CrimA 5121/98

Private (res.) Raphael Yissacharov

v.

1. Chief Military Prosecutor

2. Attorney-General

a **3. National Public Defender's Office**

4. Israel Bar Association

The Supreme Court sitting as the Court of Criminal Appeals

[4 May 2006]

Before President A. Barak, Vice-President Emeritus M. Cheshin and Justices D. Beinisch, E. Rivlin, A. Procaccia, E.E. Levy, A. Grunis,

b *M. Naor, S. Joubran*

Appeal of the judgment of the Appeals Court Martial (General I. Schiff, Brigadier-General M. Finkelstein, Colonel (res.) Y. Kedmi) on 13 May 1998 in case no. 139/97/9.

Facts: While being admitted into prison for being absent from the army without leave, the appellant was found to have a dangerous drug in his possession. When he was interrogated about this, the interrogator failed to advise the appellant that he had a right to consult a lawyer. This omission, which was omitted by the prosecution, was held by the trial court to have been illegal and intentional. In the

c course of the interrogation, the appellant confessed that he had, on three occasions while he was a soldier, made use of dangerous drugs.

The appellant argued that the confession should not be admissible in evidence, because it was made in consequence of the interrogator failing to advise him of his right to consult a lawyer. Under Israeli law there was no statutory or case law precedent for the exclusion of evidence because of the illegal method of obtaining it, but the appellant argued that the court should adopt such a doctrine, in the spirit of the Basic Law: Human Dignity and Liberty, which was enacted in 1992.

Held: (Majority opinion — Justice Beinisch, President Barak, Vice-President Emeritus Cheshin and Justices Rivlin, Procaccia, Levy, Naor and Joubran) In view of the normative change in the Israeli legal

d system introduced by the Basic Law: Human Dignity and Liberty, and in the absence of legislation on this issue, the time has come to adopt a case law doctrine of inadmissibility for illegally obtained evidence. The appropriate doctrine for the Israeli legal system to adopt is not an absolute doctrine, but a relative doctrine of inadmissibility, which allows the court to exclude illegally obtained evidence at its discretion.

The criterion for excluding illegally obtained evidence is that the evidence should be excluded if admitting it would substantially violate the right of the accused to a fair trial, considering the circumstances of each case on its merits. This doctrine is therefore a 'preventative' one, rather than a 'remedial' one. Its aim is to prevent a violation of the right of the accused to a fair trial, rather than to educate and deter the police authorities from future violations of the law.

Factors that should be taken into account when the court exercises its discretion are the character and seriousness of the illegality that was involved in obtaining the evidence, the seriousness of the offence, the degree to which the improper investigation method affected the evidence that was obtained and the social damage and social benefit involved in excluding the evidence.

The case law doctrine of the inadmissibility of illegally obtained evidence is a general one and it applies to all types of evidence, including defendants' confessions, notwithstanding the statutory arrangement regarding defendants' confessions in s. 12 of the Evidence Ordinance [New Version].

In the specific case of the appellant, the failure to inform him of his right to consult a lawyer was intentional, and this was a significant factor in reaching the decision to exclude the confessions he made in the interrogation.

(Minority opinion — Justice A. Grunis) It is questionable whether a broad doctrine of the inadmissibility of illegally obtained evidence should be adopted in case law rather than in legislation.

In the specific case of the appellant, in view of the fact that the police interrogator did advise the appellant of his right to remain silent, the failure to advise him of his right to consult a lawyer should not be sufficient to justify an exclusion of the confessions. The significance of the intentional nature of the failure to advise the appellant of his right to consult a lawyer was questionable, both because the doctrine being adopted does not have an educational-deterrent purpose, and because it is hard to conceive of such an omission by a professional interrogator being unintentional.

Appeal allowed, by majority opinion (Justice Beinisch, President Barak, Vice-President Emeritus Cheshin and Justices Rivlin, Procaccia, Levy, Naor and Joubran), Justice Grunis dissenting.

Legislation cited:

Basic Law: Freedom of Occupation, s. 10.
Basic Law: Human Dignity and Liberty, ss. 1A, 2, 4, 5, 9, 10, 11.
Criminal Procedure (Enforcement Powers — Arrests) Law, 5756-1996, ss. 28(a), 32, 32-36, 32(a) 34(a), 34(b), 34(c).
Criminal Procedure (Interrogation of Suspects) Law, 5762-2002, s. 16(b).
Criminal Procedure Law (Amendment no. 15), 5741-1981.
Criminal Procedure Law [Consolidated Version], 5742-1982, s. 29.
Dangerous Drugs Ordinance [New Version], 5733-1973, ss. 7(a), 7(c).
Eavesdropping Law, 5739-1979, s. 13.
Evidence Ordinance, s. 9.
Evidence Ordinance [New Version], 5731-1971, s. 12.
Military Jurisdiction Law, 5715-1955, ss. 227A, 227A(6) 227A1, 267, 316, 440I, 476, 477, 478.
Procedure (Attendance of Attorney-General) Ordinance [New Version], 5728-1968.
Protection of Privacy Law, 5741-1981, ss. 2, 32.
Public Defender's Office Law, 5756-1995, ss. 18, 19, 19(a).
Rights of Victims of Crime, 5761-2001, s. 1.

Israeli Supreme Court cases cited:

CrimFH 9384/01 *Al Nisasra v. Israel Bar Association* (not yet reported). [1]
CA 10425/03 *State of Israel v. Sita Shasha* (not yet reported). [2]
HCJ 769/02 *Public Committee Against Torture in Israel v. Government of Israel* [2003] IsrSC 57(6) 285 (decision of 3 September 2003). [3]
RT 7929/96 *Kuzali v. State of Israel* [1999] IsrSC 53(1) 529. [4]
HCJ 249/82 *Vaknin v. Appeals Court Martial* [1983] IsrSC 37(2) 393. [5]
CrimA 307/60 *Yassin v. Attorney-General* [1963] IsrSC 17(3) 1541. [6]
CrimA 96/66 *Tau v. Attorney-General* [1966] IsrSC 20(2) 539. [7]
CrimA 533/82 *Zakkai v. State of Israel* [1984] IsrSC 38(3) 57. [8]
CrimA 334/86 *Sabah v. State of Israel* [1990] IsrSC 44(3) 857. [9]
CrimA 747/86 *Eisenman v. State of Israel* [1988] IsrSC 42(3) 447. [10]
HCJ 3412/91 *Sufian v. IDF Commander in Gaza Strip* [1993] IsrSC 47(2) 848. [11]
HCJ 1437/02 *Association for Civil Rights in Israel v. Minister of Public Security* [2004] IsrSC 58(2) 746. [12]
LCA 5381/91 *Hogla v. Ariel* [1992] IsrSC 46(3) 378. [13]
CrimA 1382/99 *Balhanis v. State of Israel* (unreported). [14]

LCrimA 3445/01 *Almaliah v. State of Israel* [2002] IsrSC 56(2) 865. [15]

LCrimA 8600/03 *State of Israel v. Sharon* [2004] IsrSC 58(1) 748. [16]

CrimA 648/77 *Kariv v. State of Israel* [1978] IsrSC 32(2) 729. [17]

CrimA 6613/99 *Smirk v. State of Israel* [1998] IsrSC 56(3) 529. [18]

[19] HCJ 3239/02 *Marab v. IDF Commander in Judaea and Samaria* [2003] IsrSC 57(2) 349; **[2002-3] IsrLR 173**.

CrimA 69/53 *Sich v. Attorney-General* [1953] IsrSC 7(2) 801. [20]

CrimA 7335/05 *Public Defender's Office, Nazareth District v. State of Israel* (not yet reported). [21]

HCJ 453/94 *Israel Women's Network v. Government of Israel* [1994] IsrSC 48(5) 501; **[1992-4] IsrLR 425**. [22]

HCJ 6302/92 *Rumhiya v. Israel Police* [1993] IsrSC 47(1) 209. [23]

CrimApp 5136/98 *Manbar v. State of Israel* (unreported). [24]

CrimA 5614/92 *State of Israel v. Mesika* [1995] IsrSC 49(2) 669. [25]

HCJ 5100/94 *Public Committee Against Torture v. Government of Israel* [1999] IsrSC 53(4) 817; **[1998 9] IsrLR 567**. [26]

CrimA 636/77 *Levy v. State of Israel* [1978] IsrSC 32(3) 768. [27]

CrimA 4427/95 *A v. State of Israel* [1997] IsrSC 51(2) 557. [28]

CrimFH 4342/97 *El Abid v. State of Israel* [1997] IsrSC 51(1) 736. [29]

FH 3081/91 *Kozali v. State of Israel* [1991] IsrSC 45(4) 441. [30]

CrimA 2/48 *Al-Lodj v. Attorney-General* [1948] IsrSC 1 92. [31]

CrimA 242/63 *Kariti v. Attorney-General* [1964] IsrSC 18(3) 477; **IsrSJ 5 203**. [32]

CrimA 270/65 *Kasey v. Attorney-General* [1965] IsrSC 19(3) 561. [33]

CrimA 347/75 *Hirsch v. State of Israel* [1976] IsrSC 30(3) 197. [34]

CrimA 369/78 *Abu-Madijem v. State of Israel* [1979] IsrSC 33(3) 376. [35]

CrimA 115/82 *Muadi v. State of Israel* [1984] IsrSC 38(1) 197. [36]

CrimA 183/78 *Abu-Midjem v. State of Israel* [1980] IsrSC 34(4) 533. [37]

CrimA 154/85 *Avroshami v. State of Israel* [1987] IsrSC 41(1) 387. [38]

LCrimA 3268/02 *Kozali v. State of Israel* (not yet reported). [39]

CrimA 161/77 *Zohar v. State of Israel* [1978] IsrSC 32(1) 326. [40]

CrimA 450/82 *Abu-Ayin Tripi v. State of Israel* [1983] IsrSC 37(2) 589. [41]

CrimA 6021/95 *Gomez-Cardozo v. State of Israel* [1997] IsrSC 51(3) 769. [42]

CrimA 277/78 *State of Israel v. Tuvyahu* [1979] IsrSC 33(1) 297. [43]

CrimA 611/80 *Matosian v. State of Israel* [1981] IsrSC 35(4) 85. [44]

CrimApp 537/95 *Ganimat v. State of Israel* [1995] IsrSC 49(3) 355. [45]

CrimFH 2316/95 *Ganimat v. State of Israel* [1995] IsrSC 49(4) 589. [46]

HCJ 7357/95 *Barki Feta Humphries (Israel) Ltd v. State of Israel* [1996] IsrSC 50(2) 769. [47]

CA 524/88 *Pri HaEmek Agricultural Cooperative Society Ltd v. Sedei Yaakov Workers Settlement Ltd* [1991] IsrSC 45(4) 529. [48]

HCJ 355/79 *Katlan v. Prisons Service* [1980] IsrSC 34(3) 294. [49]

CrimA 3632/92 *Gabbai v. State of Israel* [1992] IsrSC 46(4) 487. [50]

CA 5942/92 *A v. B* [1994] IsrSC 48(3) 837. [51]

CA 2781/93 *Daaka v. Carmel Hospital* [1999] IsrSC 53(4) 526; **[1998-9] IsrLR 409**. [52]

CFH 2401/95 *Nahmani v. Nahmani* [1996] IsrSC 50(4) 661; **[1995-6] IsrLR 320**. [53]

HCJ 8111/96 *New Federation of Workers v. Israel Aerospace Industries Ltd* [2004] IsrSC 58(6) 481. [54]

CrimApp 92/00 *A v. State of Israel* [2000] IsrSC 54(4) 240. [55]

CrimA 5825/97 *Shalom v. State of Israel* [2001] IsrSC 55(2) 933. [56]

CrimA 5203/98 *Hasson v. State of Israel* [2002] IsrSC 56(3) 274. [57]

CrimA 480/85 *Kurtam v. State of Israel* [1986] IsrSC 40(3) 673. [58]

HCJ 3815/90 *Gilat v. Minister of Police* [1991] IsrSC 45(3) 414. [59]

CrimA 1302/92 *State of Israel v. Nahmias* [1995] IsrSC 49(3) 309. [60]

CrimA 476/79 *Boulos v. State of Israel* [1981] IsrSC 35(1) 785. [61]

CrimA 16/82 *Malka v. State of Israel* [1982] IsrSC 36(4) 309. [62]

FH 9/83 *Appeals Court Martial v. Vaknin* [1988] IsrSC 42(3) 837. [63]

CrimA 951/80 *Kanir v. State of Israel* [1981] IsrSC 35(3) 505. [64]

CrimFH 4390/91 *State of Israel v. Haj Yihya* [1993] IsrSC 47(3) 661. [65]

CrimA 6147/92 *State of Israel v. Cohen* [1994] IsrSC 48(1) 62. [66]

FH 23/85 *State of Israel v. Tubul* [1988] IsrSC 42(4) 309. [67]

CA 703/86 *Bernstein v. Attorney-General* [1989] IsrSC 43(4) 529. [68]

CA 2515/94 *Levy v. Haifa Municipality* [1996] IsrSC 50(1) 723. [69]

HCJ 6319/95 *Hachmi v. Justice of Tel-Aviv-Jaffa Magistrates Court* [1997] IsrSC 51(3) 750. [70]

CrimA 260/78 *Saliman v. Attorney-General* [1979] IsrSC 33(2) 204. [71]

CrimA 559/77 *Meiri v. State of Israel* [1978] IsrSC 32(2) 180. [72]

CrimA 2286/91 *State of Israel v. Eiloz* [1991] IsrSC 45(4) 289. [73]

CrimA 639/79 *Aflalo v. State of Israel* [1980] IsrSC 34(3) 561. [74]

CA 1354/92 *Attorney-General v. A* [1994] IsrSC 48(1) 711. [75]

CA 61/84 *Biazi v. Levy* [1988] IsrSC 42(1) 446. [76]

CrimA 2910/94 *Yefet v. State of Israel* [1996] IsrSC 50(2) 221. [77]

CrimA 1668/98 *Attorney-General v. President of Jerusalem District Court* [2002] IsrSC 56(1) 625. [78]

CrimA 2180/02 *Kassem v. State of Israel* [2003] IsrSC 57(1) 642. [79]

CrimA 9970/03 *Deri v. State of Israel* (not yet reported). [80]

CrimApp 6689/01 *Migdalani v. State of Israel* [2002] IsrSC 56(1) 173. [81]

HCJ 266/05 *Pilant v. Gen. Efroni* (not yet reported). [82]

CLA 1412/94 *Hadassah Medical Organization v. Gilad* [1995] IsrSC 49(2) 516. [83]

MApp 298/86 *Citrin v. Tel-Aviv District Disciplinary Tribunal of Bar Association* [1987] IsrSC 41(2) 337. [84]

HCJ 547/84 *HaEmek Poultry Registered Agricultural Cooperative Society v. Ramat-Yishai Local Council* [1986] IsrSC 40(1) 113. [85]

CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [1995] IsrSC 49(4) 221. [86]

HCJ 3992/04 *Maimon-Cohen v. Minister of Foreign Affairs* [2005] IsrSC 59(1) 49. [87]

RT 3032/99 *Baranes v. State of Israel* [2002] IsrSC 56(3) 354. [88]

RT 8483/00 *Deri v. State of Israel* [2003] IsrSC 57(4) 253. [89]

CrimA 1741/99 *Yosef v. State of Israel* [1999] IsrSC 53(4) 750. [90]

HCJ 6972/96 *Association for Civil Rights in Israel v. Attorney-General* [1997] IsrSC 51(2) 757. [91]

HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [2005] IsrSC 59(2) 481. [92]

CrimFH 3750/94 *A v. State of Israel* [1994] IsrSC 48(4) 621. [93]

CrimA 1/48 *Silvester v. Attorney-General* [1948] IsrSC 1 5. [94]

CrimFH 4603/97 *Meshulam v. State of Israel* [1997] IsrSC 51(3) 160. [95]

LCA 8925/04 *Solel Boneh Building and Infrastructure Ltd v. Estate of Alhamid* **[2006] (1) IsrLR** שגיאה ! הסימניה אינה מוגדרת.. [96]

RT 8390/01 *Axelrod v. State of Israel* (not yet reported). [97]

CrimA 242/85 *Hazan v. State of Israel* [1987] IsrSC 41(2) 512. [98]

HCJ 6055/95 *Tzemah v. Minister of Defence* [1999] IsrSC 53(5) 241; **[1998-9] IsrLR 635**. [99]

CFH 7325/95 *Yediot Aharonot Ltd v. Kraus* [1998] IsrSC 52(3) 1. [100]

LCA 6339/97 *Roker v. Salomon* [2001] IsrSC 55(1) 199. [101]

Israeli District Court cases cited:

CrimC (Naz) 511/97 *State of Israel v. Odeh* (unreported). [102]

CrimC (TA) 4598/01 *State of Israel v. Ben-Shushan* (unreported). [103]

American cases cited:

Miranda v. Arizona, 384 U.S. 436 (1966). [104]

Dickerson v. United States, 530 U.S. 428 (2000). [105]

Australian cases cited:

Bunning v. Cross (1978) 141 C.L.R. 54. [106]

Canadian cases cited:

R. v. Oickle [2000] 2 S.C.R. 3. [107]

R. v. Collins [1987] 1 S.C.R. 265. [108]

English cases cited:

Ibrahim v. R. [1914] A.C. 599. [109]

Kuruma v. R. [1955] A.C. 197. [110]

Jewish law sources cited:

Genesis 19, 9. [111]

Maimonides, *Sefer HaMitzvot*, Prohibitions, 290. [112]

For the appellant — E. Zohar, R. Balchar, A. Crispin.
For the first respondent — E. Ron.
For the second respondent — Y. Resnick.
For the third respondent — K. Mann, A. Kobu.
For the fourth respondent — A. Feldman, M. Sefarad.

JUDGMENT

Justice D. Beinisch

Before us is an appeal on the judgment of the Appeals Court Martial after it gave leave to appeal to this court. At the heart of the appeal lies the question of the effect of not giving the statutory notice concerning the right to consult a lawyer on the admissibility of a confession made during interrogation. This question touches upon two fundamental issues that will be the focus of our deliberations: *first*, whether in the interpretive spirit of the Basic Law: Human Dignity and Liberty (hereafter: 'the Basic Law') it should be held that not giving the statutory notice concerning the right to consult a lawyer necessarily makes a confession of an accused under s. 12 of the Evidence Ordinance [New Version], 5731-1971 (hereafter: 'the Evidence Ordinance') inadmissible. This question concerns the interpretation of the provisions of the aforesaid s. 12, which makes the admissibility of a confession conditional upon its being made 'freely and willingly.' *Second*, is it possible to declare a confession as aforesaid inadmissible by virtue of a case law doctrine that illegally obtained evidence is inadmissible. This argument raises a fundamental question, which is, in essence, whether this court should adopt a general case law doctrine that illegally obtained evidence is inadmissible, and if so, what should be the nature and framework of the doctrine.

Before I turn to discuss the aforesaid questions, let us consider the main facts and proceedings that are relevant to this appeal and the arguments of the parties as presented in their written summations.

The main facts and the sequence of proceedings in the case

1. On 17 December 1996, at around midnight, the appellant was admitted to military imprisonment camp 396 (hereafter: 'Prison 6') for being absent from the army without leave. As he was being admitted into the prison, the appellant was asked to undress, and when he removed his underpants, a small package wrapped in paper fell out of them. At first, the appellant tried to hide the package under his foot, but immediately thereafter he said: 'It is grass, I can explain.' An officer from the prison staff reported the incident to the investigative military police base in Haifa at 2:30 a.m.. The report was received by the interrogator on duty at that time, Corporal Yonatan Ophir (hereafter: 'Corporal Ophir' or 'the interrogations officer'). The next day, on 18 December 1996, at 4:40 p.m., Corporal Ophir arrived at

Prison 6 in order to interrogate the appellant. Before he met the appellant, Corporal Ophir received into his custody the package that had fallen from the appellant's underpants, and also heard from the commanding officer of the prison wing where the appellant was imprisoned that the appellant confessed to him the previous use that he had made of the drug, even though it was not clear from the appellant's statement at that time whether the aforesaid use had occurred before he was recruited into the IDF or after his recruitment.

At 4:45 p.m., Corporal Ophir began to interrogate the appellant, and after approximately twenty minutes, he began to write down his statement. Before taking the statement, Corporal Ophir told the appellant the following: 'I am about to take your statement in circumstances where you are suspected of using and possessing dangerous drugs. Do you wish to say something with regard to the aforesaid offence? You are not obliged to say anything if you do not wish to do so, but anything that you will say will be written down and may be used as legal evidence.' At the beginning of his statement, the appellant admitted that he smoked a drug of the cannabis type ('grass') when he was a soldier, during the period when he was absent without leave from the army. At 5:30 p.m., before he had finished taking the statement, Corporal Ophir left the interrogation room and spoke on the telephone with the military police commander in Haifa, Captain Nir Golan, who ordered him to arrest the appellant. At the end of the aforesaid telephone conversation, Corporal Ophir returned to the interrogation room and continued to take the appellant's statement. The appellant gave details to the military interrogator of the instances when he made use of a cannabis-type drug while he was a soldier, and he also replied to the interrogator's questions with regard to possession of the drug that was found in his possession when he was admitted to the prison. At 6:27 p.m. Corporal Ophir finished taking the appellant's statement. At 6:35 p.m. Corporal Ophir ordered the appellant to provide a urine sample, and the appellant complied. Only at 6:45 p.m., approximately a quarter of hour after he finished taking the first statement, did Corporal Ophir tell the appellant that he was under arrest and that he had the right to consult a lawyer.

The next day, on 19 December 1996, the appellant spoke on the telephone with the defence attorney on duty. On the following day, Corporal Ophir interrogated the appellant a second time and took from him a second statement (prosecution exhibit 5). When Corporal Ophir began to take the

statement, the appellant said: 'I do not wish to add anything; I have nothing to add.' Later in the statement, the appellant answered the interrogator's questions with regard to possession of the drug that was found in his possession when he was admitted to Prison 6.

2. On 6 January 1997, an indictment was filed against the appellant in the District Court Martial for the General Staff District (hereafter: 'the court martial'). The first three paragraphs of the indictment charged the appellant with offences of using a dangerous drug under ss. 7(a) and (c) of the Dangerous Drugs Ordinance [New Version], 5733-1973 (hereafter: 'the Dangerous Drugs Ordinance'). The fourth paragraph of the indictment charged the appellant with an offence of possessing a dangerous drug under the same sections of the Dangerous Drugs Ordinance.

Before the court martial, the appellant pleaded guilty to the fourth paragraph of the indictment which concerned the offence of possessing a dangerous drug, but he pleaded not guilty to the first three paragraphs of the indictment that concerned offences of using a dangerous drug. In order to prove the aforesaid three indictments, the prosecution sought to rely on the first statement that was taken from the appellant in his interrogation, in which he confessed that he had made use of a dangerous drug on several occasions when he was a soldier (hereafter: 'the confession'). In so far as this confession was concerned, there was no dispute before the court martial with regard to the following matters: *first*, the prosecution confirmed to the court martial that in the circumstances of the case the military interrogator acted illegally when he took the appellant's statement without first informing him that he was under arrest and that he had the right to consult a lawyer. We shall address this issue extensively later. *Second*, counsel for the appellant confirmed that his client's confession before the military interrogator was given without any external pressure being exerted on the appellant in the interrogation in a manner that would detract from the free and willing nature of the confession that he made. Counsel for the defence also agreed that if it was determined that the confession made by the appellant was admissible and it was given full weight, it would be sufficient to prove his client's guilt with regard to the offences with which he was charged. Counsel for the defence also did not dispute that the evidence contained something extra, i.e., additional evidence that supported the truth of the aforesaid confession. The main dispute between the parties concerned the question of the admissibility

of the confession that was made when the duty to give notice of the right to consult a lawyer had been breached. Counsel for the defence argued in this respect that since the military interrogator did not warn his client of his right to consult a lawyer before the interrogation began, the appellant's confession was made as a result of an illegal violation of the aforesaid right, and therefore it should be inadmissible as evidence.

3. The District Court Martial accepted, by a majority, the argument of counsel for the defence that in the circumstances of the case the confession made by his client in the interrogation should be declared inadmissible, because it was made without him being advised according to law of his right to consult a lawyer. The appellant was therefore acquitted of the use of a dangerous drug with which he was charged in the first three paragraphs of the indictment, and he was convicted on his guilty plea of the offence of possessing a dangerous drug under the fourth paragraph of the indictment. It should be noted that for the appellant's conviction on the offence of possession a dangerous drug, the court martial sentenced the appellant to 72 days imprisonment, concurrently with the period that he was under arrest, and also to two months imprisonment that was suspended over a period of three years, provided that he was not convicted of any offence under the Dangerous Drugs Ordinance.

In its reasons for the verdict, which were given separately, the District Court Martial began by discussing s. 12 of the Evidence Ordinance, which makes the admissibility of a defendant's confession conditional upon it being given 'freely and willingly.' The court martial pointed out that according to the case law of the Supreme Court, the lack of a warning about the right to consult a lawyer was insufficient to make a confession under the aforesaid s. 12 inadmissible, as distinct from its possible effect on the weight of the confession as evidence. Therefore the court martial turned to consider the argument of counsel for the defence with regard to the inadmissibility of the confession for reasons not included within the framework of s. 12 of the Evidence Ordinance. The main argument of counsel for the defence in this respect was that in view of the provisions of the Basic Law: Human Dignity and Liberty, the court should rule that evidence obtained by means of an illegal violation of constitutional rights is inadmissible.

Justice D. Beinisch

The majority opinion in the District Court Martial held that the aforesaid argument of counsel for the defence should be accepted. According to the majority's approach, the clause requiring government authorities to comply with the law in s. 11 of the Basic Law: Human Dignity and Liberty meant that, in appropriate circumstances, evidence that was obtained by violating a constitutional right of the accused should be inadmissible, in order to protect the status and integrity of the justice system and in order to provide effective protection for rights of the individual. In this context, the majority said that: 'The weight of the interests of a fair trial, and insistence on upholding rights of the individual, are greater than the weight that should be given to pursuing the "factual truth" for the purpose of the fight against crime' (p. 36 of the reasons for the verdict). The majority further said that '… applying the rule of inadmissibility does not need to be done "strictly" but by virtue of *discretion* that will be exercised by the court' (p. 38 of the reasons for the verdict; emphasis in the original). In the circumstances of the appellant's case, the majority held that the military interrogator who took down the confession 'acted — throughout all stages of the interrogation — knowingly and intentionally in violation of the defendant's [the appellant's] right to consult a lawyer, and there was no basis for holding him to have acted in good faith in this respect.' In view of all this, the majority were of the opinion that the appellant's confession should be inadmissible, and therefore the appellant should be acquitted of the offences of making use of a dangerous drug.

By contrast, the minority opinion held that great caution should be adopted before changing case law regarding the admissibility of illegally obtained evidence, and that in this regard the Supreme Court ought to have its say. With regard to the circumstances of the case before it, the minority justice disagreed with the position of the majority with regard to the seriousness of the violation of the appellant's rights. Admittedly, no one disputed that the military interrogator acted improperly when he failed to advise the appellant of his right to consult a lawyer until his statement had been taken. Notwithstanding, unlike the majority justices, the minority justice in the District Court Martial was under the impression that the military interrogator did not act in this matter intentionally and deliberately, but as a result of an error resulting from a lack of familiarity with, and assimilation of, the new procedures at that time. The minority justice also saw fit to point

out that after he finished taking the statement, the military interrogator helped the appellant make contact with the military defence attorney in order to realize his right to consult a lawyer. In view of this, the minority justice was of the opinion that the strength of the violation of the appellant's rights was not so serious and extreme that it justified declaring the confession inadmissible.

4. The military prosecutor appealed to the Appeals Court Martial against the exclusion of the confession under discussion, and against the acquittal of the appellant by a majority on the offences of making use of a dangerous drug.

The Appeals Court Martial (Justices I. Schiff, M. Finkelstein and Y. Kedmi) allowed the appeal unanimously. The court held that in the circumstances of the case, the confession of the appellant should not be excluded. Notwithstanding, the justices of the Appeals Court Martial differed in their reasons for this decision. Two of the justices were of the opinion that even after the enactment of the Basic Law: Human Dignity and Liberty, the public interests of discovering the truth and fighting crime should take precedence, and that there was no basis for finding a confession inadmissible merely because the notice about the right to consult a lawyer was not given. According to their approach, the Basic Law does not require a change in the interpretation of the provisions of s. 12 of the Evidence Ordinance, as argued by counsel for the defence, and the Basic Law did not even contain anything that required the adoption of the doctrine that evidence obtained by means of a violation of a protected right of the person under interrogation should be inadmissible. The justices emphasized in their judgment that, in principle, this court is competent to change its case law and order the exclusion of illegally obtained evidence, but in their opinion it is not desirable, since it was questionable whether the legislature has 'expressed a desire to *revolutionize* the rules of evidence and change long-established case law' (p. 35 of the judgment; emphasis in the original). With regard to the circumstances of the appellant's case, the justices held that 'failing to notify someone who is about to be arrested and even someone who has been arrested about his right to consult a lawyer, even if it is done in bad faith, is not in itself an *extreme* violation of a basic right to the extent that it will result in the inadmissibility of the confession that was made freely and willingly' (p. 31 of the judgment; emphasis in the original).

Justice D. Beinisch

The third justice on the panel held, in a minority opinion, that in this instance there was no need to consider the question whether to adopt a constitutional rule of inadmissibility in the Israeli legal system, since in any case the provisions of s. 12 of the Evidence Ordinance constituted a comprehensive arrangement with regard to the admissibility of a defendant's confession. In the circumstances of the appellant's case, the justice held that the fact that the interrogator intentionally did not give a warning, at the proper stage in the interrogation, that the appellant had the right to consult a lawyer was insufficient to undermine the free and willing manner in which the appellant made his confession.

In view of the aforesaid reasons, the Appeals Court Martial held unanimously that the appeal should be allowed and that the case should be returned to the trial court so that it could admit the appellant's confession and make its decision accordingly. At the end of the judgment, the Appeals Court Martial decided that, pursuant to its authority under s. 440I of the Military Jurisdiction Law, 5715-1955 (hereafter: 'the Military Jurisdiction Law'), 'leave is hereby given to appeal to the Supreme Court.'

5. According to the aforesaid judgment, the case was returned to the District Court Martial. Counsel for the defence did not dispute before the court martial that in view of the decision that his client's confession was admissible, his guilt was proved for all the offences with which he was charged in the indictment. In view of this, the District Court Martial convicted the appellant of three offences of using a dangerous drug, in addition to his existing conviction for the offence of possession of a dangerous drug. With regard to the appellant's sentence, in view of his discharge from military service on grounds of incompatibility and in view of the time that had passed since the offences were committed, the court martial refrained, with the consent of the parties, from imposing a custodial sentence on the appellant for his conviction of the three offences of making use of a dangerous drug. Therefore, for these offences the appellant was sentenced to two months imprisonment that was suspended over a period of eighteen months, provided that he did not commit any offence under the Dangerous Drugs Ordinance.

