UNCONSTITUTIONALLY OBTAINED EVIDENCE: TOWARDS A COMPROMISE BETWEEN THE COMMON LAW AND THE EXCLUSIONARY RULE

S E van der Merwe
B Jur LLD
Professor, University of Stellenbosch

1 Introduction

To what extent, if at all, should the law of evidence be employed in the indirect enforcement of rights which are contained in a Bill of Rights? To put the matter differently and with greater precision: Should relevant incriminating evidence obtained in breach of an accused's[1] constitutionally guaranteed rights, be excluded in a court of law which is called upon to determine the guilt or innocence of this very accused? This question[2] will be of crucial importance if the

[1] See generally par 7 321 to 7 332 of the SA Law Commission *Interim Report: Group and Human Rights* Project 58 (1991), hereafter cited as *Report: Group and Human Rights*. The present article is confined to the position of the accused. But it must be pointed out that in par 7 323 of the *Report: Group and Human Rights*, the Commission also dealt with evidence obtained in an unconstitutional manner from persons other than the accused. Article 7(d) of the Commission's proposed bill also provides 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." The position as set out in the Constitution of the Rep of Namibia and in the Bill of Rights proposed by the ANC, is discussed in n 16 *infra*.

[2] Some of the important local academic writings dealing with the *general* issue of improperly, including illegally, obtained evidence are: Hoffmann & Zeffertt *The South African Law of Evidence* 4 ed (1988) 278–281; Skeen "The Admissibility of Improperly Obtained Evidence in Criminal Trials" 1988 *SACJ* 389; Campbell "Illegally Obtained Evidence: A Reappraisal" 1968 *SALJ* 246; Van Rooyen "Lead-in Paper: The Investigation and Prosecution of Crime" 1975 *Acta Juridica* 70 77–81; Paizes "*S v Nel* 1987 (4) SA 950 (W): Improperly Obtained Evidence . . . " 1988 *SACJ* 168; Zeffertt "A Judicial Discretion to Exclude Admissible Evidence" 1970 *SALJ* 402; Zeffertt *Pointing Out* in Kahn (ed) *Fiat Justitia: Essays in Memory of Oliver Deneys Schreiner* (1983) 398. The competing interests which must be considered, have been set out as follows by Lord Cooper in *Lawrie v Muir* 1950 Scots LT 37 39–40: "The law must strive to reconcile two highly important interests which are liable to come into conflict – (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the state to secure that evidence bearing upon the commission of a crime and necessary to enable justice to be done shall not be withheld from courts of law on any mere formal or technical

South African legal system is going to have the much-needed benefit of a Bill of Rights, and all indications are that it will.

It must, from the outset, be noted that the above question ought to be understood, examined and answered in the light of the following:

> "[T]he mission of proceduralists and procedural law has always been the enforcement of rights. I believe there is, however, a most important *new* element in what we now call human rights, an element which justifies the affirmation that *human rights have become the idea of our times*. Through tragic historical experiences, culminating in two world wars triggered by regimes contemptuous of human rights, peoples have come to understand that certain rights are a *sine qua non* for liberty, dignity, and justice. Surely, the human rights philosophy can be traced back to ancient cultures, including the Greek and the Roman which have built the foundations of what we call Western civilisation. Indeed, I would go so far as to affirm that the human rights philosophy has been *the* most important contribution not only of the West, but of humankind generally, to political science and moral philosophy. What is new in our epoch, however, is the full recognition of the insufficiency of a *mere* philosophy of human rights—the recognition, that is, that *adequate machinery and processes* are needed to make those rights effective."[3]

2 The term "exclusionary rule"

This article is confined to the criminal justice system,[4] and I shall use the term "exclusionary rule" in the following sense, namely, that

---

ground. Neither of these objects can be insisted upon to the uttermost. The protection for the citizen is primarily protection for the innocent citizen against unwarranted wrongful and perhaps high-handed interference, and the common sanction is an action for damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand the interest of the state cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods." Peiris "The Admissibility of Evidence Obtained Illegally: A Comparative Analysis" 1981 13:2 *Ottawa LR* 309 310 says that, broadly speaking, "three approaches are possible to the problem: . . . 1. if evidence is relevant, it cannot be excluded on the ground that it was obtained by illegal action; . . . 2. if evidence was obtained by illegal action, it is never admissible; . . . 3. where evidence is procured by illegal action, it is a matter for the trial judge to decide, in his discretion, whether to admit it or not, subject, in cases where the evidence is admitted, to review by an appellate court."

[3] Cappelletti *Human Rights and the Proceduralist's Role* in Scott (ed) *International Perspectives on Civil Justice* (1990) 1–2. (Emphasis in the original.) It is not suggested, and Cappelletti does not claim, that the exclusion of unconstitutionally obtained evidence necessarily provides the answer. I merely quote Cappelletti in order to underline the importance of assessing the exclusion of unconstitutionally obtained evidence in the context of effective enforcement (or, for that matter, effective protection) of fundamental liberties and rights. Paizes "Advances in the Law of Evidence: Reflections on Reading the Fourth Edition of L H Hoffmann and D Zeffertt's The South African Law of Evidence" 1989 *SALJ* 472 477 refers to "the potential in rules of evidence for giving flesh to human rights".

[4] Various countries follow different approaches in civil as opposed to criminal matters. See generally Gard *Jones on Evidence: Civil and Criminal II* 6 ed (1972) 9 and Capelletti & Cohen *Comparative Constitutional Law* (1979) 504–505.

it is a rule which excludes real, documentary and oral evidence unconstitutionally obtained by those officials who are responsible for the prevention, detection, investigation and prosecution of crime.[5] To be sure, this rule has its limitations and qualifications. I shall endeavour to point these out in the course of this article.[6]

3 The issues

According to section 252 of our Criminal Procedure Act 51 of 1977 the law as to the admissibility of evidence which was in force in respect of criminal proceedings on the 30th day of May 1961, shall apply in any case not expressly provided for in the Criminal Procedure Act or any other law. The English common law was in force on 30 May 1961,[7] and in terms of the English common law approach there is *in principle* no bar to the admissibility of relevant evidence obtained in an unlawful manner.[8] The ambit[9] and rationale[10] of our local rule are discussed more fully below.

What should the position be if a Bill of Rights were to enter the picture? Is our present inclusionary approach compatible with a Bill of Rights? In *R v Mabuya*[11] Gardiner JP admitted evidence which had been obtained as a result of (what he assumed, for purposes of argument, had been) an unlawful police search of a private dwelling. But he also made brief reference to the exclusionary rule as it had at that stage been applied in the USA.[12] He remarked:

> "The only authority for . . . exclusion comes from the American courts. There are certain decisions based on the American Constitution which . . . exclude evidence of this nature, but one must bear in mind the sanctity which the Americans attach to their Constitution. We have not that Constitution here, and that authority is not applicable."[13]

It follows that a Bill of Rights will require a fundamental shift in

---

[5] It is obvious that an exclusionary rule in this sense does not seek to promote accurate factfinding. It is, in this respect, akin to rules of exclusion relating to evidential privileges. Evidence is excluded because such exclusion is deemed to serve some other more fundamental interest than ascertaining the material truth. See generally Van Rooyen 1975 *Acta Juridica* 70 79.

[6] See par 8 *infra*, as well as n 122 *infra*.

[7] See generally Schmidt *Bewysreg* 3 ed (1989) 18–21 for some qualifications governing this general statement.

[8] See generally Cross & Tapper *Cross on Evidence* 6 ed (1985) 427–432; Keane *The Modern Law of Evidence* 2 ed (1989) 37–38; May *Criminal Evidence* (1986) par 9–54; Howard, Crane & Hochberg *Phipson on Evidence* 14 ed (1990) par 28-08; Murphy *A Practical Approach to Evidence* 27–32. But see n 23 *infra* for statutory amendments brought about by s 78 of the English Police and Criminal Evidence Act 1984.

[9] See par 4 *infra*.

[10] See par 5 *infra*.

[11] 1927 CPD 181.

[12] At that stage the exclusionary rule in the USA had not yet been extended to cover state trials. See par 7 *infra*.

[13] 182.

(or, to put it at its lowest, a fundamental reappraisal of) our jurisprudential approach to the admissibility of illegally procured evidence. But I also think that it is necessary to be most careful not to accept such a controversial[14] rule like the exclusionary rule unless

[14] The sheer bulk of foreign literature and the heated conflicting arguments put forward therein are, respectively, ample and rowdy testimony to the fact that the exclusionary rule is surrounded by controversy. And the following articles—some of which were unfortunately not available to me—prove this point: Kaplan "The Limits of the Exclusionary Rule" 1974 26 *Stanford LR* 1027; Barrett "Exclusion of Evidence Obtained by Illegal Searches—a Comment on *People vs Cahan*" 1955 43 *California LR* 565; Schrock & Welsh "Up from Calandra: The Exclusionary Rule as a Constitutional Requirement" 1974 59 *Minnesota LR* 251; Plumb "Illegal Enforcement of the Law" 1939 24 *Cornell LQ* 337; Allen "The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties" 1950 45 *Illinois LR* 1; Wingo "Growing Disillusionment with the Exclusionary Rule" 1971 25 *Southwestern LJ* 573; Cox "The Decline of the Exclusionary Rule: An Alternative to Injustice" 1972 4 *Southwestern Univ LR* 68; Peterson "Restrictions in the Law of Search and Seizure" 1957 52 *Northwestern Univ LR* 46; Coackley "Restrictions in the Law of Arrest" 1957 52 *Northwestern Univ LR* 2; Schaefer "The Fourteenth Amendment and the Sanctity of the Person" 1969 64 *Northwestern Univ LR* 1; Inbau "Restrictions in the Law of Interrogations and Confessions" 1958 52 *Northwestern Univ LR* 77; Oaks "Studying the Exclusionary Rule in Search and Seizure 1970 37 *Univ of Chicago LR* 665; Wright "Must the Criminal Go Free if the Constable Blunders?" 1972 50 *Texas LR* 736; Wigmore "Using Evidence Obtained by Illegal Search and Seizure" 1922 8 *American Bar Assoc J* 479; Canon "Is the Exclusionary Rule in Failing Health? Some New Data and a Plea against a Precipitous Conclusion" 1973 62 *Kentucky LJ* 681; LaFave & Remington "Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions" 1965 63 *Michigan LR* 987; Waite "Judges and the Crime Burden" 1955 54 *Michigan LR* 169; Burger "Who Will Watch the Watchman?" 1964 14 *American Univ LR* 1; Ball "Good Faith and the Fourth Amendment: The 'Reasonable' Exception to the Exclusionary Rule" 1978 *Journal of Crim L & Crim* 635; Wasserstrom & Mertens "The Exclusionary Rule on the Scaffold: But Was it a Fair Trial?" 1984 22 *American Crim LR* 85; Anon "The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers" 1987 54 *Univ of Chicago LR* 1016; Burns "*Mapp v Ohio*: An All–American Mistake" 1961 19 *DePaul LR* 80; Silver "The Wiretapping–Eavesdropping Problem: A Prosecutor's View" 1960 44 *Minnesota LR* 835; Duke "Making *Leon* Worse" 1986 95 *Yale LJ* 1405; White "Forgotten Points in the 'Exclusionary Rule' Debate" 1983 81 *Michigan LR* 1273; Loewy "The Fourth Amendment and the Exclusionary Rule as a Device for Protecting the Innocent" 1983 81 *Michigan LR* 1229; Stewart "The Road to *Mapp v Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases" 1983 83 *Columbia LR* 1365; Geller "Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives" 1975 *Washington Univ LQ* 621; France "Exclusion of Improperly Obtained Evidence" 1984 *New Zealand Universities LR* 334; Paulsen "The Exclusionary Rule and Misconduct of the Police" 1961 *Journal of Crim Law, Crim & Pol Science* 255; Heydon "Illegally Obtained Evidence" 1973 *Crim LR* 603; Schlag "Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies" 1982 73 *Journal of Crim L & Crim* 875; Pattendon "The Exclusion of Unfairly Obtained Evidence in England, Canada and Australia" 1980 29 *International & Comparative LQ* 664; Cappelletti "A Playful Dialogue of the Skeptic, Lady and Sir Absolutist, and the Relativist on the Exclusionary Rule and Abortion (and Human Understanding)" 1988 21 *Univ of California Davis LR* 979; Driscoll "Excluding Illegally Obtained Evidence in the United States" 1987 *Crim LR* 553; Loewenthal "Evaluating the Exclusionary Rule in Search and Seizure" 1980 9 *Anglo–American LR* 238; Morris "The Exclusionary Rule, Deterrence and Posner's Economic Analysis of the Law" 1982 57 *Washington LR* 647; McGarr "The Exclusionary Rule: An Ill Conceived and Ineffective Remedy" 1961 52 *Journal of Crim Law, Crim & Pol Science* 266; McCants "Should 'Good Faith' be an

