**International Association of Procedural Law**

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# Prohibited Methods of Obtaining and Presenting Evidence: Common Law General Report

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# Prohibited Methods of Obtaining and Presenting Evidence: General Report (Common Law)

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## I— Introduction

The desire to make available to the court the most extensive range of evidence in support of claims and defenses in criminal and civil matters can sometimes result in evidence being obtained or presented in improper ways. To protect the basic rights of privacy and security, and to preserve the integrity of the criminal and civil justice systems, the law restricts the methods by which evidence may be obtained and presented. The balance that is struck between the interest in having as much evidence available as possible and the interest in protecting these rights tells us a great deal about our criminal and civil justice systems, about the broader social context in which they operate, and about the difficult choices that must be made when these interests come into conflict with one another.

## II— Questionnaire

The following two-part questionnaire was sent to reporters from nine common law systems. The first part examines the rules that regulates the methods by which evidence is obtained. The second part examines the rules that regulates the methods by which evidence is presented in court.

### A - Obtaining Evidence

1. Describe briefly the legal rules in your country that restrain persons from obtaining evidence in breach of fundamental rights, such as physical and moral integrity, and privacy.

2. What are the legal or procedural consequences of such breaches?

3. Do the consequences vary with the gravity of the matter (*eg.*, are there special rules for serious crimes)?

4. Do the rules that apply to evidence obtained by the prosecution differ from those that apply to the defense?

5. Describe the practical effect of these rules and how they are applied by the courts.

### B - Presenting Evidence

6. Does the law in your country prohibit certain means of presenting evidence (*eg.*, hearsay testimony) due concerns about its probative value?

7. What are the legal/procedural consequences of presenting evidence by such means?

8. Do different rules apply to evidence for the claim from that for the defence?

## III— National Reports

This report is based on the information and analysis provided in nine national reports:[1]

**United States**—Professor Burt Neuborne, New York University School of Law

**Canada**—Professor Ronalda Murphy, Schulich School of Law, Dalhousie University

**South Africa**—Professor Wouter de Vos, Faculty of Law, University of Cape Town

**England and Wales**—Professor Andrew L.-T. Choo, Warwick School of Law

**Ireland**— Dr. Yvonne Marie Daly, Lecturer in Law, Socio-Legal Research Centre, School of Law and Government, Dublin City University

**Australia**—Mr. Andrew Ligertwood, Law School, University of Adelaide

**New Zealand**—Dr. G.D.S. Taylor and Ms R.M. Taylor, Barristers, Wellington

**Israel**—Dr. Amit Pundik, and Mr. Uri Preisman, Buchmann Faculty of Law, Tel Aviv University

**Singapore—**Professor Hock Lai Ho, Faculty of Law, National University of Singapore

[1] National reports available at http://research.osgoode.yorku.ca/iapl20011/

## IV— Analysis

### A. Obtaining Evidence

#### 1. Rules restraining the obtaining of evidence in breach of fundamental rights

The rights protected in the course of evidence gathering for criminal and other state prosecutions vary significantly from one common law country to another. While the traditional protections are relatively similar to one another, the protections enhanced by statutes, and in some cases, constitutional guarantees are distinctive.

***United States***—The primary sources of rules restraining the obtaining of evidence in breach of fundamental rights are found in the Bill of Rights and in the legislated and judge-made rules of evidence.[2] The guarantees in the Bill of Rights contained in the Fourth and Fifth Amendments provide in detail for constraints on evidence gathering in criminal matters. The Fourth Amendment prohibits the government from conducting unreasonable searches or seizures; the Fifth Amendment forbids compulsory self-incrimination and guarantees due process of law.[3] These constitutional guarantees will be considered in this section. The guarantees contained in the Sixth Amendment, including trial by jury, the right to confront witnesses testifying against one, and the right to counsel establish the legal and procedural consequences of breaches of fundamental rights.[4] They will be considered in the next section.

The Fourth Amendment's protection against "unreasonable searches and seizures"[5] limits the government's right to restrain an individual's freedom of movement, or to obtain information about his or her activities. This right to privacy may be infringed by a search, a seizure or an investigative stop only if adequately justified, either in advance, by applying to a magistrate to obtain a warrant based on probable cause or, where this is impracticable,[6] afterwards, by a judge determining admissibility of the

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[2] The Federal Rules of Evidence, enacted by Congress, apply in federal courts. Most state legislatures have enacted evidence rules for their courts, but New York relies on judge-made rules. Many states have adopted the Federal Rules, and, in many states, state evidence law is evolving toward the federal norms.

[3] The Bill of Rights is comprised of the first ten amendments to the Constitution. The First Amendment guarantees freedom from religion, freedom of religion, freedom of speech, freedom of the press, freedom of assembly, and freedom to petition the government for redress of grievances.

[4] The Eighth Amendment bans cruel and unusual punishment and excessive fines. The final two amendments instruct judges on how to interpret the Constitution: the Ninth Amendment instructs judges to construe rights-bearing provisions generously; and the Tenth Amendment instructs judges to construe power-conferring provisions narrowly: Burt Neuborne, "The House Was Quiet and the World Was Calm – The Reader Became the Book: Reading the Bill of Rights as a Poem" (2004), 57 Vanderbilt L. Rev. 2007.

[5] The Fourth Amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[6] *United States v. Watson*, (1976) 423 U.S. 411 (felony arrests permitted in a public place provided the arresting officer has probable cause to believe a felony took place, or is about to take place); *United States v. Santana*, (1976) 427 U.S. 38 (hot pursuit into the suspect's home permitted); *Payton v. New York*, (1980) 445 U.S. 573(warrant required in absence of hot pursuit); *Brigham City, Utah v. Stuart*, (2006) 547 U.S. 398 (emergency exception to *Payton*).

evidence.[7] Violation of the Fourth Amendment is deterred by mandatory exclusion of the evidence from state or federal criminal proceedings, but where deterrence is unnecessary because the police have acted under a good-faith, reasonable belief that a search or seizure is lawful, the evidence is not excluded.[8]

The Fourth Amendment applies to government activity that impinges on a "reasonable expectation of privacy" including wiretaps,[9] but it does not apply to aerial surveillance of land abutting a residence,[10] thermal imaging of a home, [11] drug sniffing dogs[12] and compulsory production of voice exemplars to a Grand Jury.[13] Warrantless arrests can take place in a public space for misdemeanours, but only if committed in the officer's presence.[14] Warrantless searches incident to a lawful arrest are an exception to the Fourth Amendment,[15] as are searches of an automobile in which an arrestee is riding[16] and seizing evidence "in plain view".[17] The police may conduct a limited "*Terry* frisk" in connection with an investigatory stop as a matter of self-protection. Evidence uncovered during a *Terry* frisk is admissible. The Supreme Court has also upheld random traffic stops that are designed to test for sobriety, registration and traffic safety, and for immigration status near the border.[18] Where a warrant is required, the police must present sufficient evidence to a judge to justify an inference of probable cause that a crime has been or will be committed, or that evidence of a crime exists at the designated place to be searched.[19] Once they have obtained a warrant, the police must knock and announce their

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[7] *Mapp v. Ohio*, (1961) 367 U.S. 643; *Weeks v. United States*, (1914) 232 U.S. 383; Investigative street stops must be based on "articulable suspicion," a standard lying between hunch and probable cause: *Terry v. Ohio*, (1968) 392 U.S. 1; *Arizona v. Johnson*, (2009) __ U.S. ___(approving pat down of passenger in car stopped for minor safety violation).

[8] *United States v. Leon*, (1984) 468 U.S. 897 (good faith reliance on defective warrant); *Herring v. United States*, (2009) 555 U.S. 1 (good faith reliance on negligently maintained information).

[9] *Katz v. United States*, (1967) 389 U.S. 347. Federal wiretaps are governed by statute. 18 U.S.C. §§ 2510-2522. Foreign intelligence wiretaps are authorized by 50 U.S.C. §§1801-1811, which provides for a special court to rule on wiretap requests. Surveillance of electronic communications on the Internet and stored in computers is governed by 18 U.S.C. §§2701-2711. Internet searches are governed by *Katz*.

[10] See *California v. Ciraolo*, (1986) 476 U.S. 207.

[11] *Kyllo v. United States*, (2001) 533 U.S. 27.

[12] *Illinois v. Caballes*, (2005) 543 U.S. 405.

[13] *United States v. Dionosio*, (1973) 410 U.S. 1 (Grand Jury subpoenas not Fourth Amendment "searches or seizures," but subject to similar limitations under Due Process clause).

[14] *Atwater. v. City of Lago Vista*, (2001) 532 U.S. 318.

[15] *United States v. Robinson*, (1973) 414 U.S. 218.

[16] *United States v. Belton*, (1981) 453 U.S. 454; *Arizona v. Gant*, (2009) 556 U.S. ___.

[17] *Horton v. California*, (1990) 496 U.S. 128.

[18] *Mich. Dept' State Police v. Sitz*, (1990) 496 U.S. 444; *Delaware v. Prouse*, (1979) 440 U.S. 648; *United States v. Martinez-Fuerte*, (1976) 428 U.S. 543. Erin Murphy, *Paradigms of Restraint*, (2008) 57 Duke L. J. 1321.

[19] *Aguilar. v. Texas*, (1964) 378 U.S. 108; *Spinelli v. United States*, (1969) 393 U.S. 410. *Maryland v. Pringle*, (2003) 540 U.S. 366 (discussion of the meaning of "probable cause"). Conclusory assertions are inadequate; but hearsay assertions are sufficient. Anonymous tips may constitute probable cause, but only if there is independent corroboration of the information: *Illinois v. Gates*, (1983) 462 U.S. 213 (warrant upheld on anonymous tip because sufficient corroborating evidence was presented).

presence before entering[20] unless they have a "reasonable suspicion" that this would create a physical risk, or that it would cause a risk of the destruction of evidence.[21] They may detain the occupants while searching the premises.[22]

The Due Process clauses of the Fifth and Fourteenth Amendments,[23] and the prohibition on self-incrimination in the Fifth Amendment[24] restrain breaches of fundamental rights during interrogation. The latter rights may be invoked by individuals and by individual corporate employees,[25] but not by corporations.[26]

Defendants are not required to present evidence or to testify at their trials; and the prosecutor is not allowed to comment on the defendant's failure to testify.[27] The judge must explain to the jury that the failure to testify does not suggest that the defendant is guilty. However, the defendant may be required to show the jury identifiable physical characteristics or participate in a line-up for identification purposes because this kind of evidence is not "testimonial" in nature.[28] Other witnesses are not required to give testimony that might tend to incriminate them before a Grand Jury or any other governmental body,[29] but they may wish to do so if granted immunity.[30] This immunity protects them from the evidence or any evidence derived from it being used against them in a subsequent criminal proceeding, but it does not protect them from prosecution for the conduct revealed in their testimony if other evidence is obtained independently.

Under the Fifth Amendment, pre-trial confessions and incriminating statements that are involuntary (in that they were induced by force or threat of force,[31] or obtained under circumstances such as prolonged custodial interrogation under harsh conditions[32])

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[20] *Wilson v. Arkansas*, (1995) 514 U.S. 927.

[21] But evidence obtained in violation of the requirement to knock is not excluded: *Hudson v. Michigan*, (2006) 547 U.S. 586.

[22] *Michigan v. Summers*, (1981) 452 U.S. 692; and handcuff them if necessary: *Meuhler. v. Mena*, (2005) 544 U.S. 93.

[23] The Fifth Amendment provides, "No person…shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law." The Fourteenth Amendment contains identical language prohibiting a State from depriving "any person of life, liberty, or property without due process of law."

[24] Which has been binding on the states since 1964.

[25] Corporations do, however, possess rights under the Due Process Clause and the First Amendment.

[26] *Hale v. Henkel,* (1906) 203 U.S. 43; *Braswell v. United States*, (1988) 487 U.S. 99 (no "collective entity" may claim a Fifth Amendment privilege).

[27] *Griffin v. California*, (1965) 380 U.S. 609.

[28] *Holt v. United States*, (1910) 218 U.S. 245 (requiring defendant to dress for identification purposes not a Fifth Amendment violation); *Schmerber. v. California*, 384 U.S. 757 (1966) (compulsory fingerprinting, photographing, handwriting exemplars, measurements, voice prints, blood samples do not violate Fifth Amendment); *United States v. Wade*, 388 U.S. 218 (1967) (compulsory participation in line-up and repetition of words used by perpetrator not Fifth Amendment violation).

[29] *Garrity v. New Jersey*, (1967) 385 U.S. 493.

[30] *Kastigar v. United States,* (1972) 406 U.S. 441.

[31] *Brown v. Mississippi*, (1936) 297 U.S. 278 (confessions produced by torture).

[32] *Watts v. Indiana*, (1949) 338 U.S. 49 (sustained interrogation while held in solitary confinement); but statements given by mentally unstable defendants or those who have been tricked into giving them are admissible: *Frazier v. Cupp*, (1969) 394 U.S. 731 (confession induced by false assertion that co-defendant

are inadmissible. The prosecution must demonstrate voluntariness to the judge on a preponderance of the evidence. Suspects interrogated by the police[33] in custody, whether for crimes or minor offenses, must be warned that their statements may be used against them, and must be informed of their right to remain silent and their right to retain counsel themselves or to have the court appoint counsel for them.[34] This "*Miranda* warning" is required for the admission of the statement, even if there is no indication that it is involuntary.[35] However, this does not apply to non-custodial interrogations, such as statements made to undercover agents,[36] even when the suspect is in custody on another charge.[37] Questioning during a *Terry* stop-and-frisk or a random vehicle stop may or may not trigger the requirement to give a *Miranda* warning depending on the level of "custodial restraint" used by the police.[38] If a suspect responds to a *Miranda* warning with a request for a lawyer, all interrogation must cease,[39] unless the suspect explicitly or implicitly[40] waives his right to consult a lawyer, at which time questioning may continue.

Voluntary statements that are inadmissible for lack of the *Miranda* warning may be used to discover other evidence,[41] and to impeach the defendant if he testifies.[42] Moreover, the requirement for a *Miranda* warning is subject to a "public safety" exception designed to permit custodial interrogation to discover nearby weapons and victims in danger.[43]

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had confessed).

[33] A *Miranda* warning is not required for interrogations by private persons, such as store detectives.

[34] *Miranda v. Arizona*, (1966) 384 U.S. 436; *Berkemer. v. McCarty,* (1984) 486 U.S. 420 (rejecting minor offense exception to *Miranda*). *United States v. Dickerson*, (2000) 530 U.S. 428 (constitutional basis of *Miranda* reaffirmed rejecting Congressional effort to overturn the opinion).

[35] Miranda was subjected to two-hours of non-coercive custodial questioning in the police station before confessing to a brutal rape. Whether a suspect undergoing interrogation is in custody depends upon the suspect's reasonable perception of whether he is free to leave: *Stansbury v. California*, (1994) 511 U.S. 318 (subjective intent of police irrelevant); *Beckwith v. United States,* (1976) 425 U.S. 341 (voluntary questioning by tax authorities in target's home not custodial); *Oregon v. Mathiason*, (1977) 429 U.S. 492 (voluntary questioning at stationhouse non-custodial); *Yarborough v. Alvarado*, (2004) 541 U.S. 652 (two-hour formally voluntary interrogation of juvenile in stationhouse arguably non-custodial).

[36] *Hoffa v. United States*, (1966) 385 U.S. 293.

[37] *Illinois v. Perkins*, (1990) 496 U.S. 292.

[38] *Berkemer. v. McCarty*, (1984) 468 U.S. 420 (statements at sobriety traffic stop admissible; subsequent post-arrest statements at police station inadmissible).

[39] *Arizona v. Roberson*, (1988) 486 U.S. 675 (no police-initiated questioning after request for counsel; *Edwards v. Arizona*, (1981) 451 U.S. 477 (continued questioning in absence of voluntary and knowing waiver violates *Miranda*); *Rhode Island v. Innis*, (1980) 446 U.S. 291 (voluntary admission after request for lawyer admissible).

[40] *North Carolina v. Butler*, (1979) 441 U.S. 369.

[41] *Michigan v. Tucker*, (1974) 417 U.S. 433.

[42] *Oregon v. Hass*, (1975) 420 U.S. 714; Subsequent voluntary statements made in compliance with *Miranda* may be admitted even though induced in part by previous voluntary statements made without *Miranda* safeguards, provided sufficient time elapses to reinstate a suspect's free will.

[43] *New York v. Quarles*, (1984) 467 U.S. 649.

These arrangements have helped to reduce, but not to eliminate violence in police interrogations. However, they require difficult determinations when the police have erred unintentionally and the suspect has confessed to a serious crime.

***Canada—*** In Canada, the sources of rules governing evidence obtained in breach of fundamental rights include the *Charter of Rights and Freedoms*[44] ("the *Charter*"); federal legislation, including the *Criminal Code of Canada*[45] and the *Canada Evidence Act*[46]; the Civil Code of Québec[47], provincial evidence legislation;[48] and the common law in the common law provinces and territories.[49] The common law is the foundation of the rules of evidence in criminal cases throughout Canada. The country has a unitary court system with the Supreme Court of Canada at its apex. As the final appeal court, the Supreme Court of Canada resolves any conflicts in the lower courts to ensure the common law is uniform. Canadian courts have either general or limited jurisdiction, but every court applies all laws necessary to resolve a matter within its jurisdiction.

The *Charter* restrains government action.[50] Many of the rights and freedoms it protects may be affected by evidence gathering for criminal prosecutions. These include the fundamental freedoms of religion, speech and assembly[51] as well as the fundamental rights to life, liberty and security of the person;[52] to be free from unreasonable search and seizure;[53] not to be arbitrarily detained or imprisoned;[54] upon arrest or detention, to be informed of the reasons for the arrest or detention, and to retain and instruct counsel;[55] when charged with an offence, to be informed of the specific offence, to have it tried within a reasonable time, not to be conscripted as a witness against oneself, and to be

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[44] Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (UK), 1982, c. 11 ("the *Charter*").

[45] R.S.C. 1985, c. C-46.

[46] R.S.C. 1985, c. C-5.

[47] S.Q. 1991, c. 64.

[48] *Eg.,* Ontario: *Evidence Act*, R.S.O. 1990, c. E-23; British Columbia: *Evidence Act*, R.S.B.C. 1996, c. 124; and Nova Scotia: *Evidence Act*, R.S.N.S. 1989, c. 154.

[49] Ss. 91-92 of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c. 3. Under Canadian federal arrangements, this is an area of law that spans the divide between federal and provincial legislative powers: the superior court judges are appointed by the federal government to preside in courts administered by the provinces over criminal matters prosecuted by members of the provincial Attorneys-General office of offences prescribed by the *Criminal Code of Canada,* a federal statute. However, as a court of general appellate jurisdiction mandated to hear matters of national importance, the Supreme Court of Canada has been very active in the time since the advent of the *Charter* in resolving inconsistencies in the interpretation of the *Criminal Code* and developing the law in this area.

[50] *Supra* note 44, s. 32: *RWDSU v. Dolphin Delivery*, [1986] 2 S.C.R. 573; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.

[51] *Charter, supra,* note 44, s. 2(a) freedom of conscience and religion; s. 2(b) freedom of thought, belief, opinion and expression; s. 2(c) freedom of peaceful assembly; and s. 2(d) freedom of association.

[52] *Ibid.* s. 7.

[53] *Ibid.* s. 8.

[54] *Ibid.* s. 9.