6. In view of the leave to appeal given by the Appeals Court Martial on its judgment, counsel for the appellant filed their appeal in this court. Their

main argument in the appeal was that, in view of the status and importance of the right to consult a lawyer, the confession made by the appellant as a result of an illegal violation of the aforesaid right should be declared inadmissible. On 13 September 1998, the attorney-general gave notice by virtue of his power under the Procedure (Attendance of Attorney-General) Ordinance [New Version], 5728-1968, that he would attend this proceeding, since it gives rise to a 'question that is of great legal and public importance, in the sphere of the rules of evidence and the constitutional rights of a suspect.'

At the hearing that took place in this court on 13 June 1999 (before President A. Barak and Justices T. Or and E. Mazza) it was decided that the appeal would be heard by way of written summations before an extended panel of justices. At the appellant's request, it was decided that the notice of appeal would serve as written summations on his behalf. In accordance with the aforesaid decision, the first respondent (the chief military prosecutor) and the second respondent (the attorney-general) filed written summations of their arguments in the appeal.

7. On 25 October 1999, the National Public Defender's Office filed in this court an application to file written pleadings as a 'friend of the court.' On 9 December 1999 the Israel Bar Association filed a similar application. For the reasons set out below, we saw fit to grant these two applications.

At the heart of the appeal before us lies the question of the effect of not giving the statutory notice concerning the right to consult a lawyer on the admissibility of a confession made by the accused in an interrogation. This question constitutes a part of a broader fundamental issue, which concerns the adoption of a doctrine that illegally obtained evidence should be inadmissible in our legal system. This is an issue of significant legal and public importance, which concerns a broad spectrum of defendants both in the military justice system and in the civilian justice system, and it is capable of raising a wide range of complex questions in the field of constitutional law and in the field of criminal evidence. In a deliberation of this kind, the Public Defender's Office, which has a duty under the law to represent persons who have been arrested or indicted in the civilian justice system, and the Israel Bar Association which represents the active lawyers in Israel, have the ability to assist in clarifying the issues under discussion. In view of the roles of the aforesaid bodies, their expertise and experience in representing defendants,

joining them to the proceeding is likely to contribute to a deeper understanding and clarification of the issue. For this reason, and in order that as broad and comprehensive a picture may be presented with regard to the questions that arise before us, we thought that there was a basis to allow the National Public Defender's Office and the Israel Bar Association to put forward their position in this proceeding.

We therefore decided, without any objection from the parties, to join the National Public Defender's Office and the Israel Bar Association to the proceeding before us, and we received their summary arguments (on the considerations supporting an order to join a body as a party to a proceeding in the capacity of a 'friend of the court,' see CrimFH 9384/01 *Al Nisasra v. Israel Bar Association* [1], at para. 16 of my opinion; CA 10425/03 *State of Israel v. Sita Shasha* [2]; HCJ 769/02 *Public Committee Against Torture in Israel v. Government of Israel* [3]; RT 7929/96 *Kuzali v. State of Israel* [4], at pp. 553-555, and the references cited there).

Arguments of the parties in the appeal

8. In their written summations, the parties explained in depth their positions on the fundamental question that arises in this case, and they supported their reasoning with many references from Israeli law and comparative law. At this stage of our deliberations, let us discuss in brief the positions of the parties, without addressing all of the reasons and references that they address in their summations.

9. The arguments on behalf of the appellant were presented before us by counsel from the Military Defender's Office (Adv. E. Zohar, Adv. R. Balchar and Adv. A. Crispin). In a detailed notice of appeal, which serves also as summations of their arguments, counsel for the appellant discussed the reasons why they are contesting the decision of the Appeals Court Martial to hold their client's confession admissible. According to counsel for the appellant, since their client's confession was taken without him being warned according to law at the beginning of the interrogation of his right to consult with a lawyer, the confession should be inadmissible in evidence, because of two separate provisions of statute: one is s. 12 of the Evidence Ordinance and the other is the provisions of the Basic Law: Human Dignity and Liberty.

Regarding the provisions of s. 12 of the Evidence Ordinance, counsel for the appellant argued that in view of the status and importance of the right to

consult a lawyer, this court should change the prevailing interpretation of the aforesaid s. 12, and determine that obtaining a confession without a statutory warning of the right to consult a lawyer necessarily violates the free and willing manner in which the accused makes his confession, and therefore it should be inadmissible. According to the approach of counsel for the appellant, the scope of the inadmissibility rule set out in s. 12 of the Evidence Ordinance should be extended so that a confession will be inadmissible whenever it is made without the person under interrogation being advised according to statute of his right to consult a lawyer. At the same time, counsel for the appellant emphasized that, in their opinion, the provisions of the aforesaid s. 12 do not constitute a comprehensive arrangement with regard to the admissibility of confessions made by defendants, and it cannot preclude the adoption of a case law doctrine regarding the inadmissibility of evidence, including a confession, that was obtained illegally. In this regard, counsel for the appellant argued that since the enactment of the Basic Law: Human Dignity and Liberty, the rights of suspects and defendants in criminal proceedings have a super-legislative constitutional status, since they are derived from the constitutional right to dignity and liberty. Consequently, they claim that not advising the appellant of the right to consult a lawyer constitutes an illegal violation of a constitutional right. According to counsel for the appellant, the proper remedy for this is that a confession made in violation of the aforesaid right should be inadmissible. This relief may be derived, according to counsel for the appellant, both from the constitutional right itself, and from the purpose, protection and government compliance clauses that are provided in the Basic Law. According to this approach, a relative doctrine of inadmissibility should be adopted that leaves the court discretion to exclude illegally obtained evidence.

In the appellant's case, counsel argued that his confession should be excluded, *inter alia* in view of the serious nature of the violation of the right to consult a lawyer and in view of the fact that the court martial held that the military interrogator violated this right in bad faith and intentionally. Counsel for the appellant further argued that the failure to give the appellant the notice at the beginning of his interrogation with regard to his right to consult a lawyer was not an isolated incident, and that during the period when the appellant was being interrogated by the military police, these violations were a common occurrence. In view of all this, counsel for the appellant were of

the opinion that the appeal should be allowed, the aforesaid confession should be declared inadmissible and the appellant should be acquitted of the offences of making use of a dangerous drug.

10. By contrast, the Chief Military Prosecutor, Colonel E. Ron, argued in her written summations that the appeal should be denied, for the reasons given by the majority opinion in the Appeals Court Martial. With regard to the provisions of s. 12 of the Evidence Ordinance, the chief military prosecutor argued that the court should not adopt an interpretation whereby not advising the accused of the right to consult a lawyer will necessarily lead to the inadmissibility of a confession made by him in his interrogation. According to the approach of the chief military prosecutor, for reasons that she discussed extensively, the prevailing interpretation in case law, according to which not giving a statutory notice with regard to the right to consult a lawyer does not in itself make a confession under s. 12 of the Evidence Ordinance inadmissible, should be left unchanged. With regard to the question of adopting a general doctrine that illegally obtained evidence should be inadmissible, the chief military prosecutor argued that the absence of express legislation in this regard should indicate the existence of a negative arrangement that precludes the adoption of such a judicial doctrine. According to her argument, this court ought to refrain from adopting, by means of judicial legislation, a doctrine that illegally obtained evidence is inadmissible, as requested by counsel for the appellant. In view of the variety of reasons that she listed, the chief military prosecutor argued that the appeal should be denied and the judgment of the Appeals Court Martial should be left unchanged.

11. As I said above, the attorney-general saw fit to give notice of his attendance in the proceeding before us. At the outset of his written arguments, Adv. Y. Resnick, the Deputy State Attorney, argued on behalf of the attorney-general that the attorney-general accepted the position of the chief military prosecutor and it reflected his position on the issues under consideration.

In so far as the provisions of s. 12 of the Evidence Ordinance are concerned, counsel for the attorney-general added that this is a comprehensive arrangement with regard to the question of the admissibility of defendants' confessions. According to the case law of this court, a failure

to give the statutory notice regarding the right to consult a lawyer does not, in itself, detract from the free and willing manner in which the accused makes his confession in an interrogation, and it should not be regarded as such an extreme example of an improper interrogation method that it necessarily leads to the inadmissibility of the confession. He argues that the aforesaid interpretation of the provisions of s. 12 of the Evidence Ordinance is a proper one and it should not be changed, in as much as it serves the public interest of discovering the factual truth in a criminal proceeding.

With regard to the question of the adoption of a case law doctrine that illegally obtained evidence should be inadmissible, the position of the attorney-general was that adopting such a doctrine would constitute a revolution in the rules of evidence. Therefore, he argues that if there is any basis for adoption this doctrine, it should be done in Knesset legislation and not by way of judicial legislation of the court. Counsel for the attorney-general raised a doubt as to whether all the procedural rights of suspects and defendants in criminal proceedings are in fact enshrined in the constitutional right to dignity and liberty. He further said in his arguments that the legislation that was adopted after the enactment of the Basic Laws, in the field of criminal enforcement, does not include an express provision concerning the inadmissibility of illegally obtained evidence. According to this argument, the absence of an express provision of statute in this regard is capable of indicating the existence of a negative statutory arrangement that should not be circumvented by means of a broad interpretation of the provisions of the Basic Law: Human Dignity and Liberty; this is the case especially with regard to rights that are not expressly listed within the framework of the aforesaid Basic Law. For these reasons, counsel for the attorney-general agreed with the position of the chief military prosecutor, according to which the appeal against the judgment of the Appeals Court Martial should be denied.

Adv. K. Mann and Adv. A. Kobu, counsel for the National Public Defender's Office, which was joined to the proceeding as aforesaid, discussed in their written arguments the elevated status of the right to consult a lawyer in our legal system, the reciprocal relationship between it and the right to remain silent and the importance of the right to consult a lawyer in order to protect the propriety of the interrogation and in order to ensure the rights of the person being interrogated as a whole. Later in their arguments

counsel for the National Public Defender's Office discussed the findings of field research that they conducted at the end of 1999 and during 2003 in the Tel-Aviv district, with the aim of examining what was occurring at police stations with regard to advising persons being interrogated of the right to consult a lawyer and the right to remain silent. According to the Public Defender's Office, the aforesaid research shows that there exists a phenomenon, which they allege constitutes a widespread practice, whereby policemen illegally refrain from notifying persons who are under interrogation of their right to consult a lawyer or they postpone the giving of the notice until after they have finished taking the statement of the person being interrogated, in a manner that undermines his ability to realize the right to consult a lawyer effectively. Against this background, the basic position of the Public Defender's Office is that this court should adopt a case law doctrine of inadmissibility, within which framework the court may, at its discretion, exclude evidence that was obtained in violation of the basic rights of persons being interrogated in criminal proceedings. According to the approach of the National Defender's Office, adopting such a doctrine is essential in order to protect the rights of suspects and defendants and in order to protect the fairness of criminal proceedings and the integrity and trustworthiness of the judicial system.

The Israel Bar Association (hereafter also: 'the Bar Association') argued also that this court should adopt a case law doctrine that illegally obtained evidence should be inadmissible. According to counsel for the Bar Association, Adv. A. Feldman and Adv. M. Sefarad, the Basic Law requires the development of constitutional remedies in order to protect the rights enshrined therein against illegal violations by executive authorities. According to this argument, the right to consult a lawyer and to be represented by him is a basic right of great importance, which constitutes an integral part of the right to a fair trial and a complementary right to the right to remain silent and the right not to incriminate oneself. According to the Bar Association, the right to consult a lawyer today constitutes a constitutional right that is derived from the right to human dignity and liberty. A failure to give notice of the right to consult a lawyer before taking the statement of a defendant in an interrogation deals a mortal blow to the aforesaid right. For the reasons set out extensively in its written arguments, the Bar Association is of the opinion that our legal system is ready to adopt a case law doctrine that

will exclude evidence obtained by means of a violation of the constitutional rights of persons who are under interrogation. It argues that adopting such a doctrine will be capable of educating and deterring interrogators from using illegal interrogation methods, and of protecting human rights and the credibility of the judicial system in an effective manner.

12. It is possible, therefore, to summarize that we have seen various positions with regard to the variety of issues that arise in the case before us — including arguments concerning the interpretation of the provisions of s. 12 of the Evidence Ordinance in view of the Basic Law and arguments concerning the question of adopting a case law doctrine that illegally obtained evidence should be inadmissible. It should be noted that even according to those who believe that such a doctrine should be adopted, the court has been asked, in view of the provisions of the Basic Law, to develop a relative doctrine that will allow discretion in excluding illegally obtained evidence.

The protracted nature of the proceeding

13. Before we turn to examine the positions that have been presented to us and to determine the weighty issue brought before us, we should point out that the writing of our judgment was delayed until now for various reasons. As can be seen from the arguments of the parties, among the issues that arose in the appeal before us was the fundamental question of whether to adopt a case law doctrine according to which illegally obtained evidence should be inadmissible, and what should be the nature and framework of this doctrine. It has been said in the case law of this court that '… "a rule of inadmissibility" affects the heart and soul of the criminal trial… the whole issue is of great legal and public importance, and it should not be decided without regard to the complete social picture' (*per* Justice Barak in HCJ 249/82 *Vaknin v. Appeals Court Martial* [5], at p. 422). This is an issue on which much literature has been written both in Israel and elsewhere. In other countries various arrangements have been adopted on the question of the admissibility of illegally obtained evidence. In some countries a change has occurred in the arrangements practiced in this regard as a result of legal and social developments. In *Vaknin v. Appeals Court Martial* [5], Justice Barak refrained from considering the question of adopting a doctrine as aforesaid in our legal system, for the reason that all of the relevant material on the subject

was not brought before the court (*ibid.*). Notwithstanding, in that case he discussed some of the questions that arise in this context, without deciding them: 'Should we declare evidence, which was obtained by improper methods, completely inadmissible? Should we distinguish between various kinds of evidence and between various improper methods? Does the court have discretion? What are the parameters?' (*ibid.*, at p. 422). These questions come before us now and they are difficult and complex. Their solution required us to assemble material from various legal systems, which we have studied and considered in depth.

Moreover, during the time that passed since the appeal was filed, several proposals have been considered for amending legislation on the issues that arose before us (see the draft Evidence Ordinance [New Version] Amendment (Statement of Accused Outside the Court) Law, 5760-1999, the draft Evidence Ordinance Amendment (no. 15) (Confession of Accused regarding Serious Offences) Law, 5761-2000, the draft Evidence Ordinance Amendment (Inadmissibility of Confession Obtained by Violence) Law, 5764-2004, and the draft Evidence Ordinance Amendment (Admissibility and Weight of Accused's Confession) Law, 5764-2004, which concerned proposals to amend the provisions of s. 12 of the Evidence Ordinance; see also the draft Evidence Ordinance Amendment (Inadmissibility of Evidence) Law, 5765-2005, which concerns giving general discretion to the court to exclude illegally obtained evidence in accordance with criteria that we shall discuss later). In view of the legal, public and social importance of the issues brought before us and taking into account the variety of arrangements practised in this matter in other countries, we saw fit to wait before making our decision, in case a solution would be found to these questions in legislation of the Knesset. Since the aforesaid draft laws were not passed by the Knesset from the time the appeal was filed until today, there is no alternative to examining the arguments of the parties and making a decision with regard thereto. Notwithstanding, as will be clarified below, our judgment does not provide a complete solution to all the questions involved in the issue of the admissibility of illegally obtained evidence. It can be assumed that, if a need arises, these questions will be addressed in legislation that is consistent with the provisions of the Basic Law.

It should be emphasized that the appellant did not suffer any real harm from the time that passed before we gave our judgment. As will be explained

below, the appellant's conviction on the offences of making use of a dangerous drug was based on a confession whose admissibility is the question that lies at the heart of the appeal that was filed in this court. For the appellant's conviction on the offences of making use of a dangerous drug, he was sentenced to imprisonment that was suspended for a period of eighteen months. The aforesaid suspension period has passed and, in so far as we are aware, the suspended sentence was not activated. In these circumstances, the delay in making our decision on the fundamental questions that arise in this appeal did not significantly harm the appellant.

Against this background, let us turn to examine the fundamental issues that are before us.

The right to consult a lawyer and the duty to give notice of this right

The importance of the right to consult a lawyer

14. The right of someone under arrest to be represented by a lawyer and to consult him was recognized as a fundamental right in our legal system in the earliest days of this court (see CrimA 307/60 *Yassin v. Attorney-General* [6], at p. 1570; CrimA 96/66 *Tau v. Attorney-General* [7], at pp. 545-546; see also CrimA 533/82 *Zakkai v. State of Israel* [8], at p. 65; CrimA 334/86 *Sabah v. State of Israel* [9], at p. 865; CrimA 747/86 *Eisenman v. State of Israel* [10], at p. 453).

When the Criminal Procedure Law (Amendment no. 15), 5741-1981, was adopted, the right of a person under arrest to meet with and consult a lawyer was expressly enshrined in statute, and it was originally provided in s. 29 of the Criminal Procedure Law [Consolidated Version], 5742-1982. This provision of statute was replaced by s. 34(a) of the Criminal Procedure (Enforcement Powers — Arrests) Law, 5756-1996 (hereafter: 'the Arrests Law'), with an identical wording to the wording of the aforesaid s. 29. The following is the language of the section:

'Right of person under arrest to meet with lawyer

> 1. (a) A person under arrest is entitled to meet with a lawyer and consult him.'

The importance of the right to meet with and consult a defence lawyer at the interrogation stage derives from the fact that, as a rule, an interrogation by persons in authority is a complex and stressful situation for anyone who is

interrogated under conditions of arrest when he is confronted by his interrogators on his own. The accepted opinion is that the right to be represented by and to consult a lawyer assists in protecting the rights of persons under arrest, ensures the fairness of the interrogation proceedings and prevents abuse of the inherent disparity of forces between the arrested person and the persons in authority who are interrogating him. In this context, it is possible to indicate several reasons that support the right of the person under arrest to legal representation at the interrogation stage: first, a consultation by the person under arrest with his lawyer assists in ensuring that the person under arrest is aware of all of his rights, including the right to a fair interrogation without any improper interrogation methods being used against him, the right not to incriminate himself and the right to remain silent. The assumption is that the lawyer will take care to give an explanation to the person under arrest with regard to his rights in the interrogation in simple and clear language, and that he will explain to him the significance of not presenting his version of events in the police interrogation. It has been said in the case law of this court that: 'the right to defence counsel includes the legitimate possibility that a lawyer will advise the suspect or accused to remain silent and not make any statement to the police' (*per* Justice Goldberg in *Eisenman v. State of Israel* [10], at p. 452). For this reason, it is customary to regard the right to consult a lawyer as another aspect of the right to remain silent (see *Yassin v. Attorney-General* [6], at p. 1570; *Tau v. Attorney-General* [7], at p. 546; *Eisenman v. State of Israel* [10], at p. 452; HCJ 3412/91 *Sufian v. IDF Commander in Gaza Strip* [11], at p. 847, *per* Vice-President Elon; HCJ 1437/02 *Association for Civil Rights in Israel v. Minister of Public Security* [12], at p. 764, *per* Justice Rivlin).

In addition to the aforesaid, we should point out that in the past this court has adopted the position that not only does an accused in a trial have the right to remain silent but so too does a suspect in an interrogation (see, for example, LCA 5381/91 *Hogla v. Ariel* [13], at p. 381, *per* Justice Mazza; CrimA 1382/99 *Balhanis v. State of Israel* [14], *per* Justice Ilan; LCrimA 3445/01 *Almaliah v. State of Israel* [15], at p. 869, *per* Justice Dorner). We should mention that recently this court saw fit to leave undecided the question of the scope of the right to remain silent in the interrogation of a suspect (see LCrimA 8600/03 *State of Israel v. Sharon* [16], at pp. 756-757 and 759, *per* Vice-President Or and the references cited there). This question

does not arise in the case before us, and therefore we too shall leave it undecided.

The right to consult a lawyer therefore helps to ensure that the person under arrest is aware of all of his rights in an interrogation. In addition to this, the defence lawyer of the arrested person may make a contribution towards ensuring the propriety of the interrogation and the lawfulness of the measures adopted during it, and he may also assist in ensuring the reliability of the evidence obtained in the interrogation proceedings (see, for example, CrimA 648/77 *Kariv v. State of Israel* [17], at p. 743, where President Shamgar discussed the reasons supporting the presence of a defence lawyer when an identity parade is conducted with the suspect; see also D. Bein, 'The Right of a Suspect Under Arrest to a Defence Lawyer in Interrogation Proceedings — "Compromise" Solutions,' 39 *HaPraklit* 108 (1990), at pp. 109-112). Moreover, there are some opinions that the representation of a person under arrest by a lawyer contributes to the effectiveness of the interrogation, in the sense that the lawyer may help the interrogation authorities in finding evidence that supports the innocence of the person under arrest, and even help in preventing the making of false confessions by persons under arrest (see Y. Tirosh, '"The Right to Legal Representation in an Interrogation" — Rules of Entrapment in the light of Comparative Law,' 14 *Mishpat veTzava (Military Law)* 91 (2000), at pp. 94-95). In view of all of the aforesaid reasons, no one disputes the elevated position and centrality of the right to consult a lawyer in our legal system.

15. In view of the importance of the right to consult a lawyer, the Arrests Law now provides that if a person under arrest asks to meet with a lawyer or if a lawyer appointed by someone close to the person under arrest asks to meet with him, 'the person in charge of the investigation shall allow this, *without delay*' (s. 34(b) of the law; emphasis supplied). It is further provided in the law that even though supervision of the movements of the person under arrest should be allowed, the meeting of the person under arrest with his lawyer should take place in private and in conditions that guarantee the confidentiality of the conversation (s. 34(c) of the law). It should be noted that, alongside these provisions of the law there are exceptions that, in appropriate circumstances, allow the meeting of the person under arrest with a lawyer to be deferred in accordance with the grounds and conditions prescribed by the law. The law also provides a special arrangement with

regard to the meeting of a person under arrest with his lawyer when he is suspected of security offences. These exceptions show that, like other basic rights, even the right to consult a lawyer is not absolute and there are occasions when it has to give way to competing rights and interests (see *Sufian v. IDF Commander in Gaza Strip* [11], at p. 848, *per* Vice-President Elon; CrimA 6613/99 *Smirk v. State of Israel* [18], at p. 554; HCJ 3239/02 *Marab v. IDF Commander in Judaea and Samaria* [19], at pp. 380-381 {212-213}, *per* President Barak).

In order to complete the picture, we should point out that when the Public Defender's Office Law, 5756-1995 (hereafter: 'the Public Defender's Office Law') was enacted, statute recognized the right of suspects and persons under arrest to representation by a public defender, in the circumstances listed in the provisions of s. 18 of the aforesaid law. The restrictions on the right to representation by the Public Defender's Office on the grounds listed in s. 18 of the law are also based on the perception that the right to legal representation in general, and the right to legal representation at the public expense in particular, are not absolute rights and they should be balanced against competing rights and interests in accordance with the grounds and conditions set out in the law.

Duty to give notice of the right to consult a lawyer

16. The right of the person under arrest to be represented by a lawyer and to consult him gives rise to the right to be given notice of the aforesaid right by the interrogation authorities. The reason for this is that without giving notice of the aforesaid right, the person under arrest will not be aware of his right to ask to consult his lawyer, and this may not only prejudice the actual right to consult a lawyer but also in certain circumstances undermine the fairness of the interrogation. The remarks of Vice-President Elon in *Sufian v. IDF Commander in Gaza Strip* [11] are illuminating in this regard:

> 'The basic right of the defendant to meet with a lawyer gives rise to and implies the right to receive a notice of the existence of this right and the duty imposed on the authorities to give notice of this to the person under arrest. Someone who does not know of the existence of a right cannot try to realize it. This is especially the case when we are speaking of someone who is under arrest, and his mind is troubled, and he will probably not know how he should act and what he should do.

> For this reason the person under arrest has a right to be notified of his right to meet with a lawyer, and the authorities have a duty to notify him accordingly' (*ibid*. [11], at p. 850).

This is the place to point out that the duty of the investigation authorities to give notice of the rights of the person under interrogation has undergone development over the years. Notwithstanding, it would appear that our legal system has no comprehensive and uniform statutory arrangement in this regard. With regard to the right not to incriminate oneself and the right to remain silent, the duty to give notice of these is intended to ascertain that the accused is aware of these rights at the time of his interrogation, and that he knowingly waived them when giving his statement. In its early years, this court derived the duty to give notice of the aforesaid rights from the English Judges' Rules, which were regarded merely as guidelines (see CrimA 69/53 *Sich v. Attorney-General* [20], at p. 805, and the references cited there). Now s. 28(a) of the Arrests Law prescribes a duty to give a warning, even though the aforesaid section does not refer directly to warning a suspect that he has a right to remain silent in an interrogation, but it concerns giving a person an opportunity to respond before a decision to arrest him, when the officer in charge has the duty to warn him beforehand that he is not liable to say anything that may incriminate him, but that refraining from answering questions may strengthen the evidence against him (see *Smirk v. State of Israel* [18], at p. 545). In the case before us, no one disputes that the appellant was warned before taking his statement with regard to the right to remain silent in accordance with the wording of the warning prescribed in s. 267 of the Military Jurisdiction Law. In view of this, no questions arise in the appellant's case with regard to the duty to give notice of the aforesaid right, and with regard to the scope of the application of the right to remain silent in the interrogation of a suspect, as distinct from an accused.

With regard to the duty to give notice of the right to consult a lawyer, this is now expressly enshrined in the provisions of the Arrests Law and the Public Defender's Office Law, which were enacted after the Basic Law: Human Dignity and Liberty was enacted. Section 32 of the Arrests Law provides as follows:

'Explaining rights to a person under

> ?. If the officer in charge decides to *arrest the suspect*, he shall immediately make the fact of the

arrest

> arrest and the reason for the arrest clear to him in language that he can understand, in so far as possible, and also —
>
> (1) His right that notice of his arrest should be given to a person close to him and to a lawyer, and his right to meet with a lawyer, all of which subject to the provisions of sections 34 to 36; and also his right to be represented by a defence lawyer as stated in section 15 of the Criminal Procedure Law or under the Public Defender's Office Law.
>
> (2) …'

(Emphasis supplied).

The provisions of s. 19 of the Public Defender's Office Law, which deals with giving notice of the possibility of a public defence attorney being appointed, states as follows:

'Notice to the person under arrest of a possibility of appointing a public defence lawyer

> 19. (a) If a person *is arrested* and brought to a police station or to a facility of an investigative authority under the law, *or if he is suspected of committing an offence*, the person in charge of the station or of the investigation shall notify him, as soon as possible, that he has the possibility of asking that a public defence lawyer is appointed, if he is entitled to one under this law.
>
> (b) …'

(Emphases supplied).

A study of the two aforesaid provisions of statute shows that, *prima facie*, there are differences between the two with regard to the time when the duty arises to give a notice with regard to the right to consult a lawyer and the right to be represented by a public defence lawyer: according to the provisions of s. 32(a) of the Arrests Law, the duty to give notice of the right to consult a lawyer arises when the decision to arrest a person is made by the

officer in charge and when notice is given that the person is *under arrest*. By contrast, under the provisions of s. 19(a) of the Public Defender's Office Law, the duty to give notice of the right to ask for the appointment of a public defence lawyer applies to a *person under arrest* who has been brought to the police station or to a *person suspected of committing an offence*.

17. In their arguments before the court martial and also before us, counsel for the appellant addressed extensively the question of the proper interpretation of the term 'person under arrest' in the title of section 32 of the Arrests Law. According to them, this question should be decided in order to determine when under s. 32(1) the duty arises to notify a person under interrogation of his right to consult a lawyer, and whether this duty has been breached in the case of the appellant.

In their arguments, counsel for the appellant discussed two interpretive possibilities for the term 'person under arrest' in s. 32 of the Arrests Law: according to the narrow interpretation, which counsel for the defence asks us to reject, the duty to give notice of the right to consult a lawyer arises when a decision is made by the officer in charge to make the arrest and notice of this is given to the suspect. According to counsel for the appellant, this interpretation is not desirable since it can lead to a situation in which the interrogation authorities delay giving the notice that the suspect is under arrest until after they have taken his statement, with the result that the meeting with the lawyer loses its effectiveness. It should be said at once that the answer to the aforesaid concern lies in the determination that even according to the narrow interpretation of the term 'person under arrest,' it cannot be said that an illegal delay in giving notice of the decision to make an arrest will lead to a postponement of the time when the duty arises to give notice of the right to consult a lawyer. Moreover, a delay in giving the notice of arrest, which is artificial and done in bad faith, with the purpose of tendentiously postponing the time of the duty to give notice of the right to consult a defence lawyer, is likely in itself to constitute a violation of the suspect's procedural rights, with all that this implies. Notwithstanding, it is clear that according to the narrow interpretation, the duty to give notice of the right to consult a lawyer involves the officer in charge making an objective decision to arrest the suspect, and this is capable of restricting the scope of the duty to give notice of the right to consult a lawyer.

Justice D. Beinisch

According to the outlook of counsel for the appellant, the spirit of the Basic Law: Human Dignity and Liberty and the arrangement set out in the provisions of s. 19(a) of the Public Defender's Office Law today require a broad interpretation of the term 'person under arrest' in s. 32 of the Arrests Law. According to the interpretation proposed by them, the duty to notify a 'person under arrest' of his right to consult a lawyer does not necessarily involve the making of a decision to arrest him, but it arises whenever a person is suspected of committing an offence and is detained in police custody for the purposes of interrogation, in such a way that his liberty and freedom of movement are restricted; this is the case even if no decision has been made by the officer in charge to arrest the suspect. The National Public Defender's Office also supports this interpretation, in view of its argument that the duty to give notice of the right to consult a lawyer arises at the beginning of the interrogation of a person suspected of committing an offence (regarding the difficulty in determining the borderline on the question of when a person turns from a 'witness' into a 'suspect,' see *Almaliah v. State of Israel* [15]). Indeed, in Canada, South Africa and the United States the duty to give notice of the right to consult a lawyer applies not only with regard to persons under arrest but also with regard to suspects who are detained for the purposes of interrogation. With regard to English law, the duty to give notice of the right to consult a lawyer applies, as a rule, to a 'person under arrest' when he arrives at the police station (see s. 58(a) of the Police and Criminal Evidence Act 1984 (hereafter: 'PACE'); see also Police and Criminal Evidence Act 1984 Code of Practice C, para. 3.1) Notwithstanding, there are circumstances in which the duty to give notice of the right to consult a lawyer applies even before the suspect is arrested (see PACE Code of Practice C, para. 3.21).

