is concerned with the interests of the accused, while the second leg is focused on the interests of society. The case of *S v R* (fn 256 above) could likewise have been considered on this basis. Since the seriousness of the infringement is of paramount importance during the second leg, the good faith of the police should likewise be accorded a prominent role during this phase. The good faith of the police should therefore be a significant consideration calling for the reception of the evidence in instances when the evidence is essential for a conviction on a serious charge, while the infringement could not be regarded as serious. Difficult decisions will have to be taken when,

one yardstick, that is, whether exclusion or admission would be detrimental to the administration of justice: an unfair trial is a 'specific manifestation' of the broader inquiry as to whether admission of the evidence would be 'detrimental' to the justice system.[532] According to this interpretation, a court should weigh and balance the factors contained in the first and second leg of the *Collins* admissibility framework in the end, in order to make a ruling on the admissibility of the evidence. In the light hereof, the presumption in favour of exclusion or the rule of 'automatic exclusion' whenever trial fairness has been impaired, as it is applied in *Stillman*, should have no place in the interpretation of section 35(5).

To summarise, factors having a bearing on the second leg of the admissibility assessment should, in principle, not be considered when the fair trial prong is analysed.[533] The fair trial requirement serves to protect different interests when compared to the values sought to be protected by the second phase of the analysis.[534] The presumption in favour of exclusion after a finding that trial fairness had been impaired should not be adopted from Canadian precedent. Moreover, the experiences encountered by our Canadian counterparts have demonstrated that the regular exclusion of evidence based on the exclusive consideration of the interests of the accused, may, in the long-term, be 'detrimental' to the integrity of the justice system. A court should consider 'all the circumstances' before a decision is made whether to exclude or receive the disputed evidence.

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in such circumstances, the infringement is also deemed to be serious. However, courts do make difficult decisions on a regular basis.

[532] Steytler (fn 256 above) at 36.

[533] Loc cit.

[534] Loc cit.

D. Conclusion

The view a court holds as to what constitutes a fair trial would heaviliy influence its decision on whether to admit or exclude evidence.[535] For this reason it is important to define 'trial fairness'. Davies identified two approaches as to what constitutes a fair trial. One approach focuses on a proper verdict and the other approach underscores fairness concerns in the entire criminal process.[536] The common law rationale for trial fairness is that the admission of evidence that could result in the conviction of an innocent person must be excluded. Evidence that is reliable should be received, and the manner of its obtainment is of no concern to the court. However, unreliable evidence, for example evidence obtained as a result of torture, should be excluded. On this view, a fair trial is one which satisfies the public interest in truth-seeking. Its aim is in ensuring a safe verdict. In the light hereof, the common law approach is verdict-centred.

The *Collins* and *Stillman* fair trial frameworks are by comparison, focused on the fairness of the pre-trial proceedings: Evidence obtained in a conscriptive manner that would not have been discovered if the rights of the accused were respected, has a negative effect on trial fairness. By the same token, evidence that was discovered in a non-conscriptive manner does not impact negatively on trial fairness. The underlying principle for this approach is rooted in the key pillars of the right to a fair trial: the presumption of innocence and the right to remain silent. In terms of this approach, an accused does not have to assist the prosecution in building a case against herself. It would therefore be unfair to allow the prosecution to compel the accused to give evidence at her trial against

[535] Davies (fn 136 above) at 8.

[536] Loc cit.

herself, which she had created as a result of a Charter breach.[537] It is suggested that this approach is best suited for a constitutional democracy like South Africa, where the protection of fundamental rights is one of the primary aims of the Constitution. This approach is process-centred.

Judges should at all times be heedful to apply a generous and purposive approach to the interpretation of section 35(5). The Canadian experience has demonstrated that a rigid application of the privilege against self-incrimination leads to undesirable results when interpreting a Bill of Rights provision. They have accordingly adapted the concept. This exercise has, within the context of section 35(5), been achieved by the South African Supreme Court of Appeal in *Pillay* and *Tandwa*. This was an important development of the common law privilege against self-incrimination – albeit on the limited scale of the fair trial requirement contained in section 35(5) – because a conscription analysis is at the heart of the fair trial requirement.[538]

The scope and meaning of the fair trial directive under sections 24(2) and 35(5) are essentially similar.[539] There appears to be no reason why these remedies should not have essentially the same impact in their respective criminal justice systems. Both serve the societal interest in rights protection, more particularly, the right to a fair trial; both aim to preserve the integrity of the criminal justice

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[537] Davies (fn 136 above) at 9; Wiseman (fn 239 above) at 440.

[538] See *S v Cloete and Another* 1999 2 SACR 137 (C) at 149, ("*Cloete*"), where Davis J confirmed this notion as follows: "In short, our criminal procedure places significant emphasis on a lack of compulsion and upon an obligation of the State to make out a proper case without the aid of self-incrimination". See further par C 1 above.

[539] Kentridge AJ commented in *Zuma* (fn 13 above) at par 16 that what constituted a fair trial before the advent of the Constitution does not necessarily coincide with the constitutionally entrenched right. A criminal trial would now have to comply with "notions of basic fairness", not recognised before the advent of the Constitution.

system; and both seek to enhance the truth-seeking function of criminal courts, while not losing sight of the general purposes and values sought to be achieved by the Bill of Rights.[540]

Some might argue – based on the approach suggested by Mahoney[541] – that the following three suggestions be applied to a section 35(5) assessment: Firstly, the intention of the legislature[542] should be sought when interpreting section 35(5), in order to replace the counter-majoritarian dilemma approach adopted by Lamer J in *Collins*, which was thereafter embraced in the *Stillman* analysis.[543] Secondly, the 'conscriptive/ non-conscriptive' analysis should be rejected,[544] and the former should be replaced with the principles enunciated by the common law privilege against self-incrimination,[545] thus underscoring the importance of crime control values in the analysis. Thirdly, that the discoverability analysis should play a minor role in the fair trial assessment,[546] so as to eliminate the impact of the corrective justice principle of 'no better/no worse' argument,[547] thereby approving of the notion that the prosecution should gain from constitutional violations.[548] These arguments are susceptible to criticism and it is submitted that it would not survive scrutiny.

The inappropriateness of Mahoney's arguments in the South African context are the following and is dealt with in the same sequence as outlined above: Firstly,

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[540] *Dzukuda* (fn 357 above) at par 9-11.

[541] Fn 136 above.

[542] Ibid at 452 he makes his point in the following terms: "Section 24(2) must be applied with the integrity that comes from an adherence to the intent of Parliament …".

[543] Loc cit.

[544] Ibid at 476.

[545] Ibid at 453.

[546] Ibid at 477.

[547] Ibid at 467-476.

[548] Ibid at 477.

both the Constitutional Court judgment of *Makwanyane*[549] and the Supreme Court of Appeal judgment of *Pillay*[550] render the argument of the discarding the counter-majoritarian dilemma of no force and effect; secondly, neither the Supreme Court of Appeal, nor the Constitutional Court has decided whether this concept and its function as applied in the *Stillman* analysis, should be adopted. However, the majority opinion of the Supreme Court Appeal in *Pillay* has employed the concept of 'conscription', in conjunction with the doctrine of discoverability, to assess the trial fairness requirement.[551] It is submitted that this approach is strongly aligned to the *Collins* 'conscription' analysis. Thirdly, the Supreme Court of Appeal has adopted the doctrine of discoverability in *Pillay*. The function of this doctrine was illustrated by means of the different outcomes of the trial fairness assessments in the cases of *Naidoo* and *Pillay*, despite the fact that the judgment was based on the same factual background. In *Naidoo*, the discoverability analysis was not applied under the trial fairness prong and the evidence was excluded on the basis that its admission would render the trial unfair. By contrast, in *Pillay*, after the discoverability analysis, it was held that admission of the evidence would not render the trial unfair. The application of the corrective justice principle of 'no better/no worse' worked in favour of the prosecution in this instance.

The following submission made by Mahoney bears much weight, also within the South African section 35(5) context: consideration of the 'effect of exclusion on the repute of the criminal justice system' should be revisited.[552] The latter factor is discussed in chapter five of this work.

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[549] Fn 16 above.

[550] Fn 11 above.

[551] Ibid at par 88-89.

[552] Unlike the proposition of Mahoney, it is not contended in this thesis that the "effect of exclusion" should be abandoned. Instead, it is submitted that the "current mood" of society

The criticism leveled by Maric in respect of the *Stillman* fair trial framework is justified.[553] *Stillman* and *Feeney* could be read as suggesting that 'conscriptive' evidence is limited to the following categories of evidence: statements, bodily samples, use of the body of the accused in creating the evidence or a significant infringement of human dignity. It is suggested that these categories should be viewed as examples of 'conscriptive' evidence, to be developed on a case by case basis, rather than being viewed as a final list. Such an approach would broaden the fair trial framework to encompass ***any*** evidence obtained in a manner that violates a right contained in the Charter.

The 'refined' fair trial framework has rendered a separate consideration of the third *Collins* fair trial factor superfluous. A consideration of the nature of the right infringed has been subsumed into the first step of the *Stillman* analysis. This state of affairs was achieved by reason of the fact that the 'conscription' analysis and the function of the third *Collins* fair trial factor serve essentially the same purpose.

In a manner similar to their Canadian counterparts, the South African Supreme Court of Appeal has chosen to discard the concept 'self-incrimination' from its terminology and replaced it with 'conscription'.[554] The concept 'conscription' is understood to convey the meaning of unconstitutional governmental conduct that unlawfully impinges on the pre-trial rights of an accused, which causes her to participate in the creation of the disputed evidence. The trial fairness analysis is to be determined by means of a consideration of, firstly, a 'conscription

should not be over-emphasised in determining whether exclusion of the disputed evidence would be "detrimental" to the administration of justice.

[553] Fn 79 above.

[554] See *Pillay* (fn 11 above) at par 88.

analysis, and secondly, a discoverability analysis.[555] However, an important condition is attached to the first leg of the analysis: The discovery of the evidence should not be linked to the unconstitutional participation of the accused in its creation. If this is not the case, the prosecution would be called upon to show that the evidence could have been discovered in any event without a constitutional violation.

The vast experience gained by the Canadian Supreme Court in seeking a fine balance between crime control and rights protection values when interpreting section 24(2) of the Charter, should not be baulked at with impertinence. It should always be borne in mind that these values are sought to be protected in all three groups of factors. Against this background, the *Stillman* court has given extensive consideration to the criticism leveled against the *Collins* fair trial requirement[556] and has made attempts at developing a fair trial framework with two goals in mind: first, the aim of curing the weakness in the *Collins* test; second, and most importantly, to achieve the purpose sought to be protected by the fair trial inquiry.

However, it cannot be disputed that the *Stillman* fair trial framework constitutes a 'near automatic' exclusionary rule. This state of affairs prompted the *Grant* court to modify the fair trial framework. This modified fair trial framework has its strengths and its weaknesses. One of its strengths is the fact that it suggests that all three groups of factors (the first and the second leg of the analysis) should be balanced to determine admissibility. However, it is difficult to accept its theory that trial fairness may be impaired because of conscription, but that such taint could subsequently be 'purified' by the fact that the police acted in 'good faith' – bearing in mind the well-established constitutional policy that

[555] To determine whether the evidence could have been discovered by lawful means.

[556] Fn 1 above.

contradicts such an approach.[557] One of the weaknesses of the *Tandwa* approach is that it suggests that, in principle, the assessment of whether the right to a fair trial has been infringed (in other words rights analysis relating to the cluster of individual rights that collectively serve to protect trial fairness) should be determined by balancing those rights against the public interest in convicting the factually guilty. Such an approach suggests that rights analysis should be undertaken while making an allowance for the constriction of fundamental rights in order to promote the public interest in crime control. In my view, such an approach is at odds with the notion that rights analysis should be engaged on the understanding that there is 'no need to shape the contours of the right in order to accommodate pressing social interests'.[558] Furthermore, the approach suggested in *Tandwa* fails to take account of the fact that the South African Constitution (and Canadian Charter) – unlike the common law jurisdictions of Australia and Scotland – includes a limitations clause. The presence of the limitations clause permits the courts of South Africa to 'adopt a broad construction of the right' – as opposed to narrowing it down by means of a balancing exercise as suggested in *Tandwa* – when determining whether police conduct is in conflict with a fundamental right.[559]

It is suggested that one of the ways in which the problem of a 'near automatic' exclusionary rule as it is applied in Canada can be prevented (on the understanding that a two-phased analysis should be followed as suggested by Steytler), would be, despite a finding that admission would tend to render the trial unfair, to consider in addition the second and third groups of *Collins* factors. This should be done in order to determine whether exclusion because of trial unfairness would (after a consideration of factors like, for example, police 'good

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[557] *Hebert* (fn 63 above).

[558] Cheadle "Limitation of Rights" in Chaskalson et al *South African Constitutional Law: The Bill of Rights* (2002) 698-699; Currie & De Waal (fn 257 above) at 166.

[559] Currie & De Waal (ibid) at 152.

faith' or urgency) be detrimental to the administration of justice. In other words, the three groups of *Collins* factors should be considered and balanced in order to make a value judgment as to whether admission of the evidence would either render the trial unfair or be detrimental to the justice system. When a two-phased approach is followed, it is submitted that a balance between crime control interests and due process values can only be achieved when the factors contained in all three groups of *Collins* factors are considered in the admissibility assessment. In this manner, a court will have considered 'all the circumstances' before a decision is made as to whether the disputed evidence 'must be excluded' or received.

Chapter 5: The second leg of the admissibility analysis: Determining 'detriment to the administration of justice' in terms of section 35(5)

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A Introduction

Chapter five is divided into four parts. The first part consists of this introduction. The second part includes a discussion of Canadian section 24(2) jurisprudence in relation to the second and third groups of factors articulated in *R v Collins*,[1] namely the seriousness of the infringement and the effect of exclusion on the integrity of the justice system. The third part focuses on an analysis of this group of factors set out and to be assessed in terms of the *Collins* criteria, in the South African context. The fourth part consists of a conclusion.

A comparative analysis of section 24(2) of the Charter and section 35(5) of the South African Constitution is undertaken, more particularly in relation to the second and third group of *Collins* factors.[2] These factors are the seriousness of the violation,[3] or the judicial condonation of unconstitutional conduct, on the one hand, and the effect of excluding or receiving the disputed evidence upon the repute of the administration of justice, on the other hand.[4] The second group of *Collins* factors provides a ground for exclusion whenever a violation is adjudged to be of a serious nature. However, when the violation is categorised as a good faith violation, the evidence would not be susceptible to exclusion under this group of factors. It is argued, in respect of the second group of factors, that an objective test should be applied in order to determine whether police conduct could be classified as a good faith infringement. The negligent violation of

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[1] (1987) 33 CCC (3d) 1, [1987] 1 SCR 265, 38 DLR (4th) 508, 1987 CarswellBC 94, 1987 CarswellBC 699 (SCC), ("*Collins*").

[2] The majority opinion of the South African Supreme Court of Appeal has endorsed the *Collins* test (as amplified by reported cases thereafter) in *Pillay and Others v S* 2004 2 BCLR 158 (SCA), ("*Pillay*").

[3] Also referred to as the "second group of *Collins* factors".

[4] Also referred to as the "third group of *Collins* factors".

constitutional rights has been condoned by South African courts,[5] holding that it qualifies as a 'good faith' violation for the purposes of section 35(5). A subjective approach runs counter to the objectives that section 35(5) seeks to achieve. For this reason, it is suggested that such an approach should be discarded. One of the focal points of attention is how the seriousness of a violation should be determined. Should the nature of the evidence obtained after a violation, conscriptive or non-conscriptive, testimonial or real, be determinative of the classification of the infringement as either serious or trivial? In addition, what impact the *Stillman* analysis has on the good faith exception is explored.

Canadian precedent suggests that a violation of the right to legal representation should, based on a purposive interpretation of the right, in general, be regarded as a serious violation.[6] The South African High Court has declined to categorise such a violation as serious.[7] As a consequence, unwarranted police conduct was classified as good faith infringements in instances when the charges faced by the accused were of a serious nature and the disputed evidence (for the most part real evidence) was essential for a conviction.[8] It is argued that such an approach defies a purposive interpretation of section 35(5) and should for that reason be

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[5] See for instance *S v Shongwe en Andere* 1998 2 SACR 321 (T), (hereinafter "*Shongwe*"); *S v Mkhize* 1999 2 SACR 632 (W), ("*Mkhize*").

[6] See *R v Stillman* (1997) 113 CCC (3d) 321, 144 DLR (4th) 193, 5 CR (5th) 1, CarswellNB 108, ("*Stillman*"); *R v Feeney* (1997) 115 CCC (3d) 129, 7 CR (5TH) 101, [1997] 2 SCR 13, ("*Feeney*").

[7] See *Shongwe* (fn 5 above).

[8] See, for example, *Shongwe* (ibid); see also the dissenting minority opinion of Scott JA in *Pillay* (fn 2 above). The right to privacy was violated in *Pillay* and real evidence discovered. The majority opinion held that the violation was serious, having regard to all the circumstances of the case, but the dissenting opinion categorised it as a *bona fide* violation. See also *Mkhize* (fn 5 above), where the admissibility of real evidence was in dispute, more particularly, see 637 of the judgment. See further the comments made by Van der Merwe in "Unconstitutionally Obtained Evidence" in Schwikkard & Van der Merwe (eds) *Principles of Evidence* (2 ed, 2002) at 243, with regard to the determination of good faith in *Mkhize*

rejected, because it primarily serves the values of an inclusionary rule and crime control, that unjustifiably weighs heavily in favour of the automatic reception of unconstitutionally obtained evidence.

The third group of *Collins* factors affirms the fact that the government has a vested interest in crime control. Interests considered under this group of factors are the seriousness of the charges formulated against the accused and the importance of the evidence to secure a conviction. In the event that the accused has been charged with a serious offence, the governmental concern in crime control dictates that evidence, essential for a successful prosecution should be admitted. In this regard, it is suggested that courts should consider these factors, having due regard to the presumption of innocence. Admission or exclusion should not be based upon a consideration of factual guilt, because the issue of admissibility should be seperated from criminal liability. The regular disregard by South African courts of this fundamental rule of procedural fairness could inevitably impact negatively on the right to a fair trial, consequently offending the integrity of the criminal justice system.

In the light hereof, an important issue explored in this part of the work is whether the price paid by society as a result of the exclusion of reliable evidence that tends to prove the guilt of the accused in instances when the charges against him or her is of a serious nature and the violation was flagrant, could be justified. Furthermore, should the fact that the accused is factually guilty, as suggested by the minority judgment in the South African case of *Pillay*,[9] be a determinative feature in the third group of *Collins* factors? A question related to this is should evidence, important for a successful prosecution, be regularly admitted when the accused is factually guilty? Put in a different manner: Should the minority judgment in *Pillay*, suggesting that admissibility should be closely

[9] Fn 2 above at par 133.

connected to the criminal liability of the accused, have any room in the South African section 35(5) jurisprudence?[10] Should factors that impact negatively on the presumption of innocence play a role in the admissibility assessment?

The Canadian Supreme Court has been reluctant to vigorously apply the third group of *Collins* factors, because such an approach would suggest that the ends of crime control justify the means of unconstitutional police conduct.[11] The high rate of serious crime in South Africa has resulted in public criticism of the criminal justice system.[12] This part of the work examines whether the high crime rate, in conjunction with public opinion, would tend to steer South African courts towards an approach that offers greater importance to the third group of *Collins* factors when determining admissibility.

Public opinion plays a role in determining whether exclusion or inclusion of the evidence would be detrimental to the administration of justice. To what extent should public opinion play a role when South African courts interpret section 35(5)? It is argued that by acccording inappropriate weight to 'current public mood' of society,[13] the focus of attention of South African courts would unduly weigh in favour of the seriousness of the charges and the importance of the evidence to secure a conviction, to the detriment of the long-term goals of the Constitution.[14] The disconcerting effect of such an approach is that factual guilt could potentially play a pivotal role in the admissibility assessment, thus leading courts to regularly admit unconstitutionally obtained real evidence even in cases where the infringements are serious. The disadvantage of such an approach would be that the police would be disinclined to respect the fundamental rights

[10] Loc cit.

[11] Roach *Constitutional Remedies in Canada* (1994) at 10-83, par 10.1860.

[12] See chapter 1, fn 25.

[13] See Van der Merwe (fn 8 above) at 234.

[14] See Steytler *Constitutional Criminal Procedure* (1998) at 40.

of accused persons. Perhaps the weight to be attached to public opinion should be ascertained within a purposive context.

A purposive approach to the determination of the role of public opinion calls for an answer to the following question: What is the rationale of these groups of *Collins* factors? Can its function be traced to the avoidance of a stigma of partnership in unconstitutional police conduct or in the safeguarding of popular confidence in the criminal justice system? The answer to this question is inherently related to the primary role that public opionion should play in the section 24(2) and section 35(5) analyses. Put differently: It depends on what view the courts accept as their primary goal: either the notion that their role is primarily that of upholding constitutional values or the idea that the 'current public mood' of society should be regarded as a significant factor in the assessment. It is suggested that in the case of serious violations, South African courts should not be displeased to assert their unwillingness to be associated with such conduct.

South African presiding officers should frequently remind themselves that the Bill of Rights has been designed to protect the minority from the power of the majority and that section 35(5) should be interpreted in the same manner. South African courts should also be mindful of the fact that the regular admission of unconstitutionally obtained evidence, obtained after a serious infringement, would inevitably diminish the constitutional rights of the public at large, thus causing detriment to the administration of justice. This is the approach in Canada.[15] The important issue that arises is: should South African courts consider the role of the 'current mood' of society in relation to the second and third groups of *Collins* factors in a like manner?[16] This would depend on whether

[15] See for example *Stillman* (fn 6 above); *Feeney* (fn 6 above).

[16] See Steytler (fn 14 above) at 40.

the *Collins* test was adopted by the South Africa courts. If this is the case, it follows that – unless convincing reasons existst to deviate from the Canadian approach – the interpretation of these factors as applied by the Canadian Supreme Court, should be applied in a like manner by South African courts. The South African Supreme Court of Appeal adopted the *Collins*[17] test in *Pillay*. It is submitted that such an approach denotes that the 'current mood' of society should not be over-emphasised when these groups of factors are considered.

In *Pillay*, the South African Supreme Court of Appeal emphasised the duty of the courts to protect the accused from unwarranted interference with her constitutionally entrenched rights, having due regard to the effect that the regular admission or exclusion of the disputed evidence would have on the repute of the criminal justice system.[18] It is argued that this approach of the Supreme Court of Appeal enhances the approach proclaimed by the Constitutional Court in *S v Makwanyane*,[19] and should be embraced in the interpretation of section 35(5): Courts, as the ultimate protectors of the constitutional rights of unpopular minorities, should not be seen as associating themselves with unlawful police conduct. The combined effect of the judgments in *Pillay* and *Makwanyane* is indicative of the fact that public opinion does play a role in the interpretation of section 35(5), but the final determination as to whether admission or exclusion would be detrimental to the administration of justice, falls to be decided be the courts. However, judges should constantly remind themselves when they apply section 35(5), especially when they regard an infringement as a serious violation, that their primary duty is to protect the repute of the criminal justice system. The classification of an infringement as

[17] Fn 1 above.

[18] *Pillay* (fn 2 above) at par 97.

[19] 1995 2 SACR 1, 1995 6 BCLR 665, 1995 3 SA 391 (CC) at par 88, ("*Makwanyane*").

serious should be at the heart of the issue as to whether exclusion or admission would be 'detrimental' to the administration of justice.

B Canada

This part of the work commences with a discussion of the concept 'disrepute': how should it be determined? Should a court consult public opinion polls to determine whether exclusion or admission of the disputed evidence would result in 'disrepute'? The next issue considered is the seriousness of the violation. How should this group of factors be considered and what is its impact on the admissibility assessment? The Canadian Supreme Court has proclaimed in *Collins* that section 24(2), unlike the exclusionary rule of the United States, has no place for the deterrence rationale. A question related to this line of reasoning is, if section 24(2) does not serve to punish unwarranted police conduct, should the good faith of the police nevertheless play a significant role in the assessment? If so, should an objective or subjective test be applied when this factor is considered? In other words, should negligent infringements of constitutional rights be condoned by courts? After the discussion of the seriousness of the infringement, this part of the work explores the effect of exclusion on the repute of the criminal justice system. Under this group of factors the seriousness of the charges faced by the accused and the importance of the evidence for a successful prosecution are considered. An important issue considered in this regard, is whether the seriousness of the charges and the importance of the evidence for a successful prosecution unjustifiably encroaches upon the presumption of innocence. This leads to the significant question: Should a consideration of these factors be accommodated in the section 24(2)

assessment? The contributions made by several scholarly writers have enhanced the meaning and purpose of these groups of *Collins* factors.[20]

1. Determining 'disrepute'; public opinion and the nature of the discretion

The concept 'disrepute' has flexible characteristics, especially when one considers it in conjunction with the purpose that the administration of justice serves to protect. For crime control protagonists the primary aim of the criminal justice system would be to include relevant, albeit unconstitutionally obtained evidence, because exclusion would be detrimental to the administration of justice.[21] By

[20] See, for example, Stuart (1983) 37 *CR* (3d) 175, ("Stuart 1983"); Morissette (1984) 29 *McGill LJ* 522; Roach (1986) 44 *UT Fac L Rev* 209; Paciocco (1989) 32 *CLQ* 326, ("1989"); Gold (1990) *Supreme Court L R* 55; Bryant et al (1990) *Can Bar Rev* 1; Whyte & Lederman *Canadian Constitutional Law: Cases, Notes and Materials* (1992); Hogg *Constitutional Law of Canada* (3d ed, 1992); Mitchell (1993) 35 *CLQ* 35, ("Mitchell 1993"); Sopinka, Bryant & Lederman *The Law of Evidence in Canada* (1993), ("Sopinka et al"); Roach (fn 11 above); Godin (1995) 53 *UT Fac L Rev* 49; Young (1996) 29 *CLQ* 362, ("Young 1996"); Mitchell (1996) 38 *CLQ* 23; Fenton (1997) 39 *CLQ* 279; Young (1997) 39 *CLQ* 406; Wiseman (1997) 39 *CLQ* 435 Lamer (1998) 42 *St Louis ULJ* 345; Stuart (1998) 13 *CR* (5th) 197 (SCC), ("Stuart 1998"); Mitchell (1998) 30 *CLQ* 165; Mahoney (1999) 42 *CLQ* 443; Pringle (1999) 43 *CLQ* 86; Stuart (2000) 5 *Can Crim L Rev* 51; Paciocco (2001) 80 *Can Bar Rev* 433, ("Paciocco 2001"); Pottow (2001) 44 *CLQ* 34, ("Pottow 1"); Pottow (2001) 44 *CLQ* 223; Davies (2002) 46 *CLQ* 21; Stuart (2003) 10 *CR-ART* (6th) 112, ("Stuart 2003"); Stuart (2007) 49 *CR* (6th) 282, ("Stuart 2007"); Choo & Nash (2007) *E & P* 11 (2) 75 (publication page numbers not available).

[21] See Paciocco 1989 (fn 20 above) at 364-365. He makes the following comments: "The acceptance of this philosophy [the interpretation of disrepute] by a majority of the Supreme Court of Canada is unquestionable, and it has provided the court with all the incentive it needed to push a compromise provision like s. 24(2) what is really a long way down the continuum towards the American exclusionary rule, this, despite that the language and the apparent underlying philosophy of the provision would suggest that our jurisprudence should be taking us towards the other end of the spectrum"; see also Paciocco 2001 (fn 20 above) at 435 where he

contrast, those in favour of the protection of due process interests would argue that the inclusion of unconstitutionally obtained evidence would be detrimental to the administration of justice, because the courts, as protectors of the Constitution, should not allow the government and its agents to prove its case against the accused by means of evidence obtained in violation of the Charter.[22] Canadian courts have extensively dealt with the concept of 'disrepute'.[23] Before

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argues in respect of the admissibility of evidence as follows: "Still it is my view that society should choose to sacrifice the truth by excluding information relevant to guilt only reluctantly, and even then, to no greater degree than is absolutely necessary"; Mahoney (fn 20 above) at 473, suggests that Charter violations should not intervene in cases of factual guilt. He makes the point as follows: "Criminals must be detected and punished. If this result was about to occur in a particular case, the mere fact of a Charter breach should not be treated as a sufficient reason to interfere with that inevitability".

[22] See, for example, Davies (fn 20 above) at 39, who argues that Canadian courts should adopt a prima facie exclusionary approach, thus showing that they do take the protection of fundamental rights seriously. He argues as follows: "The *prima facie* exclusionary approach is merely a way of stating that ***generally*** to admit unconstitutionally obtained evidence would cause disrepute and that ***generally*** such evidence should be excluded. It's an approach entirely consistent with the rights-centred vision of the Charter" (emphasis in original); Pottow (fn 20 above); Pringle (fn 20 above); Fenton (fn 20 above) at 310 he makes the following point: "… exclusion must be mandated in all instances where the evidence is obtained as a result of a concriptive breach or a serious breach of the Charter and the evidence ***would*** not otherwise have been discovered" (emphasis in original); Young (fn 20 above); Wiseman (fn 20 above); Choo & Nash (fn 20 above), writing on exclusion within the context of the PACE, in comparison with section 24(2); Morissette (fn 20 above); Roach (fn 11 above); Stuart (fn 20 above).

[23] See for example the following Supreme Court cases: *R v Dyment* (1982) 12 CCC (3d) 532, ("*Dyment*"); *R v Therens* (1985) 18 CCC (3d) 481, [1985] 1 SCR 613, ("*Therens*"); *Collins* (fn 1 above); *R v Trask* (1984) 6 CCC (3d) 132, ("*Trask*"); *R v Turcotte* (1987) 39 CCC (3d) 193, ("*Turcotte*"); *R v Strachan* (1988) 46 CCC (3d) 479, ("*Strachan*"); *R v Wise* (1992) 70 CCC (3d) 193, ("*Wise*"); *R v Rahn* (1985) 18 CCC (3d) 514, ("*Rahn*"); *R v Clarkson* (1984) 9 CCC (3d) 263, ("*Clarkson*"); *R v Simmons* (1984) 11 CCC (3d) 193, ("*Simmons*"); *R v Manninen* (1984) 8 CCC (3d) 193, ("*Manninen*"); *R v Hamill* (1985) CCC (3d) 338, ("*Hamill*"); *R v Tremblay* (1985) 17 CCC (3d) 359, ("*Tremblay*"); *R v Sieben* (1987) 32 CCC (3d) 574, ("*Sieben*"); *R v Pohoretsky* (1987) 33 CCC (3d) 398, ("*Pohoretsky*"); *R v Genest* (1989) 45 CCC (3d) 385, ("*Genest*"); *R v*

the relevant factors under this group of *Collins* factors are discussed, it is appropriate to consider the role of public opinion in Canada when an assessment in terms of section 24(2) is undertaken.

The role of public opinion is especially important when the courts consider the effect of excluding the disputed evidence on the repute of the justice system. Section 24(2) enjoins Canadian courts to exclude evidence if its admission would

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Debot (1989) 52 CCC (3d) 193, ("*Debot*"); *R v Duarte* ((1990) 53 CCC (3d) 1, ("*Duarte*"); *R v Brydges* (1990) 53 CCC (3d) 330, ("*Brydges*"); *Thomson Newspapers Ltd v Canada (Director of Investigation and Research)* (1990) 54 CCC (3d) 417, ("*Thomson Newspapaers*"); *R v Wong* (1990) 60 CCC (3d) 460, ("*Wong*"); *R v Kokesch* (1990) 61 CCC (3d) 207, ("*Kokesch*"); *R v Hebert* (1990) 57 CCC (3d) 97, ("*Hebert*"); *R v Greffe* (1990) 1 SCR 755, ("*Greffe*"); *R v Smith* (1991) 63 CCC (3d) 313, ("*Smith*"); *R v Elshaw* (1991) 67 CCC (3d) 97, ("*Elshaw*"); *R v Broyles* (1991) 68 CCC (3d) 308, ("*Broyles*"); *R v Harper* (1994) 92 CCC (3d) 423, ("*Harper*"); *R v Mellenthin* (1993) 76 CCC (3d) 481, ("*Mellenthin*"); *R v Dersch* (1994) 85 CCC (3d) 1, ("*Dersch*"); *R v Pozniak* (1995) 92 CCC (3d) 473, ("*Pozniak*"); *R v Cobham* (1995) 92 CCC (3d) 333, ("*Cobham*"); *R v Wijesinha* (1995) 100 CCC (3d) 410, ("*Wijesinha*"); *R v Burlingham* (1995) 97 CCC (3d) 385, ("*Burlingham*"); *R v Evans* (1996) 104 CCC (3d) 23, ("*Evans*"); *R v Goldhart* (1996) DLR (4th) 502, ("*Goldhart*"); *Stillman* (fn 6 above); *Feeney* (fn 6 above); *R v Law* (2002) 1 SCR 227, ("*Law*"); *R v Buhay* (2003) 174 CCC (3d) 97, ("*Buhay*"); *R v Mann* (2004) CarswellMan 303, ("*Mann*"); *R v Orbanski; R v Elias* (2005) 2 SCR 3, ("*Orbanski*"). The following are examples of courts, other than the Supreme Court, that dealt with these issues: *R v Charley* (1993) 16 CRR (2d) 338, ("*Charley*"); *R v Meddoui* (1992) 5 CRR (2d) 294 (Alta CA), ("*Meddoui*"); *R v Ferguson* (1991) CRR (2d) 227, ("*Ferguson*"); *R v Traverse* (2003) CarswellNfld 119, ("*Traverse*"); *R v Pippin* (1994) 20 CRR (2d) 62, ("*Pippin*"); *R v Mooring* (2003) 174 CCC (3d) 54, ("*Mooring*"); *R v Neilson* (1985) 36 CRR (2d) D-3, ("*Neilson*"); *R v Hosie* (1996) 107 CCC (3d) 385, ("*Hosie*"); *R v Baltrusaitis* (1996) 37 CRR (2d) D-5, (*Baltrusaitis*"); *R v Belnavis* (1996) 36 CRR (2d) 32, ("*Belnavis*"); *R v Gordon* (1996) 36 CRR (2d) D-8, ("*Gordon*") *R v Legere* (1988) 43 CCC (3d) 504, ("*Legere*"); *R v Buendia-Alas* (2004) 118 CRR (2d) 32, ("*Buendia-Alas*"); *R v Vu* (2004) 118 CRR (2d) 315, ("*Vu*"); *R v Manickavasagar* (2004) 119 CRR (2d) 1, ("*Manickavasagar*"); *R v Grant* (2006) 38 CR (6th) 58, CarswellOnt 3352, ("*Grant*"); *R v B (L)* (2007) 49 CR (6th) 245 (Ont CA), ("*B (L)*"); *R v Harris* (2007) 49 CR (6th) 276 (Ont CA), ("*Harris*"); *R v Williams* (2008) 52 CR (6th) 210 (Ont SC), ("*Williams*").

cause 'disrepute to the administration of justice'.[24] Paciocco is of the opinion that 'disrepute' can only be determined by reference to the views of society at large.[25] The concept therefore suggests that the courts should attach some value to the opinion of society when the section 24(2) assessment is made,[26] only if the community's current mood is reasonable.[27] However, the Canadian Supreme Court has emphasised that, when interpreting section 24(2), the concept of 'disrepute' should not be equated with public opinion.[28] The reason for this approach becomes clear when one considers that the protection of constitutional

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[24] This phrase is contained in section 24(2) of the Charter.

[25] Fn 20 above (Paciocco 1989) at 342; Morissette (fn 20 above) at 538 suggested that the following question should be asked to determine this issue: "Would the admission of the evidence bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances of the case"? This suggestion was followed by Lamer J in *Collins* (fn 1 above).

[26] Ibid at 523, where Lamer J, in *Collins*, mentioned that "… the concept of disrepute necessarily involves some elements of community views …", but that the admissibility of evidence under section 24(2) should be determined by a reasonable person who is an "average person in the community, but only when that community's current mood is reasonable". Furthermore, the decision as to whether evidence should be excluded or received, must be informed by the "long-term consequences of regular admission of this type of evidence on the repute of the administration of justice". However, before a ruling in terms of section 24(2) is made, presiding officers must constantly remind themselves that the Charter "was designed to protect the accused from the majority". Compare Paciocco 1989 (fn 20 above) at 342, contending that public opinion should play a significant role in the section 24(2) assessment, when he reasons as follows: "One cannot speak intelligently about disrepute without discussing through whose eyes the relevant reputation is to be judged. I have assumed … that the relevant reputation is that which exists in the eyes of those to whom the legal system applies. … the Supreme Court of Canada has accepted in substance that the repute of the administration of justice is to be judged through the eyes of the reasonable judge rather than in response to what the public might be thinking".

[27] Loc cit.

[28] Loc cit.

rights should not be left for protection by the majority.[29] Canadian courts and scholars alike have commended this approach[30] as the most appropriate standard to determine whether admission or exclusion of the disputed evidence would cause 'disrepute' to the administration of justice.

In summary: Public opinion polls are not considered when Canadian courts apply setion 24(2), because the Charter serves the purpose of protecting the minority from the power of the majority. However, courts do attach some value to the current mood of society, provided it is reasonable.

The seriousness of the constitutional infringement under section 24(2) of the Charter is discussed next.

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[29] *Collins* (fn 1 above) at par 32. Lamer J reasoned as follows: "The ultimate determination must be with the courts, because they provide what is often the only effective shelter for individuals and unpopular minorities from the shifting winds of public passion"; Paciocco 1989 (fn 20) at 344; see also Lamer (fn 20 above) at 354-355, where the Canadian Chief Justice explained as follows: "It is a trite observation that the repute of the administration of justice cannot be determined by simple reference to the barometer of current public opinion. One would expect public opinion regularly, if not always, to weigh in favour of admitting the evidence. There is a sense in which that opinion embodies the tyranny of the majority, a kind of tyranny against which Charter rights were designed to protect".

[30] Roach (fn 11 above); Roach (fn 20 above); Gold (fn 20 above); Bryant et al (fn 20 above); Whyte & Lederman (fn 20 above); Sopinka et al (fn 20 above); Godin (fn 20 above); Young (fn 20 above); Mitchell (fn 20 above); Stuart 2000 (fn 20 above).

2. The seriousness of the violation: exclusion to prevent judicial condonation of unconstitutional conduct

Under this group of *Collins* factors the courts must assess whether admission of the disputed evidence, obtained after a serious violation, would be tantamount to judicial condonation of unconstitutional conduct. Of paramount importance in this determination is the manner in which the right has been infringed. In this part of the work the following question is answered: How should the seriousness of the violation be determined? In terms of the *Stillman* fair trial framework, the nature of the evidence considered under the second and third groups of factors would, in general, be 'non-conscriptive, not discoverable' or derivative real evidence.[31] An important issue that arises in this regard is whether the nature of the evidence is determinative of the classification of the infringement as a serious violation. In other words, do the Canadian courts apply the same criteria to determine the seriousness of the breach, regardless of the nature of the evidence? The Canadian courts determine the seriousness of the violation by scrutinising police conduct in the entire evidence gathering process. Added to this, the seriousness of the violation is determined by a consideration of the following factors: Whether the violation was committed in good faith, inadvertently, negligently, deliberately, or on the grounds of urgency. A discoverability analysis forms an essential part of this assessment.

[31] However, see the unusual approach in *Grant* (fn 23 above) at paras 52-64, where it was held that the conscriptive evidence had a less invasive impact on trial fairness. For this reason it was not excluded on this ground. Based on this finding, its admissibility was considered under the second and third groups of *Collins* factors. An appeal was launched, which was argued in the Supreme Court on 23 April 2008. Judgment will be delivered in due course. Stuart of the Faculty of Law, Queen's University, Canada, acted on behalf of the intervenor in the appeal and has provided the writer with a copy of his Heads of Argument, ("Stuart's Heads of Argument"). The Heads of Argument is attached and marked Annexure D.

This part of the work is limited to the assessment of the seriousness of the violation and the good faith exception in Canada. The same method is followed when the seriousness of the infringement is discussed in the South African context. This method is followed because the other factors that may diminish the seriousness of the violation tend to have common characteristics with the 'good faith exception'.[32]

2.1 Ascertaining the seriousness of the violation in Canada

It was pointed out in *Colllins* that the attention of the court is directed, under this group of factors, not towards the nature of the right violated, but towards the seriousness of the constitutional violation.[33] This determination calls for an assessment of all the surrounding circumstances leading to the constitutional violation. The seriousness of the violation must be assessed by considering whether it was committed in 'good faith', or inadvertently or whether it was of a 'technical nature, deliberate, wilful or flagrant'.[34] The factors listed by Mitchell[35]

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[32] For a discussion of these other factors, see Roach (fn 11 above) at 10-69-82.

[33] *Collins* (fn 1 above) at 527.

[34] Loc cit.

[35] Fn 20 above at 178-179. He mentions the following factors, adding that the list should not be regarded as exhaustive: "1. Did the police act in good faith? 2. Did the police act on reasonable and probable grounds? 3. Were the police acting on the authority of a law that had not been declared unconstitutional? 4. Did the police act contrary to the Criminal Code? 5. Was the violation inadvertent? 6. Could the violation be characterised as deliberate, overt, blatant, wilful or flagrant? 7. Was the violation serious or trivial? 8. Was the violation only technical? 9. Did the violation involve interference with the sanctity of a person's body? A violation of a person's body is much more serious than a violation of his office or even his home. A violation of a home is more serious than an office. 10. Did the police take advantage of a person's condition to obtain evidence they had no right to acquire without his consent? 11. Was the violation motivated by urgency or necessity to prevent the loss or destruction of evidence? 12. Were other investigatory techniques available to the police? 13. Could the evidence have been obtained without a violation

are indicative of the various features of police conduct a court may consider to determine the nature of the violation.

Hogg[36] is of the opinion that the rationale for exclusion under this group of factors is the fact that the courts do not want to condone unconstitutional conduct characterised as a serious violation, because by admitting evidence obtained in this manner they would be associating themselves with the unconstitutional conduct perpetrated by the police. Such association would by its very nature, impact negatively on the repute of the criminal justice system. By excluding the disputed evidence obtained in the shadow of a serious Charter violation, the court demonstrates that it distances itself from the unconstitutional conduct. The judicial integrity rationale evidently comes to prominenece when courts exclude evidence on this ground.

In *R v Greffe*[37] the nature of the evidence in dispute was real evidence. The accused was charged with the crime of importing and the possession of heroin. Customs officers suspected that he was in possession of drugs and searched the accused without informing him about his right to legal representation. After the search, he was turned over to the drug squad, who requested a medical doctor to perform a rectal search on the accused. As a result of the latter search, heroin was discovered on the person of the accused. Lamer J, writing the majority opinion, held that the police had no reasonable and probable grounds to arrest the accused. This violation was aggravated by the nature of the subsequent searches, which progressed from the search of his bags and the frisking of his

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of the Charter? 14. What type of person did the police believe they were dealing with? 15. Did the police act in an unreasonable manner? 16. Did the accused actively provoke the police into acting too hastily? 17. Were the duties of the police respecting the right to counsel suspended because the detainee failed to act with reasonable diligence in the exercise of his rights?"

[36] Fn 20 above at 411.

[37] Fn 23 above.

outer clothing, to a strip search and ultimately a rectal search. In addition to those violations, the accused was led to believe that the rectal search was necessary after he was formally arrested for traffic offences.[38]

Lamer J reasoned as follows, and in this manner emphasised the seriousness of the violation:[39]

> Indeed, it is the intrusive nature of the rectal search and considerations of human dignity and bodily integrity that demands the high standard of justification before such a search will be reasonable. To paraphrase somewhat my statement in *Collins*, *supra*, at pp 22-3, we cannot accept that police officers subject persons to rectal examinations incident to arrests for traffic warrants when they do not have reasonable grounds to believe that those people are actually in possession of drugs. It is imperative that the court, having regard to the long-term consequences of admitting evidence obtained in these circumstances, dissociate itself from the conduct of the police in this case, which, always on the assumption that they merely had suspicions, was a flagrant and serious violation of the rights of the appellant. Indeed, in this case the absence of proof of reasonable and probable grounds, or even of 'objective articulate facts' to support the officers' suspicions, makes the unreasonable search a more serious Charter violation; see *Simmons, supra* at pp 325-6 and *Jacoy, supra,* at pp 54-5.

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[38] Ibid at 191.

[39] Loc cit. In *Collins*, Lamer J was of the opinion that the violation was serious and that he would exclude the heroin on the said grounds, because the court could "not accept that police officers take flying tackles at people and seize them by the throat when they do not have reasonable and probable grounds to believe that those people are either dangerous or handlers of drugs".

It is submitted that the police conduct could not be characterised as a good faith infringement, because the search was not motivated by urgency, necessity or with the aim to prevent the destruction of evidence. Moreover, the bad faith of the police officers becomes evident when one considers that they suggested to the accused that the rectal search should be performed under the pretence that he was arrested for traffic offences. What is more, the violation involved an interference with the sanctity of the human body, made possible because the police took advantage of the accused's vulnerability (an unlawful arrest and detention) in order to perform the rectal search. No doubt, the rectal search constituted an affront to human dignity. The court also emphasised the fact that more than one Charter right had been violated and the breaches were not isolated errors of judgment.[40] Taken together, these factors added to the seriousness of the violation. The judgment in *Greffe* suggests that where there is a pattern of disregard for Charter rights, it only adds to the seriousness of the infringement.[41]

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[40] Loc cit.

[41] See also *Feeney* (fn 6 above) at par 80, where Sopinka J summarised the seriousness of the violation as follows: "… the violations in the instant case that were associated with the gathering of the shirt, shoes, cigarettes and money were serious. The police ***flagrantly disregarded*** the appellant's privacy rights and moreover showed little regard for his s. 10(b) rights. Indeed, while such misconduct was not directly responsible for the gathering of the shirt, shoes, cigarettes and money, the fact that the appellant did not speak with a lawyer for two days following his detention, yet the police did not cease in their efforts to gather evidence from him, indicates the lack of respect for appellant's rights displayed by the police. In light of this pattern of disregard for the rights of the appellant, in my view the obtention of the shirt, shoes, cigarettes and money was associated with very serious *Charter* violations". (Emphasis added). See further *Stillman* (fn 6 above) at par 124, where Cory J articulated his concern about the seriousness of the violation as follows: "Reprehensible as these actions were in themselves [the taking of the bodily samples and statement of the accused against his will before his attorney was present, and the fact that the police waited until the lawyer of the accused had left, thereafter proceeding to use force, threats and coercion to take bodily samples and to interrogate the accused; the police further pulled the scalp hair of the accused and made him provide his pubic hair and forced a plasticine

Kokesch[42] demonstrates that when the police cannot obtain evidence against the accused in a constitutional manner, the procurement of the evidence as a result of a violation would be regarded as a serious breach.[43] In other words, a discoverability analysis is undertaken to determine whether the Charter violation could be categorised as serious. This view was confirmed by the majority judgment in *Stillman*.[44] In *Buhay*,[45] the evidence in dispute was real evidence. In this case, two accused rented a locker situated at a bus depot. They acted suspiciously and a security guard noticed the smell of marijuana when one of them opened the locker and removed a bag. The accused thereafter left the bag in the locker and both walked out of the bus depot. The security guards went to the locker and one of them sniffed through the vent of the locker door and detected the distinctive smell of marijuana. An operator of the lockers was contacted, who opened it with a master key. In the locker a quantity of marijuana was found, rolled up in the middle of a sleeping bag. The items were left in the locker and the police were contacted. The officers smelled the marijuana through the vent and the operator thereupon opened the locker for them. The marijuana was seized without a warrant for its search and seizure. The officers placed a note in the locker with the pager number of an undercover drug squad member.

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mould into his mouth] they become intolerable when the police were aware that the appellant was a young offender at the time, and that he was entitled to special protection provided by the Young Offenders Act. … All this was flagrantly disregarded".

[42] Fn 6 above.

[43] Compare the dissenting judgment of Dickson CJC in *Kokesch*, who reasoned that because other investigating techniques would have been fruitless, the breach should not be deemed a serious violation.

[44] Fn 6 above at par 125.

[45] Fn 23 above.

The next day the accused went to the locker, read the note and left. He was arrested soon thereafter. What is of paramount importance is the fact that one of the officers who was summoned by the security guards to inspect the locker, testified that he never thought about obtaining a warrant. His partner, in turn, testified that he never thought that the accused had an expectation of privacy in the locker and also conceded that he did not have sufficient grounds to obtain a warrant.

The Supreme Court held that the search and seizure without warrant constituted a violation of section 8 of the Charter.[46] Considering the seriousness of the violation, Arbour J held that the violation was serious and the officers could not successfully rely on the good faith exception, for the following reasons: Firstly, there was no situation of urgency, calling for immediate police action, because the evidence before court did not intimate that the dagga would be removed or destroyed. Furthermore, the dagga did not pose an immediate threat to public safety. Secondly, the testimony of one the officers to the effect that he thought that he lacked sufficient grounds to obtain a warrant is suggestive of a blatant disregard of the Charter rights of the accused. Thirdly, the evidence could have been obtained in a lawful manner, while the officers failed to consider other investigatory techniques to obtain the evidence.[47] The court considered in favour of the prosecution, that the officers had reasonable and probable grounds to believe that a warrant could have been issued, because the information they received was obtained from the security guards, who are deemed reliable

[46] Ibid at par 38.