one is satisfied that it has—against the immediate backdrop of a Bill of Rights—a sound jurisprudential basis and, most importantly, that it can and does work in practice. I am partial to the cautious approach which the high court of Namibia adopted in *S v Minnies*.[15] In this decision Du Toit AJ, faced with a problem involving the interpretation of article 12(1)(f)[16] of the Constitution of the Republic of Namibia, referred for comparative purposes to the exclusionary rule as presently applied in the USA:

> "The American approach has been formulated by judicial interpretation of the United States Constitution and in particular the Fourth, Fifth and Fourteenth Amendments of it. *A Judge sitting in a different environment with different laws should obviously not seek to draw too many analogies.* But what is instructive in this and other American decisions is on the one hand the far-reaching judicial protection against police abuses, based on constitutional rights, and on the other hand the accompanying awareness that criminality must not be fostered by too great an inhibition of police investigation. These competing values obviously transcend national boundaries. *A Court must evaluate them in the light of the conditions and circumstances existing in its own jurisdiction from time to time, and the facts of the case before it.*"[17]

I shall attempt to address the following issues:

(a) Must a Bill of Rights necessarily be "reinforced" or be backed up by an exclusionary rule which, obviously, differs materially from our present approach?[18]

(b) If the answer to (a) above is in the affirmative, the following problem arises: Should there be a rigid exclusionary rule

---

Element of the Inevitable Discovery Exception to the Exclusionary Rule?" 1984 17 *Creighton LR* 1123; Coutts "Admission of Evidence Illegally Obtained" 1984 48 *Journal of Crim Law* 174; Bennett "Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule" 1973 20 *UCLA LR* 1129. Kamisar, a spirited and forceful proponent of the exclusionary rule, has also written several articles, eg, "Does (Did) (Should) the Exclusionary Rule Rest on a 'Principled Basis' rather than an 'Empirical Proposition'?" 1983 16 *Creighton LR* 565; "Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment?" 1978 62 *Judicature* 66; "'Comparative Reprehensibility' and the Fourth Amendment Exclusionary Rule" 1987 86 *Michigan LR* 1; "The Exclusionary Rule in Historical Perspective" 1979 62 *Judicature* 337.

[15] 1991 1 SACR 335 (Nm).

[16] The relevant part of this article provides as follows: "No persons shall be compelled to give testimony against themselves . . . and no court shall admit in evidence against such persons testimony which has been obtained from such persons in violation of Article 8(2)(b) hereof." A 8(2)(b) provides that no persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. It is clear that the Namibian exclusionary rule is much narrower than the one proposed by the SA Law Commission. See n 1 *supra*. But this does not necessarily mean that the Namibian courts are inevitably barred from developing their own exclusionary rule alongside the one which appears in the Constitution. A 22 of *A Bill of Rights for a New South Africa* as proposed by the ANC provides as follows: "No evidence obtained through torture or cruel, inhuman or degrading treatment shall be admissible in any proceedings." See *A Working Document by the ANC Constitutional Committee* (1990) 5. This proposed article creates a constitutional exclusionary rule but is certainly no bar to the judicial creation of a wider exclusionary rule.

[17] 370g–h (my emphasis).

[18] See generally par 7 *infra*.

rendering inadmissible all unconstitutionally obtained evidence, or should there be a qualified[19] exclusionary rule?[20]

(c) Finally: Should an exclusionary rule—whether rigid or qualified—be written into a Bill of Rights?[21] Or should we follow the American approach, leaving it to the courts to develop[22] their own exclusionary rule if they should indeed experience the need for such a rule?

4 The common law rule governing evidence secured by unlawful means (the inclusionary rule)

It has already been stated that our common law rule—it might be more accurate to say "Anglo-South African rule"[23]—governing the admissibility of evidence gleaned in an unlawful manner, embodies a rather strict inclusionary approach. It is hereafter called the "inclusionary rule". In 1955 the Privy Council concluded that relevance is the test, and that the court should not be concerned with the manner in which the evidence was procured.[24]

In *S v Nel*[25] the gist of our inclusionary rule was explained as follows:[26] Evidence obtained in an unlawful manner can only be excluded where, first, the accused had been compelled to provide evidence against himself and, secondly, where the evidence had been obtained by duress from an accused.[27] In this case the court admitted evidence of certain private but "tapped" telephone conversations, despite the fact that the prosecution had failed to prove that proper authorization for the interception of these conversations had been obtained in terms of section 118A of the Post Office Act 44 of 1958. The decision in *S v Nel* can hardly be reconciled with a vigorous due process system, and much more difficult will the attempt at

---

[19] I am referring to an exclusionary rule which is qualified in the sense that the court is given a discretion, to be exercised in terms of guidelines determined by the Constitution. See, eg, the position in Canada as discussed in par 9 *infra*.

[20] See par 8 9 and 10 *infra*.

[21] See par 10 *infra*.

[22] See par 7 *infra*.

[23] We are not bound by post-1961 English decisions like *R v Sang* 1980 AC 402. The English legislature has also amended the English common law: s 78 of the Police and Criminal Evidence Act 1984 provides that a court may exclude evidence on which the prosecution proposes to rely if it appears to the court that, having regard to all the circumstances, including the circumstances in which such evidence was obtained, the admission of such evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. See Skeen 1988 *SACJ* 389 400–401 for a discussion of s 78.

[24] *Kuruma, Son of Kaniu v R* 1955 AC 197 203. At 204 Lord Goddard added a little rider: "No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of evidence would operate unfairly against the accused." See generally Skeen 1988 *SACJ* 389 974–400 for the English courts' subsequent restrictive interpretation given to this rider.

[25] 1987 4 SA 950 (W).

[26] See also Skeen 1988 *SACJ* 389 404.

[27] But see Paizes 1988 *SACJ* 168 for certain important qualifications which should be added to *S v Nel supra*.

reconciliation be in the context of a Bill of Rights which seeks to guarantee the right to privacy.

Of course, in *S v Nel* the court had to decide the matter on the basis of our inclusionary rule and without the advantage of a Bill of Rights. A Bill of Rights could possibly have allowed room for adopting an exclusionary rule. Or a Bill of Rights could have provided, in so many words, for the exclusion of such evidence.

The decision in *S v Nel* is a correct interpretation of our present position, even though there are also several earlier decisions which seem to indicate the contrary.[28]

The inclusionary approach is also to some extent reflected in our Criminal Procedure Act 51 of 1977, most notably section 225(2) as read with section 37.[29] Section 37 contains, *inter alia*, elaborate provisions regulating the power of police officials to ascertain the "prints and bodily appearance" of an accused or suspect who has been arrested. But there are also important limitations. Section 37(1)(c) provides, for example, that no police official shall take a blood sample, and that no male police official shall "make any examination of the body" of a female accused or suspect. So far, so good. But the rub lies in section 225(2). This section provides, *inter alia*, that evidence shall not be inadmissible "*by reason only thereof*"[30] that the bodily mark, characteristic, feature, condition or appearance in question was not ascertained in accordance with the provisions of section 37. It may therefore be said that the legislature has directed South African courts to ignore, for purposes of evidential admissibility, the very fact that the evidence was procured as a result of pre-trial illegalities committed by police officials in their ascertainment of the bodily features of an accused. It would seem as if the purpose of section 225(2) was to eliminate decisions like *R v Maleleke*[31] and *Goorpurshad v R*.[32]

---

[28] See generally *Coleman v R* 1907 TS 535; *Goorpurshad v R* 1914 NLR 87; *R v Sulski* 1935 TPD 292.

[29] It seems as if the controversy surrounding s 218 of the Criminal Procedure Act 51 of 1977 has now been resolved by the Appellate Division in *S v Sheehama* 1991 2 SA 860 (A). A "pointing out" not made freely and voluntarily, is inadmissible in evidence. See also *S v Minnies* 1991 1 SACR 355 (Nm) where Du Toit AJ had the benefit of the Namibian Constitution in resolving the matter. See also generally Schwikkard "Pointing Out and Inadmissible Confessions" 1991 *SACJ* 318.

[30] My emphasis. Du Toit, De Jager, Paizes, Skeen & Van der Merwe *Commentary on the Criminal Procedure Act* (1987, as revised) 3-3 suggest that s 225(2) is not an impediment in the way of an argument that there might be other grounds for exclusion, eg, considerations of public policy. It is extremely doubtful whether our courts would, eg, admit the results of a blood sample taken by a police official in breach of the proviso to s 37(1)(c). Admission of such evidence would, I submit, offend public policy.

[31] 1925 TPD 491.

[32] 1914 NLR 87.

5 The rationale of the inclusionary rule

The argument in favour of the inclusionary rule is essentially—if not entirely—pragmatic. It runs along the following lines:

— The end justifies the means.[33]

— Two wrongs do not make a right.[34]

— The *probative value* of evidence is not impaired by the unlawful method employed in acquiring such evidence;[35] and the *relevance* of such evidence cannot be affected by the mere fact that it was unlawfully procured.

— The exclusionary rule necessarily requires an investigation and adjudication of collateral issues, shifting the focus of the trial from an enquiry into the guilt or innocence of the accused to an enquiry into the conduct of the police. The true issues get blurred.[36]

— There are sufficient (other) remedies available to an accused whose constitutional or common law rights have been violated.[37]

— The police should not be "handcuffed" in their detection and investigation of crime.

— Policing is a social service aimed at protecting society; and, for purposes of effective law enforcement, society must of necessity tolerate illegal police conduct.

---

[33] This callous argument can immediately be rejected on the basis of what Brandeis J said in a dissenting judgment in *Olmstead v United States* 277 US 438 485 (1928) (my emphasis): "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws the existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. *To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes to secure the conviction of a private criminal—would bring terrible retribution.* Against that pernicious doctrine this court should resolutely set its face."

[34] Wigmore *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* 4 ed (1940, as revised) par 2183–2184 refers to the exclusionary rule as an "unnatural method," and presents the following argument and frivolous example in support of his rejection of the exclusionary rule (emphasis in the original): "Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the Constitution. Titus ought to suffer imprisonment for his crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction . . . Our way of upholding the Constitution is not to strike at the man who breaks it, but to let of somebody else who broke something else."