Prima facie, the question of the interpretation of the term 'person under arrest' in s. 32 of the Arrests Law should have arisen in the circumstances of the case before us, since the confession of the appellant was taken from him when he was suspected of offences under the Dangerous Drugs Ordinance and was being detained for the purposes of interrogation, but before he received a notice that he was under arrest for these offences. In the aforesaid circumstances, the question whether, according to the aforesaid s. 32, the interrogator should have warned the appellant before taking his statement of his right to consult a lawyer would appear to arise. But in practice, for the

reasons that will be made clear below, I agree with the position of the Appeals Court Martial that a decision with regard to the interpretation of the term 'person under arrest' in the aforesaid s. 32 is not required in the appellant's case. Therefore, even though I am inclined to adopt the *broad* interpretation of the term 'person under arrest' in s. 32 as argued by counsel for the defence, I do not see any need to decide this question in the present case, and I leave it undecided.

The breach of the duty to give the notice in the case of the appellant

18. As has been clarified above, the interrogation of the appellant was conducted by the military police because he was a soldier. Under the provisions of s. 227A of the Military Jurisdiction Law, an interrogation as aforesaid is subject to the provisions of ss. 32 to 36 of the Arrests Law, *mutatis mutandis*. Therefore, the provisions of the Arrests Law concerning the right to meet with a lawyer and to receive notice of this apply also to soldiers being interrogated by the military police. Notwithstanding, s. 227A1 of the Military Jurisdiction Law further provides the following:

'Soldier who is interrogated

> 227A1. Without derogating from the provisions of section 227, the provisions of section 34 and 35 of the Criminal Procedure (Enforcement Powers — Arrests) Law shall apply *with regard to a soldier who is interrogated and under the law there is an almost certain possibility that he will be arrested*, all of which according to the case and *mutatis mutandis* as stated in section 227A; for the purpose of this section, 'under the law' — including under case law.'

Thus we see that with regard to the interrogation of soldiers by the military police, the legislature expressly provided that the right to consult a lawyer and the duty to give notice of this right shall apply to every soldier who is interrogated and with regard to whom, under the law, 'there is an almost certain possibility that he will be arrested.' Thus, taking into account the special characteristics of soldiers and the interrogation thereof, the legislature saw fit to provide expressly that the existence of an almost certain

possibility that the soldier will be arrested is sufficient to give rise to his right to consult a lawyer and the duty to give notice thereof. Moreover, with regard to soldiers there is also an arrangement in the Military Jurisdiction Law according to which any person being interrogated who is soldier and who is likely to be arrested, and any accused who is a soldier, are entitled to representation by the military defender's office (see s. 227A(6) and s. 316 of the aforesaid law).

19. Section 227A1 of the Military Jurisdiction Law was adopted in 1998 within the framework of the thirty-fourth amendment of the law. Therefore, when the appellant was interrogated in 1996, the aforesaid provision had not yet been enacted. Notwithstanding, the guidelines of the military police that were in forced at that time determined a similar arrangement to the one enshrined in the aforesaid s. 227A1, according to which: 'should it be known in advance that a soldier is going to be arrested, he should be given notice of the suspicions and his rights before he is interrogated, including the right to consult with a lawyer' (Public Defender's Office exhibit 8). In view of this, there is no dispute between the parties before us that under the law that prevailed at the time the appellant was interrogated, there arose a duty to give notice of the right to consult a lawyer when it was known in advance that the soldier under interrogation was likely to be placed under arrest, even before a decision was made to arrest him. There is also no dispute that the military interrogator who interrogated the appellant acted contrary to what was required by the aforesaid guideline: at the beginning of the interrogation of the appellant on 18 December 1996, it was clear that he was likely to be arrested, in view of the fact that when he was admitted to Prison 6 a dangerous drug of the cannabis type was found in his possession. Notwithstanding, the military interrogator began to take the appellant's statement without first warning him of his right to consult a lawyer. Moreover, even after the military interrogator's superior officer ordered him in a telephone conversation during the interrogation to place the appellant under arrest, the interrogator continued to take the statement and only approximately a quarter of an hour after he had finished taking it, he notified the appellant that he was under arrest and that he had the right to consult a lawyer. There is therefore no dispute that the military interrogator acted illegally when he refrained from warning the appellant with regard to his right to consult a lawyer when he began to take his statement, or at least after

his superior officer told him, while he was taking the statement, to place the appellant under arrest. In view of the aforesaid omission of the military interrogator, the appellant was not aware of the right to consult a lawyer before the first statement was taken from him. Therefore the appellant did not ask to consult a lawyer before he confessed that he had made use of a dangerous drug when he was a soldier. In these circumstances, it is agreed by the parties before us that the failure to notify the appellant of his right to consult a lawyer amounted to a violation of the actual right to consult a lawyer.

20. In their written summations, the parties extensively addressed the question whether the failure to warn the appellant at the beginning of his interrogation with regard to his right to consult a defence attorney amounted to a violation of a *constitutional* right. This question has no simple solution, in view of the fact that the right to consult a lawyer is not expressly mentioned in the Basic Law: Human Dignity and Liberty. Admittedly, the constitutional right to dignity and liberty contains a variety of values, and it would appear that it has a strong connection with the rights of a suspect, a person under arrest and a defendant in criminal proceedings. Notwithstanding, various approaches are possible with regard to the question of which of the procedural rights in the criminal proceeding are indeed included within the framework of the constitutional right to dignity and liberty, and what is the scope of the constitutional protection given to rights that are not expressly mentioned in the Basic Law (see, in this regard, my remarks in CrimA 7335/05 *Public Defender's Office, Nazareth District v. State of Israel* [21], at para. 9 of my opinion; for an approach that calls for care in extending the scope of the rights included in human dignity and liberty without them being expressly mentioned in the Basic Law, see HCJ 453/94 *Israel Women's Network v. Government of Israel* [22], at pp. 535-536 {467-468}, *per* Justice Zamir; A. Bendor, 'Criticism of the Relativity of Basic Rights,' 4 *Mishpat uMimshal* (1997) 343, at p. 344; H. Sommer, 'Unmentioned Rights — On the Scope of the Constitutional Revolution,' 28 *Hebrew Univ. L. Rev. (Mishpatim)* (1997) 257, at pp. 267, 331, 337; for an approach that supports the inclusion of procedural rights of suspects, persons under arrest and defendants in criminal proceedings in the constitutional right to dignity and liberty, see A. Barak, *Interpretation in Law — Constitutional Interpretation* (vol. 3, 1994) at pp. 431-433; M. Elon, 'The Basic Laws —

Enshrining the Values of a Jewish and Democratic State,' 13 *Bar-Ilan Law Studies (Mehkarei Mishpat)* (1996) 27, at p. 34; E. Gross, 'The Procedural Rights of the Suspect or the Accused under the Basic Law: Human Dignity and Liberty,' 13 *Bar-Ilan Law Studies (Mehkarei Mishpat)* 155 (1996), at pp. 156, 179; Y. Karp, 'The Criminal Law — A Janus of Human Rights: Constitutionalization in the light of the Basic Law: Human Dignity and Liberty,' 42 *HaPraklit* 64 (1995), at pp. 80-82; for statements in the case law of this court according to which the right to consult a lawyer constitutes a constitutional right by virtue of its being derived from the dignity and liberty of the person under arrest, see *Sufian v. IDF Commander in Gaza Strip* [11], at pp. 847-848, and 850 *per* Vice-President Elon; HCJ 6302/92 *Rumhiya v. Israel Police* [23], at p. 212, *per* President Barak; CrimApp 5136/98 *Manbar v. State of Israel* [24]; *Marab v. IDF Commander in Judaea and Samaria* [19], at p. 380 {212}, *per* President Barak; *Association for Civil Rights in Israel v. Minister of Public Security* [12], at p. 764, *per* Justice Rivlin).

It should be noted that in Canada and South Africa the right to consult a lawyer is given an express constitutional status. In Canada the right to consult a lawyer is enshrined in s. 10(b) of the Charter of Rights and Freedoms, whereas in South Africa the aforesaid right is enshrined in the provisions of s. 35(2)(b) of the Constitution of 1996. In the United States, the Supreme Court has recognized the right to consult a lawyer as a constitutional right, since it is derived from the right to representation under the Sixth Amendment of the Constitution and also from the right not to incriminate oneself and the right to due process that are protected within the framework of the Fifth Amendment of the Constitution (see *Miranda v. Arizona* [104]; see also W.R. LaFave and J.H. Israel, *Criminal Procedure* (second edition, 1992), at pp. 529-530). In addition, we should point out that the draft Basic Law: Trial Rights (*Draft Laws* 1994, 335), which was prepared by the Minister of Justice and was tabled in the Knesset in 1994, proposed to give an express constitutional status to the right of a person under arrest to meet with a lawyer and the right to receive a notice of this (see s. 6 of the draft law). As is well known, this proposal did not become law.

After considering the various aspects involved in the matter, I have come to the conclusion that in the case before us we do not need to decide the comprehensive and complex issue concerning the constitutional status of the procedural rights of suspects, persons under arrest and defendants in criminal

proceedings, even though it seems that in our case law there is a trend towards the approach that the right to consult a lawyer is a constitutional right. Nonetheless, even if we say that the right of a person under arrest to consult a lawyer does not have a super-legislative constitutional status — and on this subject I see no need to express an opinion — no one doubts its importance and centrality in our legal system. Moreover, even if the right to consult a lawyer is not included within the narrow inner circle of the constitutional right to human dignity and liberty, it is possible to say that under the influence of the Basic Laws the status of the aforesaid right and the duty to take account of it has been strengthened; this is because of its possible connection with the dignity and liberty of the person under interrogation and in view of its being a part of the right to a fair trial in criminal proceedings which we shall discuss extensively later. Consequently, a failure to give the statutory notice with regard to the right to consult a lawyer may, in appropriate circumstances, lead to the inadmissibility of a confession made by the accused in an interrogation. What the normative basis for this should be and in what circumstances such inadmissibility will be required are the questions that will lie at the heart of our further deliberations.

Section 12 of the Evidence Ordinance — a 'free and willing' confession

21. For decades, the provisions of s. 12 of the Evidence Ordinance have governed the question of the admissibility of a confession made during an interrogation of a defendant. The following is the wording of the section:

> 'Confession
>
> 12. (a) Testimony concerning a confession of the accused that he committed an offence shall be admissible only if the prosecutor brings testimony concerning the circumstances in which the confession was made and the court sees that the confession was made *freely and willingly*.'
>
> (Emphasis supplied).

A similar arrangement is provided in s. 477 of the Military Jurisdiction Law, which states:

> 'Confession of accused as evidence
>
> 77. A court martial shall not admit a confession of an accused in evidence unless it is persuaded that

it was made by the accused *of his own free will*.'

(Emphasis supplied).

There is no dispute between the parties before us that the 'free will' test provided in s. 477 of the Military Jurisdiction Law is substantially the same as the 'free and willing' test provided in s. 12 of the Evidence Ordinance. Therefore, even though our deliberations below will focus on the interpretation of the provisions of s. 12 of the Evidence Ordinance, our interpretive conclusions will also be valid with regard to s. 477 of the Military Jurisdiction Law.

22. In the notice of appeal that they filed, counsel for the appellant argued that since the Basic Law: Human Dignity and Liberty was enacted, the prevailing interpretation of the rule of inadmissibility provided in s. 12 of the Evidence Ordinance, as determined in the case law of this court, ought to be changed. According to the argument, in the spirit of the Basic Law it should be held that since the appellant was not warned according to law at the beginning of his interrogation with regard to his right to consult a lawyer, the confession that was taken from him is not made 'freely and willingly' and therefore it should be declared inadmissible in accordance with the provisions of the aforesaid law. In order to make a decision with regard to this argument, let us first discuss the interpretation given to the aforesaid s. 12 in the case law of this court before the enactment of the Basic Law: Human Dignity and Liberty. Then let us turn to examine the question whether after the enactment of the Basic Law our prevailing case law interpretation of the aforesaid s. 12 ought to be changed, and whether we should decide that a failure to give the statutory warning with regard to the right to consult a lawyer necessarily makes a defendant's confession inadmissible, as argued by defence counsel.

The interpretation of section 12 of the Evidence Ordinance before the Basic Law

23. The rule of inadmissibility provided in s. 12 of the Evidence Ordinance has its origins in English common law (see *Ibrahim v. R.* [109]). Initially, the aforesaid rule was intended to examine the circumstances concerning the manner of taking a confession within the framework of an interrogation by a person in authority (see the remarks of Justice Or in CrimA 5614/92 *State of Israel v. Mesika* [25], at pp. 677-678 and the references cited there; for the opinion that the rule of inadmissibility enshrined in s. 12 of the

Evidence Ordinance applies also to confessions made before persons who are not in authority, see Y. Kedmi, *On Evidence* (vol. 1, 2004), at p. 12).

In accordance with the rule provided in s. 12 of the Evidence Ordinance, the court should declare a confession of an accused inadmissible, if it was not made freely and willingly. The definition of when a confession is made 'freely and willingly' is not simple, and the case law of this court has had to contend with this question from the outset. A person who is under interrogation for offences of which he is suspected experiences psychological pressure and physical discomfort that are inherent to the situation in which he finds himself. 'An interrogation by its very nature places the person under interrogation in a difficult position… any interrogation, no matter how fair and reasonable, places the person under interrogation in embarrassing and trying situations, intrudes into his private concerns, invades the innermost parts of his soul and places him under serious emotional pressure' (see HCJ 5100/94 *Public Committee Against Torture v. Government of Israel* [26], at pp. 834-835 {589-590}, *per* President Barak, and the references cited there). In view of this, it is clear that the expression 'freely and willingly' should not be given a literal interpretation. Indeed, the meaning given to this term over the years in the case law of this court was a technical-legal one, according to which a confession of an accused will be inadmissible under the aforesaid s. 12 only if improper 'external pressure' was exerted on him at the time of the interrogation to such an extent that it was capable of undermining his ability to choose freely between making a confession and not making one (see *Sich v. Attorney-General* [20], at p. 808; CrimA 636/77 *Levy v. State of Israel* [27], at p. 774; CrimA 4427/95 *A v. State of Israel* [28], at p. 564; *Smirk v. State of Israel* [18], at p. 541; CrimFH 4342/97 *El Abid v. State of Israel* [29], at pp. 837, 865).

The question of what is improper 'external pressure' that is capable of undermining the ability of the accused in his interrogation to choose freely between making a confession and not making one will be considered later. At this stage of our deliberations, we should emphasize that even if it is not proved that a confession made by an accused in his interrogation is admissible as evidence because it is made 'freely and willingly,' the court should also examine the weight and credibility of the confession. This is because '… even the use of interrogation methods that are permitted may lead to a person being interrogated confessing an offence that he did not

commit,' because of internal pressures in the human soul (see the remarks of President Shamgar in FH 3081/91 *Kozali v. State of Israel* [30], at p. 448).

The conditions for determining the admissibility and weight of a confession of an accused indicate that even though a confession that was obtained by a person in authority constitutes admissible evidence to prove guilt in criminal cases, statute and case law provide barriers whose purpose is to address the concerns involved in admitting it as evidence (for the reasons for the aforesaid concerns and for the possible factors leading to the making of false confessions in interrogations before persons in authority, see the Report of the Commission chaired by Justice Goldberg concerning Convictions based solely on a Confession and concerning the Grounds for a Retrial (1995), at pp. 8-10 (hereafter: the Report of the Commission concerning Convictions based solely on a Confession); B. Sanjero, 'The Confession as a Basis for a Conviction — "Queen of Evidence" or Empress of False Convictions,' 4 *Alei Mishpat* (2005) 245, at p. 249 *et seq.*; for the dominant approach in our case law, whereby a confession of an accused constitutes evidence for proving guilt in criminal trials, whose admissibility and weight will be examined in accordance with the circumstances of each individual case, see *El Abid v. State of Israel* [29], at pp. 819-820 *per* Justice Or, at pp. 833-834 *per* Justice M. Cheshin, at p. 855 *per* Justice Strasberg-Cohen, at p. 857 *per* Justice Mazza and at p. 865 *per* President Barak; for the approach that regards the confession of an accused as 'suspect evidence' whose credibility should be examined *ab initio* from a sceptical perspective, see *El Abid v. State of Israel* [29], at pp. 836-839, *per* Justice Dorner). In this context it should be noted that in 2002 the Criminal Procedure (Interrogation of Suspects) Law, 5762-2002, was passed. This provides that, as a rule, the interrogation of a suspect at a police station for serious offences shall be documented visually subject to the exceptions listed in the law. This arrangement is supposed to be implemented gradually by means of orders made by the Minister of Public Security as stated in s. 16(b) of the law. The statutory duty to document interrogations of suspects visually or audibly is intended to allow the court to obtain an impression, as closely and objectively as possible, of the manner in which the interrogation was conducted and the circumstances in which the confession was made during it. The purpose of this is to help the court decide the admissibility and weight of confessions made in an interrogation, and to allow better protection of the rights of

persons under interrogation (see the explanatory notes to the draft Evidence Ordinance Amendment (no. 15) (Confession of an Accused to Serious Offences) Law, 5761-2000).

24. The question of what is the purpose of the rule of inadmissibility provided in s. 12 of the Evidence Ordinance has undergone development over the years. Initially, the 'free will' test was used to render inadmissible confessions that were obtained by employing interrogation methods that mainly involved force and violence, or the threat thereof, and to render inadmissible confessions that were obtained by employing unfair entrapments or inducements. At that time, the prevailing approach in case law was that the 'free will' test was intended to safeguard the credibility of confessions made in the presence of persons in authority. According to that approach, improper interrogation methods, such as violence, force and threats or inducements and promises by a person in authority, were likely to lead to the making of false confessions and therefore these confessions should be regarded as inadmissible *ab initio* (with regard to the fact that the 'free will' test was originally intended to safeguard the credibility of confessions in English common law, see C. Tapper, *Cross and Tapper on Evidence* (eighth edition, 1995), at p. 664; M.A. Godsey, 'Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination,' 93 *Cal. L. Rev.* (2005) 465, at pp. 481-482; with regard to the fact that this court, in its early years, adopted from the common law the approach that the rule of inadmissibility was intended to safeguard the credibility of confessions, see CrimA 2/48 *Al-Lodj v. Attorney-General* [31], at pp. 96-97, *per* Justice S.Z. Cheshin; *Yassin v. Attorney-General* [6], at p. 1554; CrimA 242/63 *Kariti v. Attorney-General* [32], at pp. 497-498, *per* Justice HaLevy; CrimA 270/65 *Kasey v. Attorney-General* [33], at p. 566, *per* Justice Sussman).

Over the years, the emphasis was changed to include not only forcible measures and physical violence that were regarded as a ground for inadmissibility, but also claims with regard to exerting unfair emotional or psychological pressure on defendants in their interrogation. At the same time, there was a change in thinking with regard to the reasons underlying the inadmissibility rule provided in the aforesaid section 12. Alongside the purpose of safeguarding the credibility of confessions, some authorities were of the opinion that the 'free will' test was intended to protect the rights of defendants in an interrogation and the propriety of the criminal proceeding.

According to this approach, declaring a confession inadmissible is intended to provide relief for the violation of the human dignity of the person under interrogation, and in order to prevent the court being a party to the illegality perpetrated by the interrogation authorities when admitting the evidence in a trial. In addition, an opinion was expressed that the purpose of the inadmissibility rule provided in the aforesaid s. 12 is to educate and deter the interrogation authorities against the use of improper interrogation methods. (For the development in thinking with regard to the reasons underlying the inadmissibility rule enshrined in s. 12, see E. Gross, 'A Constitutional Rule of Inadmissibility — Has it a Place in Israel?' 30 *Hebrew Univ. L. Rev. (Mishpatim)* (1999) 145, at pp. 156-157; E. Harnon, 'Illegally Obtained Evidence: A Comparative Perspective,' *Landau Book* (A. Barak, E. Mazuz, eds., 1995, vol. 2) 983, at p. 1018; also see and cf. A. Stein, 'Coincidence and Theory in Dispensing Justice,' 29 *Hebrew Univ. L. Rev. (Mishpatim)* (1998) 5, at pp. 6-8; on the development in understanding the reasons for the 'free will' test in English common law before the enactment of the Police and Criminal Evidence Act 1984, see: *Cross and Tapper on Evidence* (1995), *supra*, at pp. 666-668).

25. Since the end of the 1970s, three interpretive approaches can be seen with regard to the reasons for the rule of inadmissibility in s. 12 of the Evidence Ordinance. As we shall clarify below, the three interpretive approaches are based, to a greater or lesser degree, on the reason concerning the safeguarding of the credibility of confessions; the difference between the approaches is reflected in the weight given to the purpose concerning protection of the rights of a person under interrogation.

According to one interpretive approach, whose main proponent in case law was President Landau, improper interrogation methods such as physical violence, threats, unfair inducements and promises or exerting prohibited psychological pressure on the accused in his interrogation automatically make his confession inadmissible in view of the serious violation of his dignity as a human being and of his physical and emotional integrity. In order to protect the rights of the person under interrogation, the provisions of s. 12 of the Evidence Ordinance establish an irrebuttable presumption according to which a confession that was obtained by improper methods as aforesaid is not a true confession; therefore it should be declared inadmissible *in limine*, without any need to consider the degree to which the improper interrogation

methods influenced the free will of the person under interrogation *de facto* and the truth of the content of the confession. According to this approach, the question whether we should be concerned with regard to the truth of a confession that was obtained by improper methods is, therefore, a question of law or at least a mixed question of law and fact (see the remarks of President Landau in CrimA 347/75 *Hirsch v. State of Israel* [34], at p. 200).

Alongside the aforesaid approach, another interpretive approach has been expressed in the case law of this court. The chief proponent of this approach was Justice H.H. Cohn. According to this approach, even when there are interrogation methods that are improper in the extreme, the court should examine, from a factual point of view, the circumstances of each case on its merits, in order to determine whether the improper methods were sufficient to undermine the free will of the accused *de facto* when making his confession, in which case it will be declared inadmissible because of the concern that it may be a false confession, or whether, notwithstanding the adoption of the aforesaid interrogation methods, the accused retained the ability to make a free choice with regard to making his confession, in which case the evidence will be admissible, and the trial will focus on the question of its weight as evidence. According to this interpretive approach, the illegality in obtaining the confession does not in itself make it inadmissible, as long as the accused was not deprived of his free will in making his confession and there is no concern with regard to the truth of its content. In the words of Justice H.H. Cohn: '… the accused's confession is one thing, and the abuse by his interrogators another' (CrimA 369/78 *Abu-Madijem v. State of Israel* [35], at p. 381). This interpretive approach regards the main purpose of the inadmissibility rule provided in s. 12 of the Evidence Ordinance as safeguarding the credibility of the confessions made in an interrogation (see also the remarks of President Y. Kahan in CrimA 115/82 *Muadi v. State of Israel* [36], at p. 249; see also the opinion of Justice H.H. Cohn in CrimA 183/78 *Abu-Midjem v. State of Israel* [37]).

The essence of the difference between the two interpretive approaches was discussed by Justice H.H. Cohn as follows:

> '… In practice we are deliberating upon the various facets of the question of the proper judicial policy that this court should adopt. On the one hand, it is our duty to protect human dignity so that it is not

> harmed by those who abuse it, and to do everything in out power to restrain the police interrogators from obtaining the goal of their interrogation by improper and despicable methods; on the other hand, it is our duty to fight crime, which is ever on the increase and is destroying everything good in this country, and to prevent public safety being abandoned to the villainies of violent criminals merely because they were hit by police interrogators. It seems to me that the difference between us is merely one of priorities: according to my esteemed colleague [President M. Landau] the protection of human dignity and basic rights takes precedence, whereas according to me the protection of public safety takes precedence' (*Abu-Midjem v. State of Israel* [37], at pp. 546-547) (square parentheses supplied).

A third interpretive approach with regard to the provisions of s. 12 of the Evidence Ordinance was adopted in *Muadi v. State of Israel* [36], in the opinion of Justice Goldberg (at pp. 222-224). This interpretive approach constitutes a middle path between the other two interpretive approaches that we discussed above. According to this approach, in general, the illegality in itself does not render a confession inadmissible under s. 12 of the Evidence Ordinance. Therefore, the court should examine each case, from a factual perspective, on its merits in order to discover whether the improper interrogation method deprived the accused of his free will in making his confession; if it did, the confession will be inadmissible because of concerns with regard to the truth of its content. Notwithstanding, in cases where the level of impropriety amounted to a violation of the accused's 'humanity' and reached '… a brutal and inhuman level of interrogation,' then the confession should be declared inadmissible under s. 12 automatically, without considering the *de facto* effect of the improper interrogation method on the free will of the accused. This approach combines the various possible reasons for the inadmissibility rule in s. 12 of the Evidence Ordinance. It gives considerable weight to the purpose concerning the protection of the credibility of defendants' confessions in order to protect public safety and fight crime. Nonetheless, in cases where use was made of interrogation methods that are so extremely wrong that they 'violate the humanity' of the person under interrogation, then this approach sees fit to attribute great weight to the right to human dignity and the integrity of body and mind, without examining whether in the circumstances of the case the accused was

de facto deprived of his free will when making his confession. It would appear that this interpretive approach is the one accepted by the case law of this court since the judgment given in *Muadi v. State of Israel* [36] (see, for example, the opinion of Justice Halima in CrimA 154/85 *Avroshami v. State of Israel* [38]; the remarks of President Shamgar in *Kozali v. State of Israel* [30], at pp. 446-448; and the remarks of Vice-President Mazza in LCrimA 3268/02 *Kozali v. State of Israel* [39], at para. 28).

26. For the purposes of the case before us, it should be emphasized that according to the three interpretive approaches that we have discussed, a failure to give the statutory notice concerning the right to remain silent or the right to consult a lawyer does not in itself make a confession inadmissible under section 12 of the Evidence Ordinance. It should be noted that even according to the interpretive approach of President Landau, which emphasizes the protection of the defendant's rights in his interrogation, a failure to give the statutory notice concerning the right to remain silent and the right to consult a lawyer does not amount to an improper interrogation method of the kind that necessarily leads to the inadmissibility of the confession. The position adopted in our case law is that the effect of the violation of the aforesaid rights on the free will of the person under interrogation and on the weight of the confession that he made should be examined in each case on its merits (for cases in which it was held that the absence of a statutory warning concerning the right to remain silent does not necessarily lead to the inadmissibility of a confession made in the interrogation, even though punctiliousness with regard to the warning of a suspect before taking his statement makes it easier for the court to determine the admissibility and weight of the confession, see *Yassin v. Attorney-General* [6], at p. 1556; CrimA 161/77 *Zohar v. State of Israel* [40], at p. 329; CrimA 450/82 *Abu-Ayin Tripi v. State of Israel* [41], at p. 603; *Balhanis v. State of Israel* [14], in the opinion of Justice Elon and the opinion of Justice Kedmi; for judgments in which it was held that an illegal violation of the right to consult a lawyer does not necessarily lead to the inadmissibility of a confession made in an interrogation, and that the effect of the violation of the aforesaid right on the free will of the person under interrogation and the weight of the confession that he made should be examined in each case on the merits, see *Zakkai v. State of Israel* [8], at pp. 64-65 and 68, *per* President Shamgar; *Eisenman v. State of Israel* [10], at p. 454, *per* Justice Goldberg;

CrimA 6021/95 *Gomez-Cardozo v. State of Israel* [42], at pp. 784-785, *per* Justice M. Cheshin; *Smirk v. State of Israel* [18], at pp. 545-555; it should be noted that the cases in which a confession of a defendant was held to be inadmissible under the aforesaid s. 12 because a statutory notice was not given with regard to the right to remain silent or the right to consult a lawyer have been very few, and they were based on the special circumstances of each case. See, for example, CrimA 277/78 *State of Israel v. Tuvyahu* [43], at pp. 300-301, *per* Vice-President Landau; CrimA 611/80 *Matosian v. State of Israel* [44], at pp. 105-107, *per* President Shamgar).

In addition to the aforesaid, we should point out that s. 478 of the Military Jurisdiction Law provides a similar arrangement to the one determined in case law. It states as follows:

> 'Confession of accused of his own free will
>
> 78. The fact that a statement of an accused that contains a confession was obtained other than in accordance with the rules stipulated in sections 266 to 272 [which include the duty to warn an accused about his right to remain silent in an interrogation] does not prevent the court martial from determining that the accused made the confession of his own free will.'
>
> (Square parentheses supplied).

It follows that the arrangement provided in s. 478 of the Military Jurisdiction Law is consistent with the interpretation given in case law to the provisions of s. 12 of the Evidence Ordinance, according to which a failure to give the statutory notice concerning the right to remain silent or the right to consult a lawyer does not, in itself, make a confession of an accused inadmissible; this depends on the circumstances of each case on its merits.

27. In the notice of appeal that they filed, counsel for the appellant argued that in view of the provisions of the Basic Law: Human Dignity and Liberty, the interpretation accepted by this court should be changed and it should be held that a failure to give the statutory warning with regard to the right to consult a lawyer should necessarily lead to a confession being inadmissible under s. 12 of the Evidence Ordinance.

Justice D. Beinisch

Before we turn to examine the aforesaid argument, we should point out that over the years considerable criticism has been levelled at the 'free will' test both in Israel and in other countries that have adopted the aforesaid test from English common law. The main arguments made against it were that it is too artificial and vague a test for the purpose of deciding the question of the admissibility of confessions; that the reasons underlying it are not sufficiently clear; and that it is very difficult to examine the effect of improper interrogation methods on the free will of the person under interrogation in accordance with the circumstances of each case (see, for example, M. Landau, 'Notes on the amended draft Evidence Law,' 16 *Hebrew Univ. L. Rev. (Mishpatim)* (1986) 17, at p. 26; the Report of the Commission concerning Convictions based solely on a Confession, *supra*, at p. 12; see also LaFave and Israel, *Criminal Procedure*, *supra*, at pp. 298-299; Godsey, 'Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination,' *supra*, at pp. 469-471; M. Zander, *The Police and Criminal Evidence Act 1984* (London, fourth edition, 2003), at pp. 312-313). And indeed, in England, the birthplace of the 'free will' test, as well as in Australia, where this test was adopted in case law from English common law, the legislature has seen fit to abandon the 'free will' test and replace it with other criteria for examining the admissibility of defendants' confessions (see s. 76 of the Police and Criminal Evidence Act 1984 in England and ss. 84, 85 and 90 of the Uniform Evidence Acts 1995 in Australia).