[55] *Ibid.* s. 10 (a) and (b); and (c) the right to have the validity of the detention determined by way of *habeus corpus*.

presumed innocent;[56] to be free from cruel and unusual punishment;[57] to be protected from self-incrimination;[58] and the right of any party or witness to an interpreter when necessary.[59] Any law that limits these rights or freedoms is unenforceable unless the limit is "demonstrably justified in a free and democratic society."[60]

The interplay between the various rules restraining the obtaining of evidence in breach of fundamental rights may be illustrated by the situation of coerced confessions. The right not to be assaulted is protected by the common law, which provides for civil liability for battery, by the *Criminal Code,* which makes it an offence to commit an assault, and by the *Charter,* which protects an individual's right not to be deprived of security of the person except in accordance with the principles of fundamental justice. At common law, statements obtained "by fear of prejudice or hope of advantage" are inadmissible but only when this fear or hope has been "exercised or held out by a person in authority"[61] and not when the statements are coerced by others in this way.[62] Further discussion of the kinds of breaches that may occur in evidence gathering for criminal prosecutions and their consequences is found in the next section.

***South Africa*—**South Africa has a hybrid legal system in which much of the substantive private law is based on Roman Dutch law[63] but much of the procedural law including the law of evidence, follows the common law tradition.[64] Following the common law tradition. The admissibility of evidence was once a function only of its probative value and not of the means by which it was obtained. However, it was acknowledged that in a criminal case a judge had discretion to exclude evidence where its admission would operate unfairly against the accused.[65]

When the Interim Constitution was introduced in 1993,[66] it did not contain a provision dealing specifically with the admissibility of unconstitutionally obtained evidence, but accused persons were accorded the right to a fair trial and the courts adapted their discretion to meet this requirement.[67] Three years later, when the Bill of

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[56] *Ibid.* s. 11 (a)-(i), which also includes the rights: not to be denied reasonable bail without just cause, to trial by jury when facing potential incarceration of more than five years, to be found guilty only of an act or omission criminal in Canadian or international law at the time of the offence, not to be tried for the same offence a second time, and to have the benefit of the lesser sentence available at the time of sentencing.

[57] *Ibid.* s. 12.

[58] *Ibid.* s. 13.

[59] *Ibid.* s. 14.

[60] *Ibid.* s. 1: *R. v. Oakes*, [1986] 1 S.C.R. 103.

[61] *Ibrahim v. The King,* [1914] A.C. 599 (PC); *R. v. Oickle,* [2000] 2 S.C.R. 3.

[62] The Supreme Court has decided to maintain this restriction: *R. v. Hodgson,* [1998] 2 S.C.R. 449; *R. v. Wells* [1998] 2 S.C.R. 517 (accused violently confronted by the family members of young sexual assault complainants).

[63] Cilliers, Loots & Nel, *Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa* (5 ed, 2009) at 4-5.

[64] Schwikkard & Van der Merwe, *Principles of Evidence* (3 ed, 2009) at 25 *et seq*. ("*Schwikkard & Van de Merwe*").

[65] *Kuruma, Son of Kaniu v. R.* (1955) A.C. 197 at 203.

[66] Interim Constitution 200 of 1993.

[67] *Schwikkard & Van de Merwe, supra,* note 64 at 209.

Rights of the Constitution of 1996[68] ("the Constitution") was introduced, it provided that in criminal proceedings evidence obtained in violation of the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."[69] The admissibility of evidence obtained improperly or illegally, but not in violation of a constitutional right, continues to be determined in accordance with the common law discretion, although the accused's right to a fair trial must still be taken into account.[70]

The accused's right to a fair trial,[71] embraces a number of more specific rights. The rights that are of special significance to evidence gathering for criminal prosecutions are the right to be represented by counsel and to be informed of this right, the right to remain silent, the right not to be compelled to give self-incriminating evidence and, prior to trial, the right not to be compelled to make any confession or admission that could be used in evidence.[72]

***England and Wales*—**The Human Rights Act 1998[73] incorporates the European Convention on Human Rights ("the Convention") into the domestic law of England and Wales by making certain Convention rights directly enforceable in domestic courts. It requires the courts to read and to give effect to primary legislation[74] in a way that is compatible with Convention rights.[75] Where this is not possible, the court applies the legislation but issues a declaration of incompatibility.[76] Public authorities, including courts and tribunals,[77] are obliged to act in a way that is compatible with Convention rights[78] unless otherwise required by primary legislation.[79] And courts and tribunals must take into account decisions of the European Court of Human Rights ("ECHR") in their own deliberations.[80]

In addition, the Convention provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment;[81] and it guarantees the right to privacy by providing that everyone has the right to respect for his private and family life, his home and his correspondence, and that there must be no interference by a public authority with the exercise of this right except such as is in accordance with the law and as is necessary in a democratic society in the interests of national security, public safety or the economic

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[68] Constitution of the Republic of South Africa, 1996 ("South African Constitution").

[69] *Ibid.* s. 35(5).

[70] *Schwikkard & Van de Merwe, supra,* note 64 at 207; *S. v. Kidson* 1999 (1) SACR 338 (W) 349 b-c.

[71] South African Constitution, s. 35(3).

[72] *Ibid.* s. 35(1) (right against self-incrimination).

[73] Human Rights Act 1998, in force 2 Oct 2000.

[74] *Ibid.* s. 3(2)(b).

[75] *Ibid.* s. 3(1).

[76] *Ibid.* s. 4(2). The superior courts include the House of Lords (and, from October 2009, the Supreme Court), the High Court and the Court of Appeal: s. 4(5).

[77] *Ibid.* s. 6(3)(a).

[78] *Ibid.* s. (1).

[79] *Ibid.* s. 6(2).

[80] *Ibid.* s. 2(1)(a).

[81] European Convention on Human Rights, art. 3.

well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[82] Finally, the Convention guarantees the right to a fair trial.[83] The *Police and Criminal Evidence Act 1984* contains rules relating to police powers, in eight Codes of Practice.[84]

***Ireland—***Ireland has a strict exclusionary regime for evidence obtained in breach of rights guaranteed by *Bunreacht na hEireann* (the Constitution). In fact, it may be one of the strictest regimes in relation to evidence obtained in breach of the Constitution because it is based on the rationale of protectionism (protecting the defendant's rights) rather than on deterring police misconduct or preventing the administration of justice from being brought into disrepute.

Exclusion does not depend upon the *mala fides* of the *garda* (police officer). Evidence obtained in breach of constitutional rights may be admitted only in extraordinary circumstances, such as the need to rescue a victim in peril, the imminent destruction of vital evidence, and a search without warrant that is incidental to and contemporaneous with a lawful arrest.[85] Admission of evidence under these circumstances has been rare. The Supreme Court has confirmed that the interest in protecting constitutional rights can lead to a loss of probative evidence and this is justified because the vindication of constitutional rights outweighs the public interest in convictions.[86] Constitutional rights that might be affected by the process of obtaining evidence include the enumerated and unenumerated rights to: inviolability of the dwelling, liberty, privacy, bodily integrity, pre-trial silence, pre-trial legal advice, a fair trial, including the presumption of innocence, and the right to provide only voluntary statements.

A court may also exercise discretion to exclude evidence obtained in breach of legal rights that are not guaranteed by the Constitution based on the totality of the circumstances, including the nature and extent of the illegality; whether or not it was intentional; whether or not it was a trivial breach of the law; whether it was the result of an *ad hoc* decision or settled policy; and whether the public interest would be best served by admission or exclusion. Improperly obtained evidence that is used for other purposes, such as in cases involving a guilty plea, is not affected by these exclusionary rules, but

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[82] *Ibid.* art. 8.

[83] *Ibid*. art. 6(1).

[84] These Codes of Practice are: A-Searching a person or vehicle where an arrest has not been made; B-Searching premises and seizing and retaining property found on premises and persons; C-Detention, treatment and questioning of non-terrorism suspects in police custody; D-Methods of generating identification evidence; E-Tape recording of interviews with suspects in police stations; F-Visual recording of interviews, which applies even though there is currently no obligation to apply it; G-Powers of arrest; H-Detention, treatment and questioning of terrorism suspects in police custody.

[85] *People (A.G.) v. O'Brien* [1965] I.R. 142 at 170 ("*O'Brien*").

[86] *People (D.P.P.) v. Kenny* [1990] 2 I.R. 110 at 134; quoting Art. 40.3.1 of the Constitution. F. Martin, "The rationale of the exclusionary rule of evidence revisited" (1992) 2(1) I.C.L.J. 1; D. McGrath, "The Exclusionary Rule in Respect of Unconstitutionally Obtained Evidence" (2004) 11(1) D.U.L.J. 108; D. McGrath, *Evidence* (Dublin: Thomson Round Hall, 2005), c. 7; and Y.M. Daly, "Unconstitutionally Obtained Evidence in Ireland: Protectionism, Deterrence and the Winds of Change" (2009) 19(2) I.C.L.J. 40.

the rules apply to evidence tendered at trial where there is a causal link with other evidence that was improperly obtained.[87]

***Australia—*** The federal government has decided not to entrench fundamental rights[88] but to rely upon the Human Rights Commission[89] to monitor abuses and to conciliate complaints of discrimination and breaches of human rights. Accordingly, protection of the physical and moral integrity, and the privacy of persons in connection with evidence gathering by federal officials in Australia is based on the common law and legislation. Ordinary criminal laws prohibit assaults, killings, thefts, frauds, trespasses; and other laws regulate the investigating of offences by law enforcement authorities.[90] These laws provide basic protections from arbitrary investigation[91] but these protections are subject to new laws that have been enacted to increase the effectiveness of investigations of terrorist offences. These new laws, which permit extensive detention and denial of access to legal advice,[92] cannot be challenged as a breach of any formally entrenched fundamental rights.

At the state and territory level, Victoria[93] and the Australian Capital Territory[94] have passed legislation to protect fundamental rights. This legislation does not provide a basis for declaring investigative laws invalid, but it may create standards for deciding whether to exclude evidence that has been improperly obtained. Evidence obtained improperly or in contravention of an Australian law or obtained in consequence of such an impropriety or contravention is inadmissible unless the desirability of admitting the

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[87] *People (D.P.P.) v. Buck* [2002] 2 I.R. 269 ("*Buck*") and *People (D.P.P.) v. O'Brien*, *supra,* note 85. See also Y.M. Daly, "Does the Buck Stop Here? An Examination of the Right to pre-trial Legal Advice in Light of *O'Brien v. D.P.P*" (2006), 28 D.U.L.J. 345.

[88] Although some freedoms, such as freedom of political association and ensuring the independence of the courts have been recognized as implicit in the Constitution.

[89] *Australian Human Rights Commission Act 1986* and related legislation prohibiting discrimination on grounds of age, disability, race and sex.

[90] For these investigatory powers see generally LexisNexis, *Halsbury's Laws of Australia*, looseleaf, vol. 20 at para. 320 ff, 'Police and Emergency Services'. The principal statutory powers are found in *Crimes Act 1914* (Cth) Pts, 1AA, 1AB, 1AC, 1C, 1D; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW); *Crimes (Forensic Procedures) Act 2000* (NSW) (discussed in *L v. Lyons* (2002) 56 NSWLR 600); *Police Powers and Responsibilities Act 2000* (Qld); *Summary Offences Act 1953* (SA) ss. 67–82; *Criminal Law Consolidation Act 1935* (SA) ss. 271–273; *Criminal Law (Forensic Procedures) Act 2007* (SA) (earlier version of the Act discussed in *Stephanopoulos v. Police* (2001) 79 SASR 91; *Police v. Beck* (2001) 79 SASR 98; *Criminal Code* (Tas) s. 27; *Forensic Procedures Act 2000* (Tas); *Crimes Act 1958* (Vic) ss. 459, 459A, 464–464ZL, 465; *Criminal Investigation Act 2006* (WA); *Criminal Investigation (Identifying People) Act 2002* (WA); *Crimes Act 1900* (ACT) Pt 10; *Crimes (Forensic Procedures) Act 2000* (ACT); *Police Administration Act 1978* (NT) Pt VII. In addition to these general powers, specific powers to question and search people are given in many Acts of parliament.

[91] *Eg.,* legislation permitting the taking of bodily samples from suspects and other citizens for the purposes of forensic examination, *ibid.*

[92] See for example *ASIO Act 1979* (Cth) Pt III Div 3 (persons may be detained, with judicial approval, for the purpose of questioning, not only where reasonably suspected of terrorism but where reasonably suspected of being able to provide information relating to terrorist acts and in certain circumstances access to a lawyer, or at least a lawyer of choice, may be restricted during questioning).

[93] *Charter of Human Rights and Responsibilities Act 2006*.

[94] *Human Rights Act 2004*.

evidence outweighs the undesirability of admitting evidence that has been obtained in that way.[95] In deciding this, the court may take into account whether the impropriety would also have been a breach of the International Covenant on Civil and Political Rights.[96]

In the other states and territories,[97] the common law applies. The High Court has recognized a public policy discretion to exclude improperly or unlawfully obtained evidence[98] on similar bases as those provided in the legislation. Despite the fact that exclusion is not mandatory, impropriety is interpreted broadly[99] and a court may take into account fundamental rights in determining whether there was impropriety in deciding whether to exclude the evidence.[100]

***New Zealand—***The New Zealand Bill of Rights Act ("BORA") guarantees the right to be secure against unreasonable search and seizure, whether of the person, property, or correspondence or otherwise.[101] A New Zealand Law Commission study report[102] made 300 recommendations to clarify, rationalize and codify the law, resulting in legislative reform that is currently before Parliament.[103] The new law would consolidate provisions currently found in 69 statutes that are outmoded and in conflict with one another. The reforms to search and surveillance powers for bodies other than the police are particularly urgent. A regulation has been introduced that provides for procedures that vary with the intrusiveness of the surveillance methods, and that reduces the period for which surveillance can be undertaken without a warrant from 72 to 48 hours. The new law will, however, extend police powers[104] to compel answers in investigations of commercial offences[105] beyond the Serious Fraud Office[106] and beyond organized crime groups.[107]

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[95] Uniform evidence legislation, s. 138 in federal, ACT, New South Wales, Victorian and Tasmanian courts, applicable in criminal and civil proceedings ("Uniform evidence legislation").

[96] Uniform evidence legislation, s. 138(3)(f).

[97] Queensland, South Australia, Western Australia and the Northern Territory.

[98] *Bunning v. Cross* (1978) 141 CLR 54 (departing from English common law authority).

[99] The breadth of 'impropriety' as opposed to 'contravention' is adverted to by French CJ in *Parker. v. Comptroller-General of Customs* (2009) 252 ALR 619, [2009] HCA 7 at paras. 29–30. The leading High Court cases are *Ridgeway v. R.* (1995) 184 CLR 19, *R. v. Swaffield; Pavic v. R.* (1998) 192 CLR 159; *Tofilau v. R.* (2007) 231 CLR 396.

[100] In addition, courts will 'not not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights and freedoms in question, and has consciously decided upon abrogation or curtailment.' *Coco v. The Queen* (1994) 179 CLR 427 at 437 quoted with approval in *Al-Kateb v. Godwin* (2004) 219 CLR 562 at para. 19.

[101] *New Zealand Bill of Rights Act* ("BORA"), s. 21.

[102] NZLC R97 "Search and Surveillance Powers" (http://www.lawcom.govt.nz/project/search-and-surveillance-powers?quicktabs_23=report).

[103] The Bill in its current form can be found at http://www.parliament.nz/NR/rdonlyres/54DE7129-9946-4F51-8F18-7EFEC1948311/164942/DBSCH_SCR_4903_SearchandSurveillanceBill452_7917_1.pdf ("Search and Surveillance Bill").

[104] Subject to protection from self incrimination.

[105] For offenses with maximum penalties of imprisonment of five years or more: Search and Surveillance

BORA guarantees the right not to be arbitrarily arrested or detained[108] and the rights of those arrested or detained to be informed of the reason for it; to have counsel without unreasonable[109] delay and to be informed of this right; to have the validity of the arrest or detention determined without delay and to be released if it is not lawful. Those who have been arrested have the rights: to be charged promptly or released; to be brought as soon as possible before a court; to refrain from making any statement and to be informed of this right; and to be treated with humanity and with respect for the inherent dignity of the person.[110]

A person is regarded as detained if there is physical deprivation of a person's liberty; a statutory restraint on a person's movement with penalties; or a reasonable belief induced by police or official conduct that he or she is not free to go.[111] The right to consult with counsel[112] ensures that the person detained will appreciate and benefit from the other rights,[113] but, where appropriate, it may be curtailed, as for example in cases of suspected drink driving, where permitting more than a phone call with a lawyer could delay the taking of a sample and impair the investigation. Detainees have a right to have the right to access to counsel explained to them and facilitated by the officials detaining them.[114]

In criminal matters, the right to silence has raised questions about whether it protects both oral and written statements, both elicited and pre-existing statements, both the statement and the information it contains, and the extent to which the right precludes efforts to elicit statements following the refusal to provide a statement.[115] In regulatory matters, the legislative schemes often provide for compulsory statements,[116] but they make exceptions for incriminating statements or protection from the use of the statement against the person providing it.[117] A suspect continues to have the right to remain silent

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Bill, *supra,* note 103, cl 32. These "production orders" have been restricted to material stored in the ordinary course of business so as not to create liability for internet service providers, etc.

[106] *Serious Fraud Office Act 1990*, s. 9.

[107] Defined in s. 98A(2) of the *Crimes Act 1961*.

[108] BORA, s. 22.

[109] BORA, s. 23; *R. v. Mallinson* [1993] 1 NZLR 528 (C.A.) ("*Mallinson*").

[110] These rights have been codified in the Police Detention Legal Aid Scheme under the Legal Services Act 2000, s. 51 (providing free access to legal advice upon arrest); *R. v. Alo* [2007] NZCA 172.

[111] *Ministry of Transport v. Noort; Police v. Curran* [1992] 3 NZLR 260 (C.A.) ("*Noort*") (suspect required to accompany officer to testing station for drink driving); *R. v. Elliot* (1997) 4 HRNZ 648 (C.A.) (detention for a drugs search under the Misuse of Drugs Act 1975); *Hall v. Snell* (1999) 5 HRNZ 103 (H.C.) (person detained under compulsory committal procedure in *Alcoholism and Drug Addiction Act 1966*).

[112] In private: *R. v. Kohler* [1993] 3 NZLR 129, 132 (C.A.) (which may not prevent visual monitoring as appropriate under the circumstances).

[113] *Noort, supra,* note 111.

[114] *Mallinson, supra,* note 109.

[115] *R. v. Taumata (Ruling No 4)* (1997) 4 HRNZ 297; *R. v. Kokiri* (2003) CRNZ 1016 (C.A.) and *R. v. Kai Ji*, [2004] 1 NZLR 59 (C.A.); *R. v. Neho* (CA 84/03, 26 March 2003); *R. v. Bennett* (CA 32/04, 23 March 2004); *R. v. G. [Admissibility of evidence] (No 2)* [2010] DCR 540.

[116] *Fisheries Act 1996*, s. 216; *Health and Safety in Employment Act 1992*, s. 31(6); and *Insolvency Act 1967*, s. 70(2).