[47] Ibid at paras 60-63. The court relied heavily, in this regard, on the reasoning in *Dyment* (fn 23 above), where there was no indication in the evidence before court that the rights of the accused had been ***deliberately*** violated. However, at 440 it was held that the fact that other investigatory techniques were available and there was no urgency to obtain the evidence, the evidence was excluded because "such lax police procedures cannot be condoned". This is a discoverability analysis.

informants. Despite the fact that this consideration had been held on several occasions by the Supreme Court to diminish the seriousness of the violation,[48] the court after having regard to all the circumstances, classified the violation as serious.[49]

The *Buhay* judgment serves as a convenient summary of the factors a court should consider when assessing the seriousness of the infringement. By this means, it upholds the importance of the function of the courts as protectors of fundamental rights. At the same time it acknowledges the fact that failure to do so would be synonymous with judicial disregard of unconstitutional conduct. It is further in conformity with sound constitutional policy, because it promotes the important principle that the government or its agents should not unduly interfere with the fundamental rights of citizens, unless a cogent reason for such interference can be demonstrated.[50] Before police conduct may be justified as

[48] The court referred to the following judgments: *Belnavis* (fn 23 above) at par 42; *Jacoy* (1988) 45 CCC (3d) 46 at 560, ("*Jacoy*"); *Duarte* (fn 23 above). See further *Silveira* (fn 23 above); see also *Traverse* (fn 23 above) at pars 21-22; *R v Krall* (2003) CarswellAlta 1336 at par 85, ("*Krall*"), where Allen Prov J held as follows: "The violation was serious and not merely of a technical nature. The police did not have reasonable grounds to believe that the applicant was in possession of marijuana. Had such grounds existed this would have gone a long way to mitigate their failure to obtain the appropriate warrant". In *Buhay* (fn 23 above) at par 65, it was held that the existence of reasonable and probable grounds would, in general, render a violation less serious.

[49] Fn 23 above at par 66.

[50] See the comments by Sopinka J in *Kokesch* (fn 23 above) at 231, where he confirmed this view as follows: "Where the police have nothing but suspicion and no legal way to obtain other evidence, it follows that they must leave the suspect alone, not charge ahead and obtain evidence illegally and unconstitutionally"; see also *R v Symbalisty* (2004) 119 CRR (2d) 311, where routine warrantless police searches of a pawn shop was held to violate section 8 of the Charter. Real evidence was in dispute. The violation was deemed serious, because the police conduct was tantamount to a ***careless disregard*** of fundamental rights. In *Pohoretsky* (fn 23 above), the accused was involved in a single-vehicle collision and taken to hospital. A police

inadvertent or as good faith infringements, their conduct should be objectively considered,[51] taking into account whether alternative investigative procedures were available to them that would not have resulted in the infringement of fundamental rights. Failure by the police to consider alternatives available to them, so as to avoid a Charter breach, only serves as confirmation of a lack 'of a sincere effort to comply with the Charter'.[52]

In *Hosie*,[53] the home of the accused was searched with an invalid warrant and the circumstances indicated that there was no urgency or the need for police intervention in order to prevent the loss of evidence. The Ontario Court of Appeal held that the warrant was invalid, because the police officer when applying for it, failed to disclose important facts to the issuing magistrate. The failure was

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officer requested a doctor to obtain a blood sample of the accused while he was in an incoherent and delirious state. At 401, Lamer J analysed the seriousness of the violation as follows: "I consider this unreasonable search to be a very serious one. First, a violation of the sanctity of a person's body is much more serious than that of his office or even of his home. Secondly, it was ***wilful and deliberate***, and there is no suggestion here that the police acted in good faith …". (Emphasis added). Compare *Feeney* (fn 6), where the disputed evidence was real evidence in the form of a discarded tissue containing a mucuous sample. This violation was classified as "not serious", because it did "not interfere with appellant's bodily integrity, nor cause him any loss of dignity", and the police ***would have obtained it in any event*** by sealing the "garbage container and obtained a search warrant". (Emphasis added).

[51] The court in *Buhay* applied an objective test. This is evidenced by the fact that regardless of the testimony of the police officer that they subjectively thought that they did not have reasonable and probable cause, the court held, taking into account all the circumstances, that they in fact had reasonable and probable cause.

[52] Per Arbour J in *Buhay* (fn 23 above) at par 63; see also *Wijesinha* (fn 23 above), where the fact that the police obtained legal advice from prosecuting counsel throughout the investigation, was considered as factors confirming the presence of good faith.

[53] Fn 23 above.

construed as having a misleading effect on the magistrate who authorised the warrant. Rosenburg JA held that:[54]

> [t]he obtaining of a search warrant in this fashion strikes at the core of the administration of justice.

Rosenburg JA excluded the evidence because the violation was regarded as serious, and in his considered opinion, the long-term consequences of the consistent admission of evidence obtained under those circumstances, would have a negative impact on the administration of justice.

It is evident when one considers the case law mentioned above, that the mental state and objective reasonableness of the police conduct in relation to the Charter breach, is at the heart of the assessment of this group of factors.[55] This assessment must be undertaken by scrutinising the police conduct in the entire evidence-gathering process.[56] However, Lamer J hastened to add[57] that the purpose of exclusion should not be aimed at disciplining the police,[58] but to

[54] Ibid at 110.

[55] See the cases cited at fn 48 above.

[56] Roach (fn 11 above) at 10-68, based on the approach of Dickson CJC in *Strachan*, is of the opinion that the courts, when assessing this group of factors, do not only narrowly focus on the actual police conduct in obtaining the evidence, (as in the USA), but they consider police conduct during the entire investigation process. He bases the distinguishing factors on the approach of the Supreme Court of the United States in *US v Sugera* (1984) 468 US 796, ("*Sugera*"). In this case, the illegal entry into the apartment of the accused was ignored, because the evidence was thereafter seized in terms of a legal warrant; see also *Oregan v Elstad* (1984) 470 US 298, ("*Elstad*"), where *Miranda* warnings were violated, but because the statement had been given voluntarily, it was admitted.

[57] *Collins* (fn 1 above) at par 31.

[58] It is submitted that in so doing, he highlighted the rationale of section 24(2), thus distinguishing it from the exclusionary rule applicable in the USA. Compare the dissenting judgment of Wells CJN in an appeal heard by the Newfoundland and Labrador Court of Appeal in

protect the integrity of the criminal justice system.[59] Therefore, by admitting the evidence thus obtained, courts should consider whether society at large would regard reception of the disputed evidence as judicial condonation of unconstitutional police conduct.[60]

In *Feeney*[61] and *Stillman*,[62] the Supreme Court held that violations that impact negatively on trial fairness should by their nature be deemed as serious.[63] In this way these judgments suggest that admission of the disputed evidence would, by the same token, have a negative effect on the repute of the justice system.[64] *Stillman* further confirms the fact that Canadian courts regard infringements that significantly interfere with a person's body or bodily integrity as serious

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Traverse (fn 23 above) at par 62, where the judge reasoned as follows: "If, as Lamer J decided in *Collins*, exclusion of evidence under section 24(2) of the Charter 'is not a remedy for police misconduct', then surely it should not be a remedy for police negligence or carelessness. If a remedy is required, it could be given by way of reduction of sentence".

[59] The rationale for exclusion in the USA is to discipline the police. See *Elkins v US* (1960) 364 US 206 at 217; see also *Miranda v Arizona* (1966) 384 US 436. Compare *Grant* (fn 23 above).

[60] See, for instance *Dyment* (fn 23 above) at 537-538; also *Pohoretsky* (fn 23 above) at 401-402.

[61] Fn 6 above.

[62] Fn 6 above.

[63] *Feeney* (fn 6 above) at par 170; *Kokesch* (fn 23 above); see also *Hebert* (fn 23 above). However, compare *Grant* (fn 23 above) at par 52, where Laskin JA defied the reasoning in the mentioned cases of the Supreme Court when he wrote for a unanimous Ontario Court of Appeal as follows: "… even though the admission of conscriptive evidence compromises trial fairness, its admission will not always bring the administration of justice into disrepute". The court further reasoned that the admissibility of conscriptive evidence depends on the degree of trial unfairness.

[64] See also *Hebert* (fn 23 above) at 20, where Sopinka J made the following comments: "For myself, I fail to see how the good faith or otherwise of the investigating officer can cure, so to speak, an unfair trial. This court's cases on section 24(2) point clearly, in my opinion, to the conclusion that where impugned evidence falls afoul of the first set of factors set out by Lamer J in *Collins* (trial fairness), the admissibility of such evidence cannot be saved by resort to the second set of factors (the seriousness of the violation)". Compare *Grant* loc cit.

violations.[65] *Stillman* and *Feeney* also suggest that when conscriptive evidence has been obtained after a violation, such infringement should be regarded as serious, based on the classification of the evidence.

An important issue that needs to be addressed here is whether the nature of the evidence in dispute has a decisive bearing on the assessment of the seriousness of the breach. Stuart[66] and Roach[67] are of the opinion that the nature of the evidence is determinative of whether the infringement should be regarded as serious. A review of the Canadian case law confirms the accuracy of their remarks. In *Mellenthin*, for example, the Supreme Court labelled a violation that produced conscriptive evidence as a serious breach, despite the fact that the court did not hold that the police acted in bad faith.[68] However, in *Greffe*, *Stillman*, *Feeney* and *Buhay*, where the disputed evidence was derivative real

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[65] Fn 6 above at par 124; *Pohoretsky* (fn 23 above) at 401; *Greffe* (fn 23 above) at 191.

[66] *Charter Justice in Canadian Criminal Law* (1991) at 406, where he points out that real evidence "will only be excluded if the court is prepared to brand the police conduct in terms such as 'deliberate', 'flagrant' or 'blatant'."

[67] Fn 11 above at 10-78, where he expresses his concern in this regard as follows: "The conclusion that a particular Charter violation is wilful, deliberate or flagrant may appear to be result-oriented, because the court has applied different standards in different contexts. In cases where a Charter violation leads to incriminating evidence that will affect the fairness of the trial, the Supreme Court of Canada has been willing to characterize the Charter violations as deliberate, flagrant, and serious without any evidence that suggests the police acted in bad faith. Where Charter violations result in the discovery of real evidence … they will generally only be classified as serious if there is some sign of abuse or disregard for other rights".

[68] See also *Herbert* (fn 23 above), where the infringement to the right to remain silent led to the discovery of conscriptive evidence, the infringement was classified as "wilful and deliberate"; *Therens* (fn 23 above), where a failure to inform the accused of the right to legal representation, and the evidence was conscriptive, the infringement was categorised as "flagrant", despite the fact that the court made no finding as to bad faith on the part of the police. Compare *Wise* (fn 23 above), where the evidence was real evidence and the police conduct was described as "careless". The evidence was admitted.

evidence, the infringements were regarded as serious only after the courts had classified the violations as either 'blatant', 'wilful' or 'flagrant'.[69] As a consequence, when non-conscripitive evidence is in dispute and the infringement is not categorised as 'flagrant', 'blatant' or 'wilful', the violation would, in general, not be deemed a serious infringement.[70].

Factors that 'blunt' the seriousness of the infringement are the absence of evidence showing 'systemic or institutional failure or inadequate training'.[71] Likewise, substantial compliance with the provisions of the Charter makes a violation less serious.[72]

The seriousness of the violation must be weighed against the impact that exclusion of the disputed evidence would have on the repute of the administration of justice.[73] The third group of factors is discussed after the good faith exception.

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[69] In *Feeney* (fn 6 above) at par 80, the violation of the right to privacy and legal representation (resulting in the discovery of the shoes, shirt, cigarettes and money) was typified as "flagrant" and a "pattern of disregard" and was accordingly considered a serious infringement. In *Stillman* the infringements that led to the discovery of real evidence was likewise characterised as "flagrant". In *Greffe*, the police conduct was classified as a "pattern of disregard"; see also *Buhay* (fn 23 above); *Mann* (fn 23 above) at par 57; *Williams* (fn 23 above) at par 26.

[70] See the dissenting judgment of Deschamps J in *Mann* (fn 23 above) at par 80; see also *Harris* (fn 23 above) at paras 59-61. Compare *Grant* (fn 23 above) at paras 60-63, where ***conscriptive*** evidence was adjudged not to have been obtained "deliberately", "flagrantly" or "wilfully" in defiance of Charter rights. The violation was accordingly categorised as non-serious, despite the court's finding, at par 60, that the right contained in "s 9 is an important Charter guarantee".

[71] *Grant* (fn 23 above) at par 63.

[72] *Strachan* (fn 23 above); *Grant* (fn 23 above) at par 62, suggesting that where the law on a particular issue is not unambiguous and the officers, in the execution of their duties, follow a procedure that impinges on a Charter right, such an infringement should not be regarded as a serious violation; compare *Kokesch* (fn 23 above) at 231.

[73] *Collins* (fn 1 above); see also Roach (fn 11 above) at 10-13.

Whether a violation should be classified as serious would depend on the absence or presence of good faith on the part of the police. It is therefore apposite to consider factors that could convince a court that a violation should not be classified as serious, but in good faith, and therefore non-serious.

2.2 The good faith exception in Canada

The Canadian courts have given frequent attention to the 'good faith' exception under this group of factors.[74] The conduct of the police must be objectively reasonable before it can be understood to qualify as 'good faith' for purposes of section 24(2).[75] Thus, in *Kokesch*,[76] Sopinka J wrote for the majority and reasoned that despite the honest belief of the police officers that they could proceed to search without a search warrant, one of two scenarios materialised, either they 'knew they were trespassing, or they ought to have known'.[77] In other words, the police acted either deliberately or negligently. The judge concluded that whatever their motive might have been, they could not be

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[74] See the cases cited at fn 23 above.

[75] *Mellenthin* (fn 23 above); *Kokesch* (fn 23 above); *Jacoy* (fn 23 above); *Duarte* (fn 23 above); see also *Wong* (fn 23 above). Compare *Grant* (fn 23 above) at par 63, where subjective factors were considered as diminishing the seriousness of the Charter violation. Prominent consideration was accorded to the conduct and particular perception of the officers when Laskin JA reasoned that the police "did not think that they had detained the appellant at all before he admitted to possession of marijuana". The important question is: was the belief of the police officers objectively reasonable? The court held, at par 62, that it was, having regard to the uncertainty of the legal position on the issue of when a person is deemed to be "detained". This uncertainty in the law was an important facor, indicative of a lack of bad faith on the part of the police, because it was held that the line "between police questioning that gives rise to a detention and questioning that does not is often not clear".

[76] Fn 23 above.

[77] Ibid at 231.

adjudged to have proceeded in 'good faith' as the term is understood under section 24(2). Judicial tolerance of the negligent violation of constitutional rights pays no heed to the protection of the integrity of the criminal justice system.[78]

Sincere attempts by the police to keep their investigative powers within the ambit of the law are indicative of their good faith.[79] Conversely, where there was

[78] Loc cit; see also *Feeney* (fn 6 above) at 167, where the aforesaid dictum in *Kokesch* was quoted with approval; see further Roach (fn 11 above) at 10-76, where he points out that: "Acceptance of careless or negligent violations of Charter rights sits uneasily with protecting the reputation of the administration of justice. Courts should not be quick to accept careless or negligent Charter violations that should have been prevented. Stating that such violations are unacceptable will not necessarily lead to exclusion in all cases. Other factors such as compliance with other Charter rights and the harmful effects of excluding important evidence in serious cases can still be considered". However, compare the dissenting minority opinion of Wells CJN in *Traverse*, quoted at fn 58 above.

[79] See *Legere* (fn 23 above) where the accused was arrested and detained in a police cell. The police entered the cell and, initially without consent, took several strings of hair from the beard and head of the accused. The accused eventually pulled his hair and allowed other samples to be cut and gave it to the police. A few days thereafter the police again entered the police cell where the accused was detained, armed with a warrant, and took samples of his hair without consent. Despite the absence of statutory authority or a court order allowing the taking of hair samples, it was held that admission of the evidence would not impact negatively on the administration of justice, because a reported case condemning similar police conduct had not been published at the time of the breach. The police also consulted prosecuting counsel before acting as they did. There was, in a word, evidence to the effect that the police made genuine attempts not to violate the rights of the accused; compare *Stillman* (fn 6 above) at par 125, where Cory J rejected the prosecution argument that the police acted in good faith, because they obtained an opinion from the Crown Attorney as to whether they could seize the bodily samples of the accused, prior to its taking. Cory J held, based on *Kokesch*, that the unavailability of constitutional means to obtain evidence is no justification to obtain evidence by unconstitutional means.

a pattern of disregard for Charter rights, it would add to the seriousness of the violation.[80]

Canadian courts are extremely careful to exclude evidence obtained as a result of a warrant which contains minor deficiencies that do not suggest improper police conduct.[81] However, in *Genest*,[82] where the police kicked down the door of a house without warning and used excessive force in conducting a search thereof, following a similar search a month before, the violation was classified as serious. This judgment is reconcilable with exclusion that is based on a pattern of disregard for Charter rights.[83] It additionally demonstrates that the infringements do not have to be closely linked in time to each other in order to constitute a 'pattern of disregard'. In *R v Gray*,[84] the evidence obtained as a result of a warrant was excluded because the magistrate who issued the warrant assisted the police in preparing the grounds for its authorisation. Roach[85] argues, correctly, that *Gray* was properly decided, because section 24(2) aims to protect the reputation of the entire criminal justice system. Therefore, not only

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[80] *Greffe* (fn 23 above); see also *Grant* (fn 23 above) at par 63, where the absence of evidence showing that the infringement occurred as a result of "systemic or institutional failure, or inadequate training", was regarded as factors diminishing the seriousness of the breach.

[81] See *Parent* (fn 23 above), where evidence obtained as a result of a warrant, defective in minor respects, were admitted; compare *Turcotte* (fn 23 above), where the evidence was excluded because the warrant was obtained in violation of the Criminal Code; see also *Hosie* (fn 23 above) where all the facts were not placed before the issuing magistrate when application was made for the warrant - the evidence thus obtained was excluded; see further *Mooring* (fn 23 above) where evidence of a transcript and audio tape of third-party intercepted communications was regarded as a breach of a "technical" nature, because the police had reasonable and probable grounds to conduct electronic surveillance of the accused and anyone else with whom he came into contact.

[82] Fn 23 above.

[83] See the cases cited at fn 69 above.

[84] (1993) 81 CCC (3d) 174, ("*Gray*").

[85] Fn 11 above at 10-73.

unconstitutional police conduct should be subjected to judicial scrutiny, but also the conduct of court officials.

What is the impact of the *Stillman* fair trial framework on the assessment of this group of factors, and more specifically, the 'good faith' exception? It will be recalled that, in terms of the *Stillman* fair trial framework, the evidence must be typified as either 'conscriptive' or 'not conscriptive'. When categorised as 'conscriptive, not discoverable', that would put an end to the fair trial assessment and the section 24(2) analysis. This entails that such a classification of the evidence would insulate it from further analysis in respect of the second leg of the *Collins* admissibility analysis. By the same token, it confirms the notion that the good faith of the police cannot transform a trial that is unfair into a fair trial.[86] Sopinka J held as follows in a dissenting minority judgment in *Hebert*,[87] a matter decided prior to the introduction of the *Stillman* fair trial framework:[88]

> For myself, I fail to see how the good faith or otherwise of the investigating officer can cure, so to speak, an unfair trial. This court's cases on section 24(2) point clearly, in my opinion, to the conclusion that where impugned evidence falls afoul of the first set of factors set out by Lamer J in *Collins* (trial fairness), the admissibility of such evidence cannot be saved by resort to the second set of factors (the seriousness of the violation).

[86] *Hebert* (fn 23 above) at 20. Compare *Grant* (fn 23 above), at par 59, suggesting that trial fairness can be achieved to a degree and that conscriptive evidence should be admitted if the infringement occurred in good faith. Admission of the evidence that impacts less seriously on trial fairness would, according to the court, not impact negatively on the repute of the justice system.

[87] Fn 23 above.

[88] Ibid at 20.

However, this dissenting opinion of Sopinka J was referred to with approval by Iacobucci J in *Elshaw*,[89] and embraced by majority opinions in *R v Bartle*[90] and *Broyles*.[91] As a consequence, the *Stillman* fair trial framework did not change the effect of this approach proclaimed by Sopinka J in the overall section 24(2) analysis. Only evidence categorised as 'not conscriptive, not discoverable', would be subjected to further scrutiny under the second and third group of *Collins* factors. In a word, the scope of the good faith exception is limited to serve as a factor mitigating the seriousness of the infringement, solely when the evidence is characterised as 'not conscriptive, not discoverable'.[92]

Canadian courts make use of concepts like 'flagrant', 'blatant', 'wilful' and 'careless' disregard or 'lax practices' to convey the fact that the infringements are serious. These notions may cause confusion. In *Wise*, for example, the infringement was categorised as 'careless', but the evidence was nevertheless admitted. Stuart, in his Heads of Argument in the appeal heard by the Supreme Court in *Grant*,[93] is of the view that the Supreme Court needs to clarify the meaning of these concepts. He suggests that Canadian courts should rather make use of familiar concepts like intention and negligence to describe the seriousness of the infringement. An infringement that occurred intentionally should be labeled ***especially serious***, whereas a breach that was performed negligently should be categorised as ***serious***. Conversely, police ignorance or misinterpretation of their powers should only be regarded as a factor diminishing

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[89] Fn 23 above.

[90] (1994) 92 CCC (3d) 309, (1994) 11 DLR (4th) 83 (SCC), ("*Bartle*").

[91] Fn 23 above. See also Mitchell 1993 (fn 20 above) at 443.

[92] Compare *Grant* (fn 23 above), where conscriptive evidence was assessed under the second and third groups of factors. See also Pottow (fn 20 above) at 233, who suggests that the *Stillman* fair trial assumption that all conscriptive evidence would, by its very nature, render a trial unfair, is logically flawed.

[93] Fn 23 above. Judgment was reserved. See further the Heads of Argument at fn 31 above at 7.

the seriousness of the infringement when their conduct demonstrates a genuine attempt to comply with the Charter.[94]

To summarise: The seriousness of a violation could be adjudged to have a negative impact on trial fairness and the disputed evidence may be excluded on this ground,[95] alternatively on the basis that its reception would cause disrepute to the administration of justice.[96] In general, an infringement should be regarded as serious when the privacy or freedom and security of the person interests of an accused have been infringed and:

a) the infringement was not motivated by urgency, necessity or with the aim to prevent the loss or destruction of evidence;[97]

b) the infringement consists of a significant interference with the sanctity of the human body;[98]

c) the evidence could not have been obtained without lawful authority, but the police nevertheless proceeded to obtain it. Thus, the duty rests on government to enact laws of general application which justifies the reasonable and justifiable limitation of Charter rights. For that reason, when evidence could not have been obtained within the legal constraints established by a law of

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[94] Ibid at 6-7.

[95] *Stillman* (fn 6 above) at par 31. This view was also held in *Grant* (fn 23 above) at paras 55 and 59. However, see Stuart (fn 31 above) at par 8, questioning the peculiarity of the approach suggested in *Grant* as follows: "It seems odd that a judge can acknowledge that a trial is even somewhat unfair and yet admit the evidence".

[96] See, for example, *Stillman* (fn 6 above). Stuart, in his Heads of Argument in the Supreme Court matter of *Grant* makes a similar suggestion. He argues (fn 37) at 5, that the focus of the court's attention should be on the seriousness of the violation, rather than the nature of the evidence and the seriousness of the charge.

[97] *Buhay* (fn 23 above); *Greffe* (fn 23 above); *Stillman* (fn 6 above).

[98] *Greffe* (ibid); *Feeney* (fn 6 above).

general application, the infringement is regarded as a blatant disregard of Charter rights;[99]

d) where other investigatory techniques were available to obtain the evidence, but the police officer failed to consider it;[100] and

e) if reasonable and probable grounds existed, it would generally diminish the seriousness of the violation. However, if other investigatory techniques were available and no grounds of urgency existed, the infringement may be regarded as serious.[101]

When conscriptive evidence is obtained as a result of the infringement, thus impairing the right to a fair trial, the violation is regarded as a serious breach.[102] Similarly, when more than one Charter right has been infringed, the breach is typified as a 'pattern of disregard' and the totality of the infringements are deemed a serious violation.[103] Conversely, substantial compliance with the law and the provisions of the Charter is indicative of the good faith of the officers.[104] However, the good faith of the police cannot change a trial that is unfair into a fair trial.[105]

In terms of the *Stillman* fair trial directive, the good faith of the police is applicable only with regard to evidence that is categorised as 'non-conscriptive, not discoverable'. This view has recently been challenged by a judgment delivered by the Ontario Court of Appeal in *Grant*,[106] and the Supreme Court of

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[99] *Kokesch* (fn 23 above); *Buhay* (fn 23 above); *Stillman* (fn 23 above).

[100] *Buhay* (fn 23 above); *Wijsinha* (fn 23 above).

[101] *Buhay* (fn 23 above).

[102] *Stillman* (fn 6 above); *Feeney* (fn 6 above). Compare *Grant* (fn 23 above).

[103] *Greffe* (fn 23 above); *Stillman* (fn 6 above); *Feeney* (fn 6 above); *Buhay* (fn 23 above);

[104] *Strachan* (fn 23 above); *Legere* (fn 23 above).

[105] *Hebert* (fn 23 above); *Elshaw* (fn 23 above); *Bartle* (fn 90 above).

[106] Fn 23 above.

Canada will, in due course, pronounce its judgment on this and related issues. The good faith of the police is determined by means of an objective test.[107] For this reason, honest, but objectively assessed unlawful police conduct does not qualify as 'good faith' for purposes of section 24(2).[108] The presence of reasonable and probable grounds in the investigating process is, in general, an indicator of the fact that the police acted in good faith.[109] The overall conduct, including the mental state of the police in the entire investigation should be scrutinised to determine whether they acted in good faith.[110]

In general, when non-conscriptive evidence was obtained in the shadow of Charter infringements, such violations are categorised as serious, provided the courts typify the breaches as 'flagrant', 'willful' or 'blatant'. This prerequisite does not apply to conscriptive evidence.[111] The Supreme Court will, in due course, make a ruling on the approach to be followed in this regard and in respect of related issues raised in the matter of *Grant*.

3. Effect of exclusion on the administration of justice in Canada

The third group of *Collins* factors is concerned with the effect that exclusion of the evidence would have on the repute of the criminal justice system. This group of factors consists of the following factors: Firstly, the seriousness of the ***charges***[112] against the accused; and secondly, the importance of the evidence

[107] *Mellenthin* (fn 23 above); *Kokesch* (fn 23 above); *Wong* (fn 23 above).

[108] Ibid.

[109] *Harris* (fn 23 above); *Belnavis* (fn 23 above); *Jacoy* (fn 48 above); *Krall* (fn 48 above).

[110] *Mann* (fn 23 above); *Williams* (fn 23 above);

[111] Stuart (fn 66 above) at 406; Roach (fn 11 above) at 10-78.

[112] As opposed to the ***crime committed***. The seriousness of the crime can only be assessed after the court has considered all the admissible evidence.

for a successful prosecution. The governmental concern in crime control is of great prominence at this phase of the section 24(2) assessment. However, this does not mean that section 24(2) should become an automatic inclusionary tool.[113] Canadian courts have been criticised for sacrificing the third group of *Collins* factors in favour of the first two groups of factors. The Canadian Supreme Court, according to its critics, has accorded greater prominence to these values in comparison to a consideration of the cost of excluding the evidence. Paciocco[114] and Sopinka, Bryant and Lederman[115] do not approve of this approach. Sopinka, Bryant and Lederman argue that Canadian courts are reluctant to balance the costs of excluding the impugned evidence against the seriousness of the violation and noticeably choose to place 'little weight on this [the cost of exclusion] factor'.[116] The intensity of the criticism will likely be amplified in cases where the evidence is excluded when the accused is charged with a serious offence and the evidence is reliable and essential to ensure a successful prosecution. Would the price paid by society as a result of the exclusion of evidence under these circumstances be justified?

[113] *Buhay* (fn 23 above) at par 71, where Arbour J noted the following: "Section 24(2) is not an automatic exclusionary rule … neither should it become an automatic inclusionary rule when the evidence is non-conscripted and essential to the Crown"; see also par 73; see further *Feeney* (fn 6 above) at par 82; *Orbanski* (fn 23 above) at par 93, where Fish J pointed out that the Canadian Supreme Court did not establish an automatic exclusionary rule for conscriptive evidence, when the judge wrote as follows: "Our Court has remained mindful of the principle that the Charter did not establish establish a pure exclusionary rule. … Nevertheless, while this part of the analysis [the fair trial analysis] is often determinative of the outcome, our Court has not suggested that the presence of conscriptive evidence that has been obtained illegally is always the end of the matter and that the other stages and factors of the process become irrelevant".

[114] Fn 20 above (1989) at 353.

[115] Fn 20 above.

[116] Ibid at 424.

According to Sopinka, Bryant and Lederman[117] this group of factors is primarily a means used to conclude that a particular Charter violation was not 'sufficiently serious' to warrant exclusion.[118] On this view, these factors favour admitting the disputed evidence when the Charter infringement is not serious. It was mentioned above that the most important elements constituting this group of factors are the seriousness of the charges against the accused and the importance of the evidence to secure a successful prosecution.[119] In this part of the work the following issue is pertinent: Would the over-emphasis of the importance of these factors have a negative impact on the presumption of innocence? If so, should it feature at all under the section 24(2) assessment?

Canadian courts should, when called upon to evaluate this group of factors, endeavour to strike a balance between the interests of the truth seeking goals of the criminal justice system, on the one hand, and upholding the integrity of the judicial system, on the other.[120] More importantly, the courts of Canada are alive to the fact that the concerns served by the third group of factors (crime control) do not outweigh the longer-term effects that could be caused by the regular admission of evidence obtained after a serious infringement. In such instances, the Canadian courts make every effort to achieve this longer-term goal by constantly reminding them that the purpose of the *Collins* test is to compel the

[117] Loc cit.

[118] See also the majority opinion of Sopinka J in *Feeney* (fn 6 above) at par 83.

[119] See the dictum of McLachlin J (now McLachlin CJ) in *Stillman* (fn 6 above) at par 256.

[120] Ibid at 127. In this regard, Mitchell J quotes with approval the eloquent comments made by Doherty JA in *R v Kitaitchik* (2002) 161 O A C 169, 166 CCC (3d) 14 at par 47, ("*Kitaitchik*"), where he described this stage of the assessment as follows: "The last stage of the *R v Collins, supra*, inquiry asks whether the vindication of the specific *Charter* violation through the exclusion of evidence extracts too great a toll on the truth seeking goal of the criminal trial"; see also *Buhay* (fn 23 above) at paras 71 and 73.

police to respect the guarantees contained in the Charter.[121] By contrast, the Ontario Court of Appeal in *Grant*, suggests that the focus should be on the seriousness of the charges and the reliability of the evidence. *Grant* was argued in the Supreme Court on 23 April 2008 and judgment is awaited. What are the implications of the *Grant* approach, followed by the Ontario Court of Appeal, on the third group of *Collins* factors?

The first factor considered under this group of *Collins* factors is the seriousness of the charges.

3.1 The seriousness of the charge

How should the seriousness of the charges against the accused be determined, mindful of the fact that the admissibility assessment should be isolated from the culpability evaluation by means of a *voir dire*? All open and democratic societies have, over the years, adopted objective norms that serve the purpose of categorising crimes according to the severity of its impact on society.[122] The seriousness of the charge is primarily determined by the punishment a court may impose.[123] Mahoney suggests that the seriousness of the charge should not only be considered based on objective norms, but that any aggravating circumstances

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[121] See *Buhay* (fn 23 above) at par 68, where the Supreme Court considerd whether the trial judge took this reminder into account, and concluded as follows: "For the trial judge, however, they [the third group of factors] were outweighed by his concerns about the police officers' disregard for appellant's Charter rights and the longer-term effects of the attitude they displayed in this case: 'The court is concerned at the casual approach that the police took in infringing the accused's rights in these circumstances. It is this court's view and concern that if the evidence was to be admitted in this trial that it may encourage similar conduct by police in the future'."

[122] Morissette (fn 20 above) at 528.

[123] Ibid at 529.

of a particular case, irrespective of the offence charged, should be relevant.[124] The seriousness of the charge, showing that the accused had a specific intent that has a bearing on the gravity of the offence charged, may be demonstrated by means of the testimony of an expert witness.[125]

Roach is of the view that the Canadian Supreme Court has yet to develop a 'meaningful standard by which to separate serious offences from non-serious ones'.[126] He suggests, based on a purposive interpretation of the Charter, that offences involving violence should be regarded as serious offences because the protection of human dignity is central to the values protected by the Charter.[127] More importantly, courts should be alive to the fact that the accused is entitled to the protection of all Charter rights, even at this stage of the proceedings. One such guarantee is the presumption of innocence. Therefore, when the seriousness of the charges against the accused is assessed, courts should constantly remind themselves that the accused should be presumed innocent.

It was pointed out above that the Canadian Supreme Court has been criticised[128] for ignoring the third group of *Collins* factors in favour of their concern for the

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[124] Fn 20 above at 461, next to fn 41 of his contribution.

[125] See *Buendia-Alas* (fn 23 above) at 37, where the judged implied that he would have preferred the testimony of an expert witness on this issue: "I proceed on the assumption in this case, although the Crown didn't call expert opinion evidence, for the purposes of s. 24(2) that you possessed this cocain for the purpose of trafficking".

[126] Fn 11 above at 10-86.

[127] Loc cit.

[128] See, for example, the dissenting opinion of McLachlin J in *Stillman* (fn 6 above) at par 252, where she reasoned as follows: "The balancing process that the framers of the s. 24(2) intended is thus completely undermined, and the compromise between those who feared that exclusion of evidence would undercut the administration of justice by freeing guilty persons on technicalities and those who advocated judicial consequences for violations of the *Charter* is nullified"; see also Hogg (fn 20 above) at 943, where he expresses his opinion as follows: "In most of the cases

prevention of an unfair trial and judicial condonation of unconstitutional conduct. Roach is of the opinion that the Canadian Supreme Court has been reluctant to vigorously apply this group of factors because they would in so doing, endorse the message that the goals of crime control justifies unconstitutional conduct.[129]

In *Collins*,[130] for example, it was held that the effects that exclusion might have upon the administration of justice when a serious offence has allegedly been committed, should not be considered as factors calling for the admission of the evidence when its admission would tend to have a negative impact on trial fairness. In conformity with the approach proclaimed in *Collins*, it was held in *Buhay*,[131] that one of the purposes of section 24(2) is 'is to prevent having the administration brought into ***further disrepute*** by the admission of the evidence in the proceedings'.[132] Arbour J continued his analysis of this stage of the inquiry by observing that 'further disrepute' can be caused by the reception of evidence that would 'deprive the accused of a fair hearing, ***or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies***'.[133] The judge confirmed that the decision to exclude or admit invariably represents a weighing up of the truth-seeking concerns and the protection of the integrity of the criminal justice system. The approach by the court below in weighing up these two factors at this stage of the inquiry and its conclusion 'that the vindication of the Charter in this case, which was serious, did

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where evidence has been excluded, the evidence appeared to be reliable, it appeared to be crucial to the prosecution's case, and the offence charged was a serious one. And yet the court typically did not discuss the cost of excluding the evidence and plainly placed little weight on this factor"; see further Paciocco 1989 (fn 20 above) at 326.

[129] Ibid at 10-83. He also suggests that a consideration of the seriousness of the offence would be offensive to the presumption of innocence.

[130] Fn 1 above at par 39.

[131] Fn 23 above.

[132] Ibid at par 70. (Emphasis in original).

[133] Loc cit. (Emphasis in original).

not detract too great a toll on the truth seeking goal' of the criminal justice system, was approved by the Supreme Court.[134] In this case, the seriousness of the violation and the long-term effect of the regular admission of the evidence in circumstances when it could have been obtained without a violation, weighed heavier than the truth-seeking goal of the criminal justice system.[135] Against this background, Arbour J held that admitting the evidence would be perceived by the public at large as judicial condonation of unacceptable police conduct.[136]

After the majority judgment held in *Feeney* that admission of the evidence would render the trial unfair, the court nevertheless considered the third group of *Collins* factors.[137] Addressing the serious of the charges against the accused, the court reiterated that the violation was a very serious infringement of the rights of the accused.[138] These two factors,[139] together with a consideration of the importance of the evidence for the prosecution, had to be weighed up to determine whether admission or exclusion would bring greater harm to the integrity of the justice system. In its consideration of the seriousness of the charges, the court emphasised the fact that, at this stage of the proceedings, the accused should be presumed innocent.[140]

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[134] Ibid at par 73.

[135] Loc cit.

[136] Loc cit.

[137] Fn 6 above. This approach was probably followed as a result of its critics suggesting that the Supreme Court fails to consider "all the circumstances", and that the fair trial directive functions as an automatic exclusionary rule. See, for example, Mahoney (fn 20 above) at 455; Stuart 2003 (fn 20 above).

[138] *Feeney* (ibid) at par 81. The violation was labelled as "a pattern of disregard for the Charter". In *Stillman* the majority judgment at par 126 balanced the seriousness of the violation against the third group of factors.

[139] The seriousness of the charges and the seriousness of the infringement.

[140] Ibid at par 81, Sopinka J referred to the opinion of Iacobucci J in *Burlingham* with approval, where the latter is quoted as making this point as follows: "… we should never lose sight of the

An important issue that needs to be discussed is: Would a consideration of the seriousness of the charge potentially impact negatively on the presumption of innocence? Roach highlights the concern that, during a *voir dire*, the court would not have determined whether all the admissible evidence to be presented in court would provide proof, beyond reasonable doubt, that the accused has committed the offence contained in the charge sheet.[141] The possibility exists that the evidence presented after the *voir dire* may reveal the culpability of the accused in relation to a less serious offence.[142] Pottow concurs with the view held by Roach and raises the disconcerting likelihood that, in some cases, the evidence may reveal that the conduct of the accused was lawful, because it

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fact that even a person accused of the most heinous crimes, and ***no matter the likelihood that he or she actually committed those crimes***, is entitled to the full protection of the Charter. Short-cutting or short-circuiting those rights affect not only the accused, but also the entire reputation of the criminal justice system. It must be emphasized that the goals of preserving the integrity of the criminal justice system as well as promoting the decency of investigatory techniques are of fundamental importance in applying s 24(2)". (Emphasis added). See also *Stillman* at par 126, where Cory J confirmed the sentiments held by Sopinka J in the following terms: "They [the police] were attempting to obtain evidence implicating the person they suspected had murdered a young girl. Yet Charter rights are the rights of all people in Canada. They cannot simply be suspended when the police are dealing with those suspected of committing serious crimes. Frustrating and aggravating as it may seem, the police as respected and admired agents of our country, must respect the Charter rights of all individuals, even those who appear to be the least worthy of respect. Anything less must be unacceptable to the courts".

[141] Fn 11 above at at 10-86, he reasons as follows: "Even if the seriousness of the charge can be distinguished in a manner consistent with the Charter, giving this factor determinative weight in s. 24(2) applications remains problematic. What is judged is the offence charged, not the actual crime committed, and to give the offence charged too much weight is at odds with the presumption of innocence. Even if the accused is factually guilty, the judge at a *voir dire* may not be in a position to know, for example, whether the accused is guilty of manslaughter, even though charged with murder".

[142] Loc cit. See also Pottow (fn 20 above) at 229-230.

complies with one of the grounds of justification.[143] For this reason, Roach[144] and Pottow[145] call for the removal of this factor from the section 24(2) assessment. In Canada, the admissibility issue is decided by means of a *voir dire*.[146] A ruling made in respect of the admissibility of evidence is final, since the jury should not include inadmissible evidence in their assessment of the culpability issue.[147] As a consequence, unlike the position in South Africa, it rarely happens that a court may be called upon during the trial to reconsider the admissibility issue based on new facts that arose during the trial. Viewed in this light, the concerns advanced by Roach and Pottow are valid. They highlight the fundamental concern that courts should not attach determinative weight to factual guilt during the admissibility assessment.[148] However, Canadian case law does not suggest that a consideration of this group of factors could potentially unjustifiably encroach upon the presumption of innocence.[149]

A further argument against a consideration of the seriousness of the charges, is the contention that a consideration of this factor implies that the more serious the charge, the less protection is provided by the Charter.[150] In other words, an accused charged with murder would less likely be successful in relying on section

[143] Fn 20 above at 230.

[144] Fn 11 above at 10-86.

[145] Fn 20 above at 230.

[146] This is a pre-trial motion.

[147] According to Stuart of the Faculty of Law at Queens University, Canada, in an e-mail addressed to the writer, dated 5 May 2008. He wrote as follows: "Technically a motion to exclude under s. 24(2) could be brought again if the evidential picture changes. I do not know of such a case. It seems highly unlikely in jury cases although there could be a declaration of a mistrial if the jury has heard evidence the judge now thinks should be excluded".

[148] See the dissenting minority opinion in *Vu* (fn 23 above) at 338.

[149] See *Burlingham* (fn 23 above); *Evans* (fn 23 above); *Feeney* (fn 6 above); *Buhay* (fn 23 above) and the cases cited at fn 172 below.

[150] Stuart 1983 (fn 20 above) at 177.

24(2) than one charged with the offence of driving without a valid driver's licence. Stuart correctly argued in the Supreme Court, in the appeal of *R v Grant*,[151] that there should be a 'real risk of exclusion for serious Charter breaches even in cases of serious crimes'.[152] Morissettte is of the opinion that it is sensibly impossible to 'remove from the discussion of this question any consideration of the seriousness of the offence'.[153] This view held by Morissette is correct, provided that this factor should not be accorded excessive weight during the admissibility assessment, in this manner causing damage to the long-term goals of the Charter.

3.2 The importance of the evidence for a successfull prosecution

When considering this factor, should courts adopt an approach that suggests that unconstitutionally obtained evidence should in general be received especially when the accused is factually guilty?[154] Put differently: should courts, having regard to the end (factual guilt) reason rearward, thereby condoning the means employed to achieve the end? Would the presumption of innocence not be encroached upon by such reasoning? Conversely, would the price paid by society

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[151] This appeal was heard on 23 April 2008 and judgment will be delivered after about six months. Stuart acted on behalf of the Canadian Civil Liberties Association, as an intervenor in the matter. The writer has his heads of argument on file in this matter. This matter is the sequel to *R v Grant* (2006) 38 CR (6th) 201 58 (Ont CA), cited at fn 23 above. See further fn 31 above.

[152] Stuart (fn 31 above) at 5.

[153] Fn 20 above at 529. He refers to the Australian and German approaches to exclusion where this factor is included in their admissibility assessment.

[154] The question was answered in the negative in *Genest* (fn 23 above) at 403, where Dickson CJ held as follows: "While the purpose of the rule is not to allow an accused to escape conviction, neither should it be interpreted as available only in those cases where it has no effect at all on the result of the trial. The consideration whether to exclude evidence should not be so closely tied to the ultimate result in a particular case"; see also Roach (fn 11 above) at 10-86.

be justifiable when unconstitutionally obtained evidence is excluded despite clear evidence of factual guilt? The cost of exclusion would be high when the charge is serious and the evidence essential for a successful prosecution. By contrast, the cost of exclusion would not be that high when the accused can be convicted with other evidence, despite excluding the disputed evidence.

In *Dyment*,[155] the accused suffered a head laceration caused by a car accident. A doctor took a blood sample without the consent of the accused and handed it to a police officer. The officer lacked reasonable grounds to believe that the accused has committed an offence or that the blood sample constituted evidence of an offence. He also did not have a search warrant. The officer nevertheless had the blood sample analysed. The accused was charged, based on the results of the blood test. Mitchell J typified the breach as a 'gross violation of the sanctity, integrity and privacy of the appellant's bodily substances and medical records' and voiced the concern that society would be 'shocked and appalled',[156] should the evidence be admitted. The judge assessed whether exclusion or inclusion would bring the administration of justice into disrepute by considering the importance of the evidence to secure a conviction as follows:[157]

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[155] Fn 23 above; see also *Burlingham* (fn 23 above); *Feeney* (fn 6 above), where the Supreme Court excluded evidence, essential for a conviction on a serious charge. Exclusion followed because the infringement was deemed serious.

[156] Ibid at 537.

[157] Loc cit. (Emphasis added); see also *Feeney* (fn 6 above) at par 82, where Sopinka J was of the opinion that the following opinion of Iacobucci (also quoted with approval in *Stillman* by Cory J, confirming this view, at par 126, writing a majority opinion) was relevant to the case at bar: " … we should never lose sight of the fact that even a person accused of the most heinous crimes, and no matter the likelihood that he or she actually committed those crimes, is entitled to the full protection of the *Charter*. Short-cutting or short-circuiting those rights affect not only the accused, but also the entire reputation of the criminal justice system. It must be emphasised that the goals of preserving the integrity of the criminal justice system as well as promoting decency of investigatory techniques are of fundamental importance in applying s. 24(2)".

> If the court received evidence obtained by taking a blood sample without consent, medical necessity or lawful authority, and without the police having any probable cause, it would bring the administration of justice into disrepute. ***It does not matter that the results of the blood tests confirm that, in fact, the appellant had committed an offence. The end does not justify the means***.

This judgment underlines the fact, despite an acceptance that the evidence was essential for a successful prosecution, the ends of crime control do not surpass the fundamental duty of courts to uphold Charter rights.[158] In *Feeney*, the court in delivering the majority opinion, considered the costs of excluding reliable evidence, essential for a successful prosecution of the accused, charged with serious offences. Sopinka J concluded that when unconstitutionally obtained evidence is excluded under these circumstances, the prosecuting authority is deprived of a conviction that does not meet Charter standards.[159] He concluded the section 24(2) inquiry with the following remarks, in response to a suggestion by L'Hereux-Dube J[160] to the effect that exclusion would likely result in an acquittal:[161]

> … If the exclusion of this evidence is likely to result in an acquittal of the accused, as suggested by L'Heureux-Dube J in her reasons, then the Crown is deprived of a conviction based on illegally obtained evidence. Any price to society occasioned by the loss of

[158] See also the majority opinion of Sopinka J in *Feeney* (fn 6 above) at par 83; see further the majority opinion written by Cory J in *Stillman* (fn 6 above) at par 126.

[159] Ibid at par 83.

[160] L'Heureux-Dube J wrote a dissenting minority opinion in *Feeney*.

[161] Fn 6 above at par 83.

such a conviction is fully justified in a free and democratic society which is governed by the rule of law.

The courts, as guardians of the Charter, have a constitutional duty to infuse public confidence in the 'willingness and ability' of the courts to uphold the rights guaranteed by the Constitution,[162] regardless of the seriousness of the charges against the accused.[163]

Would undue emphasis on the importance of the evidence for a successful prosecution have the potential to unjustifiably encroach upon the presumption of innocence? Pottow is of the view that it does.[164] Roach disagrees.[165] However, he acknowledges the fact that from a practical point of view, judges 'can hardly ignore that the exclusion of some evidence such as drugs will make a conviction impossible'.[166] Nevertheless, a review of Canadian case law has revealed that

[162] Loc cit; see also *Burlingham* (fn 23 above) at par 25, where the Supreme Court was of the opinion that the *Collins* test serves the purpose to "oblige law enforcement authorities to respect the exigencies of the *Charter*".

[163] *Stillman* (fn 6 above) at par 126, where Cory J wrote that Charter rights cannot be suspended when the accused is suspected of having committed a serious offence.

[164] Fn 20 above at 231. He bases his criticism on an excerpt in *Broyles* (fn 23 above).

[165] Fn 11 above at 10-86-87.

[166] Loc cit; see, for example, the approach of the Ontario Court of Appeal in *Manikavasagar* (fn 23 above), where a police officer found the accused asleep behind the steering wheel of his car, while the engine was running. He opened the unlocked door and become aware of the smell of liquor. He asked the accused to get out of his vehicle and then saw 2 fire-arms. On a charge of possession of fire-arms, the breach was held not to be serious, because the appellant had a diminished expectation of privacy. The section 24(2) analysis was completed with the following sentence: "The charges were very serious and the evidence was necessary to substantiate the charges". See also *Vu* (fn 23 above), a decision of the British Columbia Court of Appeal. The police proceeded to the house of the appellant, armed with a seach warrant. They also searched a car which was parked in the back yard. In the car they found evidence confirming the identity of the owner of the dwelling. A marijuana producing operation was found in the house. The

their approach to this factor does not pose any risk of encroaching upon the presumption of innocence.[167] The recently reported case of *Buendia-Alas*[168] reinforces this contention.

In *Buendia-Alas*, the accused was charged with dealing in cocaine. The police officer got suspicious because the occupants, while stopping at a red robot, stared forward and did not make any movements while in the car. He ran a check on the number plate of the vehicle and discovered that the vehicle was not insured. At a later stage it was established that this information was inaccurate. The officer stopped the car and noticed that the accused had a mobile phone in his possession.[169] A check on the driver revealed that he was on bail, subject to the condition that he does not possess a mobile phone and further that he should not be in a car with a person who possesses a mobile phone. The accused was searched for officer safety concerns, and as a result, cocaine was discovered in his pocket. Considering the seriousness of the offence, Tweedale Prov Ct J[170] assumed in favour of the prosecution that the charge was serious.[171] The judge said the following with regard to this factor:

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admissibility of the evidence found in the car was challenged. The majority opinion excluded the evidence after having typified the breach as serious. Braidwood JA dissented and held that the police acted in good faith. Considering the seriousness of the offence and the importance of the evidence for a conviction, the judge wrote as follows at 338: "While the cultivation of a narcotic is a very serious offence, the breach of the appellant's rights was not serious … There is no need in this case to acquit the guilty in order to ensure that in future the public's right to privacy is protected; to do so in this case would bring the administration of justice into disrepute".

[167] See, for example, the approach of the courts in respect of these group of factors in *Collins* (fn 1 above); *Kokesch* (fn 23 above); *Dyment* (fn 23 above); *Burlingham* (fn 23 above); *Evans* (fn 23 above); *Stillman* (fn 6 above); *Feeney* (fn 6 above); the majority judgment in *Vu* (fn 23 above); and *Buendia-Alas* (fn 23 above). Compare *Grant* (fn 23) above.

[168] Ibid.

[169] In his impromptu oral judgment, the judge referred to the accused as "the defendant".

[170] Fn 23 above at 37.