In addition to the aforesaid, it should be noted that the federal courts in the United States adopted in their case law the 'free will' test from English common law, and in 1936 this test was applied to the states by means of the Fourteenth Amendment of the Constitution, which concerns the right to a fair trial (see Lafave and Israel, *Criminal Procedure*, *supra*, at p. 294). After the decision was made in *Miranda v. Arizona* [104], and its rules became the main test for declaring defendants' confessions inadmissible, the 'free will' test continued to be used to examine the admissibility of confessions, even though the rules established in *Miranda v. Arizona* [104] were added to this test, according to which a failure to give a warning and notice with regard to the right to consult a lawyer became a ground for declaring a confession inadmissible. Recently the status of the 'free will' test has been significantly diminished as a satisfactory criterion for admissibility, in view of the decision

of the Supreme Court of the United States in *Dickerson v. United States* [105]. That case considered the provision of federal law that stated that a confession of an accused is admissible as evidence if it is proved that it was made freely and willingly (18 U.S.C. 3501). The Supreme Court of the United States declared the aforesaid provision of statute void. It can be understood from the judgment of the court that the 'free and willing' test does not provide sufficient protection for the right not to incriminate oneself that is enshrined in the Fifth Amendment of the Constitution, and therefore it is incapable of replacing the rules set out in *Miranda v. Arizona* [104] with regard to the admissibility of defendants' confessions. In view of the rule in *Dickerson v. United States* [105], it would appear that in the American legal system the status of the 'free and willing' test has been weakened even further as a sole test.

On the other hand, we should point out that in the Canadian legal system, which also adopted the 'free and willing' test in case law from the English common law, this test continues to be used even today in order to examine the admissibility of confessions made by defendants (see *R. v. Oickle* [107], which we shall discuss further below).

28. Unlike the common law countries where the 'free and willing' test was adopted in case law, in our legal system this test was enshrined *ab initio* in statute (see s. 9 of the Evidence Ordinance from the period of the British Mandate, which was replaced in 1971 by s. 12 of the Evidence Ordinance [New Version]). Over the years, several attempts were made to propose comprehensive legislative amendments to the Evidence Ordinance, within which framework it was suggested that the 'free and willing' test should be replaced by other criteria for examining the admissibility of defendants' confessions. But these proposals did not become law (see s. 36 of the draft Evidence Law, 5741-1981, of Prof. U. Yadin, which was published in 34 *HaPraklit* (1981) 137, at p. 147; the two versions of s. 37 of the draft Evidence Law, 5745-1985, which were drafted by a commission chaired by President M. Landau and published in 16 *Hebrew Univ. L. Rev. (Mishpatim)* (1986) 3; the Report of the Commission concerning Convictions based solely on a Confession, at pp. 11-19, and the minority opinion of Prof. Kremnitzer, *ibid.*, at pp. 58-64; see also various private draft laws for amending s. 12 of the Evidence Ordinance, in para. 13 *supra*).

In the case before us, we see no need to discuss the criticisms that have been levelled at the 'free and willing' test and the other tests that have been proposed over the years as replacements for this test. The premise for the continuation of our deliberations is that the provisions of s. 12 of the Evidence Ordinance remains on the statute books and its validity is undisputed. In view of this, the question before us is whether, after the enactment of the Basic Law: Human Dignity and Liberty, the interpretation given in case law to the aforesaid provision of law should be changed. Let us now turn to consider this question.

Interpretation of s. 12 of the Evidence Ordinance after the Basic Law

29. The question of the effect of the Basic Law: Human Dignity and Liberty on the interpretation of provisions of law enacted before the Basic Law came into force was considered extensively in the judgment of this court in CrimApp 537/95 *Ganimat v. State of Israel* [45] and in CrimFH 2316/95 *Ganimat v. State of Israel* [46]. The Basic Law: Human Dignity and Liberty expressly states that the previous law would remain valid, and therefore the provisions of s. 12 of the Evidence Ordinance remained in force even after the Basic Law was enacted (see s. 10 of the Basic Law). There is also no dispute that the old legislation should be interpreted in the spirit of the Basic Laws. An express statement to this effect was made in s. 10 of the Basic Law: Freedom of Occupation. It is also the interpretation required within the framework of the Basic Law: Human Dignity and Liberty. This was discussed by Justice M. Cheshin, who stated that '… the Basic Law ought to serve as an *inspiration in interpretation*. The legislature planted a bed of roses in the garden of law, and we smell its sweet aroma. We shall interpret laws of the past and the perfume of the Basic Law will inspire us' (CrimFH 2316/95 *Ganimat v. State of Israel* [46], at p. 643; emphasis in the original).

In *Ganimat v. State of Israel* [46] there were admittedly different approaches with regard to the nature and scope of the interpretive effect of the Basic Law on the law that predated it (see the fundamental approach of President Barak in *Ganimat v. State of Israel* [46], at pp. 652-655, as compared with the position of Justice M. Cheshin, *ibid*. [46] at pp. 639-643; see also HCJ 7357/95 *Barki Feta Humphries (Israel) Ltd v. State of Israel* [47], at pp. 780-781, *per* Justice M. Cheshin, and at pp. 786-787, *per* President Barak). But these differences in approach have no practical

significance in the case before us, since even according to the law that prevailed before the Basic Law was enacted, it was possible to reach different interpretive conclusions than the ones that were accepted previously.

30. As stated, the rule of inadmissibility prescribed in s. 12 of the Evidence Ordinance was originally intended to safeguard the credibility of confessions made before persons in authority. Over the years, an interpretive development occurred with regard to the possible reasons underlying this rule. As I have made clear above, the purpose of protecting the rights of persons under interrogation was recognized in our case law before the Basic Laws concerning human rights were enacted (see the interpretive approach of President Landau and Justice Goldberg in para. 25 *supra*). The recognition of this purpose is consistent with the general interpretive premise in our legal system that every piece of legislation is intended to uphold and protect human rights. Notwithstanding, before the Basic Laws there was no unanimity in the case law of this court with regard to the question whether and in what circumstances the purpose concerning the protection of the rights of the person under interrogation should take precedence over the other purpose of safeguarding the credibility of defendants' confessions. Even according to the interpretive approach that saw fit to attribute significant weight to the protection of the rights of a person under interrogation, the inadmissibility of the confession was based, *inter alia*, on an irrebuttable assumption that a confession obtained by improper methods is not a true confession (see the remarks of President Landau in *Hirsch v. State of Israel* [34], at p. 200; see also *Muadi v. State of Israel* [36], at pp. 223-224, *per* Justice Goldberg).

It would appear, therefore, that before the enactment of the Basic Laws, this court recognized the protection of the rights of the person under interrogation as a possible purpose of the rule of inadmissibility provided in s. 12 of the Evidence Ordinance; notwithstanding, the aforesaid purpose was not regarded as a main and independent purpose of the aforesaid s. 12, and the conceptual centre of gravity of the rule of inadmissibility under discussion was the concern that false confessions might be admitted in evidence (see in this regard, Gross, 'A Constitutional Rule of Inadmissibility — Has it a Place in Israel?' *supra*, at p. 157; M. Mountner, 'The Decline of Formalism and the Rise of Values in Israeli Law,' 17 *Tel-Aviv University Law Review (Iyyunei Mishpat)* (1993) 503, at p. 549).

31. When the Basic Law: Human Dignity and Liberty was enacted, the status of human rights enshrined therein was elevated to a constitutional super-legislative status. This created a change in our normative status. This change is reflected first and foremost in the possibility of judicial review of the constitutionality of laws that have been passed since the enactment of the Basic Laws. Notwithstanding, this in itself does not exhaust the whole scope of the effect of the aforesaid Basic Laws. The spirit and principles of the Basic Laws cast their light on all branches of law and influence basic concepts and basic outlooks that exist within their framework. *Inter alia*, as aforesaid, they influence the interpretation of legislation that was enacted before the Basic Laws concerning human rights.

In this context, it should be emphasized that from its earliest days this court recognized rights of the individual and took them into account within the framework of its interpretation of existing legislation. Even before the enactment of the Basic Laws concerning human rights this court held that '… the purpose of every piece of legislation is to uphold and safeguard basic rights and not to violate them' (*per* Justice Barak in CA 524/88 *Pri HaEmek Agricultural Cooperative Society Ltd v. Sedei Yaakov Workers Settlement Ltd* [48], at p. 561). Notwithstanding, it appears that after the enactment of the Basic Laws, emphasis has been placed on the duty to take into account the rights enshrined in them within the framework of the interpretation of existing legislation, and in appropriate circumstances the weight that should be attributed to these rights even increased relative to competing values and public interests. This is the case in general, and it is particularly so in criminal law, which is closely bound to human dignity and liberty.

32. The Basic Law created an opportunity for a new interpretive perspective also with regard to the purpose of the rule of inadmissibility enshrined in s. 12 of the Evidence Ordinance. According to the spirit and principles of the Basic Law, the status of the purpose concerning the protection of the rights of the person under interrogation should be strengthened today, so that it becomes a main purpose that stands independently in order to render inadmissible a confession under s. 12 of the Evidence Ordinance. The significance of this is that in appropriate circumstances, of which details will be given below, a confession under the aforesaid s. 12 will be declared inadmissible because of the illegal violation

of the rights of the person under interrogation, even when there is no concern with regard to the truth of the confession.

It should be noted that these remarks of mine do not negate the traditional purpose of the rule of inadmissibility under discussion, which concerns safeguarding the credibility of confessions. This purpose remains valid, as a part of the general purpose of the laws of evidence in criminal cases to discover the truth and prevent unsound convictions. Moreover, protecting the rights of the person under interrogation may lead to identifying interrogation methods that are likely to result in false confessions and miscarriages of justice. Notwithstanding, in view of the spirit and principles of the Basic Law, it is possible to determine that the interpretive centre of gravity has changed, and that today the protection of the rights of the person under interrogation is a main and independent purpose — not merely a secondary and ancillary one — for the inadmissibility of confessions under s. 12 of the Evidence Ordinance.

This background gives rise to the question of the rights of the person under interrogation that the rule of inadmissibility enshrined in s. 12 of the Evidence Ordinance is intended to protect. This question should be answered with regard to the language and wording of the aforesaid s. 12, with regard to the interpretation of the aforesaid section in case law as it has developed over the years, and in accordance with the spirit and principles of the Basic Law. Taking all of this into account, it appears that the rule of inadmissibility provided in s. 12 of the Evidence Ordinance was originally intended to protect two basic rights that have been recognized in our legal system for a long time, but the Basic Law: Human Dignity and Liberty has made an additional contribution to strengthening their status. The two rights are the right of the person under interrogation to be protected against physical and emotional harm, and the right to the autonomy of free will.

33. The right of an accused to be protected against physical and emotional harm and his right not to be degraded or humiliated more than is necessary as a result of the actual conducting of the interrogation were recognized in the case law of this court already before the enactment of the Basic Law as fundamental basic rights that were included in the ‘judicial charter of rights’ (see the remarks of Justice Barak in HCJ 355/79 *Katlan v. Prisons Service* [49], at p. 298, and the references cited there). As was noted above, the

recognition of these rights affected the interpretation of s. 12 of the Evidence Ordinance before the Basic Law was enacted (see, for example, the interpretive approach of President Landau and Justice Goldberg in para. 25 *supra*). When the Basic Law: Human Dignity and Liberty was enacted, it was expressly provided therein that 'There shall be no violation of the life, body and dignity of a human being, in as much as he is a human being' and that 'Every human being is entitled to protection for his life, his body and his dignity' (ss. 2 and 4 of the Basic Law). In view of this, it would appear that there is ample support for the opinion that the right to be protected against physical and emotional harm and the right to be protected against acts of degradation and humiliation that significantly violate a person's emotional wellbeing have risen to a constitutional super-legislative level as a result of the enactment of the Basic Law (see the remarks of Vice-President Elon in CrimA 3632/92 *Gabbai v. State of Israel* [50], at p. 490; see also Barak, *Constitutional Interpretation*, *supra*, at p. 420).

In view of the purpose concerning the protection of defendants' rights in interrogations and the spirit of the Basic Law, the rule of inadmissibility enshrined in s. 12 of the Evidence Ordinance should be interpreted in such a way that improper interrogation methods that illegally violate the right of the person under interrogation to physical integrity or that humiliate and degrade him beyond what is required as a result of conducting the interrogation, will automatically lead to the inadmissibility of the confession, without it being necessary to examine the effect of the aforesaid interrogation methods on the truth of the confession made in the interrogation. This interpretation is closest in essence to the approach of Justice Goldberg in *Muadi v. State of Israel* [36], which it would appear is the approach that has been adopted in our case law. Notwithstanding, the nature and scope of the improper interrogation methods that will today be included within the scope of 'a violation of the humanity of the person under interrogation' is likely to be wider than in the past. This is because of the interpretive influence of the Basic Law and because of the conventional international law to which Israel is a party (see and cf. the opinion of President Barak in *Public Committee Against Torture v. Government of Israel* [26]; also see and cf. the minority opinion of Prof. Kremnitzer in the Report of the Commission concerning Convictions based solely on a Confession, at pp. 58-64).

In the circumstances of the appellant's case, no claim was made that he was subjected to improper interrogation methods of the kind that are capable of humiliating and degrading the person under interrogation or of harming his physical or emotional wellbeing, and therefore this issue does not arise in the case before us.

34. In addition to the protection of the physical and emotional wellbeing of the person under interrogation, s. 12 of the Evidence Ordinance is intended, according to its express language, to protect the autonomy of the accused's freedom of choice when making his confession in an interrogation (a 'free and willing' confession).

The right to the autonomy of free will was recognized in the case law of this court as a basic right of great importance before the Basic Laws of 1992 were enacted. Notwithstanding, it would appear that after the enactment of the Basic Law: Human Dignity and Liberty, the status of the aforesaid right has been strengthened, since it is derived directly from the conception of man as an end and not merely a means, and in view of the possible inclusion of the aforesaid right in the inner circle of the constitutional right to dignity and liberty. This was discussed by Vice-President Or in the following terms:

> 'The recognition of the human right to autonomy is a basic element of our legal system, as a legal system of a democratic country… it constitutes one of the main reflections of the constitutional right of every person in Israel to dignity, which is enshrined in the Basic Law: Human Dignity and Liberty. Indeed, it has already been held that one of the expressions of the right to dignity is "… the freedom of choice of every person as a free being," and that this reflects the approach that "every person… is a world in himself and an end in himself" (*per* President Barak in *Barki Feta Humphries (Israel) Ltd v. State of Israel* [47], in para. 3 of his opinion) … The significance of human dignity, in this context, was discussed by President Shamgar in CA 5942/92 *A v. B* [51], at p. 842, where he said that "Human dignity reflects, *inter alia*, the ability of a human being as such to formulate his personality freely, as he wishes, to reflect his ambitions and to choose the means of achieving them, to make his voluntary choices, not to be enslaved to arbitrary dictates, to be treated fairly by every authority and by every

other individual, to enjoy equality between human beings…”.’ (CA 2781/93 *Daaka v. Carmel Hospital* [52], at p. 571 {462}).

(On the constitutional status of the right to autonomy of free will, see also the remarks of Justice Goldberg in CFH 2401/95 *Nahmani v. Nahmani* [53], at pp. 723-724 {389-390}; the remarks of Justice Rivlin in HCJ 8111/96 *New Federation of Workers v. Israel Aerospace Industries Ltd* [54], at pp. 595-597; the remarks of Justice M. Cheshin in CrimApp 92/00 *A v. State of Israel* [55], at p. 250; A. Barak, ‘Human Dignity as a Constitutional Right,’ 41 *HaPraklit* (1993) 271, at pp. 277-279; H.H. Cohn, ‘The Values of a Jewish and Democratic State: Studies in the Basic Law: Human Dignity and Liberty,’ *HaPraklit Jubilee Book* 9 (1994), at p. 38; it should be noted that according to the approach of Y. Karp, the essence of the right to autonomy of free will — as opposed to the rights derived from it — is included within the framework of the inner circle of the constitutional right to dignity and liberty. See Y. Karp, ‘Several Questions on Human Dignity under the Basic Law: Human Dignity and Liberty,’ 25 *Hebrew Univ. L. Rev. (Mishpatim)* 129 (1995), at p. 142).

In view of the aforesaid, a significant and serious violation of the autonomy of will and the freedom of choice of the defendant in making his confession in an interrogation will lead to the inadmissibility of the confession under the aforesaid s. 12. It should be emphasized that in these remarks of mine I am not saying that *every* violation of a protected right of the person under interrogation will necessarily lead to the inadmissibility of his confession under s. 12 of the Evidence Ordinance. Such an interpretation would excessively harm the competing values concerning the discovery of the truth, fighting crime and protecting public safety, and it cannot therefore be adopted. The wording and language of s. 12 of the Evidence Ordinance testify that the rule of inadmissibility enshrined therein is intended to protect against a significant violation of the *autonomy of will* of the accused when making his confession. Therefore a violation of the aforesaid kind will lead to the inadmissibility of a confession under the aforesaid s. 12, provided that this is required by the circumstances of each case on its merits. This interpretive conclusion is consistent with the case law of this court prior to the Basic Law, according to which in every case, according to its circumstances, the court should examine whether the use of the improper interrogation method led to the accused being deprived of free will and the

ability to choose whether to make his confession (see the remarks of Justice Goldberg in *Muadi v. State of Israel* [36], at pp. 224-225; the remarks of President Y. Kahan, *ibid.* [36], at pp. 251-252; the remarks of Justice Elon, *ibid.* [36], at pp. 263-268). Notwithstanding, whereas in the past the justification given for the inadmissibility of a confession under s. 12 relied on the assumption that denying the freedom of choice of the person under interrogation necessarily led to a concern as to the truth of his confession, in accordance with the spirit of the Basic Law, it should be held that the protection of the freedom of will of the person under interrogation today constitutes a purpose in its own right and a weighty and independent reason for declaring the confession inadmissible under s. 12 of the Evidence Ordinance.

35. Furthermore it should be noted that the right to autonomy of free will is one of the main reasons for protecting the right not to incriminate oneself and the right to remain silent. Therefore there are those who think that the rule of inadmissibility provided in s. 12 of the Evidence Ordinance was intended to protect these rights and the right to consult a law that is ancillary thereto (see, for example, Gross, 'A Constitutional Rule of Inadmissibility — Has it a Place in Israel?' *supra*, at pp. 156 and 179; Y. Kedmi, *On Evidence* (2004, vol. 1), at p. 22). Admittedly, an illegal violation of the aforesaid rights within the framework of the interrogation process will constitute a weighty consideration when examining the admissibility of a confession under s. 12 of the Evidence Ordinance. This is because a violation of these rights may significantly violate the freedom of will and choice of the person under interrogation when making his confession. Thus, for example, there will be grounds to declare a confession inadmissible under s. 12 in circumstances where the accused was not warned of his right to remain silent and not to incriminate himself in the interrogation and of his right to consult a lawyer and he was not *de facto* aware of these rights, in such a way that he was deprived of the ability to chose whether to cooperate with his interrogators.

Nothing in the aforesaid derogates from the fact that the protection of the right to remain silent and the right to consult a lawyer are based on additional reasons to the protection of the autonomy of will of the person under interrogation. The balance between the various reasons underlying these rights assists in determining their boundaries and deciding the extent to

which they are protected (for the various reasons for protecting a suspect's right to remain silent and his right not to incriminate himself in his interrogation, see *State of Israel v. Sharon* [16], at p. 759, *per* Vice-President Or; see also B. Steinberg, 'What Remains of the Warning about the Right to Remain Silent?' 48 *HaPraklit* (2005) 163, at pp. 165-169; E. Gross, 'The Right not to Incriminate Oneself — Is it really a Landmark in the Struggle of the Enlightened Man for Progress?' 7 *Mehkarei Mishpat* (1989) 67, at pp. 172-181; Lafave and Israel, *Criminal Procedure*, *supra*, at p. 43; A.R. Amar and R.B. Lettow, 'Fifth Amendment First Principles: The Self Incrimination Clause,' 93 *Mich. L. Rev.* (1995) 857; for the various reasons underlying the protection of the right of a person under arrest to consult a lawyer, see para. 14 *supra* and the references cited there).

In view of the aforesaid, I am unable to accept the argument of counsel for the appellant that s. 12 of the Evidence Ordinance was intended to protect the *full* scope of the right to remain silent and the right to consult a lawyer, so that a violation thereof will necessarily lead to the inadmissibility of a confession under the aforesaid s. 12. As stated, according to the language and purpose of s. 12, it is intended to protect against a significant violation *of the autonomy of free will* of the person under interrogation. Consequently an illegal violation of the right to remain silent or the right to consult a lawyer will lead to the inadmissibility of a confession of an accused within the framework of the aforesaid s. 12 only when that violation is of such a nature and strength in the circumstances of the case that it seriously violates the freedom of choice and the autonomy of will of the person under interrogation in making his confession. Thus, for example, an illegal failure of the interrogators to give a warning about the right to remain silent in circumstances where it is proved that the accused was aware *de facto* of his right to remain silent will not lead to the inadmissibility of his confession under s. 12 of the Evidence Ordinance, since in these circumstances the ability of the accused to choose whether to cooperate with his interrogators is not significantly impaired (see the opinion of Justice Strasberg-Cohen in CrimA 5825/97 *Shalom v. State of Israel* [56], at pp. 944-945; also see and cf. the position of Prof. Bendor who is of the opinion that a confession should be inadmissible under s. 12 of the Evidence Ordinance only when there is a causal link between not giving the warning about the right to remain silent and the making of the confession in the interrogation; A. Bendor, 'Inducing a

Confession of an Accused and its Admissibility — Ends, Means and What Lies Between Them,' 5 *Pelilim* (1996) 245, at pp. 265, 269).

36. In summary, even though I accept the position of counsel for the appellant that the provisions of s. 12 of the Evidence Ordinance should be interpreted in the spirit of the Basic Law, we should reject their argument that not giving a statutory warning with regard to the right to remain silent or the right to consult a lawyer *necessarily* leads to the inadmissibility of a confession under the aforesaid s. 12. Even though a violation of the aforesaid rights will constitute a weighty consideration within the framework of considering the admissibility of the confession, it is not a sole or decisive criterion. According to the language and purpose of the aforesaid s. 12, a confession should be declared inadmissible thereunder only when the illegal violation of the right to remain silent or the right to consult a lawyer created a significant and serious violation of the autonomy of will and freedom of choice of the accused when making his confession. The existence of such a violation will be examined in accordance with the circumstances of each case on its merits. In any case, it should be emphasized that a violation of the right to remain silent or the right to consult a lawyer in an interrogation, even in circumstances where it does not lead to the inadmissibility of the confession, is likely to detract from its weight as evidence.

37. With regard to the circumstances of the appellant's case, there is no dispute between the parties before us that the military interrogator illegally refrained from giving notice of the right to consult a lawyer, and that in the circumstances of the case the aforesaid omission amounted to a violation of the actual right to consult a lawyer (see para. 19 *supra*). As I shall explain later, in the circumstances of this case a significant violation of the appellant's right to consult a lawyer has been proved, *inter alia* in view of the determination of the court martial that the interrogator *deliberately* refrained from giving the statutory notice of the aforesaid right. Notwithstanding, for the purpose of examining the admissibility of the confession under discussion in accordance with s. 12 of the Evidence Ordinance, the question that should be addressed is whether the free choice of the appellant was impaired when he made his confession. In this matter, we must take into account that before his statement was taken, the appellant was warned that he had the right to remain silent in his interrogation, according to the wording of the warning set out in s. 267 of the Military Jurisdiction Law. The appellant was aware,

therefore, of the right to remain silent when his statement was taken. It should also be noted that after the appellant consulted the military defence lawyer, he chose to respond to the questions of the interrogator when he made his second statement (prosecution exhibit 5). In the circumstances, it cannot be said that the failure to give the statutory notice of the right to consult a lawyer led to a significant violation of the appellant's autonomy of will and freedom of choice when making his first confession, such that it requires the inadmissibility of the confession under the aforesaid s. 12 (see and cf. CrimA 5203/98 *Hasson v. State of Israel* [57], at p. 283, where Justice Naor held that in view of the fact that the accused in that case was warned before the interrogation of his right to remain silent and in view of the other circumstances of the case, the fact that his right to consult with a lawyer was violated did not render his confession inadmissible under s. 12 of the Evidence Ordinance).

It follows that even though in the case of the appellant it has been proved that there was an illegal violation of the right to consult a lawyer because of the failure to warn him of the aforesaid right before taking his statement, it should not be said that in the circumstances of the case there was a significant violation of the right to autonomy of will and freedom of choice within the framework of the rule of inadmissibility provided in the aforesaid s. 12. For this reason, we should not intervene in the decision of both instances of the court martial not to declare the appellant's confession inadmissible under s. 12 of the Evidence Ordinance.

Notwithstanding, our deliberations do not end here. A separate question that should be considered is whether the failure to give the statutory notice with regard to the appellant's right to consult a lawyer should lead to the inadmissibility of his confession on the basis of a case law doctrine that illegally obtained evidence should be inadmissible, outside the framework of the aforesaid s. 12, as argued by counsel for the appellant. Let us now turn to examine this issue.

A case law doctrine that illegally obtained evidence should be inadmissible in criminal proceedings

38. As I stated at the outset, one of the main arguments raised within the framework of the notice of appeal filed before us was that even if s. 12 of the Evidence Ordinance does not render the confession of the appellant

inadmissible, it should be declared inadmissible by virtue of a case law doctrine that illegally obtained evidence is inadmissible. According to this argument, this court should adopt a judicial doctrine of inadmissibility to this effect in view of the Basic Law: Human Dignity and Liberty. It should immediately be stated that this doctrine is not restricted to the confessions of an accused, and its application is a general one, to all types of evidence in the criminal proceeding that were obtained illegally by the law enforcement authorities. Later we shall address at length the question of what is evidence that has been obtained 'illegally.' At this stage of the deliberation and without exhausting the issue, we will point out that we are speaking of evidence that was obtained by investigation methods that are contrary to a provision of statute, regulation or binding procedure, or by means of an illegal violation of a protected basic right.

The argument concerning the need to adopt a case law doctrine of inadmissibility raises several complex questions that should be addressed. The order of addressing these questions will be as follows: first we will discuss the legal position with regard to the admissibility of illegally obtained evidence *before* the Basic Laws were enacted. Against this background, we will turn to examine the question whether in the new normative reality that was created by the enactment of the Basic Law: Human Dignity and Liberty, there is a basis for adopting a case law doctrine that evidence should be inadmissible because of the way in which it was obtained. For the reasons that will be set out below, our answer to this question is yes. In view of this, we will turn to examine the nature, scope and framework of this doctrine, and to determine the proper criteria for declaring evidence inadmissible thereunder. We will end our deliberations by applying the conditions of this doctrine to the circumstances of the appellant's case.

The admissibility of illegally obtained evidence before the Basic Laws

39. The starting point for our discussion of the question of the admissibility of illegally obtained evidence lies in the fact that the Israeli legislature has refrained from making any general and express legislative arrangement on this issue. Notwithstanding, in three special provisions of law the legislature has provided concrete rules of inadmissibility with regard to evidence that was obtained in an improper manner: the *first* is s. 12 of the Evidence Ordinance that we have discussed extensively above. The *second* is

s. 13 of the Eavesdropping Law, 5739-1979. Originally this provision of statute provided an absolute rule of inadmissibility for statements that were recorded by means of eavesdropping carried out contrary to the provisions of the law. In 1995 s. 13 was amended in a manner that gave the court discretion not to declare such evidence inadmissible, on the conditions and in the circumstances set out in the section. Section 13(a) in its amended wording provides as follows:

> 'Evidence
>
> 13. (a) Statements recorded by means of an eavesdropping contrary to the provisions of this law… shall not be admissible as evidence in court, except in one of the two following cases:
>
> (1) In a criminal proceeding concerning an offence under this law;
>
> (2) In a criminal proceeding concerning a serious felony, if the court declared it admissible after it was persuaded, for special reasons of which it shall give details, that in the circumstances of the case the need to discover the truth outweighs the need to protect privacy. An eavesdropping made illegally by someone who is entitled to receive a permit for eavesdropping shall not be admissible as evidence under this paragraph unless it was made by mistake in good faith, in an apparent use of lawful permission.'

A *third* statutory rule of inadmissibility is provided in s. 32 of the Protection of Privacy Law, 5741-1981, according to which: 'Material obtained by means of a violation of privacy shall be inadmissible as evidence in court, without the consent of the injured party, unless the court permits the use of the material, for reasons that shall be recorded, or if the person who committed the violation, who is a party to the proceeding, has a defence or exemption under this law.' The aforesaid s. 32 therefore provides that, as a

rule, evidence that was obtained by means of an illegal violation of privacy shall be inadmissible. Notwithstanding, the rule of inadmissibility is a relative one in the sense that it allows such evidence to be admitted, if the injured party gave his consent thereto, if the court, at its discretion, allowed the evidence to be admitted for reasons that shall be recorded, or when the person who committed the violation has a defence or exemption under the law.

Case law has accepted the opinion that the rules of inadmissibility enshrined in the aforesaid provisions of statute are rare exceptions in our legal system. In the words of Justice Elon: '… these provisions are exceptions that are incapable of changing the rule…' (*Muadi v. State of Israel* [36], at p. 262; see also CrimA 480/85 *Kurtam v. State of Israel* [58], at p. 691, *per* Justice Bach; HCJ 3815/90 *Gilat v. Minister of Police* [59], at p. 420, *per* Justice S. Levin; and CrimA 1302/92 *State of Israel v. Nahmias* [60], at p. 321, *per* Justice Bach, and at p. 341, *per* Justice Mazza).

The outlook that was accepted in the case law of this court before the Basic Laws was that as long as statute does not provide otherwise, relevant evidence should not be declared inadmissible because of the illegality of the means used to obtain it. The case law in this regard was summarized by Justice Elon in the following terms: 'In the Israeli legal system, it is accepted and undisputed case law that evidence that is valid and credible in itself but that was obtained by improper and illegal methods, is admissible…' (*Muadi v. State of Israel* [36], at p. 262; for similar remarks, see also CrimA 476/79 *Boulos v. State of Israel* [61], at pp. 801-802; *per* Justice Shamgar; CrimA 16/82 *Malka v. State of Israel* [62], at pp. 317-320. *per* Justice M. Bejski; FH 9/83 *Appeals Court Martial v. Vaknin* [63], at p. 855, *per* Vice-President Elon). According to this approach, illegality is a consideration with regard to determining the weight of the evidence, and in exceptional cases it may reduce its weight to nil; but it is incapable of affecting the admissibility of the evidence.

The aforesaid case law rule of this court was consistent in the main with the traditional approach adopted by English common law, according to which illegality in obtaining evidence does not make the evidence inadmissible but merely affects its weight. Admittedly, in the 1950s English law adopted a case law rule that authorized the courts to declare evidence inadmissible at

their discretion, in circumstances where admitting it would be unfair to the accused (see *Kuruma v. R.* [110], at p. 204). But the aforesaid ruling was almost never applied in English case law, and the discretion to declare evidence inadmissible within this framework was exercised in rare and exceptional cases only (see in this regard C. Tapper, *Cross and Tapper on Evidence* (ninth edition, 1999), at p. 498; see also *Boulos v. State of Israel* [61], at pp. 800-802, *per* President Shamgar; *Vaknin v. Appeals Court Martial* [5], at pp. 401-402, *per* Justice Bach; and Harnon, 'Illegally Obtained Evidence: A Comparative Perspective,' *supra*, at pp. 988-990).

