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## CRIMINAL JUSTICE AND THE TRUTH IN ZIMBABWE: A NECESSARY INTROSPECTION?

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### INTRODUCTION

Criminal justice systems in many of the countries in southern Africa are based on legal systems transferred from the erstwhile colonial powers.<sup>1</sup> It would appear that by the time of independence the adopted systems had secured such a firm footing that it was considered prudent to retain them.

The acceptance of this colonial bequest can be attributed to a number of reasons. One of the reasons was that it was the colonising countries which had set up the colonised states as geographic and political entities. In some cases, colonial delineation arbitrarily created geographic structures that were politically fragile. The colonial justice system offered a kind of common denominator to facilitate the continued existence and cohesion of the newly independent state. The unitary colonial justice system existed side by side with a multiplicity of what the colonialists perceived to be underdeveloped customary judicial systems. The law administered in the customary systems was regarded with a mixture of scepticism and contempt.<sup>2</sup> The demise of the colonial state did not herald the recognition of indigenous systems. It also did not spur the development of home-grown hybrid systems. The incoming ruling establishment considered it to be in the political and administrative interests of the emerging states to pre-empt potentially divisive arguments as to what system of law to adopt in place of the colonial system.

The second is that the emerging states lacked the capacity to make a radical break with the colonial past. Almost without exception, the former colonies were heavily dependent on bureaucrats inherited from either the colonial state or the settler colonialist state machinery. None of those bureaucrats could be expected to spearhead a crusade to jettison the inherited criminal justice system or the structures which supported it. They were more familiar with that system than any other. The replacement of the inherited bureaucrats by legally trained personnel from the ranks of the indigenous post-colonial officials did not yield revolutionary

1. English procedural law was introduced into each of the colonial territories, commencing with the constituent provinces of the Union of South Africa (see *LAWSA* (1994) Vol 5 Part 2 para 167) followed by Southern Rhodesia, Bechuanaland, Lesotho, Swaziland, Northern Rhodesia, and Nyasaland. In somewhat similar fashion, the civil system operative in Portugal was transplanted to Mozambique and Angola. The imposition of colonial criminal laws on the colonised peoples resulted in varying degrees of 'legal dualism'. There was however, a common trend of whittling away the criminal jurisdiction of customary courts. This led to a situation in which by independence, these courts only exercised jurisdiction as extended to them specifically by statute in minor cases.
2. The colonial attitude is probably summarised by the remarks of a well known English jurist, Lord Denning:

I have heard of Roman law. I know something of English law. But what is African law? It is at the moment a jumble of pieces much like a jig-saw . . . If the people of Africa are to emerge into a great civilization, then these discordant pieces must all be sorted out and fitted together into a single whole (See the foreword to the (1957) *JAL* 1).

change in the operative system. This was partly because the new 'brigade' was too small in number. The other, perhaps more decisive reason, was that many of the new bureaucrats happened to have been trained in the common law world, which imposed important limitations on their comparative acumen.

Thirdly, and perhaps in consequence of the above, the new political leadership and the inherited bureaucrats did not consider the system to be inherently faulty or ineffective. It seemed to form an integral part of the economic order which they perceived to be worth preserving and developing. It was better to stick to a tried, tested and predictable set-up than venture into uncharted territory with the attendant risks to the economic well-being of the new country. There was a lack of confidence in the capacity of customary law to do justice in serious criminal cases or in cases which arose in non-traditional settings. The ambivalent status of customary criminal law and criminal justice which had been prevalent in the colonial era outlasted the demise of colonialism,<sup>3</sup> notwithstanding the exhortation by the United Nations General Assembly in 1981 for member states to take account of political, economic, social and cultural circumstances and traditions in their countries in the formulation of criminal justice policies. In Zimbabwe, there was a marginal recognition of customary criminal jurisdiction but logistical and personnel problems nullified the exercise of such jurisdiction.<sup>4</sup>

The transferred system was therefore adopted, in an almost complacent manner,<sup>5</sup> without much critical thought being given to its imperfections. A number of imperfections are in fact evident in the colonial, Anglo-American (or common law) criminal justice system. These have been the subject of critical comment even before the dawn of British colonialism in southern Africa. The major imperfection relates to the relationship between the predominantly adversarial system and the demands of fact-finding.