[117] Furthermore, the *Criminal Investigations Bodily Samples Act 1995* as amended in 2003 has eliminated

when confronted by accusations in the presence of police and not to have the fact of the silence introduced in evidence.[118] However, when questioned by police, an accused person's silence or delay in making a statement may be noted at trial provided that a jury is admonished that this is not itself probative of guilt.[119]

There are also restrictions on evidence in criminal proceedings found in the *Evidence Act* for evidence given by one defendant against to another,[120] statements by a defendant that are argued to be unreliable[121] or obtained by oppressive conduct,[122] the presentation by other parties[123] of evidence that would be inadmissible if presented by the prosecution,[124] inferences from a defendant's silence during questioning before trial,[125] and comment on a defendant's failure to give evidence or to answer questions under cross-examination.[126]

The BORA right to be treated with humanity is supported by the right not to be subject to torture or to cruel, degrading, or disproportionately severe treatment or punishment[127] and by the right of those deprived of liberty to be treated with humanity and with respect for the inherent dignity of the person.[128]

The right to privacy is protected by the *Privacy Act 1993* under which a person about whom information is being collected must be informed of the purpose for the collection of the information and of the identities of those to whom it will be disclosed; and authorization must be received from that person. However, there are exceptions to this for a range of public purposes. The right is to be assessed at the time when the information is collected and not when it is to be used. For example, if a television interview were given, it would not breach the person's right to privacy to use the interview later in a criminal trial.[129]

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the common law right to refuse to provide blood or buccal samples, which are now required for a range of offences.

[118] *Duffy v. Police* [1979] 2 NZLR 432 (C.A.).

[119] *R. v. Coombs* [1983] NZLR 748 (C.A.); *R. v. McCarthy* [1992] 2 NZLR 550 (C.A.); *R. v. Fulton* (CA 280/96, 7 April 1998).

[120] *Evidence Act 2006*, s. 27.

[121] *Ibid.* s. 28.

[122] *Ibid.* s. 29.

[123] *Ibid.* s. 31.

[124] *Ibid.* ss. 28-30.

[125] *Ibid.* s. 32.

[126] *Ibid.* s. 33.

[127] BORA, s. 9: *Udompun* [2005] 3 NZLR 204 (C.A.) (passenger from Thailand mistreated while being held pending being "turned around").

[128] BORA, s. 23(5): *Taunoa v. Attorney-General* [2007] NZSC 70 [2008] 1 NZLR 429 (inmates subjected to unauthorized behaviour management regimes); but see *Scott v. Police* (1994) 12 CRNZ 207 (forcible removal of footwear of intoxicated detainee feared likely to self-harm with laces); *R. v. Roulston* [1998] 2 NZLR 468 (C.A.) (forcibly inducing detainee to spit out rather than swallow package of drugs).

[129] *Television New Zealand Ltd. v. Rogers* [2008] 2 NZLR 277 (S.C.); *R. v. Rogers* [2006] 2 NZLR 156 (C.A.).

Protection for confidential communications is provided by the *Evidence Act*, which gives the court discretion to prevent disclosure if the public interest in disclosure is outweighed by the public interest in preventing harm to the persons affected; to the relationships of that kind that might be affected or activities that contribute to or rely on the free flow of information.[130] Accordingly, communications during a mental health assessment of a soldier accused of attempting to murder another soldier have been admitted into evidence;[131] but orders of confidentiality have been imposed on documents produced in pre-trial disclosure in a business dispute.[132]

Under the public interest immunity[133] provisions of the *Evidence Act*, a judge may direct that a communication or information that relates to matters of State must not be disclosed if the judge considers that the public interest in the communication or information being disclosed in the proceeding is outweighed by the public interest in withholding the communication or information.[134] Under the legal professional privilege provisions of the *Evidence Act*,[135] communications between lawyer and client for the purpose of giving or obtaining legal advice,[136] communications made for the dominant purpose of preparing for litigation,[137] and communications made for the purpose of settlement are protected from disclosure.[138]

***Israel*—**There are three relevant statutory exclusionary rules. The first excludes involuntary confessions of criminal defendants[139] and is directed at confessions obtained by improper methods of investigation and interrogation, such as physical or psychological abuse of the suspect. The second excludes evidence obtained by illegal

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[130] *Evidence Act 2006*, s. 69(2). The court must consider eight factors: (a) the likely extent of harm that may result from the disclosure of the communication or information; and (b) the nature of the communication or information and its likely importance in the proceeding; and (c) the nature of the proceeding; and (d) the availability or possible availability of other means of obtaining evidence of the communication or information; and (e) the availability of means of preventing or restricting public disclosure of the evidence if the evidence is given; and (f) the sensitivity of the evidence, having regard to—(i) the time that has elapsed since the communication was made or the information was compiled or prepared; and (ii) the extent to which the information has already been disclosed to other persons; and (g) society's interest in protecting the privacy of victims of offences and, in particular, victims of sexual offences. Specialized provisions for journalists' sources are made in s. 68: *Police v. Campbell* [2010] 1 NZLR 483.

[131] *R. v. X. (CA553/2009)* [2009] NZCA 531, [2010] 2 NZLR 181.

[132] *Whitehead (as trustees of the J and R Whitehead Trust) v. Honey New Zealand (International) Ltd.* HC Auckland CIV 2008-404-2149, 3 May 2010.

[133] Formerly called Crown privilege.

[134] *Evidence Act 2006*, s. 70.

[135] *Ibid.* ss. 54-57.

[136] *R. v. Uljee* [1982] 1 NZLR 561 (C.A.) (includes overheard conversations).

[137] *Jeffries v. Privacy Commissioner* [2010] NZSC 99 (includes unsolicited information received by a lawyer).

[138] *Van Heeren v. Cooper* [2007] NZCA 207, [2007] 3 NZLR 783, at para. 41, citing *Unilever plc v. Procter & Gamble Co* [2001] 1 All E.R. 783 (C.A.) and *Bradford & Bingley plc v. Rashid* [2006] 4 All E.R. 705 (HL) (common law principles codified by *Evidence Act*).

[139] Section 12 of the *Evidence Ordinance (New Version)*, 5731-1971.

secret monitoring, *eg.,* wiretapping.[140] The third excludes evidence obtained in violation of privacy.[141]

***Singapore—***There are no constitutionally entrenched protections[142] against breaches of a person's physical and moral integrity, or privacy. However, it is a crime and a tort to extract a confession by physically assaulting someone. Furthermore, the police must obtain a search warrant to conduct a search of one's premises;[143] and legal professional privilege protects certain communications from compelled disclosure,[144] although it is not clear whether production of a document sought by law enforcement agencies can be resisted on this basis.[145]

There are no published legal rules regulating the treatment of suspects and witnesses while they are being detained for questioning by police[146] but the police must not hold out any inducement, threat or promise to an accused when taking a statement and they must not subject the accused to oppressive treatment. Only voluntary statements are admissible. Any statement caused by an inducement, threat or promise from a person in authority that would give grounds for supposing that making the statement would gain an advantage or avoid an evil in reference to the proceedings is inadmissible as is any statement obtained in oppressive circumstances.

Following the English doctrine of voluntariness,[147] the *Criminal Procedure Code 2010* now provides that a statement will be inadmissible, where it has been obtained from an accused by a person in authority whose "acts tend to sap and have in fact sapped the free will of the maker." If it would reasonably appear that making the statement would gain an advantage or avoid an evil, the acts amount to a threat, inducement or promise, the statement is inadmissible.[148]

However, this defence has rarely succeeded. For example, in one case,[149] the accused said that his will was 'sapped or broken' when he was arrested and handcuffed and made to squat at the car porch for a long time and then handcuffed to the chair in a room from mid-afternoon until after midnight with nothing to eat or drink. He was tired and hungry and in a daze and a state of confusion when the statement was given, but the

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[140] Section 13(a) of the *Secret Monitoring Law*, 5739-1979.

[141] Section 32 of the *Protection of Privacy Law*, 5741-1981.

[142] Singapore Constitution, Part IV.

[143] *Criminal Procedure Code 2010*, s. 24. Tan Yock Lin, *Criminal Procedure* (Singapore: LexisNexis, 2007) vol. 1, c. IV.

[144] *Eg.*, *Competititon Act* (Cap 50B, 2006 rev ed), s. 66(3); *Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act* (cap 65A, 2000 rev ed.), ss. 30(4)(b)(ii), 30(9)(a) and 35(2).

[145] *The Singapore Law Gazette*, Aug 2009 issue, at 38-40, and Law Society of Singapore, *Report of the Council of the Law Society on the Draft Criminal Procedure Code Bill 2009* (17 Feb 2009), c. 6, available at www.lawsociety.org.sg/feedback_pc/pdf/ReportofCouncilLawSocietyDraftCPCBill2009.pdf

[146] A schedule to the *Criminal Procedure Code* containing standards was repealed in 1977, and no standards have since been introduced despite the urgings of the President of the Law Society in *The Singapore Law Gazette*, June 2010 at 1 and 4.

[147] *R. v. Priestly* (1967) 51 Cr App R 1; *R. v. Prager* [1972] 1 W.L.R. 260 at 266.

[148] *Criminal Procedure Code 2010*, s. 258(3), Explanation 1.

[149] *Public Prosecutor. v. Tan Boon Tat* [1990] 1 S.L.R.(R.) 287 at 31, aff'd [1992] 1 S.L.R.(R.) 698.

Court found that he was not in such a state of shock, exhaustion or fatigue that he had no will to resist making a statement that he did not wish to make. The doctor who saw him before and after the statement was taken said he was alert and the interpreter said that he looked normal.

In another case,[150] the Judicial Commissioner excluded the accused's statement because the accused was without food for about seven hours before making it and his distress was compounded by the anxiety of his arrest and being charged with a capital offence so that by the time the statement was recorded, his free will was sapped. However, on appeal the Court held that it was not realistic to take the sweeping stand that every failure to offer an accused sustenance constitutes a threat or an inducement of such gravity as to automatically render the statement involuntary.[151] Since the accused did not complain of hunger, and neither of the two medical reports mentioned his having been in a state of collapse or physically weakened due to hunger and thirst, the case was not so serious and did not engender such grave consequences that the appellant's will might have been completely overborne.

In one exceptional case in which the statement was taken during an 18-hour interrogation, with an hour's break in the fourth consecutive night in which the accused did not have any adequate sleep, the statement was excluded under the doctrine of oppression.[152] The High Court was satisfied that the accused had spoken after the police had rejected his earlier versions, and had spoken when he would not have otherwise.

Under the *Criminal Procedure Code 2010*, a person has a right against self-incrimination,[153] but an incriminating statement will not be excluded solely on the basis that the person was not advised of this right.[154] This has been distinguished from a situation in which the police misled a person about his or her rights and obligations.[155] Any statement taken must be in writing and read over to the person giving it, and interpreted for the person if he or she does not speak English.[156]

### 2. Legal or procedural consequences of breaches

In common law countries, the criminal justice process begins with evidence-gathering by the police leading to its presentation by a representative of the state at a trial presided over by a judge, usually with life tenure, who makes rulings on its admissibility, based on submissions by counsel for the prosecution and for the accused. Most of the evidence is presented by witnesses who are subject to cross-examination. In most common law countries, defendants may be convicted only if the prosecution proves beyond a

[150] *Public Prosecutor. v. Fung Yuk Shing* [1993] 2 S.L.R.(R.) 92 at 14.

[151] *Fung Yuk Shing v. Public Prosecutor* [1993] 2 S.L.R.(R.) 771 at para. 17.

[152] *Public Prosecutor. v. Lim Kian Tat* [1990] 1 S.L.R.(R.) 273.

[153] *Criminal Procedure Code 2010*, s. 258(3), Explanation 2(d).

[154] *Public Prosecutor. v. Mazlan bin Maidun* [1992] 3 S.L.R.(R.) 968.

[155] *Ibid.* but in *Ong Seng Hwee v. Public Prosecutor* [1999] 3 S.L.R.(R.) 1, the High Court rejected this distinction because the 'inducement' in the positive misrepresentation did not cause the accused to make the statement.

[156] *Criminal Procedure Code 2010*, s. 23.

reasonable doubt that they are guilty and, accordingly, defendants are not required to present evidence, or to testify themselves, although they may choose to do so. In gathering evidence, the police may need to seek judicial authorization in the form of search warrants and arrest warrants. Where they do not do so, or have not done so, and the evidence has been obtained in breach of a fundamental freedom, its admissibility may be subject to determination in a pre-trial motion or at trial.

***United States***—In the pre-trial phase in the Federal Court and in some states, a panel of citizens called a Grand Jury decides, based on a presentation by the prosecution in the absence of the defendant, whether there is sufficient evidence to bring criminal charges. This practice began as a constitutional protection for the accused, but over the years, it has become an important investigatory mechanism for the prosecution. Subject to the constitutional protections described below, witnesses may be compelled to testify under oath and to produce documents. The evidence is usually gathered by the police and presented by a full-time prosecutor employed by the state. The prosecutor then has a constitutional obligation to disclose to the defendant, on pain of dismissing the case, all the evidence, including that tending to prove innocence.[157]

In criminal matters, the defendant is entitled to counsel of his or her choosing and, in cases involving the potential for incarceration,[158] if the defendant cannot afford this, the defendant is entitled to counsel appointed free of charge. In urban areas, this is usually provided by lawyers either from the Public Defenders Office or a government-subsidized private group of lawyers, which is often called the Legal Aid Society. In rural areas, court-appointed counsel are usually private lawyers who volunteer to represent indigent defendants for minimal compensation. Whether this system produces adequate representation, particularly in capital cases, is a matter of some controversy.

The Due Process Clauses of the Fifth and Fourteenth Amendments require the prosecution to prove each element of a crime to a jury beyond a reasonable doubt. The Jury Trial Clause of the Sixth Amendment[159] requires the matter to be tried by a jury, usually involving twelve community members[160] chosen at random, unless the prosecution and defense agree. Selection of their members must not be affected by race

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[157] See *Jencks v. United States,* (1957) 353 U.S. 657; *Brady v. Maryland*, (1963) 373 U.S. 83; Laval L. Hooper, "Treatment of *Brady v. Maryland* Material in United States District and State Court Rules, Orders and Policies: Report to the Advisory Committee on Criminal Rules of the Judicial Conference of the United States" (Federal Judicial Center 2004).

[158] *Griffin v. Illinois*, (1956) 351 U.S. 12 (free transcript for felony); *Mayer. v. City of Chicago*, (1971) 404 U.S. 189 (free transcript for minor offense); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (trial counsel); *Douglas v. California*, (1963) 372 U.S. 553 (appellate counsel); *Argersinger. v. Hamlin*, (1972) 407 U.S. 25 (counsel required for any offence punishable by incarceration). Appointed counsel is not constitutionally required for post-appeal proceeding, but is often provided. *Ross v. Moffit*, (1974) 417 U.S. 600. In the United States, unlike systems where indigent defendants use vouchers to hire a lawyer of choice, appointed counsel is selected by the court.

[159] *In re Winship*, (1970) 397 U.S. 358. *Winship* is applicable to the sentencing process in connection with any fact that causes the possible maximum sentence to rise; *Blakely v. Washington*, (2004) 542 U.S. 296; *United States v. Booker*, (2005) 543 U.S. 220.

[160] But see *Williams v. Florida*, (1970) 399 U.S. 78 (upholding 6 person jury); *Ballew v. Georgia*, (1978) 435 U.S. 223 (5 person jury unconstitutional).

or gender.[161] Their verdicts must usually be unanimous.[162] Trials must be public, but jury deliberations are secret.

In jury trials, questions of admitting evidence are particularly complex and important. Determinations of difficult questions of admissibility are often made in separate hearings in advance of the trial when the jury is not present. When the prosecution has finished presenting its evidence, the judge must decide whether there is enough evidence to enable a reasonable jury to conclude beyond a reasonable doubt that each element of the offence has been proved. If not, the case must be dismissed. If there is enough evidence, the jury determines whether guilt has been proved beyond a reasonable doubt.

The Sixth Amendment guarantees a number of rights in criminal prosecutions, including speedy and public trial, the right to a jury, the right to be informed of the accusation, to be confronted by the witnesses against one and to call witnesses, and the right to counsel.[163] These rights are widely accepted as necessary protections in the adversary system—the main jurisprudential debates have related to their implementation. For example, the right to counsel implies the provision of counsel to those who cannot afford it; and in a system that relies upon party prosecution, and in which a judge is relatively passive, the quality of counsel for defendants who cannot afford to provide their own counsel may cause concern. Indeed, full scale criminal jury trials are becoming relatively rare as more than 95% of prosecutions come to be resolved by negotiating a plea of guilty. It is possible to seek pre-trial rulings on the admissibility of evidence obtained in breach of the Fourth and Fifth Amendments before negotiating the plea bargain, but this is not often done. Accordingly, the question arises as to whether the high cost of adequate counsel for a complete trial or a complex evidentiary determination encourages accused persons to bargain in the shadow of perceived rights rather than to seek a full determination of those rights.

The right of a criminal defendant "to be confronted with the witnesses against him"—the "Confrontation Clause"—makes the ability to cross-examine witnesses a requirement for the admissibility of evidence.[164] Accordingly, statements made prior to trial of a deceased[165] or by an absent witness[166] are inadmissible even if they were sworn

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[161] *Batson v. Kentucky*, (1986) 476 U.S. 79 (race); *J.E.B. v. Alabama ex rel. T.B.*, (1994) 511 U.S. 127 (gender).

[162] But see *Johnson v. Louisiana*, (1972) 406 U.S. 356 (9-3 verdict constitutional); Six person juries must be unanimous: *Burch v. Louisiana*, (1979) 441 U.S. 130 (5-1 verdict unconstitutional).

[163] The Sixth Amendment provides: In all criminal prosecutions, the accused shall have a right to speedy and public trial, by an impartial jury of the State and district where the crime shall have been committed …and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

[164] *Crawford v. Washington*, (2004) 541 U.S. 36 (incriminating statement to police by co-defendant).

[165] A narrow, historically-based exception exists for pre-trial statements of deceased victims identifying their killers made under knowledge of impending death: *Mattox v. United States*, (1895) 156 U.S. 237.

[166] *Pointer v. Texas*, (1965) 380 U.S. 400 (preliminary hearing testimony of absent witness inadmissible because not tested by cross examination). If the defendant procured the witness's absence, he is estopped from invoking the Confrontation Clause: *Reynolds v. United States*, (1879) 98 U.S. 145.

or made in connection with a formal proceeding, and appear credible, unless they were subjected to adequate cross-examination at the time.[167] However, the voluntary[168] statements of an accused may be admitted even if the accused chooses not to testify at trial.[169] The Confrontation clause operates in similar fashion to the hearsay rule that applies in civil trials and to evidence tendered by the accused. However, it applies only to "testimonial" statements, *i.e.,* statements that provide a narrative of events, and not to statements, for example, made in furtherance of the conspiracy, or made in a 911 call for help.[170] Accordingly, both the right against self-incrimination and the right to counsel are fundamental rights that, if breached, can prevent the admission of evidence.[171]

***Canada*—**Any evidence that has a tendency to prove or disprove a fact in issue is, in principle, relevant[172] and admissible unless excluded by a clear ground of law or policy.[173] However, judges have residual discretion to exclude admissible evidence where its probative value is outweighed by the prejudice that may flow from admitting it.[174] Perhaps the clearest of these grounds is found in section 24(2) of the *Charter,* which provides that where a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Before the *Charter*, breaches of fundamental rights might have been punishable but the evidence remained admissible, with only two exceptions.

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[167] *Mancusi v. Stubbs*, (1972) 408 U.S. 204 (adequate pre-trial cross examination permits use of testimony at trial); *California v. Green*, (1970) 399 U.S. (ability to cross "turncoat" witness at trial about pre-trial statement satisfies Confrontation Clause).

[168] Prolonged interrogation before being presented to a judge may render involuntary the statements made by the accused: *McNabb v. United States*, (1943) 318 U.S. 332; *Mallory v. United States*, (1957) 354 U.S. 449. In 1968, Congress enacted legislation potentially superseding *McNabb-Mallory*. 18 U.S.C. §3501. Under *Miranda*, an accused can put an end to any interrogation by demanding counsel.

[169] On the theory that the accused, as a witness, confronted himself—but the statement of a co-accused cannot, which often causes co-accuseds to be tried separately: *Bruton v. United States*, (1968) 391 U.S. 123.