[35] Schlesinger *Exclusionary Injustice: The Problem of Illegally Obtained Evidence* (1977) 62. But *cf* the remarks made by Heydon *Evidence: Cases and Materials* 2 ed (1984) 254 concerning *Kuruma, Son of Kaniu v R* 1955 AC 197 203.

[36] See generally Peiris 1981 13:2 *Ottawa LR* 309 343.

[37] This argument is countered in par 6 1 and 6 6 *infra*. See also n 64 *infra*.

— The deterrent effect of an exclusionary rule is minimal.[38]
— It is not the function (purpose) of the law of evidence to deter illegal police conduct; and the rules of evidence were never meant to promote "an indirect form of punishment".[39]
— The exclusionary rule "protects" only the guilty from conviction.[40]
— Criminals do not impose restrictions upon themselves in their choice of weapons; why should the police?[41]
— The exclusionary rule frustrates or hampers effective policing in an age of rising crime rates.[42]
— There are several procedural and evidential principles and rules which mollycoddle an accused. An exclusionary rule is one too many.
— An exclusionary rule puts it in the power of any policeman to frustrate the judicial process. He can, through his unlawful conduct, control the volume of evidence available to the prosecution at the trial; and he can in this way also determine, almost in advance, what evidence a court may or may not receive.[43]

---

[38] Schlesinger *Exclusionary Injustice* 61 quotes Peterson 1958 52 *Northwestern Univ LR* 46 55: "The disciplinary . . . effect of the court's releasing the defendant for police misbehavior [*sic*] is so indirect as to be no more than a mild deterrent at best." But see par 6 3 *infra*.

[39] Wigmore *A Treatise* par 2183.

[40] However, this criticism of the exclusionary rule can be rejected on the basis that it views the rule solely from the angle of the "guilty". Dworkin "Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering" 1973 48 *Indiana LJ* 329 330–331 (as cited by Kamisar 1987 86 *Michigan LR* 1 30) has pointed out that the exclusionary rule protects "the rest of us from unlawful invasions of our security and [maintains] the integrity of our institutions . . . The innocent and society are the principal beneficiaries of the exclusionary rule."

[41] Kamisar 1987 86 *Michigan LR* 1 deals decisively and swiftly with this obnoxious argument. At 43 he says (emphasis in the original): "I wince when I hear a law enforcement official protest: 'We . . . are forced to fight by Marquis of Queensberry rules while criminals are permitted to gouge and bite.' If criminals didn't gouge and bite they wouldn't be criminals. And if police officers *did* gouge and bite they wouldn't be (or at least shouldn't be) police officers."

[42] But Stewart, a retired judge of the supreme court of the USA, has pointed out that "contrary to the charges made by some of the [exclusionary] rule's critics, there is absolutely no evidence that the exclusionary rule is in any way responsible for the horrible increase in the crime rate in the United States in the last several decades" (1983 83 *Columbia LR* 1365 1394). See also LaFave *Search and Seizure: A Treatise on the Fourth Amendment* 2 ed (1987) 22 n 6 and Kamisar 1987 86 *Michigan LR* 1 31 n 130.

[43] In *People v Defore* 150 NE 585 588 (1926) Cardozo J, in refusing to exclude illegally obtained evidence, said: "The pettiest officer would have it in his power, through overzeal or indiscretion, to confer immunity upon an offender for crimes the most flagitious. A room is searched against the law, and the body of a murdered man is found. If the place of discovery may not be proved, the other circumstances may be insufficient to connect the defendant with the crime. The privacy of the home has been infringed, and the murderer goes free . . . We may not subject society to these dangers until the legislature has spoken with a clearer voice." But there is a fundamental flaw in this line of reasoning. If you are going to deal with a corrupt or ignorant policeman,

— Public policy considerations do not militate against the admission of unlawfully obtained evidence.[44]
— A court that excludes unlawfully obtained evidence, might in effect be condoning the unlawful acts of the accused.[45] If this is not the actual effect of the exclusionary rule, then it is at least the citizen's perception of the rule.[46] And it is undesirable that a criminal justice system should be held in disrespect by the public at large.
— An exclusionary rule may, according to Schlesinger, have the "perverse and unintended" result of limiting the ambit of fundamental rights. Judges who are required to apply an exclusionary rule, might give an extensive interpretation to probable cause "in order to admit crucial evidence".[47]
— A (rigid) exclusionary rule allows no room for "proportionality", that is, an approach in terms of which a court should at least have a discretion to determine the question of evidential admissibility by comparing the gravity and nature of the offence with the gravity and nature of the unconstitutional conduct of the police.[48]

---

there will always be loss of reliable evidence irrespective of the fact whether an exclusionary or inclusionary rule is adopted. See also Heydon *Evidence: Cases and Materials* 255A. The corrupt policeman, bent on suppressing or destroying evidence, will probably find ways of doing so. And the ignorant policeman who does not know how and when he may, eg, enter premises, will also through his ignorance bring about loss of reliable evidence. But Cardozo J's concern for the dangers to society and his call for legislative enactment on the matter of an exclusionary rule must be supported. See generally par 8 9 and 10 *infra*.

[44] In *R v Mabuya* 1927 CPD 181 181–182 Gardiner JP said: "This is evidence of something that the police found, not upon the accused, but in his house, and I cannot see that the fact that the police may have been trespassers can render this evidence inadmissible, any more then if a burglar in the course of his entry upon a house saw a murder committed his evidence of what he had seen would be inadmissible. I cannot see any public policy which prevents this evidence being admitted." But see par 8 *infra*.

[45] Barrett 1955 43 *California LR* 565 582.

[46] Waite 1955 54 *Michigan LR* 169 192 points out that where a criminal goes free as a result of the exclusionary rule, the citizen knows only, or is left with the impression, "that the activities of a dope–peddler . . . a score of gun–toters, a counterfeiter, or a robber have not been considered wrongful enough by the judges to justify conviction."

[47] Schlesinger *Exclusionary Injustice* 63. The author refers to Barrett "Personal Rights, Property Rights and the Fourth Amendment" 1960 *Supreme Court Rev* 46 55 and Kitch "The Supreme Court's Possessive Code of Criminal Procedure" 1969 *Supreme Court Rev* 157–172.

[48] It is interesting to compare the German approach as set out by Morissette "The Exclusion of Evidence under the Canadian Charter of Rights and Freedoms: What to Do and not to Do" 1984 29 *McGill LJ* 521 530: "The *Rechtsstaatsprinzip* (or Rule of Law) requires the exclusion of evidence, regardless of its weight or value, in cases of police brutality or other aggravated illegality. The *Verhältnismässigkeit* (or principle of proportionality) calls for the exclusion of probative evidence where the means by which it was obtained are excessively intrusive in view of the triviality of the offence investigated and the particular sphere of privacy thus invaded. According to one fitting metaphor, the principle of proportionality means that one should not shoot sparrows with a cannon." Stewart 1983 83 *Columbia LR* 1365 1396 also concludes as

— A prosecutor who is apprehensive that the exclusionary rule might result in the acquittal of an accused, might accept a plea of guilty to a lesser charge in circumstances where such acceptance cannot be justified.[49]

Some of the above arguments can be disposed of forthwith, and I have attempted to do so in several footnotes.[50] But it must, at the same time, be conceded that there are also certain remaining arguments and pragmatic considerations which present major obstacles in the way of accepting an exclusionary rule. The most important of these is probably the danger of creating a situation where society perceives the relevant criminal justice system as a system which "frees" a murderer or rapist on account of a constable's blunder. I use an extreme example, because a rigid exclusionary rule can produce this extreme result.[51] This concern for the justified or unjustified perception the public might have, will be addressed towards the end of this article.

6 The exclusionary rule: towards an analytical appraisal

It will become evident that, in contradistinction to those pragmatic considerations which underlie the inclusionary rule, the argument in favour of an exclusionary rule is less concrete and certainly more subtle. However, this does not mean that it lacks substance. It merely means that one must examine some fine threads, weave them together and then test whether the final result produces a rope strong enough to pull an exclusionary rule into the network of our legal system—bearing in mind that our system is imminently(?) to be strengthened by a Bill of Rights.

What then is the theoretical framework and practical basis of an exclusionary rule—a rule so foreign to our inclusionary rule, and so intimately linked to a Bill of Rights?

6 1 Crime control versus due process in the context of a Bill of Rights

It may be said—with reference to Packer's distinction between crime control and due process models of criminal procedure[52]—that

---

follows: "[D]isproportionality is significant only if one conceives the purpose of the rule as compensation for the victim. Because I view the exclusionary rule as necessary to preserve fourth amendment guarantees, I do not find this criticism persuasive."

[49] Schlesinger *Exclusionary Injustice* 63.

[50] See n 33 37 40 41 42 and 43 *supra*.

[51] See *Coolidge v New Hampshire* 403 US 443 (1971).

[52] Packer *The Limits of the Criminal Sanction* (1968) 149–172. At 166 he says: "If the Crime Control Model resembles an assembly line, the Due Process Model looks very much like an obstacle course. Each of its successive stages is designed to present formidable impediments to carrying the accused any further along in the process. Its ideology is not the converse of that underlying the Crime Control Model. It does not rest on the idea that it is not socially desirable to repress crime, although critics of its

the inclusionary rule is largely crime control orientated, whereas the exclusionary rule is largely due process orientated. It must, however, be appreciated that the crime control model and the due process model are not necessarily rival models. Both models seek to vindicate the goals of substantive criminal law.[53] But they endeavour to do so along different routes. The inclusionary rule—rooted, as it is, in the philosophy of crime control—proceeds from the premiss that the exclusionary rule creates an unnecessary and improper evidential barrier to reliable fact-finding in the course of the criminal trial. But the exclusionary rule—fundamentally based in the philosophy of due process—proceeds from the premiss that reliable fact-finding is not the sole purpose of the criminal trial.[54] The conflict is clear.

The argument in favour of the exclusionary rule is based on the belief that the truth need not and should not be ascertained at all costs because there are higher values in the best interest of which illegally obtained evidence should in principle not be admitted. It is argued that the primary function or goal of a criminal justice system is not merely to secure the conviction of an accused, but to ensure that a conviction takes place in terms of a procedure which duly and properly acknowledges the rights of an accused at every critical stage during pre-trial, trial and post-trial proceedings. This due process argument gathers considerable momentum when presented in the light of a Bill of Rights which by its very nature not only demands but guarantees due process, and which places important constitutional limitations upon official power.

But if the police and prosecuting authorities should in their detection and investigation of crime be allowed to ride rough-shod over rights guaranteed in a Bill of Rights, *and if courts of law were routinely to receive the evidence obtained in this manner*, the following spectacle will ensue: Those rights so carefully identified and so prudently embodied in a Bill of Rights, will to a large extent

---

application have been known to claim so. Its ideology is composed of a complex of ideas . . . " See also generally Herrmann "Various Models of Criminal Proceedings" 1978 *SACC* 3 16–17.

[53] See also Burchell & Milton *Principles of Criminal Law* (1990) 64 n 63.