When he opened the High Court calendar year in January 1998, Zimbabwe's Chief Justice, Anthony Gubbay, joined a lengthy line of jurists who have spoken out about the anomalies of criminal justice.<sup>6</sup> The Chief Justice's speech set out the challenge facing rational criminal justice systems generally, but particularly those which must function in an environment characterised by conflicting social values. The criminal justice system should facilitate the determination of 'a sufficiently complete and accurate history of the events in question' so

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3. For the position in Zambia, see K Mwansa "The Status of African Customary Criminal Law and Justice under the Received English Criminal Law in Zambia: A Case for the Integration of the Two Systems" (1986) *ZimLR* 23.

4. The Customary Law and Primary Courts Act (No 6 of 1981) provided for jurisdiction in cases punishable by a small fine. See A Ladley "Changing the Courts in Zimbabwe: The Customary Law and Primary Courts Act" (1982) 26 *JAL* 95, 110 in which the author points out that the courts were not provided with prosecutors or the necessary recording mechanisms. In addition the police, on whose co-operation the functioning of the courts depended, withheld their co-operation.

5. For example, section 89 of the Independence Constitution of Zimbabwe (1980) decreed that the law that was to be applied by the courts was to be the law as it stood on 10 June 1891 in the Colony of the Cape of Good Hope.

6. The full text of Gubbay CJ's address was published in the *Legal Forum* (1998) (Number 1) 4-7.

that blame can be correctly apportioned, and the punitive and compensatory ends achieved.<sup>7</sup> In other words, the criminal justice system should be viewed primarily as a social process regulating and promoting the 'desirable social relationships' of the day and discouraging socially reprehensible conduct.

In his speech, Chief Justice Gubbay pointed to the cardinal imperfection of criminal justice under the common law: the incidence of disharmony between court decisions and the objective truth. One does not need much experience in the criminal justice system to realise that court decisions do not always correspond with the historical truth. A prosecution in a contested case may be based on apparently adequate and reliable historical facts, but if the facts are either not available or not receivable by the court the prosecution will fail. A verdict of not guilty is thus not always equivalent to a positive finding of innocence.<sup>8</sup> In our society, innocence is an equivocal concept. It bears a moral as well as a technical or legal meaning. From a moral perspective, an innocent person is one who has committed no wrongful act. The emphasis is on the objective fact of non-involvement in wrongdoing, rather than the fact that involvement has not been discovered. The moral sense could also be described as the religious conceptualisation of innocence.

Lawyers would however, consider innocence to mean the state of not having been proclaimed guilty of criminal conduct by a competent court. This is what is meant by the constitutionalised principle that a person who is accused of a crime is presumed to be innocent pending the conclusion of his trial.<sup>9</sup>

This article seeks to critically examine the fundamental flaws that create obstacles in the way of matching justice with the discovery of the truth in contested criminal cases in Zimbabwe. It will be argued that in order to rectify them, alternative systems of criminal justice should be considered. The demise of political colonialism should provide the impetus for a measure of integration of the inherited system with indigenous and other judicial systems.

### THE PROBLEMS WITH THE FORMAL SYSTEM OF CRIMINAL JUSTICE

The structure of the fact-finding process in criminal justice in Zimbabwe evinces adversarial characteristics. The structure of the system in which the fact-finding process occurs as well as the core regulatory principles in criminal cases were imported from England through the Cape. Evidence of this can be found in the statutory provisions in force today in Zimbabwe that refer to English common law as the source of answers on questions relating to the admission of evidence of character<sup>10</sup> or hearsay.

One of the fundamental features of the English criminal justice system is that it is trial centred. Where guilt is contested, the sole responsibility of deciding that question is vested in the judicial system, an integral component of which is the trial court. On account of the

7. Gubbay, *op cit* (n 6) 5.

8. See R Mahoney "The Presumption of Innocence: A New Era" (1988) 67 *Canada Bar Review* 1.

9. In some countries the presumption can be terminated by a guilty plea. Examples on the African continent include Botswana, Ghana, Kenya, Uganda, Zambia and Zimbabwe.