40. The case law rule whereby the manner of obtaining the evidence does not affect its admissibility is based mainly on two reasons. *First*, our case law is governed by the outlook that the main purpose of the rules of evidence in criminal proceedings is to discover the factual truth in order to convict the guilty and acquit the innocent (see, for example, the remarks of Justice Barak in CrimA 951/80 *Kanir v. State of Israel* [64], at pp. 516-517; the remarks of Justice Or in *State of Israel v. Mesika* [25], at p. 681). It should be emphasized that discovering the factual truth was not always regarded as the sole or absolute purpose of the rules of evidence in criminal proceedings, since there exist competing interests and values that we shall discuss later. Nonetheless, according to the approach that was accepted by us before the enactment of the Basic Laws, the weight of the purpose concerning the discovery of the factual truth was considerable, such that any departure from it in order to protect competing values and interests was regarded as an exception, which some authorities thought required express legislation (see the remarks of Justice Elon in *Muadi v. State of Israel* [36], at pp. 259-262). Consequently, the approach adopted in case law was that, as a rule, information that was relevant to determining innocence or guilt should not be withheld from the court, and therefore the manner of obtaining evidence does not affect its admissibility, but only its weight.

Second, until the 1980s our rules of evidence were characterized by formal rules of admissibility that were intended to safeguard the credibility of the content of evidence presented to the court. The hearsay evidence rule was one of the main rules of inadmissibility in this context, and it was originally introduced into our legal system from English common law. From the 1980s onward, a new trend began to develop in our legal system, in parallel to changes that also took place in the Anglo-American legal systems, systems

whose tradition is similar to ours. The essence of this trend was a reduction in the formal exceptions to the admissibility of evidence, in order to give the court the power to determine their credibility and weight. According to this approach, the curtailing of the rules of admissibility was needed in order to discover the truth and do justice, since it could allow the flow of relevant information to the court that would consider the credibility of the information in the circumstances of each case on its merits. The aforesaid trend was given expression in legislation with the enactment of s. 10A of the Evidence Ordinance, which provides a statutory exception to the rule against hearsay evidence; it was also expressed in case law that restricted, by means of interpretation, the scope of the various rules of inadmissibility in our legal system. This was discussed by President Shamgar, who said that:

> 'The trend that is expressed in the development of law as reflected in Israeli statute and case law, like that in other countries where the Anglo-American outlook prevails, is to restrict the exceptions to the admissibility of evidence in order to give the court the power to decide the weight of the evidence. In other words, instead of a barrier of inadmissibility, whose scope is gradually being reduced, the Anglo-American legal world has developed an approach that prefers an objective examination of every relevant piece of evidence by the court. Formalistic exceptions are replaced by an examination of trustworthiness. In this way the Anglo-American and continental legal systems have drawn closer together' (CrimFH 4390/91 *State of Israel v. Haj Yihya* [65], at p. 671).

This approach has particular strength in the Israeli legal system, which is based on professional verdicts rather than decisions made by juries. Instead of admissibility barriers, preference has therefore been given to an approach that favours a substantive examination of every relevant piece of evidence by the court. This approach is consistent with the trend in all branches of our legal system and it reflects a transition from strict formal rules to giving weight to basic principles in the law, by exercising judicial discretion. This trend has been described in case law and professional literature as a changeover 'from formalism and strict rules to flexibility and judicial discretion' (see the remarks of Justice Cheshin in CrimA 6147/92 *State of Israel v. Cohen* [66], at p. 80; and see also FH 23/85 *State of Israel v. Tubul* [67], at pp. 331-340, *per* President Shamgar, and at p. 354, *per* Justice Barak;

the remarks of Justice Kedmi in CA 703/86 *Bernstein v. Attorney-General* [68], at pp. 532-533; the remarks of Justice Or in *State of Israel v. Mesika* [25], at pp. 680-681 and the references cited there; my remarks in CA 2515/94 *Levy v. Haifa Municipality* [69], at pp. 730-733; the remarks of Justice Strasberg-Cohen in HCJ 6319/95 *Hachmi v. Justice of Tel-Aviv-Jaffa Magistrates Court* [70], at pp. 760-761). The trend of abandoning rules of admissibility in favour of a substantive assessment of evidence also in some degree affected the fact that this court adopted its fundamental position that the way in which evidence is obtained is unrelated to the question of its admissibility.

41. In addition, we should point out than the central status of the value of discovering the truth and the trend of abandoning rules of admissibility in favour of an examination of the evidence according to its nature and weight have also had an effect on the interpretive trend for the rules of inadmissibility provided in statute. With regard to the interpretation of s. 12 of the Evidence Ordinance, before the Basic Laws this court gave significant interpretive weight to the purpose concerning the safeguarding of the credibility of defendants' confessions as a part of its outlook that discovering the truth is a central value in our legal system (see para. 30 *supra*). With regard to the Eavesdropping Law and the Protection of Privacy Law, the interpretation given to the provisions of the laws that introduced rules of inadmissibility limited the scope of these rules in a way that was consistent with the trend of restricting admissibility barriers for evidence in our legal system (see, for example, *Appeals Court Martial v. Vaknin* [63], and *Kurtam v. State of Israel* [58], with regard to the interpretation of the expression 'other harassment' in s. 2 of the Protection of Privacy Law; see also: *Gilat v. Minister of Police* [59], with regard to the interpretation of the provisions of the Eavesdropping Law).

42. In summary, the Israeli legislature refrained from providing a complete and express arrangement with regard to the question of the admissibility of illegally obtained evidence. Before the Basic Laws, the position that was adopted in case law was that in general, as long as there was no contrary provision in statute, illegality in the obtaining of a relevant piece of evidence did not affect the question of its admissibility but only its weight. This position was based on the legal tradition that we inherited from English common law, and also on reasons of reducing admissibility barriers in our

legal system and giving significant weight to the purpose of discovering the truth in criminal proceedings.

In summary of this part of my opinion, it should be noted that the interpretive position of this court, before the Basic Laws, with regard to the admissibility of evidence that was obtained illegally was based on reasons of judicial policy and not on reasons of jurisdiction. There are a considerable number of judgments in which the court warned that if the illegality in obtaining evidence continued, them '… it is possible that we ought to consider a change in case law and decide that an illegally obtained confession should be inadmissible…' (*per* Justice Etzioni in *Zohar v. State of Israel* [40], at p. 329). Justice Barak also addressed this matter in CrimA 260/78 *Saliman v. Attorney-General* [71], when he said that:

> 'We are aware of the many difficulties facing the police in their war against crime, but every care must be taken that in this war the police do not cross the line, with the result that those who are acting in the name of the law are breaking it. It should be emphasized that the system practised in Israel is not the only possible system that can be adopted, *and we have the power to change it*' (*ibid.* [71], at p. 207; emphasis supplied; see also in this context the remarks of Justice H.H. Cohn in *Abu-Madijem v. State of Israel* [35], at pp. 381-383).

These remarks are capable of showing that this court has always regarded itself as having the power to determine that illegality in obtaining evidence may make it inadmissible; notwithstanding, in view of the reasons that we elucidated above, the court chose to refrain from making such a ruling, and in appropriate cases it thought it sufficient to reduce the weight of the evidence to nil as a result of the illegality that was involved in obtaining it (see, for example, CrimA 559/77 *Meiri v. State of Israel* [72], where the court attributed negligible weight to the results of a photograph identity parade that was conducted in the absence of defence counsel).

We should also point out that in a series of judgments it has been held that in our legal system we should not adopt the rules of inadmissibility of evidence practised in the American legal system, known as 'the doctrine of the fruit of the poisonous tree' (see, for example, *Abu-Midjem v. State of Israel* [37], at pp. 537-538, *per* President Landau; *Boulos v. State of Israel* [61], at p. 801, *per* President Shamgar; *Muadi v. State of Israel* [36], at pp.

261-262, *per* Justice Elon; *Appeals Court Martial v. Vaknin* [63], at p. 852, *per* President Shamgar; CrimA 2286/91 *State of Israel v. Eiloz* [73], at p. 304, *per* President Shamgar; see also *Smirk v. State of Israel* [18], at p. 555). Later in our deliberations we will address the aforesaid American doctrine. But at this stage of our deliberations I see fit to point out that even though this court rejected in its case law the American rules of inadmissibility which are regarded in our legal system as a departure from the proper balance between the relevant interests and rights in the criminal proceeding, our case law has not ruled out the possibility of adopting other doctrines that render evidence that was obtained illegally inadmissible, which are of a different nature or have a different scope or framework from those of the American doctrine.

The conflicting interests in the issue of the admissibility of illegally obtained evidence, and the effect of the Basic Law on determining the proper point of balance between them

43. We must decide the question whether in view of the Basic Law: Human Dignity and Liberty, a change is required in the fundamental case law rule that the manner of obtaining a piece of evidence does not affect its admissibility. This issue is a part of a wider question that concerns the interpretive effect of the Basic Law: Human Dignity and Liberty on the rules of evidence that apply in criminal proceedings.

There is no dispute that the main purpose of the criminal proceeding is to determine innocence or guilt. In the words of Justice Barak: 'The criminal proceeding is a harmonized and balanced set of norms that is intended to give effect to the substantive criminal law. The purpose of the criminal proceeding is to bring about the acquittal of the innocent and the conviction of the guilty' (CrimA 639/79 *Aflalo v. State of Israel* [74], at p. 575; see also *Barki Feta Humphries (Israel) Ltd v. State of Israel* [47], at p. 784, *per* President Barak). This purpose does not constitute a special interest of the individual who is facing trial but an interest of society as a whole. An erroneous acquittal, and certainly a false conviction, harm both the doing of justice and the appearance that justice is being done, and it may undermine public confidence in the ability of the judicial authority to do justice to the individual and to society.

44. Discovering the factual truth is a main method of doing substantive justice in criminal cases. Discovering the truth assists the court in

determining innocence or guilt, and it thereby contributes to realizing the goals of the criminal proceeding, namely the fight against crime, protecting public safety and protecting the rights of actual or potential victims of crime. The need to further these values became stronger as a result of the increase in the level of crime and the degree of sophistication of the methods used by criminals in order to carry out criminal acts and hide them from the law enforcement authorities. In view of all this, discovery of the factual truth has always been the dominant purpose of the rules of evidence in the criminal proceeding (see and cf. A. Barak, 'On Law, the Administration of Justice and Truth,' 27 *Hebrew Univ. L. Rev. (Mishpatim)* (1996) 11).

Notwithstanding, discovery of the truth was never the absolute or sole purpose of the rules of evidence, since there exist competing interests and values that are also worthy of protection. Therefore the rules of evidence recognize the importance of the value of discovering the truth, but also the relative nature of this value. In the words of the English scholar, Prof. Ashworth, 'No system of criminal justice values truth above all other considerations' (A.J. Ashworth, 'Excluding Evidence as Protecting Rights' [1977] *Crim. L. Rev.* 723, at pp. 732-733). Admittedly, the values and interests that affect the formulation of our rules of evidence are varied. Without purporting to exhaust them, we can mention that some of the rules of evidence practised in our legal system are based on reasons of legal policy, such as the rules of privilege whose purpose is to protect moral or professional undertakings or essential public interests, such as state security or public safety. There are rules of evidence that are based on grounds of convenience, speed and efficiency in legal procedure, such as presumptions in evidence. Many characteristics of our rules of evidence are founded on our legal tradition and the adversarial legal system practised in Israel, in which the task of bringing evidence is usually the duty of the litigants.

All of the values and interests that affect the formulation of our rules of evidence require a balancing act that is likely to lead to the creation of a disparity between reality as it is determined by the court ('legal truth') and reality as it truly is ('factual truth'). The aforesaid disparity was addressed by Vice-President Elon in the following terms:

> 'The legal system tries to adapt its principles, in so far as possible, to the truth of reality and the judicial authority implements its methods of

> investigation in order to reach, in so far as possible, the factual truth… but the factual truth is not always necessary the same as legal truth. These two truths are relative and not always identical, and, what is more, they are also not opposed to one another. For the legal system knows, and the judge is aware, that the point of origin, the methods of clarification, the nature of the norms and the rules of decision in the legal world and the work of administering justice are different from those in the research of historical fact, and from this they know and are aware that there are cases where different conclusions and "truths" are obtained by each of them' (CA 1354/92 *Attorney-General v. A* [75], at pp. 744-745, and the references cited there; see also CA 61/84 *Biazi v. Levy* [76], at para. 1, *per* Justice Elon).

45. The values that affect the formulation of the rules of evidence also include protected human rights. The protection of human rights constitutes a purpose in itself in our legal system, and it affects the shaping of all branches of law, each according to its nature, purposes and characteristics. The rules of evidence in criminal proceedings are not an exception in this regard. Even before the Basic Laws, the rules of evidence in criminal proceedings were shaped by the purpose of protecting the rights of the accused.

The purpose of protecting the rights of the accused and the purpose of discovering the factual truth both serve the supreme purpose of the law that concerns the doing of justice and preventing miscarriages of justice in their broadest sense. Often the purpose of properly ascertaining the facts and discovering the truth is consistent with the purpose of protecting the rights of the accused. Thus, for example, the rule of evidence that the prosecution must prove guilt in criminal cases beyond all reasonable doubt and the rules that require, in certain circumstances, additional evidence in order to obtain a conviction in criminal cases serve both the purpose of discovering the truth and the protection of the right of the accused to dignity and liberty. In these contexts, the two aforesaid purposes supplement one another.

Notwithstanding the aforesaid, there are cases where the purpose of protecting the rights of the accused is directly in conflict with the purpose of discovering the truth. The clearest examples of this are the rules that prevent the court from admitting evidence that can indicate guilt, in order to protect the rights of the accused. In this context, we should point out that rules that

make evidence inadmissible may be based on one of several possible reasons. There are rules of inadmissibility whose purpose is to prevent information being brought before the court because there is a concern with regard to its reliability. An example of this is the rule that hearsay evidence is inadmissible or the rule that the results of a lie-detector test are inadmissible for the purpose of a conviction in criminal cases. The purpose of these rules of inadmissibility is closely associated with the purpose of discovering the truth. On the other hand, it is possible to point to rules of inadmissibility that are based on reasons that are unassociated with the discovery of the truth but are based on competing social values and interests. In these cases, it is necessary to find the proper balance between the conflicting purposes in accordance with the relative weight of the different values underlying them (see N. Zaltzman, '"Factual Truth" and "Legal Truth" — Withholding Information from the Court to Protect Social Values,' 24 *Tel-Aviv University Law Review (Iyyunei Mishpat)* (2001) 263, at pp. 264-265).

As we have said, the question of the admissibility of illegally obtained evidence creates a need to find a proper balance. The dilemma that arises in this context is to choose between all of the rights and interests that concern the public, in its widest sense. *On the one hand*, the interests of law enforcement, fighting crime and protecting public safety support the view that the admissibility of evidence should not be considered in accordance with the way it was obtained. Thereby, all of the relevant information will be presented to the court, which will be able to clarify the factual truth. The protection of the rights of the victims of the offence also supports a position where all the relevant evidence is brought before the court in order to ascertain the innocence or guilt of the accused. In view of all of the aforesaid interests, it may be argued that acquitting the accused merely because the investigation authorities obtained the evidence against him by improper methods amounts to a 'windfall' for the offender that he does not deserve. It may also be argued that such an acquittal comes at a high social price and it may lead to the undermining of public confidence in the criminal process, especially in circumstances where the defect that occurred in the investigation proceedings was technical and negligible. According to this approach, the criminal proceeding should focus on the question whether the charge attributed to the accused has been proved or not. Dealing with investigators who acted illegally in the manner that they obtained the

evidence ought to be done in other ways — disciplinary, criminal or civil — and not by declaring illegally obtained evidence to be inadmissible.

On the other hand, no one disputes that the law enforcement authorities should act lawfully in carrying out their duties, while upholding the rights of persons under interrogation and the accused. Moreover, no one disputes that the end of law enforcement does not justify the means of obtaining incriminating evidence. 'A freedom-seeking democracy is not prepared to allow investigators to use every method in order to disclose the truth' (*per* President Barak in *Public Committee Against Torture v. Government of Israel* [26], at p. 835 {590}). In the words of Justice D. Levin: 'The authority must not violate the rights to which the accused is entitled in order to bring about his conviction at any price, since the integrity of the judicial process is a essential precondition for the existence of a proper legal system' (CrimA 2910/94 *Yefet v. State of Israel* [77], at p. 368). Admitting evidence that was obtained illegally by the law enforcement authorities may in certain cases harm crucial values in our legal system, including the administration of justice, safeguarding the fairness and integrity of the criminal proceeding and protecting the dignity and liberty of the accused. According to a broad conception of the work of dispensing justice, it is not restricted to discovering the truth and a correct application of the law to the facts of a specific case; the administration of justice is also based on the *way* in which the court reaches its decision in the circumstances of the case before it. Basing a conviction on evidence that was obtained in an illegal manner or by means of a substantial violation of a protected human right allows the investigation authorities to enjoy the fruits of their misdeed and it may create an incentive for improper acts of interrogation in the future. Admitting such evidence may be seen as the court giving approval to the aforesaid illegality and being an accessory, albeit after the event, to the improper conduct of the investigation authorities. Consequently, in certain circumstances admitting the evidence in court may prejudice the fairness and integrity of the judicial process. It is also likely to harm public confidence in the judicial system whose role is to protect the rights of the individual against illegal executive acts. It has been said in our case law, in another context, that: 'The result of the proceeding is not a judicial decision suspended in mid-air. It also involves a decision with regard to the proper method of conducting the proceeding and protecting the rights of the litigants before the court… a serious procedural defect is to a

large extent a serious substantive defect' (*per* President Barak in *Kuzali v. State of Israel* [4], at p. 564). Therefore, the administration of justice in its broad sense and maintaining public confidence in the judicial system, protecting the rights of the accused and the fairness and integrity of the criminal proceeding, and the common interest of both the public and the individual in invalidating illegal investigation methods and deterring the investigative authority from employing similar methods in the future — all of these support the conclusion that, in appropriate circumstances, a significant breach of the law in obtaining the evidence will lead to it being inadmissible, even if there is no concern with regard to the truth of its content.

46. Striking a proper balance between all of the conflicting values involved in the question of the admissibility of illegally obtained evidence is not a simple task. As I shall explain below, before the Basic Laws case law balanced the competing interests by holding that in general, as long as statute did not provide otherwise, the manner of obtaining the evidence did not affect the admissibility of the evidence but only its weight. This gave decisive preference to the value of discovering the truth and the related interest of protecting the public.

The status given to basic human rights since the Basic Laws were enacted in 1992 has given greater weight to the duty to take protected human rights into account, and in appropriate circumstances the weight that should be attributed to them has also grown in comparison to competing values and interests. This is definitely the case in the field of criminal law that directly concerns the right of a person, whether he is accused of an offence or a victim of one, to dignity, liberty and the protection of his person and property. The remarks of President Barak in CrimApp 537/95 *Ganimat v. State of Israel* [45] in this regard are illuminating:

> 'The innovation made by the enactment of the Basic Laws is not… the mere recognition of human rights and the need to maintain a balance between them and the needs of the public as a whole. The innovation made by the Basic Laws lies in the elevation of the normative level of human rights to a constitutional super-legislative status and in determining the elements of the proper balance… It follows that the innovation in the Basic Laws is not the mere existence of a balance. The innovation is *in the location of the balancing point.* Elevating the

> status of human rights on the one hand, and reducing the scope of the considerations that may violate them on the other, inherently create *a new reciprocal relationship and new balancing points* between human rights and violations thereof' (*ibid*. [45], at p. 414; emphases supplied).

The spirit of the Basic Laws that affects the interpretive approach with regard to the proper balance between the various purposes of the rules of evidence in criminal cases also has a bearing on the question of the admissibility of illegally obtained evidence. It has already been said in our case law that 'the Basic Law: Human Dignity and Liberty creates… a new margin for a fair trial within the existing system…' (*per* Justice D. Levin in *Yefet v. State of Israel* [77], at p. 368). Within the framework of this new margin, there is a basis for the claim that in the enforcement of criminal law there are circumstances in which admitting evidence that was obtained by improper methods may undermine the fairness of the proceeding vis-à-vis the accused and the administration of justice in its broad meaning (see and cf. B. Okon and O. Shaham, 'Due Process and a Judicial Stay of Proceedings,' 3 *HaMishpat* (1996) 265, at p. 279). The question of the admissibility of illegally obtained evidence cannot be decided in accordance with the purpose of discovering the truth and fighting crime only. Even though this purpose is the main purpose of the criminal proceeding, today we need a more flexible balancing point that also takes into account the protected rights of the accused and the need to protect the fairness and integrity of the process. Adopting a flexible balancing point for this issue will befit the new normative reality that was created when the Basic Law was enacted, and it will give expression to our commitment to protect the rights of the individual against a violation thereof by the executive authorities. Admittedly, withholding relevant information from the court may lead in these circumstances to a distancing of the 'legal truth' from the 'factual truth.' But this result is a consequence of the fact that the administration of justice process does not stand alone but is a part of a complex social system of values, interests and rights that need to be balanced (see Zaltzman, '"Factual Truth" and "Legal Truth" — Withholding Information from the Court to Protect Social Values,' *supra*, at p. 273).

Against this there will be those who argue that one can point to other legal measures — disciplinary, criminal or civil — in order to address any illegality that is involved in obtaining evidence by the law enforcement

authorities. According to that argument, in view of the existence of alternative legal measures, there is no basis for declaring evidence inadmissible on account of the manner of obtaining it, thereby departing from the main value of discovering the factual truth. The response to this argument lies in the fact that the alternative measures are intended to provide relief for the violation *that has already been inflicted* on the rights of the accused when the evidence was obtained. But those measures do not *prevent* a disproportionate violation of the fairness and integrity of the criminal process when illegally obtained evidence is admitted in a trial. We will return to this at greater length below.

47. The conclusion that follows from our deliberations hitherto is that in the spirit of the Basic Laws we need to reconsider the question of the admissibility of illegally obtained evidence and adapt it to the new normative reality that created. A more flexible balancing point is required, which, in addition to seeking to realize the purpose of discovering the truth and fighting crime, will give weight to the protection of the accused's rights as a factor in safeguarding the fairness of the criminal process and as a part of doing justice in the broad sense.

It should be emphasized that this approach does not include a determination that the protection of the rights of the accused has become the main purpose of the rules of evidence or that the purpose of discovering the truth has become less important. The latter purpose remains, as it was, the chief purpose of the rules of evidence in criminal law, for ascertaining innocence or guilt and for protecting public safety against ever increasing crime that has become more sophisticated and organized than in the past. Moreover, as we said above, the criminal proceeding does not focus only on the protection of the rights of suspects and defendants, but also on the protection of human dignity and the rights of the actual and potential victims of the offence. It has already been held in our case law that —

> 'The Basic Law: Human Dignity and Liberty brings with it a written constitutional message for every individual in society, but this message is intended for all of society and not merely for the offenders in it. The actual and potential victim of the offence and every innocent citizen are entitled to protection of their dignity and liberty from fear, terror and injury, no less than the accused…' (*per* President Shamgar in

CrimFH *Ganimat v. State of Israel* [46], at p. 621; see also the remarks of President Barak, *ibid.*, at pp. 651-652; see also s. 1 of the Rights of Victims of Crime, 5761-2001, which gives statutory expression to the purpose of protecting the human dignity of victims of offences).

Therefore, a more flexible balancing point between all of the competing values relevant to the question of the admissibility of illegally obtained evidence does not mean a blanket exclusion of every piece of evidence obtained in that manner. Moreover, even the Basic Laws did not give an absolute status to the human rights protected by them. The existence of a limitations clause that provides the balancing formula for a violation of constitutional rights shows that the rights protected in the Basic Law are relative and that there are cases where they must give way to competing values and interests. In this spirit, it should be determined that only in appropriate cases, which we shall address later, should the balance between the competing values lead to the exclusion of illegally obtained evidence. I have already said on another occasion that:

> 'There is a question whether the right to consult a lawyer as complementary to the right to remain silent has acquired a constitutional status as a result of the Basic Law: Human Dignity and Liberty; an associated question is whether we should today adopt a rule that a confession that was obtained as a result of a breach of the aforesaid rights is inadmissible, and what should be the nature of that rule… these questions are not simple. Their complexity derives, *inter alia*, from the fact that the aforesaid rights, whether they have acquired a constitutional status or not, are not absolute; the right of the suspect and accused to remain silent, the right to consult a lawyer and the right to a fair trial are countered by important public interests, such as the fight against crime, the protection of state security and public safety, discovering the truth, and even the need to protect the rights of the victim of the offence who was harmed as a result of the criminal act. Therefore, *a delicate and complex act of balancing is required between the variety of competing rights, values and interests, in accordance with the values of our legal system and in accordance with the framework of the limitations clause*' (*Smirk v. State of Israel* [18], at para. 14; emphasis supplied; see also in this regard: *Hasson v. State of Israel* [57], at p. 283, *per* Justice Naor; with regard to the need to find

a proper balance between the protection of the rights of the suspect and the accused, on the one hand, and the public interest in the elimination of crime and the protection of the victims of crime, on the other, see also the remarks of Justice Strasberg-Cohen, in *Hachmi v. Justice of Tel-Aviv-Jaffa Magistrates Court* [70], at pp. 755-756).

As we shall explain at length below, the balance between the rights of the accused and the fairness of the criminal process, on the one hand, and the competing values including the value of discovering the truth, the fight against crime and the protection of public safety and the rights of the victims of crime, on the other, leads to the adoption of a doctrine of relative inadmissibility. This will give the court discretion to decide the question of the admissibility of illegally obtained evidence according to the circumstances of each case on its merits and according to criteria that we will discuss below.

48. Adopting such a rule of inadmissibility may *prima facie* lead to the undermining, to some extent, of the trend that has been seen in our legal system since the 1980s, which mainly involved a transition from rules of inadmissibility to a substantive evaluation of evidence. Notwithstanding, we are speaking of a development that is rooted in the normative infrastructure introduced by the Basic Law to strengthen the trend of having consideration for human rights. We are not speaking of a step that returns our case law back to the period of admissibility barriers that we knew in the past, but of an additional development that is based on the dynamic processes that have been taking place in recent decades. Whereas in the past the strict admissibility barriers were intended to withhold from the court *ab initio* any evidence whose credibility was in doubt, over the years a trend has developed of restricting the formal rules of admissibility and giving preference to a substantial examination of evidence according to its weight and credibility. As we said above, this recent trend was based, *inter alia*, on the outlook according to which, as a rule, bringing the relevant information before the court will allow it to form an independent impression of its credibility and probative value, and aid it in realizing the purpose of discovering the truth. This trend was enshrined in the approach that the discovery of the factual truth constitutes a central value in doing justice, and that we ought to aspire to as much consistency as possible between reality as determined by the court and reality as it truly is (see Barak, ‘On Law, the Administration of Justice

and Truth,' *supra*, at p. 13). The aforesaid aspiration remains unchanged, but in view of the normative reality that was created as a result of the Basic Laws, an additional development is now required in the direction of adopting a doctrine that allows evidence to be declared inadmissible; but this time we are not speaking of formal and strict rules of inadmissibility, of the kind that were practised in the past; according to our approach, the new doctrine of inadmissibility that we must introduce is flexible and based on the need to balance the value of discovering the truth against conflicting values that mainly concern the protection of the rights of the accused and protecting the fairness and integrity of the criminal process. A similar trend has been seen in other common law countries, including England, Canada and Australia. As we shall explain below, formal barriers of admissibility have also been restricted in these countries, and at the same time doctrines have been introduced that allow illegally obtained evidence to be declared inadmissible at the discretion of the court.

49. The current development in our legal system, which leads to the adoption of a doctrine that illegally obtained evidence is inadmissible, does not constitute an unforeseen revolution in the rules of evidence but is an additional step in a gradual process. Before the Basic Laws were adopted, the legislature saw fit to provide rules of inadmissibility in the Eavesdropping Law and in the Protection of Privacy Law with regard to evidence that was obtained by means of an illegal violation of the right to privacy. Moreover, over the years the court has discussed, on several occasions, the possibility that in the future the case law rule will be changed so that illegality involved in obtaining the evidence will make it inadmissible (see para. 42 *supra* and the references cited there). In view of all this, it is clear that even before the enactment of the Basic Laws concerning human rights, it was possible to change the case law rule according to which the manner in which evidence was obtained did not affect the question of its admissibility, although in practice this court refrained from making such a change. The enactment of the Basic Law: Human Dignity and Liberty has made it more urgent to reconsider the matter, and even provided '… an indication of the proper direction of the new development' (CrimApp 537/95 *Ganimat v. State of Israel* [45], at p. 415, *per* President Barak).

Indeed, when the Basic Laws were enacted, trends could be seen in our case law that made the balancing point on the question of illegally obtained

evidence more flexible, so that after the Basic Law: Human Dignity and Liberty was passed, there was a change in the interpretive approach of this court with regard to the rule of inadmissibility in s. 13 of the Eavesdropping Law. In the spirit of the Basic Law: Human Dignity and Liberty, this court saw fit to attribute greater weight than in the past to the protection of the constitutional right to privacy, even though this interpretive approach led to *broadening of the scope* of the rule of inadmissibility provided in the aforesaid s. 13 (see, for example, *State of Israel v. Nahmias* [60], at p. 331, *per* Justice Bach, and at pp. 352-353, *per* Vice-President Barak; see also in this regard the remarks of President Barak in CrimA 1668/98 *Attorney-General v. President of Jerusalem District Court* [2002] IsrSC 56(1) 625, at pp. 631-632). It should be noted that the aforesaid trend, which attributes greater weight than in the past to the duty to take the rights of the individual into account within the framework of the interpretation of the statutory rules of inadmissibility, is very much in accord with the interpretation that we proposed above with regard to the rule of inadmissibility provided in s. 12 of the Evidence Ordinance. It may be assumed that the aforesaid interpretive trend will also, in the future, influence the interpretation of the rule of inadmissibility provided in s. 32 of the Protection of Privacy Law, but we can leave the consideration of this matter until it is required (see, in this regard, Harnon, 'Illegally Obtained Evidence: A Comparative Perspective,' *supra*, at p. 1024, footnote 150; see also Elon, 'The Basic Laws — Enshrining the Values of a Jewish and Democratic State,' *supra*, at pp. 79-83).