[170] *Davis v. Washington*, (2006) 547 U.S. 813 (recording of telephone call seeking help from police and implicating defendant is not covered by Confrontation Clause because it was non-testimonial); *United States v. Inadi*, (1986) 475 U.S. 387 (co-conspirator's incriminating statement in furtherance of conspiracy not barred by Confrontation Clause because it was non-testimonial).

[171] Statements elicited by post-indictment interrogation of a defendant in the absence of a lawyer by government informants or other government agents are inadmissible: *Spano v. New York*, (1959) 360 U.S. 315 (invalid interrogation after retention of lawyer); *Massiah v. United States*, (1964) 377 U.S. 201 (taping conversation with government informant after indictment and retention of counsel violates right to counsel); *Brewer. v. Williams*, (1977) 430 U.S. 387; *Maine v. Molton*, (1985) 474 U.S. 159.

[172] *R. v. Watson* (1996), 30 O.R. (3d) 161 (C.A.)

[173] *R. v. Morris*, [1983] 2 S.C.R. 190.

[174] *R. v. Seaboyer*, [1991] 2 S.C.R. 577. Trial judges determine what is relevant and admissible as a question of law, but where there is a jury, the jury determines the weight or probative value of the evidence in determining the facts. Questions of law are subject to appellate review, but questions of fact may be overturned only if the error is palpable and overriding. It is more difficult to appeal an acquittal than a conviction; *Criminal Code*, *supra,* note 46 at s. 676(1)(*a*).

First, the prosecution had to establish beyond a reasonable doubt that statements made by an accused to a person in authority were voluntary. However, this rule did not necessarily exclude evidence obtained as a result of the involuntary statements[175] because it was concerned only with the reliability of the evidence and not with the rights of the accused during the investigation or the propriety of police conduct.

Second, the trial judge's discretion to exclude evidence that would operate unfairly, but this was limited to cases where: it would be difficult to understand properly, as with character evidence; it would be difficult to present efficiently, such as credibility evidence of witnesses other than the accused; or it would be likely to confuse, such as some expert evidence. However, only evidence that was "gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly"[176] would be excluded.

All this changed with the introduction of the *Charter.* Under section 24(1) of the *Charter,* anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. The applicant—often the accused in a criminal trial—must demonstrate that a *Charter* right has been infringed, and the Court must be satisfied that the infringement is not justifiable under section 1 of the *Charter.*[177] Then the Court may provide an appropriate remedy, which, in the case of illegally obtained evidence, as mentioned above, is often exclusion of the evidence.

Evidence is excluded under s. 24(2), where the applicant's rights have been infringed by improper state action, and not by the actions of a third party or a hypothetical accused. While the evidence at issue must bear a relationship to the breach, the relationship can be temporal, causal or contextual in nature; and the standard is less stringent.[178] The standard of proof is the civil one – on a balance of probabilities. The applicant must establish that having regard to all the circumstances, the exclusion of evidence is the appropriate remedy for a rights violation.

According to the Supreme Court, the application judge asks, as a dispassionate and fully informed member of the public, whether the admission or exclusion of the evidence obtained as a result of the breach would bring the administration of justice into disrepute.[179] Three factors are relevant: the impact of the evidence on the fairness of the

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[175] *R. v. St Lawrence* [1949] O.R. 215 (discovery of the fact confirms the confession); Hamish Stewart, "Section 24(2): Before and After *Grant*" (2011) 15 Can Crim L Rev 253 at 263-264.

[176] *R. v. Wray* [1971] S.C.R. 272. This decision was heavily criticized: Alan Bryant, Sidney Lederman & Michelle Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3d ed. (Toronto: LesixNexis, 2009) ("*Sopinka*") at 550.

[177] While the rights guaranteed by the *Charter* are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" this exception is rarely applicable to the kinds of rights affecting the investigation of criminal matters.

[178] *R. v. Wittwer*, [2008] 2 S.C.R. 235.

[179] *Ibid.* at para. 33.

trial; the seriousness of the violation of *Charter* rights; and, the effect of the exclusion of the evidence on the administration of justice.[180]

For example, because the state bears the burden of proof of establishing guilt beyond a reasonable doubt, and an accused is entitled to the presumption of innocence and need not participate in the case. It is therefore unfair to admit conscriptive evidence, *i.e.,* evidence that the accused has generated, provided, or been the source of through interaction with the state.[181] Generally, this view does not apply to real evidence, such as physical objects, like guns or drugs, because that evidence existed prior to and irrespective of any breach of fundamental rights.[182] However, it does apply to bodily samples, such as blood, DNA, saliva and fingerprints, because these are made available by compelling the accused to participate in the creation or discovery of incriminating evidence.[183] Whether further evidence obtained as a result of conscriptive evidence is admissible depends upon whether it would have been discoverable independently of the breach of the accused's rights.

The approach under section 24 has been described as a balance between automatic exclusion, which once characterized the approach under the US Constitution, and the approach taken under the common law.[184] Striking the right balance is important. If the rights are interpreted too narrowly, only the most egregious examples of misconduct will give rise to the exclusion of evidence and this will tend to bring the criminal justice system into disrepute, but if the rights are interpreted too broadly, criminal behaviour will too frequently go unpunished and, again, the criminal justice system will be brought into disrepute. Striking the right balance has given rise to extensive jurisprudence.

By 2009, the case law on section 24(2) developed into a fairly simplistic exercise of identifying evidence as either "conscriptive" (evidence generated by the accused) or "real" (physical objects such as guns or drugs). It was generally unfair to use "conscriptive" evidence since the State bears the burden of proving guilt beyond a reasonable doubt and the accused is presumed innocent and has no obligation to participate in the trial. Real evidence, on the other hand, was generally admissible. Thus, evidence was admitted or excluded based on the initial classification of "real" or "conscriptive," despite the obvious fact that the text of the Charter commanded attention to "all the circumstances" and not only the type of evidence at issue. This simplistic analysis raised many questions. For example, why ought breath samples obtained in violation of a right be treated differently, and garner more regard, than the contents of a purse seized in violation of a right?

Dissatisfaction with an approach in which the admissibility of evidence turned on a simple distinction between conscriptive and real evidence eventually prompted a reassessment in the 2009 case of *R. v. Grant*.[185] The Supreme Court held that the primary

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[180] *Ibid.* at paras. 36-39.

[181] *R. v. Collins,* [1987] 1 S.C.R. 265.

[182] *Ibid.* at para 86.

[183] *R. v. Stillman,* [1997] 1 S.C.R. 607.

[184] *R. v. Simmons*, [1988] 2 S.C.R. 495 at 532.

[185] *R. v. Grant* [2009] 2 S.C.R. 353 [*Grant*].

concern was in maintaining the integrity of, and public confidence in, the administration of justice over the long term. Section 24(2) is animated neither by the goal of punishing the police nor by the goal of providing compensation or a benefit to the accused, but is rather focused on systemic and societal concerns and prospective long term damage. "The fact of the *Charter* breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system."[186] With this aim in mind, the court proceeded to lay out the current three-part test for section 24(2):

> When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute.[187]

The majority of cases concerning illegally obtained evidence are decided on the basis of section 24(2) of the *Charter,* but evidence may also be excluded under the general remedial provision in section 24(1) and under the residual discretion at common law if that is required to secure the guarantee to a "fair and public hearing."[188] These additional bases for exclusion may be invoked in situations where, for example, the evidence was obtained illegally by a foreign state, or if the illegality did not arise in the process of obtaining the evidence (such as where a statutorily compelled statement is sought to be used in a subsequent criminal prosecution),[189] or where the late disclosure of the evidence to the accused cannot be remedied adequately by an adjournment.[190]

***South Africa*—**Under section 35(5) of the Bill of Rights, evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. This section imposes a duty to exclude the evidence but only if, the court, in its discretion, determines that admission would render the trial unfair or that it would be detrimental to the administration of justice.[191] Accordingly, the section gives

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[186] *Ibid.* at para 69.

[187] *Ibid.* at para 71.

[188] *R. v. Harrer*, [1995] 3 S.C.R. 562.

[189] *R. v. White*, [1999] 2 S.C.R. 417.

[190] *R. v. Bjelland*, [2009] 2 S.C.R. 651.

[191] *Schwikkard & Van de Merwe, supra,* note 64 at 215; The judge in *S. v Hena* 2006 (2) SACR 33 (SE), who purported to exercise a discretion at this stage of the inquiry misconstrued 35(5): W. de Vos "Judicial Discretion to Exclude Evidence in terms of s. 35(5) of the Constitution: *S v Hena* 2006 (2) SACR 33 (SE)" 2009 (3) *SACJ* 433.

rise to interpretive issues similar to those raised by section 24(2) of the Canadian *Charter.*[192] Exclusion under section 35(5) may follow from a determination that admission would render the trial unfair or that for some other reason, it would be detrimental to the administration of justice.[193]

In determining whether admission of the evidence would render the trial unfair, the court will consider all the facts of the case including the nature and the extent of the constitutional breach, the presence or absence of prejudice to the accused, the need to ensure that exclusion of evidence does not tilt the balance too far in favour of due process against crime control, the interests of society and, furthermore, public policy."[194] As with other common law countries, the privilege against self-incrimination is confined to testimonial evidence, such as utterances or conduct with a communicative element such as a pointing out,[195] and does not apply to real evidence, such as bodily substances, or physical evidence, such as a murder weapon[196] or money taken in a robbery[197] that are discovered as a result of an unlawfully obtained statement from the accused.[198] Such evidence may still be excluded where its admission would be detrimental to the administration of justice,[199] as might be the case where the evidence was, nevertheless, the product of compulsion.[200]

In determining whether admission of the evidence would otherwise be detrimental to the administration of justice, the court must balance the need for respect by law enforcement agencies for the Bill of Rights with the need for respect by ordinary persons for the judicial process[201] in the context of a country that suffers from a high level of violent crime.[202] The factors considered may include whether the police acted in good faith[203] such as when an officer seized a gun that a suspect was pointing at someone without first warning him of his constitutional rights; or in bad faith, as when false information was sworn to obtain a warrant to tap someone's phone;[204] or whether real

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[192] Naudé "The Revised Canadian Test for the Exclusion of Unconstitutionally Obtained Evidence" (2009) *Obiter* 607 (South African assessment of *R v Grant*).

[193] *Schwikkard & Van de Merwe, supra,* note 64 at 215-216; *S. v Tandwa* 2008 (1) *SACR* 613 (SCA) para. 116 ("*Tandwa*").

[194] *Ibid.* at 227-228 with reference to case law; *Tandwa, ibid.* at para. 117.

[195] *Schwikkard & Van de Merwe, supra,* note 64 at 238 and the cases cited there.

[196] *Cf R. v. Burlingham* [1995] 28 CRR (2d) 244 (SCC).

[197] *Tandwa, supra,* note 193.

[198] *Schwikkard & Van de Merwe, supra,* note 64 at 238-245.

[199] *Ibid.* at 240.

[200] *Tandwa, supra,* note 193 at para. 125. Given the reliance of Canadian precedents, it remains to be seen whether the law in South Africa will change with the current interpretation of section 24(2) of the *Charter.*

[201] *S. v. Mphala* 1998 (1) SACR 654 (W) 657 g-h.

[202] *S. v. Ngcobo* 1998 (10) BCLR 1248 (N).

[203] *Schwikkard & Van de Merwe, supra,* note 64 at 251-56; *S. v. Lottering* 1999 (12) BCLR 1478 (N) at 1483.

[204] *S. v. Naidoo* 1998 (1) SACR 479 (N).

evidence would inevitably have been discovered despite the fact that it was improperly obtained. [205]

***England and Wales*—**There are three automatic exclusionary rules: first, confessions made by accused persons obtained by oppression; secondly, evidence obtained by words or actions conducive to unreliability, such as evidence obtained by torture; and, thirdly, evidence of intercepted communications to which the Regulation of Investigatory Powers Act 2000 applies, including communications intercepted illegally. Evidence obtained by illegal means other than these three categories may be excluded on a discretionary basis to ensure a 'fair trial'—a widely recognized discretion at common law,[206] which is now codified in the *Police and Criminal Evidence Act 1984*.[207] The Act authorizes a court to exclude prosecution evidence if, having regard to all the circumstances, including the circumstances in which the evidence was obtained, its admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

Under the first category of automatic exclusion, a confession may be admitted only if it is proved beyond reasonable doubt that, notwithstanding that it may be true, it was not obtained by oppression, or by anything said or done that was likely, in the circumstances existing at the time, to render the confession unreliable.[208] 'Oppression' includes torture, inhuman or degrading treatment, and the use or threat of violence, whether or not amounting to torture.[209] This test requires fairly harsh treatment and, therefore, rarely prevents the admission of evidence.[210] For example, where an interviewing officer, giving the impression of impatience and irritation, raised his voice and used some bad language there was no oppression.[211] However, there was oppression where a co-accused was bullied and hectored and the officers were not questioning him so much as shouting at him what they wanted him to say. The Court found that short of physical violence, it was hard to conceive of a more hostile and intimidating approach based on the pace, force and menace of the officers' delivery.[212]

Under the second category of automatic exclusion, evidence obtained by torture is automatically inadmissible in proceedings in the UK, regardless of the location where the torture occurred, and the nationalities of the torturor and the victim.[213] As the House of Lords explained "the courts will not shut their eyes to the way the accused was brought

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[205] *Schwikkard & Van de Merwe, supra,* note 64 at 258-259.

[206] *R. v. Sang,* [1980] A.C. 402.

[207] *Criminal Evidence Act 1984*, s. 78(1).

[208] *Ibid.* s. 76(2).

[209] *Ibid.* s. 76(8)

[210] "'[O]ppression' in section 76(2)(a) should be given its ordinary dictionary meaning. The Oxford English Dictionary as its third definition of the word runs as follows: 'Exercise of authority or power in a burdensome, harsh, or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc; the imposition of unreasonable or unjust burdens.' One of the quotations given under that paragraph runs as follows: 'There is not a word in our language which expresses more detestable wickedness than oppression.'" *R. v. Fulling* [1987] Q.B. 426 at 432 (C.A.).

[211] *R. v. Emmerson* (1991) 92 Cr App R 284 at 287; *R. v. Foster* [2003] EWCA Crim 178.

[212] *R. v. Paris* (1993) 97 Cr App R 99 at 103.

[213] *A. v. Secretary of State for the Home Department* [2005] UKHL 71, [2006] 2 AC 221.

before the court or the evidence of his guilt was obtained…[because] it would compromise the integrity of the judicial process, [and] dishonour the administration of justice, if the proceedings were to be entertained or the evidence admitted."[214] The court must stay the proceeding or reject the evidence to prevent an abuse. This duty is paramount because "to allow its admission would shock the conscience, abuse or degrade the proceedings and involve the state in moral defilement."[215] Automatic exclusion is limited to torture[216] and does not extend to evidence obtained by inhuman or degrading treatment, even in breach of Article 3 of the European Convention.[217] Such evidence might, nevertheless, be excluded where its admission violates the defendant's right to a fair trial under Article 6 of the Convention.

Under the third category of automatic exclusion,[218] where evidence of a suspect's involvement in importing heroin was obtained by a listening device at a time when there was no domestic law regulating their use, the ECHR held that it could not be considered to be "in accordance with the law", as required by Article 8(2) of the Convention and was, therefore, in breach of it.'[219] However, had the domestic courts been of the view that the admission of the evidence would have given rise to substantive unfairness, they would have had discretion to exclude it in any event.[220] In the circumstances, admitting the evidence did not conflict with the requirements of fairness guaranteed by Article 6(1) of the Convention.[221] Where the evidence is very strong and there is there was no risk of it being unreliable, the need for supporting evidence is correspondingly weaker.[222]

Accordingly, the reliability of the evidence is the primary consideration and the requirements of Article 6 of the Convention will be met through the application of section 78(1) of the *Police and Criminal Evidence Act 1984*. This was illustrated in a subsequent decision of the ECHR challenging the use of video surveillance evidence of conversations between a suspect and a friend in a prison visiting area, a co-accused in their cell, and another informant placed in the suspect's cell for the purpose of eliciting information.[223] Referring to the rulings of the domestic trial and appellate courts on the challenges to the admissibility of this evidence, the ECHR was not persuaded that admitting the evidence of the conversations with the friend and the co-accused breached

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[214] *Ibid.* at 87 *per* Lord Hoffmann.

[215] *Ibid.* at 150 *per* Lord Carswell.

[216] *Jalloh v. Germany* (2007) 44 EHRR 32 ("*Jalloh*") at 667 (administration of emetics forcing regurgitation of drugs that had been swallowed), and at para. 105: "incriminating evidence—whether in the form of a confession or real evidence—obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture—should never be relied on as proof of the victim's guilt, irrespective of its probative value."

[217] *Ibid.* at para. 82 at 107.

[218] Breach of Convention Article 8.

[219] *Khan v. UK* (2001) 31 EHRR 45 (p 1016) at paras. 27-28 (judgment of 2000). See also *Elahi v. UK* (2007) 44 EHRR 30 at 645 (judgment of 2006). Note that there is now legal regulation of covert surveillance in the *Regulation of Investigatory Powers Act 2000*.

[220] *Ibid.* at para. 39.

[221] *Ibid.* at para. 40.

[222] *Ibid.* at para. 37; *PG v. UK*, Application no. 44787/98, 25 Sept 2001; *Bykov v. R.ussia*, Application no. 4378/02, 10 March 2009; *Lee Davies v. Belgium*, Application no. 18704/05, 28 July 2009.

[223] *Allan v. UK* (2002) 36 EHRR 12 at 143.

the guarantee of fairness in Article 6(1) of the Convention. However, the requirements of fairness would be breached if the evidence did not consist of spontaneous and unprompted statements volunteered by the applicant, but statements induced by persistent questioning in conversations channelled into discussions of the murder in circumstances that were the functional equivalent of interrogation without the safeguards of a formal police interview.[224]

Similar rulings have been made by courts in England and Wales. In one case, evidence obtained through a search of the defendant's premises conducted without consent[225] was not excluded. The fact of the discovery of the evidence was not challenged, there was no issue as to the reliability of the evidence, and the exclusion of the evidence due to the failure to obtain formal written consent would have had the consequence of interfering with the achievement of justice.[226] In another case, the secret filming by police of defendants in the cell area of a magistrates' court was held to be in contravention of section 41 of the *Criminal Justice Act 1925* and a breach of Article 8, but it did not interfere with the right of the applicants to a fair hearing. The evidence was not excluded.[227] And in a third case, the Court of Appeal rejected the prospect of automatic exclusion based on a breach of Article 8.[228]

In sum, the courts in England and Wales take a case-by-case approach to the exclusion of evidence that has been illegally obtained taking into account in particular any danger that it might be unreliable.

***Ireland—***Evidence that is obtained by any police action in a breach of constitutional rights that is not accidental or unintentional must be excluded at trial. For example, evidence obtained in breach of the right to the inviolability of the dwelling[229] was sought to be excluded when the home of two brothers suspected of involvement in stealing and receiving stolen property was searched pursuant to a search warrant made out for the wrong address. However, since this was a mere oversight, and there was no deliberate treachery, imposition, deceit or illegality, or policy to disregard the Constitution or to conduct searches without a warrant,[230] and there was no deliberate violation of the rights of the accused,[231] the evidence was admitted. However, in another case, the evidence was excluded where a search warrant was issued by a peace commissioner without evidence that he was satisfied that the garda had reasonable grounds for the suspicion[232] even though the gardaí could not have known that the warrant was invalid.

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[224] *Ibid.* at para. 52.