10. In South Africa, section 227(1) of the Criminal Procedure Act, 51 of 1977; in Zimbabwe section 260 of the Criminal Procedure and Evidence Act [Chapter 9:07].

central place that it occupies, the trial court performs a significant role in shaping the manner in which legal guilt is constructed. Whoever aspires to establish guilt is obliged to conform with a set of procedures predetermined by the trial court system. Criminal trials in Zimbabwe are in the hands of specialist adjudicators, who are believed to be endowed with cognitive competence. These expert judges and magistrates (in a small proportion of cases with the aid of assessors) are presumed to have the capacity to convert the information that is selectively presented to them 'into a veritable account of the events as they really took place'.<sup>11</sup>

### The Nature and Role of Rules of Probative Policy

To facilitate competent but predictable performance of the task, the judicial system has fashioned a framework of rules. These rules give expression to certain ideas, values and priorities. As such they may be called rules of probative policy.<sup>12</sup> Wigmore has classified them into two broad categories. The first consists of those which limit the admission and use of evidence on the grounds of unreliability or alleged prejudicial effect. The intention behind them is to promote accuracy in decision making. Evidence which is incapable of satisfying the standards set by these rules is weeded out of the material to be considered by the trial court. On account of this function, they may be called rules of auxiliary probative policy. Prominent among them is the rule regulating the admission or exclusion of evidence of similar fact. The policy which underpins the generally exclusionary rule purports to recognise that evidence of other conduct or circumstances, of a discreditable or innocent nature, similar to the conduct or circumstances alleged to have occurred or existed on the occasion under inquiry, is potentially prejudicial. Such evidence should therefore not be admitted unless it exhibits a probative force which outweighs its inherent prejudicial qualities.<sup>13</sup>

In the second category falls rules that exclude evidence by prioritising certain values at the expense of rectitude of decision making. The policy underpinning these rules is the belief that a judicially administered criminal justice system should perform a number of functions. Discovery of the historical truth is only one of such functions. It is by no means the overriding function and can be sacrificed in favour of other objectives.<sup>14</sup> Consistent with this policy are rules that purport to safeguard the integrity of the process by excluding illegally procured evidence.<sup>15</sup> The rules have spawned elaborate procedures by which the volition of extra-curial statements given to the police is tested. The evidence generated in these procedures is isolated from the evidence on the merits of the rest of the case, in a

11. See A Zuckerman 'The Protection of the Accused from Miscarriage of Justice' (1997) 31 *Israel Law Review* 590.

12. As Professor Paizes points out, "(a)t the heart of the rules governing hearsay, similar facts, privilege, improperly obtained evidence and confessions, for instance, are to be found some of the central policies underpinning the right of confrontation, the presumption of innocence, the right to counsel, the due process of law and the protection against self-incrimination." A Paizes "Advances in the Law of Evidence: Reflections on Reading Hoffmann and Zeffertt" (1989) 106 *SALJ* 472, at 477.

13. *DPP v Boardman* 1974 (3) All ER 887 (HL); *Laubscher v National Foods* 1985 (1) ZLR 10 (HC); 1986 (1) SA 553 (Z); *S v Mavuso* 1987 (3) SA 499 (A).

14. T Geldenhuys and J J Joubert (eds) *Criminal Procedure Handbook* 2nd ed (1996) 5.

15. The philosophy at the root of this approach is that public confidence in and respect for the system is best enhanced if the courts protect the rights of the individual suspect from the unlawful exercise of

process which has given rise to the phrase 'trial within a trial'. In this way, the second category rules are extrinsic to the merits of the case against the suspect. Their observance renders it tolerable for the outcome of a criminal trial to be inconsistent with the merits.

The extent to which criminal justice systems in the common law world tolerate the incidence of such inconsistency varies. The degree of tolerance is inversely proportional to the strictness with which violations are viewed. A system which readily accepts that even a relatively insignificant violation of a rule of extrinsic policy, such as the infringement of the right of silence, will suffice to cost that party success, will view violations more strictly than a system which merely considers such a violation to be a factor to be taken into account in assessing admissibility. The so-called 'fruit of the poisonous tree' doctrine which prevails in the American criminal justice system, is illustrative of the former.<sup>16</sup> The Zimbabwean criminal justice system can be placed on the other extreme. Incorporated in it is a set of permissive statutory provisions which put pressure on the accused, subsequent to his or her arrest, to become involved in proving, or at least to substantiate his or her innocence. Save for the factor of volition, the system is not concerned about the state of the suspect's appreciation of his or her rights, if a statement should then emanate from him or her.