[54] Damaska "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure" 1973 121 *Univ of Pennsylvania LR* 506 584–585 suggests that ideological attitudes towards establishing the truth in the criminal process, can from a historical perspective at least in part be explained with refence to the English trial by jury (my emphasis): "Because its verdict is not subject to attack, the English jury has possessed for at least three centuries the power to pardon the criminal . . . by acquitting him against the weight of evidence. This power, indeed, was used where jurors believed that the punishment was unduly severe, and at times even where the statute sought to be enforced was unpolular. *This could not have failed to affect the perception of the aims of the criminal process. Gradually the idea evolved that criminal procedure may quite justifiably be used to frustrate as well as to enforce the substantive criminal law. In any event, the criminal trial ceased to be conceived solely as a vehicle to apply substantive criminal law to concrete instances of its breach.*"

be stripped of their status as constitutional guarantees. In *Weeks v United States* Day J stated:

> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense (*sic*), the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."[55]

But let us also look at the matter from the angle of those who are on a day-to-day basis involved in the investigation of crime and the out-of-court administration of the criminal justice system. On the one hand it can be argued—and I will be the first to question the general validity of this argument—that in the absence of an exclusionary rule there is no real incentive for the police and prosecutors to toe the constitutional line. On the other hand it may be argued—and I am not sure whether this argument should be described as naive or complacent—that the cumulative effect of that fine and admirable but relatively scarce and fluctuating human quality known as self-discipline, the hovering threat of a departmental enquiry and the possibility of some legal action against the department or official concerned, will somehow ensure that the citizen's constitutionally guaranteed liberties and rights will in the long run be respected. But both arguments miss the point.

As to the first argument: In a constitutionally guaranteed due process value system the exclusionary rule need not *as a point of departure* be explained in terms of incentives or disincentives. If one were to do so, the foundations of the argument will be weakened in the unlikely event of the police and prosecutors simply carrying on regardless, blaming the exclusionary rule for unsuccessful prosecutions when the truth of the matter is that they are required to operate within a system where civil liberties and due process are constitutional guarantees. The exclusionary rule is concerned with legality in the criminal process. And this legality ranges from search, seizure, arrest through to trial proceedings and final appeal or review. The fact that an exclusionary rule will in all probability serve as an incentive, is therefore a mere *additional* advantage to be gained by having an exclusionary rule.[56] The incentive does not create the exclusionary rule. It merely gives it extra impetus.

As to the second argument: It must be rescinded on the same basis as the first argument. Self-discipline might play a role, however

---

[55] 232 US 383 393 (1914). Oaks 1970 37 *Univ of Chicago LR* 665 756 puts the matter as follows: "If constitutional rights are to be anything more than pious pronouncements, then some measurable consequence must be attached to their violation. It would be intolerable if the guarantee against unreasonable search and seizure could be violated without practical consequence. It is likewise imperative to have a practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule — entirely apart from any direct deterrent effect — is that it provides an occasion for judicial review, and gives credibility to the constitutional guarantees."

[56] See par 6 3 *infra*.

minimal. Departmental enquiries might do so. And, of course, the aggrieved citizen may institute an action for damages. Or he may in turn pursue a criminal charge. And those who had infringed his rights, had therefore done so at their peril. But this line of reasoning merely creates a diversion. It is singularly unhelpful to refer to self-discipline, departmental enquiries and the obvious *availability*[57] of criminal charges and civil actions when the true issue runs deeper, cutting into the inner fibre of the relevant criminal justice system and calling for an examination and appreciation of the value system which is at hand. In a criminal justice system which is supremely governed by a Bill of Rights, due process is no longer a vague philosophical or ideological strain but, indeed, a constitutional guarantee. It is required that the investigation and prosecution of criminal conduct must proceed in accordance with constitutional prescripts. And the prosecution's attempt to introduce unconstitutionally obtained evidence, comes dangerously close to a situation where the court is not only requested to condone unconstitutional official conduct, but also invited to act contrary to the true spirit and, perhaps, express provisions of the constitution.[58] The court should turn down the request. And it should decline the invitation.

Evidence, however relevant and persuasive it might be, should in principle be excluded where the admission of such evidence would undermine and erode the value system created and guaranteed by a Bill of Rights. This argument—when developed and driven to its logical conclusion—presents another important principle: The exclusionary rule is not merely an evidential barrier to reliable factfinding; it is a *constitutional* barrier.[59] The truth of the matter is that real meaning and effect are given to constitutional provisions

---

[57] I emphasize "availability" of—as opposed to "actual"—criminal and civil actions. There are several reasons why the violation of fundamental rights will never reach a court of law. In civil actions there is the risk of costs. See generally Stewart 1983 83 *Columbia LR* 1365 1388. Ignorance and fear of publicity play a role. Heydon *Evidence Cases and Materials* 254 argues as follows: "The poor and uneducated who comprise the bulk of criminals and the bulk of innocent police victims are unlikely to know how to prosecute the police, or to be able to do so, particularly if they are in prison as a result of the admission of evidence illegally obtained. Even the innocent victim of criminal police conduct may be reluctant to prosecute because he will not wish it to be known he was under suspicion." See also generally Peiris 1981 13:2 *Ottawa LR* 309 343. In a dissenting judgment in *Wolf v Colorado* 338 US 25 42 (1949) Murphy J said: "Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect the District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered." Some commentators have suggested that special alternatives to the exclusionary rule, like specific delictual actions against the government, could be created by statute. See, eg, Levin "An Alternative to the Exclusionary Rule for Fourth Amendment Violations" 1974 58 *Judicature* 75. But see n 64 *infra*.

[58] See par 6 1 *infra*.

[59] In *Mapp v Ohio* 367 US 643 662 (1961) it was said that "when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, *a constitutional basis emerges which* not only justifies but *actually requires the exclusionary rule*." (My emphasis.)

through the medium of the law of evidence. There is, says Paizes,[60] an "inseparability of rules of evidence and constitutional entitlements". And the trial of an accused whose constitutional rights have been violated, should be seen as the appropriate forum where the constitutional barrier must be erected.[61] This is done *not* in order to provide the aggrieved accused with some form of personal remedy[62] or some distorted form of "compensation", but in order to ensure that a court of law can in accordance with its constitutional duty make a valuable contribution to the upholding of constitutional principles which govern the criminal justice system as a whole.

The exclusionary rule seeks to ensure social justice,[63] and provides courts of law with some form of "remote control" over government officials who ignore due process constitutional requirements and other constitutional guarantees when they "operate in the field", that is, in circumstances where there is no immediate judicial supervision and, I should like to add, where the officials concerned might be very much aware of the absence of such supervision.[64]

---

[60] 1989 *SALJ* 472 478.

[61] See par 6 6 *infra*.

[62] In fact, there has been general rejection of the idea that the exclusionary rule is a personal remedy. See Cleary *McCormick on Evidence* 3 ed (1984) 463.

[63] See par 6 3 *infra*.

[64] In *Brinegar v United States* 338 US 160 173 (1949) Jackson J said the following in a dissenting judgment: "Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self–reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police . . . But the right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court . . . Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted . . . There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating in which no arrest is made, about which courts do nothing, and about which we never hear . . . Courts can protect the innocent against such invasion only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty . . . We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit. We must remember, too, that freedom from unreasonable search differs from some of the other rights of the Constitution in that there is no way in which the innocent citizen can invoke advance protection. For example, any effective interference with freedom of the press, or free speech, or religion, usually requires a course of suppressions against which the citizen can and often does go to the court and obtain an injunction. Other rights, such as that to an impartial jury or the aid of counsel, are within the supervisory power of the courts themselves. Such a right as just compensation for the taking of private property may be vindicated after the act in terms of money . . . But an illegal search and seizure usually is a single incident, perpetrated by surprise, conducted in haste, kept purposely beyond the court's supervision and limited only by the judgment and moderation of officers whose own interests and records are often at stake in the search. There is no opportunity for injunction or appeal to disinterested intervention. The citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence." I submit that these arguments presented by

The exclusionary rule attempts to affirm the rule of law in the criminal process.[65] It is a mechanism which serves to protect a due process value system. And ultimately society benefits,[66] despite the occasional release of the factually guilty. In this respect one ought to examine the distinction between social and individual justice in a procedural context.

6 2 Social versus individual justice

The exclusionary rule can, of course, produce a most unfortunate result, namely, the acquittal of someone (or the decision not to prosecute someone) who had manifestly or in all probability engaged in criminal activity. 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 as a result of the exclusion of unconstitutionally obtained evidence, is really a mere incidental beneficiary[67] under the rule. He should be seen as a citizen (I use "citizen" advisedly) who happens to be uniquely placed to alert the court to constitutional violations in the criminal justice system. The moment the court has been alerted, the experience of the accused becomes a matter of wider concern. What can, must or should the court do to ensure that citizens are not subjected to what the accused had experienced on a personal level? A thread in the cloth of the constitutional due process system has snapped. It becomes necessary to examine and attend to the loom. Proponents of the exclusionary rule would say that this expansion of the issue or crucial shift in approach, must be understood in the context of the distinction between social and individual justice, and the fact that at times social rather than individual justice must be promoted.[68]

Jackson J, clearly show that there is from a practical point of view no immediate remedial alternative to the exclusionary rule. Paulsen 1961 52 *Journal for Crim Law, Crim & Pol Science* 255 takes this argument one step further. He claims (256, my emphasis): "It is doubtful that the substitution of a claim against the government for the exclusionary rule in all cases would provide equally effective vindication of the constitutional interests thus protected, *and it is . . . doubtful that such a substitution would be constitutionally valid.*"

[65] See n 48 *supra*, as well as Van Rooyen 1975 *Acta Juridica* 70 79.

[66] See n 40 *supra*.

[67] Kamisar 1987 86 *Michigan LR* 1 30.

[68] Diamond "The State and the Accused: Balance of Advantage in Criminal Procedure" 1960 69 *Yale LJ* 1149 states (my emphasis): "The principal objective of criminal procedure, like that of procedure generally, is to assure a just disposition of the dispute before the court. But because time, resources and the ability to determine what is just are limited, a procedural system inevitably represents a series of compromises. *Justice to society is sometimes taken to require that a given case be used not only to deal with the situation immediately before the court but also to serve a larger public interest.* In criminal cases, the accused may get relief, not so much out of

This brings one to the preventive and educative purpose served by an exclusionary rule, sometimes inaccurately called the deterrent basis.

6 3 The "preventive effect" argument

It has been said that the exclusionary rule

> "is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[69]

Opponents of the exclusionary rule have levelled strong criticism against this "deterrent purpose or basis" of the exclusionary rule.[70] It would seem, however, that they misunderstand or tend to ignore the following:

First, "deterrence" must not be viewed in a narrow traditional sense. The "educative" purpose and ultimate preventive[71] effect are more important than immediate deterrence. Kamisar says:

> "Deterrence suggests that the exclusionary rule is supposed to influence the police the way the criminal law is supposed to affect the general public. But the rule does not, and cannot be expected to, deter the police the way the criminal law is supposed to work. The rule does not inflict a punishment on police who violate the fourth amendment: exclusion of the evidence does not leave the police in a worse position than if they had never violated the Constitution in the first place. Because the police are members of a structural governmental entity, however, the rule influences them, or is supposed to influence them, by systemic deterrence i.e. through a department's institutional compliance with fourth amendment standards."[72]

Secondly, the exclusionary rule—even if one were to reject the idea that its effect is primarily systemic in nature—does *in passing* provide an *incentive* to law enforcement officers to perform their duties with due regard for the constitutional rights and liberties of

---

concern for him or for the 'truth', but because he is strategically located, and motivated, to call the attention of the courts to excesses in the administration of criminal justice. The underlying premise is that of a social utilitarianism. *If the criminal goes free in order to serve a larger and more important end, then social justice is done, even if individual justice is not.* For example, if the police beat an offender in order to extract a confession, the social interest is held to require that the confession be excluded from evidence, even if amply corroborated. The same is true, in varying extents in the several states, when evidence is illegally seized, or telephones 'tapped', or counsel denied, or jurors selected improperly, or judges biased. In each of these cases, terminating the proceeding against the accused, regardless of his guilt or innocence, shifts the focus of deterrence from the accused to his prosecutors . . . Though this idealized conception of procedure, as a means of shaping institutions involved in the administration of substantive law, has a place in civil cases as well as in criminal, it shows up most clearly and dramatically in the criminal cases."