[225] And, therefore, in breach of Code of Practice B.

[226] *R. v. Sanghera* [2001] 1 Cr App R 20 (p 299) at paras. 15–17.

[227] *R. v. Loveridge* [2001] EWCA Crim 973, [2001] 2 Cr App R 29 (p 591) at para. 33. See also *R. v. Lawrence* [2002] Crim LR 584, citing *R. v. Perry, The Times*, 28 April 2000

[228] *R. v. Button* [2005] EWCA Crim 516 at paras. 23-24; and see *R. v. Hardy* [2002] EWCA Crim 3012, [2003] 1 Cr App R 30 (p 494) at paras. 18–19.

[229] Article 40.5 of the Constitution.

[230] *O'Brien, supra,* note 85 at161.

[231] *Ibid.* at 170.

[232] As is required under the provisions of the *Misuse of Drugs Act, 1977*.

In contrast with evidence obtained in breach of a constitutional right, evidence obtained in breach of a legal right is subject to exclusion only at the discretion of the judge. The legislation specifically provides that breaches of certain legislative rights alone will not affect the admissibility of statements by accused persons.[233] Although courts are less inclined to exclude evidence obtained in breach of legal rights, unless there have been multiple breaches, the rights that are likely to be breached in the course of pre-trial investigations and the gathering of evidence are often constitutional rights.

***Australia*—**Investigators who have broken the law may be subject to criminal or civil sanction, or may be disciplined and the evidence obtained improperly or unlawfully may be excluded. However, the evidence will be excluded only if it has been created or obtained as a consequence of the impropriety or illegality[234] because the discretion operates to ensure that the courts do not permit prosecutors to benefit from impropriety[235] and bring the administration of law into disrespect. Accordingly, exclusion would not stop the police from destroying lawfully obtained evidence to prevent the accused from examining it;[236] and where an accused has lost the opportunity to examine some evidence other evidence could be excluded to ensure a fair trial only at the discretion of the court.[237] This 'fairness' discretion is not directed at disciplining law enforcement officials

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[233] *Criminal Justice Act 1984*, s. 7(3) in relation to the Custody Regulations 1987, and s. 27 in relation to the *Electronic Recording Regulations 1997*. In relation to the *1987 Custody Regulations*, see *People (D.P.P.) v. Connell* [1995] 1 I.R. 244; *D.P.P. v. Spratt* [1995] 1 I.R. 585; *People (D.P.P.) v. Van Onzen* [1996] 2 I.L.R.M. 387; *People (D.P.P.) v. Darcy,* unreported, Court of Criminal Appeal, July 29, 1997; *People (D.P.P.) v. Smith,* unreported, Court of Criminal Appeal, November 22, 1999; *People (D.P.P.) v. Murphy,* unreported, Court of Criminal Appeal, July 12, 2001. In relation to the *Electronic Recording Regulations, 1997* see *People (D.P.P.) v. Holland,* unreported, Court of Criminal Appeal, June 15, 1998; *People (D.P.P.) v. Paul Kelly,* unreported, Special Criminal Court, November 26, 2004; *People (D.P.P) v. Connolly* [2003] 2 I.R. 1; *D.P.P. v. Diver* [2005] 3 I.R. 270.

[234] *Question of Law Reserved (No 1 of 1998)* (1998) 70 SASR 281 at 287–8 (Doyle CJ); *R. v. Lobban* (2000) 77 SASR 24 at paras. 39–41 (Martin J.). A more liberal approach to causation is suggested in *Robinett v. Police* (2000) 78 SASR 85 at 101 (Bleby J.) (criticised by Grant, (2001) 25 *Crim Law Journal* 97, but followed by Smart AJ in *DPP v. Carr* [2002] NSWSC 194 at paras. 50–72). In *R. v. Haddad* (2000) 116 A Crim R 312; [2000] NSWCCA 351 at paras. 69–76 Spigelman CJ, disapproving of Martin J's comments in *Lobban* at para. 39, suggests the words 'obtained in contravention' in s. 138 may 'encompass the entirety of an integrated scheme … designed to protect fundamental freedoms' and thus encompass impropriety following the obtaining of evidence; but see narrower approach in *R. v. Dalley* (2002) 132 A Crim R 169; [2002] NSWCCA 284 at para. 86; and *State of Tasmania v. Crane* [2004] TASSC 80 at para. 21 (Blow J.). Doyle CJ in *Police v. Hall* (2006) 95 SASR 482; [2006] SASC 281 at paras. 39–45, expressly modified his narrow position in *Lobban* and followed Chernov J.A. in *DPP v. Moore* (2003) 6 VR 430 at para. 55 in agreeing that impropriety after the obtaining of evidence may be so closely related as to give rise to this discretion (for example, improper failure to provide defendant with blood-test kit following taking of breathalyser test). See also *DPP v. Riley* (2007) 16 VR 519.

[235] *Ridgeway v. R.* (1995) 184 CLR 19 at 31 (Mason CJ, Deane and Dawson J.J.); *Nicholas v. R.* (1998) 193 CLR 173 at paras. 35–36 (Brennan C.J.), para. 101 (McHugh J.), and paras. 211–214 (Kirby J.).

[236] See also *Question of Law Reserved (No 1 of 1998)* (1998) 70 SASR 281 where the court refused to exercise the discretion to exclude evidence lawfully obtained under a search warrant where police had later given deliberately false evidence in court about how they had executed the warrant.

[237] *R. v. Lobban* (2000) 77 SASR 24; *Police v. Hall* (2006) 95 SASR 482, and ss. 135-7 of the uniform legislation.

and must be distinguished from the 'public policy' discretion to exclude evidence improperly or illegally obtained.[238]

At common law, the party seeking exclusion of improperly or unlawfully obtained evidence bears the onus, but the onus is reversed under the legislation. Under the legislation, improperly or unlawfully obtained evidence must be excluded unless the court can be persuaded to exercise its discretion to admit it. Given the strongly adversarial nature of proceedings in common law countries this is an important procedural reform.

***New Zealand*—**Under the legislation, all evidence that is not explicitly declared inadmissible by statute is admissible,[239] but a judge must exclude evidence if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding,[240] or needlessly prolong the proceeding. In criminal proceedings this must take into account the right of the defendant to offer an effective defence.[241] Factors relevant to the balance to be struck in determining whether to exclude the evidence include: the need for an effective and credible system of justice; the value that the right protects and the seriousness of the intrusion upon it; whether the breach was deliberate or arose through gross carelessness; whether other investigatory techniques, not involving any breach of rights, were known to be available and not used; the nature and quality of the disputed evidence; the centrality of the evidence to the prosecution's case; and in cases where a conviction would not lead to a sentence of imprisonment, the availability of an alternative remedy or remedies.[242]

***Israel*—**An out-of-court confession is admissible only if the court is persuaded, based on the evidence regarding the circumstances in which the confession was made, that the confession was given freely and voluntarily. The defendant's right to physical and psychological integrity is protected by discouraging law-enforcement authorities from obtaining confessions through improper methods of interrogation, such as physical violence, threats, psychological abuse, denial of medical care, and other methods that infringe the defendant's fundamental bodily rights. This is not limited to law enforcement authorities but the voluntariness is assessed more carefully if the confession was made in the presence of a law enforcement officer. Further, the Supreme Court has ruled that confessions must be corroborated; a defendant cannot be convicted if the only evidence against him is his own confession.

If the method of obtaining a confession degrades the suspect's dignity, humiliates, or grossly violates the suspect's bodily rights, the confession will be excluded,[243] but only if there is a causal connection between the improper method and the confession, one that

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[238] For a full discussion of the fairness and public policy discretions and the distinctions between them see Ligertwood and Edmond, *Australian Evidence*, 5 ed, (Sydney: LexisNexis Butterworths, 2010) at para. 2.28ff.

[239] *Evidence Act 2006*, s. 7.

[240] *R. v. McGregor* [1968] 1 QB 371 (C.A.) (not to a particular party); *R. v. Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734.

[241] *Evidence Act 2006*, s. 8.

[242] *R. v. Shaheed* [2002] 2 NZLR 377 (C.A.).

[243] CrimA 168/82 *Moadi v. The State of Israel* IsrSC 38 (1) 197.

would also affect its credibility. For example, failure to inform a suspect of the right to counsel does not degrade the suspect or violate any fundamental bodily rights, particularly where the suspect has already been informed of the right to remain silent.[244]

To conduct secret monitoring, *i.e.,* listen to, receive or record a conversation through the use of a device without the consent of the participants,[245] one must have a permit from a government minister if the monitoring is for purposes of national security, or from the President or Vice-President of a District Court if the monitoring is for investigating or preventing an offence punishable by three or more years of imprisonment. Evidence obtained by secret monitoring without a permit is inadmissible unless the monitoring relates to violations of the Secret Monitoring Law or to an offence punishable by seven or more years of imprisonment and the court is not persuaded that, in the circumstances of the case, the public interest in discovering the truth outweighs the interest of privacy. However, the evidence may not be admitted if the person who conducted the monitoring could have obtained a valid permit but failed to do so, unless there was a good faith belief that the monitoring was properly authorised.

It is illegal to violate the privacy of others by stalking or harassing them, photographing them in a private domain, and copying or using the contents of a letter, or of any other written material not intended for publication, without permission from the addressee or the writer.[246] Law enforcement authorities and security agencies are exempted from liability for violations made in the course of reasonably performing their duties.[247] Evidence obtained in violation of privacy is presumptively inadmissible without the consent of the person whose privacy was violated. However, a court may admit the evidence for reasons specified in its decision, and the evidence can be admitted if the violator is a party to the proceedings and has a defence or an exemption under the legislation.[248]

***Singapore*—**Police officers who act illegally in obtaining evidence may be disciplined, and in theory, a civil action may be brought against them, but this hardly ever happens. Moreover, a statement that does not meet the test of voluntariness must be excluded. If the statement passes the voluntariness test, it is generally admissible even if the procedural requirements for the taking of the statement are not met. However, the court has the discretion to exclude a voluntary statement where, as a result of a procedural irregularity, the prejudicial effect of the statement exceeds its probative value.[249]

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[244] CrimA 5121/98 *Issascharov v. Chief Military Prosecutor*, [2006] (1) IsrLR 320, available at: http://elyon1.court.gov.il/files_eng/98/210/051/n21/98051210.n21.htm (last accessed 25.2.2011).

[245] Conversations secretly recorded by one participant without the knowledge of another do not come under this law.

[246] *Protection of Privacy Law*, 5741-1981, s. 2. It is a tort and a criminal offence punishable by up to five years of imprisonment.

[247] *Ibid.* ss. 4, 5.

[248] *Ibid.* s. 32.

[249] *Muhammad bin Kadar v. PP* [2011] SGCA 32 at paras. 55, 56 and 60; *Criminal Procedure Code 2010,* s. 258(3), Explanation 2(e); *PP v. Tan Kiam Peng* [2007] 1 S.L.R.(R.) 522 at para. 45, aff'd [2008] 1 S.L.R.(R.) 1.

Entrapment, though not a defence or a basis for a stay of prosecution,[250] is a mitigating factor in sentencing.[251] At one time, the High Court had distinguished the law in Singapore from that in England,[252] saying that where the illegality perpetrated by the officers preceded the crime and was designed to bring about its commission, the evidence could be excluded,[253] but recent authority has cast doubt on this.[254]

In rare situations, the Courts have excluded statements, for example, when a police officer conducted an interview in English despite the accused's lack of proficiency, took notes on a piece of paper and later transcribed an expanded version in his notebook using words the accused could not have used. Exclusion of the statement was not mandatory but in this case the violations of police procedure were flagrant.

### 3. Variations in consequences based on the gravity of the matter

***United States***—In principle, the Constitutional guarantees, which are more detailed in the US than in any other common law country, apply to all persons accused of crimes. However, some of the rights afforded to accused persons apply only to persons accused of crimes and not to those accused of lesser offences, and some of the procedural rights of persons accused of crimes are available only in Federal Courts, and not in every State court.

***Canada—*** The Supreme Court has identified the gravity of the offence as a factor in assessing applications for the exclusion of evidence under s. 24(2) of the *Charter.* It reflects society's interest in securing a determination of the case on its merits, but does not necessarily always weigh in favour of admission of the evidence. As the Court explained in *R. v. Grant*:

> Failure to effectively prosecute a serious charge due to excluded evidence may have an immediate impact on how people view the justice system. Yet…it is the long-term repute of the justice system that is s. 24(2)'s focus. [...] the goals furthered by s. 24(2) "operate independently of the type of crime for which the individual stands accused" [and] "[t]he *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority" [...]. The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a

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[250] Hock Lai Ho, "State Entrapment" Legal Studies, no. doi: 10.1111/j.1748-121X.2010.00176.x.

[251] *Tan Boon Hock v. PP* [1994] 2 S.L.R.(R.) 32.

[252] *R. v. Sang* [1980] AC 402 (H.L.).

[253] *SM Summit Holdings Ltd. v. PP* [1997] 3 S.L.R.(R.) 138; *Wong Keng Leong Rayney v. Law Society of Singapore* [2006] 4 S.L.R.(R.) 934 (H.C.).

[254] But see *Law Society of Singapore v. Tan Guat Neo Phyllis* [2008] 2 S.L.R.(R.) 239 ("*Tan Guat Neo Phyllis*"); *Muhammad bin Kadar v. PP* [2011] SGCA 32.

> vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.[255]

In a companion case,[256] the Court emphasized that focusing on the offence or the reliability of the evidence tends to diminish the accused's rights—the concern should be with the impact of the state conduct on individual rights and freedoms, and not with the type of evidence at issue.

***South Africa—***As explained earlier, the interpretation in South Africa of the Constitutional provisions for excluding improperly obtained evidence has relied to a large degree on the Canadian jurisprudence and, accordingly, the courts there might follow the approach taken in Canada as described above in respect of the significance of the gravity of the matter.

***England and Wales—***While the gravity of the matter is not explicitly a factor, it seems to have had an effect on the exercise of discretion.[257] Similarly, the seriousness of the breach has also been considered. In one case, a court compared the significance of finding of drugs with the finding of explosives, holding that since entering the premises in breach of the Police and *Criminal Evidence Act 1984* had not been necessary to save life or limb or prevent serious damage to property, the evidence should be excluded.[258]

***Ireland—***The operation of the exclusionary rule is not predicated on the seriousness of the offence and is therefore not affected by it. However, when the right breached is a legal right and not a constitutional right and the exclusion of evidence is at the discretion of the trial judge, the seriousness of the violation of rights may be taken into account along with the seriousness of the crime under investigation in considering the balance between admission or exclusion, in the public interest.[259] Similarly, the extent of the intrusion on rights, rather than the seriousness of the relevant crime, will affect the outcome in police discipline and other remedies external to the criminal process.

***Australia—***The gravity of the crime is an important factor in guiding the discretion of the court. Courts are reluctant to exclude improperly obtained evidence where this impropriety does not undermine the reliability of the evidence and where the evidence is necessary to ensure the conviction of persons who have committed serious crimes. For example, evidence obtained by undercover agents posing as members of criminal organizations has been held admissible,[260] but courts have been more willing to exclude improperly obtained evidence concerning blood alcohol tests.[261]

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[255] *R. v. Grant*, *supra,* note 185 at para 15; Hamish Stewart, *supra,* note 175 at 261-63.

[256] *R. v. Harrison*, [2009] 2 S.C.R. 494 at para. 40.

[257] *Jalloh*, *supra* note 216.

[258] *R. v. Veneroso* [2002] Crim LR 306.

[259] *People (D.P.P.) v. McMahon, McMeel and Wright* [1987] I.L.R.M. 87.

[260] *Tofilau v. R.* (2007) 231 CLR 396.

[261] *DPP v. Moore* (2003) 6 VR 430; *DPP v. Riley* (2007) 16 VR 519.

***New Zealand*—**Under the *Evidence Act*, a judge must exercise discretion to determine whether improperly obtained evidence should be excluded. The seriousness of the offence is a factor that the judge must take into account.[262]

***Israel*—**A confession may be excluded under the common law 'judicial exclusionary doctrine' if admitting the evidence would substantially violate the defendant's right to due process.[263] The court must weigh the nature and gravity of the illegality involved in obtaining the evidence; the degree to which the illegality affects on the probative value of the evidence; and the cost and the benefit to society of excluding the evidence. In the third of these factors, the court is concerned with the importance of the evidence in proving guilt, and the nature and gravity of the offence for which the defendant is being tried.

***Singapore*—**The gravity of the alleged offence does not appear to be a factor in determining whether to exclude improperly obtained evidence.

### 4. Differences between the rules for the prosecution and for the defense

***United States***—In criminal matters, the "Confrontation Clause"—the right to be confronted by the witnesses against one—in the Sixth Amendment, applies only to evidence presented by the prosecution. Its counterpart, the rule against hearsay evidence, applies to evidence presented by the defense.

An accused person's prior behaviour, past convictions or prior criminal acts may not be tendered to show a propensity to misconduct, [264] but they may be introduced for other purposes, such as to show motive, intent, absence of mistake, identity or participation in a common course of conduct, or to challenge the credibility of a defendant who chooses to testify, particularly one who introduces evidence of his or her own good character. A major exception to the general rule exists in rape prosecutions, where the victim's past sexual activities are usually deemed inadmissible, but the defendant's past sexual encounters may be introduced to prove a pattern of sexually deviant behavior.

***Canada*—**Judges have residual discretion to exclude admissible evidence where its probative value is outweighed by the prejudice that may flow from admitting it. In a criminal case, this discretion is exercised differently when it is the defence seeking to admit evidence: the prejudice at issue must *substantially* outweigh the probative value of the evidence before a judge will exclude it.[265]

***South Africa*—**This does not appear to have been considered by the courts, but the question might arise in the context of exculpatory evidence, particularly where it affects the trial of a co-accused.

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[262] *Evidence Act 2006*, s. 30(3).

[263] CrimA 5121/98 *Issascharov v. Chief Military Prosecutor*, [2006] (1) IsrLR 320, available at: http://elyon1.court.gov.il/files_eng/98/210/051/n21/98051210.n21.htm (last accessed 25.2.2011).

[264] *People v. Zackowitz*, (1930) 254 N.Y. 192, 172 N.E. 466.

[265] *R. v. Seaboyer*, [1991] 2 S.C.R. 577.

***England and Wales*—**The issues surrounding the exclusion of improperly obtained evidence appear to have been considered only in the context of evidence for the prosecution.

***Ireland*—**There is no formal distinction to be found in the rules, but as a practical matter, the defendant is usually the party challenging the admissibility of evidence.

***Australia*—**In principle, the rationale for the discretion applies equally to all parties to criminal and civil proceedings, but in practice, criminal defendants are usually the persons seeking to exclude improperly obtained evidence. Moreover, the concern to prevent a wrongful conviction would conceivably affect the exercise of discretion, making a court reluctant to exclude evidence improperly obtained by an accused.

***New Zealand*—**Some examples of differences in the application of the rules for the prosecution and the defence are the exclusion of unreliable statements,[266] exclusion of statements influenced by oppression,[267] and improperly obtained evidence.[268] Some sections of the *Evidence Act* do not refer explicitly to the prosecution, but of their nature would apply only to the prosecution.[269]

***Israel*—**The exclusionary rules discussed above apply equally to both prosecution and defence.

***Singapore*—**It would seem that there is no difference. It has been suggested that in cases of entrapment that state-directed entrapment and private entrapment should be treated similarly[270] and the suggestion that the court should be less reluctant to intervene in private entrapment has also been rejected.[271]

### 5. Practical effect of the rules and how they are applied by the courts

***United States***—Most privacy infringements, such as internet surveillance, national security wiretaps[272] and random stops in public places,[273] which may involve racial and other profiling, [274] are for data gathering or for deterrence purposes, and not for obtaining

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[266] *Evidence Act 2006*, s. 28.