In between the two extremes are to be found systems which are permissive of violations provided that admission of the evidence obtained or derived from the violation does not bring the administration of justice into disrepute. The classic example of this approach is section 24(2) of the Canadian Charter of Rights and Freedoms. In so far as it requires the exclusion of evidence whose admission would bring the administration of justice into disrepute, this provision mandates the court to take judicial notice of the 'views of the community at large, developed by concerned and thinking citizens'.<sup>17</sup> Strictly speaking, this requires the court to achieve the difficult feat of acquainting itself with the values, thought processes and behaviour patterns of the average members of an often diverse community.<sup>18</sup>

The judicial system is also constrained to observe similarly extrinsic rules relating to the liability of witnesses to be forced to give evidence. These rules fall into the interrelated spheres of witness compellability and witness privilege. The prevailing adversarial system accords a right to some prospective witnesses to choose whether or not to divulge information which is in their custody or under their control. The competence of a witness to testify does not imply that they are compellable to do so.<sup>19</sup> A witness who is not

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state power. In *Attorney General v Slatter and others* 1984 (1) ZLR 306 confessions were excluded on account of the unconstitutional denial of access of the accused to their lawyers by the police. See also *S v Motloutsi* 1996 (1) SA 584 (C). Even for a non-constitutional violation of privacy, Farlam J excluded confessional evidence in *S v Hammer and others* 1994 (2) SACR 496 (C).

16. For a discussion of the doctrine, see S Hirtle "Inadmissible Confessions and their Fruits: A Comment on *Harrison v United States*" (1969) 60 *Journal of Criminal Law, Criminology and Police Science* 58-64.
17. Seaton JA in *R v Collins* (1983) 5 CCC (3d) 141 (BCCA).
18. For a discussion of the difficulties involved see D Gibson "Determining Disrepute: Opinion Polls and the Canadian Charter of Rights and Freedoms" (1983) 61 *Canadian Bar Review* 377.
19. Notwithstanding the statutory linkage between the two concepts in section 244 of the Criminal Procedure and Evidence Act, which reads:

Every person not expressly excluded by this Act from giving evidence shall be competent and compellable to give evidence in a criminal trial in any court in Zimbabwe, or before a Magistrate in a preparatory examination.

compellable is absolved from the penal sanctions of a subpoena. The spouse of an accused person, for instance, cannot be forced to testify for the prosecution where the offence involved falls outside the range provided in section 247(2) of the Criminal Procedure and Evidence Act.<sup>20</sup> A perusal of the list reveals that they are invariably of a domestic character, and that, in one way or another, each of them would normally be expected to personally involve the spouse. Although the Act is silent on her position *vis-a-vis* her husband's co-accused, it appears that the accused's spouse cannot be compelled to give evidence at the instance of his co-accused.<sup>21</sup> Diplomats and foreign heads of state are also not compellable to give evidence in criminal cases.

### The Role of Privileges

The concept of privilege seeks to give expression to values which are clothed in the amorphous expression, 'public policy'. The term itself is regularly used in order to describe the excuse behind which an otherwise compellable witness is allowed to take shelter in avoiding pertinent questions. Several kinds of privilege have received legal recognition in Zimbabwean law. Each derives its descriptive title from the sphere in which it arises and is enforced. Alternatively, the sphere of public policy on which it is based is reflected in the title. The concept of privilege includes the restrictions imposed by the Act on the cross-examination of the accused as to his or her misconduct on other occasions or as to previous convictions. One should however, point out that these restrictions are based on different considerations to those that generally underlie witness privilege. The 'privileges of accused persons when giving evidence', as they are described by the statutory sub-heading, are not grounded on extrinsic policy concerns, but rather on auxiliary probative policy. As observed above, the goal of the policy is to eliminate evidence that is either apparently unreliable or so prejudicial as to be dangerous to accurate fact-finding. The primary basis for the objection to evidence of bad character has been traced to its tendency to promote irrational decision making. As Murphy explains:<sup>22</sup>

The fact that a person has in the past been guilty of discreditable acts has no relevance to proving that he was guilty of a particular discreditable act now alleged against him. Of course it may be argued that someone who has offended in the past is likely to do so again, but the law has never favoured proof by evidence of past disposition. The law will not "give a dog a bad name and hang him". If guilt depended on a past record the law would have ceased to try cases on their facts, and the defence of an innocent man of bad character would have become difficult and in some cases practically impossible. For the same reason, if the dog happens to have a good name, the law will not, for that reason, acquit him.