> … I proceed on the assumption in this case, although the Crown didn't call expert opinion evidence, for the purposes of s. 24(2) that you possessed this cocaine for the purposes of trafficking. Of course the trial is not over … being in possession of cocaine [is] a serious drug.

Turning to consider the seriousness of the Charter violation, the judge emphasised the fact that the officer failed to balance his 'discomfort, his concern about officer safety' that was not confirmed by evidence to be at risk, 'to in effect trump the rights that the defendant was entitled to under the Charter".[172] In so doing, the officer did not act in good faith when he failed to inform himself of the importance of the Charter rights of the accused. The violation was therefore serious. Thereafter, the judge balanced the various factors to be considered under these groups of factors and addressed the accused directly in the extemporised judgment as follows:[173]

> The fact is, you [the accused] live in a country where you ***are to be left alone*** by the police in the circumstances you found yourself in here. It's not right if you did possess cocaine, and ***it seems likely you did***, and it is certainly not right if you ***did that for the purpose of trafficking***. But there are more important rights that need to be protected in the circumstances of this particular case, and as a result I am excluding the evidence of the cocaine found on you, and that being the case, as I understand it, ***an acquittal should result***.

[171] Loc cit.

[172] Loc cit.

[173] Ibid at 38. (Emphasis added).

The italicesed phrases demonstrate that the judge balanced the seriousness of the infringement, the importance of the evidence for a successful prosecution and the seriousness of the charges in a manner that does not unjustifiably impinge upon the presumption of innocence. The judge considered the factual guilt of the accused, when he made the remark that 'it seems likely you did'. However, a consideration of this factor did not, in this case, have a negative effect on the presumption of innocence, because the court emphasised the long-term effect of the regular admission of evidence obtained in this manner.

In *Grant*, Laskin JA re-oriented not only the fair trial assessment, but also the weight to be attached to the factors under the second and third groups of *Collins* factors. In terms of *Grant*, the focus should be on the reliability of the evidence and the seriousness of the offence.[174] Such an approach lays undue emphasis on the 'current mood' of society[175] and in this manner suggests that a consideration

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[174] Fn 23 above at par 64, Laskin JA reasoned as follows: "Here, four considerations favoured admission of the evidence: possession of a loaded firearm in a public place is a very serious offence, as reflected in in the mandatory minimum one-year sentence for a conviction under s. 95 or s. 100(1) of the *Crimial Code*; the appellant was carrying the gun in the vicinity of several schools, which aggravated the seriousness of the offence; the evidence was crucial to the Crown's case, and the evidence was entirely reliable. As Doherty JA said in *R v Belnavis* (1996) 29 OR(3d) 321 (Ont CA) at 349, and approved of in (1997) 118 CCC (3d) 405 (SCC) at para 45: 'The exclusion of reliable evidence essential to the prosecution of a significant criminal charge must, in the long-term, have some adverse effect on the administration of justice'." See further par 65; see also *Harris* (fn 23 above) at par76.

[175] Ibid at par 66 Laskin AJ dealt with the current public mood as follows: "Although the right to be free from arbitrary detention touches an individual's rights of autonomy and freedom, increasing levels of gun violence in our communities threaten everyone's personal freedom"; see also *B (L)* (fn 23 above) at par 80, where MJ Moldaver JA considered the current mood of society as one of the grounds for receiving the evidence, when made the following comments: "This case involves a loaded handgun in possession of a student on school property. Conduct of that nature is unacceptable without exception. It is something ***Canadians will not tolerate***. It conjures up

of the long-term effects of the regular admission of evidence obtained after a serious infringement should be relegated to an insignificant concern when the disputed evidence is reliable and the charges are of a serious nature.[176] More importantly, such an approach defies the essence of the influential judgment delivered by Lamer J in *Collins*.[177] In this manner, the *Grant* judgment postulates that the reliability of the evidence determines that crime control interests should be elevated above the general purpose of the Charter, that is, the protection of fundamental rights.[178] In other words, Charter rights should be suspended when reliable evidence, crucial for the successful prosecution of a serious charge is in dispute. It is submitted that what should be regarded as important, is not the reliability of the evidence, but whether it was obtained in a manner that seriously infringed a Charter right.[179] The *Grant* judgment in effect calls upon courts to display judicial tolerance when reliable evidence is discovered as a result of serious Charter infringements in cases where the accused face serious charges.[180] In the absence of a real risk of exclusion when the Charter infringements are serious, even when the charges are serious, would indirectly encourage the police to deliberately or flagrantly infringe Charter rights when they are aware that the disputed evidence is reliable real evidence.[181]

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images of horror and anguish the likes of which few could have imagined twenty-five years ago when the Charter first came into being". (Emphasis added).

[176] Compare *Collins* (fn 1 above); *Kokesch* (fn 23 above); *Dyment* (fn 23 above); *Burlingham* (fn 23 above); *Evans* (fn 23 above); *Stillman* (fn 6 above); *Feeney* (fn 6 above); the majority judgment in *Vu* (fn 23 above); *Buendia-Alas* (fn 23 above); and the recently reported case of *Williams* (fn 23 above).

[177] Fn 1 above at 523; see also Lamer (fn 20 above) at 344.

[178] See *Grant* (fn 23 above) at par 52.

[179] See the cases cited at fn 155 above; see also Stuart (fn 31 above) at 5-6.

[180] Compare *Mann* (fn 23 above); *Buhay* (fn 23 above); *Williams* (fn 23 above).

[181] Stuart (fn 31 above) at 6-7. The dangers of such an approach was by highlighted by Roach (1999) 33 *Israel LR* 607 at 623 and (1999) 42 *CLQ* 39) in relation to the first group of *Collins*

To summarise, when Canadian courts consider the third group of *Collins* factors, they weigh up and balance the seriousness of the charge (not the crime), against the seriousness of the Charter infringement and the importance of the evidence to secure a successful prosecution. This balancing exercise is undertaken while the courts frequently remind themselves that the *Collins* test serves the purpose to 'oblige law enforcement agencies to respect the exigencies of Charter'. In the light hereof, when a serious Charter infringement occurs in the evidence-gathering process and the evidence is essential for the prosecution of a serious charge, Canadian courts would, in general, exclude the disputed evidence.[182]

A review of Canadian case law does not confirm the view held by commentators that a consideration of the importance of the evidence for the prosecution or the seriousness of the charges against the accused, pose any potential risk to the presumption of innocence. This may be ascribed to two important features: Firstly, when the courts of Canada consider these factors, they consciously remind themselves of their duty to respect and uphold the presumption of innocence; and secondly, they do not assign decisive significance to the 'current public mood'.[183] Nevertheless, a consideration of the seriousness of the charges may prejudice an accused, since the evidence that the prosecution leads during the trial may not establish proof of the crime contained in the charge sheet. However, this result follows the nature of a trial by jury.

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factors. It is suggested that such criticism is applicable even with regard to the treatment of real evidence in the second and third groups of factors; see also Ally (2005) 1 *SACJ* 66 at 69.

[182] See the cases cited at fn 155 and 176 above; compare *Grant* (fn 23 above); *Harris* (fn 23 above).

[183] Compare *Grant* (fn 23 above); *Harris* (fn 23 above).

C South Africa

This part of the thesis commences with a discussion of the concept 'detriment': Do the concepts of 'disrepute' and 'detriment' serve a similar purpose? The next issue considered is the seriousness of the violation. The seriousness of the constitutional infringement is considered while having due regard to the good faith of the police. This is followed by a discussion of the effect of exclusion on the integrity of the criminal justice system. Under these groups of factors, the seriousness of the charges faced by the accused and the importance of the evidence for a successful prosecution are explored.

South African courts have considered this group of factors in a number of cases.[184] The issues raised with regard to section 24(2) are revisited within the context of section 35(5).

The Canadian section 24(2) jurisprudence under the second and third groups of *Collins* factors are compared with the South African approach to the same groups

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[184] See, for example, *S v Melani and Others* 1996 1 SACR 335 (E), ("*Melani*"); *S v Motloutsi* 1996 1 SACR 78 (C), ("*Motloutsi*"); *S v Madiba* 1998 1 BCLR 38 (D), ("*Madiba*"); *S v Mayekiso en Andere* 1996 2 SACR 298 (C), ("*Mayekiso*"); *S v Mark and Another* 2001 1 SACR 572 (C), ("*Mark*"); *S v Agnew* 1996 2 SACR 535 (C), ("*Agnew*"); *S v Marx and Another* 1996 2 SACR 140 (W), ("*Marx*"); *S v Desai* (1997) 1 SACR 38 (W), ("*Desai*"); *S v Mathebula* 1997 1 SACR 10 (W), ("*Mathebula*"); *Shongwe* (fn 5 above); *S v Mfene* 1998 9 BCLR 115 (N), ("*Mfene*"); *S v Malefo en Andere* 1998 1 SACR 127 (W), ("*Malefo*"); *S v Gasa and Others* 1998 1 SACR 446 (D), ("*Gasa*"); *S v Mphala and Another* 1998 1 SACR 338 (W), ("*Mphala*"); *S v Soci* 1998 2 SACR 275 (E), (*Soci*"); *S v Nomwebu* 1996 2 SACR 396 (E), ("*Nomwebu*"); *S v Naidoo and Others* 1998 1 SACR 479 (N), ("*Naidoo*"); *S v Ngcobo* 1998 10 BCLR 1248 (W), ("*Ngcobo*"); *S v Mkhize* 1999 2 SACR 632 (W), ("*Mkhize*"); *S v Lottering* 1999 12 BCLR 1478 (N), ("*Lottering*"); *S v Seseane* 2000 2 SACR 225 (O), "*Seseane*"); *S v R* 2000 1 SACR 33 (W), ("*R*"); *S v M* 2002 2 SACR 474 (N), ("*M*"); *S v Mansoor* 2002 1 SACR 629 (W), ("*Mansoor*"); *S v M* 2002 2 SACR 411 (SCA), ("*M* (SCA)"); *Pillay* (fn 2 above); *S v Hena and Another* 2006 2 SACR 33 (SE), ("*Hena*").

of factors in section 35(5) challenges. The phrase 'all the circumstances' appears in section 24(2) of the Charter, but has been omitted from section 35(5). One of the issues considered in this part of the work, is whether South African courts should, in a similar manner as their Canadian counterparts, consider all the circumstances leading to a constitutional violation in order to assess the seriousness of the violation, despite the absence of this phrase in section 35(5). This leads to an important question that should be asked by South African courts when the admissibility of evidence is considered under these groups of factors: Would the reception of evidence, essential for a conviction on a serious charge, but obtained after a serious infringement, be perceived by the public at large as synonymous with judicial condonation of unconstitutional police conduct? Put differently, should South African courts, in a similar manner as their Canadian counterparts, be reluctant to typify the infringement as serious in cases when the admissibility of reliable evidence, that does not impact negatively on trial fairness, is at issue? Should evidence of this nature only be excluded when it was obtained in a manner that is indicative of police abuse? What weight should be attached to the seriousness of the infringement, on the one hand, and the the reliability and importance of the evidence for a conviction, on the other hand, when the accused is charged with a serious offence and the infringement is of a serious nature?

The seriousness of a violation is determined while having regard to the absence or presence of good faith on the part of the police. For this reason, a comparative analysis is undertaken of the good faith exception, an excuse available to the prosecution that calls for the admission of unconstitutionally obtained evidence when guaranteed rights have been infringed. It is argued that the condonation of negligent police conduct offends the rationale of this group of *Collins* factors, as well as the spirit, purport and objectives of the Bill of Rights. Negligent violations of constitutional rights should not withstand section 35(5) scrutiny.

A theme explored in the overall assessment of these groups of factors is whether the over-emphasis of the seriousness of the charges and the importance of the evidence for a successful prosecution could possibly unreasonably impinge upon the presumption of innocence. This leads to the significant question: If it does, should a consideration of these factors be discarded in the section 35(5) assessment or should the weight attached to the 'current mood of society', when these groups of factors are considered, be re-aligned to achieve the goals sought to be achieved by the Bill of Rights?

These groups of factors were discussed by a number of scholarly writers.[185]

1. Determining 'detriment'; public opinion and the nature of the discretion

Two issues are discussed under this heading: first, whether the concepts of 'disrepute' and 'detriment' serve a similar purpose; and second, the role of public opinion when section 35(5) is interpreted.

Do the concepts 'disrepute' and 'detriment' seek to achieve a comparable purpose? Cloete J mentioned obiter, in *S v Mphala*,[186] that the concept of 'disrepute', contained in section 24(2) of the Charter appears to be a test 'with a higher threshold for exclusion' than 'detriment', which appears in section 35(5) of

[185] See, for example, De Jager et al *Commentary on the Criminal Procedure Act* (2005) at 24-98H to 24-98N-1; Van der Merwe (fn 8 above) at 233; Schwikkard "Arrested, Detained and Accused Persons" in Currie & De Waal (eds) *The Bill of Rights Handbook* (5th ed, 2005) 795-797; Schmidt & Rademeyer *Schmidt Bewysreg* (4th ed, 2006); Viljoen "The Law of Criminal Procedure and the Bill of Rights" in Mokgorro & Tlakula (eds) *The Bill of Rights Compendium* (2008); Steytler (fn 14 above) at 38-40; Skeen (1988) *SACJ* 389; Meintjies-Van der Walt (1996) 3 *SACJ* 389; Schutte (2001) 13 *SACJ* 57; Ally (fn 181 above).

[186] Fn 184 above at 659i-j.

the South African Constitution. Viljoen mentions that it is important to note that both concepts promote the application of an objective analysis.[187] Van der Merwe[188] accurately observes that once a court has concluded that admission of the evidence would cause 'disrepute' to the administration of justice, it would by necessary implication be indicative of the fact that such admission would be 'detrimental' to the administration of justice. In a word, the admission of evidence discovered as a result of a constitutional breach that could cause society to disrespect the criminal justice system would by the same token be harmful to it.[189] The Supreme Court of Appeal concurred with the line of reasoning suggested by Van der Merwe without referring to it, in the influential decision of *Pillay*,[190] when it resolved to employ the test of its Canadian counterpart in the seminal case of *Collins*.[191] The *Collins* test was engaged as a means to determine whether exclusion or admission of the disputed evidence would be 'detrimental' to the administration of justice. In the light hereof, one cannot but conclude that the purpose sought to be achieved by the concepts of 'disrepute' and 'detriment' are analogous.

Should public opinion play a role in determining whether exclusion or admission of the disputed evidence could result in 'detriment' to the administration of justice? If so, what weight should be attached to it? The Constitutional Court was called upon in *Makwanyane*,[192] to determine the relevance and weight to be

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[187] Fn 185 above at 5B-50.

[188] Fn 8 above at 233.

[189] See Viljoen (fn 185 above) at 5B-50, who refers to the literal differences between the subjective concept "disrepute" and the objective concept "detriment", (meaning harm or damage). This view was confirmed by the Supreme Court of Appeal in *Pillay* (fn 2 above) at par 94, when the majority opinion reasoned that admission of the disputed evidence would "do more ***harm*** to the administration of justice than enhance it". (Emphasis added).

[190] Fn 2 above at par 88.

[191] Fn 1 above.

[192] Fn 19 above.

attached to public opinion when interpreting the Bill of Rights. Chaskalson P held that public opinion ***does*** play a role when interpreting the Constitution, but courts should not be a slave to it.[193] In his often-quoted statement on this issue, Chaskalson P was prepared to assume that the majority of South Africans are in favour of the retention of the death penalty, and continued by demarcating the impact of public opinion in a constitutional democracy as follows:[194]

> Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary souvereignity, and a retreat from the new legal order established by the 1993 Constitution.

It should be emphasised that Chaskalson P discussed the task of public opinion not only in relation to the constitutionality of the death penalty, but the judgment was intended to provide guidance with regard to the interpretation of the provisions of the Bill of Rights. To state the obvious, section 35(5) forms an integral part of the South African Bill of Rights. In the premises, it is suggested that the pronouncement of Chaskalson P should apply with equal force to the interpretation of section 35(5). Van der Merwe argues that the phrase 'would be detrimental to the administration of justice' is indicative of the fact that public opinion should be a prominent consideration in the second phase of the

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[193] *Makwanyane* (ibid) at par 88.

[194] Loc cit.

admissibility assessment.[195] This argument of Van der Merwe is vulnerable to criticism on several grounds: Firstly, despite the fact that the concept of 'detriment' involves the making of a value judgment, determined by a presiding officer while taking into account the contemporary views of the public at large, this assessment should not be equated with a consideration of public opinion. Langa P in *S v Williams*[196] emphasised the importance of this distinction when he indicated that the South African Constitution is different when compared to that of the United States. The President of the Constitutional Court held that South African courts should interpret the Constitution in accordance with the 'values that underlie an open and democratic society based on [human dignity], freedom and equality', instead of 'contemporary standards of decency'.[197] In the premises, it is important to note that Langa P intended to impress on South African courts that the prevailing public mood should occupy a subsidiary role in relation to the long-term values sought to be achieved by the Constitution.

It is suggested that the approach to the interpretation of the provisions of the Bill of Rights should – depending on the rationale and the text of its constituent

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[195] Fn 8 above at 234 he contends the following: "It is submitted that the courts are … fully entitled to lean in favour of crime control. … And whilst it is probably true that public opinion – including ***public*** acceptance of a verdict and ***support for the system*** – must go into the scale of as a ***weighty factor***". (Emphasis added). This approach was followed by Scott JA in *Pillay* (fn 2 above) at par 126.

[196] 1995 (7) BCLR 861 (CC), ("*Williams* CC"). Langa P was the Deputy President of the Constitutional Court when this judgment was delivered.

[197] Ibid at par 36-37. The judge intimated that the relationship between "contemporary standards of decency" and public opinion is uncertain, but added that he is unconvinced that they are synonymous. It should be mentioned that the concept of "human dignity" was not included as a constitutional value in the Interim Constitution. This constitutional value is included in the 1996 Constitution. The matter of *Williams* CC was decided in terms of that Constitution.

provisions – as far as possible, be in accordance with its broader purposes.[198] Within this context, South African courts should, when determining whether to exclude or admit unconstitutionally obtained evidence, take note of the *aide memoire* provided by Chaskalson P in *Makwanyane*.[199] This is especially important when one takes into account that the *Makwanyane* court was called upon to provide a ***remedy*** for the vindication of constitutional guarantees – section 35(5) serves the equivalent purpose. It is therefore suggested that South African courts should take note of public opinion when applying section 35(5), without seeking public popularity. Erasmus J is in favour of such an approach to the consideration of the issue of public opinion under section 35(5), as expounded by him in the cases of *Nomwebu*[200] and *Soci*.[201] He mentions that public opinion is influenced by the seriousness of the violation and the seriousness of the charges,[202] especially when one has regard to the state of 'lawlessness' prevailing in South Africa'.[203] He also refers to Van der Merwe,

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[198] See the approach of the European Court of Human Rights in *Klass v Germany*, (1961), Series A, No 28 at par 68, ("*Klass*"), where it was held that the interpretation of a provision of the European Convention must be "in harmony with the logic of the Convention"; see further the Canadian approach in *R v Big M Drug Mart Ltd* (1985) 50 CCC (3d) 1 (SCC), ("*Big M Drug Mart*") which was adopted by Chaskalson P in *Makwanyane* (fn 19 above).

[199] Kentridge and Spitz "Interpretation" in Chaskalson et al (eds) *Constitutional law of South Africa*, (Rev Serv 1, 1996) at 11-16A, refers to this approach by the Constitutional Court as the "counter-majoritan dilemma". This "dilemma" is encountered because a minority (the judges) are empowered to overrule unwarranted legislation or conduct of the majority (politicians representing the majority in Parliament); see also Currie and De Waal (eds) *The Bill of Rights Handbook* (5th ed, 2005) at 10, who describe this attribute of the Constitution in the following terms: "The new Constitution is a democratic pre-commitment to a government that is constrained by certain rules, including the rule that a decision of the majority may not violate the fundamental rights of an individual".

[200] Fn 184 above.

[201] Fn 184 above.

[202] The third group of *Collins* factors.

[203] *Nomwebu* (fn 184 above) at 648a-c; *Soci* (fn 184 above) at 295.

where the scholarly writer correctly argues that the public might have a negative perception of the criminal justice system in the event that it is perceived as acquitting a dangerous criminal because of an infringement that could be classified as an insignificant technicality.[204] Erasmus J cautions that it is dangerous to ignore such public perceptions. Moreover, the judge reasoned, a consideration of the ***prevailing*** public mood[205] provides a measure of flexibility to the application of the Bill of Rights and public acceptability of the values enshrined in the Constitution. The judge positioned the relevance of public opinion within its proper scope in section 35(5) challenges, when he wrote the following:[206]

> Not that a court will allow public opinion to dictate its decision (*S v Makwanyane and Another* 1995 (3) SA 391 (CC) at 431C-F). The court should in fact endeavour to educate the public to accept that a fair trial means a constitutional trial, and *vice versa*. … It is therefore the duty of the courts in their everyday activity to carry the message to the public that the Constitution is not a set of high-minded values designed to protect criminals from their just deserts; but is in fact a shield which protects all citizens from official abuse. They must understand that for the courts to tolerate invasion of the rights of even the most heinous criminal would diminish ***their*** constitutional rights. In other words, the courts should not merely have regard to public opinion, but should mould people's thinking to accept constitutional norms using plain language understandable to the common man.

[204] Loc cit. This was also of concern to the Full Bench in *Desai* (fn 189 above) at 42b-f; see also Meintjies-Van der Walt (fn 185 above).

[205] *Nomwebu* (fn 184 above) at 648. Compare the Canadian approach, proclaimed in *Collins*, to the effect that the current mood of the public should be considered, only if it is ***reasonable***.

[206] Ibid at 648d-f; *Soci* (fn 184 above) at 295-296. (Emphasis in original).

The approach of Erasmus J complements the dictum of Chaskalson P in *Makwanyane*, while at the same time it is harmonious with the approach of our Canadian counterparts as reflected in the cases of *Collins*,[207] *Jacoy*[208] and *Feeney*.[209] For these reasons, it is suggested that, the dictum of Erasmus J accuarately sets out the scope and function of public opinion in terms of section 35(5). Of great value for South African section 35(5) jurisprudence, is the observation by Erasmus J that admissibility rulings should not be premised on public opinion.

Secondly, the contention by Van der Merwe that 'public support for the criminal justice system must be a weighty factor,' should be approached with caution, especially when the second and third groups of *Collins* factors are considered. The undue emphasis on the 'current public mood' may potentially unjustifiably compromise the presumption of innocence in cases where the accused is faced with a serious charge and the the evidence is important for a conviction. This argument is explored under C 3.2 below. Further, there appears to be no convincing reason why the prudent approach by Lamer J in *Collins* to the effect that the courts are customarily the only 'effective shelter for individuals and unpopular minorities',[210] should not be applicable to South African courts[211] when 'detriment' has to be determined in terms of section 35(5).

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[207] Fn 1 above.

[208] Fn 48 above.

[209] Fn 6 above.

[210] Fn 1 above at par 34.

[211] In this regard, see the approach of Chaskalson P in *Makwanyane* (fn 19 above) dealing with the constitutionality of the death penalty; see also *Melani* (fn 184 above) at 352, where Froneman J correctly concluded as follows: "It is true that courts should hold themselves accountable to the public, but that does not mean that they should seek public popularity"; compare Van der Merwe (fn 8 above) at 324.

The provisions of section 35(5) have been introduced into the Bill of Rights in order to protect persons accused of having allegedly committed a crime, from the power of the majority. Against this background, the protection granted by section 35(5) should not be left to the majority.[212] No doubt the accused, when faced with the might of the prosecuting authority - with all its expertise and resources, representing the people of South Africa – represents a vulnerable minority. By showing a preparedness to protect the constitutional rights of the accused, South African courts will instil public confidence in the criminal justice system. An unwillingness to do so will produce the opposite result, which would be detrimental to the administration of justice. This argument is further fortified by the supremacy clause,[213] which dictates that the Constitution shall be the supreme law in South Africa. In the event that public opinion is in conflict with it, the provisions of the Constitution must prevail.[214]

Thirdly, the approach suggested by Van der Merwe fails to give adequate recognition to the purposes that section 35(5) seeks to protect, under the second and third groups of factors, which is: The protection of fundamental rights, the avoidance of what could be perceived as judicial condonation of unconstitutional police conduct by avoiding the long-term consequences of the regular admission

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[212] See, in this regard, the comments by Chaskalson P in *Makwanyane* (fn 19 above) at par 88, where he reasoned as follows: "The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those entitled to claim this protection include the social outcasts and marginalized people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected".

[213] Section 2 of the Constitution of the Republic of South Africa, 1996.

[214] Kentridge and Spitz (fn 199 above) at 11-16A, where they argue as follows: "The effect of the supremacy clause is to assign to the courts a role which extends beyond interpreting and enforcing the majority will, to the protection of the fundamental rights of individuals and minorities".

of evidence obtained through a serious constitutional infringement.[215] It is suggested that an over-emphasis of public opinion, especially during a consideration of the second and third group of factors, would necessarily imply that a consideration of the long-term effect that the regular admission of unconstitutionally obtained evidence would have on the justice system, would be relegated to an insignificant concern when the evidence is important to convict an accused on a serious charge, while the constitutional infringement consists of a deliberate breach.

Moreover, the contention of Van der Merwe was not followed by the majority opinion of the Supreme Court of Appeal in *Pillay*,[216] where the *Collins* test was adopted to determine whether admission or exclusion would cause 'detriment' to the administration of justice.[217] Against this background, it is suggested that South African courts should seek guidance from Canadian case law when they assess the task and weight to be attached to the different *Collins* factors.[218] Such

[215] See *Collins* (fn 1 above) at par 45; *Buhay* (fn 23 above) at par 90; *Feeney* (fn 6 above) at paras 81 and 83; *Stillman* (fn 6 above) at par 126; *Dyment* (fn 23 above) at 537.

[216] *Pillay* (fn 2 above) at paras 87 and 97; see also *Melani* (fn 184 above) at 352. Compare the minority opinion of Scott JA in *Pillay* (fn 2 above) at par 126, preferring the approach suggested by Van der Merwe.

[217] Ibid at paras 87 and 97. The cases of *Collins* and *Jacoy* were referred to with approval and followed in *Melani* (fn 184 above), and *M* (fn 184 above).

[218] *Pillay* (fn 2 above) at par 94, where the majority opinion adopted the Canadian approach of distancing itself from the unconstitutional conduct of the police when the violation is serious, the charges serious and the evidence important for a conviction, the Court declared as follows: "In our view, to allow the impugned evidence derived as a result of a serious breach of accused 10's constitutional right to privacy might create an incentive to law enforcement agents to disregard accused person's constitutional rights …"; and at par 97 the majority judgment stated as follows: "Lamer J, in the Collins [sic] case (at 138), says the question under section 24(2) of the Charter is whether the system's repute will be better served by the admission or exclusion of the evidence. Our view is that the same applies under section 35(5) of the Constitution. Although it

an approach would give effect to the purposes that section 35(5) seeks to achieve. To be precise: Although section 35(5) does not serve as a deterrent for police misconduct,[219] it does serve a regulatory purpose, since one of its primary aims under the second and third groups of factors is to avoid the long-term effect of the regular admission of evidence procured as a result of serious constitutional infringements.[220] By apportioning undue weight on the 'current public mood' when the constitutional infringement is serious, the evidence important for a successful prosecution and the accused is faced with a serious charge, would in effect convey the unbecoming message that the courts are affixing their stamps of approval to such constitutional infringements.[221] Moreover, if that were to be the case, the educational role of the courts would be downgraded so as to fade into obscurity.[222] To be sure, such a result would not be in conformity with one of the explicit purposes that section 35(5) seeks to achieve: the prevention of disrepute to the justice system.

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may cause concern that a perpetrator such as accused 10 might go free as a result of exclusion of evidence which would have secured her conviction …".

[219] *Pillay* (fn 2 above) at par 92.

[220] Ibid at par 94, where the majority opinion adopted the judicial integrity rationale (in respect of the second and third group of factors), in the following terms: "That result – of creating an incentive for the police to disregard accused person's constitutional rights in cases like the present where a judicial officer is misled – is highly undesirable and would, in our view, do more harm to the administration of justice than enhance it"; and at par 97 they said the following after having considered the seriousness of the infringement and the costs of exclusion: "The police, in behaving as they did … and the courts sanctioning such behaviour, the object referred to will in future be well nigh impossible to achieve"; see also *Collins* (fn 1 above) at par 31 and 45.

[221] *Pillay* (fn 2 above) at par 97; Fenton (fn 20 above) at 310-311.

[222] Per Erasmus J in *Nomwebu* (fn 184 above) at 422; see also *Soci* (fn 184 above); see also Schwikkard "Evidence" in Woolman et al (eds) *Constitutional Law of South Africa* (Vol 3, 2nd ed, 2007) at 52-62.

Fourthly, the undue emphasis on public opinion during the assessment of the second and third groups of factors may disturb the essential structure designed for the admissibility analysis as suggested in *Collins*[223] and *Pillay*.[224] Such a re-orientation of the character of the section 35(5) discretion could in turn provide judges with the latitude to determine the admissibility issue based on his or her subjective views of the 'current mood' of society. In such circumstances, the possibility remains that the purposes sought to be achieved by section 35(5) might be disturbed.[225] Ostensibly with the aim to prevent the personal perspectives of judges to interfere with their section 35(5) assessments, the *Collins* judgment commands that judicial officers should refer to what they conceive to be the views of society at large, bearing in mind that they do not have an unfettered discretion: A presiding officer should constantly remind herself or himself that[226]

> … his [or her] discretion is grounded in community values. He [or she] should not render a decision that would be unacceptable to the community when the community is not being wrought in passion or otherwise under passing stress due to current events.

This dictum of Lamer J in *Collins* clearly indicates that public attitudes towards exclusion or admission does matter[227] when a court determines the second leg of

[223] Fn 1 above.

[224] Fn 2 above.

[225] See, for example the approach in *Shongwe* (fn 5) above)

[226] Fn 1 above at par 34; see *Melani* (fn 184 above) at 352, where this dictum was quoted with approval.

[227] The South African High Court adopted this approach. See, for example, *Melani* (ibid) at 297, where the court dealt with the function of public opinion and its role in the admissibility assessment when the charges are of a serious nature as follows: "At the time of delivery of this judgment it is, I think, fair to say that there is a widespread public perception that crime is on the increase … I venture to suggest that a public opinion poll would probably show that a majority of

the admissibility inquiry, provided that the 'current mood' of society could not be characterised as unreasonable.[228] What could be categorised as unreasonable

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our population would at this stage of the history of our country be quite content if the courts allow evidence at a criminal trial, even if it was unconstitutionally obtained". Furthermore, Froneman J, in *Melani* at 352, was mindful of the fact that the "current pubic mood" of the public towards unconstitutionally obtained evidence favoured the inclusion of evidence, but declined to be bound by such public attitudes, and observed as follows: "It is true that courts should hold themselves accountable to the public, but that does not mean that they should seek public popularity"; compare *Ngcobo* (fn 184 above) at 1254, where Combrinck J emphasised the importance of the "current mood" of society towards the exclusion of relevant and reliable evidence when the violation was ***not deemed to be of a serious nature***. He was of the view that the public at large should have confidence in the criminal justice system and that such confidence is "… eroded where courts on the first intimation that one of the accused's constitutional rights has been infringed excludes evidence which is otherwise admissible". See further *Malefo* (fn 184 above) at 151, where the court initially made the statement that courts must "enjoy public support", but at 155 the emphasis is adjusted to the view held in *Collins*. The court held that the "current mood of society" should be "reasonable", while having due regard to "long-term values" of society; see further *Nomwebu* (fn 184 above) at 1660-1661; *Soci* (fn 184 above) at 295; *Naidoo* (fn 184 above) at 531; *Mphala* (fn 189 above) at 400; *Pillay* (fn 2 above) at par 92, where Mpati DP and Motata AJA wrote as follows: " …the concept of disrepute necessarily involves some element of community views …"; however, compare *S v Desai* 1997 (fn 189 above) at 42, where the Full Bench emphasised the importance of public attitudes towards the exclusion of evidence as follows: "Victims and those around them, and also society at large have an interest which is real and legitimate" in the outcome of a criminal trial; see also the view of the minority dissenting opinion of Scott JA, in *Pillay*, where the judge referred to *Makwanyane* (fn 19 above) and in particular the caveat issued by Chaskalson P regarding the dangers of relying on public opinion when interpreting the South African Constitution. Scott JA at par 126, confirming the view of Van der Merwe, distinguished the said approach from an interpretation of section 35(5) and concluded that: "It seems to me, however, that the very nature of the second leg of the inquiry postulated in section 35(5) of the Constitution contemplates a reference to ***public opinion***. It must, ***at least***, therefore constitute an ***important*** element of the inquiry". (Emphasis added).

[228] See *Collins* (fn 1 above) at par 33-34.

should not be left to the all-encompassing discretion of the presiding officer.[229] A presiding officer should always be mindful of the fact that he or she is interpreting a constitutional provision and his or her conclusion should therefore demonstrate that due regard has been given to the values that underpin the Constitution.[230]

To summarise, the concepts of 'disrepute' and 'detriment' aim to achieve a similar purpose. Public opinion does matter when South African courts have to determine whether admission or exclusion of evidence could be detrimental to the administration of justice. However, the decision to admit or exclude, should not be based on the 'current mood' of society. The public at large should be confident that the criminal justice system functions effectively by prosecuting and convicting those guilty of committing criminal offences. Yet this does not mean that the courts should sacrifice 'constitutional principle to the demands of expediency'.[231] The failure by South African courts to demonstrate a willingness to uphold constitutional rights, particularly when the infringement is regarded as serious, could have a detrimental effect on the criminal justice system. The discretion to admit or exclude evidence should, in the South African context, reflect due regard for the protection of the fundamental rights enshrined in the Constitution, recognise the values underpinning the Bill of Rights, and give effect

[229] Loc cit.

[230] Compare *Mkhize* (fn 184 above) at 637, where Willis J, writing a unanimous judgment for a Full Bench, made the following disturbing comments: "It seems to me that the provisions of the Act relating to the obtaining of search warrants are there not for the purposes of ensuring the fairness of the trial of an accused person but to protect the ordinary law-abiding citizens of our land from abuse of the formidable powers which the police necessarily have". This dictum begs the question: does the constitutional guarantee of the presumption of innocence serve any meaningful purpose in terms of the South African Bill of Rights? Compare the dictum of Erasmus J in *Nomwebu* (fn 184 above) at 422, to the effect that everyone is entitled to the protection provided by the rights in the Bill of Rights.

[231] Schwikkard (fn 185 above) at 795.

to the purposes that section 35(5) seeks to achieve. If South African courts take rights protection seriously, they will ensure that the significance of these factors is not undervalued.

2. The seriousness of the constitutional violation in South Africa

In this part of the work, the seriousness of the constitutional infringement is explored, followed by a discussion of the good faith exception. The following issues are the key focus areas: What factors should be taken into account when the seriousness of the constitutional infringement is determined? Is the nature of the evidence – real, reliable or testimonial compulsion – determinative of the classification of the infringement as either serious or trivial? Would South African courts, like their Canadian counterparts, be reluctant to classify the infringement as serious when the disputed evidence is real, reliable evidence that does not impact negatively on trial fairness and there is no indication that police abuse was the cause of its discovery? Put differently, would South African courts be more amenable to classify the infringement as serious when the disputed evidence constitutes testimonial compulsion? The phrase 'having regard to all the circumstances' which appears in section 24(2), does not appear in section 35(5). Do the South African courts have to consider all the circumstances surrounding the constitutional breach when making this assessment? What is the impact of this phrase on the admissibility assessment? An important issue considered here, is whether an honest belief by the police that they acted lawfully when the infringement occurred, should be regarded as a good faith violation.

2.1 Ascertaining the seriousness of the violation in South Africa

How should the seriousness of a violation be determined? The seriousness of a constitutional infringement depends on the facts of each case. A review of Canadian case law has shown that the absence or presence of good faith on the part of the police is a compelling indicator as to whether the infringement should be typified as serious, flagrant, deliberate or trivial, inadvertent, or of a technical nature. Exclusion of evidence obtained as a result of a trivial infringement, when the evidence is reliable and necessary to secure a conviction, would be detrimental to the administration of justice.[232] For this reason the classification of the infringement as either serious or trivial, is an important part of the assessment in the section 35(5) analysis. The classification of a violation as serious is a significant step in justifying its exclusion, because its admission would be regarded as judicial condonation of unconstitutional conduct.[233] By

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[232] See *Mark* (fn 184 above) at 578; see also Meintjies-Van der Walt (fn 185 above) at 87.

[233] *Mphala* (fn 184 above) at 400, where Cloete J confirmed this position as follows: "I cannot accept that the conduct of the investigating officer was anything but intentional. In such a case the emphasis falls on the 'detrimental to the administration of justice' portion of s 35(5) and the disciplinary function of the Court, set out in the judgment of Tarnopolsky JA in *R v James; R v Dzagic* (1988) 33 CRR 107, (which has twice been approved by the Constitutional Court – in *Du Plessis and Others v De Klerk and Another* 1996 (3) SA) 850 (CC) and *Keys's* case *supra* becomes important: 'The object of the Charter is not to make the obtaining of evidence or the getting of a conviction easier or more difficult, it is not intended to help people get acquittals or the Crown to succeed in its prosecutions, but rather to induce legislatures and government agents to respect the rights and freedoms set out therein, with notice as to the consequences of invalidity that follow any contrary action'." See further *Malefo* (fn 184 above) at 148; *Pillay* (fn 2 above) at paras 94 and 97; *Hena* (fn 184 above) at 42. For an analogous approach in common law jurisdictions, see *The People v O' Brien* [1965] IR 142, ("*O' Brien*"), where Kingsmill Moore J reasoned as follows at 162: "… where evidence has been obtained … as a result of deliberate and conscious violation of the constitutional (as opposed to the common law) rights of an accused person it should be excluded save where there are 'extraordinary excusing circumstances' …". For

contrast, the categorisation of an infringement as non-serious is, in general, an important step to account for the reception of the disputed evidence, especially when the accused faces serious charges and the evidence is reliable and essential for a conviction.[234]

It is suggested that, having regard to the purpose that the right to legal representation seeks to achieve, a violation thereof should, in general, be regarded as a serious violation.[235] The fact that the infringement is categorised

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the position in England and Wales relating to exclusion when a serious infringement has occurred, see chapter 3.

[234] See *Shongwe* (fn 5 above); *Mkhize* (fn 184 above).

[235] *Mphala* (fn 184 above) at 399-400. The manner in which the right to legal representation was violated in this case caused the court to categorise it as a deliberate and therefore, a serious infringement. Cloete J highlighted the seriousness of the violation as follows: "The State would not have been in possession of confessions which implicate the accused to the hilt and which, if admitted, would probably be decisive of their guilt, but for the fact that the Investigating Officer caused the confessions to be taken … (a) at a time when he knew that the accused's attorney did not wish them to make any statement before consulting with him … (b) without informing the accused of that fact and the fact that their attorney was on the way; and (c) after he had misled their attorney as to the time when the statements would be taken (obviously with the view to ensuring that the statements would be made before the attorney arrived) …". The conduct of the police officer was categorised as a "***deliberate***" infringement, calling upon the court to exercise its "disciplinary function"; see also *Melani* (fn 184 above), where evidence of a pointing-out – the court emphasised the purpose of the right to legal representation – was excluded; *Soci* (fn 184 above), where evidence of a pointing-out, after a violation of the right to legal representation was not consciously violated, was nevertheless excluded; *Mfene* (fn 184 above), where the accused was not informed of his right to legal representation at governmental expense and the evidence of a pointing-out was excluded; *Gasa* (fn 184 above), the right to legal representation at state expense was infringed and the evidence obtained was excluded; *Seseane* (fn 184 above), where it was held that a ploy used by the police, practised over a long period, that was designed to obtain incriminating evidence from an accused without informing her of her fundamental rights which serve to protect her against self-incrimination, as sufficiently serious to warrant exclusion of the conscripted evidence. Compare *Malefo* (fn 184 above), where the

as serious, calls upon the prosecuting authority to present evidence showing that the police acted in good faith, or on the grounds of urgency or necessity.[236] These factors have an extenuating effect on the seriousness of the infringement.

An assessment of the police conduct in the entire chain of events leading to the infringement and discovery of the evidence is central to this issue.[237]

In *Seseane*,[238] Pretorius AJ appropriately held that a tactic used by the police, established over a prolonged period and which was designed to obtain incriminating evidence from an accused without informing her of her fundamental rights which serve to protect her against self-incrimination, as

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offences were allegedly committed by the accused which had occurred before the Interim Constitution came into force, but the trial commenced thereafter. For the reason that the accused merely suggested hypothetically and in passing that their right to legal representation had been infringed, without mentioning what effect such infringement had on trial fairness, it was held that admission of the disputed evidence would not be detrimental to the administration of justice. It is suggested in chapter 4 C 4 that admission of the evidence would, on a sound legal basis, have been "detrimental" to the justice system, despite the fact that its admission would have tended to render the trial unfair; see further *Shongwe* (fn 5 above), where the accused was not advised of his right to legal representation at state expense and the consequences of making a statement was not conveyed to him before his statement was taken. Furthermore, before he was taken to make a pointing-out, he was not informed of the right to legal representation. The violations were held not to be suffiently serious to warrant exclusion of evidence essential for a conviction.

[236] For a discussion of these factors, see Roach (fn 11 above) at 10-69-82; Van der Merwe (fn 8 above) at 179-186, and 241-344.

[237] *Mark* (fn 184 above); *Agnew* (fn 184 above); *Seseane* (fn 184 above); *Madiba* (fn 184 above); *Soci* (fn 184 above); *Mkhize* (fn 184 above); *Pillay* (fn 2 above); *Hena* (fn 184 above). See also Roach (fn 11 above) at 10-67, and 10-79.

[238] Fn 184 above; see also *Agnew* (fn 184 above), where a tactic used by the police to avoid the attorney of the accused with the aim of obtaining a confession, Foxcroft J labeled the police conduct as a ***flagrant*** breach of the accused's right to silence; *Motloutsi* (fn 184 above); *Naidoo* (fn 184 above).

sufficiently serious to warrant exclusion of the conscripted evidence.[239] The gist of this judgment suggests that admission of evidence obtained as a result of a conscious and deliberate infringement would be tantamount to judicial condonation of unconstitutional conduct. The police conduct could not be described as an infringement committed in good faith, inadvertently or negligently. The evidence was accordingly excluded so as to avoid giving the police an incentive to continue this mischief. However, when the violation is not adjudged to be of a serious nature and the evidence important for a successful prosecution, exclusion would be detrimental to the administration of justice.[240]

The nature of the disputed evidence, in *Pillay*, was reliable real evidence. The majority opinion of the Supreme Court of Appeal in *Pillay*,[241] embraced the *Collins*[242] approach by considering and balancing the different factors mentioned in *Collins* to determine whether the admission or exclusion of the challenged evidence would bring the administration of justice into 'disrepute'.[243] Considering the seriousness of the violation, Mpati DP and Motata AJA, followed Canadian

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[239] *Seseane* (ibid) at 230*f-g* and 231*c-d*. It must be mentioned that the court endorsed the prejudice model advocated by Van der Merwe.

[240] See the minority judgment in *Pillay* (fn 2 above) at par 127, where Scott JA correctly summarised the position as follows: "At the other end of the scale the refusal to admit derivative evidence on the grounds of some technical infringement of little consequence, would be no less detrimental to the administration of justice"; see also *Melani* (fn 184 above) at 191H-J, where Froneman J held that because the police could not, at the time of the violation, have foreseen what provisions would be contained in the Bill of Rights, it could not be said that the violation was serious; see also Meintjies-Van der Walt (fn 185 above) at 87; see further Skeen (1988) 3 *SACJ* 389 at 405.

[241] *Pillay* (fn 2 above); also *Soci* (fn 184 above) at 295.

[242] Fn 1 above.

[243] Fn 2 above at par 93 to 95. The second and third group of *Collins* factors were considered and balanced to determine whether admission of the evidence would be detrimental to the justice system. Compare the recommendation contained in chapter 6 of this thesis that all the factors, that is, the first, second and third groups of factors, should be considered and balanced.

precedent[244] by taking into consideration the police conduct during the ***entire*** investigation process[245] – unlike the approach of the dissenting minority opinion[246] – to assess this group of factors. This approach of the majority judgment is predicated upon its pronouncement that despite the fact that section 35(5) does not direct South African courts to consider 'all the circumstances',[247] logic dictates 'that all relevant circumstances should be considered'[248] to determine whether admission or exclusion of the disputed evidence would be detrimental to the administration of justice. The majority opinion declined to accept any suggestion that the constitutional violation should be labeled as 'merely technical' in nature, because some of the information contained in the

[244] See the approach adopted by the Supreme Court of Canada in *Strachan* (fn 23 above).

[245] Fn 2 above at par 93, the majority opinion was the following: "In the present case the infringement of accused 10's right to privacy through the illegal monitoring was quite serious when looked at from the point of view of ***how*** the direction to monitor was procured". (Emphasis added). See also *Naidoo* (fn 184 above) at 530.

[246] See the approach of Scott JA (dissenting) in *Pillay* (fn 2 above) at 133, preferring to focus on the conduct of the police after the warrant had been obtained - in accordance with the approach of the courts in the USA - therefore concluding that the violation had been serious, but that the police officers who monitored the conversation had not acted *mala fide*. The judge arrived at this conclusion by separating the conduct of police officers who applied for a monitoring court order, from that of the members who actually monitored the conversations. Scott JA reasoned at paras 129-130, that the police officers who monitored the conversations "neither had sight of the application [authorising the monitoring of conversations]" and "[a]t all times while listening to the tape recordings of the telephone conversations and acting on the information obtained, they were bona fide in their belief that a valid monitoring order had been granted authorising them to proceed as they did".

[247] This phrase is contained in section 24(2) of the Charter, but not in section 35(5) of the South African Constitution.

[248] Fn 2 above at par 93.

application for a monitoring order was 'patently false' and some of which was 'downright misleading'.[249]

The majority judgment in *Pillay* added that the seriousness of the violation was aggravated by the fact that another investigating technique,[250] for example, surveillance of the houses of the suspects, was available to procure the evidence in a constitutional manner.[251] The availability of constitutional means to procure the disputed evidence suggests that the police acted in an unacceptable manner by obtaining the evidence in a manner which they did. The fact that they could have achieved the same result in a lawful manner, only adds to the seriousness of the violation.[252] This approach of the Supreme Court of Appeal is comparable to that of the Supreme Court of Canada in *Collins*[253] and *Kokesch*.[254] By contrast,

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[249] Loc cit; see also *Melani* (fn 184 above) at 352, in a matter decided before the existence of s 35(5), where Froneman J underscored the seriousness of the violation as follows: "Infringements of fundamental rights resulting in an accused being conscripted against himself through some form of evidence emanating from himself would strike at one of the fundamental tenets of a fair trial, the right against self-incrimination".

[250] See also *Motloutsi* (fn 184 above) at 87, where Farlam J, based on *The People v O' Brien*, held that where a police officer, acting beyond the bounds of the search warrant provisions of the Criminal Procedure Act when he searched the premises rented by the accused, without a warrant and without consent, constituted a ***serious violation***, because he could have obtained a warrant from a senior officer. The availability of lawful means to obtain the evidence, but not employed by the police, only adds to the seriousness of the infringement.

[251] Fn 2 above at par 93; see also *Hena* (fn 184 above) at 40; compare *Mkhize* (fn 184 above) at 638e, the Full Bench reasoning that the fact that alternative means to procure the disputed evidence were available is not decisive. Police failure to follow lawful procedural rules was deemed a "technical and inadvertent" violation which does not call for exclusion of the disputed evidence.

[252] Loc cit. The majority judgment approved of this approach proclaimed in *Collins*, arguing that "the fact that the evidence could have been obtained without the infringement tend to render the violation of the right more serious".

[253] Fn 1 above.

Scott JA, writing a minority dissenting opinion in *Pillay*, was of the view that the illegal monitoring was 'perhaps not the only possible course', but certainly 'the most expeditious course to solve one of the most successful and daring robberies in South Africa'.[255] This view of the minority opinion could be read as suggesting that the urgency of the detection and apprehension of the suspects,[256] against the background of the high level of the crime rate in South Africa and the

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[254] Fn 23 above; see also *Dyment* (fn 23 above).

[255] *Pillay* (fn 2 above) at par 132.

[256] Compare the approach to the evaluation of "exigent circumstances" by Sopinka J, writing the majority opinion in *Feeney* (fn 6 above) at 168 where he stated the following: "The respondent [prosecution] also argued that there were exigent circumstances in this case, which, according to *Silveira*, *supra*, may be a relevant consideration in a s. 24(2) analysis. As discussed above, in my view exigent circumstances did not exist in this case any more than they would exist in any situation following a serious crime. After any crime is committed, the possibility that evidence might be destroyed is inevitably present. To tend to admit evidence because of the mitigating effect of such allegedly exigent circumstances would invite the admission of all evidence obtained soon after the commission of a crime"; see, however, the comments by L'Heureux-Dube J, writing a dissenting minority opinion in *Feeney*, at par 156, where she formulated the grounds why she disagrees with Sopinka J as follows: "In my view, where there is a genuine fear that evidence of the crime will be lost, this can constitute the necessary exigent circumstances for a warrantless entry". The judge, at par 160, held that exigent circumstances did exist in this case, having regard to the fact that "… the police were pursuing the offender a short time after the occurrence of the crime. They had every reason to believe that the killer, if apprehended quickly, would still have blood stains on him, which would be important evidence". The judge cited with approval, case law of the USA which re-enforces her contention: *People v Johnson* 637 P2d 676 (Cal. 1981) and *People v Williams* 641 NE 2d 296 (1994). The passage quoted by L'Hereux-Dube J from this United States case illustrates the point made by her. She argued as follows at par 166: "The crime involved was of the most serious nature, involving unprovoked, deadly violence against the victim. From the time of the murder until defendant's arrest only 27 hours later, the police conducted an around-the-clock investigation, acting on every lead without delay … Defendant's argument that, given the time lapse between Golden's statement and his arrest, the police could have obtained an arrest warrant is unpersuasive … The officers clearly acted without delay in initiating efforts to apprehend defendant following receipt of information from Golden concerning defendant and his possible whereabouts".

prevalence of armed robberies,[257] rendered the police conduct less blameworthy. The opinion of Roach,[258] to the effect that a 'general concern and fear' should not justify any constitutional infringement is preferred above that suggested by Scott JA. Roach is correct in the view that urgency should not be an 'at-large excuse' for constitutional violations and suggests that there should be a rational connection between the violation and legitimate police concerns that explain why compliance with the Constitution was not possible.[259] Based on the reasoning above,[260] Scott JA concluded that the exclusion of the disputed evidence would, 'in the eyes of reasonable and dispassionate members of society' result in a 'loss of respect for not only the judicial process but the Bill of Rights itself'.[261]

Proceeding with their evaluation of the seriousness of the violation, the majority opinion took into consideration the fact that the violation of the rights of the accused 'did not end with the unlawful monitoring' of her conversations. Added to this, the police officers, assumedly aware of the fact that they were not armed with a search warrant,[262] persuaded the accused to tell them where the money

[257] Ibid at par 133.