[69] *Elkins v United States* 364 US 206 217 (1960). See also LaFave *Search and Seizure: A Treatise on the Fourth Amendment* 17.

[70] See n 38 *supra*, as well as Oaks 1970 37 *Univ of Chigaco LR* 665.

[71] *Stone v Powell* 428 US 465 492 (1976).

[72] 1987 86 *Michigan LR* 1 34 n 147 quoting from his earlier article "Does (Did) (Should) the Exclusionary Rule Rest on a 'Principled Basis' rather than an 'Empirical Proposition'?" 1983 16 *Creighton LR* 565 597 n 204.

citizens. But the foundations of the exclusionary rule are still to be found in a constitution which guarantees fundamental rights.[73]

Thirdly, deterrence is largely a by-product of the "judicial integrity" argument,[74] an argument which will in due course be discussed.[75] And Van Rooyen has also pointed out that the argument in support of an exclusionary rule does not only turn on deterrence. Far weightier than deterrence, says he, are the "notion of *legality* in the criminal process" and the doctrine of legal guilt.[76]

6 4 The doctrine of legal guilt: legal guilt versus factual guilt

Packer remarks as follows:

> "The most modest seeming but potentially far-reaching mechanism by which the Due Process Model implements . . . anti-authoritarian values is the doctrine of legal guilt. According to this doctrine, *a person is not to be held guilty of crime merely on a showing that in all probability, based upon reliable evidence, he did factually what he is said to have done. Instead, he is to be held guilty if and only if these factual determinations are made in procedurally regular fashion and by authorities acting within competences duly allocated to them.* Furthermore, he is not to be held guilty, even though the factual determination is or might be adverse to him, if various *rules designed to protect him and to safeguard the integrity of the process* are not given effect."[77]

The doctrine of legal guilt can also be detected in the South African criminal justice system—as is evident from decisions like *S v Mushimba*,[78] *S v Zulu*,[79] *S v Ebrahim*[80] and *S v Lwane*.[81] In the latter case the prosecution had tendered, and the trial court had received, evidence which had been obtained from the accused at an earlier preparatory examination where he had testified and inculpated himself in his capacity as a witness. At the preparatory examination the accused (witness) had not been warned that he was not obliged to give evidence exposing himself to a criminal charge. The trial court convicted the accused on the basis of his self-incriminating evidence which he had, as a witness, given at the

---

[73] See par 6 1 *supra*.

[74] Gard *Jones on Evidence: Civil and Criminal* 13: "It is said that the primary ground for exclusion of this kind of evidence is to avoid sanction by the courts of unconstitutional conduct by government agents in the prosecution procedures. As a by-product of this effort to maintain the integrity of the courts by withdrawing sanction to unconstitutional acts by the government itself it is thought that doing so will act as a deterrant (*sic*) to such activity by law enforcement officials and thereby serve as an instrument for enforcement of constitutional rights."

[75] See par 6 5 *infra*.

[76] Van Rooyen 1975 *Acta Juridica* 70 78 (emphasis in the original).

[77] *The Limits of the Criminal Sanction* 166.

[78] 1977 2 SA 829 (A). This case is discussed in par 8 *infra*.

[79] 1990 1 SA 655 (T).

[80] 1991 2 SA 553 (A).

[81] 1966 2 SA 433 (A).

preparatory examination. On appeal, Holmes JA remarked as follows:

> "The . . . question is whether such evidence given in the absence of judicial warning is admissible on the prosecution of the witness. As to that, the pragmatist may say that the guilty should be punished and that if the accused has previously confessed as a witness it is in the interests of society that he be convicted. The answer is that between the individual and the day of judicial reckoning there are interposed certain checks and balances in the interests of a fair trial and the due administration of justice. The rule of practice to which I have referred is one of them, and it is important that it be not eroded. According to the high judicial traditions of this country it is not in the interests of society that an accused should be convicted unless he has had a fair trial in accordance with accepted tenets of adjudication."[82]

The remarks of Holmes JA clearly illustrate the difference between legal guilt and factual guilt; and his approach also illustrates the fact that in a criminal justice system there are, and ought to be, higher values which outweigh the belief that accurate fact-finding should be the sole aim of the process.

Holmes JA's reference to the pragmatist is also of special significance. The pragmatic approach (the accused had confessed his guilt in open court during earlier judicial proceedings and should on the basis of his confession have been convicted at his later trial) is outweighed by the fact that the search for truth must proceed along lines which ensure the validity, and protect the values, of the criminal justice system as a whole. The result might very well be that the "formal truth" is promoted at the expense of the "material truth". But the important point is that legality in procedural context, is maintained. And it is in the final analysis the duty of the court to see to, and where necessary enforce, legality in the criminal process. The integrity of the system, including that of the courts, must be conserved. Upon this basis it becomes necessary to put forward the so-called "judicial integrity" argument.

6 5 Judicial integrity

The supreme court of the United States has identified "the imperative of judicial integrity" as an important rationale of the exclusionary rule.[83] It would appear that there are at least four inter-related facets to this rationale, namely, that by admitting unconstitutionally obtained evidence

(a) courts themselves will violate the Constitution;[84]

---

[82] 444C–E.

[83] *Elkins v United States* 364 US 206 222 (1960). See also generally Osakwe *The Bill of Rights for the Criminal Defendant in American Law: A Case Study of Judicial Law–making in the United States* in Andrews (ed) *Human Rights in Criminal Procedure: A Comparative Study* (1982) 259 280.

[84] In *Janis v United States* 428 US 433 458 (1966) it was said: "The primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution."

(b) courts will act contrary to their oath to uphold the Constitution;[85]

(c) courts will indirectly encourage violations of the Constitution;[86] and

(d) courts will somehow create the impression that they sanction or condone unconstitutional conduct by government officials.[87]

Of course, the "judicial integrity" argument is—apart from the consideration pertaining to the judicial oath—based on two important assumptions. It is, in the first place, assumed that the public's perception of the integrity of the court will suffer greater harm when courts admit unconstitutionally obtained evidence than when they release the factually guilty on account of the exclusionary rule. I am not convinced that this assumption is totally valid. The truth, I think, lies somewhere in between.[88]

The "judicial integrity" argument does, in the second place, assume that a separate civil action or criminal matter where the constitutional infringement is the central issue and where it can be appropriately addressed, cannot affirm or vindicate the integrity of the court. Judicial integrity, it would seem, must of necessity be maintained wherever and whenever the prosecution should attempt to introduce unconstitutionally obtained evidence. This means that, for all practical purposes, the trial of the accused whose constitutional rights had been violated, provides the vital moment and becomes the appropriate forum for invoking the exclusionary rule. I have no quarrel with this assumption. It does not grant the exclusionary rule the status of a personal remedy,[89] and it does fit in most neatly with the application of the principle of self-correction.

6 6 The principle of self-correction

Packer remarks as follows:

> "*The possibility of legal innocence is expanded enormously when the criminal process is viewed as the appropriate forum for correcting its own abuses*. This notion may well account for a greater amount of the distance between the [Crime Control and Due Process Models] than any other. In theory the Crime Control Model can tolerate rules that forbid illegal arrests, unreasonable searches, coercive interrogations, and the like. What it cannot tolerate is the vindication of those rules in the criminal process itself through the exclusion of evidence illegally obtained or through the reversal of convictions in cases where the criminal process has breached the rules laid down for its observance. And the Due Process Model, although it may in the first instance be addressed to the maintenance of reliable fact-finding techniques, comes eventually to incorporate prophylactic and deterrent rules that result in the release of the factually guilty

[85] *Elkins v United States supra* 223.
[86] *Janis v United States supra*.
[87] See generally n 33 *supra*.
[88] See par 8 and 9 *infra*.
[89] See n 62 *supra*.

> even in cases in which blotting out the illegality would still leave an adjudicative fact-finder convinced of the accused person's guilt. Only by penalizing errant police and prosecutors within the criminal process itself can adequate pressure be maintained, so the argument runs, to induce conformity with the Due Process Model."[90]

It is submitted that an effective due process system must have the inherent ability to correct abuses within the system;[91] and it must be able to do so "immediately", that is, at the first moment it is established that there has been an abuse (for example, where during the course of a trial the prosecution attempts to introduce unconstitutionally obtained evidence). To argue that a separate criminal charge (or a civil action for damage to property, for assault or for an illegal arrest, *et cetera*) against the perpetrator is the appropriate remedy, amounts to a tacit admission that the relevant criminal justice system

— is not truly a due process one, because, for purposes of adjudication, it tolerates infringements of rights which are otherwise considered essential for due process;
— is for the maintenance or perpetuation of its status as a fair and just system, depended upon (or in need of being propped up by) whatever civil action the accused may or may not institute against the perpetrator, or whatever criminal charges the authorities (or the accused) may follow up;
— cannot operate unless abuses or excesses are accommodated on an "internal" level.

It is submitted that much can be said in favour of the "principle of self-correction". At first glance it might seem as if the application of the principle of self-correction might conflict with the primary function of the law of evidence, namely to regulate proof of facts according to the basic evidential canon that all relevant evidence is admissible. But is there a true conflict? The law of evidence must of necessity reflect and protect (or even tolerate) those values which underlie other branches of the law. An objective view—let us call it an aerial view—will show that the law of evidence is not an island. It is part of the legal mainland,[92] where it must follow, give collateral support to and also assist in shaping the fundamental contours of the legal landscape. The exclusionary rule is a good example of what can be achieved when the law of evidence is seen and treated as an integral part of the legal system. However, one must then also be prepared to acknowledge the importance of the principle of self-correction.

Acceptance of the principle of self-correction also leads to a further valid argument. The exclusionary rule is not primarily aimed at discouraging unconstitutional official conduct. *Its true purpose is*

---

[90] *The Limits of the Criminal Sanction* 167–168 (my emphasis).
[91] See also generally Damaska 1972 *Univ of Pennsylvania LR* 506 583.
[92] The parol evidence rule is, eg, a rule of substantive law, but finds its true application in the evidential terrain.

to serve as an effective internal tool for maintaining and protecting the value system as a whole; but if officials are as a result of the exclusionary rule deterred from infringing fundamental rights, then so much the better. To argue that an exclusionary rule cannot be supported because there is insufficient indication that it deters illegal police behaviour,[93] is to overlook the fact that deterrence is not the true justification for the exclusionary rule.