[267] *Ibid.* s. 29.

[268] *Ibid.* ss. 30-31.

[269] Examples are *ibid.* s. 32, which prohibits any person to invite the fact finder to infer guilt from the defendant's silence and requires the Judge to direct the jury that it may not draw that inference, and s. 33, which states that no person other than the defendant's counsel or the Judge may comment on the fact that the defendant did not give evidence at his or her trial.

[270] *Tan Guat Neo Phyllis, supra,* note 254 at para. 47.

[271] *Ibid.* at paras. 43-47.

[272] The Executive has successfully invoked the "state secret" privilege for information on certain aspects of anti-terrorism surveillance to a reviewing court, forcing dismissal of the proceedings.

[273] *Macwade v. Kelly*, (2006) 460 F.3d 260 (2nd Cir.) (random searches of persons on public transit systems upheld); *Nicholas v. Goord*, (2005) 430 F.3d 652 (2nd Cir.) (DNA databanks upheld).

[274] In New York City, during 2006, more than 500,000 persons were stopped and questioned by the police and approximately 200,000 were *Terry*-frisked, overwhelmingly in minority neighbourhoods (which also happen to have the highest incidence of crime). In 98% of cases, no contraband was discovered. See *New York City Police Dep't Stop, Question and Frisk Database*, 2006. http://dx.doi.org/10.3886/ICPSR21660.

evidence *per se.* Furthermore, in the context of evidence gathering, the issues are usually assessed in borderline situations in which technicalities might cause potentially dangerous, and guilty, persons to be freed. All this makes the breaches of fundamental freedoms that occur in evidence gathering difficult to assess in the aggregate.

***Canada—***An empirical study of the decisions following the Supreme Court's 2009 reassessment[275] of the approach taken to illegally obtained evidence under the *Charter* concluded that physical evidence was excluded at a rate of 69% and statements at a rate of 74%[276] where previous the global exclusion rate, while using a different methodology had been 51%.[277] However, a comprehensive picture would need to take into account the cases that are withdrawn by the Crown or that are resolved by a plea bargain.

***South Africa—***While the formal legal rules in South Africa are very similar to those in other common law countries, especially Canada, the balance struck in discretionary determinations between the interest in securing convictions of offenders and safeguarding the rights of accused persons necessarily reflects the particularly needs of a society with a very high rate of violent crime.

***England and Wales—***The exclusion of illegally obtained evidence could have the effect in terminating the prosecution if the evidence was crucial. It is difficult to comment on the way in which the exclusionary rules are applied in the in the absence of comprehensive empirical research, particularly in view of the case-by-case discretion permitted under the legislation.

***Ireland—*** In 2007, a majority of the Balance in the Criminal Law Review Group, which was established by the Minister of Justice, recommended a more flexible rule giving discretion to the trial judge based on the totality of the circumstances, with particular regard for the rights of the victim. However, the Chairman dissented from this recommendation, saying that the current rule protects constitutional rights, and society should be prepared to pay the price for upholding these rights in the exclusion of evidence.[278]

In a decision rendered in the same year a judge criticized the strict approach to exclusion, saying that "[a] rule which remorselessly excludes evidence obtained through an illegality occurring by a mistake does not commend itself to the proper ordering of society which is the purpose of the criminal law".[279] Decisions to exclude should balance the interests of society and the accused, taking the victim's rights into account. The

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[275] In *R. v. Grant*, *supra,* note 185.

[276] Mike Madden, "Marshalling the Data: An Empirical Analysis of Canada's Section 24(2) Case Law in the Wake of *R. v. Grant*" (2011) 15 Can Crim L Rev 229; Mike Madden, "Empirical Data on Section 24(2) under *R. v. Grant*" (2010), 78 CR (6th) 278.

[277] Nathan J.S. Gorham, "Eight Plus Twenty-Four Two Equals Zero Point Five" (2003) 6 CR (6th) 257 at 259.

[278] Balance in the Criminal Law Review Group, *Final Report* (Stationery Office, Dublin, 2007) at 166. Note of Dissent on Exclusionary Rule by the Chairman of the Balance in the Criminal Law Review Group, Gerard Hogan, *Final Report* (Stationery Office, Dublin, 2007) at 287–288.

[279] *D.P.P. (Walsh) v. Cash* [2007] I.E.H.C. 108; Unreported, High Court, March 28, 2007, at para. 65, *per* Charleton J.

defence had sought to have fingerprint evidence following an arrest for burglary excluded because the arrest was based on a match of fingerprints kept on file, the propriety of taking and retaining of which was unclear.[280] On one view, this might be regarded as an attempt to extend the exclusionary rule to evidence not proferred at trial, *i.e.,* the original fingerprints, but on another view, as evidence causatively linked to a breach of rights, [281] it ought to have been excluded.[282]

Impropriety in obtaining evidence is also addressed by internal garda discipline, but that has not historically been satisfactory.[283] In 2007, the Garda Complaints Board was replaced by the Garda Síochána Ombudsman Commission (GSOC) to improve the discipline process, but concern remains as the Obudsman allows gardaí to investigate other gardaí.[284] Criminal proceedings against members of the Garda Síochána have similarly shown a low rate of prosecution and conviction. Pursuant to the Response of the Irish Government to the Report of the CPT in 1998, the Garda Complaints Board referred 196 cases to the Director of Public Prosecutions. Prosecutions were directed in nine complaints but none resulted in convictions.[285] Whether this reflects high standards of police conduct or a reluctance to prosecute and to convict remains unclear.

Civil actions against gardaí are rarely taken and even more rarely pursued to their conclusion.[286] In 1992, 31 proceedings were initiated, one was settled, one was dismissed, and only one resulted in an award of damages.[287] The low rate of civil actions may be explained by the expense involved and the limited access to legal aid. The *Garda Síochána Act, 2005* provides that the State may be held vicariously liable in damages in respect of an "actionable wrong" perpetrated by a member of the gardaí in the course of performing his duties.[288] This may encourage more civil actions in the future, but it

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[280] *Criminal Justice Act 1984*, ss. 6, 8 as am., which provides for the destruction of fingerprints after one year if no proceedings are instituted.

[281] Article 8 ECHR; *Marper v. U.K.*, 4 December 2008 (Appellant's right to privacy under the Constitution and the ECHR).

[282] *Buck, supra,* note 87 and *O'Brien, supra,* note 85.

[283] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) questioned the effectiveness of the garda complaints procedure: D. Walsh, "Twenty Years of Handling Police Complaints in Ireland: a Critical Assessment of the Supervisory Board Model" (2009) 29(2) *Legal Studies* 305.

[284] V. Conway, "A Sheep in Wolf's Clothing? Evaluating the impact of the Garda Síochána Ombudsman Commission" (2008) 43 *Irish Jurist* 109.

[285] Response of the Irish Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 31 August to 9 September 1998 at para. 32.

[286] Response of the Irish Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 26 September to 5 October 1993 at 10–12.

[287] *Ibid.* at 11 (17 cases were not pursued and 11 were pending at year's end; similar statistics applied for the following year).

[288] *Garda Síochána Act, 2005*, s. 48; An "actionable wrong" is defined as a tort or breach of a constitutional right, whether or not the wrong is also a crime and whether or not the wrong is intentional.

would not affect the operation of the exclusionary rule, which is based on the rationale of protectionism, rather than deterrence.[289]

***Australia—***The practical effect of the rules and how they are applied by the Court is difficult to assess because discretionary determinations in lower courts that are not appealed are not a matter of record. However, the factors taken into account include the probative value of the evidence; and the importance of the evidence in the proceeding; and the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and the gravity of the impropriety or contravention; and whether the impropriety or contravention was deliberate or reckless; and whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

Accordingly, courts are likely to exclude evidence obtained in deliberate disregard of law or the standards of propriety,[290] and they are likely to do so where the crime is serious and the evidence could not otherwise be obtained, and they will be more sympathetic to law enforcement officers who believed that they were acting lawfully[291] or whose impropriety was not the sole basis for the evidence.[292] Discretionary determinations in this area, as in other areas are entitled to deference on appeal unless it can be shown that the discretion was exercised on the basis of an error in law or fact.[293]

***New Zealand—***The statutory protections of fundamental rights in New Zealand are still relatively new, and in some respects, such as the right to be treated with humanity, their interpretation cannot readily be based on precedents elsewhere. Accordingly, many of the details of their practical effect on improperly obtained evidence remains to be worked out.

***Israel—*** Although Israel is a mixed jurisdiction (common law/civil law), the law of evidence is based primarily on adversarial common law rather than the inquisitorial continental systems. It favours discretionary rules of weight over strict rules of inadmissibility. The judge as fact-finder exercises discretion in determining the admissibility and the appropriate weight to be given to evidence, when the means by

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[289] Contrast this with the apparent view of the U.S. Supreme Court that improvements in police discipline and accountability have lessened the necessity for exclusion as a remedy: see *Hudson v. Michigan* (2006) 547 US 586. Y.M. Daly, "Unconstitutionally Obtained Evidence in Ireland: Protectionism, Deterrence and the Winds of Change" (2009) 19(2) I.C.L.J. 40.

[290] *Bunning v. Cross* (1978) 141 CLR 54 at 77–8; *Parker. v. Comptroller-General of Customs* [2007] NSWCCA 348 at para. 59, but this deliberation is not necessarily determinative: ALRC 26 (1985), vol. 1 at para. 964.

[291] *Law Enforcement (Controlled Operations) Act 1997* (NSW); *Dowe v. R.* [2009] NSWCCA 23.

[292] *R. v. Swaffield; Pavic v. R.* (1978) 141 CLR 54. Cases under the uniform legislation also appear to have regard to the effect of impropriety upon the accused as an aspect of 'fairness' to be considered in exercising the s. 138 discretion: *DPP v. Farr* (2001) 118 A Crim R 299; [2001] NSWSC 3 at para. 86 (Smart AJ); *R. v. Dungay* [2001] NSWCCA 443 at paras. 31–51 (Ipp AJA); *R. v. Helmhout* [2001] NSWCCA 372 at paras. 11- 12 (Ipp AJA); *R. v. Phuong* [2001] NSWSC 115 at paras. 48–50 and 59 (Wood CJ at CL).

[293] *R. v. Ridgeway* (1998) 71 SASR 73 at 85 per Doyle CJ).

which it was obtained is challenged. In 2006, the Supreme Court of Israel formulated an overarching exclusionary rule that gives any court the discretion to exclude any illegally obtained evidence if the court considers that its admission would substantially violate the defendant's right to due process.[294] However, exclusion of evidence under this rule is relatively rare.

***Singapore—***In practice, the courts have rarely exercised discretion to exclude illegally obtained evidence and it is now doubtful that they have the discretion to do so.[295] The competing interests in exercising discretion were once described as follows:

> …two important interests come into conflict when considering the question of admissibility of …. evidence [that has been illegally] obtained. On the one hand there is the interest of the individual to be protected from illegal invasions of his liberties by the authorities and on the other hand the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from the courts on any merely technical ground.[296]

In practice, the emphasis has been on the latter concern and this has caused the courts to caution those seeking to raise allegations of impropriety on the part of the police for the purposes of seeking to exclude evidence that "[i]t is not incumbent on the prosecution... to prove that there is no lurking shadow of doubt or minute vestiges of fear in the mind of the accused before a statement is recorded'.[297] Putting it more directly, in 1994, the Court of Appeal said: "Robust interrogation is, in our opinion, an essential and integral aspect of police investigation."[298]

There is a noticeable 'tough on crime' attitude exhibited by Singapore politicians. As, Lee Kuan Yew, the then Prime Minister, explained:[299]

> The basic difference in our approach springs from our traditional Asian value system which places the interests of the community over and above that of the individual. In English doctrine, the rights of the individual must be the paramount consideration. We shook ourselves free from the confines of English norms which did not accord with customs and values of Singapore society. In criminal law legislation, our priority is the security and well-being of law-abiding citizens rather than the rights of the criminal to be protected from incriminating evidence. … These differences in approach may explain why law and order is better in Singapore than in many other new countries

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[294] CrimA 5121/98 *Issascharov v. Chief Military Prosecutor*, [2006] (1) IsrLR 320, available at: http://elyon1.court.gov.il/files_eng/98/210/051/n21/98051210.n21.htm (last accessed 25.2.2011).

[295] *Tan Guat Neo Phyllis, supra,* note 254.

[296] *Cheng Swee Tiang v. PP* (1964) 30 MLJ 291.

[297] *PP v. Lim Thian Lai* [2005] SGHC 122 at para. 32, aff'd [2006] 1 S.L.R.(R.) 319, citing *Panya Martmontree v. Public Prosecutor* [1995] 2 S.L.R.(R.) 806 at para. 29.

[298] *Seow Choon Meng v. PP* [1994] 2 S.L.R.(R) 338 at 353.

[299] 'Address by the Prime Minister, Mr Lee Kuan Yew' (1990) 2 Singapore Academy of Law Journal 155 at 155-156.

Judges too have stressed the need to take into account local conditions and values in shaping the administration of criminal justice; to give primacy to the objectives and values of the Singapore criminal justice system; and despite the common or universal values infused in the common law, in the field of criminal law, to recognize that national values on law and order may differ not only in type, but also in intensity of adherence. This has led to a reluctance on the part of judges to let 'legal technicalities' get in the way of convicting the guilty. [300] Nevertheless, others have expressed concern about how the 'national values on law and order' are defined, and by whom; and there is debate over what bearing cultural and social sensitivity should have, as a matter of principle, on the rights of the accused.

## B. Presenting Evidence

### 6. Restrictions on means of presenting evidence due to its probative value

***United States***—The well-known hearsay rule applies to all evidence, including testimonial and non-testimonial evidence, presented by both the prosecution and the defense, subject to various exceptions. In criminal matters, these exceptions primarily include party admissions, such as confessions; declarations against financial or penal interest; excited utterances; prior inconsistent statements; and descriptions of present sense impressions. In ruling on the admissibility of evidence, judges will consider whether a hearsay exception exists, and then, where appropriate, test the statement against the Confrontation Clause of the Sixth Amendment.

In addition, the fundamental rights to confidential communications with counsel,[301] with one's spouse,[302] with one's doctor, and with one's clergy member, are protected to varying degrees by the law of privilege, with communications to journalists and social workers rarely enjoying such protection.

***Canada—***In the last two decades, significant efforts have been made by the courts to rationalize and reassess the underlying logic and policy of many of the rules governing the presentation of evidence, particularly in areas such as similar fact evidence,[303] expert opinion evidence, judicial notice, and privilege,[304] to ensure they are coherent and consistent with contemporary constitutional[305]and cultural[306] values and capable of providing a proper foundation for a finding of legal consequences.

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[300] *Fung Yuk Shing v. PP* [1993] 2 S.L.R. 771 at para. 19.

[301] The principal exception to the attorney-client privilege is the "crime-fraud" exception, lifting the privilege for conversations designed to facilitate the commission of crime or fraud.

[302] Several variants of the spousal privilege exist, ranging from an absolute spousal privilege invocable by either spouse, to one waiveable by the testifying spouse.

[303] *R. v. Handy*, [2002] 2 S.C.R. 908, 213 D.L.R. (4th) 385.

[304] *R. v. Marquard*, [1993] 4 S.C.R. 223, 108 D.L.R. (4th) 47.

[305] *Eg., M.(A.) v. Ryan*, [1997] 1 S.C.R. 157; *R v. Mills*, [1998] 3 S.C.R. 668; *R. v. O'Conner*, [1995] 4 S.C.R. 411 (gender equality principles and the law governing access to the prior sexual and psychiatric records of sexual assault complaints in civil and criminal cases).

[306] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *R. v. N.S.*, 102 O.R. (3d) 161 (oral testimony from aboriginal elders now admissible); Robert J. Currie, "The Bounds of the Permissible: Using 'Cultural

One area of significant development has been in the rules governing the use of hearsay evidence. Out of court statements tendered for the truth of their contents despite the lack of contemporaneous cross-examination of the declarants are presumptively inadmissible.[307] While common law and statutory exceptions exist, primarily for documents and business records, in 1990 the Supreme Court began a "hearsay revolution"[308] to create a "principled approach" to the admission of such statements, based on their reasonable necessity and threshold reliability. The evidence must also be otherwise admissible—the principled approach does not override other policy reasons for exclusion and cannot be used to undermine them.[309] However, for example, in criminal matters, the *Charter* does not guarantee the right to cross-examine in and of itself; it is just one means to the end of trial fairness[310] but the "difficulties in testing the evidence, or conversely the inability to present reliable evidence, may impact on an accused's ability to make full answer and defence."[311]

The requirement of *necessity* represents society's interest in getting at the truth. Hearsay evidence may be necessary where the declarant is unavailable or the applicant is unable to obtain evidence of a similar quality from another source, as might be the case, for example, with a prior statement of a recanting witness. This requirement seeks to ensure that evidence is presented in the best available form.[312] A witness' fear or disinclination does not, on its own, constitute necessity, but age, trauma or hardship might do so.[313]

The requirement of *reliability* represents society's concern with ensuring the integrity of the trial process. This is achieved by admitting only hearsay that is sufficiently reliable to overcome the dangers of not being tested through cross-examination. Hearsay testimony may be regarded reliable for substantive or procedural reasons.[314] Hearsay may be *substantively* reliable if the circumstances of the making of the statement tend to negate inaccuracy or fabrication; in other words, are the circumstances in which the statement came about such that the contents are trustworthy? If it is a highly reliable spontaneous statement, there may be is no real concern about whether the statement is true, and thus it may not be crucial that it be tested by cross-examination.[315] Hearsay may be *procedurally* reliable where the circumstances of the

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Evidence' in Civil Jury Cases" (2005) 20.1 CJLS 75.

[307] *R. v. Khelawon*, [2006] 2 S.C.R. 787 at para 35 ("Our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, whose demeanour can be observed by the trier of fact, and whose testimony can be tested by cross-examination.")

[308] Bruce Archibald, "The Canadian Hearsay Revolution: Is Half a Loaf Better Than No Loaf at All?" (1999) 25 Queen's LJ 1.

[309] *R. v. Couture, supra,* note 312 at para. 63.

[310] *R. v. Potvin*, [1989] 1 S.C.R. 525.

[311] *R. v. Khelawon*, *supra,* note 307 at paras. 47-49.

[312] *R. v. Couture*, [2007] 2 S.C.R. 517 at para. 79, *per* Charron J.

[313] See generally: *R. v. F. (W.J.)*, [1999] 3 S.C.R. 569; Shalin Sugunasiri & Ronalda Murphy, "*R. v. F. (W.J.)*: Hearsay Evidence and the Necessity of Necessity", Case Comment, (2000) 43 Crim LQ 181.

[314] *Khelawon*, *supra,* note 307 at para. 61: *Couture*, *supra* note 312 at paras. 80 and 87.