[258] Fn 11 above at 10-82.

[259] Loc cit. Roach argues that the police should therefore provide evidence as to why compliance with a particular constitutional right in urgent circumstances would be inconsistent with legitimate police concerns. He bases his opinion on *Greffe* (fn 23 above), where the Supreme Court held that urgency did not justify a rectal search - the preferred course would have been to detain the suspect to "facilitate the recovery of the drugs through the normal course of nature", as well as the principle enunciated in *Strachan* (fn 23 above); see also the reasoning in *Stillman* (fn 6 above) at par 126. In the South African context, see *Madiba*, (fn 184 above), where the approach suggested by Roach was applied in relation to a violation of the right to privacy.

[260] As well as a balancing exercise with the third group of *Collins* factors, ie the effect of exclusion on the administration of justice system. The third group of factors is discussed in this chapter under 3 below.

[261] Fn 2 above at par 133.

[262] Ibid at par 95. This is indicative of the fact that more than one infringement occurred.

was hidden, while 'giving her the undertaking that she would not be prosecuted'.[263] This promise, the majority opinion concluded, was motivated by the aim to arrest the 'prime suspect', one Naidoo. Having regard to public policy, calling on citizens to report crime in order to prosecute and convict the prime suspects of serious crime, the majority opinion posed the following rhetorical question, while in this fashion underlining the seriousness of the infringement as tantamount to an abuse of governmental power designed to achieve unwarrantable self-incrimination:[264]

> Can it ever be in the public interest, in a crime ridden society like ours, and where members of the public are urged to assist in combating crime by reporting it, to charge someone after having given him/her an undertaking that he or she would not be charged in the event of him or her disclosing a fact which, though prejudicial to him or her, will bring perpetrators of serious crime to book? We think not. In our view such conduct would be more harmful to the justice system than advance it.

This dictum is evidence of the fact that the judicial integrity rationale should in future be a prominent consideration in the interpretation of section 35(5) whenever unwarranted police conduct is labelled as a serious violation of constitutional rights. Highlighting the interests that section 24(2) serves to protect, and concluding that section 35(5) serves an indistinguishable purpose,[265] the majority opinion arrived at the following conclusion:[266]

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[263] Loc cit; and (ibid) at par 96, where the seriousness of the violation was re-iterated as follows: "And what transpired in accused 10's house should not be considered in isolation, as if removed from the original violation of accused 10's right to privacy, ie the illegal monitoring of her telephone communications".

[264] Ibid par 96.

[265] Ibid par 97. Both sections call upon courts to determine whether admission or exclusion of the disputed evidence would better serve the repute of the administration of justice.

> The police, in behaving as they did … and ***the courts sanctioning such behaviour***, the objective referred to will in 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.

Despite a clear rejection of the deterrence rationale,[267] the majority opinion extensively scrutinised the police behaviour which led to the discovery of the evidence in concluding that the violation was serious.[268] This approach is correct,[269] because in order to determine whether the violation should be classified as serious, inadvertent, or committed in good faith, it would be essential to scrutinise the police conduct in the entire investigating process. For the reason that the infringement was typified as serious, the majority opinion was evidently concerned with future police compliance with the Constitution. This is borne out by the fact that when they assessed the 'detriment' requirement, they reasoned that, by admitting the evidence the court would be 'sanctioning such behaviour'[270] which in turn, would provide an 'incentive for the police to disregard an accused person's constitutional rights'.[271] Mpati DP and Motata AJA thus conveyed the message that the courts should not associate themselves with police misconduct that could be characterised as a serious violation of

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[266] Ibid at par 97. (Emphasis added).

[267] Ibid at par 92. The deterrence rationale was rejected and the court endorsed the *Collins* approach.

[268] Ibid at paras 93, 95, and 96. Compare the conclusion of Scott JA in *Pillay*, at par 132, to the effect that the violation (the illegal monitoring), "though serious, cannot be said to be *mala fide*, because the police officers who monitored the conversations were not aware of the fact that the monitoring order had been illegally obtained and the monitoring police officers therefore acted "in the bona fide and reasonable belief that they were authorised to do what they did".

[269] See also Roach (fn 11 above) at 10-79, who is of the same opinion.

[270] Fn 2 above at par 97.

[271] Ibid at par 94.

constitutional rights - even when it means that a 'perpetrator of serious crime goes free as a result of exclusion of evidence which ***would have secured her conviction***'.[272] The *Pillay* judgment clearly suggests that the long-term effect of the regular admission of evidence obtained after a serious constitutional infringement (as opposed to the 'current mood' of society) should be of primary concern to South African courts when they consider the second and third group of factors.[273]

It is important to note that the *Pillay* court excluded real, reliable evidence, essential for a conviction on serious charges, only after the court demonstrated that the infringement of the right to privacy (which, viewed independently, was considered a serious infringement) did not occur in isolation: additional unwarranted police conduct[274] only aggravated the seriousness of the violation.

In *Naidoo*,[275] the case that preceded *Pillay*, the evidence in dispute were illegally monitored telephone conversations. The evidence was excluded because its admission, it was held, would render the trial unfair.[276] The court further held, obiter, that it would have excluded the evidence even on the ground that its reception would be detrimental to the administration of justice. McCall J held that the irregularities relating to the obtainment of the monitoring order was a serious infringement of the right to privacy, for the reason that a judge was misled in

[272] Ibid at par 97. (Emphasis added).

[273] See – in Cananadian context – cases confirming this view, *Buhay* (fn 23 above) at par 70; *Feeney* (fn 6 above) at par 80; *Stillman* (fn 6 above) at par 126.

[274] The undertaking not to prosecute the accused was breached despite the fact that public policy encouraged suspects to co-operate with governmental agents in order to convict the kingpins of crime. Added to this, the evidence could have been obtained by lawful means, but the police failed to make use of such options. Moreover, more than 1 right was violated.

[275] Fn 184 above.

[276] Ibid at 532.

order to obtain the order.[277] The court acknowledged that the evidence was important for a conviction on a serious charge.[278]

In *Hena*,[279] the two accused were charged with two counts of rape, as well as robbery with aggravating circumstances. These charges were by their very nature, serious accusations leveled against the accused, especially when one considers that the culprits had unprotected sexual intercourse with the complainants. The following facts were not in dispute in this matter: The two female complainants were accosted at night by three men, armed with knives. The culprits stole two mobile phones, money and jewellery, using their knives as a threat to rid the complainants of their property. The complainants were ordered to enter a church. There, the three men raped them. The identity of the culprits was the principal issue during the trial. However, accused 2 was linked to the crime by means of DNA evidence. Accused 1 could not be connected to the crime by means of DNA evidence. The prosecution based their case against accused 1 on the 'doctrine of recent possession'.[280] Based on this doctrine, it was argued that the fact that accused 1 was in possession of the stolen mobile phone shortly after the crimes were committed, the only inference that could be drawn was that he was one of the three culprits who committed the offences. The judgment essentially dealt with the admissibility of the evidence that linked accused 1 to the crimes.

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[277] Ibid at 530.

[278] Ibid at 530-531.

[279] Fn 184 above.

[280] See, in this regard, *R v Chetty* 1943 AD 514, ("*Chetty*"); *S v Skweyiya* 1984 4 SA 712 (A), ("*Skweyiya*"). See further Kriegler *Hiemstra: Suid-Afrikaanse Strafproses* (5th ed, 1993) at 373.

The court extensively analysed the circumstances that connected accused 1 to the crimes:[281] The circumstances are the following: Approximately a week after the incident, one of the complainants received information that a person had sold a mobile phone to certain Khayaletu Lucas (hereinafter referred to as "Lucas"), a person at that stage unknown to the complainant. The complainant conveyed this information to a member of a local anti-crime committee. The anti-crime committee member, together with other members, as well as the two complainants went to the house of accused 1. He was placed in the boot of a car and taken to the offices of the anti-crime committee, where members of the committee subjected him to continued interrogation and assaults. Eventually, accused 1 took the members of the committee to Lucas. Lucas produced the mobile phone, which was identified by the complainant as her property.

In court, Lucas testified that accused 1 and 2, together with a third person offered the mobile phone for sale. He took it, but refused to pay any sum of money, informing the three persons that he would keep and later return it to its owner. The admissibility of the ***testimony*** given by Lucas was attacked by accused 1 in terms of section 35(5) on the basis that it was derived from unconstitutionally obtained evidence. This type of evidence is classified as derivative evidence, because the testimony of Lucas existed regardless of the infringements suffered by the accused. It should therefore be treated the same as real evidence, derived from testimonial compulsion.[282]

The court held that the evidence had been obtained in an unconstitutional manner, because the anti-crime committee 'acted in a capacity similar to agents of the police conducting the investigation on their behalf'.[283] Plasket J proceeded

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[281] This approach is in conformity with *Pillay* and *Strachan*, although these cases were not referred to.

[282] Wiseman (fn 20 above) at 466-468.

[283] Fn 184 above at 40.

to consider the second leg of the section 35(5) inquiry, without having considered whether admission of the evidence would render the trial unfair.[284] In considering whether admission of the evidence would be detrimental to the administration of justice, the court took into account a number of factors,[285]

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[284] When the *Stillman* fair trial framework is applied, it is submitted that the fair trial assessment could conceivably not have resulted in the finalisation of the admissibility determination (even if the presumption in favour of exclusion was applied – see chapter 4 in 4.2, under the heading "The presumption in favour of exclusion"), for the reason that: Firstly, the ***testimony*** of Lucas was not a product of the accused's mind or body. Secondly, the assaults may have been a 'sufficient' cause for the discovery of Lucas, but it was not the '***necessary***' cause for his ***testimony***. (See Wiseman fn 20 above at 466-468: "It is important to remember that not all live testimony is the result of something the accused has created. If someone witnesses an event and the Crown wishes to call that person, then that person's testimony is, in effect, no different than real evidence – the witness existed regardless of the illegal behaviour of the state actor or actors, and the illegality merely helped the Crown locate the witness"). Furthermore, and unrelated to the fair trial assessment, it could be argued that the link between the infringement and his testimony was "too remote" – the reliance by the prosecution on the absence of a causative link between the infringement and the discovery of the live testimony of Lucas would in all probability have finalised the issue without the court having to consider the section 35(5) assessment, for lack of compliance with this threshold requirement. (See the discussion of *R v Goldhart* in chapter 3 par C – at 496 of the judgment – where the following argument from the judgment of Rehnquist J in *US v Ceccolini* (1978) 435 US 268 at 276-277 ("*Ceccolini*"), was quoted with approval by Sopinka J: "Witnesses are not like guns or documents which remain hidden from view until one turns over a sofa or opens a filing cabinet. Witnesses can, and often do, come forward and offer evidence entirely of their own volition. And evaluated properly, the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live witness testimony than any other kinds of evidence". Compare *Mthembu v S* (64/2007) [2008] ZASCA 51 (10 April 2008), where a prosecution witness was tortured in order to obtain incriminating evidence against the accused; see further Fenton (fn 20 above) at 282-299).

[285] Fn 184 above at 41, the judge considered the following factors, but emphasised that the exercise of the discretion is not limited to a consideration of these: (a) the absence or presence of good faith; (b) public safety and urgency; (c) the nature and seriousness of the violation; (d) the availability of lawful means of securing the evidence; (e) whether or not the impugned

frequently considered by Canadian courts under the second and third group of *Collins* factors.[286]

The court in *Hena* classified the violation as serious,[287] because there was no evidence to the effect that the unconstitutional conduct was necessitated by public safety concerns or urgency.[288] In light hereof, *Hena* can be read as postulating that, depending on the circumstances, the absence of public safety

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evidence is real evidence; and (f) whether or not the evidence would have been discovered without a violation.

[286] See, for example, *Jacoy* (fn 23 above) at 298, where the following was said: "The second set of factors concerns the seriousness of the violation. Relevant to this group is whether the violation was committed in good faith, whether it was inadvertent or of a merely technical nature, whether it was motivated by urgency or to prevent the loss of evidence, and whether the evidence could have been obtained without a Charter violation".

[287] Fn 184 above at 42; see also *S v M* (N) (fn 184 above): The investigating officer approached a defence witness with the sole aim of intimidating him to change his testimony in court, to the prejudice of the accused. The witness disclosed this to court. The court held that the police conduct could not be regarded as inadvertent or of a mere technical nature or in compliance with the requirements of urgency. It was further held that the accused's right to challenge and adduce evidence had been violated. As a result, the court held, at 489, that the violation was serious and the conduct of the officer labelled as *mala fide*. Furthermore, the court quoted McQuoid-Mason at 488, and held that the evidence should be excluded, because courts should not be seen to "encourage or even condone the violation of the rights of suspects in the course of the investigative process". However, this case was overruled by the Supreme Court of Appeal in *M* (SCA) fn 184 above); see also the comments made by McCall J in *Naidoo* (fn 184 above) at 94, dealing with the issue of judicial condonation of serious unconstitutional conduct. He said: "Both the interim Constitution and the new Constitution affirm the Legislature's commitment to the concept of protection of private communications against violation or infringement. To countenance the violations in this case would leave the general public with the impression that the courts are prepared to condone ***serious failures*** by the police to observe the laid-down standards of investigation so long as a conviction results". (Emphasis added).

[288] *Hena* (ibid) at 42. A similar approach is followed in Canada. See, for example, *Kokesch* (fn 23 above); *Dyment* (fn 23 above); and *Buhay* (fn 23 above).

concerns or exigent circumstances when evidence is gathered, could be indicative of a lack of good faith. Moreover, the unwarranted conduct consisted of the deliberate infliction of physical violence, associated with the conscious interference with the liberty and human dignity of the accused. It is suggested that the seriousness of the violation was aggravated for the reason that the challenged conduct unjustifiably impinged upon rights that are intrinsically linked to the foundational values of the Bill of Rights, being human dignity and freedom.[289] In the result, the the accused's right to bodily sanctity was impaired. Moreover, the seriousness of the infringement was amplified by the fact that the infringements were motivated by the unjustifiable aim of obtaining compelled self-incriminatory evidence against the accused.[290] It cannot be disputed that the seriousness of the violation was aggravated by the fact that more than one constitutional right was violated: the right to freedom and security of the person, the right to human dignity, freedom from torture, the right to remain silent, and the privilege against self-incrimination. In other words, there was a pattern of disregard for fundamental rights protected by the Bill of Rights.

The judge furthermore highlighted the seriousness of the infringement by typifying it as 'systemic' unconstitutional conduct[291] perpetrated on persons accused of having committed a crime.[292] By excluding the disputed evidence, the court demonstrated: Firstly, that it does not want to be associated with unconstitutional conduct, from whatsoever source, especially when the constitutional infringement can be categorised as serious; and secondly, that

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[289] Such an interpretation is aligned to a purposive approach.

[290] Roach (fn 11 above) at 10-78, par 10-1740.

[291] Fn 184 above at 41-42. With regard to the "systemic" abuse perpetrated by the anti-crime committee, see also *S v T* 2005 1 SACR 3I8 (E), ("*T*"), a judgment delivered by Plasket J; see further the comments made by McCall J in *Naidoo* (fn 184 above) at 94, with regard to the issue of judicial condonation of serious unconstitutional conduct; see also *S v M* (fn 184 above).

[292] *Hena* (loc cit).

once a violation is deemed serious, any evidence obtained as a result is susceptible to exclusion, because courts have to take account of the long-term effects that the regular admission of evidence obtained in this manner would have on the repute of the justice system. In this manner, section 35(5) also serves a regulatory purpose, because it serves to regulate future police conduct, with the aim to prevent 'systemic abuse' of fundamental rights. Thirdly, that, by excluding the evidence – which was essential for a successful prosecution – the court fulfilled its educational duty, illustrating that constitutional rights are meant for the protection of 'all of us'.[293]

Should South African courts, in view of the developments in Canadian section 24(2) jurisprudence, regard the absence of reasonable grounds when the police execute their investigative powers, as an indicator of the seriousness of the infringement?[294] This issue was considered by the High Court in *Mkhize*,[295] *Mayekiso*[296] and *Motloutsi*.[297] In *Mkhize*, the accused faced a number of serious charges, ranging from murder to the unlawful possesion of firearms. The accused's locker was searched without a warrant or his consent. The officer – a Superintendent – testified that he did not consider it necessary, in terms of the law, to obtain a search warrant.[298] In other words, he did not subjectively believe that his conduct violates the accused's right to privacy. The Superintendent had received information about the whereabouts of firearms that were not related to the charges faced by the accused. Section 22 of the Criminal Procedure Act

[293] Ibid at 41.

[294] See for example, *Kokesch* (fn 23 above); *Buhay* (fn 23 above); *Buendia-Alias* (fn 23 above); and *Symbalisty* (fn 50 above).

[295] Fn 184 above.

[296] Fn 184 above. This matter was decided in terms of the Interim Constitution.

[297] Fn 184 above. It should be noted that this case was decided before the advent of section 35(5).

[298] Fn 184 above at 635.

authorises a search when the person concerned gives his or her consent or when the officer ***on reasonable grounds*** believes that a warrant will be issued if he applies for one, but the delay in obtaining it would defeat the object of the search.[299] The court therefore had to decide whether the belief of the officer was, objectively considered, reasonable. The court held that 'even if it be accepted that he failed to comply with the provisions of the Act relating to the search', such failure was committed in good faith.[300] The court arrived at this conclusion despite the absence of any indication in the judgment that the officer made earnest attempts to keep the search within the ambit of the provisions of the Criminal Procedure Act.[301] Besides, other investigatory techniques, for example, consent from the accused or the obtainment of a search warrant was available, but an officer of his rank failed to consider any of these lawful alternatives. Canadian section 24(2) standards mandate that a failure by the police to consider lawful alternatives available to them, instead of committing Charter infringements, serves as an indicator of a lack of sincere effort to comply with the Charter as well as a pointer that the infringement should be regarded as a serious violation.[302]

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[299] Section 21(1)(a) of the Criminal Procedure Act permits the issue of a search warrant to conduct a search for an object which on reasonable grounds is suspected of having been used in an offence and which, on reasonable grounds, is believed to be in possession or under the control of any person or at any premises.

[300] Fn 184 above at 638.

[301] Loc cit. It is clear that the officer was not acquainted with the scope of his powers or the rights of the accused. Perhaps the dictum of Sopinka J in *Kokesch*, at 231, should be paraphrased to summarise the position of the officer: Either he knew the search was unlawful or he ought to have known.

[302] See for example, *Buhay* (fn 23 above) at par 63. In *Buendia-Alas* (fn 23 above), the officer had two-and-half years experience at the time of the infringement. The officer's lack of understanding of Charter rights and his policing duties was recorded as follows by the court at par 19: "… [he] did not understand, and perhaps today does not understand sufficiently, the balancing of interests that require him to have more evidence …" before he interferes with the

The *Mkhize* judgment is susceptible to the criticism that it suggests that the police may successfully rely on good faith even though their conduct consists of an 'unreasonable error or ignorance as to the scope of his or her authority'.[303] It is suggested that the fact that the officer subjectively thought that his conduct was lawful, only adds to the seriousness of the infringement, because this factor is indicative of the fact that he did not even consider the scope of his authority and whether the execution of his powers impacted on the constitutional rights of the accused. Should such conduct not be considered as 'a blatant disregard' of constitutional rights?[304]

The matters of *Motloutsi* and *Mayekiso* were decided in terms of the Interim Constitution. Searches were conducted in both matters without consent and without warrants. Furthermore, the presence or not of 'reasonable grounds', contained in section 22 of the Criminal Procedure Act was at issue in both matters. In addition, in both matters, real evidence was discovered after the infringements. The judgment in *Mayekiso* was based on the reasoning in *Motloutsi*. In *Motloutsi*, the search was conducted at approximately 03h00 in the morning. It was held that the belief of the officer that the delay in obtaining a search warrant was not based on reasonable grounds.[305] The prosecution argument that the officer misinterpreted the Criminal Procedure Act and therefore committed the infringement in good faith, prompted the court to rely

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Charter rights of citizens. Evidence that cocaine was found in the possession of the accused was excluded.

[303] Sopinka et al (fn 20 above) at 450.

[304] *Buhay* (fn 23 above) at par 60. See, in this regard the recommendations made by Stuart (fn 31 above) at 7-8.

[305] Fn 184 above at 87.

on the remark made by Walsh J in *People v Shaw*,[306] where the following was said:[307]

> A belief, a hope, on the part of the officers concerned that their acts would not bring them into conflict with the Courts is no answer, nor is an inadequate appreciation of the reality of the right of personal liberty guaranteed by the Constitution.

This view is comprehensively aligned to the approach applied by the Supreme Court of Canada in for example, *Kokesch*,[308] *Buhay*[309] and *Buendia-Alas*.[310] Such an approach accurately postulates the contention that courts should not readily condone the honest, but mistaken belief by police officials that make significant inroads into fundamental rights. In the result, Farlam J held, in *Motloutsi*, that the infringement constituted a 'conscious and deliberate' violation,[311] sufficiently serious to justify exclusion. The *Motloutsi* judgment reaffirms the view held by McCall J in *Naidoo* to the effect that the tolerance by the courts of serious violations would leave 'the general public with the impression that the courts are prepared to condone ***serious failures*** by the police to observe the laid-down standards of investigation so long as a conviction results'.[312]

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[306] [1928] IR 1 at 33-34, ("*Shaw*").

[307] Fn 184 above at 87.

[308] Fn 23 above.

[309] Fn 23 above.

[310] Fn 23 above at par 19. See also *Krall* (fn 48 above) at par 84; *R v Rolls* 2001 CRR (2d) 151, 2001 CarswelAlta 922 at par 31, (*Rolls*"): "In assessing the gravity of the Charter breach in this case, one starts from the proposistion that it is a very serious interference with a person's right of privacy for the police to search the person's home".

[311] Fn 184 above at 88.

[312] Ibid at 94.

South African courts, like their Canadian counterparts,[313] are reluctant to classify an infringement as serious when the disputed evidence is real, reliable evidence that does not impact negatively on trial fairness. When in such cases, the police conduct cannot be described as 'flagrant', 'willful', 'deliberate' 'intentional', the cause of 'erroneous institutional training' or abusive, the infringement will not be classified as serious.[314] By contrast, South African courts are inclined to readily

[313] See Stuart (fn 66 above) at 406; Roach (fn 11 above) at 10-78.

[314] See, for example, *Pillay* (fn 2 above), *Mayekiso* (fn 184 above) and *Motloutsi* (fn 184 above), where real evidence were excluded after the right to privacy of the accused in each of these cases were infringed. The infringements in these matters were classified as serious only after the respective courts categorised the violations as "conscious", "deliberate", or "quite serious". In *Hena* (fn 184 above), the testimony of a third party, who was located as a result of the infringement of several fundamental rights of the accused, was excluded. It is submitted that this evidence should be treated as derivative evidence, because the testimony of the third party existed regardless of the infringement of the rights of the accused; it was also not a product of the accused's mind. The court held that the infringement was serious after describing the nature of the violation as "systemic abuse", committed in "bad faith", where there was "no public safety or urgency concerns". Compare *Lottering* (fn 184 above), where the evidence was a knife (reliable, real evidence) and testimonial compulsion. The court, at 1483, classified the violation as "not deliberate or flagrant", despite the fact that the police officer clearly had no clue of the informational duties contained in the Bill of Rights and its impact on his investigatory duties. Furthermore, the rights to legal representation and the privilege against self-incrimination were violated. In *Mkhize* (fn 184 above), the evidence in dispute was a gun (real evidence). The court, at 638, classified the infringement of the right to privacy as "inadvertent and technical in nature", again, despite the fact that the police officer had no idea of the scope of his powers; see also *Shongwe* (fn 5 above) at 345. These matters confirm the fact that the nature of the evidence obtained after a violation is determinative of the classification of the infringement as either serious or trivial. It is further suggested that the classification of the infringements in *Lottering*, *Shongwe* and *Mkhize* were result-constrained, which explains why the police conduct was erroneously considered to have been committed in good faith. See also the approach of Scott JA, writing a dissenting opinion in *Pillay* (fn 2 above), and categorised the police conduct as a bona fide violation, while the infringement was deemed serious. The judge would have received the real, reliable evidence which was essential for a conviction on a serious charge.

categorise the infringement as serious when the disputed evidence constitutes testimonial compulsion.[315]

The good faith of the police, in the execution of their duties, is discussed below.

2.2 The good faith exception in South Africa

A review of Canadian case law is indicative of the fact that significant police compliance with the law and the Charter during their investigation could be considered as a factor demonstrating that the police acted in good faith.[316] Should this approach be accepted by South African courts? A question related to this is, should negligent or inadvertent infringements of the law by the police, be

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[315] See, for example, *Agnew* (fn 184 above), where a tactic used by the police to avoid the attorney of the accused with the aim of obtaining a confession, Foxcroft J labelled the police conduct as a "flagrant" breach of the accused's right to silence; see also *Soci* (fn 184 above), where the accused was not informed of the right to legal representation, available at governmental expense before he incriminated himself by means of a pointing-out. A pointing-out has been construed by South African courts (see for example *S v Sheehama* 1991 2 SA 860 (A), as a statement of the accused made by his or her conduct. The evidence was excluded, despite a finding by the court, at 296, that it could not be said that the infringement was committed mala fide or even consciously. The infringement was, by necessary implication, regarded as serious. *Naidoo* (fn 184 above) at 527, where the court equated the monitored telephonic conversations with testimonial compulsion. Determining "detriment", at 530, the irregularities were typified as "serious", despite the absence of any indicators that the police conduct was mala fide. In *Mphala* (fn 184 above), the evidence in dispute constituted testimonial self-incrimination, obtained in violation of the right to legal representation. The infringement was adjudged to have been committed "deliberately and consciously" – in this case, there was clear evidence of mala fides on the part of the police. In *Seseane* (fn 184 above), the evidence in dispute was testimonial compulsion. The infringement was labelled "serious". However, in this case, there was clear evidence of institutional abuse.

[316] *Jacoy* (fn 23 above); *Strachan* (fn 23 above); *Stillman* (fn 6 above), more particularly regarding the tissue containing mucuous.

condoned by South African courts as good faith violations? In other words, should the test to determine whether the police acted in good faith be a subjective or an objective test?

In *Pillay*, Scott JA correctly held that, in order to comply with the 'good faith' exception, police conduct must not only be *bona fide*, but it should also be reasonable.[317] In this regard, the opinion of Chaskalson P in *Pharmaceutical Manufacturers Association of SA and Another: in re Ex Parte President of the RSA and Others*,[318] confirms the rectitude of the approach adopted by Scott JA, when Chaskalson P declared as follows:[319]

> The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in ***good faith*** believed it to be rational. Such a conclusion will place form above substance and undermine an important constitutional principle.

Van der Merwe[320] echoes the view held by Scott JA. Based on this premise, the negligent violation of constitutional rights should not be tolerated by South African courts, especially in view of the fact that such an approach would be tantamount to the judiciary condoning unacceptable police conduct. In this

[317] *Pillay* (fn 2 above) at par 132, where Scott JA reasoned as follows: "Eva and Havenga acted in the *bona fide* and ***reasonable belief*** that they were authorised to do what they did". (Emphasis added).

[318] 2000 2 SA 674 (CC), ("*Pharmaceutical Manufaturers Association*").

[319] Ibid at par 86. (Emphasis added); see also *Manqalaza v MEC for Safety and Security, Eastern Cape* 2001 3 All SA 255 (Tk), ("*Manqalaza*"); see further *Mhaga v Minister of Safety & Security* 2001 2 All SA 534 (Tk), ("*Mhaga*").

[320] (1998) 11 *SACJ* 462 at 473; see also Ally (fn 181 above) at 74.

regard, the approach adopted by Farlam J in *Motloutsi*[321] is to be preferred instead of that applied by Preller AJ in *Shongwe*.[322] In *Shongwe*, more than one constitutional right was violated. As a result, the accused was conscripted against himself;[323] the accused was further detained and not advised of his right to legal representation and the consequences of any incriminating conduct on his part.[324] All these violations occurred while the police sought his co-operation in their efforts to obtain incriminating evidence against him. Despite the fact that more than one constitutional right were violated, Preller AJ held that the constitutional infringements could not be labelled as serious, because it was ascribed to police ignorance of the law. The reasons for such a finding are not altogether clear from a reading of the judgment. However, the *Shongwe* approach to the

[321] Fn 184 above at 87-88, where the judge reasoned, based on *Shaw* (fn 306 above) that it would be absurd to condone police conduct as a bona fide error, due to his or her ignorance of constitutional law or ordinary law. However, it must be emphasised that *Motloutsi* preceded section 35(5), therefore the section was not applied. Despite this, it is suggested that *Motloutsi* should be followed, on this issue, when interpreting section 35(5).

[322] See *Shongwe* (fn 5 above) at 334, where it appears that the police failed to inform the accused of the consequences of not exercising the right to remain silent when he was arrested; in addition, he was not warned of his right to obtain legal representation at government expense before he co-operated with the police. The court held, at 334, that the violation was committed in good faith, because of the absence of mala fides on the part of the police or their ignorance of the law. Preller AJ reasoned at 344 as follows: "4. Vir sover daar 'n inbreuk op beskuldigde 1 se grondwetlike regte was, was dit van minder ernstige aard. 5. Daar is nie sprake dat die polisie anders as te goeder trou opgetree het nie. Enige moontlike inbreuk was nie die gevolg van kwaadwilligheid nie, maar hoogstens van onagsaamheid of onkunde". (Loosely translated, the above passage states the following. 4. Insofar as the rights of the accused 1 had been violated, such violations were trivial in nature. 5. One cannot but conclude that the conduct of the police was in good faith. Any possible breach was not caused as a result of mala fides, but at the most, it could be ascribed to ignorance or the inadequate appreciation of the constitutional rights of the accused) – my translation. Compare *Motloutsi* (fn 184 above) at 87; *Buendia-Alas* (fn 23 above).

[323] Should this factor not have been considered as a factor having an adverse impact on fair trial concerns?

[324] Fn 5 above at 334.

determination of 'good faith' suggests that, in effect, careless or negligent violations of the fundamental rights contained in the Constitution should be condoned by South African courts.[325] Alternatively, it suggests that the absence of mala fides on the part of the police should be equated with good faith.[326] Such an approach loses sight of the purpose that the seriousness of the violation criteria serves to protect: The protection of judicial integrity when unacceptable police conduct could have been prevented by applying the law.[327]

Farlam J, in *Motloutsi*, also referred to Canadian case law[328] when he was of the view that the reliance by police officers on an Act of Parliament that had not been declared unconstitutional or a reported case of the highest court which had not been over-ruled, would qualify as a 'good faith' violation.[329] In *S v R*,[330] a

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[325] Loc cit.

[326] Compare *Soci* (fn 184 above) at 296, where, despite the absence of mala fides, the infringement was not equated with good faith.

[327] See the majority opinion in *Pillay* (fn 2 above); see also *Therens* (fn 23 above); *Kokesch* (fn 23 above); *Evans* (fn 23 above); *Stillman* (fn 6 above); *Feeney* (fn 6 above); *Buhay* (fn 23 above).

[328] Fn 184 above at 88. However, he distinguished the conduct of the police officers in the present case from that of the police officers in the Canadian cases of *Simmons* (fn 23 above); *Hammill* (fn 23 above), and *Sieben* (fn 23 above).

[329] See also the approach of Erasmus J in *Soci* (fn 184 above) at 297, where this approach was applied to the interpretation of section 35(5). The accused was not informed about his right to legal representation before he made a pointing-out. Erasmus J held that the police conduct could not be classified as mala fide or a deliberate violation, because the police officer conscientiously complied with "departmental prescriptions, in a form apparently drafted by legal advisers of the SA Police Service", but nevertheless held that because the said form constituted the basis of the decision in *Marx* (fn 184 above), the violation could not be construed as a "good faith" infringement, within the meaning of section 35(5); see also *Mathebula* (184 above) at 142, where the matter was decided based on the limitations clause instead of a discretionary exclusionary rule or in terms of s 35(5). The importance of the decision is that, in that case, Claasen J applied an objective test to determine whether the accused had waived his rights and

police officer received instructions from the Director of Public Prosecutions to obtain blood samples from the accused, who were minors, for the purposes of DNA testing. The officer obtained 'imperfect' consent from one of the accused, because consent was obtained from his uncle, instead of his mother or guardian.[331] This failure was mitigated by two important features: firstly, the fact that the consent of the legal representative of the accused had been obtained and secondly, the fact that, at the time, no standard practice existed regarding the obtainment of consent in respect of the procurement of the relevant evidence.[332] Willis J held that the police officer acted in good faith. This is evidenced by the fact that the officer made sincere attempts to obtain the evidence within the parameters of the existing law.[333] This approach is in

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held that the ***negligence*** of the police in using an old form, not containing the constitutional warnings that an accused was entitled to, was a "bad slip" on their part, without any grounds of urgency, where there "clearly was no reason for the rights to have been breached".

[330] Fn 184 above.

[331] Ibid at 42.

[332] Loc cit.

[333] See, in this regard, the similarity in the approach to this issue by the Canadian Supreme Court in *Buhay* (fn 23 above) at par 63; *Strachan* (fn 23 above); see also *Legere* (fn 23 above), where there was no reported case condemning the police conduct and the officers consulted prosecuting counsel before acting as they did. It was held that the police made genuine attempts to comply with the provisions of the Charter; compare *Stillman*, where it was held that the unavailability of lawful means to obtain the evidence does not justify its unconstitutional obtainment. In South African context, see *Soci* (fn 184 above) at 296, where Erasmus J correctly approached the issue as follows: "The failure of the police, especially Superintendent … to inform the accused properly of his right to consult there and then with a legal practitioner violated a fundamental right of the accused … This violation was not, however, *mala fide* or even conscious. Superintendent … in fact did his best to treat the accused fairly by complying with departmental prescriptions, in accordance with a form supplied for such purposes. The fault lies rather with the form apparently drafted by legal advisors of the South African Police Service". However, the police conduct did not qualify as a good faith infringement, because the judge continued as follows: "There can be little excuse for the oversight, as the *lacuna* in the form was the basis for the judgment in *S v Marx* …". (Citation omitted).

conformity with the argument presented by Stuart[334] in the Supreme Court of Canada, in the yet to be reported case of *Grant*.[335]

Mkhize[336] is a decision where Willis J wrote the judgment on behalf of the Full Bench of the Witwatersrand Local Division of the High Court of South Africa. The police searched the locker of the acused without a search warrant, while investigating an unrelated crime. An unlicensed gun was discovered. The court held that the violation of the accused's right to privacy could not be classified as a serious infringement.[337] A disturbing feature of this judgment is the fact that the judge suggested that the provisions of the Criminal Procedure Act relating to the obtainment of search warrants were intended to protect the rights of 'law-abiding citizens', as opposed to those persons suspected of having committed a criminal offence.[338] Based on this premise, Willis J classified the violation as 'inadvertent and technical' and the police conduct was adjudged to have been committed in good faith.[339] The court reasoned that if the police were armed with a search warrant, the evidence could have been discovered in any event.[340] This conclusion, it is submitted, serves the purpose of aggravating the seriousness of the violation when the second group of *Collins* factors is considered. It is important to note that the discoverability inquiry in respect of the fair trial assessment differs from the causation requirement under the seriousness of the violation inquiry.

[334] Fn 31 above at 7-8.

[335] The Supreme Court will, in due course, deliver its judgment.

[336] Fn 184 above.

[337] Ibid at 638 the judge held that the infringement was "inadvertent and technical in nature".

[338] Ibid at 637.

[339] Ibid at 638. Van der Merwe (fn 8 above) at 243, correctly suggests that the judge "perhaps rather generously" arrived at such conclusion.

[340] Loc cit.

The difference between the two approaches is not only of academic importance, but also of considerable practical significance to an accused person. Each inquiry serves a significantly different purpose and achieves remarkably divergent goals. For this reason, they should be distinguished and kept apart:[341] Under the seriousness of the violation group of factors, the fact that the police could have discovered the evidence by constitutional means only aggravates the seriousness of the violation.[342] By contrast, under the fair trial inquiry, the fact that the police could have discovered the evidence by constitutional means is a factor that could turn the outcome of the assessment in favour of the admission of the evidence.[343] It appears that the Full Bench applied the discoverability analysis under the seriousness of the violation group of factors.[344] However, after a discoverability analysis, the court held that the violation was not sufficiently serious to warrant exclusion of the evidence.[345]

In part B of this chapter, the good faith exception was considered in light of the *Stillman* fair trial framework. What is the position in South African section 35(5) jurisprudence? In *Melani*,[346] Froneman J held that the good faith of the police relates mainly to the discovery of existing facts or objects, and not to self-incriminating evidence. In other words, this confirms the view that the good faith

[341] Roach (fn 11 above) at 10-79, is of the same opinion.

[342] See *Collins* (fn 1 above); also *Kokesch* (fn 23 above); also *Pillay* (fn 2 above) at par 93.

[343] *Burlingham* (fn 23 above); *Feeney* (fn 6 above); see also *Stillman* (fn 6 above).

[344] Van der Merwe (fn 8 above) at 243 indicates that the court decided the admissibility issue "with reference to the second leg of the test", in other words, the second and third groups of factors.

[345] Ibid at 244. Van der Merwe suggests that the *Mkhize* court appears to have adopted the "inevitable discovery" doctrine applicable in the USA, and the *Stillman* and *Feeney* approach in Canada. However, in terms of the discoverability doctrine in Canada, this analysis is undertaken to assess trial fairness and the evidence must have been discoverable by lawful means. (*Burlingham* fn 23 above).

[346] Fn 184 above at 352.

of the police cannot change a trial that is unfair into a fair trial. By the same token, an infringement that results in the accused being conscripted against herself should be regarded as a serious violation.[347] This is one of the reasons why an infringement of the right to legal represenrtation should be jealously protected by South African courts.

To summarise, South African courts should scrutinise the entire circumstances surrounding unwarranted police conduct to determine whethere an infringement should be classified as serious. Members of the South African Police Service should, in order to prevent the unwarrantable violation of constitutional rights, be properly trained. This is especially important when one considers that institutional police ignorance or conduct that 'arises from incorrect training' of police officers that result in the violation of the fundamental rights of an accused is a factor that aggravates the seriousness of a violation.[348] It is suggested that the costs involved in such training justifies the benefit of the respect for fundamental rights in a democratic society striving towards fairness and social justice. Against this background, South African courts should not have any qualms in classifying a violation as serious when the evidence is reliable and important to convict an accused facing serious charges. This approach would result in the conversion of the section 35(5) inquiry (and the entire Bill of Rights) into an empty promise. Such conversion would, in turn, inevitably have a detrimental effect on the criminal justice system.[349]

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[347] *Hena* (fn 184 above) at 40.

[348] *Soci* (fn 184 above); see also Schwikkard (fn 222 above) at 52-63.

[349] Morrissette (fn 20 above) at 551, makes the same point when he wrote as follows: "Conversely, the admission of the evidence translates into a denial of any adequate remedy, which amounts to obliterating a Charter right. Why have such a right, then, if it can be violated and the violation quickly forgotten? Why make the Charter lie if it is so easy to ensure that it speaks the truth?"

The classification of a violation as 'serious', 'inadvertent' or in 'good faith', would have significant consequences for an accused relying on the remedy contained in section 35(5). This is the case, because in the event that the violation has been typified as 'serious', this factor would weigh heavily in favour of the exclusion of the disputed evidence. In contrast, should the violation be regarded as an infringement committed in 'good faith', this factor would weigh heavily in favour of the admission of the disputed evidence.

Similar to the approach adopted by their Canadian counterparts, South African courts have held that in general, a violation of the right to legal representation should be deemed a serious violation.[350] It is suggested that, having regard to the purposes the said right aims to protect, that a violation thereof should in general, be regarded as serious. This suggestion would not cause undue hardship on law enforcement agencies, especially when one considers government policy in providing legal aid and the provision of the services of the office of the public defender throughout South Africa.

Pillay and *Hena* demonstrate that the violation of more than one constitutional right adds to the seriousness of the violation. The majority opinion in *Pillay* further confirms that a violation committed to obtain evidence that could have been discovered in a constitutional manner, only adds to the seriousness of the violation.[351] This approach complies with the principles enunciated in *Collins*, *Stillman*, *Feeney*, and *Buhay*. The *Pillay* judgment has further highlighted the fact that the approach adopted in *Mkhize* and *Shongwe* is inconsistent with Canadian precedent[352] and for this reason are not in conformity with the rationale of

[350] See *Feeney* (fn 6 above); *Stillman* (fn 6 above); see also Seseane (fn 184 above); *Melani* (fn 184 above); *Marx* (fn 184 above); *Naidoo* (fn 184 above) at 91C-D, where such an approach was referred to with approval; compare *Shongwe* (fn 5 above).

[351] Compare *Mkhize* (fn 184 above).

[352] See, for instance, *Therens* (fn 23 above); *Kokesch* (fn 23 above); *Evans* (fn 23 above).

section 35(5). *Mkhize* and *Shongwe* should accordingly not be followed. Subjectively honest, but objectively assessed unreasonable police conduct in the execution of their powers does not comply with the good faith exception within the meaning of section 35(5). However, sincere attempts made to substantially comply with the law could be regarded as a factor demonstrating police good faith.[353]

Van der Merwe is correct when he affirms that the test to determine whether police conduct complies with the 'good faith' exception should be an objective test. Guidance has also been given by the High Court in determining whether police conduct should be classified as a *bona fide* violation. The approach adopted in *Shongwe*, regarding the negligent infringement of fundamental rights, should be rejected and that applied in *Motloutsi*, *Soci*, and *S v R* should be embraced. The approach followed in *Motloutsi*, *Soci* and *S v R* unequivocally proclaims that the negligent violation of constitutional rights flies in the face of the judicial integrity rationale. For this reason the negligent violation of constitutional rights should not be tolerated by South African courts.

In the light of the following three factors, negligent infringements should be categorised as serious violations: firstly, the fact that the South African Constitution has been in force for more than a decade. This is one of the reasons why members of the South African Police must be presumed to be aware of the scope and ambit of their powers, as well as the duty imposed on them by the provisions of the Bill of Rights;[354] secondly, the vast majority of South Africans

[353] Stuart (fn 31 above) at 8.

[354] Section 7 of the South African Constitution provides that the South African government must "protect, respect, promote and fulfil" the rights guaranteed in the Bill of Rights. Unlike socio-economic rights, the rights of accused, arrested and detained persons are couched in different terms. The rights of accused persons do not contain internal qualifiers like "progressive realisation" or "available resources". (See sections 26, 27 and 28 of the South African

are uneducated and unaware of the level of the protection they are entitled to in terms of the Bill of Rights;[355] and, thirdly, South African courts should particularly be concerned about the long-term effect that the regular admission of evidence obtained by the negligent violations would have on the repute of the justice system. Anything less would be understood by the public at large that the courts are giving the police an incentive to infringe the fundamental rights of South African citizens.[356] Moreover, the approach in *Motloutsi* and *Soci* is in conformity with an interpretation that gives effect to the spirit, purport and objects of the Bill of Rights and meet the terms of the approach adopted by the Constitutional Court in the *Pharmaceutical Manufacturers* case.[357]

3. The effect of exclusion in South Africa

Should reliable evidence, essential for a conviction on a serious charge, obtained after a serious infringement, be excluded? This question challenges South African presiding officers, schooled and experienced in the application of the common

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Constitution). This entails that the governmental duties in respect of accused persons arose the moment the Bill of Rights became the supreme law. This, in turn, means that the government and its agents have an immediate constitutional duty to refrain from any unjustifiable interference with the fundamental rights of an accused. It further means that the government should take positive steps to fulfil the protection of the fundamental rights of arrested, detained and accused persons, by implementing measures and programmes designed to protect their fundamental rights. One such measure would be to properly train members of the police to prevent the ***negligent*** infringement of the rights of the accused while exercising their official duties. In order to effectively execute their constitutional and other duties, members of the police must be conversant with the duties imposed on them by the provisions of section 35 – but not limited thereto – of the Constitution.

[355] See *Melani* (fn 184 above) at 347.

[356] Ibid at 6-7.

[357] Fn 318 above.

law inclusionary rule, to adapt their approach to the admissibility of evidence in order to give effect to the values sought to be protected by the provisions of section 35(5). A comparative study confirms that South African courts should apply Canadian precedent, while having proper regard for the high rate of serious crime. Exactly what is meant by 'proper'? Section 35(5) enjoins South African courts not to be swayed by the pressures of public opinion, but to assure all South Africans – irrespective of the fact that they are accused of having committed the most heinous crimes and no matter whether the likelihood is great that they probably committed such crimes – that the goals of crime control do not justify unconstitutional conduct.

Instead, the goal of preserving the integrity of the criminal justice system is of paramount importance when the second and third groups of *Collins* factors are applied in section 35(5) challenges. It is submitted that, while the 'current public mood' may be a relevant consideration under these groups of factors, it should not replace the fundamental duty of South African courts to 'uphold and protect the Constitution and the human rights entrenched in it', and to administer justice to 'all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law'.[358]

South African courts must in a similar manner as their Canadian counterparts, consider the seriousness of the charges against the accused and the importance of the disputed evidence for a successful prosecution, under this group of factors.[359] Compared to their Canadian counterparts, a number of South African

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[358] The oath taken by judges when they take office, contained in item 6 of Schedule 2 of the South African Constitution.

[359] *Pillay* (fn 2 above) the majority opinion, at par 93; see also the minority opinion of Scott JA in *Pillay*, at par 132, where he clearly demonstrated the application of the said factors as follows: "… her crime remains a serious one. The evidence in question was essential to substantiate the charge".

judgments have, perhaps as a result of the high rate of serious crime, over-emphasised the significance of the 'current mood' of society when they considered the third group of *Collins* factors.[360] Two equally important issues are emphasised in this part of the work. The first is whether South African courts acknowledge the importance of the presumption of innocence when the seriousness of the charge against the accused is considered. The second issue is that of factual guilt. Should it be allowed to enter the equation when the importance of the evidence for a successful prosecution is determined? The disregard of these two issues might create the impression (and justifiable public concern) that the criminal culpability of the accused, facing a serious charge when the reliable evidence, essential for a successful prosecution, is not entitled to equal protection of the law when compared to an accused facing a minor offence under the same circumstances. Hahlo and Kahn pertinently describe the

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[360] See, for example, *S v Khan* 1997 2 SACR 611 (SCA), [1997] 4 All SA 435 (A) at 621, ("*Khan*"), even though section 35(5) was not applied in this case, the seriousness of the offence and the interests of the public weighed heavily in favour of the admission of the evidence; see also the minority judgment in *Pillay* (fn 2 above); see further the comments made in *Soci* (fn 184 above) at 297; *Shongwe* (fn 5 above) at 344-345 Preller AJ dealt with the current public mood as follows: "Die land in die algemeen beleef 'n ongekende vlaag van wetteloosheid en in die betrokke omgewing het boonop tot onlangs 'n bloedige taxi-oorlog gewoed. Die publiek eis optrede teen misdaad. Die howe moet sigbaar 'n ferm standpunt inneem teen alle vorms van misdaad, onder andere om te verhoed dat die publiek in die versoeking kom om die reg in eie hande te neem". Loosely translated, it means the following: Lawlessness and crime is in general at the order of the day in this country, and the residents in this particular area recently had to endure a taxi war. The public demands that action be taken against crime. The courts must take a firm stand against all forms of crime to prevent the public from taking the law into their own hands – my translation; and *Ngcobo* (fn 184 above) at 1254, where the judge dealt with the reaction of society in instances when evidence is excluded as follows: "At the best of times but particularly in the current state of endemic violent crime in all parts of our country it is unacceptable to the public that such evidence be excluded. Indeed the reaction is one of shock, fury and outrage when a criminal is freed because of the exclusion of evidence".

unjustifiable inequity caused by such unequal treatment in the following terms:[361]

> It is unjust to select arbitrarily different systems of value in considering one case and another. It is unjust to discriminate arbitrarily among equal cases.

However, when Hahlo and Kahn wrote on the differential treatment of similar cases, a provision in terms of section 35(5) was not contemplated in South African law. In spite of this, their comments have equal force, even today. The approach of the High Court of South Africa on the issue of the seriousness of the charges is considered against this background. The approaches adopted in the cases of *Melani*[362] and *Shongwe*[363] are compared to demonstrate the unequal treatment of this factor in these two matters. These two matters are examples of the two divergent approaches applied by the courts of South Africa: The one favours due process concerns, while the other, crime control values. In other words, the *Melani* case focused on the long-term effect of the regular admission of evidence obtained after a serious infringement, and *Shongwe* opted to emphasise the 'current mood' of society, without demonstrating that such mood is reasonable.