### Witness-centred Privileges

In order to highlight the functional distinction between them, the privileges that are based on extrinsic policy may be described as the true privileges. They fall into three discernible groups, consisting of first, those which are vested in the witness, justifying the refusal to

20. Chapter 9:07.

21. As is the position in South Africa. See s 196(1) proviso (b) of the Criminal Procedure Act, 51 of 1977.

22. P Murphy *A Practical Approach to Evidence* (1980) 86.

answer questions on particular issues. The privilege against self-incrimination may be counted among the privileges in this group. In *Magmoed v Janse van Rensburg & others*<sup>23</sup> the privilege was described as a 'personal right to refuse to disclose admissible evidence' where there is a real danger that a witness's answer will render him liable to a criminal charge. It is a right the exercise of which obstructs the administration of justice by withholding the truth from the judicial process. For this reason, necessity may dictate a judicially supervised trade-off between the prosecution and an accomplice witness.<sup>24</sup>

Marital privilege also falls into this group. Assuming that the spouse is a compellable witness, the privilege entitles her to refuse to reveal a communication that was made to her by the accused spouse during the subsistence of the marriage. She also has a right to refuse to disclose a communication that she made to the accused spouse. Underlying the privilege is the much proclaimed inviolability of domestic confidence. The disclosure of communications between spouses is presumed to be so socially harmful as to outweigh whatever short term contribution the revelation may make to the resolution of a pending case.<sup>25</sup> In addition to the right to withhold information to which she is privy, the witness spouse has a derivative right to refuse to answer a question which would reveal the accused spouse's previous convictions or previous misconduct, if the accused would have had a similar right. This privilege can have far-reaching implications for the fact finding capacity of a criminal court where the accused's spouse is the sole witness. The incidence of the privilege cannot be superseded by the nature or gravity of the offence. In terms of section 291, marital privilege in criminal cases survives the judicial dissolution of the marriage.<sup>26</sup>

### **Party-centred Privileges**

The second group embraces privileges that are vested in a party and enable him to 'gag' a witness, preventing her from giving certain evidence. In criminal cases, the archetype of this form of privilege is the legal professional privilege. The privilege has long been recognised in the common law world as an inherent part of the relationship between a lawyer and a client.<sup>27</sup> It has been called the 'the cornerstone of our judicial system'<sup>28</sup> and its scope of application has been extended beyond the judicial arena. In essence it epitomises

23. 1993 (1) SACR 67 (A).

24. Section 267 of the Criminal Procedure and Evidence Act, in terms of which in return for a promise of indemnity from prosecution, an accomplice undertakes to answer self incriminating questions.

25. The Second Report of the Common Law Commissioners proclaimed that:

So much of the happiness of human life may fairly be said to depend on the inviolability of domestic confidence, that the alarm and unhappiness occasioned to society by invading its sanctity, and compelling the public disclosure of confidential communications between husband and wife, would be a far greater evil than the disadvantage which may occasionally arise from the loss of the light which such revelations might throw on questions in dispute.

These remarks were quoted with approval by Sir Wilfred Greene MR, in *Shenton v Tyler* [1939] 1 All ER 827 833B-C.

26. See also *R v John* 1965 113 P 660.

one of the prominent features of the adversarial trial system, the principle of party autonomy. The principle has in turn influenced the nature of the criminal justice system and the extent to which it can produce results that accord with the truth. It is not my purpose to discuss the preconditions on which the incidence of the legal professional privilege depends. Two points will be made here. The first is that by its very nature, the legal professional privilege cannot be conducive to the discovery of the truth through litigation. This much is acknowledged by Wigmore, in his articulation of the pillars on which the privilege rests.<sup>29</sup> They are:

- (a) that the communication originates in a confidence that they will not be disclosed;
- (b) that this element of confidentiality is essential to the full and satisfactory maintenance of the relationship between the parties;
- (c) that the relationship is one which in the opinion of the community ought to be sedulously fostered; and
- (d) that the injury that will enure to the relationship by the disclosure of the communication is greater than the benefit thereby gained for the correct disposal of litigation.