6 7 Primary rules and the secondary rule ("the inclusionary rule")

Van Rooyen (who is in favour of a strict exclusionary rule, but who is prepared to accept a discretionary exclusionary rule on the basis that it is better than nothing[94]) argues as follows:

> "It is usually said against the exclusionary rule that exclusion of illegally obtained evidence infringes the principle that all relevant and credible evidence should be admitted at an accused's trial. However, upon close analysis it is clear that the policy decision that certain relevant and credible evidence may not be obtained unless certain prerequisites are met—ie that relevant and credible evidence should not be gathered at all costs—has already been taken by the rules regulating pre-trial police powers (which I shall call 'primary rules') and is not newly imposed by the exclusionary rule (the 'secondary rule'). The secondary rule merely 'enforces' the primary rules: if, for example, the police in a given case voluntarily obey the primary rules, the result may well be that certain evidence is lost and will accordingly not be used at the trial—a calculated risk that we must run if we are to have legal limits on police powers to infringe individual interests; if, on the other hand, the police flout the primary rules, the secondary rule simply achieves the same result."[95]

I find this distinction between the primary rules and the secondary rule (the exclusionary rule) very useful. It shows that the exclusionary rule is deep-seated in sound jurisprudential analysis. Does it not show that opponents of the exclusionary rule are somewhat hypocritical when they weep and wail over the loss of reliable incriminating evidence brought about by the exclusionary rule? Loss of reliable evidence is an inevitable result of any civilized procedural system. Kamisar argues as follows:

> "A society whose officials obey the fourth amendment in the first place (because of an effective tort or other 'direct alternative' remedy) 'pays the same 'price'' as the society whose officials cannot use the evidence they acquired because they obtained it in violation of the fourth amendment. *Both* societies convict fewer criminals."[96]

But there is a consideration which militates against a strict scientific approach. To what extent is society prepared to accept the sometimes "unhappy outcome" of a trial where incriminating evidence of strong probative value was excluded as a result of a

---

[93] See n 38 *supra*.
[94] 1975 *Acta Juridica* 70 80 n 62.
[95] 1975 *Acta Juridica* 70 79.
[96] 1987 86 *Michigan LR* 1 47–48 (emphasis in the original). See also Stewart 1983 83 *Columbia LR* 1365 1392.

policeman's trivial, technical and inadvertent infringement of a primary rule? This issue—which is more fully dealt with below[97]—should not necessarily be seen as criticism of the exclusionary rule. It is, I think, something that ought to be taken into account in determining and formulating the *ambit* of an exclusionary rule. At this stage it is only necessary to answer the preliminary question: Must there in principle be an exclusionary rule?

7 Preliminary conclusion

On a balanced assessment of all the factors, considerations and doctrines referred to in paragraphs 6 1 to 6 7 above, it is my submission that an exclusionary rule should, in principle, be accepted. The common law inclusionary approach will fly in the face of a Bill of Rights. This much is evident from the American experience.

In the USA the supreme court, after decades of hesitation,[98] developed a vigorous exclusionary rule. In 1886 the rule was first imposed on federal courts[99] and in 1961 it was held in *Mapp v Ohio*[100] that evidence obtained in violation of the fourth amendment guarantees against unreasonable search and seizure, must be excluded in federal as well as state trials.[101] *Mapp v Ohio* overruled *Wolf v Colorado*[102] which had been decided in 1949, and in which the supreme court had refused to impose the exclusionary rule on state courts.

It is submitted that, subject to the criticism noted in paragraph 8 below, the exclusionary rule generally works well in the USA, most notably in the following areas:

(a) *Illegal searches and seizures*: *Mapp v Ohio*[103] (the search of a residence without a warrant) provides a good example. One can, in this regard, compare the South African case *R v Uys & Uys*[104] where a very timid approach was adopted. The court admitted certain evidence despite the fact that it was assumed that this evidence had been illegally obtained.

---

[97] See par 8 and 9 *infra*.

[98] See generally Mason & Beany *American Constitutional Law: Introductory Essays & Selected Cases* 4 ed (1968) 443–444.

[99] *Boyd v United States* 116 US 616 (1886).,

[100] 367 US 643 (1961).

[101] *Mapp v Ohio supra* was preceded by *Elkins v United States* 364 US 206 (1960) where the supreme court rejected the so–called "silver platter" doctrine in terms of which evidence unconstitutionally procured by state officials and handed over to federal officials, could be received in federal criminal proceedings. This doctrine, concluded the court, violated the fourth amendment prohibition against unreasonable search and seizure.

[102] 338 US 25 (1949).

[103] 367 US 643 (1961).

[104] 1940 TPD 405.

(b) *Questioning by the police*: In this respect *Miranda v Arizona*[105] is an excellent example: A suspect should, prior to his being interrogated by the police, be informed of his right to silence, as well as his right to have a legal representative present during such interrogation. Any evidence obtained in the absence of these warnings, cannot be received. The right to silence is enshrined in the fifth amendment and the right to legal representation stems from the sixth amendment. Both these rights ought to apply from the very outset (unless there is a waiver which is made voluntarily, knowingly and intelligently). The decision can be explained with reference to Kamisar's metaphors.[106] He says that the police station is the "gate house"; the courtroom is the "mansion". And he calls for equal justice at both locations. One can, for comparative purposes, refer to the purely administrative or directive nature of our Judges' Rules. It comes as no surprise that in *S v Mpetha (2)*[107] Williamson J found it necessary to remark that serious consideration should be given to an approach in terms of which material non-observance of the Judges' Rules would ordinarily render the incriminating statement inadmissible. It is also significant that article 6 of the South African law commission's proposed Bill of Rights provides that everyone who is arrested has the right to be informed as soon as possible in a language which he understands that he has the right to remain silent and the right to refrain from making any statement, and to be warned of the consequences of making a statement.

(c) *Securing identification evidence in breach of the fifth or sixth amendments*: *Gilbert v California*[108] provides an example.[109] In this case evidence was excluded because certain fundamental rules which apply in respect of identification parades, had not been followed. In our law an irregularity at the parade merely affects the weight of the identification evidence.[110]

---

[105] 384 US 436 (1966). See also generally Kamisar *The Right to be Informed of Legal Rights: The Miranda Warnings* in Marshall (ed) *The Supreme Court and Human Rights* (1982) 189–207; Fijnaut *De Toelating van Raadslieden tot het Politiële Verdachtenverhoor* (1987) 246 275; Mirfield *Confessions* (1985) 173–174; Rothblatt *Handbook of Evidence for Criminal Trials* (1965) 17.

[106] Kamisar *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure* in Hall & Kamisar (ed) *Modern Criminal Procedure* 2 ed (1966) 313 as cited by Paizes "Undue Influence and Involuntary Admissions and Confessions" 1981 *SACC* 122 131. See also Kamisar *Police Interrogation and Confessions* (1980) 31.

[107] 1983 1 SA 576 (C) 594A.

[108] 388 US 263 (1967).

[109] See also *United States v Wade* 388 US 218 (1967) where an identification at a police identification parade was held inadmissible because the parade was held in the absence of the suspect's lawyer.

[110] See generally *R v Kola* 1949 1 PH H100 (A).

(d) *Police methods that "shock the conscience"*: *Rochin v California*[111] is a case in point. In this case a suspect had swallowed drugs in the presence of state police officers. Unable to remove the drugs from his mouth, these officers then arranged for an "involuntary stomach pump" to obtain physical evidence of the drugs. It was held that their conduct had violated due process in the sense that it shocked the conscience. One can, in this respect, compare the rather cautious approach adopted by our appellate division in *R v Lincoln*[112] where the police had administered a "truth serum" to the accused.

The next issue is whether there should be a rigid exclusionary rule or a qualified one?

8 Public policy

The American experience has shown that the strict application of a rigid exclusionary rule can bring the criminal justice system into disfavour.[113] In 1974 the director of the criminal justice division of the attorney-general's office in Illinois (USA) complained as follows:

> "In one recent instance in my experience a person murdered a young teenage girl and hid her body in a rural farm area. The police got a warrant signed by a judge, which gave them the right to search. [B]ut there was a technical deficiency in the warrant, and the Court held that the very body itself, the nature of the crime itself, had to be suppressed. It was a magical disappearing act. It was as if this young girl never walked the earth."[114]

This is the type of situation, and this is the kind of complaint, that should be avoided. In the USA the rigid exclusionary rule has come under increasing attack,[115] and the US supreme court has over several years made a concentrated effort to whittle back the expansions of *Miranda v Arizona*[116] that occurred during the late sixties and seventies. The US supreme court has relaxed the rigidity of the exclusionary rule in cases of good faith, for example, where a law enforcement officer had reasonably relied and acted upon a statute which was only at a later stage held to be in violation of the fourth amendment.[117] There is also a so-called "inevitable discovery" exception[118] in terms of which the evidence can be admitted on

---

[111] 388 US 263 (1957). See also generally Jones *The Law of Criminal Procedure: An Analysis and Critique* (1981) 161 and Cook *Constitutional Rights of the Accused: Pretrial Rights* (1972) 352–354.

[112] 1950 1 PH H68 (A).

[113] Schlesinger *Exclusionary Injustice* 3–5.

[114] Cited by Schlesinger *Exclusionary Injustice* 2.

[115] See generally Barrett 1965 43 *California LR* 565; Oaks 1970 37 *Univ of Chicago LR* 665; Friendly 1965 53 *California LR* 929 951–953.

[116] 384 US 436 (1966).

[117] *Illinois v Krull* 480 US 340 (1987). See also generally *United States v Leon* 468 US 897 (1984); *Massachusetts v Sheppard 468 US 981* (1984); LaFave *Search and Seizure: A Treatise on the Fourth Amendment* 47.

[118] *Nix v Williams* 467 US 431 (1984).

the basis that it would eventually have been discovered anyway.[119] And unconstitutionally obtained evidence can in cross-examination be used to impeach an accused's testimony.[120] It has, furthermore, been held that the police practice "to stop and frisk" a suspect in circumstances where a police officer observes unusual conduct and suspects on less then normal probable cause the imminent commission of a crime, does not violate the constitutional prohibition against unreasonable search and seizure.[121] This is not an exhaustive list.[122]

It seems as if the gentle and at times robust pruning of the exclusionary rule in the USA, became necessary because the rule was reaching into areas where it no longer served the best interest of society, the very interest it was originally supposed to protect. The rule went beyond its original purpose and terrain, allowing, for example, an accused to benefit from *bona fide* but unconstitutional police actions; and the accused was permitted to take advantage of technicalities.

But the fact that the exclusionary rule has in the USA been trimmed, should not detract from its basic value—and its trimming should, in fact, merely be seen as an admission that the exclusion or admission of unconstitutonally obtained evidence is a matter which should be decided in the light of more than mere "strict law".[123]

Now, it seems to me that a rigid exclusionary rule is not acceptable. It deprives the courts of a discretion,[124] and its strict application might produce results which cannot be harmonized with considerations of public policy. *The infringement of any fundamental*

---

[119] See generally Wasserstrom & Mertens 1984 22 *American Crim LR* 85, as well as Stewart 1983 83 *Columbia LR* 1365 1392.

[120] *United States v Havens* 446 US 620 (1980).

[121] *Terry v Ohio* 392 US 1 (1968). See also generally *Michigan v Summers* 452 US 692 (1981).

[122] See eg *United States v Calandra* 414 US 338 (1974).

[123] In *S v Chretien* 1981 1 SA 1097 (A) it was held that voluntary intoxication could be a complete defence to criminal liability. But there was a public outcry. Legislation followed, largely filling the gap created by *S v Chretien*. Burchell & Milton *Principles of Criminal Law* 222 remark as follows (my emphasis): "The *Chretien* decision . . . settled our law in accordance with legal principle and logic. The legislature has, however, intervened in terms of the Criminal Law Amendment Act [1 of] 1988 in an attempt *to give expression to the needs of public policy*." This example—although taken from substantive criminal law—illustrates the point that a strictly legal scientific approach can sometimes yield a result incompatible with public policy. Adoption of a rigid exclusionary would, I submit, also be contrary to public policy—even though the rule itself can more than adequately be defended on grounds of logic and legal principle.