3.1 The seriousness of the criminal charge

How should the seriousness of the charge against the accused be determined during the admissibility assessment? Unlike the position in Canada, in South

[361] *The South African Legal System and its Background* (1968) at 35.

[362] Fn 184 above; see also *Pillay* (fn 2 above); *Hena* (fn 184 above), where similar approaches were adopted in assessing the second and third groups of *Collins* factors.

[363] Fn 5 above; see also *Mkhize* (fn 184 above).

Africa this factor is not determined in a pre-trial motion, with the result that the concerns raised by Roach[364] and Pottow[365] would not be applicable in the South African context. In South Africa the admissibility assessment takes place in a trial-within-a-trial.[366] The admissibility assessment is further not limited to the facts contained in the trial-within-a-trial. A court may determine the seriousness of the charge against the accused by considering facts that are not in dispute in the main trial,[367] facts in the trial-within-trial,[368] and the charge sheet.[369] If the evidence led at the end of the trial does not, for example, prove the charge of murder – but assault – the defence may request the presiding officer to reconsider the admissibility issue, based on this new development.[370]

It should be emphasised that, when considering this factor, due regard should be had to the presumption of innocence and the values sought to be protected by this constitutionally entrenched right. The Constitutional Court has typified the presumption of innocence as 'fundamental to our concepts of justice and forensic fairness'.[371] What should therefore be assessed under this group of factors should be the seriousness of the ***offence*** charged and not the seriousness of the ***crime committed***.[372]

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[364] Fn 11 above at 10-86.

[365] Fn 20 above at 229-230.

[366] See chapter 3 par D 2.

[367] See *Naidoo* (fn 184 above) at 507-522.

[368] See *Malefo* (fn 184 above) at 133 and 138.

[369] Loc cit.

[370] Kriegler *Hiemstra: Suid-Afrikaanse Strafproses* (5th ed, 1993) at 553. Mindful hereof, and the importance of the presumption of innocence, should this factor – the seriousness of the charges – in actual fact have such a determinative impact on the admissibility issue?

[371] *S v Zuma* 1995 4 BCLR 401(CC) at par 36, ("*Zuma*").

[372] See *Soci* (fn 184 above) at 297, where the importance of the presumption of innocence was highlighted, having regard to this distinction.

In *Melani*,[373] the charges against the accused were murder, robbery, and the unlawful possession of firearms and ammunition. These are indisputably serious charges. The three accused were conscripted against themselves. Froneman J observed that a public opinion poll would have suggested that the evidence should be admitted, despite the seriousness of the constitutional violations. However, after the judge gave due consideration to the presumption of innocence, the evidence was excluded.[374] Froneman J based his decision on 'the longer term purpose of the Constitution, to establish a democratic order based on, amongst others, the recognition of basic human rights'.[375] The court made its admissibility ruling while emphasizing that it is not bound by the 'current mood' of society.

The case of *Shongwe* was discussed previously, but the facts material to this discussion are repeated to illustrate the difference in the approach to the same groups of factors in the two cases. The three accused faced four charges of murder, four charges of kidnapping, the unlawful possession of two firearms, unlawful possession of ammunition, and armed robbery of a motor vehicle. The charges, arising from a local taxi-war, are by their nature serious. The admissibility dispute relates to accused 1.[376] After he was arrested, the accused was not warned by a senior police officer of the consequences of not remaining silent and that he is entitled to legal representation at governmental expense. Furthermore, the accused was not warned of his right to legal representation before he co-operated with the police by making a pointing-out, once again, in the company of another senior officer. All of this happened approximately seven months after the advent of the Interim Constitution.[377] It is clear that the

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[373] Fn 184 above.

[374] Ibid at 353.

[375] Loc cit.

[376] Hereinafter "the accused".

[377] Fn 5 above at 325. The accused was arrested on 14 December 1994.

accused was compelled to co-operate in the creation of evidence against him. Should the infringement not have been classified as serious, in the same manner that the obtainment of conscriptive evidence was classified in *Melani* and *Pillay*? Instead, Preller AJ emphasised the seriousness of the charges against the accused,[378] the 'current mood' of the particular society where the crimes were committed,[379] and factual guilt.[380] The court admitted the disputed conscriptive evidence.[381]

The difference in the outcomes of these cases resulted from the emphasis placed by the *Shongwe* court on the seriousness of the charges and the 'current mood' of society.[382] As a consequence, undue weight was accorded to the seriousness of the criminal charges and factual guilt, without proper regard for the seriousness of the infringement.[383] Such an approach implies that the duty of

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[378] Ibid at 344, the seriousness of the charge was described as follows: "Die ten laste gelegde misdaad is een van die heel ergste graad – vier hulpelose mense is koelbloedig, die een na die ander en ten aanskoue van mekaar, doodgeskiet". Loosely translated, this means the following: The charge faced by the accused is of the worst kind possible – four helpless people were cold-bloodedly shot dead, one after the other, and while the deceased witnessed how the others died. (My translation).

[379] Loc cit.

[380] Ibid at 345, Preller AJ reasoned as follows: "As 'n skuldige persoon in hierdie omstandighede vry uitgaan, sal dit teenproduktief wees vir die bevordering van 'n kultuur van menseregte …". Loosely translated, this sentence has the following meaning: When a guilty person is aquitted under these circumstances, it would be counter-productive for the development of a culture of human rights …". (My translation).

[381] Loc cit.

[382] It is suggested that the "current mood" of society was a weighty factor in the assessment, even though the judge mentioned, at 344, that he was not influenced by it. See, for example, at 344-345, the fact that it is mentioned at points 1, 2, 6, and 7 of the reasons for judgment.

[383] In fact, Preller AJ held, at 344, that the infringement was not serious. Compare *Melani*, where a violation that caused self-incrimination was deemed serious. More importantly, there were more than one violation in *Shongwe*, which was tantamount to "institutional carelessness". The

courts to protect the fundamental rights of accused persons, who are guaranteed the right to be presumed innocent, should be of secondary importance while serious crime continues to remain at a high level. South African courts should guard against such an approach, because an over-emphasis of the fact that the accused is factually guilty of serious charges may perhaps unjustifiably encroach upon the presumption of innocence.

3.2 The importance of the disputed evidence for the prosecution

The question addressed here is whether a consideration of the importance of the evidence to obtain a conviction may possibly make unwarranted inroads into the presumption of innocence. It is in the interests of the prosecution to demonstrate that the disputed evidence is essential for a conviction and that it should for that reason, be received by the court. In other words, the prosecution must present evidence that suggest that the costs of exclusion would be high. However, the importance of an impugned confession, admission or pointing-out may, more often than not, be demonstrated exclusively by means of the contents of the disputed testimonial evidence.

It was held in the case of *S v January: Prokureur-Generaal, Natal v Khumalo*,[384] that the disputed evidence may not be admitted until the court has made a ruling on its admissibility after a trial-within-a-trial. Furthermore, the case of *S v Lebone*[385] effectively insulates the presumption of innocence from encroachment when the admissibility of testimonial evidence is the subject of the admissibility

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fact that the officers were senior police officers should have been regarded as a factor which adds to the seriousness of the infringement.

[384] 1994 2 SACR 801 (A), ("*January*").

[385] 1965 2 SA 837 (A), ("*Lebone*"); see also *S v Khuzwayo* 1990 1 SACR 365 (SCA), ("*Khuzwayo*"); *S v Tsotsetsi and Others* (1) 2003 2 SACR 623 (W), ("*Tsotsetsi*").

dispute. The *Lebone* decision confirms the position in South African law that the prosecution may not lead evidence that discloses the contents of disputed incriminating testimonial evidence, unless the accused disputes its admissibility on the basis that information therein contained is false or originates from another source.[386] The prosecution may therefore not introduce evidence relating to the contents of testimonial evidence obtained after a constitutional infringement, even in section 35(5) challenges, for the same reason that evidence of this nature was not allowed before the enactment of section 35(5).[387] As a consequence, when the prosecution is called upon to demonstrate the importance of the disputed evidence to secure a conviction – while the contents of disputed testimonial evidence is the only source – they would be faced with the dilemma presented by the *Lebone* and *January* decisions.

Nevertheless, a court, when making the section 35(5) determination, should include this factor (the importance of the evidence for a conviction) in its assessment when it makes a value judgment[388] as to whether admission or exclusion would be detrimental to the administration of justice.[389] The fact that an onus should not be applied to determine whether admission or exclusion would be 'detrimental' to the administration of justice,[390] ensures that the

[386] Ibid at 841-842; see also *Tsotsetsi* (fn 385 above) at 627-628; see further De Jager et al (fn 185 above) at 24-66G; and Kriegler (fn 370 above) at 555.

[387] See *Tsotsetsi* (fn 385 above) at 628.

[388] *Lottering* (fn 184 above) at 1483; *Pillay* (fn 2 above) at par 92 and 97; see also Steytler (fn 14 above) at 36; Van der Merwe (fn 8 above) at 201.

[389] See, for example, how McCall J assessed this factor in *Naidoo* (fn 184 above) at 394, where the disputed evidence consisted of monitored telephone conversations. (Could it be regarded as statements?). McCall J mentioned that it "was by no means apparent at this stage of the trial quite how material the evidence is", but nevertheless assumed its importance in view of the vigour with which the prosecution attempted to have it admitted and the defence sought to have it excluded.

[390] See Van der Merwe (fn 8 above) at 201; Steytler (fn 14 above) at 36.

prosecution is not prejudiced when a court considers its ruling, especially in matters where testimonial evidence is in dispute. In this regard, the *Lebone* and *January* decisions prevent a court from considering the question of the factual guilt of an accused during a trial-within-a-trial.

In *Pillay*,[391] the Supreme Court of Appeal had to make a ruling on the admissibility of real evidence obtained after a constitutional infringement. Scott JA, writing a dissenting opinion, considered in his assessment of the 'detriment' requirement, whether an ***acquittal*** or ***conviction*** of the accused would be detrimental to the administration of justice.[392] It is fundamentally important to acknowledge that the admissibility issue should be separated from the determination of the criminal liability of the accused.[393] It is for specifically this reason that the issue of the admissibility of evidence should be determined by means of a trial-within-trial. To add to the evaluation of the admissibility inquiry an assessment as to whether an accused is factually guilty, would inevitably impact negatively upon the presumption of innocence and such effect may possibly result in an unfair trial: One of the consequences that section 35(5)

[391] Fn 2 above.

[392] Ibid at par 133, the judge approached the issue of admissibility as follows: "Whether the admission of the evidence and the resultant ***acquittal*** of accused 10 would be detrimental to the administration of justice involves, I think, an inquiry whether an ***acquittal*** would be likely to bring the about a loss of respect for the judicial process in the eyes of reasonable and dispassionate members of society and, conversely, whether a ***conviction*** would be likely to result in a loss of respect for the Bill of Rights" (emphasis added); see also *Shongwe* (fn 5 above) at 345, where the judge stated as follows: "As 'n skuldige persoon in hierdie omstandighede vry uitgaan, sal dit teenproduktief wees vir die bevordering van 'n kultuur van menseregte …". (Loosely translated, this phrase means the following: If a guilty person is set free under these circumstances, it would be counter-productive for the advancement of a culture of human rights …". (My translation).

[393] Kriegler (fn 370 above) at 553-554; Van der Merwe (fn 8 above) at 244.

evidently aims to prevent.[394] An approach that evaluates admissibility with the emphasis on the factual guilt of the accused, flies in the face of the presumption of innocence and the long-term values the Constitution seeks to protect.[395] Such an approach suggests that unconstitutionally obtained evidence should be readily admitted in the event that the accused is adjudged to be factually guilty. Taken to its logical conclusion, evidence should regularly be excluded when the acused is likely to be acquitted.[396] Surely, this could not have been the purpose of section 35(5)? If this were to be the case, the rationale for the existence of the constitutional provision would be defeated. Conversely, the majority opinion in *Pillay*,[397] whilst acknowledging the concerns of Scott JA, placed great emphasis on the duty of the courts to protect the integrity of the criminal justice system. On this basis, the majority opinion concluded that the disputed should be excluded so as to prevent judicial contamination.[398]

The majority judgment in *Pillay* placed a high premium on their function as protectors of constitutional rights, even though the social costs of exclusion in the case at bar were great.[399] Heeding the rationale of section 35(5), the

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[394] Roach (fn 11 above) at 10-86, arrives at the same conclusion. He illustrates the importance of such an approach by means of an example: when an accused is charged with murder, the judge may not, at the admissibility stage, know whether the accused is guilty of assault.

[395] See, in this regard, the approach in *Melani* (fn 184 above) at 353.

[396] Sopinka J adopted a similar approach in *R v Grant* (1994) 84 CCC (3d) 173 at 203*a-b*.

[397] Per Mpati DP and Motata AJA in *Pillay*.

[398] Ibid at par 97, where the judges reasoned as follows: "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 future be well nigh impossible to achieve".

[399] The accused was factually guilty of a serious offence, but acquitted. Were the social costs of exclusion an important factor that accounts for the different outcomes in the cases of *Melani* and *Shongwe*? In *Melani*, the accused was convicted on evidence other than the excluded evidence. Exclusion only weakened, but did not destroy, the case of the prosecution. In other words, the disputed evidence was not that important to secure a conviction, whereas the same could not be

majority opinion asserted their dissociation with the unwarranted police conduct as the ground for excluding reliable real evidence, essential to secure the conviction of the accused.

This approach by the majority opinion is in conformity with the Canadian section 24(2) jurisprudence and should be welcomed, especially in the light of the dissimilar approaches of the various divisions of the High Court with regard to this issue.[400]

The objection to an approach that attaches too much weight on factual guilt is pertinently demonstrated by the comments made by the Full Bench in *Mkhize*,[401] where Willis J wrote a unanimous judgment to the effect that the provisions of

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said of the disputed evidence in the case of *Shongwe*. Likewise, in *Soci* (fn 184 above), the costs of exclusion were not very high, because the accused was convicted on the strength of other evidence. Compare *Naidoo* (fn 184 above), *Hena* (fn 184 above), and *Mphala* (fn 184 above), where the disputed evidence was essential for a conviction, but nevertheless excluded.

[400] See, for instance, *Melani* (fn 184 above): following a violation of the right to legal representation, essential evidence was excluded, despite the fact that the case for the prosecution was weakened; see also *Motloutsi* (fn 184 above): evidence, essential to the prosecution, was excluded after a violation of the right to privacy. However, it should be noted that the judgments in the mentioned cases pre-dated s 35(5); *Soci* (fn 184 above): a confession was excluded because of a violation of the right to legal representation – however, the evidence was not essential for a successful prosecution. The accused was convicted on the strength of the remainder of the evidence; compare *Shongwe* (fn 184 above): after the violation of more that one constitutional right, including the right to legal representation, the conscriptive evidence, essential for a successful prosecution, was admitted; see further *Mkhize* (fn 184 above): the right to privacy was violated and real evidence, essential for a successful prosecution, was discovered and admitted at trial. The charges against the accused were serious. The evidence was admitted because the violation was deemed to have been committed in "good faith" and not regarded to be of a serious nature, calling for its exclusion.

[401] Fn 184 above; compare *Melani* (fn 184 above) at 353, where the presumption of innocence was duly considered.

the Criminal Procedure Act, regarding the obtainment of search warrants are ***not*** intended for:[402]

> … the purpose of ensuring the fairness of a trial of an accused person but ***to protect the ordinary law-abiding citizens*** of our land from an abuse of the formidable powers which the police necessarily have.

The court in *Mkhize* conveyed an inapt message to law enforcement agencies to the effect that the goals of crime control justifies the unwarranted interference with constitutional rights: The end justifies the means, a sentiment reminiscent of the rationale of the common law inclusionary rule. In this regard, *Mkhize* challenges the comments made by South African scholarly writers to the effect that section 35(5) has evidently been designed to make 'a clear break with the common law' approach.[403] The *Mkhize* judgment further implies that when the unconstitutional police conduct leads to the discovery of evidence that confirmins the factual guilt of the accused, such evidence should, regardless of the manner of its obtainment, be admitted. By contrast, when it does not confirm factual guilt (and the person would be considered 'law abiding'), the disputed evidence would be inadmissible, and the police conduct classified as unconstitutional.

To summarise, under these groups of factors, the courts must consider whether exclusion or admission of the disputed evidence would have a negative impact on the integrity of the criminal justice system. The seriousness of the constitutional violation plays an important role in the assessment of this group of *Collins* factors. The reason why the seriousness of the constitutional violation should be balanced against other factors, is because the administration of justice may be brought into disrepute when evidence, essential for the prosecution, is

[402] Fn 184 above at 637. (Emphasis added).

[403] Van der Merwe (fn 320 above) at 463.

excluded as a result of a trivial violation. Factors that weigh heavily in favour of admission of the evidence are, on the one hand, the fact that the violation cannot be regarded as sufficiently serious, and the fact that the evidence is important for a successful prosecution, on the other hand.[404] Conversely, in the event that the violation could be regarded as serious, this would be a factor that weighs heavily in favour of exclusion of the evidence.[405]

However, when assessing the seriousness of the charges, courts should consciously remind themselves that the presumption of innocence operates in favour of the accused when the admissibility of evidence has to be assessed. The issue of factual guilt should be totally divorced from the admissibility inquiry. Such a clear separation is necessary to ensure that the fair trial concerns and the integrity of the justice system are not rendered irrelevant in cases where the accused faces serious charges and the evidence is essential for a successful prosecution. Further, when interpreting section 35(5), the provisions of section 9 of the Bill of Rights should be borne in mind. Those accused of allegedly having committed serious offences are, like those charged with minor offences, entitled to the full measure of protection guaranteed by the Bill of Rights. It is especially for this reason that the presumption of innocence, whether the charges are serious or not, should be a dominant consideration in the assessment of these group of factors.

When applying these groups of factors, courts should consciously be aware of the fact that the aims of crime control should not outweigh their constitutional duty to uphold, fulfil and promote the protection of constitutional rights. In giving effect to the judicial integrity rationale, South African courts should constantly – similar to approach of the *Pillay* court – pose the following question

[404] See *Mooring* (fn 23 above).

[405] In this regard, see the discussion under B 2 and C 2 above.

when called upon to apply the factors under this group of *Collins* factors: what effect would the regular admission of evidence, obtained after a serious infringement, have on the integrity of the criminal justice system? The majority opinion in *Pillay* has evidently aligned the South African jurisprudence on the admissibility of unconstitutionally obtained evidence with that of the Supreme Court of Canada.[406] In the light hereof, one can safely assume that South African courts will not over-emphasise the 'current mood' of society, when they apply the second and third groups of *Collins* factors.

D. Conclusion

This chapter contains a discussion of the approaches to the interpretation of the second and third groups of *Collins* factors in admissibility disputes in terms of sections 24(2) of the Charter and 35(5) of the South African Constitution. A comparative review of the case law of the two jurisdictions suggests that South African jurisprudence on the admissibility of unconstitutionally obtained evidence has made sufficient progress towards the interpretation of these groups of factors under section 35(5).

In both jurisdictions, the classification of a violation as serious is at the heart of the assessment of the second and third groups of factors. The classification of a violation as serious is a significant step in justifying its exclusion, because admission of evidence obtained in such a manner would be regarded as judicial condonation of unconstitutional conduct.[407] By contrast, the categorisation of a

[406] Ally (fn 181 above) at 74.

[407] *Mphala* (fn 184 above) at 400; *Malefo* (fn 184 above) at 148; *Pillay* (fn 2 above) at paras 94 and 97; *Hena* (fn 184 above) at 42. For an analogous approach in common law jurisdictions, see

constitutional breach as non-serious would, in general, be an important step to account for the reception of the disputed evidence, especially when the accused faces serious charges and the evidence is reliable and essential for a conviction.[408] A number of South African courts paid heed to the judicial integrity rationale by classifying violations as serious, even in cases where the evidence were reliable and essential for a conviction on serious charges.[409] Such an approach mirrors the approach followed by Canadian courts to these groups of factors.[410]

However, notably after the bench of the Supreme Court of Canada is comprised of newly appointed judges, there has been a remarkable predisposition by especially the Ontario Court of Appeal, to attach much weight to the third group of factors (the reliability and importance of the evidence to secure a coviction and the seriousness of the charges).[411] The Supreme Court heard argument relating to this recent modification of the assessment of these groups of factors, in the matter of *Grant*, on 23 April 2008. Judgment will be delivered in due course. Stuart, acting on behalf of an intervener in this appeal, correctly argued that the focus of the *Grant* approach on the reliability of the evidence and the seriousness of the charges bears the inherent danger that 'far less exclusion' would result after Charter infringements.[412] As a consequence, he submits, this would lead to 'patterns of inclusion despite police breaches', resulting in less

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O' Brien (fn 233 above) at 162. For the position in England and Wales in relating to exclusion when a serious infringement has occurred, see chapter 3.

[408] See *Shongwe* (fn 5 above); *Mkhize* (fn 184 above).

[409] See the cases cited at fn 407 above.

[410] See, for example,*Mellenthin* (fn 23 above); *Kokesch* (fn 23 above); *Jacoy* (fn 23 above); *Duarte* (fn 23 above); *Wong* (fn 23 above);*Stillman* (fn 6 above); *Feeney* (fn 6 above); *Buhay* (fn 23 above).

[411] See, for example, *Manikavasagar* (fn 23 above); *Vu* (fn 23 above); *Harris* (fn 23 above); *B (L)* (fn 23 above); *Grant* (fn 23 above).

[412] Fn 31 above at 5.

police incentive to 'take the Charter seriously'.[413] Such a result would, no doubt, have an adverse effect on the repute of the criminal justice system.

A comparative anaysis has revealed that, in both jurisdictions, the seriousness of the infringement pivots on the nature of the evidence discovered after a violation. In cases where conscriptive evidence has been discovered, courts are more amenable to categorise the infringement as serious.[414] By contrast, when reliable, real evidence has been discovered after infringements, courts are prepared to classify the breaches as serious only when the manner in which the evidence has been obtained could be described as 'flagrant', 'willful' or 'blatant'.[415]

Factors that are indicative of the seriousness of infringements are essentially the same in both jurisdictions. Likewise, factors that are indicative of the good faith of the police are comparable. However, South African courts should guard against condoning negligent police conduct as good faith infringements for purposes of section 35(5), because such an approach is inimical to the judicial integrity rationale.

Public opinion does matter in the section 35(5) assessment. This is common cause between both due process protagonists and those in favour of crime control. The differences emerge when one has to determine the weight to be

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[413] Ibid at 6-7.

[414] In Canada, see for example, *Mellenthin* (fn 23 above); *Hebert* (fn 23 above); *Therens* (fn 23 above). For the position in South Africa, see for example, *Melani* (fn 184 above); *Seseane* (fn 184 above); *Naidoo* (fn 184 above); *Mphala* (fn 184 above).

[415] In Canada, see for example, *Greffe* (fn 23 above); *Symbalisti* (fn 50 above); *Pohoretsky* (fn 23 above); *Feeney* (fn 6 above); *Stillman* (fn 6 above); *Buhay* (fn 23 above). South African cases where this approach was followed are for example, *Motloutsi* (fn 184 above); *Soci* (fn 184 above); *Hena* (fn 184 above); *Pillay* (fn 2 above).

attached to the 'current mood' of society. Those in favour of crime control would suggest that the 'current mood' of society should feature prominently during the second phase of the admissibility inquiry. South African scholarly writers, like their Canadian counterparts,[416] are divided on this issue.[417] Likewise, South African decisions were, until the *Pillay* judgment, incompatible with regard to the weight that should be attached to public opinion.[418]

The high rate of serious crime in South Africa has, wittingly or unwittingly, been considered as a factor unduly weighing in favour of the admission of evidence, even when the constitutional violation should have been regarded as serious.[419] However, South African courts should be wary not to convey the message to society that the ends of crime control justifies unconstitutional means. This would be tantamount to informing society at large that ***their*** rights guaranteed in the Bill of Rights are not of any value while the high rate of serious crime in South Africa does not show any signs of a decline.[420] Is such an approach reasonable? This implies that South Africans should accept that whatever the Constitution guarantees, should not be taken seriously. Would this state of affairs not be detrimental to the administration of justice?

The presumption of innocence deserves particular protection in a constitutional democracy based on human dignity, freedom and equality, even when the

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[416] Paciocco 1989 (fn 20 above) argues that the courts should seek public popularity; compare Roach (fn 11 above) who is opposed to this view.

[417] Van der Merwe (fn 8 above) argues that the 'current mood' of society should be a "weighty factor" when courts consider the second and third groups of factors; compare Steytler (fn 14 above) at 40, who is of the opinion that the long-term values of the Constitution should be a dominant feature.

[418] See *Shongwe* (fn 5 above); *Mkhize* (fn 184 above); *Ncgobo* (fn 184 above); compare *Melani* (fn 184 above); *Nomwebu* (fn 184 above); *Soci* (fn 184 above).

[419] See *Shongwe* (fn 5 above); *Mkhize* (fn 184 above).

[420] See the approach of the minority opinion in *Pillay* and *Shongwe* (fn 5 above).

evidence is essential to convict an accused facing serious charges. For this reason, the admissibility inquiry should be isolated from the assessment of factual guilt. In the light hereof, too much weight should not be attached to the seriousness of the charges against the accused and the importance of the evidence for a conviction, especially when the evidence was obtained as a result of a serious infringement. Furthermore, the fact that the accused is factually guilty should not be determinative of the admissibility assessment. Contrary to the approach suggested by Scott JA in *Pillay*,[421] it is suggested that the admissibility issue should not, in order to protect the presumption of innocence, be closely linked to criminal culpability. Moreover, the regular admission of reliable, real evidence, even when the infringement is serious and the accused is factually guilty on serious charges, would serve as an incentive for police abuse.

Those in favour of due process concerns will argue that it would be a considerable mistake to attach too much weight to the 'current mood' of society when South African courts determine whether exclusion or admission would be detrimental to the administration of justice. The approach suggested by Erasmus J in *Nomwebu*,[422] approved in *Naidoo*,[423] and applied in *Pillay*,[424] is based on a sound policy basis. As such, it is consistent with the dictum of Chaskalson P in *Makwanyane*.[425] Disrepute to the administration of justice would result if, despite a serious constitutional infringement, the courts were to enforce what they perceive to be the will of the majority, on a minority the Constitution expect it to protect.

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[421] Ibid at par 133.

[422] Fn 184 above.

[423] Fn 184 above.

[424] Fn 2 above.

[425] Fn 19 above.

Chapter 6: Conclusions and recommendations

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This part of the thesis consists, firstly, of conclusions comprising responses to the research questions posed in chapter one; secondly, recommendations to guide the future interpretation of section 35(5); and thirdly, concluding remarks.

A Conclusions

Given the aim of this work, the research questions are focussed on the issue of exclusion of evidence in terms of section 35(5). It follows that matters related to constitutional exclusion in South Africa form the greater part of the conclusions in this chapter. In this thesis, as in South African case law, the Canadian section 24(2) jurisprudence has been employed as a guide for the interpretation of section 35(5). Reference is also made here to section 24(2) in order to highlight the similarities and differences in the approach to the interpretation of the two provisions, while it also serves as a guide for the future development of section 35(5).

1 The appropriateness of Canadian section 24(2) jurisprudence as a guide for the interpretation of section 35(5)

Is Canadian section 24(2) jurisprudence an appropriate guide for the interpretation of section 35(5) of the South African Constitution? Canada and South Africa share fundamental similarities relating to the historic legal developments in the respective countries. For example, during the pre-constitutional era in both countries, judgments in Canadian and South African cases dealing with the admissibility of evidence were based on the English

decision in *R v Leatham*.[1] These similarities stem from the fact that both countries were at some stage under British rule, and that their procedural and evidentiary law were principally based on the English common law.

Both countries emerged from systems of parliamentary sovereignty to become constitutional democracies, in which substantive fairness defines trial fairness.[2] A number of fundamental principles that enhance procedural fairness, which originate from the English law of evidence and criminal procedure, were incorporated into the Bills of Rights of both countries.[3] For example, the Constitutions of both countries include provisions containing comprehensive procedural rights aimed at protecting an accused during the pre-trial, trial and post-trial phases. Furthermore, the Constitutions of both countries contain a general limitations clause,[4] and a provision that establishes the constitutional foundation for the exclusion of unconstitutionally obtained evidence.[5]

Of particular importance for purposes of this work, is the fact that the exclusionary provisions contained in the Constitutions of both jurisdictions are couched in strikingly similar terms.[6] The differences between the provisions were pointed out by commentators such as Van der Merwe.[7] The significance of two

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[1] 1861 Cox CC 498, ("*Leatham*").

[2] *R v Collins* (1987) 33 CCC (3d) 1 (SCC), 38 DLR (4th) 508, 1 SCR 265, (1987) Can LII 84 (SCC), ("*Collins*") at 20; see also *S v Dzukuza* 2000 4 SA 1078 (CC), ("*Dzukuza*").

[3] De Villiers unpublished LLD thesis at the Faculty of Law, UP, entitled *Problematic Aspects of the Right to Bail under South African Law: A Comparison with Canadian Law and Proposals for Reform* (2000) at 522-523; see also Hamman unpublished LLM dissertation at the Faculty of Law, UWC, entitled *The Right to Privacy and the Challenge of Modern Cell Phone Technology* (2004).

[4] Section 1 of the Canadian Charter and section 36 of the South African Constitution.

[5] Section 24(2) of the Charter and section 35(5) of the South African Constitution.

[6] See the introductory chapter par 1.

[7] "Unconstitutionally Obtained Evidence" in Schwikkard & Van der Merwe (eds) *Principles of Evidence* (2nd ed, 2002) at 200.

important aspects, namely (a) omission of the phrases 'if it is established' and 'all the circumstances'[8] from section 35(5), and (b) the explicit ***inclusion*** of the phrase 'or otherwise'[9] in this section, is discussed below.

However, it has to be kept in mind that there are socio-political differences between the two countries: For example, Canada has been a liberal democracy for more than two decades with the focus of the courts centred on sustaining fundamental rights. The socio-economic state of affairs in the two countries is markedly different. The general level of education in Canada is, for example, notably higher when compared to that of South Africa. In addition, the extent of serious crime in Canada is not as high as that of South Africa.[10] Furthermore, civil society organisations in Canada have developed a strong commitment to the protection of fundamental rights, including the Charter rights of persons accused of having allegedly committed crimes. One such non-governmental organisation is the Canadian Civil Liberties Association, which was established during 1964. Perhaps the perceived high rate of serious crime in South Africa accounts for the absence of an effective fundamental rights movement aimed at the protection of the constitutional rights of the accused.

It is submitted that the differences in the levels of crime and education place a heavier duty on the courts of South Africa – and other appropriate role players in

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[8] These phrases appear in section 24(2). The Supreme Court of Appeal held in *Pillay and Others v S* 2004 2 BCLR 158 (SCA), ("*Pillay*"), that the phrase "all the circumstances" should be read into section 35(5). This view is supported; see par A 3.3 below. For a discussion of the phrase "if it is established", see A 2.4 below.

[9] This phrase is not contained in section 24(2), but it is included in section 35(5).

[10] See for example the article by Steenkamp in the *Rapport* newspaper dated 10 August 2008, and entitled "Minister erken: ANC het groot foute gemaak (misdaad wen, erken die regering". The author mentions that the Minister acknowledged that the rate of serious crime in SA is amongst the highest in the world.

government, the media and civil society – to mould public opinion, in furtherance of the achievement of the important constitutional goal of creating and further fostering a culture of fundamental rights. The appropriateness of the Canadian section 24(2) jurisprudence, for purposes of a comparative analysis with section 35(5), should be understood while bearing in mind these differences.[11]

In the light hereof, the importance of a comparative law analysis for the interpretation and application of section 35(5) has highlighted that the courts of South Africa could – as argued below – benefit with regard to the interpretation of a number of aspects, from Canadian section 24(2) jurisprudence. Conversely, this comparative analysis has furthermore revealed that the approach followed by the Canadian courts relating to numerous other aspects of the interpretation of section 24(2) should be avoided by the courts of South Africa.

2 Threshold requirements

2.1 The beneficiaries of section 35(5)

Who are the beneficiaries of section 35(5)? Would section 35(5) be applicable when the fundamental rights of South African citizens, contained in section 35 of the South African Constitution, have been infringed in foreign jurisdictions by foreign governmental officials? Would evidence obtained in this manner, be admissible in a South African court? The second question posed under this

[11] Ackermann argues in (2006) 123 *SALJ* 497 at 505 that cultural (legal or otherwise) and political differences should not be used to generally prevent the use of foreign law as a comparative tool for the benefit of the South African legal system. These differences were not highlighted in *S v Melani* 1996 1 SACR 335 (E), ("*Melani*"); see also *Pillay* (fn 8 above). However, the minority opinion in *Pillay* emphasised the high rate of serious crime in South Africa; see also *S v Shongwe* 1998 9 BCLR 1170 (T), ("*Shongwe*").

heading is whether a person, who has been regarded a 'suspect' when the violation occurred, may have access to the relief guaranteed by section 35(5), given that section 35 does not explicitly mention that suspects may rely on the protections guaranteed in the rights contained in the Bill of Rights.

The South African Constitutional Court correctly held that the Constitution does not, as a general rule, apply extra-territorially.[12] It follows that section 35(5) does not have direct or indirect application in instances when South African citizens face criminal charges allegedly committed in a foreign jurisdiction.[13] To state the obvious, a South Africa citizen facing criminal charges in a foreign court cannot, at least in respect of the exclusion of unconstitutionally obtained evidence, demand that the criminal justice system of that jurisdiction complies with the provisions of the South African Constitution in this respect.

However, the position would be entirely different if the evidence were obtained by South African governmental officials in a foreign jurisdiction in violation of the provisions of the Constitution, with the aim of using the disputed evidence in a South African court. The Bill of Rights, including section 35(5), would not be directly applicable, since the infringement occurred outside the borders of South Africa, and the evidence accordingly would not have been '***obtained***' in a manner that violates a right contained in the Bill of Rights. However, it is submitted that the Bill of Rights would be indirectly applicable, since ***admission*** of the evidence could render the trial unfair or otherwise be detrimental to the administration of justice. It follows that at her trial, the accused should be a

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[12] *Kaunda and Others v President of the RSA* 2005 1 SACR 111 (CC). It was similarly held in Canada, in the decision of *R v Harrer* (1995) 101 CCC (3d) 193; and in England and Wales, in *R (Al-Skeini and Others) v Secretary of State for the Defence* 14 June 2007, *The TimesOnline*, http://business.timesonline.co.uk/tol/business/law/reports/article1929124.ece?, accessed on 25/06/2007.

[13] Chapter 3 par 2.

beneficiary of the right to a fair trial. In any event, even if section 35(5) does not find application, the court may in terms of section 38 of the Constitution exercise its common law discretion to exclude the disputed evidence.[14] The common law exclusionary rule should accordingly be developed, having regard to the spirit, purport and objectives of the Bill of Rights.[15]

Should a 'suspect' be a beneficiary of the rights contained in section 35? It is submitted that the literal and legalistic interpretation of the concepts 'arrested' and 'detained', followed by MacArthur J in *S v Langa*,[16] should not be adopted by other courts in South Africa. Such a restrictive interpretation has the undesired effect of unduly limiting the scope of the protection guaranteed by the conspectus of fundamental rights. Instead, the generous and purposive interpretations suggested obiter in *S v Sebejan*,[17] and *S v Zuma*,[18] are supported.[19] Moreover, these obiter observations were unequivocally applied in *S v Orrie*.[20] Such an approach is compellingly aligned with the primary rationale of section 35(5), which is the protection of judicial integrity, while it also serves a

[14] See the judgment of MT Steyn JA, delivered during the pre-constitutional era, in *S v Ebrahim* 1991 2 SA 553 (A) at 582; see also Schwikkard "Arrested, Detained and Accused Persons" in Currie & De Waal (eds) *The Bill of Rights Handbook* (5th ed, 2005) at 792 is of the opinion that admissibility may, under these circumstances, be challenged in terms of the common law. She suggests that admissibility should be considered on the same basis as in *S v Mthethwa* 2004 1 SACR 449 (E), ie whether admission would render the trial unfair or bring the administration of justice into disrepute. By contrast, it is submitted in this work (chapter 4 par B 1.2.2), that the test for trial fairness suggested by Schwikkard would be best suited to determine trial fairness when the common law should be developed in terms of s 39(2).

[15] See *Thebus v S* 2003 10 BCLR 1100 (CC) at par 28, ("*Thebus*").

[16] 1998 1 SACR 21 (T), ("*Langa*").

[17] 1997 8 BCLR 1086 (T), ("*Sebejan*").

[18] 2006 3 All SA 8 (W), ("*Zuma* 2").

[19] Schwikkard (fn 14 above) at 791 supports this point of view; see also Schwikkard (1997) 3 *SAJHR* 446.

[20] 2005 1 SACR 63 (C), ("*Orrie*").

regulatory and deterrent purpose by influencing future police conduct. It follows that in order to achieve these purposes, a court should be empowered to exclude evidence if the rights of a suspect had been infringed. It is the effect of the admission of the evidence, rather than the status of the accused when the inculpatory conduct was performed, that should determine the issue.

Schwikkard is of the view that the *Sebejan* judgment demonstrates that the concept of 'detention' could nevertheless be relevant in the South African context.[21] She argues that a person could technically be regarded as a 'suspect' and might incriminate herself because she feels obliged to respond to police questioning. In other words, the use of the concept 'suspect' could in such cases not be sufficiently broad to protect a suspect when compared to the scope of protection guaranteed by the concept 'detained', as interpreted in Canada. In Canada, the concept includes the 'pscychological' detention of a person, which consists of three elements: A police direction or demand to a person; such person's voluntary compliance with the police demand and which results in a deprivation of liberty or other serious legal consequences; and the person's reasonable belief that she has no choice but to comply with the police demand. Stuart is of the opinion that the Canadian approach to 'detention' is vulnerable to abuse and suggests that it should be broadened to include any steps the police take to establish, denounce or reveal the existence of inculpatory evidence against a person being interviewed.[22] A comparable approach is applied by the ICTY, ICTR, ICC, and the majority of the domestic legal systems of the members of the European Union.[23]

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[21] Fn 19 above at 455.

[22] See Annexure "D", being the Heads of Argument of Stuart in the appeal of the decision of *R v Grant* (2006) 209 CCC (3d) 250, 143 CRR (2d) 223, 38 CR (6th) 58, (2006) CarswellOnt 3352, 81 CR (3d) 1, 213 OAC 127 (Ont CA), ("*Grant*"). He acted on behalf of the intervenor in this case, argued before the Supreme Court of Canada on 23 April 2008. Judgment has been reserved.

[23] See Chapter 3 par 2.2.

2.2 The 'connection' requirement

The following question was posed in the introductory chapter: Should an accused show that the disputed evidence would not have been obtained 'but for' the infringement, or would the 'connection' requirement be satisfied when the court is convinced that the evidence had been obtained after the violation? Put differently: Should the phrase 'obtained in a manner' be interpreted as requiring from an accused to satisfy a strict causal link between the infringement and the discovery or creation of the evidence?

Both sections 24(2) and 35(5) contain the phrase 'obtained in a manner' that violates any right guaranteed in terms of the Constitution. A comparative review of case law in both jurisdictions reveals that the phrases have been accorded a comparable meaning. However, unlike the position in Canada, an accused in South Africa does not bear the ***onus*** of showing that a link exists between the infringement and the discovery of the evidence.[24] In spite of this procedural difference, the courts in both jurisdictions have held that this requirement has been satisfied when one of either a temporal sequence test or a causal connection requirement is present. If one of the two 'connections' is weak, the stronger connection should be regarded as sufficient to satisfy this threshold requirement.[25] In both jurisdictions, the breach must not be 'too remote' from the discovery of the evidence.[26] In other words, the courts must consider the

[24] *S v Ntlantsi* 2007 4 All SA 941 (C) at par 16, ("*Ntlantsi*"). In South Africa, the presiding judge must make a value judgment, based upon "all the circumstances". The different approaches adopted by the courts in the two countries in relation to the "threshold onus" in showing that the evidence has been obtained in violation of the constitutional rights of an accused is dealt with in par A 2.4 below.

[25] Steytler *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa, 1996* (1998) at 35; see also chapter 3 par C.

[26] *R v Goldhart* (1996) DLR (4th) 502, ("*Goldhart*"); Steytler (loc cit).

presence and strength of both the temporal and causal connections to determine whether the infringement is closely linked to the discovery of the evidence. This exercise should be undertaken on a case-by-case basis.

The South African decision in *Mthembu v S*[27] demonstrates that when the infringement forms part of a chain of events that leads to the discovery of the disputed evidence, an important issue in the assessment of this threshold question should be whether there is a sufficient link between the violation and its discovery.

2.3 The standing threshold requirement

May an accused rely on section 35(5) when the rights of an innocent third party (and not that of the accused) had been infringed, and the prosecution seeks to rely on this evidence at the trial to secure a conviction of the accused? The legal position in the two jurisdictions differs on this issue. Before an accused in Canada may rely on section 24(2), she must show that ***her*** Charter rights have been infringed during the evidence-gathering process. If the rights of a third party have therefore been infringed, the accused may not challenge the admissibility of the evidence obtained at her trial.[28]

By contrast, under South African section 35(5) jurisprudence, an accused may challenge the admissibility of the unconstitutionally obtained evidence procured in this manner. In *Mthembu*, for example, the rights of a third party were infringed by the police. The court nevertheless allowed the accused to challenge

[27] [2008] 2 ZASCA 51 (10 April 2008), ("*Mthembu*").

[28] See Godin (1995) 53 *UT Faculty LR* 49. He is of the view that the Supreme Court of Canada has incorrectly followed decisions of the USA on this issue, instead of a purposive approach. See chapter 3 par E.

the admissibility of the evidence. Such an approach is, in my view, in line with a purposive interpretation of section 35(5). Furthermore, the text of section 35(5) dictates that the disputed evidence must be excluded if its ***admission*** – regardless of the fact that the rights of a third party or that of an accused has been infringed – could cause the results forbidden in terms of the section. Such an interpretation sustains the important virtue of preventing the deliberate infringement of the rights of third parties in order to convict those guilty of committing criminal offences at all costs. The rationale of the prevention of judicial contamination is also advanced by such an approach.[29] The judgment in the recently reported decision of *Mthembu*,[30] which confirms the writer's point of view on this issue, should be followed.[31] This decision furthermore confirms the views held by Steytler[32] and Van der Merwe.[33]

2.4 The 'threshold onus' of showing a rights violation

Should the accused bear the onus of proving that her constitutional right has been violated or should the prosecution bear the burden of showing that the evidence has been obtained in a constitutional manner?

The phrase 'if it is established' contained in section 24(2) of the Charter led to the remark made by Lamer J in *Collins*[34] that an accused should bear the onus of

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[29] See also Van der Merwe (fn 7 above) at 207.

[30] Fn 27 above.

[31] See chapter 3 par E.

[32] Fn 25 above at 35. Steytler approaches this issue by means of a contextual interpretation of section 35(5). He gives meaning to section 35(5) by reading it together with section 38 of the South African Constitution. His interpretation of this threshold requirement leads to a comparable result when compared with the outcome of *Mthembu*.

[33] Fn 7 above at 207-208.

[34] Fn 2 above at 21.

showing, on a balance of probabilities, that her Charter rights have been infringed. However, the drafters of section 35(5) have, seemingly by design, omitted this phrase from this provision. The decision by the Supreme Court of Appeal in *Director of Public Prosecutions v Viljoen*,[35] suggesting that section 35(5) should, on this issue, be interpreted in a similar manner as section 24(2), should in my view not be followed. Rather, it is submitted that the Full Bench decision of the Transvaal Provincial Division in *S v Mgcina*,[36] where it was held that the onus of showing that the disputed evidence had not been procured in an unconstitutional manner rests on the prosecution, should be welcomed. The judgment in *Mgcina* is based on sound constitutional policy, established in the seminal case of *S v Zuma*.[37] As such, the *Mgcina* approach serves to protect the right to remain silent and the privilege against self-incrimination, and furthermore re-affirms that the onus to prove criminal culpability should be satisfied by means of constitutionally obtained evidence. Those whose unwarranted conduct impinges on constitutional guarantees should be required to show that their conduct was not unconstitutional. An accused that relies on section 217 of the Criminal Procedure Act as a ground for exclusion should not

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[35] [2005] 2 All SA 355 (SCA), ("*Viljoen*").

[36] 2007 1 SACR 82 (T), ("*Mgcina*"). Schmidt & Rademeyer *Schmidt Bewysreg* (4th ed, 2006) at 383, refers to *Fedics Group (Pty) Ltd v Matus* 1997 9 BCLR 1199 (C), ("*Fedics*") and express the opinion that, in civil matters, the party who obtained the evidence in an unconstitutional manner bears the onus of providing reasons why it was obtained in this manner.

[37] 1995 BCLR 401 (CC), ("*Zuma*"). In *Zuma*, Kentridge AJ dealt with the issue of whether the onus of proving that a confession has been obtained voluntarily in terms of the common law as follows at par 33: "… [T]he common law rule in regard to the burden of proving that a confession was voluntary … has been an integral and essential part of the right to remain silent after arrest, the right not to to be compelled to make a confession, and the right not to be a compellable witness against oneself. These rights, in turn, are the necessary reinforcement of Viscount Sankey's 'golden thread' – that it is for the prosecution to prove the guilt of the accused beyond reasonable doubt. Reverse the burden of proof and all these rights are seriously compromised and undermined".

be better off than an accused that relies on section 35(5) for exclusion arising from a breach of a constitutional guarantee.

Furthermore, in my view, a contextual reading of section 35(5) with sections 35(2)(b) and 39(3) confirms the soundness of the *Mgcina* approach: Section 39(3) preserves the common law position insofar as it is not incompatible with the Constitution. For the reason that section 35(5) is silent on the issue as to who should bear the burden of proving a violation of rights, it is submitted that it cannot plausibly be argued that the common law, on this issue, is in conflict with the provisions of section 35(5). The Constitutional Court has confirmed the common law position relating to the question of the incidence of the onus in the *Zuma* decision. It was held in *Zuma* that the prosecution bore the burden of showing that a confession or admission was obtained voluntarily. Based on this premise, the *Mgcina* court properly held that the prosecution should bear the burden of showing that the evidence had been obtained in a constitutional manner. Moreover, one of the purposes of section 35(5) is to ensure that an accused has a fair trial. The right to legal representation during the pre-trial phase, guaranteed by section 35(2)(b), is essential to ensure that an accused effectively exercises the right to remain silent and the right not to make a confession. These rights, in turn, seek to achieve the goal of preventing an unfair trial – one of the purposes of section 35(5). In the same vein, the 'golden thread', that it is for the prosecution to prove the guilt of the accused – relied upon by Kentridge AJ in *Zuma* – is preserved.

Additional support for the *Mgcina* approach can be found in the practice followed in England and Wales. In England, an accused that relies on section 78(1) to challenge the admissibility of evidence does not bear the onus of showing that it

had been obtained in a manner prohibited by the provisions of the Police and Criminal Evidence Act[38] or the Code.[39]

It is therefore submitted that in South Africa, unlike the position in Canada, an accused should not bear the onus of showing that her rights have been infringed. The point of view held by Van der Merwe, that the accused should allege that – but does not have to prove – the evidence had been obtained in violation of a right guaranteed by the Bill of Rights, is supported.[40]

A comparative overview of the threshold requirements contained in sections 24(2) and 35(5) has revealed that, by and large, and considered from the perspective of an accused person, the threshold requirements contained in section 24(2) are more onerous to satisfy than those contained in section 35(5). The lenient threshold requirements of section 35(5) accords with a purposive and generous interpretation and promotes the virtue of broadening access to courts. The strict threshold requirements applicable in Canada may be attributed to two factors: firstly, the adoption by the Supreme Court of Canada of the United States approach to threshold requirements, instead of a purposive interpretation; and, secondly, the drastic impact of the rule of 'near automatic' exclusion whenever trial fairness has been impaired. It is submitted that the regular exclusion of evidence based on the Canadian approach to trial fairness[41] could be

[38] Hereinafter "the PACE".

[39] See chapter 2 par D 2(a).

[40] Fn 7 above at 245, where he makes the following submission: "It is submitted that an alternative approach is possible. ***First***, the defence must allege – but need not prove – that there has been an infringement of a constitutional right of the accused …". Emphasis in original.

[41] See paragraph A 3.3 below.

considered as one of the factors that contributed to the strict interpretation of the threshold requirements in Canada.[42]

3 The fairness of the trial requirement

The discussion under this heading starts off with an examination of the rationales for the exclusionary provisions in different jurisdictions, aimed at preserving trial fairness. A review of the different rationales is important in order to determine the scope and purpose of the different exclusionary provisions. This is followed by a discussion of two issues that are intrinsically linked to each other: Whether the courts of South Africa should adopt the Canadian practice of a presumption in favour of exclusion whenever trial fairness has been impaired; and, whether conscriptive evidence should be admitted despite the fact that its admission would tend to render the trial unfair.

The purposes sought to be protected by the applicable exclusionary rule determines the scope of the concept 'trial fairness'. Four different notions of the concept 'fair trial' have been identified by focusing on the rationales of the different exclusionary rules. For example, the common law exclusionary rule was designed to achieve a notion of trial fairness that does not necessarily coincide with the purpose sought to be achieved by an exclusionary rule which is constitution-centred. The exclusionary remedy in the two systems serves to protect different interests. The notion 'fair trial' may be defined as verdict-centred, process-centred, balance-centred, or constitution-centred. The differences among the different approaches are discussed above.[43] The

[42] Steytler (fn 25 above) at 35, raises a similar argument with regard to the Canadian standing threshold requirement.

[43] The differences have been identified in chapter 1 par B.

rationales of the exclusionary rules applicable in England and Wales, Canada and South Africa are summarised against this background.