Moreover, in a series of cases decided after the enactment of the Basic Law, this court spoke positively of the possibility of adopting a relative doctrine of the inadmissibility that would allow illegally obtained evidence to be declared inadmissible in appropriate circumstances (see my remarks in *Smirk v. State of Israel* [18], at pp. 546 and 555; *Hasson v. State of Israel* [57], at p. 283, *per* Justice Naor; my remarks in CrimA 2180/02 *Kassem v. State of Israel* [79], at p. 654; and see the comments on these remarks in CrimA 9970/03 *Deri v. State of Israel* [80], at para. 6 of the opinion of President Barak; CrimApp 6689/01 *Migdalani v. State of Israel* [81], at pp. 176-177, *per* Justice Rivlin; HCJ 266/05 *Pilant v. Gen. Efroni* [82], at para. 3C of the opinion of Justice Rubinstein; for judgments of lower courts that support the adoption of such a doctrine of inadmissibility, see, for example, CrimC (Naz) 511/97 *State of Israel v. Odeh* [102]; CrimC (TA) 4598/01 *State*

of Israel v. Ben-Shushan [103]). Support for adopting in our legal system a doctrine of inadmissibility of illegally obtained evidence has also been expressed in the academic literature of many scholars (see, in this regard, Gross, 'The Procedural Rights of the Suspect or the Accused under the Basic Law: Human Dignity and Liberty,' *supra*, at p. 180; Gross, 'A Constitutional Rule of Inadmissibility — Has it a Place in Israel?' *supra*; A. Barak, 'The Constitutionalization of the Legal System following the Basic Laws and its Ramifications on (Substantive and Procedural) Criminal Law,' 13 *Bar-Ilan Law Studies (Mehkarei Mishpat)* (1996) 5, at pp. 23-24); E. Harnon, 'Illegally Obtained Evidence — Has the Legal Position Changed following the Basic Law: Human Dignity and Liberty,' 13 *Bar-Ilan Law Studies (Mehkarei Mishpat)* (1996) 139; Zaltzman, '"Factual Truth" and "Legal Truth" — Withholding Information from the Court to Protect Social Values,' *supra*; Y. Shahar, 'Criminal Procedure,' *Israel Law Yearbook 1992*, 3; Elon, 'The Basic Laws — Enshrining the Values of a Jewish and Democratic State,' *supra*, at pp. 79-83).

Thus we see that the adoption of a doctrine of inadmissibility for illegally obtained evidence does not constitute a revolution that is foreign to our legal system; rather it is a desirable and expected development. There is no doubt that the Basic Law paved the way for the required change in thinking that made it possible to adopt such a doctrine. Moreover, the provisions of the Basic Law may serve as a possible basis for enshrining this doctrine normatively, which I shall explain later.

Adopting a judicial doctrine of inadmissibility

50. The Chief Military Prosecutor and the attorney-general argued in their written summations that even if there is a basis for adopting a doctrine in our legal system that makes illegally obtained evidence inadmissible, it is not the role of this court to order this by means of judicial legislation. According to them, the case law that the manner of obtaining evidence does not affect the question of its admissibility is well-established case law of many years' standing, and therefore any change to it ought to be made only by the legislature. It should be emphasized that the prosecution does not dispute the fact that case law does not constitute a 'law' within the meaning of this term in the retaining of laws provision set out in s. 10 of the Basic Law. There is therefore no dispute between the parties before us that the case law with

regard to the admissibility of illegally obtained evidence may be changed in the spirit of the Basic Law. The main argument of the prosecution in this context is that even though this court is competent in principle to order a change of the aforesaid case law, it ought to refrain from doing so until the legislature has stated its express position on the subject.

It is possible that the doctrine of inadmissibility of illegally obtained evidence should have been introduced by the legislature. For this reason, we even waited before giving our judgment, in the hope that the matter would be regulated in legislation of the Knesset (see para. 13 *supra*). But since the draft laws on this matter have not matured into legislation from the time the appeal was filed until today, there is no alternative to making a judicial decision on the question whether the *case law rule* that has prevailed hitherto in our legal system until now, according to which the manner of obtaining evidence does not affect the question of its admissibility, should be changed.

In this context it should be emphasized that in view of the fact that the Evidence Ordinance does not constitute a complete and exhaustive codex of law, our rules of evidence are to a large extent the result of development by this court. As such, they constitute a part of the 'Israeli version of common law' (see LCA 1412/94 *Hadassah Medical Organization v. Gilad* [83], at p. 524, *per* President Barak; see also the remarks of President Shamgar in *State of Israel v. Tubul* [67], at pp. 318-319, and his remarks in MApp 298/86 *Citrin v. Tel-Aviv District Disciplinary Tribunal of Bar Association* [84], at p. 354). The approach that prevailed in our legal system until now, according to which the manner of obtaining evidence did not affect the question of its admissibility is also not the creation of the legislature but the product of the case law of this court. In view of this, this court has always had the power to change it.

Admittedly, as has been stated above, even before the enactment of the Basic Laws this court assumed that it had the power to change the case law rule under discussion, but it refrained from doing so for reasons of judicial policy. In view of the effect of the Basic Laws, a reconsideration is now required of the question of the admissibility of illegally obtained evidence, in order to make the case law rule in this matter consistent with the change that has occurred in our normative reality. Indeed, a change in case law, especially when it may affect the way in which the criminal trial is conducted and the

rules of evidence that apply to it, is not made as a matter of course. 'This approach derives from the respect that we feel towards our colleagues, whose learning can be seen from legal literature, from the need to ensure security and stability and from the recognition that the reasonable expectations of members of the public, which are based on the case law of the court, should be realized' (*per* Justice Barak in HCJ 547/84 *HaEmek Poultry Registered Agricultural Cooperative Society v. Ramat-Yishai Local Council* [85], at p. 145). Great care is therefore required before this court changes its case law on the fundamental issue of the admissibility of illegally obtained evidence. Indeed, as we shall explain below, the case law adoption of the doctrine under discussion will be carried out with moderation and care, while giving discretion to the court to examine the question of the admissibility of illegally obtained evidence in each case according to its circumstances and in accordance with criteria that we shall address below. Moreover, our judgment does not provide a solution to all of the questions involved in the adoption of such a case law doctrine, and in any event these questions will be resolved in future case law, by moving forward carefully from case to case. Certainly the legislature will be able to have its say on the subject under discussion even after we have given our judgment, and it may determine the arrangement that it thinks fit, provided that this legislative arrangement 'befits the values of the State of Israel, is intended for a proper purpose and is not excessive' (s. 8 of the Basic Law: Human Dignity and Liberty). So we see that the adoption of a case law doctrine that excludes illegally obtained evidence should be made with the sensitivity and care that are required by the change in the case law rule that prevailed until now.

Notwithstanding, it should be emphasized that the need to preserve legal stability and certainty does not mean that case law should remain stagnant without any ability to change and adapt itself to the needs of the changing reality. This is especially the case when the change in case law is required in order to protect human rights and in order to safeguard the fairness of the criminal process and the administration of justice in their broad sense. This court has been committed, since its founding, to the protection of human rights. It is bound by the duty to uphold the rights protected in the Basic Laws and whatever is implied by this with regard to conducting the judicial process (see s. 11 of the Basic Law: Human Dignity and Liberty). In view of all this, the fact that after the Basic Laws the legislature has not seen fit to

introduce an express statutory doctrine that allows illegally obtained evidence to be declared inadmissible in appropriate cases does not exempt the court from its duty to make its case law on the aforesaid issue consistent with the spirit of the Basic Laws, in order to create 'normative coherence' (A. Barak, *A Judge in a Democracy* (2004), at p. 63). This is especially the case in view of the fact that the court is responsible for the process of discovering the truth and dispensing justice in the criminal proceeding, and in view of its duty to achieve these purposes without any disproportionate violation of the accused's rights.

In addition, we should point out that a comparative perspective of the position in other countries with a similar legal system to our own shows that some of them have adopted judicial doctrines according to which illegally obtained evidence is inadmissible. Thus, for example, in the United States the Supreme Court has developed rules that evidence obtained by means of a breach of constitutional rights is inadmissible. In England, the common law recognized, as long ago as 1955, the discretion of the court to declare evidence inadmissible if admitting it would be unfair to the accused. As I said in para. 39 above, this authority has hardly ever been used in practice, and the aforesaid doctrine was replaced in 1984 statutory inadmissibility provisions in the Police and Criminal Evidence Act, which we shall discuss later. In Australia the High Court adopted a case law doctrine that allowed illegally obtained evidence to be declared inadmissible at the discretion of the court (*Bunning v. Cross* [106]). Later the Uniform Evidence Acts 1995 were enacted, and these contain inadmissibility provisions that apply in the federal courts. We cannot rule out the possibility that a similar process will also occur in the future in Israel, such that the judicial recognition of a doctrine that illegally obtained evidence is inadmissible will lead to the assimilation of the aforesaid doctrine in a statute that is consistent with the provisions of the Basic Law.

51. The Chief Military Prosecutor and the attorney-general further argued in their written summations that in view of the absence of an express statutory arrangement that illegally obtained evidence is inadmissible, the existing statutory position in our legal system should be interpreted as indicating an intention on the part of the legislature to create a 'negative arrangement' on this issue. This argument was comprised of several secondary arguments that we will consider below.

Justice D. Beinisch

It was argued before us that the three rules of inadmissibility set out in s. 12 of the Evidence Ordinance, s. 13 of the Eavesdropping Law and s. 32 of the Protection of Privacy Law should be interpreted as evidence of the existence of a negative legislative arrangement with regard to the adoption of a case law doctrine that illegally obtained evidence should be inadmissible; this argument cannot be accepted for several reasons. *First*, this court has always refrained from basing its case law on the question of the admissibility of illegally obtained evidence on this interpretation. In *Vaknin v. Appeals Court Martial* [5] it was expressly held that 'from the provisions of s. 32 of the Protection of Privacy Law, which makes material that was obtained by means of a violation of privacy inadmissible as evidence in certain circumstances, *nothing can be implied — either positively or negatively* — with regard to the policy of the legislature with regard to the rule of inadmissibility in general' (*per* Justice Barak, *ibid.*, at p. 423; emphasis supplied). *Second*, from a purposive viewpoint, the aforesaid inadmissibility provisions should not be interpreted as evidence of an intention on the part of the legislature that a general doctrine that excludes illegally obtained evidence should not be adopted. Thus, for example, there is no logic in saying that eavesdropping without a lawful permit is more serious than obtaining other evidence by improper means (see, in this regard, Harnon, 'Illegally Obtained Evidence: A Comparative Perspective,' *supra*, at p. 1026). According to my approach, the statutory rules of inadmissibility may imply a fundamental position that is different from the one argued by the chief military prosecutor and the attorney-general, according to which in certain circumstances declaring evidence inadmissible because of illegality that was involved in obtaining it is a possible relief.

It should be stated that there is a separate question as to whether the concrete rules of inadmissibility provided in legislation create an *exhaustive* arrangement with regard to the admissibility of the evidence addressed therein. In other words, do the aforesaid rules prevent the application of a case law doctrine of inadmissibility of confessions of defendants and evidence obtained contrary to the provisions of the Eavesdropping Law and the Protection of Privacy Law? We shall address this question, which concerns the scope of the application of the case law doctrine, below.

52. The Chief Military Prosecutor and the attorney-general further stated before us that the Basic Law: Human Dignity and Liberty does not contain an

express provision with regard to the inadmissibility of evidence that was obtained by means of an illegal breach of the rights protected within its framework. According to their argument, the silence of the Basic Law on this issue is very significant, and it indicates a negative arrangement that prevents the judicial adoption of a doctrine that illegally obtained evidence should be inadmissible.

This argument should be rejected. The Basic Laws that address human rights do not contain any provision concerning remedies or reliefs for a violation of the rights protected by them. The silence of the Basic Law on this issue should not be interpreted as a negative arrangement. It is well known that s. 1A of the Basic Law: Human Dignity and Liberty provides that the purpose of the Basic Law is 'to protect human dignity and liberty, in order to enshrine in a Basic Law the values of the State of Israel as a Jewish and democratic state.' Without reliefs for a breach of the rights protected within the framework of the Basic Law, the purpose of protecting these rights would be bereft of all significance. Admittedly, the role of formulating the reliefs for a breach of constitutional rights is first and foremost the duty of the Knesset. It has the proper tools for creating a comprehensive arrangement that will lead to a proper correlation between the violation of the constitutional right and the relief for it. Notwithstanding, in the absence of a statutory provision in this regard, the court is competent to formulate appropriate reliefs for a breach of the rights protected in the Basic Laws, by virtue of its positive duty to protect these rights and in accordance with the general outlook of our legal system that where there is a right, there is also a remedy (*ubi ius ibi remedium*) (see Barak, *A Judge in a Democracy*, *supra*, at pp. 237-238; Barak, *Constitutional Interpretation*, *supra*, at pp. 365 and 703; D. Barak-Erez, *Constitutional Torts — The Pecuniary Protection of the Constitutional Right* (1993), at p. 151; E. Gross, 'Constitutional Remedies,' 4 *Mishpat uMimshal* (1998) 433, at pp. 436-439).

Indeed, in several judgments this court has adopted the interpretive outlook that the aforesaid silence of the Basic Law does not constitute a negative arrangement with regard to the recognition of reliefs whose purpose is to protect the rights protected therein. Thus, for example, in CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [86], at pp. 276, 415-419. it was held that the court is competent to declare an ordinary law void if it conflicts with the Basic Law, as a part of the outlook that legislation of the

Knesset should be consistent with the general constitutional framework. The court held this even though the Basic Laws that address human rights do not contain an express provision — as opposed to an implied inference — with regard to the existence of a power to declare a statute void if it is inconsistent with their provisions. We should also point out that in *Daaka v. Carmel Hospital* [52] this court held, by a majority, that an illegal violation of a protected constitutional right (the right of the individual to autonomy of will) may constitute an independent compensatable head of damage within the framework of the tort of negligence. It may be assumed that in the future we will be called upon to determine the question of the recognition of additional relief for the breach of constitutional rights and the question of the manner in which such reliefs should be formulated: whether they should be derived directly from the Basic Law or whether they should find their place in areas of law that are external to them (with regard to the possible methods of formulating relief for the breach of constitutional rights, see Barak, *Constitutional Interpretation*, *supra*, at pp. 780-781; see also Barak-Erez, *Constitutional Torts — The Pecuniary Protection of the Constitutional Right*, *supra*, at pp. 149 *et seq.*; Gross, 'Constitutional Remedies,' *supra*, at pp. 439-440). In any case, for the purpose of the matter before us it is sufficient for us to determine that the Basic Law: Human Dignity and Liberty does not contain a negative arrangement with regard to the inadmissibility of illegally obtained evidence, and that, in the spirit of the provisions of the Basic Law, the adoption of such a doctrine is now required.

53. The Chief Military Prosecutor and the attorney-general, in their written summations, also addressed the Criminal Procedure (Enforcement Powers — Arrests) Law and the Criminal Procedure (Enforcement Powers — Search of Body of Suspect), 5756-1996, which were enacted after the Basic Laws came into force. According to their argument, the absence of an express provision of statute that allows evidence that was obtained in violation of the provisions of the aforesaid laws to be declared inadmissible indicates the existence of a negative arrangement with regard to the adoption of the doctrine under discussion.

This argument should also be rejected. The two aforesaid laws were intended to bring the arrest, detention and search powers into line with what is required by the provisions of the Basic Law: Human Dignity and Liberty. These laws indicate the change in outlook introduced by the Basic Law, with

a greater emphasis than in the past on the protection of the rights of persons under interrogation and under arrest vis-à-vis the needs of the investigation in the sphere of criminal procedure. The aforesaid laws do not address at all the questions of evidence that arise from exercising the powers of arrest, detention and search, and in any case they do not imply anything, either positively or negatively, with regard to the position of the legislature on the adoption of a doctrine that illegally obtained evidence should be inadmissible.

Interim summary

54. The Basic Law: Human Dignity and Liberty elevated the human rights that are protected in it to a constitutional super-legislative status. A change was therefore made to our normative reality. This change is reflected first and foremost in the possibility of judicial review of the constitutionality of laws that were enacted after the Basic Laws concerning human rights came into force. Notwithstanding, this does not exhaust the whole scope of the effect of the aforesaid Basic Laws. The Basic Laws affect the manner in which executive discretion is exercised. The spirit and principles of the Basic Laws shed light with varying degrees of intensity on all branches of law and these affect the basic concepts and basic outlooks in them. *Inter alia,* they affect the interpretation of legislation that preceded the Basic Laws and 'the Israeli version of common law' that is developed in the case law of this court.

These normative changes require a reconsideration of the question of the admissibility of illegally obtained evidence. If in the past our legal system was guided by the case law ruling that the question of the admissibility of evidence is not considered in accordance with the manner in which it was obtained, since the interpretive centre of gravity in this respect was focused on the purpose of discovering the truth and fighting crime, today a more flexible balancing point is required, which takes into account the duty to protect the rights of the accused and the fairness and integrity of the criminal process. The proper balance between all of the competing values and interests on this question leads to the adoption of a relative doctrine of inadmissibility, within the framework of which the court will have discretion to decide the admissibility of illegally obtained evidence in the circumstances of each case on its merits, and in accordance with criteria that we shall discuss below.

The adoption of a doctrine that illegally obtained evidence is inadmissible and determining the strength and scope of such a doctrine is a matter worthy of legislation. Nonetheless, as aforesaid, our rules of evidence are largely the creation of case law, and in the absence of a negative legislative arrangement on this issue, the court has the duty to adapt the case law norm that it originally determined to the changing normative reality. For the reasons that we have discussed extensively above, the necessary conclusion is that the time has come to adopt a case law doctrine that, in appropriate circumstances, allows illegally obtained evidence to be declared inadmissible in our legal system.

Models of doctrines that exclude illegally obtained evidence — a comparative perspective

55. In order to determine the nature and framework of the doctrine under discussion, we should address three main questions that are interrelated, even though for the convenience of our deliberations we shall present them as separate questions: *the first question* concerns the main purpose of a doctrine that renders evidence inadmissible because of the manner in which it was obtained. In the case law of this court and also in other legal systems that are closely related to our legal system, different approaches have been expressed on this question. We shall focus our perspective on the three main approaches to the issue. According to one approach, the main purpose of excluding evidence because it was obtained illegally is an *educational-deterrent purpose*. According to this approach, the inadmissibility of evidence that was obtained in an improper way is intended mainly to educate the investigation authorities and deter them from adopting similar methods in the future, by making it impossible for the prosecution to benefit from the fruits of the illegality that was involved in obtaining the evidence. According to this approach, alternative methods of deterring the police from using improper investigative methods have been found to be ineffective, and it is therefore necessary to declare evidence that was obtained by such methods inadmissible.

According to a second approach, the exclusion of illegally obtained evidence is mainly intended to protect the rights of defendants in their interrogation. According to this approach, the violation of the protected rights of the person under interrogation by the law enforcement authorities gives

rise to a justification for the evidence that was obtained as a result of that violation not being admissible, as a part of the protection of those rights. This approach has also been called the 'protective approach.'

According to a third approach, the main emphasis in excluding illegally obtained evidence is placed on the moral aspect of the criminal proceeding. According to this approach, a judicial decision with regard to a conviction and sentencing of a person does not merely impose on him a legal sanction — imprisonment or a fine — but also a moral sanction that is reflected in the stigma that accompanies a criminal conviction. Making use of evidence that was obtained improperly by the law enforcement authorities may, in certain circumstances, taint the criminal conviction and undermine its legitimacy. *Inter alia*, the court may be regarded as sanctioning the defect and being a party, after the event, to the illegality in the behaviour of the investigators. Moreover, since the police investigation stage is a part of the complete system of administering justice, the admissibility of evidence in a trial when it was obtained by means of illegal interrogation methods may undermine the integrity of the judicial process and public confidence therein. According to this approach, the inadmissibility of the evidence is intended to protect values that mainly concern the integrity and fairness of the criminal process, and it is required as a part of the work of administering justice in its broad sense, and as a prerequisite for public confidence in the judicial system. At this point we should emphasize that there is a close relationship between the three aforesaid purposes, and that the formulation of the nature and framework of a doctrine concerning the inadmissibility of illegally obtained evidence will necessarily be affected by all of the purposes that we have discussed. Notwithstanding, the question before us is what is the *primary* or *dominant* purpose that ought to serve as the basis for such a doctrine.

The *second question* that affects the formulation of the doctrine under discussion concerns the theoretical model on which the inadmissibility of the evidence should be based. In this regard, two main models can be identified. According to one model, the inadmissibility of the evidence is a remedy for an illegal violation of a protected right of the accused, which took place when the evidence was obtained. As we shall clarify later on, this theoretical model is consistent with the educational-deterrent approach, and it may also be consistent with the protective approach (hereafter: 'the remedial model').

Another possible model is that the inadmissibility of the evidence is intended to prevent a future violation of a protected value, which is separate from the original right that was violated when the evidenced was obtained. Within the framework of this model, the inadmissibility of the evidence constitutes a prospective relief and its purpose is to prevent a violation of the protected social value when the evidence is admitted in the trial. As we shall explain below, this theoretical model is consistent with the approach that regards the protection of the criminal process, its integrity and fairness as the main purpose for declaring evidence inadmissible if it was obtained illegally. This theoretical model may also be consistent with the protective approach, especially in legal systems where the protected right that lies at the heart of the doctrine of inadmissibility is the right of the accused to a fair criminal trial (hereafter: 'the preventative model').

The *third question* that affects the formulation of a doctrine that excludes illegally obtained evidence concerns the degree of flexibility and the scope of discretion that the court has within the framework thereof. In this matter there are also two main possibilities: one possibility is an *absolute* doctrine of inadmissibility that holds that illegally obtained evidence may not be admitted in evidence. The second possibility is a *relative* doctrine of inadmissibility that leaves the court with discretion to decide the question of the admissibility of the evidence in view of the circumstances of the case that is before it.

A comparative look at other legal systems that are similar to our legal system shows that the aforesaid three questions led to the development of two main models of doctrines for the exclusion of illegally obtained evidence. One model is expressed in the exclusionary rules practised in the United States. The second model is the one practised in the other common law countries, including Canada, England, South Africa and Australia. Let us therefore turn to examine closely the inadmissibility doctrines practised in these countries, in order to obtain inspiration from the arrangements adopted by them on the matter under discussion. Obviously the comparative perspective does not bind us in formulating a doctrine that is appropriate for our legal system, and reference to legal systems that are fundamentally similar to our legal system is merely intended to broaden our horizons and benefit from the experience of those countries, in so far as this experience is relevant for the purposes of the legal position in Israel.

(a) The exclusionary rules practised in the United States

56. The rules of inadmissibility or the exclusionary rules as practised in the United States are based mainly on the exclusion of evidence that was obtained in contravention of the Fourth Amendment of the Constitution, which concerns the principles of searches and seizures, the Fifth Amendment of the Constitution, which concerns the protection of the right not to incriminate oneself and the right to due process, and the Sixth Amendment of the Constitution, which concerns the right to representation by counsel. The case law of the Supreme Court of the United States has adopted the approach that the aforesaid exclusionary rules were intended mainly for an educational-deterrent purposes, so that the police do not again in the future make use of investigation methods that are capable of violating the constitutional rights of the suspect or accused (see, in this regard, J. Stribopoulos, 'Lessons from the Pupil: A Canadian Solution to the American Exclusionary Rule Debate,' 22 *B. C. Int. & Comp. L. Rev.* (1999) 77, at p. 101; R.H. Fallon and D. J. Meltzer, 'New Law, Non-Retroactivity and Constitutional Remedies,' 104 *Harv. L. Rev.* (1991) 1731, at p. 1810). The educational-deterrent purpose has had a dominant effect on the formulation of the American exclusionary rules. *Inter alia*, the aforesaid approach has led in the United States to the development of the 'fruit of the poisonous tree' theory. According to this theory, the court should declare inadmissible not only evidence that was obtained as a direct result of a violation of the constitutional right of the accused, but also any other evidence that was found directly or indirectly as a result of the information that was disclosed by that initial evidence; and this applies even when the credibility of the aforesaid items of evidence is not in doubt. This theory was mainly intended to deter investigators from making future use of improper investigation methods, by excluding all the evidence that was found as a result of the aforesaid illegality.

The theoretical model on which the exclusionary rules in the United States are based is the 'remedial model.' The exclusion of the evidence is a remedy for the violation of the constitutional right of the accused that took place when the evidence was obtained. The exclusion of the evidence is therefore intended to provide relief for a violation that was completed in the past, and it is not intended to prevent a future violation of a protected right or value. We should also point out that *ab initio* the American exclusionary rules were formulated as sweeping rules that did not leave the courts any discretion on

the question of the admissibility of evidence that was obtained as a result of a violation of the Constitution. Notwithstanding, following major criticism that has been heard over the years with regard to the rigidity of the aforesaid exclusionary rules, the Supreme Court of the United States has recognized exceptions to these rules, which have relaxed, to some extent, the sweeping obligation mandated by them to exclude evidence. It should also be emphasized that the rigidity of the American exclusionary rules has had far-reaching consequences from the viewpoint of undermining the purpose of law enforcement, fighting crime and discovering the truth, and as a result of these social consequences, criticism has been levelled at these rules in the United States and elsewhere.

In concluding these remarks, we should point out that over the years there has been disagreement on the question whether the aforesaid exclusionary rules are enshrined in the United States Constitution or not. In *Dickerson v. United States* [105], which we discussed in para. 27 *supra*, the Supreme Court of the United States held, by a majority, that the exclusionary rule held in *Miranda v. Arizona* [104] had a constitutional basis and it could therefore not be nullified by an ordinary statute of Congress.

(b) The doctrines of inadmissibility practised in Canada, England, South Africa and Australia

57. Other common law countries, including Canada, England, Australia and South Africa, have adopted doctrines of inadmissibility that are more flexible and moderate, based on a different theoretical model from the one practised in the United States.

Section 24(2) of the Canadian Charter of Rights and Freedoms of 1982 provides as follows:

> ‘24. Enforcement of guaranteed rights and freedoms
>
> (1)…
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.’

Justice D. Beinisch

Section 24(2) of the Charter provides two conditions for the inadmissibility of evidence: first, it must be proved that the evidence was obtained in violation of a protected constitutional right under the Charter. Second, the court should exclude evidence as aforesaid if, taking into account all of the circumstances, it is proved that admitting the evidence in the court proceedings would lead to substantial harm to the administration of justice system.

Thus we see that, unlike the rigid exclusionary rules practised in the United States, under s. 24(2) of the Canadian Charter the obtaining of evidence in violation of a constitutional right does not in itself necessitate its inadmissibility; the evidence will be excluded only if admitting it in the trial will harm the process of administering justice. It should be emphasized in this context that the test enshrined in s. 24(2) of the Charter is not whether the illegal behaviour of the investigation authorities has resulted in harm to the administration of justice process, but whether *admitting the evidence in a trial* would create such harm. It follows that the inadmissibility is not a remedial relief for the improper conduct of the investigators when they obtained the evidence, but a relief that is intended to prevent substantial harm to the integrity and propriety of the administration of justice system if the evidence is admitted in the trial ('the preventative model'). It should also be emphasized that s. 24(2) refrains from establishing a presumption with regard to the inadmissibility of illegally obtained evidence, and the matter is left to the discretion of the courts according to criteria that have been determined in the case law of the Supreme Court of Canada. At this stage we should point out that one of the main considerations in this context is whether admitting the evidence in the trial will prejudice the *fairness* of the criminal trial (see R.J. Sharpe and K.E. Swinton, *The Charter of Rights and Freedoms* (1998), at pp. 178-179).

Taking all of the aforesaid into account, the accepted view in case law and academic literature in Canada is that the main purpose of the doctrine of inadmissibility that is enshrined in s. 24(2) of the Charter is not to deter or educate the police, but to protect the fairness of the proceedings and to uphold the integrity and status of the administration of justice system. Deterring the investigation authorities from using illegal investigation methods in the future constitutes a desirable side-effect of excluding the evidence, but it is not one of its main purposes (see, in this regard, *R. v.*

Collins [108], at p. 281; P.W. Hogg, *Constitutional Law of Canada* (student edition, 2005), at p. 911).

58. With regard to England, the doctrine practised there for the inadmissibility of illegally obtained evidence is set out in the provisions of s. 78(1) of the Police and Criminal Evidence Act 1984 (PACE), which is an ordinary statue of Parliament. Section 78(1) provides:

> '78. Exclusion of unfair evidence
>
> (1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.'

The premise on which s. 78(1) of PACE is based is that all relevant evidence is admissible in a trial. Nonetheless, according to the aforesaid s. 78(1), the court is competent to refuse to allow evidence that was presented to it by the prosecution, after considering the following issues: first, the court should consider all the circumstances of the case, including the circumstances of obtaining the evidence. Second, the court needs to be persuaded that in the circumstances of the case admitting the evidence would have such a detrimental effect on the fairness of the proceedings that it should not be allowed.

Thus we see that the English legislature saw fit to adopt a relative doctrine of inadmissibility, which leaves the court discretion on the question of the inadmissibility of evidence that was obtained improperly. The main test in this regard is whether, in the circumstances of the case, admitting the evidence in the trial will seriously prejudice the *fairness of the proceedings*. Like s. 24(2) of the Canadian Charter, the inadmissibility of the evidence under s. 78(1) of the PACE is not intended to offer a remedial relief for the harm to the accused that was completed when the evidence was obtained, but its purpose is to prevent future harm to a protected value — the fairness of the criminal proceeding — when the evidence is admitted in the trial. Like in Canada, English case law has also determined that the main purpose of the inadmissibility of the evidence under the aforesaid s. 78(1) is not to educate the police or deter them from making use of improper investigation methods

in the future, but to protect the fairness and integrity of the judicial system (see Zander, *The Police and Criminal Evidence Act 1984*, *supra*, at p. 347; R. Stone, 'Exclusion of Evidence under Section 78 of the Police and Criminal Evidence Act: Practice and Principles,' [1995] 3 *Web J.C.L* 1).

It should be noted that according to the legal position in England, the English doctrine of inadmissibility is not conditional upon the evidence being obtained by means of an illegal violation of a protected constitutional right. It is sufficient to prove that, in view of all of the circumstances of the case, including the circumstances of obtaining the evidence, admitting it in the trial would prejudice the fairness of the proceedings. A study of English case law shows that most of the cases where evidence was declared inadmissible under the aforesaid s. 17(1) concerned evidence that was obtained by the police by means of a serious violation of the provisions of the PACE or of the Codes of Practice that were issued under the aforesaid law and have the status of secondary legislation. Notwithstanding, English case law has emphasized that evidence may be inadmissible also because of the use of unfair investigation methods, and it is not necessary to prove formal illegality in obtaining the evidence.