[315] Relevant factors include: the possibility of inaccuracy in respect of the hearsay statement; content of the statement; motive to lie; relationship between the hearsay declarant and the witness; mental capacity; the

making of the statement provide the trier of fact with a satisfactory basis for evaluating the truth of the statement. This could be the case where it was made under oath; where it is available for viewing on videotape, or where there was an opportunity to cross-examine the declarant at the time it was made. The analysis of substantive and procedural reliability may be combined as complementary to one another.[316]

The "principled approach" has changed evidence law considerably, facilitating the prosecution of assault cases of assault against children and of domestic violence, but it sometimes results in admitting evidence that would not have been admitted under the traditional exceptions or excluding evidence that would have been admitted under the traditional exceptions but does not meet the requirements of necessity and reliability.[317] In addition, it remains subject to the residual discretion of the trial judge to exclude hearsay evidence where its probative value is outweighed by its prejudicial effect.[318]

***South Africa*—**The law of evidence, which regulates the proof of facts in both criminal and civil proceedings, is part of the English oriented procedural system that was introduced in the Cape. Accordingly, it is characterized by the same salient features as the traditional English Model.[319] The influence of the jury on the English trial proceedings gave rise to a body of rules regulating the admissibility of evidence[320] consisting mainly of categories of evidence that are generally inadmissible, including character evidence, similar fact evidence, opinion evidence and previous consistent statements.[321] In addition, evidence, though probative, may be excluded for various reasons of privilege.[322] Finally, hearsay evidence is also presumptively excluded, although the court has a wide discretion to admit it if it is in the interest of justice.[323]

***England and Wales*—**Among the many rules affecting the presentation of evidence improperly obtained, two exclusionary rules are indicative: the rule prohibiting the introduction of evidence of bad character in criminal cases except in specified circumstances; and the rule prohibiting the introduction of hearsay evidence in criminal cases except in specified circumstances.

***Ireland*—**The rules of evidence affecting the manner in which certain evidence is presented are generally based on the need to ensure an appropriate balance between the

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ability to perceive, recall and recount accurately; a child's demeanour, personality, intelligence and understanding; social or formal context of statement; and declarant's reputation for truthfulness.

[316] *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764.

[317] *R. v. Starr*, [2000] 2 S.C.R. 144 (traditional "state of mind" exception modified to require additional element: that the statement not be made "under circumstances of suspicion"; contrast *R. v. Mapara*, [2005] 1 S.C.R. 358 (co-conspirators' exception to the hearsay rule met the requirements of threshold reliability and necessity).

[318] Subject to the lower threshold for exclusion where it is tendered by defence counsel: *R. v. Seaboyer*, *supra* note 174.

[319] On the incorporation of English law of evidence into the South African law, see *Schwikkard & Van der Merwe, supra* note 64, at 25 *et seq*.

[320] *Ibid.* at 4-6.

[321] See *Schwikkard & Van de Merwe, supra,* note 64, chapters 5-9.

[322] *Ibid.* chapters 10-11.

[323] *Ibid.* chapter 13.

probative value of the relevant evidence and its potential to prejudice the accused. The constitutional right to a fair trial[324] underlines the importance of achieving this balance. In addition to a residual discretion to exclude any evidence where its probative value is outweighed by its prejudicial effect[325] the following rules are relevant: the rule against hearsay; the rule requiring confessions to be voluntary; the rules requiring evidence to be corroborated; the rules restricting opinion evidence.

In Ireland, subject to various exceptions, the rule against hearsay[326] is part of the "best evidence" rule, which confines admissible evidence to the most reliable evidence available.[327] One such exception that is provided for in recent legislation is designed to protect testimony that might be lost through the intimidation of a witness. It permits the introduction of a witness statement even though the witness may refuse to give evidence at trial, denies making the statement or gives evidence that contradicts in a material manner that which is mentioned in the original statement.[328] The safeguards supporting this exception require the witness to be available for cross-examination;[329] the witness to confirm, or it to be proved, that he made the statement;[330] the court to be satisfied that direct oral evidence of the fact concerned would be admissible, that the statement was made voluntarily and that it is reliable;[331] and, the statement to have been given on oath or affirmation or with a statutory declaration by the witness that it is true to the best of his knowledge or belief, or the court is otherwise satisfied that when the statement was made the witness understood the requirement to tell the truth.[332]

Only a confession that has been voluntarily given may be admitted in evidence[333] because coerced confessions are more likely to be unreliable than those that are freely given.[334] The traditional rule sought to exclude confessions obtained by threats or

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[324] Protected under Article 38.1 of the Constitution.

[325] *People (D.P.P.) v Quinn* unreported, Court of Criminal Appeal, March 23 1998; *People (D.P.P.) v. McMahon, McMeel and Wright* [1987] I.L.R.M. 86.

[326] D. McGrath, *Evidence*, (Dublin: Thomson Round Hall, 2005) Ch. 5. For Irish caselaw on the rule against hearsay see *Cullen v. Clarke* [1963] I.R. 368; *People (A.G.) v. Crosbie* [1966] I.R. 490; *People (A.G.) v Casey (No.1)* [1961] I.R. 264; *People (D.P.P.) v McGinley* [1998] 2 I.R. 408. See also *Criminal Evidence Act 1992*, ss. 5 and 8; *Children Act 1997*, ss. 23 and 24; *Criminal Assets Bureau Act 1996*, ss. 8(5) and 8(7); *Proceeds of Crime Act 1996,* s. 8; and the *Criminal Justice (Theft and Fraud Offences) Act 2001*, s. 52.

[327] *Teper v. R.* [1952] A.C. 480; *Dascalu v. Minister for Justice* unreported, High Court, November 4, 1999. D. McGrath, *Evidence*, *ibid.* at 214.

[328] *Criminal Justice Act 2006*, s. 16.

[329] *Ibid.* s. 16(1).

[330] *Ibid.* s. 16(2)(a).

[331] *Ibid.* s. 16(2)(b).

[332] *Ibid.* s. 16(2)(c).

[333] See *In re National Irish Bank (No.1)* [1999] 3 I.R. 145 at 186-187 where Barrington J. stated that ""any trial at which an alleged confession other than a voluntary confession [was] admitted in evidence against the accused person would not be a trial in due course of law within the meaning of Art. 38 of the Constitution…"

[334] Reliability is an important concern given that, as Hardiman J. noted in *Braddish v. D.P.P.* [2001] 3 I.R. 127 at 133 "…relatively recent history both here and in the neighbouring jurisdiction has unfortunate examples of the risks of excessive reliance on confession evidence".

inducements,[335] but this has been expanded to include confessions obtained in circumstances of oppression.[336]

Corroboration of evidence may be required[337] for certain offences, such as treason,[338] perjury,[339] procuration (procuring a woman or a girl to become a prostitute),[340] or elements of offences, such as the speed, where necessary, in road traffic offences.[341] Where uncorroborated confession evidence is given at a trial on indictment the judge is required by law to warn the jury to have due regard to the absence of corroboration.[342] A similar warning must generally be given in relation to uncorroborated accomplice evidence;[343] and this is also thought to be desirable but not mandatory for uncorroborated identification evidence.[344] Such a warning is discretionary under the legislation in relation to the evidence of a complainant in a sexual offence.[345]

Only the professional opinion of experts, such as doctors, psychiatrists, or forensic analysts, may be admitted, and only when it enables the court to make an informed decision on the facts, and does not answer the central question before the court. Expert opinion should be sought only on matters outside of the ordinary understanding of ordinary members of the community.[346]

***Australia—***As in other common law jurisdictions, the restrictions on the means of presenting evidence are the product of the adversary process and the tradition of presenting oral testimony from witnesses based on memory and subject to cross-examination. The integrity of this testimony is preserved by rules restricting hearsay evidence, but there are many exceptions in both the common law states and territories and those that have adopted the uniform legislation, and the legislation now more generally admits first-hand hearsay in both civil and criminal cases.

***New Zealand—***The main restriction on the means of presenting evidence due to its probative value is for hearsay evidence. Statements made by persons other than a

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[335] *Ibrahim v. R.* [1914] A.C. 599; *A.G. v. McCabe* [1927] I.R. 129; *McCarrick v. Leavy* [1964] I.R. 225.

[336] *R. v. Priestly* (1965) 50 Cr. App. Rep. 183; [1966] Crim. L.R. 507; *R v. Prager* [1972] 1 All E.R. 1114; [1972] 1 W.L.R. 260; *People (D.P.P.) v. Breathnach* (1981) 2 Frewen 43; *People (D.P.P.) v. Pringle, McCann and O'Shea* (1981) 2 Frewen 57; *People (D.P.P.) v. Lynch* [1982] I.R. 64.

[337] See McGrath, D. *Evidence*, (Thomson Round Hall, Dublin, 2005) Ch. 4.

[338] *Treason Act 1939*, s. 1(4).

[339] This is a common law rule. See *R. v. Parker* (1842) Car. & M. 639 at 645; *R v. Linehan* [1921] V.L.R. 582 at 588; *R. v. Sumner* [1935] V.L.R. 197 at 198.

[340] *Criminal Law Amendment Act, 1885*, s. 2.

[341] *Road Traffic Act 1861*, s. 105.

[342] *Criminal Procedure Act 1993*, s. 10.

[343] See *People (A.G.) v. Phelan* (1950) 1 Frewen 98.

[344] *People v. Casey (No. 2)* [1963] I.R. 33; *People (D.P.P.) v. O'Reilly* [1990] 2 I.R. 415.

[345] *Criminal Law (Rape)(Amendment) Act 1990,* s. 7. On the application of this provision see *People (D.P.P.) v. Molloy*, unreported, Court of Criminal Appeal, July 28, 1995; *People (D.P.P.) v. Wallace*, unreported, Court of Criminal Appeal, April 30, 2001; and *D.P.P. v. Peter Dolan* [2007] I.E.C.C.A. 30.

[346] See *Attorney General (Ruddy) v. Kenny* (1960) 94 I.L.T.R. 185; *R v. Turner* [1975] QB 834; [1975] 1 All E.R. 70; *People (D.P.P.) v. Kehoe* [1992] I.L.R.M. 481.

witness offered in evidence at the proceeding to prove the truth of its contents[347] are admissible if the circumstances relating to the statement provide reasonable assurance that the statement is reliable and the maker of the statement is unavailable as a witness, or the Judge considers that undue expense or delay would be caused if the maker of the statement were required to appear to testify.[348] Specific provision is made for interlocutory applications[349] and for documents provided in pre-trial disclosure,[350] and for business records,[351] but double hearsay is excluded in any event.[352] In criminal proceedings, no evidence can be given about what an accused person has said by anyone other than the accused, and authorization to tender hearsay evidence must be determined on application in advance of the hearing.[353]

***Israel*—**For various reasons concerning the probative value of evidence, certain types of evidence, such as evidence based on conjecture or opinion, hearsay, the defendant's prior convictions, and the results of a polygraph test, may not be presented. However, there are exceptions to these rules that are similar to those found in other common law countries. For example, exceptions to hearsay, based on the presumed reliability of the statement, notwithstanding that it is hearsay, include: excited utterance, dying declaration, declarant unavailability, and inconsistent or conflicting prior statement by a witness testifying in court.[354] Similarly, hearsay documents are admissible on consent, provided that the defendant is represented by counsel; prior convictions may be admitted, where the evidence qualifies under the similar fact exception.

In addition, in response to the concern that prosecution witnesses might recant or disappear, particularly in organized crime matters, a court has discretion to admit a prior out-of-court statement if the witness's testimony substantially contradicts the prior statement or if improper or illegal means served to dissuade or prevent the witness from testifying.[355] However, the testimony must be corroborated.

***Singapore*—**Hearsay evidence is generally inadmissible in Singapore unless it falls under an exception to the rule[356] because the original maker of the statement is not available to be cross-examined and the reliability of the evidence cannot be properly tested. However, many exceptions can be found in the *Evidence Act*[357] and the *Criminal Procedure Code 2010*[358] including the unavailability of the original maker of the

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[347] *Evidence Act 2006*, s. 4(1).

[348] *Ibid.* s. 18(1).

[349] *Ibid.* s. 34(1).

[350] High Court Rules, 7.29, 7.30.

[351] *Evidence Act 2006*, s. 19(1)

[352] *R. v. Rajamani* HC, Auckland CRI 2005-004-001002, 5 June 2008.

[353] *Evidence Act 2006*, s. 22.

[354] *Evidence Ordinance (New Version)*, 5731-1971, ss. 9-12.

[355] *Ibid.* ss. 10A(a) and 10A(b).

[356] The source and framework of the law on hearsay evidence in Singapore is complex in relation to the Evidence Act: *Lee Chez Kee v. PP* [2008] 3 S.L.R.(R) 447 at paras. 66-75.

[357] *Evidence Act,* s. 32.

[358] *Criminal Procedure Code 2010*, ss. 269-77.

statement, such as where he has died or cannot be found,[359] 'dying declarations', business records and statements against the self-interest of the maker.[360] Procedural safeguards in the admission of hearsay include the requirement to serve on the opponent a notice of intent to adduce hearsay evidence (including information relating to the statement and its maker[361]) and guidance for the court in assessing the weight of the hearsay statement (such as possible incentives for the maker of the statement to conceal or misrepresent the facts).[362]

In addition, Singapore has adopted the English common law test for similar fact and character evidence,[363] reading them into the interpretation of the *Evidence Act.*[364] The probative force of previous misconduct must exceed its potential prejudicial effect. Related to this is the rule that an accused person generally cannot be crossed-examined on his bad character.[365] Furthermore, the evidence of certain categories of 'unreliable' witnesses, such as accomplices,[366] and, controversially, children[367] and complainants of sexual offences[368] must be treated with caution[369] and may be excluded entirely.[370] An accomplice charged and jointly tried with the accused assumes the status of a co-accused and the confession of one can be taken into consideration against the other.[371] This

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[359] *Evidence Act,* s. 32 and s. 270(1)(b); *Criminal Procedure Code 2010,* s. 272(2)(c).

[360] *Evidence Act*, ss. 32(a), (b) and (c) respectively.

[361] *Criminal Procedure Code 2010* s. 271(2) and (3).

[362] Criminal Procedure Code 2010, s. 273(3).

[363] *DPP v. Boardman* [1975] 1 A.C. 421; *DPP v. P.* [1991] 2 A.C. 447.

[364] *Evidence Act,* ss. 14, 15 and 11(b); *PP* v *Teo Ai Nee* [1995] 1 S.L.R.(R) 450; *Tan Meng Jee* v *PP* [1996] 2 S.L.R.(R) 178; *Lee Kwang Peng* v *PP* [1997] 2 SLR(R) 569.

[365]Section 122(4) of the Evidence Act protects the accused from being cross-examined on: the fact that he has committed, or has been charged with or convicted or acquitted of, any offence other than the offence charged; or the fact that he is generally or in a particular respect a person of bad disposition or reputation. There are however exceptions to this rule. The accused can be cross-examined on any of these matters where, to put it loosely, the defence has attacked the character of a prosecution witness (s. 122(7)) or the accused has given evidence against a co-accused (s. 122(8)) or he has given evidence of his good character (s. 56).

[366] Particularly where their trials remain incomplete. *PP v. Syed Abdul Aziz bin Syed Mohd Noor* [1992] SGHC 197, citing the English cases of *R. v. Pipe* (1967) 51 Cr App R 17 at 20 and *R. v. Turner* (1975) 61 Cr App R 67 at 78. (appeal allowed on another point in *Syed Abdul Aziz v. PP* [1993] 3 S.L.R.(R) 1.) There is no mandatory obligation to give a corroboration warning with respect to accomplice evidence: *Evidence Act*, s. 135 but caution must be exercised.

[367] *Lee Kwang Peng v. PP* [1997] 2 S.L.R.(R) 569 at para. 67: 'there is no special rule requiring a trial judge to direct himself as to the dangers of convicting without corroboration where the only evidence is that of a child witness, although he or she must remain sensitive to the requirement of corroborative evidence or alternatively consider that corroboration is not required because of the maturity and reliability of the witness.'

[368] *PP v. Mohammed Liton Mohammed Syeed Mallik* [2008] 1 S.L.R.(R) 601 at para. 37 et seq.

[369] J. Pinsler, *Evidence and the Litigation Process* (LexisNexis: Singapore, 3 ed, 2010) ch 13.

[370] *Roy S Selvarajah v. PP* [1998] 3 S.L.R.(R) 119 at para. 59. The power exists as a matter of discretion or practice; an accomplice is, as a matter of law, competent to give evidence against an accused person: *Evidence Act*, s. 135.

[371] *Criminal Procedure Code 2010*, s. 258(5) (formerly *Evidence Act*, s. 30).

evidence no longer needs to be corroborated to sustain a conviction,[372] but this development has been questioned.[373] Finally, silence may be taken as evidence in Singapore: an adverse inference can be drawn from the failure of the accused to disclose relevant information to the police and also from his failure to take the witness stand.[374]

### 7. Legal or procedural consequences of presenting evidence by such means

***United States***—A distinction is made between evidence of past behavior that is introduced to prove propensity, which is inadmissible, and evidence of past behavior that is introduced to undermine credibility, which is often admitted. As a practical matter, a criminal defendants' failure to testify is often driven by a desire to keep certain facts about his or her past from the jury. Some courts distinguish between convictions of dishonesty, and other types of convictions, reasoning that dishonesty convictions, like perjury or counterfeiting, are particularly relevant to credibility. Other courts consider the age of the conviction. Yet other courts consider the seriousness of the offense, differentiating between felonies and misdemeanors. Arrests are not admissible for any purpose. A defendant is entitled to know in advance what convictions and bad acts the prosecution intends to use to impeach his or her credibility, and to have a hearing on whether the evidence will is admissible before deciding whether to testify. A judge often charges the jury that convictions and bad acts are not evidence of the crime, but merely guides to credibility, but it is doubtful whether this instruction is effective.

***Canada—*** The admissibility of evidence is determined by the trial judge upon submissions of counsel either before or during the trial.[375] Major issues, such as similar fact evidence, hearsay, or a confession, will typically be decided in a separate hearing called a *voir dire* that permits the party seeking to introduce the evidence to prove on a balance of probabilities through evidence and submissions that the evidence should be admitted. If admitted, the trier of fact determines what weight, if any, to give to it. The failure to object to the admission of evidence may preclude objection to it on appeal, particularly where the failure to object appears to have been part of the litigation strategy. Evidentiary determinations are usually appealable only after the trial is concluded, and discretionary rulings are accorded deference.[376]

***South Africa—***Under the common law position, prior to the adoption of the Constitution of 1996, recognition was accorded in several cases to a judicial discretion to exclude illegally or improperly obtained evidence[377] as a matter of public policy,

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[372] *Chin Seow Noi v. Public Prosecutor* [1993] 3 S.L.R.(R) 566.

[373] *Lee Chez Kee v. PP*, [2008] 3 SLR(R) 447 at para. 113 (questioning the elimination of the need for corroboration); Michael Hor 'Co-accused confessions: the third anniversary' (1996) 8 Singapore Academy of Law Journal 323-343; 'The confession of a co-accused' (1994) 6 Singapore Academy of Law Journal 366-391.

[374] *Criminal Procedure Code 2010,* ss. 230(1)(m) and 261.

[375] *Sopinka*, *supra,* note 176 at 74-82.

[376] *Grant*, *supra,* note 185.

[377] *Cf Shell SA (Edms) Bpk v. Voorsitter Dorperaad van die OVS* 1992 (1) SA 906 (O); *Motor Industry Fund Administrators (Pty) Ltd v. Janit* 1994 (3) SA 56 (W); *Lenco Holdings Ltd v. Eckstein* 1996 (2) SA 693 (N).

particularly in view of the way modern technology can facilitate the invasion of privacy. After the commencement of the constitutional era this approach was acknowledged to apply also in civil matters.[378] While the Constitution provides a basis for the discretion to exclude evidence only in criminal matters, the guaranteed of a right to a fair trial provides a framework for this discretion in civil matters as well.[379] For example, where an applicant in compulsory sequestration proceedings sought to introduce evidence that had been obtained in a manner that was unlawful and constituted a deliberate infringement of the respondents' right to privacy,[380] the Court excluded it on the basis that it was obliged to uphold the principles and foundational values of the Constitution. The Court was of the view that it had a discretion to exclude evidence in civil matters that had been obtained in violation of the Constitution or by a criminal act or otherwise improperly, and that such evidence should be admitted only if it would not lead to an unfair trial, or would not bring the administration of justice into disrepute.[381]

***England and Wales—***Evidence of a person's bad character, *i.e.,* evidence of the commission of an offence or other reprehensible behaviour[382] unrelated to the alleged facts of the offence or in connection with the investigation or prosecution of the offence, or evidence of a disposition towards such misconduct[383] is subject to certain restrictions. It may be presented only through one of seven specified "gateways" including, that all the parties agree; that the defendant adduces it or provides it in cross-examination intended to elicit it; that it is important explanatory evidence; that it is relevant to an important matter in issue between the defendant and the prosecution; that it has substantial probative value in relation to an important matter in issue; that it corrects a false impression given by the defendant; or that the defendant has made an attack on another person's character.