3.1 The rationales for the exclusionary remedies in England, Canada and South Africa

What values are sought to be protected by the fair trial requirement under section 35(5)? In order to answer this question, it is important to consider the rationales for exclusion. This issue is especially essential to determine whether the purposes sought to be protected by the fair trial tests suggested by the Canadian decision in *Grant*, and the South African case of *Tandwa*, adequately seek to protect the procedural rights contained in the Bill of Rights. Furthermore, are the fair trial rationales applicable in England, Canada and South Africa comparable?

England and Wales

The underlying purpose of the common law exclusionary rule applicable in England is the prevention of police impropriety that has a negative effect on the ***reliability*** of the evidence and the ***privilege against self-incrimination***.[44] Before the introduction of justiciable constitutional rights in Canada and South Africa, the scope and purpose of the common law exclusionary remedy applicable in both countries were indistinguishable from that applied in England. The exclusionary remedy contained in section 78(1) of the PACE serves to safeguard identical values as that protected by its common law precursor.[45] The

[44] *Leatham* (fn 1 above) at 239; *R v Sang* [1980] AC 402, ("*Sang*").

[45] See for example, *R v Samuel* [1998] 87 Cr App R 237, ("*Samuel*"); *R v Mason* [1998] 1 WLR 144, "*Mason*"); and *R v Canale* [1990] 2 All ER 187, ("*Canale*"). In *Samuel* and *Mason* evidence was excluded because it was obtained in a manner that encroached upon the privilege against

importance of reliability concerns in terms of both the common law exclusionary rule and exclusion in terms of section 78(1) emphasises the fact that both remedies serve the purpose of enhancing the truth-seeking goal of the courts. It is also important to note that neither the common law exclusionary rule,[46] nor the remedy contained in section 78(1), is based on the deterrence rationale.[47]

The Human Rights Act incorporated the provisions of the European Convention into the national law of England. This Act provides that its provisions should be interpreted while having due regard to the case law of the European Court of Human Rights.[48] In *Funke v France*,[49] the European Court of Human Rights held that the privilege against self-incrimination and the right to remain silent serve to protect the right to a fair trial. It is noteworthy that the *Funke* court excluded real evidence on the basis that its admission would render the trial unfair. This implies that the exclusionary rule contained in section 78(1) could be interpreted to protect an accused against compelled conscription. However, Lord Hobhouse, in *R v Chesterfield Justices, ex parte Bradley*,[50] was of the view that the Human Rights Act did not have any effect on the interpretation of section 78(1). The decision in *Samuel*,[51] read with *Bradley*, confirm the notion that criminal trials in England, both before and after the advent of the Human Rights Act, are verdict-centred. In other words, the truth-seeking goal of the courts is of paramount importance to the criminal justice system.

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self-incrimination; whereas in *Canale*, *R v Keenan* [1990] 2 QB 54, ("*Keenan*") and *R v Delaney* [1989] 2 Cr App R 565, ("*Delaney*"), exclusion was based on the effect the police conduct had on the reliability of the evidence.

[46] Per Lord Goddard in *Kuruma v R* [1955] 1 All ER 236 at 239, ("*Kuruma*").

[47] *Mason* (fn 45 above). However, compare *Keenan* (fn 45 above) at 61, which could be read as suggesting the opposite.

[48] Section 2 of the Act.

[49] Application No 31827/96, decided on 3 May 2001, ("*Funke*").

[50] [2001] 1 All ER 411, ("*Bradley*").

[51] Fn 45 above. See also the other cases cited at fn 45 above.

Canada and South Africa

The exclusionary rules contained in sections 24(2) of the Canadian Charter and 35(5) of the South African Constitution serve to protect an accused from compelled conscription.[52] Exclusion is founded on the fundamental unfairness caused by self-conscription: An accused would have to face evidence at her trial she would not otherwise have had to face had her rights been respected by the police.[53] In other words, the police should not gain unfairly by admitting the disputed evidence if they could not have obtained the evidence in a constitutional manner.[54] In this manner the trial fairness requirement serves the purpose of encouraging police officials to respect the fundamental rights of the accused during the evidence-gathering process. In the light hereof, the trial fairness rationale serves a regulatory purpose. Compared to the fair trial concerns protected by section 78(1) of the PACE, the fair trial prong contained in sections 24(2) and 35(5) can be defined as constitution-centred. This classification is based on the fact that it serves to enhance the constitutionally entrenched right to remain silent and the privilege against self-incrimination. By the same token, it enhances the view that the onus of proof, which rests on the prosecution, should not be satisfied by means of unconstitutionally obtained evidence.

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[52] For the position in Canada, see *Collins* (fn 2 above); *Mellenthin* (1993) 76 CCC (3d) 481, ("*Mellenthin*"); *R v Ross* (1989) 46 CCC (3d) 129, ("*Ross*"); *Stillman* (1993) 113 CCC (3d) 321, ("*Stillman*"). For case law on the South African position, see *Melani* (fn 11 above); *Pillay* (fn 8 above); *S v Tandwa* [2007] SCA 34 (RSA), at paras 124-125, ("*Tandwa*").

[53] Davies (2000) 29 CR (5th) 225 (publication pages not available) at 8-9 of the printed pages.

[54] See chapter 4 par B 2; see also *Stillman* (fn 52 above). However, compare Mahoney (1999) 42 *CLQ* 443. In the South African context, see *Pillay* (fn 8 above) at par 89-90.

The concept of a 'fair trial' was recently adapted in Canadian section 24(2) as well as South African section 35(5) jurisprudence. In *Grant*,[55] the Ontario Court of Appeal proposed the re-alignment of the fair trial requirement by supplementing a ***second phase*** to the *Stillman* fair trial analysis.[56] During the second phase, the societal interest in truth-seeking and the extent of the infringement were added to the analysis. The overall effect of the *Grant* fair trial test is that a trial that has been rendered unfair may be transformed into a fair trial based on the reliability of the evidence and the extent of the infringement. In other words, truth-seeking values may be accorded more weight than fundamental rights aimed at protecting trial fairness.

In *Tandwa*,[57] the South African Supreme Court of Appeal seemingly sought guidance for its interpretation of the concept 'trial fairness' from a combination of the article written by Skeen during 1988,[58] and the work by Schwikkard and Van der Merwe.[59] In terms of *Tandwa*, the trial fairness prong should be determined by means of the exercise of a discretion by balancing the interests of the accused against the interests of society.[60] It could be argued that the phase during which the balancing exercise is undertaken in *Tandwa*, entails that the approach it advocates is analogous to that applicable in the common law jurisdictions of Australia and Scotland.[61] In terms of *Tandwa*, the following

[55] Fn 22 above.

[56] The *Stillman* fair trial framework basically "refined" the *Collins* fair trial prong, by introducing a precise, almost mathematical, method for the determination of trial fairness. (See chapter 4 par B 4.2). It also dictated that when the admission of the disputed evidence would tend to render the trial unfair, it is not necessary to consider the factors contained in the second leg of the assessment.

[57] Fn 52 above.

[58] (1988) 3 *SACJ* 389.

[59] Fn 7 above at 213-214.

[60] Fn 52 above at par 117.

[61] See chapter 4 par C 1.2.2; see also par A 3.3 and A 3.4 below.

factors should amongst others, be considered in the exercise of the discretion: Firstly, the nature and degree of the prejudice suffered by the accused as a result of the infringement must be taken into account.[62] The degree of prejudice suffered hinges on the proximity of the causal connection between the infringement and the conscriptive conduct. Conscription refers to testimonial compulsion and includes the compelled discovery of real evidence. Secondly, the extent of the infringement must be considered. If the police conduct can be labelled as a 'good faith' infringement, as opposed to deliberate or flagrant, the violation would not be regarded as serious and the trial would not be unfair.[63] Thirdly, the 'current mood' of society should have a significant impact on the overall assessment.[64] It was held in *Tandwa* that the admission of real evidence obtained through torture would render the trial unfair, because the infringement was regarded as serious and the accused suffered a high degree of prejudice.[65] The expression of concern about the lack of clarity as to what weight should be attached to the fact that the evidence had been obtained in a conscriptive manner would be justified.

The following question might arise: Does it really matter whether the *Tandwa* or *Pillay* fair trial framework is followed, as neither of the tests follows the extremities of the verdict-centred or process-centred approaches? It is submitted that it does matter. For some, the approach in *Tandwa* might be appealing because it appears to strike a balance between rights protection and crime control values. However, it is submitted that the *Tandwa* approach achieves this purpose at the cost of potentially weakening the fundamental rights aimed at enhancing the essential content of the right to a fair trial.

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[62] Fn 52 above at par 117.

[63] Ibid at paras 124-126.

[64] Ibid at par 121.

[65] Ibid at par 128.

One of the dangers of the *Tandwa* fair trial framework is that the balancing exercise that is performed during the ***first leg*** of the analysis, in actual fact dilutes the normative value of those procedural rights aimed at protecting trial fairness. This weakening of the meaning of fundamental rights is brought about because, in terms of *Tandwa*, those fundamental rights are to be weighed against societal interests that serve to ensure that those who are factually guilty are convicted. In this manner, the approach advocated in *Tandwa* suggests that ***trial fairness*** should be determined by means of a proportionality test between the nature of the infringement and factors that explain why the police acted as they did. The innate risk attached to such an approach is that judges show different degrees of latitude towards unwarranted police conduct. Such an approach may lead to unwarranted police conduct being readily categorised as 'good faith' infringements even when the evidence had been obtained in a conscriptive manner, thus providing adequate justification for a ruling that trial fairness had not been impaired.

By contrast, a purposive interpretation of such an infringement could have determined that the constitutional infringement should be regarded as serious, despite a tenuous causal nexus. Furthermore, in terms of the *Tandwa* approach the possibility exists that evidence may be admitted despite the fact that the accused suffered a high degree of prejudice, if this factor is outweighed by the competing requirements of public policy that those guilty of perpetrating criminal offences should be convicted. More importantly, one of the detrimental implications of the *Tandwa* fair trial assessment is that it may in the long-term lead to the weakening of the normative value of those fundamental rights aimed at achieving substantive fairness. In a word, the long-term decline of the importance of the fundamental rights that serve to protect 'forensic fairness' would be detrimental to the administration of justice – one of the consequences section 35(5) seeks to prevent. Furthermore, when section 35(5) is read

contextually with section 36 of the South African Constitution, a fundamental vulnerability of the *Tandwa* fair trial framework is exposed.

In terms of the *Tandwa* fair trial analysis, the infringement of a fundamental right should be weighed against factors that validate or justify such an infringement (such as the good faith of the police).[66] In performing such a balancing exercise, a court is by implication authorised to 'limit' the scope of protection guaranteed by the procedural rights aimed at enhancing the right to a fair trial, based on policy considerations – as opposed to a law of ***general*** application.[67] By contrast, such police conduct cannot be justifiable in terms of section 36 of the Constitution. For example, when a police officer fails to inform an accused about her right to legal representation as a result of which she incriminates herself, the police conduct cannot be justified in terms of the limitations clause: section 36 would not be applicable because the infringement would not have been authorised by a law of general application. However, the *Tandwa* fair trial framework allows a court to consider factors that justify the 'limitation' or constriction of the normative value of rights, firstly, that are not subjected to any limitation in terms of section 36, and, secondly, on a basis not authorised by section 36. The *Tandwa* approach raises the following fundamental question: If the limitations clause has not been designed for the purpose of sanctioning unwarranted executive conduct, 'however reasonable, to limit rights where this is not done in terms of a law':[68] why should the right to a fair trial be interpreted in such a manner?

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[66] Fn 52 above at par 117.

[67] Section 36 of the South African Constitution provides that all rights contained in the Bill of Rights may be limited "***only*** in terms of a law of general application"; see Steytler (fn 25 above) at 18.

[68] Steytler (ibid) at 19 confirms this view, citing *President of the RSA v Hugo* 1997 6 BCLR 708 (CC), ("*Hugo*") where the Constitutional Court reasoned as follows: "The limitations clause, Kriegler J observed, 'is not there for the preservation of executive acts of government but to

Against this background, it is forcefully contended that the *Tandwa* and *Grant* fair trial frameworks do not adequately protect the rights aimed at advancing trial fairness concerns when compared to the *Collins* and *Pillay* approaches. Quite the opposite, the tests suggested in both *Grant* and *Tandwa* create the likelihood that the fair trial values guaranteed in terms of the Charter and the Bill or Rights may in the long-term be eroded.

The second phase of the fair trial analysis in *Grant* leans towards a verdict-centred approach, because it emphasises reliability and truth-seeking concerns, while effectively underrating the fact that the accused had been conscripted against herself in the process of the discovery of the evidence.[69] By comparison, the *Tandwa* fair trial assessment can be described as balance-centred, because it weighs the severity of the infringed right against the public interest in convicting those who are factually guilty. This approach begs the question: Why should factors relevant to the second leg of the assessment have to be considered during the first leg of the assessment? The inappropriateness of the *Tandwa* fair trial assessment within the context of section 35(5) is discussed above. The significant impact such an approach could have on the admissibility assessment and the likely explanation for the adoption of the *Tandwa* fair trial framework is dealt with under A 3.3 and A 3.4 below.

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allow certain rules of law to be saved'… As the primary function of the Bill of Rights is to limit state powers, it does not provide authorisation for conduct, however reasonable, to limit rights where this is not done in terms of a law".

[69] Compare the following dictum in *R v Burlingham* (1995) 97CCC (3d) 385 at 408, ("*Burlingham*"): "In any event, even if the improperly obtained evidence is reliable, considerations of reliability are no longer determinative, given that the Charter has made the rights of the individual and the fairness and integrity of the judicial system paramount".

To review the main points, the rationales applicable to trial fairness concerns in England, Canada and South Africa are not comparable. The trial fairness assessment in England is focused on the reliability of the evidence and the soundness of the outcome. Real evidence is readily admitted, despite infringements. By contrast, the fair trial requirement under sections 24(2) and 35(5), before *Grant* and *Tandwa*, was focused on the prevention of conscription. Furthermore, in terms of the fair trial requirement contained in these provisions, real and testimonial evidence obtained as a result of compulsion could be excluded.

3.2 The fair trial tests: real evidence and the common law privilege against self-incrimination

The following research question was posed in chapter one: Does the common law privilege against self-incrimination, applied within the context of section 35(5), adequately protect the procedural rights contained in the Bill of Rights? An issue related to this question is whether the common law privilege against self-incrimination should or has been adapted within the limited context of section 35(5).

In answering these questions, it is apposite to first consider the position in England and Wales, and to thereafter explore the position in Canada and South Africa.

England and Wales

The courts of England and Wales exercise a very broad discretion in section 78(1) challenges. This broad discretion, compared to the exclusionary remedy in Canada before *Grant*, is unstructured and has the potential to lead to

unpredictable outcomes in admissibility disputes. True to the common law exclusionary rule, testimonial self-incriminatory evidence obtained after a violation is readily excluded. This broad discretion and its emphasis on reliability concerns has caused scholarly writers to conclude that it primarily serves to enhance the truth-seeking function of the courts, given that reliable evidence obtained after unwarranted police conduct is generally admitted.[70] Real evidence could be excluded on the exceptional ground that it shocks the moral integrity of the justice system, for example, when the evidence was obtained through torture.[71] It is submitted that this notably high threshold for the exclusion of real evidence is comparable to the 'shock the community' test, applied by the Supreme Court of Canada in *R v Wray*,[72] during the pre-Charter-era.[73]

Canada and South Africa

The Supreme Court of Canada, in *Collins*, identified the following factors to determine trial fairness under section 24(2):

a) The first factor is the nature of the evidence.[74] The manner in which Lamer J formulated this requirement created the impression that testimonial evidence obtained after an infringement would ordinarily render a trial unfair, but real evidence obtained in the same manner would not ordinarily have the same effect.[75] In subsequent decisions, Canadian section 24(2) jurisprudence has substituted this factor and in its stead focused on the manner in which the

[70] Tapper *Cross and Tapper on Evidence* (2004) at 543.

[71] *A and Others v Secretary of State for the Home Department* [2005] UKHL 71, [2006] 2 AC 221 (HL), ("*A and Others*").

[72] (1970) 4 CCC (3d) 1, ("*Wray*").

[73] For a discussion of the admissibility of evidence in Canada during this era, see chapter 4 par B 1.1.

[74] See chapter 4 par B 1.2.1.

[75] *Collins* (fn 2 above) at par 37.

evidence had been obtained.[76] This development, in South African context, is discussed below.

b) The second factor relates to the 'but for' requirement or causation analysis, and may be posed as a question: Could the evidence have been discovered in any event in the absence of a constitutional violation?[77] This factor has not eluded criticism from scholarly writers.[78] This factor serves the purpose of determining whether the participation of the accused led to the discovery of the evidence intended to be used against her. In other words, it primarily serves the purpose of the prevention of conscription. This factor additionally serves to assess whether the police have gained an unfair advantage from their unconstitutional conduct which they would not otherwise have achieved had the rights of the accused been respected. Put differently, this factor seeks to achieve fundamental fairness during the pre-trial phase. In *Tandwa*, a causation analysis is likewise applied, with the emphasis on determining the degree of prejudice suffered by the accused.

c) The third factor is the nature of the right infringed. This factor functions under the assumption that certain rights are inherently designed to protect an accused from compelled conscription. As such, the task of this factor is to identify those rights, seemingly with the aim of notifying the police in advance that an infringement thereof would impair trial fairness. It is submitted that the *Stillman* fair trial framework has rendered a consideration of this factor superfluous as an independently existing factor.[79] To determine whether evidence had been obtained in a conscriptive manner, the right infringed must

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[76] *Ross* (fn 52 above); *Burlingham* (fn 69 above); *Mellenthin* (fn 52 above); *Stillman* (fn 52 above); *Feeney* (1997) 115 CCC (3d) 129, 7 CR (5th) 101, [1997] 2 SCR 13, ("*Feeney*"); *Grant* (fn 22 above).

[77] See chapter 4 paras B 2 and C 2. Mahoney (fn 54 above) at 466, makes the point that the doctrine of discoverability is actually an "extrapoliation" from the "independent source" doctrine.

[78] Chapter 4 par B 4.4.

[79] See chapter 4 par B 4.4

necessarily also be considered. Such an approach implies that the admissibility test should apply equally to the infringement of any constitutional right. However, the *Stillman* fair trial framework failed to achieve the goal of protecting all fundamental rights. The courts of Canada applied the *Stillman* fair trial assessment in a pigeon-hole manner. Conscriptive evidence was limited to the following categories of evidence: statements, bodily samples, the use of the body of the accused in creating the evidence or a significant interference with human dignity. If the evidence did not fall under any of these categories, the courts automatically held that trial unfairness had not been compromised.[80]

In the case of *Pillay*,[81] the South African Supreme Court of Appeal adopted the *Collins* fair trial test, as amplified by cases reported thereafter.[82] The Court was alive to the fact that the distinction between real evidence and testimonial compulsion, which originates from the common law privilege against self-incrimination,[83] had been adapted in subsequent Canadian decisions.[84] In *Pillay*, the majority and the minority opinions concurred that admission of the real evidence (money) would not render the trial unfair.[85] These separate but concurring judgments, on the issue of trial fairness, were not based on the reliability of the evidence. Rather, the judgments concurred by holding that the evidence could have been discovered in any event without a violation.[86] This

[80] Maric (1999) 25 *Queen's LJ* 95 at par 119-120.

[81] Fn 8 above at par 87-88.

[82] See also *Melani* (fn 11 above); *S v M* 2002 2 SACR 411 (SCA) at par 31, ("*M*").

[83] See chapter 4 par B 1.1 and C 1.1 for a discussion of the privilege against self-incrimination and the values sought to be protected by this concept.

[84] *Pillay* (fn 8 above) at par 88 and 89; see also *Tandwa* (fn 52 above) at par 125, where Cameron JA dealt with this issue as follows: " … focusing as the Court [below] did on the classification of the evidence (distinguishing between testimonial or real) is misleading, since the question should be whether the accused was compelled to provide the evidence".

[85] Ibid at par 90 and 125.

[86] Loc cit.

approach is aligned to the principle of the 'absence of pre-trial obligation', also known as the principle of the 'case to meet'. It is submitted that a number of South African courts have adopted the principle of the 'absence of pre-trial obligation'[87] into section 35(5) jurisprudence, with the result that the distinction between real evidence and testimonial compulsion had been discarded. In terms of this principle, the focus of attention should be directed towards the manner in which the evidence had been obtained instead of its nature.

It is further submitted, based on the criteria identified in *Thebus*,[88] that the common law privilege against self-incrimination had been adapted, within the limited context of section 35(5), in order to give effect to the spirit, purport or objects of the Bill of Rights.[89] This adaptation was neccessitated by reason of the fact that the common law privilege against self-incrimination is limited in its scope to the protection of testimonial evidence obtained in an unconstitutional manner, and not real evidence obtained in a similar manner. Against this background, nowadays in South Africa, any evidence, testimonial or real evidence obtained in an unconstitutional manner, may be excluded if its admission would render the trial unfair.[90]

The common law privilege against self-incrimination was not designed to protect the procedural rights of an accused person in instances when real evidence had been discovered after a constitutional infringement. The courts of South Africa were alive to this shortcoming and consequently adapted the common law privilege, at least within the context of the fair trial prong of section 35(5), to

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[87] Chapter 4 par C 1.2.3.

[88] Fn 15 above at par 28.

[89] See chapter 4 par C 1.2.2(a) and (b).

[90] The future position in Canada depends on the outcome of the appeal argued before the Supreme Court in the appeal of *Grant* (fn 22 above). In South Africa, in terms of both the *Pillay* and *Tandwa* fair trial assessments, the real evidence distinction has been discarded.

protect both testimonial and real evidence discovered in an unconstitutional manner.[91]

3.3 The presumption in favour of exclusion

The issue considerd here is whether the presumption in favour of exclusion once trial fairness had been impaired, should be adopted by the courts of South Africa. The presumption in favour of exclusion when trial fairness has been compromised can be traced to the dissenting opinion delivered by Sopinka J in *R v Hebert*.[92] This dissenting opinion was subsequently adopted by majority opinions in *R v Bartle*,[93] *R v Elshaw*[94] and *R v Broyles*.[95] Cory J, in *Stillman*, added force to these judgments when he incoporporated a 'near automatic' exclusionary rule whenever trial fairness has been impaired. Cory J included as part of the 'refined' fair trial framework, the directive that the courts of Canada do not have to consider the second leg of the admissibility assessment (dealing with the second and third groups of *Colins* factors) whenever admission of the disputed evidence would render the trial unfair. It will be recalled that the trial fairness requirement is considered during the first leg of the admissibility assessment. Cory J reasoned that an unfair trial would necessarily be detrimental

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[91] See chapter 4 par C 1.2.3 (a) and (b).

[92] (1990) 57 CCC (3d) 97 at 20, ("*Hebert*"). Sopinka J reasoned as follows: "For myself, I fail to see how the good faith or otherwise of the investigating officer can cure, so to speak, an unfair trial. This court's cases on section 24(2) point clearly, in my opinion, to the conclusion that where impugned evidence falls afoul of the first set of factors set out by Lamer J in *Collins* (trial fainess), the admissibility of such evidence cannot be saved by resort to the second set of factors (the seriousness of the violation)". Perhaps this approach of Sopinka J explains why the good faith of the police was included as a factor in the *Grant* and *Tandwa* fair trial assessments.

[93] (1994) 92 CCC (3d) 309, ("*Bartle*").

[94] (1991) 67 CCC (3d) 97, ("*Elshaw*").

[95] (1991) 68 CCC (3d) 38, ("*Broyles*").

to the administration of justice.[96] Such an application of the fair trial framework led to Canadian scholars typifying section 24(2) as a 'near automatic' or an 'automatic' exclusionary provision.[97] In this manner section 24(2) became a mechanism that focused almost exclusively on the rights of the accused (assessed during the first leg) while ignoring the interests of society, which should be assessed under the second leg of the admissibility assessment. In other words, when trial fairness concerns were adversely affected during the first leg of the analysis, the public interest in convicting those guilty of committing criminal offences (determined during the second leg), absolutely disappeared from the radar of section 24(2). Put in a different way: The directive of section 24(2) that the courts of Canada should consider 'all the circumstances' before evidence is excluded or admitted, was ignored. However, this approach has since been overturned.

Apparently because of the following two reasons, a new trend has developed in the interpretation of section 24(2). Firstly, the fervent opposition by Canadian judges and scholars to the rule of 'near automatic' exclusion when trial fairness has been impaired.[98] Secondly, the new appointments made to the bench of the Supreme Court of Canada after the retirement of Lamer CJ, Sopinka, and Cory JJ.[99] This new development is evidenced by the reasoning of Arbour J in *R v*

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[96] *Stillman* (fn 52 above) at par 119.

[97] See chapter 4 par B 4.4. See also Stuart (2003) 10 CR (6th) 233 (publication page references not available) at printed page 2, where he summarises the position as follows: "There may be another shoe to fall from the Supreme Court in its new unified approach to s 24(2) … Many judges and commentators see the Court's exclusion of conscripted evidence as going to the fairness of the trial as a rule of automatic exclusion especially as factors of seriousness of the violation and effect on the administration of justice are normally not to be considered".

[98] See for example, Delaney (1997) 76 *CBR* 521; Brewer (1997) 2 *Can Crim LR* 239; Mahoney (fn 54 above) at 445; Paciocco (1997) 2 *Can Crim LR* 163; Stuart (fn 22 above) at par 10.

[99] The retirement from the Supreme Court bench of Lamer CJ, Sopinka, and Cory JJ, who supported the argument of the presumption in favour of exclusion once trial unfairness has been

Buhay,[100] when she explained the function of section 24(2) on behalf of a unanimous court, as follows:[101]

> Section 24(2) is not an automatic exclusionary rule (see *inter alia*, *Dyment*, *supra*); in my view neither should it become an automatic inclusionary rule when the evidence is non-conscriptive and essential to the the Crown's case.
>
> The question under s. 24(2) is whether the system's repute will be better served by the admission or the exclusion of the evidence, and it is thus necessary to consider any disrepute that may result from the exclusion of the evidence …

On this view, evidence should not be excluded in a mechanical manner because its admission would tend to render the trial unfair. The admissibility test is essentially an assessment of what impact admission or exclusion would have on the reputation of the administration of justice.

This new approach was confirmed by Fish J in *R v Orbanski*,[102] where the judge re-affirmed that section 24(2) is not a 'pure exclusionary rule',[103] which dictates that exclusion should follow whenever trial fairness has been compromised. The

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compromised, has left room for the reconsideration of this approach by a Canadian Supreme Court Bench consisting of new members. For example, the approach followed by the Ontario Court of Appeal in *Grant* defies the approach adopted by the retired Supreme Court judges mentioned above. The current members sitting on the Bench of the Supreme Court of Canada are Rothstein, Charrion, Abella, Fish, Deschamps, LeBel, Binnie, Bastarache JJ, and McLachlin CJ. (http://www.scc-csc.ac.ca/AboutCourt/judges, accessed on 20 May 2008).

[100] [2003] 1 SCR 63 at par 71, ("*Buhay*").

[101] Ibid at paras 71 and 72.

[102] (2005) 196 CCC (3d) 481, ("*Orbanski*").

[103] Ibid at par 93. Lebel J, writing a separate concurring opinion confirmed this point of view.

judge in effect reversed the impact of *Bartle*, *Elshaw* and *Broyles*, in relation to the presumption in favour of exclusion, when he emphasised that the Supreme Court of Canada did not suggest that the 'presence of conscriptive evidence that has been obtained illegally is always the end of the matter and that the other stages and factors of the process become irrelevant'.[104] Therefore, despite trial unfairness, the second leg of the admissibility assessment should not altogether be ignored. The courts of Canada should, in addition, consider the factors resorting under the second leg of the inquiry and perform a balancing exercise by considering all the different factors to determine whether exclusion or admission of the disputed evidence would offend the integrity of the criminal justice system. Such an interpretation of section 24(2) is firmly aligned to the dictum of Lamer CJ in *Collins*, where he said the following:[105]

> In determining whether the admission of the evidence would bring the administration of justice into disrepute, the judge is directed by s 24(2) to consider 'all the circumstances'. The factors which are to be ***considered*** and ***balanced*** have been listed by many courts in the country …

Lamer CJ proceeded by listing the various factors frequently considered by the courts of Canada, under both the first and second legs of the analysis, before a ruling on the admissibility of the evidence is made. It is important to note that he mentioned that all the factors, resorting under the first, second and third groups of *Collins* factors had to be considered and balanced in order for a court to make the admissibility assesment.

[104] Loc cit.

[105] Fn 2 above at par 35. (Emphasis added).

The view held by Van der Merwe, when he makes the following remark constitutes an endorsement of the approach of 'near automatic' or 'automatic' exclusion whenever trial fairness has been compromised:[106]

> Obviously, if the court concludes that admission would render the trial unfair the evidence ***must*** be excluded.

However, this statement of Van der Merwe must be considered within its proper context. It must be emphasised that he does not base his opinion on an approach that is similar to that advocated in *Bartle*. He supports an approach analogous to the *Tandwa* approach, where factors relevant to the second leg of the *Collins* admissibility assessment is weighed against factors normally considered under the first, in order to determine trial fairness. In other words, only after a balancing exercise of the various factors, followed by a ruling that admission would impair trial fairness, must it be excluded. This should be the case, according to Van der Merwe, because its admission would, per se, be detrimental to the integrity of the justice system.[107] Put differently, 'automatic' exclusion should only follow after factors relevant to the public interest in the protection of the rights of the accused and the public interest in convicting the factually guilty have been considered, and it is held that admission could have a negative impact on trial fairness. He bases his opinion, cited above, on the presence of the phrase 'or otherwise' contained in section 35(5), as interpreted in *S v Naidoo*.[108] However, it should be mentioned that the *Naidoo* court followed the two-phased interpretation of the substantive phase, established in *Collins*, and followed in *Pillay*.

[106] Fn 7 above at 209. Emphasis added.

[107] Ibid at 202.

[108] 1998 1 SACR 479, ("*Naidoo*").

In my view, once the court has found that admission of evidence would tend to render the trial unfair, this factor should (depending on factors relevant to the second leg of the admissibility assessment) weigh heavily in favour of exclusion. This should be position, since an infringement of the right to a fair trial should always be regarded as a serious infringement: Judicial condonation of serious infringements would always be detrimental to the integrity of the justice system. It is submitted that under these circumstances the constitutional imperative that the impugned evidence 'must be excluded' is set in motion. The reasons why such an approach should be followed is discussed below. Conversely, the point of view that the disputed evidence must always be excluded ***at this stage*** of the admissibility assessment when a two-phased approach is applied during the substantive phase – as in the *Naidoo* decision – thus rendering the second leg of the analysis redundant, is not supported.

It is submitted that a plain reading of the phrase 'or otherwise' should have the following effect on the remainder of the section, and should accordingly be read to mean: 'for reasons other than trial fairness may be admitted', if its ***exclusion*** could be detrimental to the administration of justice.[109] Zefferrt[110] is of the opinion that the phrase could be interpreted to have such meaning. Nevertheless, he is of the view that such an interpretation is implausible. By contrast, the core of the reasoning of Steytler[111] could be read as confirming – to

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[109] See chapter 4 par C 4.2. Allen (ed) *The Concise Oxford Dictionary of Current English* (8th ed, 1991) at 841, explains the meaning of the phrase as follows: "the negation or opposite (of a specified thing)"; see also Brown (ed) *The New Shorter Oxford English Dictionary on Historic Principles* (Vol 2, 1991) at 2032; Bullon (ed) *Longman Dictionary of Contemporary English* (4th ed, 2003) at 1164; Black, Nolan & Connolly *Black's Law Dictionary* (4th ed, 1993) at 1101; Soanes & Stevenson (eds) *Concise Oxford English Dictionary* (11th ed, 2004) at 1013; *South African Oxford School Dictionary* (2nd ed, 2004) at 313-314.

[110] 1996 *ASSAL* 803 at 804-805.

[111] Fn 25 above at 36.

an extent – the plausibility of the interpretation suggested in this thesis. The viewpoint of Steytler that the purpose of section 35(5) is to achieve primarily one goal, that is, to determine whether exclusion or admission of the disputed evidence would be detrimental to the administration of justice, is supported. He argues that an unfair trial should be regarded as a specific manifestation of the broader inquiry into what would be 'detrimental' to the justice system. Taken to its logical conclusion, it is submitted that the peremptory instruction that the evidence 'must be excluded', should be based on a value judgment that should be made after 'all the circumstances' have been considered. The majority opinion in *Pillay* held that, despite the absence of this phrase in section 35(5), it should be incorporated into the section.[112] Canadian precedent dictates that this phrase refers to all the *Collins* factors listed under the first and second legs of the admissibility analysis.[113] Read in this manner, the soundness of the interpretation suggested in this thesis is further re-inforced. In other words, the factors relevant to the second leg of the analysis (the second and third groups of *Collins* factors) should be considered to determine whether, despite the fact that admission would tend to render the trial unfair, the evidence should on different grounds be ***admitted***. In the final analysis, it is submitted that the three groups of factors (trial fairness, the seriousness of the infringement, and the effect of exclusion) should be considered to determine the issue of admissibility.[114]

[112] Fn 8 above at par 93.

[113] See, for example, *Grant* (fn 22 above); see further the cases cited at fn 114 below.

[114] See the overall approach in *Grant* (fn 22 above) at par 67. In terms of *Grant*, the three groups of factors are to be balanced to determine the admissibility of the disputed evidence; see also *R v Krall* (2003) CarswellAlta 1336 at par 99, ("*Krall*"); *R v Harris* (2007) 49 CR (6th) 276 (Ont CA) at par 77, ("*Harris*"); see further *Collins* (fn 2 above) at par 35, where Lamer J introduced this approach. In South African context, it could be argued that the approach advocated in *Tandwa*, and preferred by Van der Merwe, gives effect to the phrase "all the circumstances", since those factors are considered during the fair trial assessment.

The courts of South Africa should, therefore (always on the understanding that this thesis supports an approach based on a two-phased analysis to determine the substantive phase of the admissibility assessment),[115] despite a finding that admission of the evidence would tend to render the trial unfair, nevertheless also consider whether exclusion would not be detrimental to the administration of justice.[116] The advantage of such an interpretation is that it permits a court to hold that despite trial unfairness (the first leg of the analysis), exclusion would – on unrelated grounds – be detrimental to the administration of justice. Bearing in mind the contention by Steytler that the admissibility assessment should be undertaken while considering the two legs of the analysis as identified in *Collins*, and the endorsement of his argument in this thesis that those two phases should be separated:[117] When admission would tend to render the trial unfair, why should the good faith of the police or the fact that the evidence had been obtained on grounds of urgency, for example, be totally ignored?[118] Even if the courts of South Africa should accept that the *Hebert* rule is based on sound constitutional policy, it is submitted that the phrase 'or otherwise' permits of an approach which determines the admissibility issue based on trial fairness, but also on grounds other than trial fairness. In instances when trial unfairness was caused by the police acting in objective 'good faith', for example, should the courts not consider whether exclusion, having regard to this and other factors, could be 'detrimental to the administration of justice'? In this manner the 'good faith' of the police officers does not transform an unfair trial into a fair trial, but the fact that they acted in good faith may be considered as a factor determining what effect exclusion might have on the integrity of the justice system.

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[115] See par B 2.1 below.

[116] It is submitted that such an approach is not inconceivable. See the Canadian decision of *R v Tremblay* (1987) 37 CCC (3d) 481, ("*Tremblay*"). See further chapter 4 par C 4.2.

[117] Steytler (fn 25 above) at 36.

[118] This is the upshot of the judgments in *Hebert*, *Bartle*, *Broyles* and *Stillman*.

Compared to the *Hebert* and *Stillman* approaches, the interpretation suggested in this thesis allows for a broader application of the good faith exception and other excusing factors. For example, in terms of the *Stillman* approach, the good faith of the police would only be relevant in respect of 'non-conscriptive, not discoverable' evidence. In this way the interests of society in crime control is completely ignored whenever the evidence had been classified as conscriptive. By contrast, the approach suggested in this work has the advantage that the societal interests in crime control are not altogether disregarded whenever trial fairness had been compromised because conscriptive evidence had been unconstitutionally obtained. In the light hereof, it is submitted that the good faith of the police, including the factors relevant to the second leg of the analysis, should be considered regardless of whether admission would tend to render the trial unfair. Such an approach would ensure that the interests of the accused are as a rule weighed against the interests of society.

It is therefore suggested that, instead of the presumption in favour of exclusion, the courts of South Africa should follow the following approach: If admission would tend to render the trial unfair, the phrase 'or otherwise' permits the courts to consider factors other than trial unfairness that could – if ignored – in the long-term, be 'detrimental' to the integrity of the justice system. In other words, an unfair trial reflects negatively on the integrity of the justice system. It follows that a violation that has brought about such an effect on the trial fairness requirement should, for this reason, be considered as a serious infringement. However, a court may consider different factors that may, if disregarded, be equally detrimental to the justice system. For example, the failure to consider factors like the 'good faith' of the police which contextualises the nature and extent of the infringement (both relevant during the second leg) may indisputably be detrimental to the justice system, since such an approach may

create the impression among reasonable members of society that the courts are showing unwarranted 'sympathy for crime and its perpetrators'.[119]

Against this background, it is submitted that the courts of South Africa should not adopt the presumption in favour of exclusion, as it is applied in Canada, into our section 35(5) jurisprudence.

3.4 Admission of conscriptive evidence despite trial unfairness

Should the courts of South Africa adopt the approach suggested in *Grant*, which supports the view that even though the admission of the disputed evidence would tend to render the trial unfair, it should nevertheless be received – depending on the extent of the infringement?

Grant suggests, despite a finding that admission of the evidence would tend to render a trial unfair in terms of the *Stillman* and *Pillay* fair trial frameworks, that the disputed evidence should – having regard to factors associated with the second leg of the *Collins* assessment – nevertheless be admitted. Van der Merwe, in the South African context, observes that the courts have adopted a similar line of reasoning.[120] It was argued above that the innate danger of such an approach is that it could likely erode the normative value of the constitutional rights which collectively serve to protect the right to a fair trial. It follows that if the fundamental rights guaranteed to protect an accused against governmental abuse during the pre-trial phase could be interpreted in this restrictive manner, it could create the likelihood that other fundamental rights established to protect

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[119] Per Kriegler J in *Key v Attorney-General, Cape Provincial Division* 1996 4 SA 187 (CC), at par 13, ("*Key*"), a judgment delivered before the advent of section 35(5).

[120] Fn 7 above at 215; see also chapter 4 par C 4.1.

individuals from governmental intrusion or neglect may be interpreted in a like manner.

Some might understandably argue that the approach followed in *Grant* (and the argument raised by Van der Merwe, if applied to a two-phased analysis) relating to trial fairness, have been developed to achieve the worthy aim of attenuating the impact that the presumption in favour of exclusion, as applied in *Hebert*, would have on the overall admissibility assessment. It is submitted that no rational connection exists between the achievement of this procedural goal and the negative effect it could have on the normative value of fundamental rights, designed with the aim of protecting the right to a fair trial. The avoidance of the effect that the rule of 'near automatic' exclusion has on the overall analysis does not justify the erosion of fundamental rights. This consequence should especially be avoided when an alternative, less obtrusive approach, can be followed to achieve the purposes of section 35(5).

It follows that if the approach suggested in this thesis under A 3.3 above is adopted in South Africa, the call for the admission of the disputed evidence despite trial unfairness, as suggested by the *Grant* court, cannot be justified.

4 Determining 'detriment'

4.1 The role of public opinion

The important question asked here is whether the concepts of 'disrepute' and 'detriment' have an equivalent meaning. If so, having regard to the high rate of serious crime in South Africa, should public opinion or the 'current mood' of society be considered as a weighty factor in the assessment of the 'detriment'

requirement? Does the judicial integrity rationale not direct that courts should mould public opinion rather than abide by it?

The concepts 'disrepute' contained in section 24(2) and 'detriment', which appears in section 35(5), have a comparable meaning.[121] Neither concept should be equated with public opinion. At the same time, this also does not mean that the view held by the public at large about the integrity of the criminal justice system should be totally ignored.[122] The 'current mood' of society should be considered, but only if such mood is reasonable.[123] This qualification is necessary, because the protection of the minority (in this the accused) should not depend on the utterly impulsive will of the majority (here, the public at large or the people, as represented by the might of the prosecuting authority) against which the minority has to be protected.[124]

Van der Merwe is of the view that the 'current mood' of society should be considered as a 'weighty' factor and argues that the courts of South Africa should lean in favour of crime control concerns during the second leg of the admissibility assessment.[125] He asserts that the high rate of serious crime justifies such an approach. Langa DP[126] did not share this view in *S v Williams*,[127] when he maintained that the Constitution should be interpreted while having proper

[121] See chapter 5 C 1.

[122] Loc cit.

[123] *Collins* (fn 2 above).

[124] Ibid at par 34.

[125] Fn 7 above at 234.

[126] Now Langa CJ.

[127] 1995 (7) BCLR 861 (CC) at par 36-37, ("*Williams*"). In *Williams*, Langa CJ had to decide on the constitutionality of corporeal punishment as a competent sentencing option. See also *S v Makwanyane and Another* 1995 2 SACR 1 (CC), ("*Makwanyane*").

regard to constitutional values, as opposed to 'contemporary standards of decency'.

Furthermore, the Constitutional Court was called upon in *Makwanyane* to provide a ***remedy*** for the infringement of constitutional rights. As section 35(5) serves a similar purpose, the role of public opinion in this provision should be interpreted in a like manner. In other words, judges should relate their decision, whether to exclude or admit the disputed evidence, to the broader purposes of the Bill of Rights.[128] An important purpose of the Bill of Rights is to instil a culture of fundamental rights protection. The approach followed in *S v Soci*,[129] and *S v Nomwebu*,[130] which were decided within the context of section 35(5), appropriately gives effect to the achievement of such a purpose. These cases are furthermore aligned to the approach adopted by the Constitutional Court in *Williams* and *Makwanyane*.[131] In a word, the approach adopted in *Soci* and *Nomwebu* is analogous to the *Collins* approach to public opinion.

In my view, Schwikkard is correct when she remarks that the high rate of serious crime has influenced the courts of South Africa to steer away from the approach

[128] Roach *Constitutional Remedies in Canada* (2004) at 10-18, confirms this point of view as follows: "*Collins* has the important virtue of assimilating s. 24(2) decisions to the rest of constitutional interpretation. This forces judges to relate their decisions to the larger purposes of the Charter." See further Davies (2002) 46 *CLQ* 21 at 29, where he endorses this point of view as follows: "It [s 24(2)] must also be interpreted remembering that the Charter is the 'supreme law of Canada'. In other words, s 24(2) must be interpreted in a way that ensures for Canadians the full benefit of their rights and in a way that gives effect to the Charter's overall purpose of constraining governmental action".

[129] 1998 2 SACR 275 (E), ("*Soci*").

[130] 1996 2 SACR 396 (E), ("*Nomwebu*").

[131] See also *Melani* (fn 11 above); the majority opinion in *Pillay* (fn 8 above). Schmidt & Rademeyer (fn 36 above) at 180-181 confirm the aptness of the *Soci* and *Nomwebu* approach. However, compare *S v Ngcobo* 1998 (10) BCLR 1248 (W), ("*Ngcobo*").

advocated in *Soci* and *Nomwebu*.[132] She maintains that the courts of South Africa are inclined to underscore the 'current mood' of society during section 35(5) challenges. The danger attached to the over-emphasis of the 'current mood' of society, is that the costs of exclusion could be determinative of the outcome of the admissibility assessment. If such an approach is adopted, reliable real evidence would regularly be admitted, especially when the evidence is essential to convict an accused facing serious charges. Moreover, as illustrated under A 4.3.1 and A 4.3.2 below, it is submitted that the effect of an over-emphasis of the 'current mood' of society may potentially result in the encroachment upon the presumption of innocence. The final objection to such an approach is that it may render a consideration of the factor of the long-term effect of the regular admission of the evidence on the integrity of the justice system, as well as the educational role of the courts, redundant.[133] It is submitted that what really matters is that the public should have faith in the judicial process.

The integrity of the ***judicial process*** has an effect on public attitudes towards the justice system.[134] The public should be satisfied that the judiciary is impartial and independent of any improper influence.[135] In the same vein, the public should have faith that the decision of a judge, whether to exclude or admit evidence, is grounded in the Constitution. If the Constitution directs that evidence that was obtained in a manner not sanctioned by it should be excluded, it cannot plausibly be argued that the consequences brought about by the

[132] Schwikkard (fn 14 above) at 795-796.

[133] Schwikkard (loc cit) confirms this point of view.

[134] Speech delivered by McLachlin CJ on 5 May 2001 entitled "The Role of Judges in Modern Society", accessed on 22 May 2008, available at www.scc-csc.gc.ca/aboutcourt/judges/speeches/role-of-judges_e.asp.

[135] Speech delivered by McLachlin CJ on 11 May 2001, entitled "Judicial Independence", accessed on 22 May 2008, available at www.scc-csc.gc.ca/aboutcourt/judges/speeches/independence_easp.

faithful application of the Constitution could be detrimental to the justice system. Any argument along these lines would render section 35(5) redundant. Empirical research undertaken in Canada with specific reference to the outcome in *Feeney*,[136] revealed that the exclusion of reliable evidence essential to convict the accused on a charge of murder did not detrimentally affect the integrity of the criminal justice system, because the Canadian public at large – even after this case – still have faith in the criminal justice system.[137] The public at large should be able to count on the independence of the judiciary. They should have faith in the fact that the courts would only convict an accused based on evidence which has been procured in a constitutionally fair manner, and which does not tarnish the integrity of the justice system. The educational role of the courts should for this reason not be underrated.

A purposive interpretation of section 35(5) dictates that the rationale of section 35(5) should determine the role and weight to be attached to public opinion. As a consequence, the view held by the South African courts in *Makwanyane*, *Williams*, and *Soci* should be followed when section 35(5) is interpreted. Put differently, section 35(5) should be interpreted in conformity with other provisions of the Constitution. When a violation is typified as serious, the courts of South Africa should see their role as educators and guardians of the Constitution, thereby serving the purpose of moulding public opinion and upholding fundamental rights. Moreover, by adopting the role of moulders of public opinion and guardians of constitutional rights, the courts would enhance the normative value of the infringed rights. In this manner the courts would implement their fundamental duty, which is to serve as protecters of the integrity of the criminal justice system. Section 35(5) should function as a mechanism to protect these interests, rather than becoming an instrument in the enthusiastic

[136] Fn 76 above.

[137] Fn 134 above.

quest to seek public popularity by upholding the truth-seeking function of the courts. The supremacy clause dictates that the Constitution is the supreme law of South Africa. It follows that it would be a contradiction in terms to argue that a faithful application of the supreme law could be detrimental to the justice system. Against this background, public opinion should not be allowed to 'limit' the scope of fundamental rights, by permitting it to usurp the fundamental function of the courts to uphold the protection of fundamental rights. Should this be the case, the courts may be perceived by the public at large as having abdicated their fundamental duty as guardians of the Constitution. In the light hereof, it is submitted that the attachment of too much weight to the 'current mood' of society would be incompatible with the purposes of section 35(5).

The effective enforcement of the fundamental rights of the accused in South Africa should not be dependent on a decrease in the high rate of serious crime. Crime must be detected and effectively prosecuted within the parameters permitted by the Constitution. The procedural rights contained in section 35 are not couched in terms analogous to those of socio-economic rights. The duties imposed by the provisions of the Constitution on officials involved in the criminal justice system (including the courts) are enforceable with immediate effect. The over-emphasis of the role of the 'current mood' of society would serve a similar purpose as that of internal qualifiers, characteristically designed for the progressive enforcement of socio-economic rights: The enforceability of socio-economic rights is generally dependent on the future realisation of governmental obligations, in anticipation of the availability of resources.[138] The enforcement of

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[138] See *Soobramoney v Minister of Health* 1998 1 SA 765 (CC), ("*Soobramoney*"); *Government of the RSA and Others v Grootboom and Others* 2001 1 SA 46 (CC), ("*Grootboom*"); Brand "Introduction to Socio-economic Rights in the South African Constitution" in Brand & Heyns (eds) *Socio-economic Rights in South Africa* (2005) at 1-56; Liebenberg & Pillay (eds) *Socio-economic rights in South Africa* (2000) 9-105.

the procedural guarantees contained in the Bill of Rights should not be subjected to such an interpretation.

In view hereof, the rights contained in section 35 and the remedy contained in section 35(5) should not be interpreted in a manner that their scope is narrowed whenever the rate of serious crime is high. For these reasons, the *Soci* approach should be followed and the *Ngcobo* and *Grant* approaches, which emphasise the 'current mood' of society, should be rejected.

4.2 Determining the seriousness of the infringement by considering the nature of the infringement and police 'good faith'

How should the seriousness of the violation be determined? Should the nature of the evidence (real or testimonial) be determinative of the classification of the infringement as either serious or non-serious? Would the 'good faith' of the police be considered as a factor that diminishes the seriousness of the infringement? What purpose should the 'good faith' of the police fulfil in the overall admissibility analysis?

The seriousness of the infringement is considered under the second group of *Collins* factors, (during the second leg of the admissibility analysis). The rationale for exclusion based on the second group of *Collins* factors is that the courts do not want to be associated with unwarranted police conduct when the infringement is regarded as serious. It is submitted that the seriousness of the infringement should be at the heart of the overall admissibility assessment. The exclusion of evidence essential for a conviction on a serious offence, obtained after a trivial infringement, would in general be detrimental to the administration of justice. It is submitted that a similar consequence could follow if trial fairness had been compromised in circumstances when the police acted in objective

'good faith'. This consideration was consistently neglected in the overall admissibility assessment in terms of *Stillman*, especially with regard to 'conscriptive, not discoverable' evidence. It is submitted that the absence or presence of 'good faith' on the part of the police should be a compelling indicator of whether the infringement should be categorised as serious, 'flagrant', deliberate' or 'trivial', 'inadvertent' or of a 'technical' nature.