It is clear from the 'pillars' that the priority given to the lawyer-client relationship is such that if there should be a conflict between it and the correct disposal of litigation, the relationship prevails. In other words, the notion of freedom of communication takes precedence over the notion of rectitude of decision making. In their conception of a fair trial, proponents of party autonomy would consider this freedom to be a central ingredient.<sup>30</sup>

Party autonomy tends to be inimical to accurate fact finding because of its prioritisation of control over the selective presentation of evidence. Such control enables the custodian of the evidence to pursue the partisan interests of himself or his client without the fear of external interference. Invasive control by the courts or legislation on the other hand weakens party autonomy and enhances the presentation of a broader range of evidence. In discussing the impact exerted on the judicial system of criminal adjudication by party autonomy, one needs to examine the function that is played by lawyers in the decision making processes.

A lawyer often plays an important function in deciding the crucial question of when it is in the interests of the client to compromise the right to withhold information from, in the first instance, the police, later the prosecution and ultimately the court. The lawyer has to resolve this question personally first and then jointly with her client if she is to be able to give competent advice. At each stage she will invariably be influenced by the relative strength and depth of the information in the hands of the police and the prosecution as against the information revealed to her by the client. The lawyer will know that her client need not expose himself more than is absolutely in his interests. To be sure, there will be occasions when the partisan interests of a party will require that the truth be revealed by the client. It may also be in his interest to enter into some kind of plea bargain. Studies conducted in some common law countries suggest that the majority of criminal prosecutions are resolved by guilty plea.<sup>31</sup> My argument is that the decisive factor is not the interests of justice which

29. Wigmore *Treatise on the Anglo-American System of Evidence in Trials at Common Law* (1961) para 2285.

30. See D Unterhalter "Professional Privilege and the Proof of Innocence" (1988) 105 SALJ 291 299.

31. For a recent reference to the statistics, see Professor John Jackson's inaugural lecture, "Truth and Compromise in Criminal Justice: A Critique of Trial Practice and Lawyers' Ethics" (1997) *Northern Ireland Law Quarterly* 321.

leads to this confluence, rather it is the interests of the client, as perceived by the lawyer which predominate. To put it bluntly, if it is not in the interests of the client for the truth to be told, the lawyer has no right to volunteer it or advise his client to commit 'hara kiri' by doing so. The truth will simply be suppressed. Sometimes the truth will be that the client committed the crime charged. He however wants to take his chances with the criminal justice system. If the client has confessed to his lawyer, this can raise an ethical dilemma. The party autonomy principle, in combination with the presumption of innocence, renders it possible to keep the dilemma private, and indeed to conduct the defence on the basis of a plea of not guilty. Should the prosecution case turn out to be weak, there may well be an acquittal. This possibility has prompted the remark that:

It is probably because it is incomprehensible that a man who clearly committed an offence should be acquitted that the legal profession is burdened with the vulgar perception that lies are part of the lawyer's tools . . .<sup>32</sup>

It may be a vulgar perception, but it encapsulates a widely held impression of how lawyers discharge their responsibilities. It appears certain that lawyers socialised in a culture pervaded by the twin principles of party sovereignty and the presumption of innocence will throw up their arms and retort that they have no option.<sup>33</sup>

#### ***The Implications of Party Autonomy for the 'Construction' of the Prosecution's Case***

Party autonomy places the police and the prosecution in an influential position in the control of the information to be placed before the court. State interest privilege will be discussed in the context of the third group of privileges. It is however appropriate, in the interests of completeness, to highlight the way in which the autonomy principle can expose the judicial system to the whims of the State machinery as opposed to the machinations of the defence.