In concluding these remarks, we should point out that the European Convention on Human Rights is silent on the question of the admissibility of illegally obtained evidence, and this matter is regulated in the internal law of the states. Notwithstanding, the European Court of Human Rights has held that a violation of a protected right under the Convention when obtaining the evidence does not necessarily result in its inadmissibility. According to the court, the circumstances of each case should be considered on the merits to determine whether admitting the evidence will make the trial as a whole unfair under s. 6 of the Convention. Thereby the European Court of Human Rights approved the position of English law on this subject (see Zander, *The Police and Criminal Evidence Act 1984*, *supra*, at pp. 347-348; Archbold, *Criminal Pleading, Evidence and Practice* (London, P.J. Richardson ed., 2003), at p. 1477).

59. The South African constitution of 1996 also contains an express provision with regard to the inadmissibility of illegally obtained evidence, which states:

> '35. Arrested, detained and accused persons
>
> …
>
> (5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'

Like the doctrine of inadmissibility practised in England and Canada, s. 35(5) of the South African Constitution also provides a relative doctrine that leaves the court discretion in excluding the evidence. The theoretical model on which the inadmissibility doctrine is based is not the giving of relief for the initial violation of the constitutional right when the evidence was obtained, but the prevention of future harm to protected values — the fairness of the proceeding and the harm to the administration of justice system — as a result of admitting the evidence ('the preventative model').

Adopting a case law doctrine of inadmissibility in our legal system — guiding principles

60. How should we formulate the case law doctrine of inadmissibility in Israel? What ought to be the nature of this doctrine and what are the general principles that should guide us in determining its framework? In view of the characteristics of our legal system and the basic outlooks that prevail in it, and against the background of the interpretive inspiration that may be derived from the experience of other countries, as has been set out above, I think that it is possible to reach the following conclusions:

Of the two theoretical models that we have discussed, I believe that the appropriate model for our legal system is the 'preventative model' according to which the inadmissibility of evidence will be a relief whose purpose is to prevent a future violation of a protected value when the evidence is admitted in a trial, and not remedial relief for the initial harm to the accused that was completed when the evidence was obtained. The rejection of the 'remedial model' is based on two reasons: *first*, the 'remedial model' which is practised in the United States bases the relief of inadmissibility on the existence of a violation of a *constitutional* right at the time of obtaining the evidence. At the current time, our legal system does not have a complete and comprehensive constitutional bill of human rights. As I said in para. 20 *supra*, the question of

the constitutional status of the procedural rights of persons under interrogation, suspects and defendants in criminal proceedings has also not received a clear and comprehensive response. Different approaches are possible on the question of which procedural rights that are not listed expressly in the Basic Law should be included within the framework of the constitutional right to dignity and liberty. In view of this, it would seem that the adoption of the 'remedial model' may raise significant difficulties in our legal system. *Second*, from a theoretical point of view, it is doubtful whether excluding illegally obtained evidence really gives relief for a violation to a protected right of the defendant that was completed. The illegal violation of the right to privacy and property occurs at the time of the search. Whether evidence was discovered in that search or not is immaterial from the viewpoint of the violation of the right that has already taken place. Therefore, there is a basis to the argument that excluding the evidence does not constitute remedial relief for the violation of a protected right that has been completed. *Third*, there are some who argue that the 'remedial model' leads to an improper discrimination between persons under interrogation. This is because this model offers relief for the initial violation of the constitutional right only for persons under interrogation who are indicted and against whom the evidence is presented by the prosecution in their trial (see, in this regard, Gross, 'A Constitutional Rule of Inadmissibility — Has it a Place in Israel?' *supra*, at p. 170). *Fourth*, it is possible to point to alternative reliefs — criminal, disciplinary, tortious and possibly even constitutional — for the initial violation of a protected right of the person under interrogation at the time that the evidence was obtained. In view of the existence of alternative reliefs as aforesaid and the social price involved in the exclusion of evidence that is capable of contributing to the discovery of the truth, it is doubtful whether there is a justification for adopting the 'remedial model.'

The vast majority of the aforesaid difficulties do not arise with regard to the 'preventative model,' within which framework the exclusion serves as a defensive relief that is intended to prevent a future violation of a protected value when the evidence is admitted in a trial. And indeed, apart from the American legal system, all the other common law countries that we have discussed saw fit to adopt the 'preventative model' and to base the inadmissibility doctrines that they practise on this model.

61. With regard to the dominant purpose that should lie at the heart of the case law doctrine of inadmissibility that we should adopt, it appears that the educational-deterrent cannot be the main purpose of this doctrine. In view of the American experience, it is questionable whether the exclusion of illegally obtained evidence does indeed constitute an effective means of educating and deterring the investigation agencies from the use of improper investigation methods (see, in this regard, LaFave and Israel, *Criminal Procedure*, *supra*, at pp. 315-316; H.M. Caldwell and C.A. Chase, 'The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding about Its Effects Outside the Courtroom,' 78 *Marq. L. Rev.* (1994) 45, at p. 55). It should be noted that even in the context under discussion there are some who argue that there are alternative legal measures for educating and deterring investigators who made use of illegal investigation methods, including the filing of disciplinary, criminal or civil proceedings against the investigators who have acted improperly. Filing such proceedings constitutes a direct sanction against those investigators, and therefore there are some persons who think that this is a more effective relief for the purposes of education and as a deterrent.

Taking all of the aforesaid into account, it would appear that the educational-deterrent purpose cannot serve as a strong basis for formulating a doctrine for excluding illegally obtained evidence in our legal system. In view of the commitment of this court since its inception to the protection of human rights and the inspiration of the Basic Laws concerning human rights, it would appear that the purpose of protecting the fairness and integrity of the criminal process is the main purpose that should assist in formulating the aforesaid doctrine. The educational-deterrent purpose may be a possible and even a desirable side-effect of the exclusion of the evidence within the framework of this doctrine.

62. With regard to the degree of flexibility of the case law doctrine of inadmissibility, counsel for the appellant, as well as the Israel Bar Association and the National Public Defender's Office, expressed support for the adoption of a *relative* doctrine, which leaves the court discretion to exclude illegally obtained evidence after taking into account the circumstances of each case on its merits. Indeed, there are many reasons that support the adoption of such a relative doctrine. As we explained above, the question of the admissibility of illegally obtained evidence requires us to find

a proper balance between the protection of the rights of the accused and safeguarding the fairness and integrity of the criminal process, on the one hand, and competing values and interests, including the value of discovering the truth, fighting increasing crime and protecting public safety and the rights of victims of crime, on the other. It has already been said in our case law, in another context, that 'we should… find a proper balance between the need to protect the right of the individual to dignity, liberty, privacy and a fair trial, on the one hand, and the need to protect the rights of society and its individuals against crime, on the other. We should refrain from paying too dear a price, whether from a desire to win the war against crime or a desire in another direction, to overprotect the suspect and the accused' (*per* Justice Strasberg-Cohen in *Hachmi v. Justice of Tel-Aviv-Jaffa Magistrates Court* [70], at p. 761). Consequently, the aforesaid balancing should be done with proper care and with a view to all of the circumstances of the case. As we shall explain below, a serious illegal act that was carried out intentionally by the investigation authorities cannot be compared to a negligible defect in the investigation process that was done in good faith and without any real ramifications on the rights of the person under interrogation. Because of the complexity of the matter and the many factors that should be taken into account, it is not desirable to adopt a strict rule of inadmissibility, but we should leave the court with discretion on the question of the admissibility of illegally obtained evidence, so that it can take into account the circumstances of each case on its merits. For these reasons, this court has in the past already expressed the opinion that there is no basis for adopting strict rules of inadmissibility like those that are practised in the American legal system, and that the relativity of the doctrine of inadmissibility is '… a basic condition for doing justice' within its framework (*per* Justice Mazza in *State of Israel v. Nahmias* [60], at p. 339).

It should be noted that giving discretion to the court as aforesaid is consistent with the general theory of checks and balances that characterizes our legal system and it is consistent with the values of the State of Israel as a Jewish and democratic state (see, in this regard, Elon, 'The Basic Laws — Enshrining the Values of a Jewish and Democratic State,' *supra*, at p. 82). Moreover, the adoption of a relative doctrine that gives the court discretion on the question of the admissibility of illegally obtained evidence is consistent with our duty to act moderately and carefully when changing a

case law rule that has existed in the matter under discussion until now (see, on this point, para. 50 *supra*). It is supported by the relative arrangements that were adopted in other common law countries and the lessons learned from the criticism levelled at the sweeping exclusionary rules practised in the American legal system.

The case law doctrine of inadmissibility — its nature and scope

63. In view of all of the conclusions that we have reached in our deliberations up to this point, it is possible to formulate the case law doctrine of inadmissibility that we are adopting in our legal system as follows:

The premise for the question of the admissibility of evidence is the same that has always been applied in Israel, according to which evidence that is relevant is admissible in a trial. Notwithstanding, the court has discretion to exclude evidence in criminal cases if it finds that the evidence was obtained illegally and admitting it in the trial will result in serious harm to the right of the accused to a fair criminal trial that departs from the framework of the limitations clause.

Thus we see that according to the case law doctrine, the inadmissibility of evidence in criminal cases because of the manner of obtaining it depends upon satisfying two conditions simultaneously: first, that the evidence was obtained illegally, and second, that admitting the evidence in the trial will significantly harm the right of the accused to a fair trial contrary to the conditions of the limitations clause. It should be emphasized that according to the 'preventative model,' which we have discussed, the inadmissibility of evidence is intended to prevent an illegal violation of the right to a fair trial *as a result of admitting the evidence in the trial* — a violation that is distinct and separate from the initial violation of the accused's rights that was completed when the evidence was obtained. Let us now consider in greater detail the nature of the aforesaid conditions.

(a) Illegally obtained evidence

64. The first condition for the application of the case law doctrine of inadmissibility is that the evidence was obtained illegally by the law enforcement authorities. The question of what is 'illegally' obtained evidence cannot be given a precise and comprehensive answer. As a rule, it can be said that we are speaking of evidence that was obtained by means of illegal

investigation methods, namely, methods that are contrary to a provision contained in statute, regulations or binding practice, methods that are unfair or methods that illegally violate a protected basic right. Naturally the question of the illegality or the unfairness of the investigation methods should be examined in accordance with the circumstances of each case on its merits. It has already been said in our case law that:

> 'It is not possible to define what will be considered unfair or immoral in an investigation; it is necessary to consider this matter in accordance with the circumstances of each case. Thus, for example, a method of investigation that is permitted vis-à-vis an adult may be forbidden vis-à-vis a minor, and what an investigator may be permitted to do in a murder investigation he may not be permitted to do in the investigation of a traffic offence' (*per* President Y. Kahan, in *Muadi v. State of Israel* [36], at pp. 250-251; with regard to the general principles for reasonable rules of investigation, see also the remarks of President Barak in HCJ 5100/94 *Public Committee Against Torture v. Government of Israel* [26], at pp. 834-836 {589-592}).

In any case, in order to exclude evidence under the aforesaid doctrine, a connection is required between the use of the improper investigation methods and the obtaining of the evidence. The question of the nature and strength of the aforesaid connection can be left to be resolved in the future (on the aforesaid connection in Canadian law, see Hogg, *Constitutional Law of Canada*, *supra*, at pp. 913-914).

It should be emphasized that within the framework of the case law doctrine of inadmissibility, it is *not* essential to prove that the evidence was obtained by means of a violation of a right that has constitutional status. As stated, contrary to the legal position in the United States, Canada and South Africa, in Israel a complete and comprehensive charter of rights has not yet been formulated, and therefore the application of the case law doctrine of inadmissibility is not restricted to evidence that was obtained specifically by means of a violation of a constitutional right. Instead, the doctrine provides a condition similar to the one practised in England and Australia, according to which the court must be persuaded that the law enforcement authorities obtained the evidence illegally, unfairly or by means of a violation of a protected human right.

(b) Admitting the evidence in a trial will significantly violate the right of the accused to a fair trial, contrary to the terms of the limitations clause

65. The focus of the second condition for the application of the case law doctrine of inadmissibility is the right of the accused to a fair criminal trial. Thereby we realize the main purpose of the doctrine under discussion, namely the protection of the rights of the accused and the fairness and integrity of the criminal trial. Thus we are following a similar path to the one chosen in England, Canada and South Africa, where the protection of the fairness of the proceedings and public confidence in the administration of justice process are the centre of gravity of the inadmissibility doctrines practised in their legal systems. In this context, it should be stated that the draft Evidence Ordinance Amendment (Inadmissibility of Evidence) Law, 5765-2005, which was tabled in the Knesset on 21 February 2005 also proposed that the inadmissibility of evidence that was obtained by 'improper methods' should be based on the right of the accused to a fair trial.

66. Even though the right to a fair criminal proceeding has been recognized in our legal system as a basic right from its inception, it would appear that defining the content and internal scope of the aforesaid right is not a simple task. We are speaking of a multifaceted right that is open-ended, and its title and precise content vary from one legal system to another, even in the various international conventions. Thus, for example, in the American legal system the Fifth and Fourteenth Amendments of the Constitution speak of the right to 'due process'; in South Africa the provisions of art. 35(3) of the Constitution of 1996 address the right to a 'fair trial'; by contrast, the provisions of s. 11(d) of the Canadian Charter, as well as the provisions of art. 10 of the Universal Declaration of Human Rights, the provisions of s. 14(1) of the International Covenant on Civil and Political Rights and the provisions of s. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms refer to the right to a 'fair hearing.' The internal scope of the aforesaid rights is not identical in the various legal systems and even in the different sources of internal law. It is clear, therefore, that defining the boundaries of the right to a fair criminal trial is a difficult and complex task, and it must be done while taking into account all of the principles and characteristics of the relevant legal system (see, in this regard, D. Cheney, L. Dickson, J. Fitzpatrick and S. Uglow, *Criminal Justice and the*

Human Rights Act 1998 (1999); see also the remarks of Justice Adiel in HCJ 3992/04 *Maimon-Cohen v. Minister of Foreign Affairs* [87], at pp. 67-68).

Against this background, it would appear that it is possible to point to several characteristics of the right to a fair criminal trial in our legal system: *first*, the purpose of the aforesaid right is to ensure a fair procedure and proper procedural safeguards for the fairness of the criminal trial vis-à-vis the accused. Procedural fairness is, therefore, what lies at the heart of the aforesaid right. *Second*, the right to a fair criminal proceeding applies to all stages of the criminal proceeding, 'both in the investigation stage and in the trial stage' (*per* Justice Barak in *Kanir v. State of Israel* [64], at p. 516). Indeed, the police investigation stage is a preliminary proceeding to the trial itself, such that defects that occurred in it may have ramifications on the fairness of the criminal proceeding as a whole. This was discussed by Justice H.H. Cohn, who said that '… the whole of the police investigation is merely preparatory to the trial, and crimes committed in the investigation can cast a dark shadow on the trial proceedings that come in its wake' (*Abu-Madijem v. State of Israel* [35], at p. 381). *Third*, the protection of the right to a fair criminal trial is not confined to examining the potential effect of procedural defects specifically on the outcome of the trial; this context requires a broader perspective that is based on general considerations of fairness, justice and preventing a miscarriage of justice. *Finally*, we should point out that the right to a fair criminal trial is a multifaceted right, which may serve as a basis for deriving many procedural rights of the person under interrogation, the suspect and the accused in criminal proceedings. Without exhausting the issue, we should point out that in foreign legal systems that are similar to our own and even in international conventions, the right to a fair criminal trial includes the right of the accused to know why he was arrested and what are the charges against him, the right to be represented by a lawyer, the right to be present at the trial, the right to an open trial by an unbiased and neutral tribunal and the right to defend himself at the trial and to present relevant evidence. The aforesaid right also includes the presumption of innocence, the principle of legality and the prohibition of placing the accused in double jeopardy of a conviction for the same act (see Cheney et al., *Criminal Justice and the Human Rights Act 1998*, *supra*, at pp. 77-78). In many countries that have a legal tradition similar to ours and in the case law of the European Court of Human Rights, it has been held that the right to a fair criminal trial

also includes the right to consult a lawyer and even the right to remain silent and the right not to incriminate oneself at the interrogation stage, even though this does not prevent adverse inferences being drawn from the silence of the accused in his interrogation (see, for example, the position of English case law on this issue, which has been approved by the European Court of Human rights: Cheney et al., *ibid*., at pp. 86-90; see also A. Ashworth, 'Article 6 and the Fairness of Trials,' [1999] *Crim. L. R.* 261, at pp. 265-267).

67. As stated, this court has recognized the right to a fair trial as a fundamental and basic right from its inception. The draft Basic Law: Trial Rights (*Draft Laws* 1994, 335), proposed expressly enshrining the right to a fair trial and to due process in a Basic Law, but until now this proposal has not been adopted.

Many authorities are of the opinion that when the Basic Law: Human Dignity and Liberty was enacted, the right to a fair criminal trial obtained a constitutional super-legislative status. This position makes much sense. An illegal violation of the right to a fair trial in criminal proceedings may violate the constitutional right of the accused to liberty under s. 5 of the Basic Law. It may also harm the accused's self-image and give him a feeling of degradation and helplessness as if he is a plaything in the hands of others, to the extent of a violation of his constitutional right to dignity under ss. 2 and 4 of the Basic Law (on the constitutional status of the right to a fair criminal trial, see the remarks of Justice Dorner in RT 3032/99 *Baranes v. State of Israel* [88], at p. 375; the remarks of President Barak in RT 8483/00 *Deri v. State of Israel* [89], at p. 263; the remarks of Justice Türkel in CrimA 1741/99 *Yosef v. State of Israel* [90], at p. 767; the remarks of Justice Strasberg-Cohen in HCJ 6972/96 *Association for Civil Rights in Israel v. Attorney-General* [91], at p. 782; see also Barak, *Constitutional Interpretation*, *supra*, at p. 422; Barak, 'Human Dignity as a Constitutional Right,' *supra*, at p. 281). In the case before us, we do not need to decide the question whether the right to a fair criminal trial and the specific rights derived therefrom have acquired a constitutional status *for their whole scope*. We can rely merely on the ruling that was recently confirmed in the case law of this court with an expanded panel of eleven justices, according to which '… in appropriate circumstances, a *substantial violation* of the right to a fair trial will amount to a violation of the constitutional right to human dignity

(see HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [92], at para. 173; emphasis supplied).

Accordingly, the case law doctrine of inadmissibility provides that illegally obtained evidence shall be inadmissible, if admitting it in the trial will create a *substantial* violation of the right to a fair trial *contrary to the terms of the limitations clause*. In other words, in order to exclude illegally obtained evidence, admitting it in the trial must violate the fairness of the proceedings vis-à-vis the accused in a way that is substantial, for an improper purpose and to an extent that is excessive. In such circumstances, admitting the evidence in the trial will amount to an illegal violation of the constitutional right to dignity and liberty. In order to prevent this violation, the court should declare the evidence inadmissible. Excluding the evidence in the aforesaid circumstances is required by the purpose and compliance clauses provided in the Basic Law: Human Dignity and Liberty. It is derived from the obligation of the court not to violate the aforesaid constitutional right (*status negativus*) and also from its duty to protect it (*status positivus*) (see Barak, 'Human Dignity as a Constitutional Right,' *supra*, at p. 273). In view of all of these, it appears that apart from the general interpretive spirit of the Basic Law, its provisions also serve as a basis for the normative enshrining of the case law doctrine of inadmissibility that we are adopting.

68. The restriction of the doctrine under discussion to circumstances in which admitting evidence at the trial will lead to a *substantial* violation of the right to a fair trial contrary to the terms of the limitations clause gives expression to the relativity of the aforesaid right. Indeed, like all the rights that are recognized in our legal system, the right to a fair criminal trial is also not absolute. The scope of the protection given to it is derived from the need to balance it against the competing values, rights and interests that we have discussed, including the values of discovering the truth, fighting crime, protecting public safety and protecting the rights of potential and actual victims of crime. Justice D. Levin rightly said in this regard: 'The public interest in protecting the integrity of the judicial process should not make us forget other important public interests, such as the public interest in conducting trials to their conclusion, discovering the truth and the private interest of the injured victim' (*Yefet v. State of Israel* [77], at p. 369). 'The fairness of the trial, to which we aspire, is not merely fairness vis-à-vis the accused, but also vis-à-vis anyone who seeks the help of society in drawing

conclusions from his degradation and humiliation as a human being' (*per* President Shamgar in CrimFH 3750/94 *A v. State of Israel* [93], at p. 630).

The fundamental balancing formula between all of the aforesaid interests and values is the one that we have discussed, according to which illegally obtained evidence will be inadmissible only if the court discovers that admitting it in the trial will lead to a substantial violation of the right to a fair criminal proceeding, which is not for a proper purpose and to an extent that is excessive. The aforesaid balancing formula will be applied at the discretion of the court, in view of the special circumstances of the case that comes before it. Below we shall discuss the basic criteria for exercising the aforesaid judicial discretion.

Criteria for exercising judicial discretion within the framework of the case law doctrine of inadmissibility

69. In order to decide the question whether evidence should be declared inadmissible within the framework of the case law doctrine of inadmissibility, the court should consider a variety of considerations in accordance with the circumstances of the case before it. As I shall explain below, it is possible to point to three main groups of relevant considerations with regard to the question of when admitting illegally obtained evidence in a trial will inflict a substantial violation on the right of the accused to a fair trial contrary to the terms of the limitations clause. It should be emphasized that we are not speaking of a strict and exhaustive list of considerations, but merely guidelines for the court in exercising its discretion within the framework of the fundamental balancing formula on which the case law doctrine of inadmissibility is based.

(a) The character and seriousness of the illegality that was involved in obtaining the evidence

70. As I said above, the first condition for the application of the case law doctrine of inadmissibility is that the evidence was obtained illegally, i.e., in an illegal or unfair manner or by means of a violation of a protected right of the person under investigation. According to this, the first relevant group of considerations for deciding the question of the admissibility of illegally obtained evidence focuses on the improper conduct of the investigation authorities. In this context, the court should consider the following issues:

Justice D. Beinisch

First, what is the character and seriousness of the illegality or the unfairness that were involved in obtaining the evidence? Logic dictates that a technical, negligible or inconsequential violation of the rules of proper investigation is not the same as a serious breach of these rules involving a significant violation of one of the main basic rights of the person under investigation. In general, admitting evidence at a trial, even though it was obtained by means of technical and marginal defects, does not substantially violate the right of the accused to a fair trial, and therefore there will be no reason to exclude it. This result is desirable because '… the criminal trial should not adopt the form of a game of chess in which one wrong move determines the result of the game (*per* Justice Zamora in CrimA 1/48 *Silvester v. Attorney-General* [94], at pp. 18-19; see also my remarks in CrimFH 4603/97 *Meshulam v. State of Israel* [95], at p. 197). On the other hand, in cases where the evidence was obtained by means of a major violation of an express provision of statute that was intended to protect the rights of defendants in their interrogations, or in circumstances where obtaining the evidence involved a serious violation of one of the main basic rights of the person under investigation, the weight of the values that support the inadmissibility of the evidence will increase. Between these two extremes of the types of violations there is a wide range of possibilities. Not every departure from the investigation rules and not every method adopted in an investigation, even if they are unacceptable to the court, will result in the inadmissibility of the evidence. It should be stated that the seriousness of the violation of the rules of proper investigation constitutes a main consideration for excluding illegally obtained evidence in all the legal systems in which relative doctrines of inadmissibility are practised. It should also be emphasized that this approach is consistent with the doctrine of relative voidance that is practised in our legal system, according to which not every deviation from the law nor every impropriety will lead to a result of voidance.

Second, the court should examine whether the law enforcement authorities made use of the improper investigation methods intentionally and deliberately or in good faith. When the investigation authorities have intentionally violated the provisions of law that bind them or they have knowingly violated a protected right of the person under investigation, this is capable of increasing the seriousness of the violation of the rules of proper

investigation and the possible violation of due process if the evidence is admitted in the trial. Conduct that involves an intentional violation on the part of the investigation authorities may, therefore, be a circumstance of considerable weight for declaring the evidence inadmissible even when the defect is not serious. Notwithstanding, it should be pointed out that the fact that the authority acted in good faith does not necessarily prevent the evidence being excluded when this is required in order to protect the right of the accused to a fair criminal trial. Thus, for example, in circumstances where the defect that occurred in the manner of obtaining the evidence was serious and involved a substantial violation of the protected rights of the person under investigation, then the mere fact that the authority acted in good faith will not prevent the evidence being excluded. It should be noted that this is also the case law rule practised in Canada and in England (with regard to the case law rule in Canada, see the leading decision in *R. v. Collins* [108]; with regard to the rule in England, see Archbold, *Criminal Pleading, Evidence and Practice*, *supra*, at p. 1480).

Third, the court should consider whether in the case before it there are 'mitigating circumstances' that are capable of reducing the seriousness of the illegality that was involved in obtaining the evidence. This is the case, for example, when the illegality committed by the investigation authorities was intended to prevent the disappearance or destruction of essential evidence by the accused, when the accused contributed to the illegality in conducting the investigation, by abusing his rights, or when the illegality was the result of an urgent need to protect public security (see and cf. *Smirk v. State of Israel* [18], at p. 546).

Fourth, the court should consider how easy it would have been to obtain the evidence lawfully. If obtaining the evidence in permitted ways was possible and easy, then the violation of the rules of proper investigation should be considered more serious, in such a way that it will support the conclusion that admitting the evidence in the trial will create a serious and disproportionate violation of the right of the accused to a fair trial.

Finally, the court may consider whether the evidence would have been discovered or obtained by the law enforcement authorities even without making use of the improper investigation methods. When the answer to this question is yes, this may reduce the strength of the violation of the right of

the accused to a fair trial if the evidence is admitted in the trial (see and cf. *Hasson v. State of Israel* [57], at p. 283, where the court concluded that in view of all the circumstances of the case, the accused would have made his confession even had it not been for the illegal violation of his right to consult a lawyer. Therefore the court refrained from declaring the statement inadmissible in that case).

(b) The degree to which the improper investigation method influenced the evidence that was obtained

71. The second relevant group of considerations for the exercising of judicial discretion within the framework of the case law doctrine of inadmissibility concerns the degree to which the illegal or unfair investigation method affected the evidence that was obtained. In this context, the court should consider two interrelated questions: *first*, to what degree was the illegality that was involved in obtaining the evidence likely to affect the credibility and probative value of the evidence. In circumstances where there is a concern as to the credibility of the evidence, the tension between the value of discovering the truth and the protection of the fairness and integrity of the process is reduced, in such a way that may support the inadmissibility of the evidence. *Second*, the court should consider whether the existence of the evidence is independent and distinct from the illegality that was involved in obtaining it. In circumstances where the answer to this is yes, the improper investigation methods are not capable of affecting the content of the evidence, and this is likely to constitute a consideration in favour of admitting it in the trial.

With regard to the two aforesaid questions, there may be great importance in the character of the evidence (tangible, verbal, etc.) that is being considered. Tangible evidence, such as firearms, drugs or stolen property have an independent and distinct existence from the illegality that was involved in obtaining them, and as a rule the aforesaid illegality will not be sufficient to render this evidence inadmissible. Therefore, the weight of the considerations that support the admissibility of tangible evidence is usually great (see J.R. Spencer's chapter on 'Evidence' in *European Criminal Procedure* (Cambridge Studies in International and Comparative Law, M. Delmas-Marty and J.R. Spencer eds., 2002), at p. 605). Notwithstanding, it

should be emphasized that even in this context we are not speaking of a strict rule, and the matter depends on the circumstances of each case on its merits.

In closing these remarks, I think it right to point out that since the case law doctrine of inadmissibility that we are adopting is not mainly based on an educational-deterrent purpose, we should not adopt in our legal system the 'fruit of the poisonous tree' doctrine that prevails in the United States (see para. 56 *supra* on this doctrine). The question of the admissibility of evidence that was found as a result of other inadmissible evidence should be considered in accordance with the circumstances of each case on its merits, while taking into account the effect that admitting the aforesaid evidence would have on the right of the accused to a fair criminal trial. In this context, the court should examine all of the considerations that we discussed above, including the character and seriousness of the illegality that led to obtaining the original evidence, the nature of the derived evidence concerned and the connection between it and the illegality that was involved in conducting the investigation.

(c) The social damage, as compared with the social benefit, in excluding the evidence

72. The third group of considerations that may be relevant when deciding the question of the admissibility of illegally obtained evidence concerns the effect that excluding the evidence will have on the work of administering justice in its broad sense. The main question that arises in this context is whether the social price involved in excluding the evidence is higher than the potential benefit that will arise from admitting it. The main parameters in this regard are the importance of the evidence for proving guilt, the nature of the offence attributed to the accused and its degree of severity. When we are concerned with evidence that is important and decisive for the prosecution and when the offences attributed to the accused are very serious, the exclusion of the evidence may cause excessive harm to the public interests of fighting crime and protecting public safety and the victims of crime. In these circumstances, the exclusion of the evidence will lead to the fact that the person who is guilty of committing serious offences will not be held accountable for his deeds, a consequence that may in itself undermine the administration of justice and public confidence in the courts. For these reasons, the courts in England and Australia are accustomed to taking into

account the degree to which the evidence is essential and the seriousness of the offence attributed to the accused, when they decide the question of the admissibility of illegally obtained evidence (see Spencer, 'Evidence,' *supra*, at p. 605; *Bunning v. Cross* [106]; s. 138(2) of the Uniform Evidence Acts 1995 in Australia.

73. Notwithstanding the aforesaid, I am not unaware that giving weight to the importance of the evidence and the seriousness of the offence attributed to the accused when deciding the question of the admissibility of illegally obtained evidence involves certain difficulties. Taking into account the aforesaid considerations may lead to a situation in which precisely in investigations of serious felonies in which the constitutional right of the accused to dignity and liberty deserves substantial protection, the compliance with the rules of conducting a fair and proper investigation will decrease. In this context we should point out that in *R. v. Collins* [108] the Supreme Court of Canada saw fit to include the seriousness of the offence among the relevant considerations for exercising judicial discretion within the framework of s. 24(2) of the Charter, but in practice the courts in Canada tend to give the aforesaid consideration very little weight, and they do not take it into account when they decide the question of the admissibility of evidence that was obtained in violation of the Charter (see Hogg, *Constitutional Law of Canada*, *supra*, at pp. 931-932; for criticism of this trend in Canadian case law, see Stribopoulos, 'Lessons from the Pupil: A Canadian Solution to the American Exclusionary Rule Debate,' *supra*, at footnote 229).

The question of the degree to which the courts in Israel should take into account the importance of the evidence and the seriousness of the offence attributed to the accused within the framework of exercising their discretion under the case law doctrine of inadmissibility does not require a decision in the appellant's case and we can leave this too to be decided in the future.