When the infringement is labelled as serious, it should be regarded as a significant step in justififying the exclusion of the disputed evidence. This criterion is employed in a number of open and democratic societies, as well as the ad hoc International Criminal Tribunals, where exclusionary remedies are utilised for the protection of fundamental fairness and the integrity of the criminal justice systems.[139] The classification of the violation as non-serious is an important step to explain why the evidence should be received, especially when it is essential for a conviction on a serious charge. It is furthermore a common norm in open and democratic societies that evidence obtained as a result of a violation of the right to legal representation necessarily impacts negatively on trial fairness and the infringement of both rights, even when considered independently, are deemed serious infringements.[140]

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[139] See chapter 2 for examples of the application of this method in England and Wales; see also the position in Australia and Scotland in, for example, the decisions of *The People v O' Brien* [1965] IR 142, ("*O' Brien*"), and *Bunning v Cross* (1978) 141 CLR 54, ("*Bunning*"). For the position in Canada, see *Buhay* (fn 100 above); *Stillman* (fn 52 above). For the position in respect of the ad hoc International Criminal Tribunals, see chapter 2 par E 3. The cases of *Melani* (fn 11 above) and *Pillay* (fn 8 above) confirm the fact that section 35(5) is comparable to section 24(2) of the Charter.

[140] For the position in England and Wales, see chapter 2 par D 3. For the Canadian position, see chapter 4 par B 2.1. For the position in South Africa, see chapter 4 par C 2.1.

Should the nature of the evidence be determinative of the classification of the infringement as serious? Stuart[141] and Roach[142] are correct when they conclude that the classification of a violation in Canada is in general 'result-oriented'. They argue that when the disputed evidence had been obtained in a manner that impairs trial fairness the infringement is typified as serious despite a lack of evidence of police abuse or bad faith. By contrast, when the disputed evidence is real evidence, the manner of its procurement is only categorised as serious when the police conduct can be described as 'wilful', 'flagrant', 'deliberate' or obtained as a result of police abuse or in a pattern of disregard. A review of South African case law has revealed that some of the courts of South Africa have followed this tendency.[143] However, this is not a common trend.[144]

Canadian and South African jurisprudence dealing with the determination of the seriousness of the infringement have in general considered the factors listed below as indicators of the seriousness of the violation. Those factors are whether:[145]

a) the evidence was obtained in a manner that constitutes an affront, not minimal in nature, to human dignity;[146]

b) the evidence was obtained in a pattern of disregard for constitutional rights;[147]

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[141] *Charter Justice in Canadian Criminal Law* (2001) at 406.

[142] Fn 128 above at 10-76, par 10.1710.

[143] See chapter 5 par C 2.1.

[144] Loc cit.

[145] See the discussion of these factors in chapter 5 par B 2.1 and C 2.1.

[146] *Buhay* (fn 100 above); *Stillman* (fn 52 above); *Feeney* (fn 76 above); *S v Hena* 2006 2 SACR 33 (SE), ("*Hena*"); *Tandwa* (fn 52 above); *Mthembu* (fn 27 above).

[147] See the Canadian cases referred to in fn 146 above. In the South African context, see *Pillay* (fn 8 above); *Mthembu* (fn 27 above); and *Hena* (fn 146 above).

c) the evidence could not have been obtained in a constitutional manner;[148]

d) the evidence had been obtained without reasonable grounds to obtain a warrant when a warrant could have been obtained;[149]

e) the evidence could have been obtained in a constitutional manner if other investigatory techniques were followed;[150]

f) the evidence was not obtained on the grounds of urgency, calling for immediate police action or it was not obtained on the grounds that it might otherwise have been destroyed or removed;[151]

g) the evidence had been obtained in a conscriptive manner, which has a negative impact on trial fairness;[152]

h) the violation was caused as a result of systemic unconstitutional conduct or institutional failure or inadequate training;[153]

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[148] *R v Kokesch* (1990) 61 CCC (3d) 207, ("*Kokesch*"); *Mthembu* (fn 27 above).

[149] *Kokesch* (fn 148 above); *Buhay* (fn 100 above); *R v Buendia-Alas* (2004) 118 CRR (2d) 32, ("*Buendia-Alas*"); *S v Motloutsi* 1996 1 SACR 78 (C), ("*Motloutsi*"); *S v Mayekiso* 1996 2 SACR 396 (E), ("*Mayekiso*"). These South African cases were decided before the advent of section 35(5), but it is submitted that the principles considered to determine this factor are relevant in section 35(5) disputes.

[150] *R v Greffe* (1990) 55 CCC (3d) 161, ("*Greffe*"); *Buhay* (fn 100 above); *Motloutsi* (fn 149 above); *Pillay* (fn 8 above); *Hena* (fn 146 above).

[151] *R v Hosie* (1996) 107 CCC (3d) 385, ("*Hosie*"); *Buhay* (fn 100 above); *S v Madiba* 1998 1 BCLR 38 (D), ("*Madiba*"); *Motloutsi* (fn 149 above); *Mayekiso* (fn 149 above); *Hena* (fn 141 above); see also the minority opinion of Scott JA in *Pillay* (fn 8 above) at par 132.

[152] *Hebert* (fn 92 above); *Kokesch* (fn 148 above); *Stillman* (fn 52 above); *Feeney* (fn 76 above); however, compare *Grant*, suggesting that despite trial unfairness, the infringement could be regarded as less serious. In the South African context, see *S v Mphala* 1998 1 SACR 388 (W), ("*Mphala*"); *Melani* (fn 11 above); *Soci* (fn 129 above); *S v Mfene* 1998 9 BCLR 115 (W), ("*Mfene*"); *S v Gasa* 1998 1 SACR 446 (D), ("*Gasa*"); *S v Malefo* 1998 1 SACR 127 (W), ("*Malefo*"); *Tandwa* (fn 57 above); however, compare *Shongwe* (fn 11 above), where, it is submitted, the court should have held that the infringements were serious, given that it impaired trial fairness.

i) the accused was, because of his youthful age, regarded as especially vulnerable and legislation was introduced with the aim of protecting such individuals during the evidence-gathering process, which legal provisions were flouted by the police in the procurement of the evidence;[154]

j) the evidence, typified as conscriptive, was obtained through torture;[155]

k) the evidence had been obtained in circumstances where the police could easily have complied with their constitutional duties which would have enabled the accused to exercise her rights aimed at protecting her against self-conscription, but they deliberately failed to discharge such duties.[156]

In terms of Canadian and South African exclusionary jurisprudence the mental state and objective reasonableness of the police conduct is key to the assessment.[157] Hence the courts of both jurisdictions determine the 'good faith' of the police by means of an objective test. It follows that the courts of South Africa should not regard the negligent infringement of fundamental rights as

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[153] *Buhay* (fn 100 above); *Orrie* (fn 20 above); *S v Seseane* 2000 2 SACR 225 (O), ("*Seseane*"); *Hena* (fn 146 above). However, compare *S v Mkhize* 1999 2 SACR 632 (W), ("*Mkhize*").

[154] In *Stillman* the provisions of the Young Offender's Act were violated, which added to the seriousness of the infringement. On 25 June 2008 the Child Justice Bill was approved by the South African National Assembly during its second reading. This Bill aims to protect a juvenile offender in a manner comparable to the Young Offender's Act. The violation of the rights of a juvenile accused, protected by the provisions of this Bill could, once enacted, be regarded as a factor that adds to the seriousness of the infringement.

[155] See *Tandwa* (fn 52 above); *Mthembu* (fn 27 above).

[156] *Ross* (fn 52 above); *Stillman* (fn 52 above); *Mphala* (fn 152 above).

[157] Roach (fn 128 above) at 10-75; Steytler (fn 25 above) at 39; Van der Merwe (fn 7 above) at 240-241.

'good faith' infringements within the meaning of section 35(5).[158] Despite the absence of the phrase 'all the circumstances' in section 35(5), the majority opinion in *Pillay* held that this phrase should be read into section 35(5). *Pillay* demonstrates that a consideration of 'all the circumstances' may have a significant impact on the outcome of the admissibility assessment. In *Pillay*, the majority opinion considered the police conduct in the entire evidence-gathering process. Based on such an interpretation of the phrase 'all the circumstances', it was held that the infringement was serious and the police conduct was accordingly held not to meet the criteria of 'good faith' for purposes of section 35(5). By contrast, the dissenting minority opinion of Scott JA regarded the violation as less serious and the infringement was consequently adjudged to meet the standards of a 'good faith' violation. It is submitted that the minority opinion did not consider 'all the circumstances' that led to the discovery of the evidence, given that the judge narrowly focused on the unwarranted police conduct that was closely connected to the discovery of the evidence, instead of the entire police conduct that led to its discovery. It is further submitted that the approach of the majority opinion in *Pillay* was followed in *Mthembu*, without explicitly referring to it. In the light hereof, 'all the circumstances' that led to the discovery of the evidence should be considered when a court determines the seriousness of the infringement and the 'good faith' of the police.

The following factors have been considered as indicative of the fact that a police officer acted in 'good faith':

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[158] See chapter 5 par C 2.1; see also Van der Merwe (loc cit). Compare *Shongwe* (fn 11 above); *Mkhize* (fn 153 above).

a) he made sincere attempts to exercise his duties within the ambit of the law;[159]

b) the evidence was obtained on grounds of urgency that explains why it was objectively impossible to obtain the evidence by constitutional means;[160]

c) the police conduct was based on 'reasonable and probable grounds';[161]

d) the violation was unintentional or of a technical nature;[162]

e) the police in reasonable good faith relied on the validity of a law or procedure that was, when the infringement occurred, not declared unconstitutional;[163]

f) the police had reasonable grounds to believe that the force they used was necessary in order to prevent harm to themselves, the accused or members of the public;[164]

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[159] *R v Strachan* (1998) 46 CCC (3d) 479 (SCC) at 694, ("*Strachan*"); *S v R* 2000 1 SACR 33 (W), ("*R*"); the dissenting judgment of Scott JA in *Pillay*. However, see the comments above relating to the approach of the minority judgment in *Pillay*.

[160] *Elshaw* (fn 94 above); see also the dissenting opinions in *Feeney* (fn 76 above). Van der Merwe (fn 7 above) at 215-217, argues that urgency should have been considered as a mitigating factor which diminished the seriousness of the infringement of the trial fairness prong in *S v Lottering* 1999 12 BCLR 1478 (N), ("*Lottering*") – see chapter 4 par C 4. In this thesis, the two phased admissibility analysis is supported, instead of the approach preferred by Van der Merwe. In the light hereof, it is submitted that urgency should be considered under the second leg of the analysis, which serves to determine the 'disrepute' requirement.

[161] However, see how this factor was applied in *Buhay* (fn 100 above).

[162] *Strachan* (fn 159 above); *Grant* (fn 22 above). See also *R* (fn 159 above).

[163] *R v Sieben* (1987) 32 CCC (3d) 574, ("*Sieben*"); *R* (fn 159 above). The decision in *R* suggests that a violation may be construed as having been committed in 'good faith', even though the police conduct was not authorised by an Act of Parliament. This approach broadens the scope of the concept 'good faith', and should be welcomed.

[164] *R v Genest* (1989) 45 CCC (3d) 385, ("*Genest*"); *Madiba* (fn 151 above).

g) the infringement could not be branded as a case of flagrant police abuse, given that the police did not 'grossly overstep' their authority;[165]

Stuart draws attention to the present trend followed by the Canadian Provincial Courts of Appeal by rating the seriousness of the infringement in relation to the 'good faith' of the police according to a scale of seriousness.[166] He argued in the Supreme Court of Canada that the applicable terminology should be clarified in order to prevent the uncertainty caused by this an approach of the courts of appeal. There is no evidence that the South African courts have followed this Canadian trend. Nevertheless, this problem can be averted if the courts of South Africa follow a purposive interpretation, based on the case law of the Supreme Court of Canada prior to *Grant*.

4.3 Determining the effect of exclusion on the integrity of the justice system by considering the seriousness of the charges and the importance of the evidence for the prosecution

The relevant factors considered under the third group of factors are the seriousness of the charges and the importance of the evidence to secure a conviction. Whether the reliability of the evidence and its significance in proving factual guilt should feature prominently under this leg of the assessment is of paramount importance. The research question posed in chapter one in respect of these factors is whether the over-emphasis of the seriousness of the charges and

[165] *Grant* (fn 22 above) at par 66; *Harris* (fn 114 above) at par 72; *Madiba* (fn 151 above). This factor and factor (d) could be regarded as essentially similar. The validity of factor (g) is one of the issues in the appeal of *Grant*, argued in the Supreme Court on 23 April 2008. As mentioned previously, judgment has been reserved and will be delivered in due course.

[166] Fn 22 above at par 25.

the importance of the evidence for a conviction might unjustifiably make inroads on the presumption of innocence. An issue related to this question is whether a consideration of factual guilt should form part of the admissibility assessment. If this were the case, it would entail that the fact that the evidence is reliable and essential for a conviction when an accused faces serious charges, should be determinative of the overall admissibility assessment. Put differently: Should crime control interests be a dominant factor in the admissibility assessment?

4.3.1 The seriousness of the charge

In Canada, admissibility disputes are determined by means of a *voir dire* (pre-trial motion). The danger exists that the charges formulated against an accused at this stage may not be proved by the prosecution at the end of the trial. For example, on a charge of murder the evidence may prove culpability in respect of assault. For this reason the charge formulated against the accused should not be over-emphasised in Canada. This problem is not applicable to South Africa, because the admissibility assessment takes place, as part of the trial process, during a trial-within-a-trial. The defence may, based on new evidence, invite the court to reconsider the admissibility assessment at any stage of the trial proceedings. However, the practice has recently developed in South Africa that an accused may challenge the admissibility of evidence by means of a pre-trial motion on the grounds that a warrant authorising the search and seizure of evidence be declared invalid[167] or that a provision contained in an Act of Parliament, authorising the issue and execution of a search warrant be declared

[167] See for example *Bennett and Others v Minster of Safety and Security and Others* 2006 1 SACR 523 (T), ("*Bennett*"); *Mahomed v National Director of Safety and Security and Others* 2006 1 SACR 495 (W), ("*Mahomed*"); *Zuma and Another v National Director of Public Prosecutions and Others* 2006 1 SACR 468 (D), ("*Zuma* 3").

unconstitutional.[168] In the recently reported case of *Thint (Pty) Ltd v National Director of Public Prosecutions and Another; Zuma v National Director of Public Prosecutions and Others*,[169] the Constitutional Court discouraged the exercise of this pre-trial remedy when it is aimed exclusively at circumventing the application of section 35(5) or at delaying the finalisation of criminal proceedings.

The courts of South Africa do acknowledge the presumption of innocence when they consider the factor of the 'seriousness of the charge faced by the accused' during admissibility assessments.[170] However, the perception should not be created that the more serious the charges, the lesser protection should be accorded to an accused. Correspondingly, the courts should not be more amenable to exclude evidence when the charges are regarded as less serious. The potential harmful effect of such an approach on the integrity of the criminal justice system is discussed below.

In chapter five, the cases of *Melani* and *Shongwe* were compared to illustrate that the issues in these cases were more or less similar, but the outcomes were different, partly because the seriousness of the charges were over-emphasised in the admissibility assessment in *Shongwe*. It was pointed out earlier that *Melani* was decided in terms of the Interim Constitution. It is nonetheless submitted that the *Melani* court applied the rationale of section 35(5) when the admissibility challenge was considered. This explains the relevance of *Melani*, despite the fact that judgment was delivered in terms of the Interim Constitution. In these cases the courts assessed the different factors to be considered under the second leg of the analysis differently. In each case the court considered the seriousness of the charges and the seriousness of the infringements. In *Melani*, the court

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[168] *Maghjane v Chairperson, North-West Gambling Board and Others* 2006 2 SACR 447 (CC), ("*Maghjane*").

[169] [2008] ZACC 13 at par 65, ("*Thint*").

[170] See the discussion of *Melani* (fn 11 above) in chapter 5 par C 3.1.

focused on the seriousness of the infringement and long-term constitutional values. The *Melani* approach is supported by the approach followed by the Canadian Supreme Court in, for example, *Burlingham*[171] and *Greffe*.[172] Differently put, the decision whether to admit or exclude the disputed evidence should hinge on the seriousness of the infringement. When the seriousness of the infringement outweighs the public interest in securing a conviction, exclusion should in general follow. In terms of this view, admission or exclusion turns on a balance between the truth-seeking function of the courts and the preservation of the constitutional directive contained in section 35(5) that courts have a constitutional duty to safeguard the integrity of the justice system. By contrast, in *Shongwe*, where the infringements were more or less the same in nature and extent as in *Melani*, the court emphasised the seriousness of the charges, factual guilt, the effective prosecution of crime, and the perceived response of the local residents to the exclusion of the evidence and the acquittal of the accused. In other words, the 'current mood' of society was a weighty factor in the assessment. Authority for the *Shongwe* approach can be found in *Grant* and the Australian approach to this group of factors.[173]

The *Grant* court reasoned that the more serious the offence charged, the greater the probability that the administration of justice will be brought into disrepute by the exclusion of the evidence crucial to secure a conviction. This reasoning was applied in the Australian case of *R v Dalley*,[174] where Spigelman CJ expressed the opinion of the court as follows:

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[171] Fn 69 above at 408.

[172] Fn 150 above at 193.

[173] See also the approach suggested by Van der Merwe (fn 7 above) at 234, where he argues that courts should be entitled to lean towards crime control. He further asserts that public acceptance of a verdict and ***public support for the criminal justice system*** should be a "weighty factor" in the second leg of the assessment.

[174] [2002] NSWCCA 284 at par 3, ("*Dalley*").

> … the public interest in admitting evidence varies directly with the gravity of the offence. The more serious the offence, the more likely it is that the public interest requires the admission of the evidence.

These approaches suggest that the seriousness of the charges, the 'current mood' of society, and considerations of factual guilt should be weighty factors in the admissibility assessment. This implies that the less serious the charge, the greater constitutional protection is accorded to an accused. Equally, the more serious the charge, the evidence would less likely be excluded. A proportionality test applied in this manner should not be determinative of the admissibility assessment. Such an approach implies that an accused, who is guaranteed the right to be presumed innocent, may in actual fact not rely on this constitutional guarantee if the prosecution ***alleges*** that she has committed a serious offence: The remedy contained in section 35(5) would be rendered superfluous unless the accused faces a less serious offence. Stuart highlighted the danger of this approach in the appeal of *Grant*.[175] Such an approach flies in the face of the constitutional value of equal protection before the law and equal benefit of the law. Moreover, it would offend the integrity of the justice system, and should

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[175] Fn 22 above at par 15, he argued as follows: "There are dangers in adopting a test of 'proportionality' between the seriousness of the violation and the seriousness of the offence. A criminal trial under a system of entrenched *Charter* rights for accused has to concern itself with the truth of police abuse and disregard of *Charter* standards, not just truth of the accused's guilt. Without the remedy of exclusion in cases where the court considers the crime serious there will be a large number of criminal trials where the *Charter* will cease to provide protection"; see also Davies (fn 128 above) at 27, where he remarks that a proportionality test applied in this manner creates a "rights paradise" for those charged with trivial offences, but alleged rapists and murderers will find themselves in "a due process desert". He highlights, (ibid) at 29, the fact that a proportionality test runs counter to the presumption of innocence.

primarily for this reason not be followed by the courts of South Africa when this group of factors is considered.

To return to the comparison between the two approaches: In *Melani* the evidence was excluded, while the evidence was received by the *Shongwe* court. This comparison illustrated that the accordance of too much weight to the 'current mood' of society (which translates to the seriousness of the charge and the importance of the evidence for a conviction), may disturb the fine balance created by the *Collins* admissibility assessment. More importantly, such an approach may lead to the erosion of the significance of a consideration of the seriousness of the infringement in the overall admissibility assessment, as well as the educational role of the courts.

4.3.2 The importance of the evidence for a conviction

The South African decisions of *S v January; Prokureur-Generaal, Natal v Khumalo*[176] and *S v Lebone*[177] effectively insulate the presumption of innocence from encroachment during a trial-within-a-trial where testimonial evidence is in dispute. In terms of these decisions the prosecution may not lead evidence disclosing the contents of disputed testimonial evidence obtained after a violation. In many instances the importance of a confession or statement made by the accused may only be determined after its contents had been disclosed. Against this background, it would be difficult for the prosecution to show how important the disputed evidence would be to secure a conviction. However, this difficulty does not prejudice the prosecution, given that a court should make a value judgment to determine whether admission or exclusion would render the

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[176] 1994 2 SACR 801 (A), ("*January*").

[177] 1965 2 SA 837 (A), ("*Lebone*").

trial unfair or otherwise be detrimental to the repute of the justice system.[178] Moreover, the *Januarie* and *Lebone* decisions ensure that a consideration of factual guilt cannot be added to the admissibility assessment when the prosecution relies on testimonial evidence.

However, when Scott JA in his dissenting judgment in *Pillay*, assessed the admissibility of real evidence he considered whether an ***acquittal*** or ***conviction*** of the accused would be 'detrimental' to the administration of justice.[179] In other words, admissibility was determined by connecting the assessment with criminal culpability. Factual guilt determined the outcome of the admissibility analysis. Such an approach may make inroads into the presumption of innocence. It is submitted that criminal culpability should be totally seperated from the admissibility assessment.

An issue that is intrinsically linked to this submission is whether the costs of exclusion should determine the outcome of the admissibility assessment. Such an approach would imply that reliable real evidence, essential for a conviction on serious charges, would be more readily admitted. Admission under these circumstances would evidently find public support, especially when South Africans are enduring high levels of serious crime. A review of sections 24(2) and 35(5) jurisprudence has revealed that, by and large, the courts in the relevant jurisdictions have demonstrated firm resistence against the contention that the costs of exclusion should influence their admissibility rulings.[180] This stance is laudable. However, it would be disturbing for due process protagonists to note that such factors could convince a court to admit evidence in the face of the purposes sought to be protected by the relevant provisions.

[178] Steytler (fn 25 above) at 36; Van der Merwe (fn 7 above) at 201.

[179] Fn 8 above at par 133. See further chapter 5 par C 3.2 for a discussion of *Mkhize* (fn 153 above), where an analogous approach was followed.

[180] See chapter 5 par B 3.1 and C 3.1.

B Recommendations

In this part of the thesis, recommendations are made, firstly, with regard to the threshold requirements, and secondly, with regard to the substantive phase of the section 35(5) analysis.

1 Threshold requirements

Under this heading, recommendations are made with regard to the different threshold requirements discussed in this thesis.

1.1 Beneficiaries of section 35(5)

The decision by the Constitutional Court in *Kaunda*,[181] to the effect that the South African Constitution does not, as a general rule, have extra-territorial application is based on sound international law principles. It follows that section 35(5) would not have direct application when a right of a South African accused guaranteed by the Bill of Rights has been violated in a foreign jurisdiction. However, when evidence obtained in this manner is sought to be admitted in a South African court, the Bill of Rights should have indirect application. This would be the case because the Bill of Rights guarantees to everyone who faces a criminal charge within the terriritorial borders of South Africa, that her trial must comply with the concept of 'substantive fairness' as expounded by the Constitutional Court in the seminal case of *Zuma*.[182] The spirit, purport and objectives of the Bill of Rights should, in such circumstances, be infused into the

[181] Fn 12 above.

[182] Fn 37 above at par 16; *Dzukuda* (fn 2 above) at par 9-11 confirms the correctness of the *Zuma* approach.

common law exclusionary rule in order to ensure that it adequately achieves the notion of 'substantive fairness'.[183]

Section 35(5) should be interpreted generously and purposively, while having due regard to the goals sought to be achieved by the Bill of Rights.[184] In the light hereof, an accused should be entitled to challenge the admissibility of unconstitutionally obtained evidence against her while she was a 'suspect'. It was argued above[185] that it is not the status of the accused when a fundamental right is infringed that is at the heart of the matter. Rather, it is the manner in which the evidence had been obtained and the effect that its admission would have on the fairness of the trial and the integrity of the justice system that should be central to the assessment. In Canada, a generous and purposive interpretation was likewise employed to give meaning to the concept 'detained'. The virtue of such an interpretation is that it is firmly aligned to the goal of the prevention of judicial contamination that could likely be caused by unwarranted police pre-trial conduct. In the light hereof, the approach suggested in *Sebejan*,[186] which was followed in *Orrie*,[187] should be embraced.

Despite the broad interpretation of the concept 'detained' in Canada, the fact that its practical application has given rise to confusion that may leave room for the unwarranted interference with fundamental rights, was recently highlighted

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[183] It is suggested in fn 14 above that the test suggested by Schwikkard (fn 14 above) at 794, and Skeen (fn 58 above) at 405, which was applied in *Tandwa* (fn 56 above), would be apposite for the development of the common law exclusionary rule.

[184] See *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 385 at 237, ("*Big M Drug Mart*"); *R v Mills* (1986) 29 DLR (4th) 161, ("*Mills*"); *Makwanyane* (fn 127 above) at par 9; *Melani* (fn 11 above) at 347-348.

[185] Chapter 3 par B 3.2.

[186] Fn 17 above.

[187] Fn 20 above.

in the appeal of *Grant*.[188] The reasons for this difficulty are twofold: firstly, the line between police questioning that triggers the informational warnings and questioning that does not is often blurred,[189] and secondly, the police may deliberately delay an arrest to avoid issuing the informational warnings required by sections 9 and 10 of the Charter. Under these circumstances, the police strategy would be to inform the person that she is free to leave when she is in fact regarded as a suspect.[190] Stuart argued in the appeal of *Grant* that this concern can be overcome by adding an alternative test which broadens the concept 'detention' to include any steps taken by the police to establish, denounce or reveal the existence of inculpatory evidence.[191]

A comparative analysis undertaken in this thesis has shown that the ICTY, ICTR, ICC and the legal systems of the majority of the members of the European Union apply a comparable approach.[192] The application of this assessment is supported. The advantages of such an approach are: firstly, that it enhances the *Sebejan* and *Orrie* approaches, given that it serves the purpose of highlighting the dividing line between legitimate police questioning in terms of, for example, section 41 of the Criminal Procedure Act, and interrogation aimed at obtaining incriminating evidence while the suspect is not informed that she is regarded as such. Secondly, it serves as a pointer to the police as to when the duty to issue the informational warnings arises. For example, the practical efficacy of such an approach would have been of considerable advantage to a police officer investigating a complaint based on the facts of *Lottering*.[193] Thirdly, the

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[188] *Grant* (fn 22 above).

[189] Ibid at par 62.

[190] Stuart (fn 22 above) at par 28.

[191] Loc cit.

[192] See chapter 3 par B 2.

[193] Fn 160 above. This case is discussed in chapter 4 par C 4.

establishment of a clear dividing line has the added advantage of precluding the unintended infringement of fundamental rights.

1.2 The 'connection' requirement; standing; and the threshold onus of showing a rights violation

The Canadian and the South African interpretation of the 'connection' requirement are comparable. The phrase 'obtained in a manner' appears in both section 24(2) of the Charter and section 35(5) of the Constitution. The standard endorsed in both jurisdictions in order to satisfy this requirement can be summarised as follows: A causal or temporal connection between the infringement and the discovery of the evidence is required. However, the link between the discovery of the evidence and the infringement should not be too remote. In *Mthembu*, for example, the temporal link between the infringement and the actual testimony of the prosecution witness was weak, given that he had been tortured (about four years before he testified in court), which prompted him to make a statement that implicated the accused in the commission of the crimes. In contrast, the causal link between the violation and his testimony in court was strong, because 'the fact that his subsequent testimony was given apparently voluntarily does not detract from the fact that the information contained in that statement … was extracted through torture'.[194] Approached in this manner, the Supreme Court of Appeal was correctly satisfied that the manner in which the evidence had been obtained met the terms of the 'connection' requirement under section 35(5).[195]

[194] *Mthembu* (fn 27 above) at par 34.

[195] Loc cit.

However, the courts of South Africa correctly, it is submitted, did not follow the Canadian approach relating to the standing threshold requirement.[196] The Canadian approach to this threshold requirement does not enhance the judicial integrity rationale: it indirectly encourages the infringement of the rights of innocent third parties. On this view, it advances sentiments closely associated with the common law inclusionary rule, given that the evidence is admitted, regardless of the effect that such admission could have on the integrity of the justice system. By contrast, the approach adopted in *Mthembu* serves to prevent detriment befalling the criminal justice system. The *Mthembu* interpretation of this threshold requirement should accordingly be followed.

It was argued above[197] that *Viljoen*[198] could be read as suggesting that a 'threshold onus' of showing that evidence had been obtained as a result of a violation of a fundamental right should rest on the accused. Such an approach favours crime control concerns and should not be followed. In terms of the *Viljoen* approach, a potential beneficiary of fundamental rights should be saddled with the duty of showing that the police conduct did not comply with the provisions of the Constitution. Failure to satisfy this onus would render the police conduct immune from the rigours of scrutiny provided by section 35(5). In other words, if the accused cannot satisfy this threshold requirement the court may receive the evidence without investigating the manner in which it had been obtained. The danger of such an approach is that it may create the public perception that the courts are prepared to condone or indirectly encourage unconstitutional police conduct. Such an approach evidently runs counter to the judicial integrity rationale.

[196] See chapter 3 par E.

[197] See par A 2.4 above.

[198] Fn 35 above.

By comparison, the approach followed by the Full Bench of the Transvaal Provincial Division in *Mgcina*,[199] to the effect that the prosecution bears the burden of showing that the evidence had been obtained in a constitutional manner, serves to protect constitutional values generally allied to the advancement of substantive fairness. For this reason, and the argument set out in A 2.4 above, the standard established by the *Mgcina* court should be adhered to.

2 The substantive phase

The Supreme Court of Appeal has adopted two different approaches to determine whether admission of the disputed evidence would render the trial unfair or would otherwise be harmful to the integrity of the justice system. One approach favours the Canadian approach of a two-phased analysis during the substantive phase, while the other prefers a balancing exercise in order to determine trial fairness: If admission would impair trial fairness, admission would, by itself, be detrimental to the justice system. My purpose in this part of the thesis is to consider an alternative approach that is, in my view, aligned to the purposes sought to be achieved by section 35(5).

The recommended overall structure of the admissibility analysis is discussed in light of the developments in Canada, which suggests the reason why the drafters of section 35(5) modified the section by means of the inclusion of the phrase 'or otherwise'. In addition, the reason why the importance of the 'seriousness of the infringement' factor should be at the heart of the admissibility assessment is discussed. While explaining the reasons why a balancing exercise should be undertaken in the end of the analysis, the pitfalls experienced by the Canadian

[199] Fn 36 above.

courts in the interpretation of section 24(2) that should be prevented in the interpretation of section 35(5), are highlighted.

2.1 The recommended overall structure of the admissibility assessment

The suggested overall structure of section 35(5) preferred in this thesis is derived primarily from a combination of the approaches followed in *Pillay*, *Tandwa*, Canadian precedent and the opinions of scholars.

The overall structure followed by the Supreme Court of Appeal in *Pillay* should be embraced by the courts of South Africa.[200] In other words, a court that determines the admissibility of evidence should consider the three groups of *Collins* factors: firstly, what effect the admission of the evidence would have on the fairness of the trial (also referred to as the first leg of the analysis or the first group of *Collins* factors); secondly, whether admission of the evidence obtained after a serious infringement would be tantamount to judicial condonation of unconstitutional conduct (also known as the second group of *Collins* factors); and, thirdly, what effect admission or exclusion of the evidence would have on the integrity of the justice system (referred to as the third group of *Collins* factors). The second and third groups of *Collins* factors are to be considered during the second leg of the admissibility assessment. In addition, a balancing exercise, analogous to that applied in *Tandwa*, should be undertaken – however, not as suggested in *Tandwa* during the first leg of the analysis – but at the end. The purpose of such a balancing exercise at the end of the analysis is to consider and weigh rights protection concerns against crime control values in order to

[200] Stuart (2000) 5 *Can Crim L Rev* 51 at par 6 makes a similar recommendation in relation to section 24(2), suggesting that the *Collins* approach should be followed. See further *Melani* (fn 11 above). Although *Melani* was decided before section 35(5) came into effect, the court applied the rationale of the provision.

establish whether either admission or exclusion would ultimately be detrimental to the justice system.

Based on Canadian precedent, the trial fairness assessment, representing the public interest in the protection of the interests of the accused, should be assessed during the first leg of the assessment. The public interest in convicting perpetrators of crime should be determined during the second leg of the analysis. The difficulties experienced by our Canadian counterparts should be considered as useful guidelines when the courts of South Africa interpret section 35(5). One such pitfall was the over-emphasis by the Supreme Court of Canada, during the Lamer CJ era, of the task of the trial fairness requirement in the overall admissibility assessment. It was held that whenever trial fairness concerns were impaired, exclusion should automatically follow.[201] Cory J re-inforced this line of reasoning in *Stillman*,[202] by asserting that the second leg of the analysis need not be considered whenever the admission of conscriptive evidence would impact negatively on trial fairness.

It cannot be denied that Lamer CJ made profound contributions towards the development of the Canadian section 24(2) jurisprudence.[203] Most of the majority judgments written by him have shaped the present-day Canadian criminal justice system, and the principles contained in those judgments will continue to be quoted with approval by both Canadian and South African courts. However, the approach of 'near automatic' or 'automatic' exclusion whenever trial fairness has been compromised, elicited passionate criticism by Canadian courts and scholars.[204]

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[201] See Stuart (loc cit); Mahoney (fn 54 above) at 444.

[202] Fn 52 above.

[203] See for example the introductory remarks of Stuart (fn 200 above).

[204] See Stuart (fn 22 above) at par 7.

The gist of the criticism leveled against the rule of 'automatic' exclusion is that the public interest in the protection of the rights of the accused has been elevated and equated with 'detriment to the justice system', regardless of the effects that exclusion may have on the integrity of the justice system. This approach has the inherent disadvantage of undermining the public interest in convicting perpetrators of crime. After the early retirement of Lamer CJ, the only member on the bench of the Supreme Court of Canada with comparable experience in criminal law was Arbour J.[205] Although assessing the second leg of the admissibility assessment in *Buhay*,[206] the unanimous judgment written by Arbour J can be read as suggesting a new trend in the interpretation of section 24(2), given that the judge emphasised the fact that section 24(2) should not function as an automatic exclusionary or inclusionary rule.[207]

The approach of the 'automatic' exclusion of evidence once trial fairness has been impaired was applied in Canada before section 35(5) was incorporated into the 1996 Constitution of South Africa.[208] Paciocco, the principal opponent to the rule of 'automatic' exclusion, conveyed his concern with regard to this rule prior to such incorporation.[209] Against this background, it is assumed that the drafters of section 35(5) must have been aware of the weakness of the rule of 'automatic' exclusion. However, they nevertheless deemed it appropriate to follow the structure and essential content of the Canadian exclusionary provision,[210] subject

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[205] Fn 200 above, more particularly the introductory paragraph.

[206] Fn 100 above. She retired on 30 June 2004. See http://www.scc-csc.ac.co/AboutCourt/judges/arbour/index_e.asp. (Accessed on 20 May 2008).

[207] Ibid at par 71-72; see also *Orbanski* (fn 102 above) at par 93; Stuart (fn 200 above).

[208] See, for example, *Hebert* (fn 92 above); *Bartle* (fn 93 above); *Broyles* (fn 95 above).

[209] See (1989) 32 *CLQ* 326; Paciocco (1996) 38 *CLQ* 26; see also Hogg *Constitutional Law of Canada* (3rd ed, 1992) at 943.

[210] The courts of South Africa noted these striking similarities in, for example, *Naidoo* (fn 108 above); *Ntlantsi* (fn 24 above); *Pillay* (fn 8 above).

to an important modification: the phrase 'or otherwise' was included in section 35(5). The meaning of this phrase within the context of section 35(5) was discussed above.[211] To be precise, it means 'the negation or opposite' of something specifically mentioned earlier.[212] Differently put, in ordinary terms, the relevant phrase suggests that, despite trial unfairness, factors that may make an allowance for the reception of the evidence on different grounds, should be considered in order determine whether either exclusion or admission would be detrimental to the justice system. In the light hereof, it is submitted that the significance of the drafters' inclusion of the phrase 'or otherwise' becomes clear in the overall interpretation of section 35(5). In other words, section 35(5) should not be applied as a rule of automatic exclusion whenever trial fairness has been compromised. The courts of South Africa should, additionally, proceed to consider the second leg of the admissibility assessment to determine whether exclusion would for reasons other than trial unfairness – and on different grounds – be detrimental to the administration of justice. Put differently, if admission of the disputed evidence would tend to render the trial unfair, the phrase 'or otherwise' authorises the courts of South Africa to consider different factors to determine whether ***exclusion*** may, after having considered the latter factors, be more harmful to the integrity of the justice system than ***admission***. Given that an unfair trial should be a compelling factor that could tilt the balancing exercise in favour of exclusion, a court should nevertheless consider other factors (under the second leg of the analysis) to determine whether exclusion would (because the police acted in objective 'good faith', for example) be detrimental to the justice system.

All three groups of *Collins* factors must therefore be considered to determine whether either admission or exclusion of the disputed evidence would be

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[211] Chapter 4 par C 4; see also par A 3.3 above.

[212] Allen (fn 109 above) at 841; see further the dictionaries mentioned in fn 109 above.

detrimental to the criminal justice system. In my view, such an approach can be reconciled with the purposes of both sections 24(2) of the Charter and 35(5) of the South African Constitution. The suggested approach was pioneered by Lamer CJ in *Collins*, where the judge introduced the following important procedural standard:[213]

> In determining whether the admission of evidence would bring the administration of justice into disrepute, the judge is directed by s 24(2) to consider 'all the circumstances'. The factors which are to be ***considered*** and ***balanced*** have been listed by many courts in the country …

Lamer CJ then proceeded to list the factors to be considered under the first and second leg of the admissibility assessment. It was held in *Pillay*, that the phrase 'all the circumstances' should be read into section 35(5).[214] It was mentioned earlier that this view is supported. In the light hereof, a court making an admissibility assessment should, in each and every admissibility dispute, consider the public interest in protecting the interest of the accused (which is considered under the first leg), and the public interest in convicting perpetrators of crime (which is scrutinised under the second leg), before a ruling in terms of section 35(5) is made.[215] It is accordingly submitted that factors relevant to trial fairness

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[213] Fn 2 above at par 35. Emphasis added.

[214] See paragraph A 3.4 above.

[215] Compare Van der Merwe (fn 7 above) at 211, fn 289, who explains that a set sequence is not a requirement under s 35(5), without providing any reason for such contention. He contends that if a court is "satisfied that admission of the evidence would be detrimental to the administration of justice" (referred to as the 'second leg' in his work and in this thesis), the court is "strictly speaking, not even required to consider trial fairness as required in the 'first leg'." Nonetheless, he hastens to add that the *Naidoo* court followed the sequence recommended in this thesis. The procedure advocated in this thesis was also followed in *Pillay* and in Canadian section 24(2) jurisprudence since *Collins*. The method preferred by Van der Merwe was followed in *Mthembu*

should be considered first, and thereafter, factors that may have a negative impact on the integrity of the justice system.

The fact that trial fairness concerns have been compromised does not mean that the evidence should 'automatically' be excluded.[216] However, the fact that the violation had a negative impact on the trial fairness directive should, at the end of the analysis, be accorded much weight when the 'seriousness of the infringement' is considered and balanced against the effects of exclusion.[217] If, after having considered the second group of factors, the seriousness of the infringement has not been diminished by for example, police good faith, urgency or necessity, this should be a compelling factor that should prompt the courts to give effect to the constitutional command that the impugned evidence 'must be excluded'. Exclusion on the grounds that admission would render the trial unfair, would, under these circumstances, not be detrimental to the integrity of the justice system. This should be the case because the admission of evidence obtained after a serious infringement (since the infringement impacted negatively on trial unfairness) would always be 'detrimental to the administration of justice'. Such an approach is forcefully allied to the primary rationale of section 35(5) that prescribes that judicial exoneration of serious constitutional violations would be harmful to the integrity of the justice system.

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and *Hena*, once more, without disclosing any cogent reason why the South African approach should be any different from the Canadian approach.

[216] See chapter 4 par C 3; see also par A 3.3 above.

[217] In other words, all three groups of *Collins* factors should be considered to determine the admissibility issue. The majority judgment in *Stillman* (fn 52 above) at par 122-123 followed a similar approach in delivering an obiter dictum to demonstrate that the infringements were of a serious nature; see also the approach adopted by Sopinka J in *R v Grant* (1994) 84 CCC (3d) 173 at 200-203, ("*Grant* 1"). However, the judge erroneously applied the "real" evidence distinction to determine trial fairness. See further Mahoney (fn 54 above) at 460. For a discussion of the determination of the seriousness of the infringement and the effects of exclusion in terms of the recommended application of section 35(5), see the discussion under 2.1.3.1 and 2.1.3.2 below.

Against this background, it is recommended that all of the factors mentioned by Lamer CJ in *Collins* should be considered by the courts of South Africa to determine whether the disputed evidence should either be received or excluded. It is important to note that, among those factors, the 'seriousness of the infringement' should be a weighty factor.[218] Such an approach is closely aligned to the judicial integrity rationale: The more serious the constitutional infringement, the more likely admission of the evidence obtained as a result thereof would be detrimental to the integrity of the justice system.

For some, the approach suggested in this thesis begs the question: Why the need to distinguish between the two legs or phases during the substantive phase, if all the factors have to be weighed and balanced in the final analysis? Differently put, why not perform a balancing exercise during the first leg of the analysis by weighing and balancing the two counterveiling public interests of rights protection and crime control? South African scholars concur that the two tests, representing the two legs of the admissibility assessment, should be kept apart, as each test aims to achieve a different purpose.[219] This thesis supports this point of view. It is accordingly submitted that the test applicable to the first leg should not be loaded with factors that should in actual fact be considered under the second leg. Put differently, one test should not be allowed to cast a shadow over the other. A balancing exercise performed at end of the analysis has the important virtue of avoiding this difficulty.

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[218] Stuart (fn 141 above) at 466-469; see also Penney (2004) *McGill LJ* 105 at 133.

[219] Steytler (fn 25 above) at 36 expresses his opinion as follows: "… it should be emphasized that section 35(5) has created two tests which should be kept separate: rules applicable to one are not necessarily applicable to the other"; see also Van der Merwe (fn 7 above) at 202. However, compare Van der Merwe (ibid) at 215, suggesting that a court may, while assessing the trial fairness prong, consider factors like, for example, the seriousness of the infringement, the interests of society, and public policy.

To come to the point, the courts of South Africa should be wary of the pitfalls experienced in the Canadian section 24(2) jurisprudence of the over-emphasis of, for example, the first leg of the admissibility analysis to the disadvantage of the second leg. The danger of such an approach is that it entails that the public interest in the protection of the rights of the accused outweighs the public interest in convicting the guilty, whenever trial fairness has been compromised. This Achilles' heel in the interpretation of section 24(2) led to the *Grant* court introducing factors, normally considered under the second leg, into the first leg of the admissibility assessment. In other words, the strictness of the rule of 'automatic' exclusion was alleviated by creating an 'exception' that dictates that despite trial unfairness, the disputed evidence should nevertheless be received. This approach gives rise to two fundamental issues: Did the 'good faith' of the police 'transform' a trial that was initially unfair, into a fair trial? How does one reconcile this approach with the notion that an unfair trial is, as such, detrimental to the justice system?[220]

The *Grant* decision (while applying a two-phased analysis) diluted the normative value of concerns aimed at protecting trial fairness by supplementing it with factors meant to be considered when assessing the public interest in convicting the guilty. The danger of such an approach is that the normative value of the procedural rights, designed to protect an accused from, for example, self-conscription, may be weakened. In the vein of the *Grant* approach, it was submitted earlier that the balancing exercise performed during the ***first leg*** of

[220] Compare *Hebert* (fn 92 above); *Stillman* (fn 52 above); *Tandwa* (fn 52 above) at par 118, where Cameron JA challenges the rectitude of the approach followed in *Grant*, without referring to it, as follows: "As we have pointed out, though admitting evidence that renders the trial unfair will ***always*** be detrimental to the administration of justice …". Emphasis added. See also Van der Merwe (fn 7 above) at 211.

the analysis in *Tandwa*, bears a similar attribute.[221] Surely, section 35(5) was not designed to achieve such purposes? On the contrary, its aim is to prevent the erosion or at worst, the negation of fundamental rights.

A balancing exercise should be undertaken at the end, since it demonstrates that the section 35(5) analysis strives to achieve a compromise between the two counterveiling public interests of rights protection and crime control. In the same vein, the view held by Cloete J, eloquently articulated as follows in *Mphala*,[222] may indeed be achieved when the balancing exercise is undertaken in the end of the analysis:

> So far as the administration of justice is concerned, there must be a ***balance*** between, on the one hand, respect (particularly by law enforcement agencies) for the Bill of Rights and, on the other, respect (particularly by the man in the street) for the judicial process. Over-emphasis of the former would lead to acquittals on what would be perceived by the public as technicalities whilst over-emphasis of the latter would lead at best to a dilution of the Bill of Rights and at worst to its provisions being negated.

In my view, one of the primary purposes of section 35(5) is to achieve this goal: A balance between crime control interests and the enhancement of fundamental rights. A balancing exercise at the end of the admissibility analysis is best suited to achieve this goal, without possibly eroding the normative value of fundamental rights. Ackermann J in *Ferreira v Levin NO and Others v Powell NO*

[221] See the discussion under A 3.1 and A 3.4 above.

[222] Fn 152 above at 657g-h (emphasis added); see also *Hena* (fn 184 above above) at 39, citing *Key v A-G, Cape Provincial Division* 1996 6 BCLR 788 (CC).

and Others[223] appealed for a generous and purposive interpretation during the rights analysis phase of interpretation, as opposed to the performance of a balancing exercise in order to determine ***whether a violation occurred***. He argued that such an approach is tantamount to inviting a court to apply a limitations exercise 'at the first stage of the enquiry', and that it 'requires at best, an uncertain, somewhat subjective and generally constitutionally unguided normative judicial judgment to be made'. The judge warned that when applying such an approach '[t]he temptation to, and danger of, judicial subjectivity is great'.[224] It is submitted that, although mentioned in a different context, this objection is relevant to the balancing exercise followed in *Tandwa*, since such an approach in effect 'limits' the normative value of the trial fairness requirement by balancing the interests it was designed to protect against the public interest in convicting the factually guilty, with the aim of determining whether trial fairness has been impaired.

The approach presented in this thesis has the significant virtue of achieving the aim mentioned in *Mphala*: that is, determining admissibility challenges without over-emphasising one public interest to the disadvantage of the other.

It must be emphasised that the balancing exercise suggested here differs from that applied in the common law jurisdictions of Australia and Scotland, since the balancing exercise proposed in this thesis should be focused on the purposes of section 35(5) and the values espoused by the Bill of Rights. For example, one such purpose is the furtherance of an ethos of fundamental rights; another is the constriction of governmental authority. In the light hereof, courts should

[223] 1996 1 BCLR 1 (CC), ("*Ferreira*"), at par 82. It must be mentioned that this was a dissenting opinion. The judge distinguished between the Constitutions of South Africa and that of the USA (the one having a limitations clause while a similar provision is absent in the other) and raised the relevant argument witin this context.

[224] Loc cit.

consciously remind themselves that their decision, whether to receive or exclude unconstitutionally obtained evidence, should be related to the purposes sought to be achieved by section 35(5), in particular, and the Bill of Rights in general.

Finally, it is suggested that the approach advocated in this thesis provides legal clarity as to the interpretation of section 35(5), since it gives effect to the text of the provision, its purposes, and furthermore seeks to achieve the general purposes of the Bill of Rights.

2.1.2 Trial fairness: the first leg of the assesment

For the reasons mentioned in the discussion under A 3.1 above, this thesis does not endorse the *Tandwa* fair trial analysis.[225] Rather, the fair trial prong of section 35(5) should be interpreted in a purposive manner, while having due regard to its rationale. In other words, the interpretation should advance the constitutional values sought to be protected by the trial fairness requirement. In my view, the trial fairness requirement was designed to prevent an accused from being conscripted against herself. The majority judgment of the Supreme Court of Appeal in *Pillay* has endorsed such an approach.[226] A comparative analysis of the right to a fair trial in comparable open and democratic societies has confirmed that this right primarily serves to protect the right to remain silent and the privilege against self-incrimination.[227] In this way the standard is promoted that criminal culpability should be satisfied by the prosecution based, on the one hand, on evidence procured in a lawful manner; and evidence obtained in a

[225] See also par A 3.4 above and B 2.1.1 above, more particularly in the text above fn 223 above.

[226] Fn 8 above at par 88-90. See also Steytler (fn 25 above) at 36-37.

[227] For the position in England and Wales, and the European Court of Human Rights, see par A 3.1 above (see further chapter 2 par D 3); for the Canadian position, see chapter 4 par B 1.

manner that is fair towards the accused, on the other hand. In other words, the unlawful conscription of an accused should be prevented. These values are incorporated into the South African Constitution. In a word, the trial fairness requirement contained in section 35(5) should be constitution-centred.

Factors having an adverse impact on trial fairness should be regarded as serious infringements, given that an unfair trial reflects negatively on the integrity of the justice system.[228] The seriousness of the violation of interests aimed at protecting an accused against trial unfairness could be aggravated or diminished, having regard to factors regularly considered under the second leg of the analysis. It is against this backdrop that it is suggested that the admissibility assessment, at the end of the analysis, should be determined by weighing and balancing all three groups of *Collins* factors to determine the impact that either exclusion or admission would have on the integrity of the justice system.

Evidence that would not have been obtained 'but for' the infringement is an important indicator (among other factors to be considered under the trial fairness requirement) that admission would tend to render the trial unfair.[229] An accused should not have to defend her liberty interests by having to confront evidence she would not have had to challenge if her fundamental rights had not been infringed. In such circumstances the prosecution gains unfairly from the manner in which the evidence had been obtained. For this reason, the nature of the evidence that would tend to render the trial unfair should not be limited to testimonial compulsion, but it should encompass any type of evidence that would not have been discovered without the compelled participation of the accused.[230]

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[228] Mitchell (1993) *CLQ* 433 at 434.