[124] Cross 1975 *Acta Juridica* 87 90 has said (my emphasis): "*The fruits of the poisoned-tree doctrine with its automatic exclusion of improperly obtained evidence is the product of lack of confidence in the judiciary*; some improprieties are venial, or such as must be tolerated having regard to the gravity of the situation with which the police were faced, others are fit subjects for action against the police without the exclusion of the improperly obtained evidence, while others are so gross that it would be base for the State, however stringent the official action against their perpetrator might be, to rely on evidence produced by them."

right of a suspect (accused) may lie somewhere on a scale ranging from the trivial, technical and inadvertent to the gross, violent, deliberate and "cruel". It is submitted that there should be a qualified exclusionary rule, which ought to be formulated and applied in the light of considerations of public policy. Would public policy demand exclusion of evidence which is of high probative value but which was also obtained as a result of a technical, trivial and inadvertent infringement of a fundamental right?

It is certainly no novelty to claim that issues pertaining to admissibility, ought at times to be decided by resorting to public policy ("openbare beleid", *boni mores*, "regsoortuiging van die gemeenskap").[125] In *S v Forbes*[126] Theron J excluded evidence which was neither irrelevant nor privileged. He said that his exclusion of relevant and non-privileged evidence was "justifiable on a . . . fundamental ground, viz, on the consideration of public policy . . . "[127] The crucial role that public policy, or considerations of public policy, can and should play in determining and analysing evidential rules of admissibility, has been set out in great detail by Van Wyk.[128] One of the main thrusts of Van Wyk's dissertation, is that courts should be given a greater discretion in deciding upon the exclusion or, for that matter, the admission of evidence. And he says that

> "[i]ndien die *boni mores* verg dat relevante getuienis uitgesluit of toegelaat behoort te word, moet die howe aan die roepstem gehoor gee".[129]

If a qualified exclusionary rule (that is, one that incorporates considerations of public policy as a ground for exclusion or admission of unconstitutionally obtained evidence) can be written into a constitution, the judicial integrity rationale would be accommodated. First, the judicial oath to uphold the constitution would not be compromised.[130] Second, courts will have a constitutionally created discretion when it comes to the exclusion or admission of unconstitutionally obtained evidence—and in the exercise of this discretion the public's perception of their integrity will be a factor to be considered.[131]

Considerations of public policy also play a role in determining

---

[125] See generally Van Niekerk, Van der Merwe & Van Wyk *Privilegies in die Bewysreg* (1984) 8 for a brief discussion of the meaning of these concepts, mainly in the field of the law of evidence.

[126] 1970 2 SA 59 (C).

[127] 599A.

[128] *Die Boni Mores as Toetssteen vir Toelaatbaarheid in die Bewysreg* (1983) Unpubl LLM–dissertation UOFS.

[129] 135. Van Wyk does not use the concept "boni mores" as some "sede–maatstaf" or "moral criterion". It is the prevailing mode of thought in society which is meant.

[130] See generally par 6 5 (b) *supra*.

[131] It will also give courts the opportunity to accommodate the following remark made in *Stone v Powell* 428 US 465 485 (1976): "While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence."

whether a trial was conducted in a procedurally regular fashion, that is, in accordance with the principle of legality. This is vividly illustrated by the decision of the Appellate Division in *S v Mushimba*[132]—a case alluded to earlier in the context of the doctrine of legal guilt.[133] In this case the accused had been convicted and sentenced by the court *a quo* at the end of a trial which, at first glance, had been conducted with impeccable regard for those standard procedures which are deemed to ensure a fair trial. But after completion of the trial, it turned out that a member of the staff of the instructing attorneys had in breach of legal professional privilege given copies of the statements of the appellants and their defence witnesses to the security police who, in turn, had handed these over to the investigating officer who was also a member of the security police. The investigating officer did not hand these statements over to the prosecutor, but during the trial had given instructions to the prosecutor who was at that stage not aware of the original source on which these instructions were based. The matter came before the Appellate Division by way of a special entry. In setting aside the convictions and sentences, Rumpff CJ remarked as follows:

> " '[G]eregtigheid' . . . is nie 'n begrip wat veronderstel dat die beskuldigde noodwendig onskuldig is nie. Geregtigheid wat geskied het in hierdie sin is die resultaat wat 'n bepaalde eienskap van verrigtinge aandui. Die eienskap toon aan dat aan vereistes wat grondbeginsels van reg en regverdigheid aan die verrigtinge stel, voldoen is. Die vraag of onreëlmatige of met die reg strydige verrigtinge in verband met 'n verhoor van 'n beskuldigde van so 'n aard is dat dit gesê kan word dat van daardie grondbeginsels nie nagekom is nie, en geregtigheid dus nie geskied het nie, sal afhang van die omstandighede van elke geval *en sal altyd 'n oorweging van publieke beleid vereis*. In die onderhawige saak was daar vóór die verhoor tot aan die einde daarvan, deur die optrede van die Veiligheidspolisie, 'n volledige uitskakeling van die privilegie van die beskuldigdes, in 'n lang saak wat weke van voorbereiding moes vereis het en waarvan die verhoor weke lank geduur het en waarin omstandigheidsgetuienis 'n groot rol gespeel het. Die vraag is wat die *publieke beleid* verg vir sover dit die taak en plig van die Veiligheidspolisie betref teenoor die reg van 'n beskuldigde om hom op privilegie te beroep in 'n saak soos die onderhawige. Dat die Veiligheidspolisie sy taak moet uitoefen om te sorg dat gesag en orde gehandhaaf moet word met al die wettige mag tot sy beskikking ly geen twyfel nie. *Publieke beleid* verg myns insiens egter ook dat 'n beskuldigde in 'n saak nie onderwerp behoort te word aan wat in die onderhawige saak gebeur het nie."[134]

It should also be noted that the Appellate Division did not proceed from the premiss that the police should be deterred from resorting to improper investigative techniques. The court held that, having regard to considerations of public policy, it could not be said that there was a fair trial.

---

[132] 1977 2 SA 829 (A).
[133] See par 6 4 *supra*.
[134] 844H–845B (my emphasis).

9 The Canadian approach[135]

If a Canadian court is satisfied that evidence was obtained in a manner which infringed or denied any rights or freedoms guaranteed by the Canadian Charter of Rights and Freedoms, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of such evidence would bring the administration of justice into disrepute. This provision is contained in section 24(2) of the Canadian Charter. In *R v Collins*[136] the court considered the method of ascertaining the meaning of "disrepute". Seaton JA held as follows:

> "Disrepute in whose eyes? That which would bring the administration of justice into disrepute in the eyes of a policeman might be the precise action that would be highly regarded in the eyes of a law teacher. I do not think that we are to look at this matter through the eyes of a policeman or a law teacher, or a judge for that matter. *I think that it is the community at large, including the policeman and the law teacher and the judge, through whose eyes we are to see this question.* It follows, and I do not think this is a disadvantage to the suggestion, that there will be a gradual shifting. *I expect that there will be a trend away from admission of improperly obtained evidence* . . . I do not suggest that the courts should respond to public clamour or opinion polls.[137] *I do suggest that the views of the community at large, developed by concerned and thinking citizens, ought to guide the courts when they are questioning whether or not the admission of evidence would bring the administration of justice into disrepute.*"[138]

In *R v Collins* Seaton JA was also careful to point out that nothing in section 24(2) of the Canadian Charter suggests a discretion. He ruled that once it has been established that admission of the evidence would bring the administration of justice into disrepute, the evidence shall be excluded.[139] But, of course, this does not mean that the

---

[135] See generally Sheppard *Evidence* (1988) par 967–987; Delisle *Evidence: Principles and Problems* 2 ed (1989) 580–593; Williams *Canadian Criminal Evidence* 3 ed (1988) 3–22; Christian "Sweeping Constitutional Changes in Canada" 1987 36 *International and Comparative LQ* 139 141; Deutsher "Section 24(2) of the Charter in the Manitoba Court of Appeal" 1990 19 *Manitoba LJ* 174; Morissette 1984 29 *McGill LJ* 521; Klinck "The Quest for Meaning in Charter Adjudication: Comment on *R v Therens*" 1985 31 *McGill LJ* 105; Gibson "Shocking the Public: Early Indications of the Meaning of Disrepute in Section 24(2) of the Charter" 1984 13 *Manitoba LJ* 495; Bryant, Gold, Stevenson & Northrup "Public Attitudes Toward the Exclusion of Evidence: Section 24(2) of the Canadian Charter of Rights and Freedoms" 1990 69 *Canadian Bar Rev* 1. The Canadian approach is incorrectly summarized in par 7 329 of the SA Law Commission's *Report: Group and Human Rights*. The Canadian test is not whether the exclusion of the evidence would bring the administration of justice into disrepute, but whether the *admission* of such evidence would have the afore–mentioned effect. The common law inclusionary approach remains the essential point of departure but is qualified by an exclusionary rule which ought to be invoked in certain circumstances.

[136] (1983) 5 CCC (3d) 141 (BCCA).

[137] See generally Gibson "Determining Disrepute: Opinion Polls and the Canadian Charter of Rights and Freedoms" 1983 61 *Canadian Bar Rev* 377.

[138] (1983) 5 CCC (3d) 141 (BCCA) 150–151 (my emphasis).

[139] 154.

court cannot consider a wide variety of factors[140] in determining whether the admission of certain evidence would bring the administration of justice into disrepute. *And in this sense the Canadian courts are left with a discretion.* I submit that the Canadian approach is just another way of saying that public policy must ultimately play a decisive role.

The spate of Canadian decisions in which section 24(2) has been interpreted,[141] was to be expected. Section 24(2) was super-imposed on the common law inclusionary rule as previously applied in Canada,[142] and the fairly wide criterion embodied in section 24(2) obviously provided a fertile ground for "test cases". But important principles have gradually been established through the law of precedent.[143] It is for present purposes sufficient to note that Canadian courts have, by and large, attempted to identify three categories of factors which must be assessed and balanced in the application of section 24(2). The first category covers the fairness of the trial process; the second one refers to the seriousness of the violation[144] of the Charter and the third relates to the consequences

---

[140] Levy "The Invocation of Remedies under the Charter of Rights and Freedoms: Some Procedural Considerations" 1984 13 *Manitoba LJ* 523 533 n 56 claims that s 24(2) "confers a potentially discretionary exclusionary power if the range of permissible invocative criteria is drawn widely and vaguely enough".

[141] See generally Marin *Admissibility of Statements* 7 ed (1989) 171–205.

[142] Sheppard *Evidence* par 965.