The most controversial is the gateway that permits the introduction of evidence of bad character that is relevant to an important matter in issue between the defendant and the prosecution. This gateway relaxes the stringent standards of the common law 'similar fact evidence' rule, by making admissible prosecution evidence[384] of a defendant's bad character based on its mere relevance to an important matter in issue between the defendant and the prosecution. Whether the defendant has a propensity to commit offences of the kind with which he is charged constitutes a matter in issue between the defendant and the prosecution if such propensity is relevant to guilt of the offence charged.[385]

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[378] 1998 (2) SA 609 (C); *Schwikkard & Van de Merwe, supra,* note 64 at 264.

[379] W. de Vos "Civil Procedural Law and the Constitution of 1996; an Appraisal of Procedural Guarantees of Civil Proceedings" 1997 (3) *TSAR* 444.

[380] *Lotter v Arlow* 2002 (6) SA 60 (T) 63J – 64 B referring to *Lenco Holdings Ltd v Eckstein, supra,* note 377 at 704C

[381] *Ibid*. at 64 F.

[382] *Criminal Justice Act 2003*, s. 112(1).

[383] *Ibid.* s. 98.

[384] *Ibid.* s. 103(6).

[385] *Ibid.* s. 103(1)(a),

Commission of an offence of the same description[386] or category[387] is admissible where establishing propensity in this way would not be unjust, for example, by reason of the length of time since the conviction. Offences are considered to be of the same description if the charge or indictment would be stated be in the same terms,[388] and they are considered to be of the same category if they are so prescribed by an order of the Secretary of State.[389] Such an order may be made in respect of offences of the same type,[390] for example, a particular category of theft offences or a category of sexual offences involving persons under the age of 16.[391]

Evidence of the bad character of a person other than the defendant is admissible only if: it is important explanatory evidence; it has substantial probative value in relation to a matter in issue in the proceedings, and is of substantial importance in the context of the case as a whole; or all parties to the proceedings agree to the evidence being admissible.[392]

In regard to hearsay evidence in criminal cases, a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated only if provided by specific legislation, or if all parties consent, or if the court is satisfied that it is in the interests of justice for it to be admitted. In exercising its discretion under the last of these exceptions, the court must consider: the probative value of the statement in relation to a matter in issue or its value in understanding other evidence; other available evidence on the matter; how important the matter is in the context of the case as a whole; the circumstances in which the statement was made; how reliable the maker of the statement appears to be; how reliable the evidence of the making of the statement appears to be; whether oral evidence of the matter stated can be given and, if not, why it cannot; the amount of difficulty involved in challenging the statement; and the extent to which that difficulty would be likely to prejudice the party facing it.[393]

The jurisprudence interpreting the statutory provisions is growing, but appellate courts are reluctant to interfere with the highly fact-specific and discretionary rulings of trial courts unless the judgment is unreasonable.[394] Still, the statutory exceptions that

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[386] *Ibid.* s. 103(2)(a).

[387] *Ibid.* s. 103(2)(b).

[388] *Ibid.* s. 103(4)(a).

[389] *Ibid.* s. 103(4)(b).

[390] *Ibid.* s. 103(5).

[391] *Criminal Justice Act 2003 (Categories of Offences) Order 2004*.

[392] *Criminal Justice Act 2003*, s. 100(1)

[393] *Ibid.* s. 114(2)

[394] *R. v. Hanson* [2005] EWCA Crim 824, [2005] 1 WLR 3169 at para. 15. This is because 'the trial judge's "feel" for the case is usually the critical ingredient of the decision at first instance which this court lacks. Context therefore is vital. The creation and subsequent citation from a vast body of so-called "authority", in reality representing no more than observations on a fact-specific decision of the judge in the Crown Court, is unnecessary and may well be counter-productive': *R. v. Renda* [2005] EWCA Crim 2826, [2006] 1 WLR 2948 at para. 3. See also *R. v. Lawson* [2006] EWCA Crim 2572, [2007] 1 WLR 1191 at para. 39; *R. v. Finch* [2007] EWCA Crim 36, [2007] 1 WLR 1645 at para. 23: 'This court will interfere if, but only if, he has exercised it on wrong principles or reached a conclusion which was outside the band of legitimate decision available to him.'

currently permit the admission of hearsay may be in breach of the Convention rights of the accused to examine witnesses against him. A recent decision of the ECHR suggested that where the hearsay evidence was the sole or decisive evidence against the defendant it could only be admitted where the defendant had the opportunity at some stage to cross-examine the maker, unless the reason why the maker was kept from testifying was fear of the defendant.[395]

Recent developments suggest that the hearsay provisions of the Criminal Justice Act 2003 may, in certain circumstances, breach Article 6(3)(d) of the European Convention on Human Rights, which guarantees everyone charged with a criminal offence the right to examine or have examined witnesses against him. A 2009 ruling of the ECHR appeared to suggest that the introduction of hearsay evidence that constituted the sole or decisive evidence against the defendant would breach Article 6(3)(d) and the general right to a fair trial under Article 6(1), unless the defendant had had an opportunity at some stage to cross-examine the maker of the relevant statement, or unless the maker of the statement was kept from giving evidence through fear induced by the defendant.[396] Subsequently, the UK Supreme Court reiterated the traditional position of the courts of England and Wales, that proper application of the provisions of the *Criminal Justice Act 2003* would represent a 'less draconian' way of protecting against the risk of an unsafe conviction than would the application of a 'sole or decisive' test.[397] The ECHR has since accepted the United Kingdom's request for the matter to be referred to the Grand Chamber of the Court, and the judgment of the Grand Chamber is now awaited.

***Ireland—***Generally, a judge would respond to a breach of the rules on the presentation of evidence by warning the jury to disregard it, but in the case of the Special Criminal Court in Ireland,[398] which sits as a three-judge court with no jury, usually to hear cases involving paramilitary or gangland crimes, this may be problematic because they must disregard evidence they have already heard for the purposes of determining its admissibility.

The exclusion of evidence critical to a case could result in a dismissal of the charges. If the challenge to admissibility is a ground of appeal, then the result of the trial could be affirmed; overturned and a retrial ordered; overturned and no retrial ordered; or, overturned and another verdict substituted (e.g. manslaughter substituted for murder). This will depend upon the significance of the impugned evidence to the result, although this may be difficult to determine in the case of a jury verdict.

***Australia—***When a party objects to the presentation of evidence on the basis that it is hearsay, or on some other basis, the trial judge will rule whether the evidence will be permitted. A party that does not object may be taken to have waived the objection, and an

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[395] *Al-Khawaja and Tahery v. UK* (2009) 49 EHRR 1 ("*Al-Khawaja*") at para. 37, not followed in *R. v. Horncastle* [2009] UKSC 14, [2010] 2 AC 373 ("*Horncastle*") at para. 92; the matter is now before the Grand Chamber of the ECHR.

[396] *Al-Khawaja, ibid.* at para. 37.

[397] *R. v. Horncastle, supra,* note 395 at para 92.

[398] Established under the *Offences Against the State Act 1939,* Part V.

adverse ruling can be appealed only as part of an appeal against an adverse result, but such an appeal by the prosecution in a criminal matter will not affect the result.[399]

Although the rules of evidence are clear, the rulings in trials tend to be fact-specific and discretionary, and appeals against guilty verdicts may succeed only where the improper admission of illegally obtained evidence produced a substantial miscarriage of justice.[400] In cases without juries, appeals against acquittals on this basis similarly may succeed only if the error affected the result; and in cases decided by juries, the result will not vary and the appeal will merely establish a precedent.[401]

***New Zealand—*** Evidence of a witness's veracity, *i.e.,* the disposition to refrain from lying, may be offered only if it is determined to be "helpful" on the basis of a range of factors. These factors include the veracity of the witness when previously under a legal obligation to tell the truth; any convictions of offences indicating a propensity to lack veracity; previously inconsistent statements; and bias or a motive to be untruthful.[402] In criminal proceedings a defendant may offer evidence of his or her own veracity and, if this is done, the judge may permit the prosecution to offer evidence to challenge it. The judge will consider: that the veracity of witnesses have been put in issue in the defendant's evidence; the time that has elapsed since any conviction about which the prosecution seeks to give evidence; and whether any evidence given by the defendant about his or her veracity was elicited by the prosecution.

Propensity evidence, once called similar fact, or bad character evidence, may now be offered under the legislation on similar terms as evidence of a defendant's veracity.[403] Factors relevant to assessing its probative value include the nature of the issue in dispute; the frequency of the acts that are the subject of the evidence; the connection in time between the acts and the offence; the similarity between them; the number of persons making these allegations; whether the allegations may be the result of collusion or suggestibility; and the extent to which these are unusual acts. Factors relevant to assessing its prejudicial effect include: whether the evidence is likely to predispose unfairly the fact-finder against the defendant; whether the fact-finder will tend to give disproportionate weight to it.

Propensity evidence includes previous criminal allegations not proved,[404] but it is unclear whether it also includes evidence of reputation.[405] Beyond this, there has been further debate,[406] but it is clear that evidence that relates primarily to veracity rather than generally to propensity is to be admitted under the regime governing veracity evidence. Whether there is a distinction to be drawn between admissibility for the purpose of

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[399] Ligertwood and Edmond, *Australian Evidence*, 5 ed, (Sydney: LexisNexis Butterworths, 2010) ("Ligertwood and Edmond") at para. 2.14ff.

[400] *Weiss v. R.* (2005) 224 CLR 300.

[401] Ligertwood and Edmond, *supra,* note 399 at para. 2.14 ff.

[402] *Ibid.* s. 37. A party may not challenge his or her own witness's veracity unless the witness is declared hostile, but the party may offer evidence to counter the evidence given by the witness.

[403] *Ibid.* s. 38; *R. v. Taunoa* (CA 494/04, 13 April 2005).

[404] *R. v. Degnam* [2001] 1 NZLR 280.

[405] *R. v. Falealili* [1996] 3 NZLR 664 at 674 (C.A.).

[406] *R. v. Accused (CA 8/96)* (1996) 13 CRNZ 677.

identifying a perpetrator and admissibility for the purpose of determining whether the offence was committed has also been the subject of debate in the jurisprudence.[407] Defendants may offer propensity evidence about themselves, but this entitles the prosecution to offer rebuttal evidence.[408]

Identification evidence is admissible unless the defendant proves on a balance of probabilities that it is unreliable in that it fails to meet the requirement that, based on reason or good grounds, the surrounding circumstances are conducive to accurate evidence and the witness inspires confidence.[409] A detailed procedure must be followed for the evidence to be admitted[410] unless the prosecution can show that the identification was made promptly by someone who knew the accused well.[411] While the admissibility of visual identification is widely accepted, the admissibility of voice identification is less so.[412]

Previous consistent statements are generally inadmissible except to counter a previous inconsistent statement, or where the circumstances indicate that it is reliable or where the witness cannot recall the earlier situation and another witness gives evidence of it or a document is put to the witness.[413] Where they are admitted, they are to be considered for proof of their contents, and the restriction on them applies only to repetitive statements, and not to those merely compatible with the evidence provided at trial.[414] Nor do the restrictions apply to statements contrary to the person's interest offered in civil matters.[415]

Opinion evidence may be provided only by experts unless it is necessary to enable the witness to communicate, or the fact-finder to understand what the witness saw, heard, or otherwise perceived.[416] Even then, expert evidence is admissible only if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining a fact that is of consequence to the determination of the proceeding.[417]

***Israel*—**Despite the inadvertent acceptance of inadmissible evidence at trial, the judgment will be quashed only if the conviction could not have been secured without the inadmissible piece of evidence.[418]

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[407] *R. v. G* [2001] 3 NZLR 729; *R. v. Holtz* [2003] 1 NZLR 667 and *R. v. Kingi* CA 66/06, 21 March 2006.

[408] *Evidence Act 2006*, s. 41; Special rules apply to propensity evidence offered by a co-accused.

[409] *Ibid.* s. 45.

[410] *R. v. Edmonds* [2010] 1 NZLR 763 (C.A.).

[411] *Harney v. R.* [2010] NZCA 264; *Tararo v. R.* [2010] NZCA 287.

[412] *R. v. Wickramasinghe* (1992) 8 CRNZ 478 (C.A.); *R. v. Waipouri* [1993] 2 NZLR 410 (C.A.).

[413] *Evidence Act 2006*, s. 35.

[414] *R. v. Barlien* [2008] NZCA 180, [2009] 1 NZLR 170; *Rongonui v. R.* [2010] NZSC 92.

[415] *Evidence Act 2006*, s. 34.

[416] *Ibid.* s. 24.

[417] *Ibid.* s. 25. The Act also clarifies that expert evidence may be given about an ultimate issue in the proceeding and about a matter of common knowledge, and that facts on which the opinion are based must be proved or judicially noted.

[418] *Evidence Ordinance (New Version)*, 5731-1971, s. 56.

***Singapore*—**The decision of a trial court will be reversed, and a new trial necessarily be ordered in connection with wrongly admitted or excluded evidence only if this would have made a difference in the decision and there has been a 'failure of justice.'[419] In part, this is because cases are tried by judges and not by juries, and prejudicial evidence is thought not necessarily to have the same adverse influence.[420]

### 8. Differences between the rules for the claim and for the defence

***United States***—The absolute rule banning "testimonial" evidence in a criminal case unless subject to cross-examination is available only to the defense. Testimonial evidence includes records of pre-arrest questioning and lab findings. It does not include recordings of a victim's calls to a 911 police emergency number, or pre-arrest interrogation aimed at discovering whether a danger to the community exists. Nor does the Confrontation Clause bar statements by co-conspirators made in furtherance of the conspiracy. While hearsay limits the defense, it is less absolute than the Confrontation Clause, permitting evidence falling into broad exceptions like declarations against interest and present sense impressions even when not subjected to cross-examination.

***Canada*—**In principle, the rules of evidence apply equally to prosecution and defence but there are many exceptions, such as for evidence of alibi, mental disorder, self-incrimination, character evidence, right to silence, confessions, which a result of the special status of an accused in a criminal trial and the need to ensure a fair trial.

***South Africa*—**The same rules apply to claimants and defendants subject to the exceptions noted above.

***England and Wales*—**Inherent in the relevant statutory provisions is the idea that there should be greater control of the evidence presented by the prosecution than by the defence. For example, evidence of a defendant's bad character, even if it falls within one of the permissible "gateways" if the defendant asks for it to be excluded and the court determines that it would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. In determining this, the court will consider the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged.[421]

Similarly, in the context of hearsay evidence, certain safeguards apply to evidence presented by the prosecution. For example, in cases involving a jury, if the case is based wholly or partly on hearsay and it is so unconvincing that, considering its importance to the case, the conviction would be unsafe, the court must direct an acquittal or a retrial.[422] Further, the court can exclude hearsay if it is satisfied that the case for excluding the

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[419] *Evidence Act*, s. 169; *Halsbury's Laws of Singapore*, vol 10, *Evidence*, 2006 Reissue (LexisNexis: Singapore) at para. 120.030; Criminal Procedure Code 2010, s. 423; Tan Yock Lin, *Criminal Procedure*, vol. 2, (Singapore: LexisNexis, 2007) at para. 1253 et seq.

[420] *Wong Kim Poh v. Public Prosecutor* [1992] 1 SLR(R) 13 at para. 14; *Tan Chee Kieng v. PP* [1994] 2 S.L.R.(R) 577 at para. 8; '*Tan Meng Jee v PP* [1996] 2 S.L.R.(R) 178 at para. 48.

[421] *Criminal Justice Act 2003*, ss. 101(3), 101(4).

[422] *Ibid.* s.125(1).

statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence.[423] And courts have noted the difference between admitting hearsay for the prosecution and for the defence, urging caution in determining the admissibility of hearsay evidence that inculpates, rather than exculpates, the defendant.[424]

***Ireland*—**The central concern of the courts is the fairness of the trial and thus there is no difference in the rules for the presentation of evidence that apply to the defence or to the prosecution. However, when a defence of insanity is raised at trial, the burden of proof shifts to the defence. The burden of proof can also shift to the defence under statutory provisions,[425] or where certain matters fall within the "peculiar knowledge" of the defence.[426] In addition, special rules modify the accused's privilege against self-incrimination if he chooses to testify in order to avoid frustrating the prosecution but to "shield" past criminal behaviour so as not to unfairly disadvantage him.[427] This shield can be removed if the past behaviour is held to be admissible as similar fact evidence;[428] if the accused has given evidence against another person charged with the same offence;[429] or, if the accused has asked questions of prosecution witnesses for evidence his own good character, or has given evidence of his good character, or if the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution.[430]

***Australia*—**In principle the same rules apply to claimants and defendants, but special rules at common law and under the uniform legislation are designed to protect the defendants' right to silence and the privilege against self-incrimination. For example, guilt cannot be inferred from the failure to testify,[431] and at common law, confessions could only be admitted if voluntary. However, the protections in the legislation seem to be directed more at protecting accused persons from violence and inhuman and degrading treatment,[432] and from investigative methods that might impair the reliability of admissions.[433]

***New Zealand*—**The same rules apply to claimants and defendants subject to the exceptions noted above.

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[423] *Ibid.* s. 126(1).

[424] *R. v. Y.* [2008] EWCA Crim 10, [2008] 1 W.L.R. 1683 (C.A.).

[425] *O'Leary v A.G.* [1993] 1 I.R. 102 (H.C.); [1995] 1 I.R. 254 (SC) (in relation to the *Offences Against the State Act 1939* s. 24 and the *Offences Against the State (Amendment) Act 1972* s. 3(2)).

[426] See *D.P.P. v Best* [2000] 2 I.R. 17 in relation to the *School Attendance Act 1926*; see also *Minister for Industry and Commerce v Steele* [1952] I.R. 304; *McGowan v Carville* [1960] I.R. 330; and *A.G. v Shorten* [1961] I.R. 304.

[427] *Criminal Justice (Evidence) Act 1924*.

[428] *Criminal Justice Act 1924,* s. 1(f)(i).

[429] *Ibid.* s. 1(f)(iii).

[430] *Ibid.* s. 1(f)(ii). See *People (D.P.P.) v McGrail* [1990] 1 I.R. 38.

[431] Uniform Evidence legislation, s. 20.

[432] *Ibid.* s. 84.

[433] *Ibid.* s. 85.

***Israel—***The same rules apply to claimants and defendants subject to the exceptions noted above.

***Singapore—***In general, the same rules apply, but there are some asymmetries. For example, the standard of proof that applies to the defence (where it carries the burden of proof) is 'balance of probabilities' and the standard of proof that the prosecution carries is 'beyond reasonable doubt'. Also, the accused is allowed to adduce evidence of his good character to bolster credibility[434] but, as discussed above, the prosecution is generally barred from adducing evidence of the accused's bad character.

[434] *Evidence Act*, s. 55.