74. As I have already said, the list of considerations enumerated above does not purport to be a closed and exhaustive list. It gives examples of the type of circumstances and facts that may influence the court when exercising its discretion within the framework of the case law doctrine of inadmissibility. These facts concern, on the one hand, the degree of the harm to the accused's right to a fair trial if the evidence is admitted in court, and,

on the other hand, the extent of the harm to the conflicting interests if the evidence is declared inadmissible. It is important to emphasize that none of the considerations that we have discussed have an exclusive or decisive status, and that the relative weight of the aforesaid considerations will be determined in the circumstances of each case on its merits. Thus, for example, if the violation of the rules of proper investigation is serious and without it the evidence would not have been obtained, and if the offence attributed to the accused is a less serious one, then the weight of the interests supporting the admissibility of the offence will be reduced. In such circumstances, the protection of the right of the accused to a fair trial is likely to lead to the exclusion of the evidence.

In view of the fundamental balancing formula that we have discussed, and in view of the guidelines that we have set out above, I think that the concerns that the prosecution expressed before us, with regard to the uncertainty that will be caused as a result of the adoption of a case law doctrine of inadmissibility in our legal system, are exaggerated. Since we are speaking of a flexible doctrine, often the result will be identical to the one under current case law. In certain cases, a change will be required in the outcome, but this change is unavoidable in view of the normative changes that have been brought about by the Basic Laws that address human rights. This change will find expression as case law develops, by means of careful progress from case to case and by specific applications of the balancing formula that we have discussed, according to the circumstances of each case on its merits. In time, the nature and scope of the case law doctrine of inadmissibility, for which we have laid the foundation in our judgment, will become clear. Baseless applications for the exclusion of evidence will become fewer, and the arguments will become more focused. The experience of other countries that have adopted relative doctrines for the inadmissibility of illegally obtained evidence — whether in case law or in statute — shows that it is indeed possible to overcome the concerns with regard to uncertainty and the flooding of the courts with baseless claims that illegally obtained evidence should be excluded. It can be assumed that when the initial transition period is over, the same will also be the case in Israel (see and cf. the remarks of President Barak in CrimApp 537/95 *Ganimat v. State of Israel* [45], at p. 420, and his remarks in *Barki Feta Humphries (Israel) Ltd v. State of Israel* [47], at pp. 787-788).

The application of the case law doctrine of inadmissibility to defendants' confessions

75. The last issue that we shall address before we turn to consider the specific case of the appellant before us concerns the question of the relationship between the rule of inadmissibility provided in s. 12 of the Evidence Ordinance and the case law doctrine of inadmissibility that we are adopting into our legal system. The interpretive question that arises in this regard is whether the rule of inadmissibility provided in the aforesaid s. 12 constitutes a comprehensive arrangement for the purpose of the admissibility of confessions of the accused, as argued by the attorney-general in his summations before us and as thought by the one of the justices of the appeals court martial in the minority opinion, or whether the aforesaid s. 12 does not constitute a comprehensive arrangement as aforesaid, and therefore there is nothing to prevent the case law doctrine of inadmissibility applying also to a confession of an accused.

According to our interpretive approach as set out in para. 32 *supra*, in addition to the purpose concerning the protection of the credibility of defendants' confessions, the rule of inadmissibility provided in s. 12 of the Evidence Ordinance is intended to protect the right of the person under interrogation to physical and emotional wellbeing and his right to the autonomy of free will. The inadmissibility of a confession under s. 12 therefore constitutes a relief for a substantial violation of one of the aforesaid rights of the accused when the confession was made. By contrast, the case law doctrine of inadmissibility is intended to prevent an illegal violation of the right to a fair criminal trial if the evidence is admitted in the trial. These purposes do not conflict with one another, but are complementary. Consequently, there is a purposive justification for having the case law doctrine of inadmissibility apply to the confessions of defendants *in addition to* the rule of inadmissibility provided in s. 12 of the Evidence Ordinance. Accordingly, a defendant's confession may be found to be admissible under the provisions of s. 12 of the Evidence Ordinance but inadmissible within the framework of the case law doctrine of inadmissibility, and *vice versa*.

Support for this conclusion can be found in comparative law. The Supreme Court of Canada held that the 'free will' test that was originally adopted in its case law from English common law continues to exist

alongside the doctrine of inadmissibility provided in s. 24(2) of the Charter. It was also held that the 'free will' test cannot prevent the application of the aforesaid doctrine to defendants' confessions (see *R. v. Oickle* [107]). In addition, we should point out that the doctrines of inadmissibility adopted in England and Australia with regard to illegally obtained evidence have also been applied to all types of evidence, including defendants' confessions, alongside special arrangements that were provided in legislation with regard to the admissibility of defendants' confessions (with regard to the application of the doctrine of inadmissibility enshrined in s. 78 of the PACE in England to defendants' confessions, see Archbold, *Criminal Pleading, Evidence and Practice*, *supra*, at p. 1476, and Tapper, *Cross and Tapper on Evidence*, at p. 193; with regard to the application of the Australia doctrine of inadmissibility, which is enshrined in s. 138 of the Uniform Evidence Acts, to defendants' confessions, see Australian Law Reform Commission, *Review of the Uniform Evidence Acts* (2005), at para. 14.67).

In view of all of the aforesaid reasons, we are led to the conclusion that s. 12 of the Evidence Ordinance is not a comprehensive arrangement with regard to the admissibility of confessions made by an accused in his interrogation. Consequently there is nothing that prevents the case law doctrine of inadmissibility also applying, in accordance with its purpose, to evidence of this kind. In closing we should point out that a similar question may arise with regard to the relationship between the rules of inadmissibility provided in the Protection of Privacy Law and the Eavesdropping Law, on the one hand, and the case law doctrine of inadmissibility that we are adopting into our legal system, on the other. This question does not arise in the circumstances of the case before us. Therefore I see no need to decide this issue and it may be addressed at a later date.

Summary

76. A summary of the main points of the case law doctrine of inadmissibility, as set out above, is as follows:

The premise for the question of the admissibility of evidence is the one that has been established in Israel since its inception, that evidence which is relevant is admissible in a trial. Notwithstanding, according to the aforesaid doctrine, the court has jurisdiction to declare evidence inadmissible in criminal cases, if it discovers that the evidence was obtained illegally and

admitting it in the trial will create a substantial violation of the right of the accused to a fair trial contrary to the terms of the limitations clause. We are speaking of a fundamental balancing formula that seeks to achieve a proper compromise between all of the rights and interests that are relevant to the question of the admissibility of illegally obtained evidence, including the discovery of the factual truth, the fight against crime and the protection of public safety and the rights of victims of the offence on the one hand, as opposed to the protection of the rights of the accused and the fairness and integrity of the criminal trial on the other.

The aforesaid balancing formula will be applied at the discretion of the court, while taking into account the circumstances of each case on its merits and in accordance with the guidelines that we have discussed. These guidelines concern the nature and seriousness of the illegality that was involved in obtaining the evidence, the degree to which the improper investigation method affected the evidence that was obtained and the question of the social damage as compared to the social benefit involved in excluding it. The aforesaid doctrine will be a general one and it will be applied to all types of evidence, including defendants' confessions.

77. It should be noted that our judgment assumes an infrastructure for adopting a case law doctrine of the inadmissibility of illegally obtained evidence, but our remarks do not provide a complete solution to all of the questions involved in the adopting of such a doctrine. Thus, for example, our judgment does not address the question whether an application to exclude illegally obtained evidence is the privilege of the accused only, or whether the prosecution may also make such an application; or, for example, who has the burden of proving the evidence involved in an application for such an exclusion and what is the appropriate stage for making the application. These questions will certainly be addressed in the future, whether in legislation that is consistent with the provisions of the Basic Law, or in the case law of the court, by means of careful steps from one case to the next.

78. Naturally, since we had not yet adopted our case law doctrine, the parties refrained from addressing in their arguments the question of when the case law doctrine that illegally obtained evidence is inadmissible should be introduced. This doctrine belongs to the sphere of the rules of evidence in criminal proceedings and its purpose is to protect the right of defendants to a

fair criminal trial. The adoption of the doctrine in our legal system is a required and expected development (see para. 49 *supra*), and its application does not harm a reliance interest worthy of protection. In view of all this, the ruling made by us shall apply to every defendant whose case is pending before the court, in so far as there are grounds for applying it in the circumstances of the case (see and cf. LCA 8925/04 *Solel Boneh Building and Infrastructure Ltd v. Estate of Alhamid* [96]; see also RT 8390/01 *Axelrod v. State of Israel* [97].

79. In conclusion and after reading the opinion of my colleague Justice Grunis, I would like to point out that contrary to what is implied by para. 6 of the opinion, my opinion does not address the ruling made in CrimA 242/85 *Hazan v. State of Israel* [98], and I see no reason to express any position on that issue. With regard to the other arguments that appear in the opinion of my colleague Justice Grunis, the response to them can be found in my remarks above, and I see no need to add anything further in this regard.

From general principles to the specific case — applying the doctrine of inadmissibility to the circumstances of the appellant's case

80. As I explained at length at the beginning of our deliberations, in the course of admitting the appellant into Prison 6 for being absent from the army without leave, a small packet wrapped in paper fell from his underpants, and then the appellant said: 'It is grass, I can explain.' The next day, the appellant was interrogated in the prison by a military interrogator. When he began taking his statement, the interrogator warned the appellant of his right to remain silent, but he refrained from advising him of his right to consult a lawyer. In the course of taking the aforesaid statement, the appellant confessed to the military investigator that he had smoked a drug of the cannabis type on several occasions during the period that he was absent from the army without leave. It will be remembered that before he finished taking the statement, the military investigator left the interrogation room and spoke on

the telephone with the military police commander who told him to arrest the appellant. At the end of the aforesaid telephone conversation, the investigator returned to the interrogation room and continued taking the appellant's statement. Only a quarter of an hour after finishing taking the first statement did the military investigator notify the appellant that he was under arrest and that he had the right to consult a lawyer.

The prosecution did not dispute, either before the court martial or before us, that the military investigator acted illegally when he refrained from warning the appellant of his right to consult a lawyer before he began taking his statement. As we clarified above, the investigator acted in this matter in contravention of the arrangement that was provided at that time in the guidelines of the military police investigation department and that was later enshrined in s. 227A1 of the Military Jurisdiction Law, according to which a soldier should be informed of his right to consult a lawyer whenever there is an almost certain likelihood that he will be arrested. In view of the aforesaid omission of the military investigator, the appellant was unaware of the right to consult a lawyer before his first statement was taken. Therefore the appellant did not ask to consult a lawyer before he confessed that he had used a dangerous drug while he was a soldier. In these circumstances, the parties before us agree that not giving the appellant the notice about his right to consult a lawyer amounted to a violation of the actual right to consult a lawyer (see para. 19 *supra*).

We have come to the conclusion that notwithstanding the aforesaid violation of the right to consult a lawyer, there was no substantial violation of the appellant's right to autonomy of will and freedom of choice when he made his confession. In view of this, we held that we should not intervene in the decision of both instances of the court martial, which did not declare the confession of the appellant inadmissible under the provisions of s. 12 of the Evidence Ordinance. But this conclusion is insufficient to end our deliberations. There is a separate question as to whether there is a basis for excluding the aforesaid confession of the appellant in accordance with the case law doctrine of inadmissibility that we are adopting into our legal system. It should be stated that the aforesaid doctrine applies in the appellant's case in view of what is stated in s. 476 of the Military Jurisdiction

Law, that: 'The rules of evidence that are binding in criminal matters in the courts of the state are also binding in a court martial…, when there is no contrary provision in this law.' It should also be noted that even though s. 9 of the Basic Law: Human Dignity and Liberty provides a special limitations clause for the security forces, as a rule this does not change the fundamental balancing formula on which the case law doctrine of inadmissibility is based or the guidelines for exercising judicial discretion within this framework. If and in so far as it is required, the nature and character of the military service will affect the *application* of the criteria that we have discussed, in view of the circumstances of each case on its merits (on the special limitations clause provided in s. 9 of the Basic Law, see the opinion of Justice Zamir in HCJ 6055/95 *Tzemah v. Minister of Defence* [99], at pp. 262-267 {657-663}).

81. In the circumstances of the case before us, the first condition for applying the case law doctrine of inadmissibility is satisfied, since there is no dispute before us that the military investigator acted illegally when he refrained from notifying the appellant before beginning to take his statement about his right to consult a lawyer. It remains, therefore, to examine whether admitting the appellant's confession as evidence in the trial will create a significant violation of his right to a fair criminal trial contrary to the terms of limitations clause.

We discussed above the importance of the right to consult a lawyer and its contribution to protecting the fairness and propriety of the interrogation proceedings (see para. 14 *et seq.*). In view of this, we said that a substantial violation of the right to consult a lawyer in the interrogation proceedings may in certain circumstances harm the fairness of the criminal justice process as a whole. In the appellant's case, the District Court Martial held, by a majority, that the military investigator acted — throughout all the stages of the interrogation — knowingly and intentionally in violation of the defendant's [the appellant's] right to consult a lawyer, and there was no basis for holding him to have acted in good faith in this respect' (p. 38 of the verdict). The Appeals Court Martial did not see fit to intervene in the aforesaid factual finding, and we too will refrain from doing so in the proceeding before us. The fact that the military investigator refrained intentionally from informing the appellant of his right to consult a lawyer and deliberately violated this basic right increases the severity of the illegality that was involved in obtaining the appellant's confession and constitutes a weighty reason for

excluding it as evidence. To this we should add the considerable ease with which it was possible to obtain the appellant's confession lawfully, and also the fact that the offences attributed to the appellant are not the most serious ones in the statute book. On the other hand, it should be noted that in his arguments before the court martial, counsel for the defence confirmed that the illegality under discussion did not undermine the credibility of the content of the confession given by the appellant in his interrogation. But the *prima facie* credibility of the confession, in itself, is incapable of being a sufficiently weighty reason when confronted with all the other considerations that we have discussed. Therefore, we are drawn to the conclusion that in the unique circumstances of the case before us, admitting the confession of the appellant in evidence will create a substantial and disproportionate violation of his right to a fair criminal trial and therefore we should declare it inadmissible.

In addition to the aforesaid, we should point out that counsel for the appellant argued in the notice of appeal that was filed in the court that the violation of the duty to give notice of the right to consult a lawyer was not an isolated event and that at the time the appellant was interrogated, the aforesaid violation was a common phenomenon in the investigations of the military police investigations department. The National Public Defender's Office raised a similar argument with regard to police investigations. In their written summations, the National Public Defender's Office gave details of the results of a field survey carried out at the end of 1999 and during 2003. The research was conducted on a group of 220 persons under arrest in the Tel-Aviv District. It is argued that the findings of the research show that a significant number of persons under arrest at police stations do not receive a statutory notice of their right to consult a defence lawyer. I would remark on this that I doubt whether the research method and the population group size that was examined by it allow reliable and comprehensive conclusions to be reached as was claimed before us. Indeed, the Public Defender's Office confirmed in its arguments that there may be a margin of error in the findings of the research that was conducted. Nonetheless in the case before us the need to decide this does not arise: *first*, as we have clarified above, the case law doctrine of inadmissibility is not based mainly on an educational-deterrent purpose. Therefore there is no need to prove that the illegality that was involved in obtaining the evidence is a common phenomenon, even if

such proof is likely to be a circumstance that the court would take into account within the framework of its considerations. *Second*, in view of all the reasons that were set out above, and especially in view of the finding of the court martial that the military investigator *intentionally* refrained from advising the appellant of the right to consult a lawyer, the confession that the appellant made in the interrogation should be declared inadmissible, whether the violation of the duty to give the notice is a common phenomenon as alleged by the appellant and the National Public Defender's Office, or not.

82. Consequently, in view of all the reasons that I have discussed above, I have reached the conclusion that we should allow the appeal in the appellant's case and declare his confession inadmissible in accordance with the conditions of the case law doctrine of inadmissibility. The appellant should therefore be acquitted of the three offences of using a dangerous drug, whereas his conviction on the offence of possessing a dangerous drug that he confessed should remain unaffected. In so far as the appellant's sentence is concerned, for the reasons set out above, the court martial refrained from imposing an actual custodial sentence for his conviction of the offences of making use of a dangerous drug, and it thought it sufficient to impose a suspended sentence for these offences. The operational period of the suspended sentence has already ended, and to the best of our knowledge the suspended sentence was not implemented during it.

I therefore propose that the appeal should be allowed and that the appellant should be acquitted of the three offences of making use of a dangerous drug.

President A. Barak

I agree.

Justice E. Rivlin

I agree.

Justice A. Procaccia

I agree.

Justice E.E. Levy

I agree.

Justice M. Naor

I agree.

Justice S. Joubran

I agree with the illuminating and comprehensive opinion of my colleague, Justice Beinisch.

Vice-President Emeritus M. Cheshin

I have read the *magnum opus* of my colleague, Justice Beinisch, and I agree with her conclusions, both with regard to the interpretation and implementation of the provisions of s. 12 of the Evidence Ordinance and with regard to the validity and effect of illegally obtained evidence. If I wish therefore to add two or three footnotes, these are not intended to derogate in any way from the illuminating remarks of my colleague.

2. With regard to the interpretation and scope of application of the provisions of s. 12 of the Evidence Ordinance, as my colleague said in her opinion, the core of the interpretation proposed by her was inherent in the provisions of s. 12 already before the enactment of the Basic Laws. All that has happened is that the Basic Laws and the 'spirit of the times' have germinated the seed that was previously dormant and hidden within the provisions of s. 12; now that the seed has been germinated, it has been nourished by the Basic Laws and the 'spirit of the times,' and thus it has succeeded in sprouting and growing until it has brought forth fruit, which is the fruit that we now have before us.

3. The interpretation currently being proposed for the provisions of s. 12 has two tributaries. The source of the *first tributary* in the language of s. 12. The court should ascertain that a confession brought before it as evidence was 'free and willing,' nothing more. But now this tributary is seeking to increase by one level or several levels the degree of abstraction of the concepts 'free and willing,' by determining that the essence of the matter before us, and other matters, is the autonomy of the individual and the freedom of choice given to him to make — or not to make — a 'free and willing' confession. Only someone who has personal autonomy — or, to put it another way, someone whose personal autonomy has not been substantially violated — can confess freely and willingly, and only a confession made by someone in this state can have a presumption of truth. Making a 'free and willing' confession is merely one of the manifestations of personal autonomy, and instead of focusing on the manifestation (the external appearance), we should prefer to examine the source, the root of the manifestation. It need not be said that the autonomy of the individual inherently includes also his right to physical and emotional wellbeing. We must remember and safeguard all this, because the formulation of criteria is only the beginning of the work; the essence lies in the methods of implementing them and in erecting fences around them.

4. The *second tributary* is the 'spirit of the times,' an inspiration that we have been fortunate to receive from the Basic Laws, from the general atmosphere, and no less importantly from the spirit of the age that reaches us mainly from countries with which we have a common way of legal thinking. It has been said in case law on more than one occasion that the interpretation of a statute of the Knesset is not like the interpretation of an old inscription found in an archaeological excavation. A statute of the Knesset is like a living and breathing fabric that is nourished by the spirit and substance of society as it prevails from time to time. The basic principles and doctrines that are a product of the age enter into the law and nourish its roots. We ourselves are the products of the 'spirit of the times,' and with our spirit — the 'spirit of the times' — we will establish and strengthen the law. See and cf. CFH 7325/95 *Yediot Aharonot Ltd v. Kraus* [100], at pp. 71 *et seq.*; LCA 6339/97 *Roker v. Salomon* [101], at pp. 265 *et seq.*.

5. 'This person came to reside and he has acted as a judge' was the angry complaint of the wicked people of Sodom against Lot (Genesis 19, 9

[111]). We too can say this — here in the positive sense of the expression — with regard to the doctrine called the doctrine of 'relative voidance' or 'relative result.' The doctrine came to us only recently, and it has taken control of spheres of law that our predecessors never imagined. And it is also true that we have always availed ourselves of this doctrine (in part), albeit not under this name. So we see that the doctrine proposed by my colleague, Justice Beinisch, with regard to the inadmissibility of evidence that was obtained by means of an illegal criminal proceeding — a doctrine of 'relative inadmissibility' — is merely a child of its parent, the doctrine of 'relative result.'

6. A final comment: we are discovering, not for the first time, that history repeats itself, albeit on higher levels of sophistication and abstraction than in the past. Thus we see that during the formative period of the common law, the courts fashioned raw materials into fundamental principles, doctrines and patterns of thinking. In the next stage, the more advanced stage, the courts, as well as the legislature, took steps to crystallize the rules of law, to pour the primeval material into more rigid utensils, which were supposed to make it easier for the courts to apply the law to sets of facts that came before them for a decision. The purpose of the crystallization was that instead of the courts being required to concern themselves, again and again, with tens or maybe hundreds of precedents, the courts and the legislature created relatively strict formulae to facilitate the work of the courts. And now we come to the present. The time has come to make strict frameworks flexible, to interpret concepts according to their purpose, to examine the origins of rules, to infuse into rules that have been established the 'spirit of the times' and the concepts of justice that are accepted by us at this time. This is what my colleague Justice Beinisch has done, and may she be blessed for it.

Justice A. Grunis

1. My colleague Justice D. Beinisch discussed in her comprehensive and penetrating opinion a long list of legal issues in the field of the rules of criminal evidence. Because of various constraints, I cannot elaborate on the many questions that arise and I will state my position briefly and succinctly, from the difficult issues to the easier ones, or, to be more precise, from general principles to the specific case.

Justice A. Grunis

2. The preliminary and first question that arises is whether it is desirable that the court should adopt, by means of 'judicial legislation,' a broad doctrine concerning the inadmissibility of illegally obtained evidence. Indeed, my colleague restricts and qualifies the scope of the doctrine, but still the question remains as to whether such a significant step ought not to be taken by the legislature, particularly in view of the fact that specific arrangements with regard to the admissibility of evidence that originated in illegal acts were enacted by the Knesset (s. 12 of the Evidence Ordinance [New Version], 5731-1971 (hereafter — the Evidence Ordinance); s. 13 of the Eavesdropping Law, 5739-1979 and s. 32 of the Protection of Privacy Law, 5741-1981), and at a time when draft laws on the issue have once again been tabled in the Knesset. Since the opinion of my colleagues supports the adoption of such a doctrine, I too shall address the merits of the matter.

3. In my opinion, before we begin to examine the important question under discussion — the adoption of a doctrine concerning the inadmissibility of illegally obtained evidence — we should examine the values that we are interested in realizing, and in particular we are obliged to determine the importance of those values relative to one another. In my opinion, the highest value that should concern us is to restrict, in so far as possible, the fear of false convictions. The next most important value is the public interest in achieving the conviction of those persons who have committed crimes. The combination of these two values, even from the viewpoint of their relative status, is expressed in the statement 'better ten guilty men go free than one innocent one be convicted,' or, in the language of Maimonides: 'It is better and more desirable to acquit a thousand offenders than to kill one innocent person at some time in the future' (Maimonides, *Sefer HaMitzvot*, Prohibitions, 290 [112]). On the next level of importance, we arrive at the need to safeguard the fairness of the criminal trial in its procedural aspect, as distinct from its ultimate purpose, namely the determination of the accused's guilt or innocence.

4. Throughout the opinion of my colleague Justice Beinisch, she mentions the transition that has occurred in recent decades in the sphere of the rules of evidence, from admissibility to weight. Arrangements that determined in what conditions evidence would be admitted have been replaced by the rule that holds almost all evidence to be admissible, so that the court will consider it and will be required to determine its weight. Those

who support this approach believe that it gives expression to the main purpose of the court, which is discovering the truth. The argument against admissibility barriers is that they may impede the ability of the court to discover the truth, since it will be obliged to ignore relevant evidence. There is no doubt that in certain cases the approach that bars admissibility will result in the truth not coming to light. We should remember that in the vast majority of cases such an approach within the framework of the criminal trial will work against the prosecution and not against the accused. The result is likely to be that the guilty person is acquitted in his trial because incriminating evidence was not admitted. By contrast, admitting the evidence and moving the scrutiny to the question of weight is likely to result in there being cases where the innocent man is found guilty. In my opinion, these opposites of the innocent and the guilty should not be treated equally. The transition from admissibility to weight is likely to create a symmetry between them. In this regard, I can merely cite the remarks of Justice S. Levin, in the minority opinion in *State of Israel v. Tubul* [67], at pp. 359-360:

> 'In addition to theoretical questions of interpretation, from between the lines and from the very lines of the opinion of the majority justices there emerges an approach that if the courts remove the "technical barriers" of admissibility that confronted them in the past and still do today, the power of the court to do justice and to determine the facts as they really were will be increased; this approach gives decisive weight to what it regards as the unlimited power of the courts to discover the truth on the basis of their impression of the testimonies alone, and it seeks to remove from its path procedural and evidential rules that, in the opinion of the supporters of this approach, have become antiquated.
>
> In my opinion, the approach of the majority judges is too simplistic; it emphasizes individual cases in which the court, because of evidence that was excluded, did not discover the truth (and such cases definitely do exist) but it ignores the existence of many other cases in which different judges may be impressed differently by particular evidence and therefore reach different factual findings from one another; not only is the discernment capacity of different judges dissimilar, but sometimes the period of time during which the evidence is heard and the short time during which a witness is on the witness stand do not

> allow the court to reach sufficiently definite conclusions, and in addition, the "truth" is determined only according to reality as it appears from the evidence, which may not reflect reality as it truly is. In such circumstances, providing so-called "formal" evidential barriers is capable of balancing the picture and changing the result, to some extent, in favour of standardization in determining factual findings, contributing to legal certainty and serving as a kind of constitutional safeguard against mistakes or arbitrariness; the existence of "formal" barriers as aforesaid is especially required in a legal system like ours, in which the determination of factual findings is usually solely the province of the trial court, and the court of appeal does not tend to intervene in these except in special and rare cases. It should be noted that I do not intend to say that every "formal" provision is desirable merely because it is such, but that in each case we should examine to what extent it serves a worthy purpose and is intended to balance risks that should be avoided…
>
> There is no doubt that any legal system that prefers the existence of evidential or procedural safeguards to the unlimited discretion of the court, or that excludes them, pays a price as compared with the opposite system. Indeed, in every case where there is a conflict between the approaches, the legislator or the interpreter, as applicable, must create the appropriate balancing formula that will, in so far as possible, give the proper weight to the conflicting interests and considerations.'

It should be noted that the fear of false convictions is even greater when we are concerned with a confession, since the additional evidence required for a conviction on a confession is minimal.

5. My colleague Justice D. Beinisch considered at length the interpretive development of s. 12 of the Evidence Ordinance. It is clear that originally the section applied only to cases in which there was at least a doubt as to the credibility of the confession. Case law extended the interpretation of the section so that in certain circumstances there was no further need to ascertain how the action of the person in authority affected the credibility of the confession. The broader approach is consistent with the approach that a violation of the autonomy of the person under interrogation (who later

becomes the accused) or his freedom of choice is what lies at the heart of s. 12. I wonder whether today, when the doctrine of illegally obtained evidence is being adopted, there is no basis for returning to the original interpretation of s. 12. In other words, the question is why we do not leave outside the framework of s. 12 the problematic cases in which there is no difficulty with regard to the credibility of a confession, so that these will be subject to the same rules of the doctrine that apply with regard to the other types of evidence.

6. Another point that should be considered concerns the distinction between a confession of an accused and a statement of a witness (or of another defendant in the same indictment). Consider a case in which the confession of an accused is also used as evidence against another defendant (in one indictment). Let us assume that because of various defects in the investigation, the court decides that the confession should not be admissible against the accused who confessed because of a doubt as to its credibility. Is it possible that the very same evidence will be admissible against another defendant in the indictment? (See A. Stein, 'Section 10A of the Evidence Ordinance and its Interpretations: a Positive Development or Danger of a Miscarriage of Justice?' 21 *Hebrew Univ. L. Rev. (Mishpatim)* 325 (1992), at p. 339, footnotes 15-16). I think that case law has not gone so far as to hold that it is possible to rely on the statement against the other defendant, even if it is inadmissible in evidence against the person who made it because of the issue of credibility (the problem arose in *Hazan v. State of Israel* [98]; see the opinion of Justice S. Levin, at p. 526). I fear that the adoption of the doctrine is likely to lead to a slippery slope that in the end will result in a confession that is inadmissible against one defendant because of the problem of credibility (under s. 12 of the Evidence Ordinance) serving as a basis for a conviction of another defendant (according to the tests of the general doctrine).

According to my colleague's position, we should examine the seriousness of the offence within the framework of all the considerations that the court should take into account when it decides how to address illegally obtained evidence. In other words, the more serious the offence, the less justification there will be for excluding the illegally obtained evidence. I agree with this only when there is no problem of credibility for a reason that would exclude a confession under s. 12 of the Evidence Ordinance according to its original

interpretation. It is difficult to accept that it is not possible to rely on certain evidence in a case where the offence is a minor one, whereas it will be possible to make use of the same evidence when the offence is a serious one. The consideration of the seriousness of the offence will be permitted if the reason for the argument of inadmissibility is unrelated to credibility. Naturally, certain steps or actions of investigation authorities may be considered to create an absolute presumption with regard to undermining credibility (see *Muadi v. State of Israel* [36]).

7. I shall now turn to two points that concern the facts of the case. It will be remembered that the appellant was not told by the military policeman who interrogated him that he was entitled to consult a lawyer. The policeman said to the appellant that he had the right to remain silent. Should the confession made by the appellant be excluded in these circumstances? There is no dispute that the interrogator violated his duty to notify the appellant of his right to consult a lawyer. Notwithstanding, there is no claim in the present case that there is a question as to the credibility of the confession. My opinion is that since the appellant was aware of his right to remain silent, the violation of the duty to notify him of the right to consult a lawyer, in itself, does not justify the exclusion of the confession. Had the interrogator also refrained from telling the appellant that he had the right to remain silent, it is possible that the two omissions jointly would justify the exclusion of the confession.

8. The last point concerns the question of whether, and to what extent, we should attach weight to the intention of the interrogator, who, it will be remembered, intentionally refrained from notifying the appellant of his right to consult a lawyer. According to the position of my colleague Justice D. Beinisch, the finding that this was an intentional omission is a circumstance of considerable weight for excluding it as evidence. I will make two remarks about this: first, I have difficulty in understanding, in view of the circumstances of the case, what connection there is between the intention of the interrogator and the determination of inadmissibility. It is possible that considerable weight should be attached had the main purpose of the rule of inadmissibility been an educational-deterrent one. But according to the approach of my colleague, this is not the dominant purpose. Second, when we are speaking of a policeman whose job it is to interrogate suspects or witnesses, can we accept that such an omission is ever unintentional?!

Justice A. Grunis

9. Therefore, were my opinion accepted, we would deny the appeal.

Appeal allowed, by majority opinion (Justice Beinisch, President Barak, Vice-President Emeritus Cheshin and Justices Rivlin, Procaccia, Levy, Naor and Joubran), Justice Grunis dissenting.

3 Elul 5765.

7 September 2005.