[143] In *R v Cohen* (1983) 5 CCC (3d) 156 (BCCA) Anders JA enumerated the following factors, principles and guidelines (187–188, my emphasis): "[1] The words 'administration of justice' include not only the trial process but the investigatory process. In other words, the 'integrity of the judicial process' depends not only on the conduct of strictly judicial matters but also on the conduct of the police in their dealings with suspected offenders . . . [2] The administration of justice will be brought into disrepute if the conduct of the police tends to '*prejudice the public interest in the integrity of the judicial process*' . . . [3] The 'integrity of the judicial process' may be prejudiced by the conduct of the police in several ways, some of which are as follows . . . (a) failure to observe a humane and honourable standard of conduct in the treatment of persons suspected or accused: (b) flagrant abuse of police powers: (c) failure of the police to abide by the law in carrying out their duties . . . [4] A balance must be struck between the need for firm and effective law enforcement and the right of the citizen to be free as far as reasonably possible from illegal and unreasonable conduct on the part of the police . . . [5] *The courts will not be concerned with technical or insubstantial breaches of the law by the police* . . . [6] In determining whether the violation is 'prejudicial to the integrity of the judicial process', the court will review all the circumstances in the light of, at least, the following factors: (a) The seriousness of the offence in the light of the facts relating to the charge. (b) The seriousness of the violation and, in particular: (i) the extent to which the constitutional rights of the accused were breached in obtaining the evidence; (ii) whether any harm was inflicted on the accused; (iii) the seriousness of the violation as compared to the seriousness of the offence . . . (c) Was the violation deliberate or inadvertent?" . . . (d) Urgency of necessity, in the sense that the police may be required in some circumstances to take reasonable steps, including the use of violence, to prevent the destruction of evidence."

[144] In *R v Therens* (1985) 18 CCC (3d) 481 Le Dain J remarked as follows (512, my emphasis): "The *relative* seriousness of the constitutional violation has been assessed in the light of whether it was committed in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, wilful or flagrant. *Another*

of admitting the evidence, namely the question whether the reputation of the system will be better served by admitting or excluding the evidence.[145]

Most relevant to our immediate situation though, is to emphasise the following two aspects concerning section 24(2).

First, section 24(2) attempts to strike a balance between the common law inclusionary rule and the exclusionary rule as it developed in the USA:

> "[T]he *Charter* enshrines a position with respect to evidence obtained in violation of *Charter* rights that falls between two extremes. Section 24(2) rejects the American rule that automatically[146] excludes evidence obtained in violation of the Bill of Rights . . . It also shuns the position at common law that all relevant evidence is admissible no matter how it was obtained . . . "[147]

Second, in pursuit of the afore-mentioned balance, the public's respect for the law[148] has been identified as an important and appropriate criterion. The ultimate result is a compromise:

> "The core idea is simple. An effective and stable legal system must enjoy the support of the public. To admit unconsitutionally obtained evidence where that would bring the system into disrepute in the eyes of the public would be to compromise the public's support for the legal system. Conversely, to exclude evidence under circumstances where this would bring the administration of justice into disrepute would again undermine public support for the legal system. Hence the 'compromise' reflected in section 24(2)."[149]

It is submitted that the Canadian rule—whilst certainly not free from interpretational problems[150]—does have a sound policy basis.

---

relevant consideration is whether the action which constituted the constitutional violation was motivated by urgency or necessity to prevent the loss or destruction of the evidence."

[145] See generally *R v Collins* (1983) 5 CCC (3d) 141 (BCCA); *R v Debot* (1989) 73 CR (3d) 129 (SCC); *R v Leclair & Ross* (1989) 67 CR (3d) 209 (SCC); *R v Genest* (1989) 45 CCC (3d) 385 (SCC) 403–410.

[146] Bryant *et al* 1990 69 *Canadian Bar Rev* 1 5 n 5 have correctly pointed out that it is misleading to describe the *present* "American rule" as an absolute one. There are—as was noted in par 8 *supra*—several important exceptions and qualifications to the present exclusionary rule in the USA.

[147] *R v Simmonds* (1988) 55 *DLR* (4th) 673 700.

[148] Gibson 1983 61 *Canadian Bar Rev* 377 378: "Why were the drafters of the Charter concerned about the reputation of the administration of justice? The answer seems obvious: the efficacy of the Canadian legal system is widely believed to depend in no small measure on the respect with which it is regarded by the community it serves. Without general respect throughout the community for the institutions of justice, it is thought, public acceptance and support of the decisions and actions of those institutions would erode. Without general public acceptance of the law and public co–operation with law enforcement agencies many fear that it would be extremely difficult, if not impossible, to maintain an effective system of justice in a democratic country. It was, I believe, to preserve public respect for the law, and thereby to encourage public compliance and co–operation with the law, that section 24(2) adopted 'disrepute' as the basis for rejecting evidence obtained in violation of the Charter."

[149] Bryant *et al* 1990 69 *Canadian Bar Rev* 1 5.

[150] See generally Gibson 1984 13 *Manitoba LJ* 495.

10 Conclusions

Article 7(d) of the proposed Bill of Rights of the South African Law Commission determines that every accused person has the right not to be convicted 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.[151]

This proposed article differs in several important respects from section 24(2) of the Canadian Charter of Rights. However, I submit that both approaches do in essence capture the true nature and structural purpose of an exclusionary rule: to uphold constitutional guarantees in accordance with public opinion. The jurisprudential validity of a "constitutional exclusionary rule" which allows room for considerations of public policy—be it "public interest" or "disrepute"—is unassailable because:

— It is a rule which makes a clear break with the common law inclusionary approach and which can be vigorously invoked to protect guaranteed rights, having regard to the specific circumstances of each case.
— It is a rule which can form part of and which can protect a due process value system, correcting abuses on an internal level in accordance with the principle of self-correction.
— It is a rule which allows adequate room for the promotion of social justice and the application of the doctrine of legal guilt, reflecting concern for the violations of constitutional rights and freedoms.
— It is a rule which can serve any avowed purpose to be served by a rigid exclusionary rule. It can have an educative and preventive effect. It can protect the value system created by a Bill of Rights.
— It is a rule which does not conflict with the judicial integrity rationale. The rule itself forms part of the constitution.
— It is a rule which, unlike the inclusionary rule, does not dismiss the importance of legality in the criminal process. And it does, at the same time, affirm that public policy does play a role in determining the presence or absence of legality in the criminal process.
— It is a rule which acknowledges the important inter-action between the primary rules and the secondary rule, but which also gives due recognition to the fact that society will at times find the acquittal of the "guilty" unacceptable—especially where there has been a trivial infringement of a constitutional right in the course of the investigation of a *serious* common law crime.

---

[151] See n 1 *supra*.

— It is a rule which seeks to strike a balance between the competing interests[152] which are at hand.
— It is a rule which will in all probability ensure that the criminal justice system—including the courts—will be held in high esteem by the public at large irrespective of the fact whether in a particular case unconstitutionally obtained evidence has been excluded or admitted. The very rule is designed to achieve this result.

Finally, it is submitted that a qualified exclusionary rule should be written into a Bill of Rights. This was done in Canada, and has also been proposed by the South African Law Commission. In this way the necessary guidance can be given to the courts, and an initial period of hesitation and uncertainty can be avoided. In *People v Defore*, decided in 1926, Cardozo J refused to exclude unconstitutionally obtained evidence "until the Legislature has spoken with a clear voice".[153] The American experience highlights the need for guidance. The Canadian rule provides the solution. We ought to take our cue from the latter. And we must accept the inevitable:

> "The law should strive to balance the interest of the citizen to be protected from illegal invasions of his liberty by the authorities and the interest of the state to bring to justice persons guilty of criminal conduct. *An attempt to reconcile these two interests which may come into conflict will mean that sometimes such evidence will be admitted and sometimes rejected.*"[154]

OPSOMMING

Suid-Afrika volg die Engelse gemene bewysreg se algemene uitgangspunt dat 'n geregshof relevante getuienis moet ontvang ongeag die feit dat hierdie getuienis op 'n onregmatige wyse bekom is. Hierdie gemeenregtelike toelatingsbenadering is egter nie versoenbaar met 'n Handves van Menseregte nie. Grondwetlike waarborge kan betekenisloos raak wanneer 'n geregshof in beginsel steeds gebonde is om getuienis wat op onregmatige (ongrondwetlike) wyse bekom is, te ontvang. Dit is immers so dat 'n Handves regsprosesreëlmatigheid (regsbeginselmatigheid, *due process*) ten aansien van sowel verhoor- as voorverhoorprosedure vestig. Dit is veral ten opsigte van laasgenoemde prosedure dat die individu—weens die afwesigheid van *onmiddellike* regterlike toesig—besonder weerloos staan teenoor ongrondwetlike vergrype deur amptenare belas met die opsporing, ondersoek en vervolging van misdaad. Die howe se ontvangs van getuienis wat bekom is deur hierdie amptenare se ongrondwetlike optrede, maak 'n klug van 'n Handves en ondermyn legaliteit in die strafregspleging. Wat is die oplossing?

Die hooggeregshof van die VSA het 'n uitsluitingsreël (*exclusionary rule*) ontwikkel. In die konteks van 'n Handves, het die uitsluitingsreël 'n sterk regswetenskaplike basis en stewige analitiese onderbou. Trouens, 'n uitsluitingsreël moet gesien word as 'n fundamentele komponent van 'n strafregspleging-stelsel wat deur 'n Handves gerugsteun word.

---

[152] See n 2 *supra*.
[153] See n 43 *supra*.
[154] Cowen & Carter *Essays on the Law of Evidence* 103 (my emphasis). See also Skeen 1988 *SACJ* 389 400. But *cf* Kamisar 1987 86 *Michigan LR* 1.

'n Suiwer regswetenskaplike benadering klop egter nie altyd met oorwegings van openbare beleid nie. Dit is so dat 'n *rigiede* uitsluitingsreël tot ongelukkige resultate aanleiding kan gee. Dit mag byvoorbeeld gebeur dat die polisie 'n geringe en tegniese oortreding begaan het in hul ondersoek van 'n ernstige misdryf, byvoorbeeld moord. Uit die oogpunt van openbare beleid is dit onwenslik dat sterk inkriminerende getuienis bekom deur 'n tegniese oortreding deur die polisie, uitgesluit moet word.

Dit is moontlik om die uitsluitingsreël en die gemenereg se toelatingsreël te versoen. Oor die afgelope dekade en 'n half het die Hooggeregshof van die Verenigde State van Amerika begin om die trefwydte van hul uitsluitingsreël in te kort. Artikel 24(2) van die Kanadese *Charter of Rights and Freedoms* poog ook om 'n vergelyk tussen die uitsluitingsreël en die gemenereg se toelatingsreël te tref. Volgens hierdie artikel moet ongrondwetlik-verkreë getuienis uitgesluit word as die hof sou bevind dat in die lig van al die omstandighede van die saak, die toelating van sulke getuienis die regspleging in diskrediet (*disrepute*) sal bring. Volgens artikel 7 van die Suid-Afrikaanse Regskommissie se voorgestelde Handves moet elke beskuldigde die reg hê om nie skuldig bevind of gevonnis te word op grond van getuienis wat bekom of voorgelê is op 'n wyse wat enige van die beskuldigde of die betrokke getuie of enige ander persoon se regte ingevolge die Handves skend nie, *tensy die hof in die lig van alle omstandighede en uit hoofde van die openbare belang anders gelas.*

Die Regskommissie se voorstel word ondersteun. Dit breek weg van die gemenereg se toelatingsbenadering, verleen erkenning aan die belang van legaliteit in die strafregspleging en verskaf 'n nuttige meganisme vir die afdwinging van die waarde-sisteem geskep deur 'n Handves. Maar terselfdertyd het die hof ook 'n diskresie. Soms sal ongrondwetlik-verkreë getuienis uitgesluit word en soms sal dit toegelaat word. Soos in Kanada, sal die howe riglyne stel. Dit is goed so. En dit hoort so.