[229] See chapter 4 par B 2 and C 2. Compare Stuart (fn 22 above) at para 3 and 9, who advocates that the discoverability analysis should be abandoned.

[230] *Ross* (fn 52 above); *Mellenthin* (fn 52 above); *Brydges* (1990) 53 CCC (3d) 330, ("*Brydges*"); *R v Black* (1989) 50 CCC (3d) 20, ("*Black*"). Mahoney (fn 54 above) at 454 eloquently sums up

However, evidence that could have been discovered without the accused having been unlawfully conscripted against herself and that would inevitably have been discovered by lawful means or that could inevitably have been discovered by means of an independent, lawful source does not impact negatively on trial fairness, because the accused did not create the inculpatory evidence against herself.[231] The seriousness of the infringement is accordingly blunted by the manner in which the evidence had been obtained. The fact that the manner of its obtainment did not jeopardise trial fairness concerns could have an effect on the extent of the infringement, which should be considered under the second leg of the analysis.[232]

The reason why the 'seriousness of the infringement' is mentioned here is to demonstrate the inter-relationship among the different groups of factors (when the balancing exercise is undertaken at the end) and to illustrate that the seriousness of the infringement should be a weighty factor in the overall admissibility assessment.[233] It was pointed out above that the extent of the

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the sense of unfairness caused by unconstitutional governmental pre-trial conduct as follows: "The trial is the metaphorical battle in the adversarial system, and Canadians may rightly view as unfair any contest where one contestant has been severely handicapped by earlier, disgraceful conduct by his or her opponent".

[231] Mahoney (fn 54 above) at 466; see also Naude (2008) 2 *SACJ* 168 at 185. Some might argue that the *Tandwa* prejudice model generally serves a similar purpose as the discoverability/ "independent source" doctrine.

[232] Whether the infringement remains non-serious depends on an assessment of the factors usually considered under the 'seriousness of the infringement' group of factors, during the second leg of the analysis.

[233] Compare *Grant* (fn 22 above), highlighting reliability concerns during the trial fairness analysis; see also *Tandwa*, where the good faith of the police is included as a factor for consideration in relation to the fairness of the trial. Van der Merwe (fn 7 above) at 217-221 confirms that the seriousness of the infringement should be an important factor during the first leg of the admissibility assessment. Compare Stuart (fn 22 above) at par 12, confirming that the seriousness of the infringement should be of paramount importance in the section 24(2) analysis;

infringement should be considered during the assessment of the second and third groups of *Collins* factors (during the second leg of the admissibility inquiry) to determine what effect exclusion or admission would have on the integrity of the justice system. The intensified importance of the 'seriousness of the infringement' factor is justifiable, given that section 35(5) was designed to advance the protection of fundamental rights, while by the same token it serves to safeguard the integrity of the justice system: Admission of evidence obtained as a result of a ***serious infringement*** would invariably tarnish the integrity of the criminal justice system. Likewise, the exclusion of evidence essential for a conviction obtained after a trivial infringement while the accused faces serious charges, would be detrimental to the justice system.

As mentioned above, the trial fairness assessment should be focused on the prevention of conscription. In addition, the 'independent source' exception[234] and the doctrine of 'discoverability'[235] should, where applicable, be considered to determine whether admission of the disputed evidence would tend to render the trial unfair.[236] The prosecution may rely on these exceptions to demonstrate that

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see further Mahoney (fn 54 above) at 460, asserting that the fact that the accused had been conscripted against herself should be considered as a factor that is indicative of the seriousness of the infringement. Mahoney (ibid) at 476, confirms that the seriousness of the infringement should be considered as one of the "most important" factors in the s 24(2) analysis.

[234] Van der Merwe (fn 7 above) at 182 confirms that Langenhoven, in an unpublished LLD thesis, makes a similar recommendation. For a discussion of the "independent source" doctrine, see Van der Merwe (loc cit); and Naude (fn 230 above), and the authorities cited at 173-175.

[235] For a discussion of this doctrine, see chapter 4 par B 2 and C 2.

[236] Van der Merwe (fn 7 above), like Mahoney (fn 54 above) do not call for the total discardence of the doctrine of discoverabiity. Van der Merwe (ibid) at 244, argues that the doctrine of "discoverability" and the "independent source" exception should be applied during the second leg of the admissibility assessment, as factors justifying the reception of the evidence. The point of view that all the circumstances that led to the discovery of the evidence should be considered in order to determine the admissibility issue is supported.

admission of the disputed evidence would not render the trial unfair. The doctrine of discoverability has been subjected to rigorous scrutiny by both Canadian and South African scholars.[237] It must be emphasised that the discoverability analysis does not serve the purpose of determining whether an unfair trial could be transformed into a fair trial.[238] Rather, its purpose is to assess whether the evidence has been discovered through a process of compelled conscription. In point of fact, trial fairness should be determined with the focus centred on whether the evidence would inevitably have been discovered by ***constitutional*** means, in the absence of conscription. It follows that evidence that has been obtained in a constitutional manner would not render the trial unfair.[239]

The seriousness of the charge faced by the accused, the 'good faith' of the police, factual guilt, and the 'current mood' of society should not be considered at this stage of the analysis.[240] These factors cannot transform a trial that has been rendered unfair into a fair trial.[241] Quite the opposite, those factors, in conjunction with other relevant factors, collectively determine whether the effects of exclusion or admission of the disputed evidence would be injurious to the integrity of the justice system.

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[237] The following commentators do not approve of the manner in which the doctrine is applied: Mahoney (fn 54 above) at 464; Stuart (1996) 48 CR (4th) 251; Delaney (fn 98 above) at 527. In the South African context, see Naude (fn 230 above). However, compare, for instance, Brewer (1997) *Can Crim LR* 329; Moreau (1997) 40*CLQ* 148; Roach (fn 128 above) at 10-6, par 10.1310.

[238] Mahoney (fn 54 above) at 449.

[239] Van der Merwe (fn 7 above) at 189, fn 144.

[240] Steytler (fn 25 above) at 37. It is submitted that a consideration of factual guilt should not be considered at all during the admissibility assessment, given that it may likely encroach upon the presumption of innocence.

[241] *Hebert* (fn 92 above); *Collins* (fn 2 above).

2.1.3 'Detriment' caused to the justice system because of admission or exclusion: the second leg of the analysis

This part of the recommendations relate to the second leg of the admissibility analysis. Recommendations are made with regard to the impact that the nature of the evidence has on the classification of the infringement, the effect of the successful reliance on the 'good faith' exception, the role of the 'current mood' of society, and the significance of factual guilt during this leg of the analysis.

2.1.3.1 The seriousness of the infringement and the good faith of the police

The seriousness of the infringement and the good faith of the police should be determined while having due regard to 'all the circumstances'.[242] The mental state of the police when the infringement occurred should be an important factor during the assessment.[243] The purpose of the assessment of the seriousness of the infringement is to determine whether exclusion or admission of the disputed evidence would be 'detrimental' to the justice system. The judiciary should not be perceived by the public at large as associating itself with serious constitutional violations. It is submitted that this is one of the primary rationales of section 35(5). Therefore, when an infringement has been classified as serious, it should be a significant step in explaining why the disputed evidence should be excluded.

A number of particular factors taken into account by the courts of Canada and South Africa to deterimine whether the infringement should be labelled as

[242] *Pillay* (fn 8 above).

[243] Steytler (fn 25 above) at 39.

serious or a good faith violation have been outlined under A 4.3 above. It must be emphasised that the lists of factors mentioned in A 4.3 are not exhaustive. In general, if an infringement can be categorised as 'blatant', 'deliberate' 'wilful' or 'flagrant', the evidence obtained as a result thereof could be susceptible to exclusion, given that its admission would be tantamount to judicial condonation of unconstitutional conduct. Evidence obtained as a result of the police acting in objective good faith can be saved from exclusion. However, negligent infringements should not be equated with 'good faith' violations.[244]

The nature of the evidence obtained after a violation could be determinative of the classification of the infringement as serious.[245] Some might argue that such an approach only serves to perpetuate the common law distinction between the admissibility of 'real' and testimonial evidence. Perhaps this linkage between the nature of the evidence and the classification of the extent of the infringement can be explained in light of the fact that the nature of the evidence is a significant factor in determining the effect of exclusion on the repute of the justice system. However, the courts of South Africa have, in a number of judgments, steered away from such an approach.[246] This approach should be embraced.

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[244] Loc cit; Van der Merwe 1988 11 *SACJ* 462 at 473; see also chapter 5 par C 2.2.

[245] See chapter 5 par B 2.1 and C 2.1.

[246] Ibid.

2.1.3.2 The effect of exclusion on the integrity of the justice system

The 'current mood' of society should be considered under this group of factors, provided such mood is adjudged to be reasonable.[247] When a violation is non-serious, the exclusion of evidence essential to secure a conviction on a serious charge might be detrimental to the justice system. However, the seriousness of the charge faced by the accused should not be determinative of the admissibility assessment: the exclusionary remedy should not be reserved for instances when the accused faces less serious charges.

Finally, the inherent danger of two approaches, which could unavoidably be 'detrimental' to the justice system, should be particularly guarded against by the courts of South Africa: the first of these approaches is that the admissibility assessment should not be closely linked to criminal culpability.[248] The fact that the accused is factually guilty should not be determinative of the admissibility assessment. Such an approach is not justifiable in a democratic society based on human dignity, freedom and equality – factual guilt should not be allowed to encroach upon the presumption of innocence.

The second potentially dangerous approach is that the costs of exclusion should not influence the outcome of the admissibility assessment.[249] Evidence should

[247] *Collins* (fn 2 above); Steytler (fn 25 above) at 40. Compare Van der Merwe (fn 7 above) at 234.

[248] See the approach of the minority judgment in *Pillay*, and the judgment in *Mkhize*, discussed in chapter 5 at paragraph C 3.2.

[249] See chapter 5 par C 3.2. In *Melani*, for example, the social costs of exclusion were not very high, because the accused was convicted on the strength of other admissible evidence. Exclusion weakened, but did not destroy the case of the prosecution. The same can be said of *Soci*: the accused was convicted on evidence other than the excluded evidence. In *Naidoo*, *Hena*, *Mphala*, and *Pillay*, the excluded evidence was essential to convict the accused on serious charges. However, in *Shongwe*, exclusion would have resulted in an acquittal.

not only be excluded when criminal culpability can be satisfied by means of other admissible evidence. Such an approach would be results-oriented, thus defeating the purpose of section 35(5).

C Concluding remarks

In a speech delivered by McLachlin CJ, the current Canadian Chief Justice, she correctly remarked that public support for the courts is not determined by the popularity of a judgment.[250] Rather, she contended, public approval of the Supreme Court of Canada is 'tied to the perceived integrity of the judicial process'.[251] The perceived integrity of the justice system, in turn, hinges on the apparent impartiality and independence of the courts.[252] She elaborated by citing the report of the Canadian Institute for Research on Public Policy, compiled after the judgments of the Supreme Court had been delivered in *Feeney* and *Vriend v Alberta*.[253] In *Vriend*, the government of Alberta was directed to extend fundamental rights to everyone regardless of their sexual orientation. In *Feeney*, reliable real evidence, essential to convict the accused on a charge of murder was excluded, because he had been conscripted against himself. The study

[250] Roach (fn 128 above) at 3-7, par 3.160, confirms the argument that it is unlikely that the reputation of the administration of justice would be adversely affected by a decision to exclude or receive unconstitutionally obtained evidence. He argues that the reputation of the administration of justice could depend on community standards or a lack of control over police misconduct. However, compare Packer *The limits of the Criminal Sanction* (1968) Part II who makes the point that some might argue that the repute of the criminal justice system is closely linked to its ability to control crime. The argument of Van der Merwe, that the "current mood" of society should be emphasised during the second leg of the admissibility assessment, appears to be based on this contention.

[251] Fn 134 above.

[252] Fn 135 above.

[253] 1998 1 SCR 493, ("*Vriend*").

examined Canadian public attitudes towards the courts against this background. The research revealed that a majority of Canadians opposed the outcome in *Feeney*, while most Canadians were in favour of the outcome in *Vriend*. The study arrived at the following insightful conclusion:[254]

> Notably, where Canadians are generally opposed to [a] ruling, as in *Feeney*, these attitudes have little leverage on overall assessments of judicial institutions. In contrast, where public sentiment is consonant with the Court's decision, [as in] *Vriend*, … opinion on the case is more tightly linked to general attitudes that citizens' faith in the courts is not principally the result of agreement with the court's decisions, but a result in faith in the judicial process.

In the light hereof, McLachlin CJ expressed the view that it should be a common belief in ***all*** open and democracratic societies that when all other governmental institutions fail, its citizens should be able to 'count on the fairness of the courts'.[255] In order for a court to achieve this goal, its role in the admissibility assessment should not be aimed at the appeasement of public attitudes. Moreover, the study undertaken by the Canadian Institute for Research on Public Policy, including research undertaken by Canadian commentators,[256] have

[254] Cited by McLachlin CJ. See fn 124 above.

[255] Loc cit. In the South African context, compare the front page news report by Boyle in the *Sunday Times* dated 7 December 2008, entitled "We are gatvol!" The correspondent reports on the outcome of the annual Reconciliation Barometer complied by the Institute for Justice and Reconciliation, which concludes as follows: "Public confidence in churches and the media has remained stable over the past two years, but trust in political and governmental institutions – from the presidency, parliament and provincial government to the Human Rights Commission and the Constitutional Court – is down by around 20%". It must be emphasised that the exclusion of unconstitutionally obtained evidence is not cited as a reason for the decline of public confidence in the Constitutional Court.

[256] See Bryant et al (1990) 2 *CBR* 1; Gold et al (1990) 1 *Supreme Court LR* 555.

indicated that no evidence exists that the exclusion of unconstitutionally obtained evidence in circumstances when the public at large would be opposed to such exclusion, necessarily leads to negative public perceptions of the justice system. It is submitted that no such evidence exists in the South African context either.

What really matters is whether the public perceives the judiciary as an independent institution which enforces the law without fear, favour or prejudice. In a word, South Africans should have faith in the impartiality of the judiciary. The current dilemma faced by the South African judiciary where a senior judge of the High Court allegedly attempted to influence the outcome of a case pending before the Constitutional Court does not enhance this perception.[257]

[257] See *Thint* (fn 164 above) at par 4-6, more particularly par 4, where Langa CJ refers to this alleged disreputable occurrence in the following terms: "After judgment was reserved in these cases on 13 March 2008, certain events occurred that resulted in a complaint being lodged with the Judicial Services Commission (JSC) by judges of this Court. The complaint was against the alleged conduct of a Judge from one of the High Courts, the basis of which was that he had allegedly tried improperly to influence two Judges of this Court to decide these cases in favour of one of the parties in these cases. It is now common cause that the High Court Judge did visit the Judges of this Court. There is a dispute abouth the content of the discussions that took place during the visits. The High Court Judge has in turn lodged a counter-complaint against Judges of the Constitutional Court alleging improper conduct on their part which amounted to a violation of his constitutional rights. The basis of his complaint is the issuing by the Judges of this Court to the media of a statement about their complaint to the JSC, which is also common cause". The Witwatersrand Local Division of the High Court has subsequently held that the Constitutional Court judges have infringed the rights of the relevant senior judge by disclosing details of the alleged attempt to influence them before reporting the matter to the JSC. The complaint against the senior judge is pending before the JSC. Mkhabela reports in the *Sunday Times* newspaper, dated 7 December 2008, at 4, and entitled "Special deal could end judges' fight", that this dispute may soon be settled out of court. See also the newspaper article by Mkhabela in the *Sunday Times*, 24 October 2008 at 4, entitled "We won't mess with Constitution". The journalist reports on a meeting recently addressed by the Deputy President of the ANC (and current President of South Africa), held near Stellenbosch. Attendees raised their concern regarding the independence of the judiciary during the post-Mbeki period.

However, it may be argued that the fact that the alleged unwarranted conduct was exposed instead of covered up constitutes sufficient evidence that South African courts do exercise their duties without fear, favour or prejudice.[258] Then again, calls that the charges against the President of the African National Congress be abandoned, in the absence of any legal foundation, may have a negative impact on the rule of law and consequently, the integrity of the justice system.[259] Plato cautioned against the setting of such precedents when he reasoned as follows:[260]

> Where the law is overruled or obsolete, I see destruction hanging over the community; where it is sovereign over the authorities and they its humble servants, I discern the presence of salvation and every blessing Heaven sends on a society.

The perception should not be created among members of the public that the 'authorities' are entitled to special treatment by the criminal justice system. The

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[258] This concern was highlighted in *Thint* (fn 169 above) at par 6, where Langa CJ deemed it necessary to mention that the Constitutional Court judgment in that case was not influenced by the events that preceded the judgment, as follows: "It is however important to emphasise that the cases have been considered and decided in the normal way, in accordance with the dictates of our Oath of Office and in terms of the Constitution and the law, without any fear, favour or prejudice"; see also *Langa v Hlope* (697/08) [2009] ZASCA 36 (31 March 2009) at par 50, ("*Hlope*").

[259] See the article by Malefane, Mafela & Mkhabela in the *Sunday Times*, dated 7/9/2008 at 4, entitled "Cosatu warns of strike if Zuma charges are not dropped". The acting National Director of Public Prosecutions (NDPP) has, on 7 April 2009, withdrawn the charges against Mr Zuma. The reason given for the withdrawal of the charges is that the criminal proceedings had been tainted by the conduct of a member of staff, previously employed by the NDPP. (*e-News Channel* Special broadcast at 11h30, on 7 April 2009).

[260] Quoted by Mahomed DP in a speech reported in [1989] 5 *Lesotho LJ* 1 at 2. Mahomed DP was the first Deputy Chief Justice in South Africa after 1994.

law, as dictated by the Constitution and the rule of law, must be general in its application.[261]

The public should accept that even members of the judiciary are servants of and subject to the Constitution: They should be content that any decision made by a judge on the admissibility of unconstitutionally obtained evidence does not reflect his or her personal views on the issue, but rather, the long-term values sought to be protected by the Constitution. Research has revealed that the police do change their practices to avoid the risk of exclusion.[262] Hence, the reasons for exclusion or admission should be conveyed to the police by means of, for example, continued education. In other words, the educational role of, not only the courts, but also government and civil society organisations, should be harnessed.

Significant steps have already been taken by the courts to explain to the general public the reasons why an accused has been convicted or acquitted: The Constitutional Court and the Supreme Court of Appeal have, for example, established websites that include media summaries of their judgments, which explain in layman's terms the reasons for their judgments,[263] and a number of significant criminal court judgments have been televised on national television. The success achieved by the educational role, undertaken by the South African government in relation to discrimination based on sexual orientation, confirms

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[261] Ibid at 3.

[262] Uchida & Bynam (1991) 81 *J Crim L & Criminology* 1034; Moore (1992) *Osgoode Hall LJ* 547; Stuart 1998 11 *SACJ* 325; compare Mahoney (fn 54 above) at 448, who argues that in terms of the current approach to s 24(2), "tainted evidence must be excluded if its admission into evidence will bring the administration into disrepute", regardless of the effect that exclusion may have on future police misconduct.

[263] See the websites of the Constitutional Court at www.constitutionalcourt.org.za; and the Supreme Court of Appeal at www.supremecourtofappeal.gov.za.

the validity of this submission: gay and lesbian rights were initially perceived by the public at large as unthinkable – nowadays, the application of fundamental rights to gays and lesbians are not generally frowned upon by the South African public at large.[264]

We, as South Africans, must be concerned about the perceived high rate of serious crime. Would it, for this reason be justifiable to ordinarily admit evidence, essential for a conviction on a serious charge, despite the fact that it had been obtained in deliberate violation of the constitutional rights of the accused? It is assumed that right-thinking South Africans would not approve of it. If evidence should readily be admitted under these circumstances, then none of us would be ensured that the rights contained in the Bill of Rights are meant to protect all of us from unwarranted governmental conduct. It is submitted that the rational solution to the problem of the high rate of serious crime should be found in the effective policing and prosecution of crime, rather than the condonation (and implied encouragement) of unconstitutional police conduct.[265] Yet the courts of South Africa have, on a number of occasions, related their decisions on the admissibility of unconstitutionally obtained evidence to the high rate of serious

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[264] See, for example, the television broadcast by SABC TV1 on 24 November 2008 at 23h00, entitled "Counting the booty – it's okay to be gay". The program probed public attitudes towards gay marriages or unions, as well as the right of gay persons to adopt minor children. The title is self-explanatory as to the outcomes of the evaluation.

[265] See Plasket (1998) 11 *SACJ* 173 at 195; see further the *Rapport* newspaper dated 22 September 2007, entitled "Kry nuwe minister vir beter strafregstelsel", by Mapiloko, Lubisi and Sefara, at www.news24.com/Rapport/Nuus/0,,752-795_2188914,00.html. (Accessed on 25 May 2008). Mr DeLange, the current Deputy Minister of Safety and Security, has recommended a crime-fighting plan to effectively curb the problem of the high crime rate by, among others, co-ordinating the functions of the justice cluster; see also the article by Mkwanazi in Independent Online, entitled "Skilled staff key to new crime initiative", at www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn2007111208544567, accessed on 2007/11/26.

crime.[266] Supporters of this line of reasoning will be relieved – provided these promises are faithfully implemented – that the South African government has identified the reasons for the high rate of serious crime and has designed a crime-fighting plan, aimed at reducing the level of crime.

The Deputy Minister of Safety and Security ascribes the high rate of serious crime in South Africa to incorrect governmental policy decisions, unprofessionalism in the law enforcement agencies, as well as a lack of essential resources and accountability.[267] The solutions to these problems should preferably be implemented sooner rather than later. A local television news channel commented that a lack of political will to reduce the high rate of serious crime, rather than the introduction of the Constitution, is the cause of this evil.[268]

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[266] See, for example, *Ngcobo* (fn 131 above); *Shongwe* (fn 11 above).

[267] See the newspaper article by Steenkamp in the *Rapport* (fn 10 above), where the Deputy Minister of Safety and Security acknowledged that the government erred by not employing its resources effectively in the fight against crime. He recommended that the police, correctional services and the courts should implement a seven point plan to rectify the current dilemma in the criminal justice system. The flaws in the justice system are, among others, the following: the police should gather evidence relating to the commission of offences – a great number of crime scenes are not inspected by the police; a shortage in resources which prevents police experts to effectively execute their duties; the policing services do not employ a sufficient number of forensic experts to assist in the investigation of crime; only 15% of the members of the police services are tasked with the investigation of crime; the backlog in criminal matters in the magistrates courts are extremely high; the average session of regional courts is three and-a-half hours hours per day. He concludes by recommending that the government should develop a professional attitude in its law enforcement agencies in order to effectively fight crime. Compare Van Dijkhorst *Consultus* (1998) Vol II, 136.

[268] 'The Big Debate' *e-News Channel* 17/04/09 at 11h00; see also the report by Human Rights Watch, issued during the third week of January 2009, and cited by Fabricius, the foreign news editor of the *Pretoria News* newspaper, dated 16 January 2009 at 7, entitled 'Rights group criticises SA government'. He quotes as follows from the report: "Poverty, unemployment, gender-based and xenophobic violence, and ***crime*** remain significant barriers to the enjoyment

The government has recently, as part of a longer-term solution, called upon the public at large to make recommendations for the review of the criminal justice system.[269]

The regular excuse of unconstitutional police conduct merely because the evidence is essential for a conviction on serious charges should be avoided for another important reason: Such an approach would only enhance the public perception (which existed before 1994),[270] that the police are above the law.[271] To be sure, such a state of affairs runs counter to the 'never again' principle, which was endorsed by the Constitutional Court as one of the fundamental tools that should be employed to interpret the provisions of the Bill of Rights.[272]

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of human rights; the government's commitment to address them is inadequate". (Emphassis added).

[269] See the special feature in the *Sowetan* newspaper, 29 August 2008; see also the the website of the Department of Justice at www.doj.gov.za, calling on the public to make such recommendations.

[270] Complaints against members of the SAPS investigated by the investigative journalist, Patta, and televised on '3rd degree Plus', *e-News Channel TV* on 21 August 2008 at 23h00, led to her concluding that the pattern of police misconduct creates the perception that the police are above the law.

[271] See De Villiers (ed) *The Truth and Reconciliation Commission of SA Report* (Vol 6, 2003).

[272] *Ferreira* (fn 221 above) at par 257, fn 22 of the separate but concurring judgment delivered by Sachs J.

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ANNEXURES

A. Selected provisions of the South African Interim Constitution

B. Selected provisions of the South African Constitution, 1996

C. Selected provisions of the Charter

D. Heads of Argument of Professor Stuart in *R v Grant*

ANNEXURE A

The South African Bill of Rights

CHAPTER 3

(OF THE REPUBLIC OF SOUTH AFRICA CONSTITUTION ACT 200 OF 1993)

7 Application

(1) This Chapter shall bind all legislative and executive organs of state at all levels of government.

(2) This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution.

(3) Juristic persons shall be entitled to the rights contained in this Chapter where, and to the extent that, the nature of the rights permits.

(4)

(a) When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.

(b) The relief referred to in paragraph (a) may be sought by -

(ii) a person acting in his or her own interest;

(iii)an association acting in the interests of its members;

(iv)a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;

(v) a person acting as a member of or in the interest of a group or class of persons; or

(vi)a person acting in the public interest.

13 Privacy

Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches or his or her person, home or property, the seizure of private possessions or the violation of private communications.

22 Access to court

Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.

25 Detained, arrested and accused persons

(1) Every person who is detained, including every sentenced prisoner, shall have the right –

(a) to be informed promptly in a language which he or she understands of the reason for his or her detention ;

(b) to be detained under conditions consonant with human dignity, which shall include at lest the provision of adequate nutrition, reading material and medical treatment at state expense ;

(c) to consult with a legal practitioner of his or her choice, to be informed of this right promptly and, where substantial injustice would otherwise result, to be provided with the services of a legal practitioner by the state;

(d) to be given the opportunity to communicate with, and to be visited by, his or her spouse or partner, next-of-kin religious counselor and a medical practitioner of his or her choice; and

(e) to challenge the lawfulness of his or her detention in person before a court of law and to be released if such detentions unlawful.

(2) Every person arrested for the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right-

(a) promptly to be informed, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;

(b) as soon as it is reasonably possible, but not later than 48 hours after the arrest or if the said period of 48 hours expires outside ordinary court hours or on a day which is ot a court day, the first court day after such expiry, to be brought before an ordinary court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be released;

(c) not to be compelled to make a confession or admission which could be used in evidence against him or her; and

(d) to be released from detention with or without bail, unless the interests of justice require otherwise

(3) Every accused person shall have the right to a fair trial, which shall include the right-

(a) to a public trial before an ordinary court of law within a reasonable time after having been charged;

(b) to be informed with sufficient particularity of the charge;

(c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;

(d) to adduce and challenge evidence, and not to be a compellable witness against himself or herself;

(e) to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result to be provided with legal representative at state expense, and to be informed of these rights;
(f) not to be convicted of an offence in respect of any act or omission which was not an offence at the time it was committed, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;
(g) not to be tried again for any offence of which he or she was previously been convicted or acquitted;
(h) to have recourse by way of appeal or review to a higher court than the the court of first instance;
(i) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her; and
(j) to be sentenced within a reasonable time after conviction.

ANNEXURE B

The South African Bill of Rights

CHAPTER 2

(OF THE REPUBLIC OF SOUTH AFRICA CONSTITUTION ACT, 1996)

7 Rights

(1) This Bill of Rights is a comerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democractic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36 or elsewhere in the Bill.

8 Application

(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or juristic person if and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), court –

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

9 Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

34 Access to courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

35 Arrested, detained and accused persons

(1) Everyone who is arrested for allegedly committing an offence has the right-

(a) to remain silent ;

(b) to be informed promptly –

(c) of the right to remain silent; and

(d) of the consequences of not remaining silent ;

(e) not to be compelled to make any confession or admission that could be used in evidence against that person ;

(f) to be brought before a court as soon as reasonably possible, but not later than –

I. 48 hours after the arrest; or

II. the end of the first court day after the expiry of the 48 hours expire outside ordinary court hours or on a day which Is not an ordinary court day;

(g) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and

(h) to be released from detention if the interests of justice permit, subject to reasonable conditions.

(2) Everyone who is detained, including every sentenced prisoner, has the right-

(a) to be informed promptly of the reason for being detained ;

(b) to choose, and to consult with, a legal practitioner, and to be informed of his right promptly ;

(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly ;

(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released ;

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and

(f) to communicate with, and be visited by, that person's –

(i) spouse or partner ;

(ii) next of kin ;

(iii) chosen religious counselor; and

(iv) chosen medical practitioner.

(3) Every accused person has a right to a fair trial, which includes the right-

(a) to be informed to the charge with sufficient detail to answer it;

(b) to have adequate time and facilities to prepare a defence ;

(c) to a public trial before an ordinary court;

(d) to have their trial begin and conclude without unreasonable delay;

(e) to be present when being tried;

(f) to choose, and be represented by a legal practitioner, and to be informed of this right promptly;

(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

(i) to adduce and challenge evidence;

(j) not to be compelled to give self-incriminating evidence;

(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;

(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;

(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(o) of appeal to, or review by, a higher court.

(4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.

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

36 Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

(a) the nature of the rights;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

38 Enforcement of rights

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 or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members.

39 Interpretation of Bill of Rights

(1) When interpreting the Bill of Rights, a court, tribunal or forum-

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The 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.

ANNEXURE C

The Canadian Charter of Rights and Freedoms

1 Rights and freedoms in Canada

The Canadian Charter of Rights and Frredoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

7 Life, liberty and security of person

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8 Search or seizure

Everyone has the right to be secure against unreasonable search or seizure.

9 Detention or imprisonment

Everyone has the right not to be arbitrarily detained or imprisoned.

10 Arrest or detention

Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

11 Proceedings in criminal matters

Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) except in an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission, unless at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognised by the community of nations;

(h) if finally acquitted of the offence, not to be tried again for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishmentfor the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

24(1) Enforcement of guaranteed rights and freedoms

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.

24(2) Exclusion of evidence that would bring the justice system into disrepute

Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring bring the administration of justice into disrepute.

ANNEXURE D

(HEADS OF ARGUMENT OF PROFESSOR D STUART, FILED OF RECORD IN THE SUPREME COURT OF CANADA IN THE MATTER OF *R v GRANT*, IN ITS ORIGINAL FORM)

PART I - STATEMENT OF FACTS

1. The Canadian Civil Liberties Association ("CCLA") files its Factum and Book of Authorities pursuant to the Order of Rothstein J. dated January 2, 2008. The CCLA accepts the facts as outlined in paragraphs 3 to 4 of the Appellant's factum.

PART II – ISSUES

2. #1 Should the Court simplify the principles for excluding of evidence obtained in violation of the *Charter* under section 24(2)?

#2 Should the meaning of "detention" under section s. 9 be extended?

PART III - STATEMENT OF ARGUMENT

Overview

3. The C.C.L.A. respectfully submits that

(1) The Court should adopt a simplified, discretionary approach to the exclusion of evidence under section 24(2) of the *Charter* applying to any *Charter* breach, which abandons the overly complex and unsatisfactory distinction between conscripted and non-conscripted evidence and also the doctrine of discoverability;

(2) The Court should decide that the following general principles it unanimously adopted for non-conscripted evidence cases in *R.* v. *Buhay* should apply to all *Charter* breaches:

(a) There are no rules of automatic exclusion or inclusion;
(b) Deference must be given to section 24(2) rulings of trial judges; and
(c) The central consideration is the seriousness of the breach rather than the reliability of the evidence or the seriousness of the offence;

(3) Instead of using the labels of police good or bad faith, the Court should state clearly that a *Charter* breach will be considered *especially serious* where the police have intentionally breached a *Charter* standard and *serious* where the breach was negligent, and that police misperception or ignorance of *Charter* standards will only mitigate a *Charter* breach where the Crown has shown due diligence by the police in their attempt to comply with *Charter* standards; and

a. The Court should re-affirm that psychological compulsion triggers section 9 protections in both vehicle and pedestrian stops AND decide that detention occurs where police suspicion reaches the point of attempting to obtain incriminating evidence.

ISSUE #1 - A SIMPLIFIED, DISCRETIONARY APPROACH TO SECTION 24(2) SHOULD BE APPLIED TO ALL *CHARTER* BREACHES

(1) Abandoning the Conscripted/Non-conscripted Dichotomy and the Doctrine of Discoverability

4. It is respectfully submitted that the distinction between conscripted and non-conscripted evidence drawn by the Supreme Court in *R.* v. *Collins* by Chief Justice Lamer as a "matter of personal taste", and re-affirmed by Justice Cory in *R.* v. *Stillman,* has proved to be unsatisfactory and overly complex, and should be abandoned.

R. v. Collins, [1987] 1 S.C.R. 265 at para. 36
R. v. *Stillman* [1997] 1 S.C.R. 607 at para., 80

5. For several years the effect of *Stillman* was the drawing of a bright line: conscripted evidence was almost always excluded and non-conscripted evidence almost always included. Clearly that is far from what the framers intended given the legislative history and the discretionary wording of s. 24(2).

R. v. Stillman supra per McLachlin J. (dissenting)
R. v. Orbanski; R. v. Elias [2005] 2 S.C.R. 3 (per Lebel and Fish JJ.)

6. A satisfactory definition of conscription has proved elusive. In *Stillman*, Justice Cory describes conscription broadly as a process in which the accused is "compelled to participate in the creation or discovery of the evidence," and also as a narrow category approach of compelled incrimination "by means of a statement, the use of the body or the production of bodily samples". Courts now tend to rely on the category test when defining conscription. Especially in the case of statements this leads to strange results. Where a statement by accused to the police was obtained in violation of section 10(b) but there was no issue of voluntariness in what sense can the accused be said to have been compelled?

R. v. Stillman supra at paras. *75, 80*

7. In the view of most academics and many judges, the distinction between conscripted and non-conscripted evidence is overly complex and arbitrary. Apart from the difficult issue of definition, different approaches must be followed when considering conscripted and non-conscripted evidence, even in the same trial. Furthermore a breach relating to conscripted evidence is not necessarily more serious than a breach relating to non-conscripted evidence. There is no presumption of exclusion, for example, where a drug squad ransacks a private dwelling without bothering to get a warrant in deliberate violation of s. 8. Exclusion should not be based on artificial categories. Instead, what should be at stake is the integrity of the justice system in admitting evidence obtained in breach of the *Charter* where the breach was serious.

8. In the Court below, Justice Laskin's decision in *R.* v. *Grant* breaks new ground in deciding that it is appropriate in conscripted cases to look at the degree of trial unfairness. Given the reliability of the evidence and the nature of the police conduct the impact on trial fairness was held to lie at the less serious end of the trial fairness spectrum. It seems odd that a judge can acknowledge that a trial is even somewhat unfair and yet admit the evidence. The problem here is of the *Stillman* majority's making in their over-inflated use of the phrase "fairness of the trial".

R. v. *Grant* (2006) 38 C.R. (6th) 58 (Ont.C.A.) at para. 52

9. The doctrine of discoverability set out in *Stillman* allows the second and third *Collins* factors to be considered in conscripted cases where the police would have found the evidence without violating the *Charter*. This adds an obtuse inquiry and does not make sense. Why ask this question at all, other than as a pragmatic device to allow those factors to be considered in some cases? Questions of legal remedy should turn on the evidence before the trier of fact, not on what might have been the reality. Furthermore the fact that the police could have found the evidence without breaching the *Charter* makes the violation more serious and should therefore more likely to result in exclusion. This proposition is accepted in *Collins* and re-asserted in *Buhay* but is often overlooked by lower courts, to the detriment of accused. The doctrine would be superfluous if the distinction between conscripted and non-conscripted evidence were to be abandoned.

R. v. *Collins* [1987] 1 S.C.R. 265 at para. 38
R. v. *Buhay* [2003] 1 S.C.R. 63 at para 63

(2) The Principles Articulated in *R.* v. *Buhay* Should Apply to All *Charter* Breaches

10. The Court should apply the general principles for s. 24(2) it unanimously adopted for non-conscripted cases in *R.* v. *Buhay* to all cases where there has been a *Charter* breach:

(a) There are no rules of automatic exclusion or inclusion;
(b) Deference must be given to s. 24(2) rulings of trial judges; and
(c) The central consideration is the seriousness of the *Charter* breach rather than the reliability of the evidence or the seriousness of the offence.

R. v. *Buhay supra*

11. In *R.* v. *Buhay*, Justice Arbour provided a tightly reasoned re-statement of the current position of the Court respecting exclusion of non-conscripted evidence:

> Section 24(2) is not an automatic exclusionary rule [...]; neither should it become an automatic inclusionary rule when the evidence is non-conscripted and essential to the Crown's case.

The combined effect of these pronouncements – deference to trial judges and no automatic inclusion – should, and has, led to greater exclusion of non-conscripted evidence.

R. v. *Buhay supra* at para. 71

12. The C.C.L.A. respectfully submits that the Court should make it clear that the central consideration is the seriousness of the breach rather than the reliability of the evidence or the seriousness of the offence. The criteria used to determine the seriousness of the breach should include those long established by the Supreme Court starting in *Collins* and crystallised in *Law* and *Buhay*. The Court should change the presumption that conscripted evidence should be excluded and instead declare that any police compulsion in obtaining evidence in violation of the *Charter* will make the violation more serious.

R. v. *Law* [2002] 1 S.C.R. 227
R. v. *Buhay supra*

13. In his analysis of trial fairness and the second and third *Collins* factors, Laskin J.A. in *Grant* emphasises the reliability of the evidence. This focus is not apparent in the Court's rulings to exclude non-conscripted evidence of drugs in both *Buhay* and *Mann*. Justice Laskin contrasts cases of statements obtained in violation of s. 10(b), which he says raise reliability issues. There is, however, much case law excluding confessions for 10(b) violations where it was clear the statement was voluntary and, therefore, there was likely no issue of reliability. The right focus is on whether the breach was serious.

R. v. *Grant supra* at paras. 53-54 and 65
R. v. *Buhay supra*
R. v. *Mann* [2004] 3 S.C.R. 59

14. Since the time of the drafting of the *Charter* in 1982 the C.C.L.A. has consistently urged that there be an effective remedy of exclusion for *Charter* breaches to ensure that *Charter* rights for all are meaningful. The danger of the *Grant* focus on reliability and seriousness of the offence is that it there will be far less exclusion of evidence found following *Charter* violations. This will considerably diminish the importance of carefully balanced *Charter* standards for policing that the Court has taken great pains to put in place since the entrenchment of the *Charter* in 1982.

R. v. *Grant supra* at para. 65

15. There are dangers in adopting a test of “proportionality" between the seriousness of the violation and the seriousness of the offence. A criminal trial under a system of entrenched *Charter* rights for accused has to concern itself with the truth of police abuse and disregard of *Charter* standards, not just the truth of the accused’s guilt. Without the remedy of exclusion in cases where the court considers the crime serious there will be a large number of criminal trials where the *Charter* will cease to provide protection. There will be a significant risk that the public will see no sanction for *Charter* violations. This could create public cynicism regarding the integrity of our system of law enforcement. There cannot be a *de facto* two-tier system where one zone is *Charter*-free and the police ends always justify the means. There must be a real risk of exclusion for serious *Charter* breaches even in cases of serious crimes, as the Court has previously determined, for example, even in double murder cases.

R. v. *Burlingham* [1995] 2 S.C.R. 206
R. v. *Evans* [1991] 1 S.C.R. 869

16. Commendably there is resistance by some trial judges to *Grant*, especially at the level of the provincial Courts where the vast majority of criminal trials now occur. As

recognised in *Buhay*, judges at this level of local immersion are in the best position to know on a daily basis whether *Charter* standards are being broken and what remedy is warranted. In excluding, these judges have focussed on the seriousness of the violation and the role of courts as guardians of the *Constitution*. Were the Court to confirm the focus in *Grant* on the reliability of the evidence and seriousness of the offence such rulings would be in error.

> *R.* v. *Buhay supra* at paras. 46-47
>
> *R.* v. *Payne* (2006) 41 C.R. (6th) 234 (Nfld. & Lab. S.C.) at paras. 50-63 (bloody socks seized in violation of ss. 8 and 9) [C.C.L.A. Book of Authorities Tab 1]
>
> *R.* v. *Nguyen* (2007) 45 C.R. (6th) 276 (Ont. C.J.) at paras. 48-49 (roadside breath sample where delay breaching ss.10(a) and (b) [C.C.L.A. Tab 2]
>
> *R.* v. *D.(J.)* (2007) 45 C.R. (6th) 292 (Ont. C.J.) at paras. 76-79, 85-90 (gun and burglary tools in stop of youth in high crime area in violation of sections 8 and 9) [C.C.L.A. Tab 3]
>
> *R.* v. *Champion* (2008) 52 C.R. (6th) 201 (Ont. C.J.) at paras. 46-60 (breathalyser evidence due to breach of s. 10(b) right to consult counsel in private) [C.C.L.A. Tab 4]
>
> *R.* v. *Williams* (2008) 52 C.R. (6th) 210 (Ont. S.C.) at paras. 24-30 (marihuana and crack cocaine found by stop of known drug dealer in violations of ss. 8 and 9) [C.C.L.A. Tab 5]

17. In *R.* v. *B.(L.)* Justice Moldaver of the Ontario Court of Appeal did not have to consider section 24(2), since he found no *Charter* violation, but he indicated that exclusion should only be for egregious police behaviour and that "most Canadians" would not countenance not having a trial on the merits for a person found with a gun. Under this test, exclusion should be rare where the evidence is reliable and the offence serious and should only occur when the community would be shocked. This view was expressly rejected in *Collins*. In the subsequent twenty years of jurisprudence it has only been supported in the dissenting opinion of Justice L'Heureux-Dubé in *Burlingham*. This approach should be clearly rejected again. Otherwise *Charter* standards for policing will become largely meaningless. There must be a sanction for serious *Charter* breaches. Courts must be above law and order politics.

> *R.* v. *B.(L).* (2007) 49 C.R.(6th) 245 (Ont. C.A.) at paras. 80-82
> *R.* v. *Collins supra* at para. 41
> *R.* v. *Burlingham* supra

18. The remedy of exclusion for *Charter* breaches has proved to be an important vehicle to hold agents of the State indirectly and publicly accountable. Where there are patterns of inclusion despite police breaches there will be less incentive for police to take the *Charter* seriously. Those preferring alternative remedies, such as civil suits and police complaints procedures, now bear a heavy burden of demonstrating their comparative efficacy. They have thus far proved to be a poor and low visibility response to systemic problems of police abuse or ignorance of their powers. Police are rarely, if ever, disciplined for *Charter* breaches that uncover evidence of criminality. Civil litigation is expensive, uncertain in outcome, and, if successful, likely to be subject to confidentiality agreements. Civil litigation is highly unlikely where the plaintiff is in prison.

> Data collected by C.C.L.A. [Tab 6]

19. In considering the s. 24(2) remedy Courts must be concerned with the long-term integrity of the justice system if *Charter* standards for accused are ignored and/or operate unequally against vulnerable groups, such as persons of colour and those who are persons. In developing standards for strip searches the majority of the Court in *R*. v. *Golden* took into account Commission findings of over-representation of African Canadians and Aboriginals in the Canadian criminal justice system and likely disproportionality in arrests and searches. This sensitivity should also inform the development of an effective s. 24(2) remedy. The *Charter* is in place to try to ensure that minorities are fairly treated by the State.

> *R*. v. *Golden* [2001] 3 S.C.R. 679 at para. 83
> *R*. v. *Harris* (2007) 49 C.R. (6th) 270 (Ont. C.A.) at para. 63

(3) <u>No Mitigation for Good Faith if No Diligent Effort to Comply with the *Charter*</u>

20. The Court needs to clarify the meaning of good faith on which s. 24(2) rulings so often turn. Instead of using the politically and emotionally charged labels of "good faith" versus "bad faith", the Court should employ the familiar legal concepts of intention and negligence. A *Charter* breach should be considered *especially serious* where the police have *intentionally* breached the *Charter* and *serious* where the police breach was a result of negligence. Police misperception or ignorance of *Charter* standards should only mitigate the breach where they have shown due diligence in their attempt to comply.

21. According to *Buhay*, police good faith must be reasonably based. Justice Arbour, speaking for the full Supreme Court, was concerned that one officer had demonstrated a "casual attitude" to the accused's *Charter* rights and the other "blatant disregard". Neither officer was found to have acted in good faith.

> *R*. v. *Buhay supra* at paras. 59-61

22. According to Justice Laskin in *Grant* there was no bad faith and no institutional indifference to individual rights. Given that the Court decided that the stop was in violation of the *Mann* standards, and that such good faith arguments were not accepted in *Mann* itself, this view is clearly in error.

> *R*. v. *Grant supra* at paras. 62-63

23. In *R*. v. *Washington*, the B.C. Court of Appeal wrestled for almost a year over the question of whether the police had acted in good faith when they conducted a warrantless search of a package found to contain drugs by airport authorities. This contravened the Supreme Court's decision in *Buhay*, handed down six weeks prior to the search. Justice Ryan (Lowry J.A. concurring) for the majority decided that it was reasonable for the police to believe that they had the authority to act and that the evidence should therefore be admitted. Justice Rowles in dissent relied on a comprehensive review of the Supreme Court's dicta that good faith cannot be found where police made an unreasonable error as to a *Charter* standard or were ignorant of it. With Justice Rowles in dissent it is hard to accept that the police in *Washington* showed due diligence in failing to comply with, or know about, the *Buhay* ruling.

R. v. *Washington* (2008) 52 C.R. (6th) 1 (B.C.C.A.) at paras. 115-138) [C.C.L.A.Tab 7]
Stephen Coughlan, "Good Faith and Exclusion of Evidence under the *Charter*" (1992) 11 C.R. (4th) 304 [C.C.L.A. Tab 8]

24. Justice Doherty of the Ontario Court of Appeal has pointed to dangers of labels such as good or bad faith in *R*. v. *Kitaitchuk*:

> Police conduct can run the gamut from blameless conduct, through negligent conduct, to conduct demonstrating a blatant disregard for *Charter* rights […]

and in *R*. v. *Harris*:

> Police misconduct resulting in a *Charter* violation can be placed on a continuum [...] between the two extremes of a good faith error and a blatant disregard for constitutional rights

R. v. *Kitaitchuk* (2002), 4 C.R. (6th) 38 (Ont. C.A.) at para. 41, relying on C. Hill, "The Role of Fault in Section 24(2) of the *Charter*", The *Charter*'s Impact on the Criminal Justice System (1996) p.57)
R. v. *Harris supra* at para. 62

25. It is time to expressly disavow the utility of the politically and emotionally charged labels of good or bad faith, which have produced uncertainty and inconsistency. Judges are very familiar with deciding whether conduct was intentional or negligent. Decisions would likely be more consistent if it was made clear that a breach can only be mitigated where the police made a diligent effort to comply with the *Charter*. We should expect police not to be careless about *Charter* rights. As in the case of the tort of negligent investigation, the standard should be that "police act professionally and carefully, not just to avoid gross negligence"

Hill v. *Hamilton –Wentworth Regional Police Services Board* 2007 SCC 41 at para. 70 (per McLachlin C.J. for the majority)

ISSUE #2 - THE MEANING OF DETENTION SHOULD BE WIDENED

(4) Psychological Detention OR Attempting to Obtain Incriminating Evidence

26. Iacobucci J. remarked in *obiter* for the majority in *Mann* that police cannot be said to "detain", within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for purposes of identification, or even interview and that constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint. It is respectfully submitted that this test of degree is too uncertain and also misses civil liberty concerns about general stop powers. The Supreme Court could not have intended that the careful limits they were placing on investigative detention based on individualized suspicion could be completely bypassed by the current police practice in Toronto, as in *Grant*, of approaching persons on the street, especially young persons and/or persons of colour, getting their names, doing a C.P.I.C. search and then launching into aggressive questioning aimed at incrimination.

R. v. *Mann supra* at para 19
R. v. *D.(J.) supra*
R. v. *Williams supra*

27. The Court should confirm that Ontario Court of Appeal's ruling in *Grant* that the concept of psychological detention applies to both vehicle and pedestrian stops where

there is a reasonable belief that there is no choice but to comply with a police request. Courts should not play down the coercive realities of all exchanges with police.

Sed contra R. v. *B.(L.) supra*

28. The problem with a sole focus on physical or psychological detention is, however, that this leaves one who naively thinks he or she is free to go without *Charter* protection. The test also encourages police to avoid section 9 and 10 rights by delaying arrest, and resorting to such strategies as telling the detainee he or she is free to leave when in fact they are not and are suspected of criminal activity. These concerns would be addressed by an alternative test that detention also occurs where police have a suspicion which has reached the point that they are attempting to obtain incriminating evidence. This was the compromise test carefully articulated by a majority of the Newfoundland Court of Appeal in *R. v. Hawkins.* On the appeal as of right to the Supreme Court this approach was implicitly rejected in the briefest of reasons consisting of a one sentence assertion that the accused was detained. The CCLA respectfully suggests that it is time to fully reconsider.

R. v. *Hawkins* (1992) 14 C.R. (4th) 286 (Nfld. C.A.) at paras. 26-32 [C.C.L.A. Tab 9]; rev'd [1993] 2 S.C.R. 157

PART IV- COSTS

29. The CCLA respectfully requests that there be no order as to costs given the importance of the *Charter* issues at stake.

PART V - ORDER SOUGHT

30. The CCLA respectfully requests the Court to allow the appeal and substitute an acquittal.

31. The CCLA respectfully requests permission to present oral argument for no longer than 20 minutes.

ALL OF WHICH is respectfully submitted, at Kingston, Ontario, this 22nd day of February 2008, by

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Don Stuart
Counsel for the Intervener
The Canadian Civil Liberties Association

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