The point has been made above that our system of criminal justice is trial-centred. It would, however, be a mistake to exaggerate the investigative capacity of the criminal trial. The trial, in spite of all the drama which is often associated with it, and its apparently terminal impact on the dispute between the prosecution and the accused, is only a part of a longer process. That process is virtually dominated by the police and the prosecution. For one thing the police will usually determine the pace at which the 'wheels of justice' are to turn in a particular case. For another, the police also largely decide on the manner and methodology of investigation. The 'picture of reality' which is eventually presented as 'the State case' is in fact put together by the police, often with the help of the prosecution. The process is usually one-sided. Non-participation in the investigative stages by the accused, as is his right, only reinforces its unilateral nature. The resulting edifice is usually:

not built of pure objective fact, nor does it render a purely factual reality. It is not, as it were, an accurate, disinterested snapshot of a past event. No such thing exists. It is an

32. Per Flemming DJP in *Desai v S* [1997] 2 All SA 298 (W) 302.

33. This appears to be the essence of the response by Bramwell B in *Emerson v Sparrow* (1871) LR 6 Ex 329 371. He argued that the matter of guilt or innocence is to be determined by the court, and not by the client's lawyer(s). He went on, "(i)t is for want of remembering this that foolish people object to lawyers that they will advocate a case against their own opinion. A client is entitled to say to his counsel, 'I want your advocacy and not your judgement; I prefer that of the court.'"

account of a possible reality in which fact, imagination and inference all play a part. Moreover, in an atmosphere of sharp adversity it is quite unrealistic to expect the police, or any other official, to aim at constructing possible accounts of innocence as well as of guilt.<sup>34</sup>

As Professor Zuckerman has pointed out, the efficiency and effectiveness of the criminal trial as a forum for discovering the truth heavily depends on the quality and reliability of the case prepared by the police and the prosecution.<sup>35</sup> This is so because the court operates under such serious limitations of capacity and of resources that it cannot independently investigate the facts alleged by the prosecution.<sup>36</sup> Studies have demonstrated that the quality of police work is affected by such factors as the prevailing conditions in which a particular investigation has to be carried out, the experience of the investigating officer or team, the availability of resources, motivation, the quality of supervision, general working conditions, and political pressure.<sup>37</sup>

The single most powerful device at the disposal of the court to ensure that the prosecution presents qualitative and reliable evidence is the threat of acquittal. Admittedly that threat is backed up by the role played by the presumption of innocence in visiting the consequences of shoddy work on the prosecution. One should, however, hasten to caution that when viewed from the standpoint of promoting comprehensive and fair investigations, the threat of acquittal is a rather double-edged sword. It may have the opposite effect of encouraging the police to cheat by suppressing or even destroying adverse information. Recent English criminal justice history has demonstrated this danger. Notable examples of police misconduct can be found in the handling of suspects in the IRA bombing campaign of the mid-seventies. The "Guildford Four" and the "Birmingham Six" cases stand out among them.

Police bias could also be unintentional. It is not always easy to keep an open mind when one is presented with one-sided information by an overbearing or vengeful complainant. Those who have had prosecution experience will be familiar with assault cases in the early stages of which the sad tale told by the injured complainant sounds highly plausible and thoroughly deserving of sympathy. Once the accused is introduced into the arena and the respective roles played by the parties has emerged, it is not uncommon for the complainant's image to be transformed and for the sympathy to vanish. If the police rely on too subjective a view of things, there is a danger of being sucked into adopting an unconsciously biased position. The insidious effect of unconscious bias cannot be overemphasized. Its most obvious consequence is that it leads to mistakes of interpretation of events or statements or conduct. It can also result in alternative interpretations being overlooked and the evidence to support them being ignored.<sup>38</sup> The police practice of conferencing, common in the Criminal Investigations Department, can mitigate this kind of bias. Whether it can succeed in eliminating bias is debatable.

34. A Zuckerman "The Protection of the Accused" *op cit* (n 11) 609.

35. *Ibid.*

36. There are inherent as well as external constraints on the ability of the court to scrutinise the case presented to it. Inherent factors can be attributed to the exclusionary rules of evidence and to witness deception. External limitations arise from the time limits within which a criminal case has to be concluded, and the absence of legal representation.

37. Some of these factors are regarded by Professor Zuckerman as constituting police discipline.

38. This has been referred to as the interpreter effect of bias. It stems from the tendency to try to substantiate a belief or conclusion reached in advance of the inquiry. Any information pointing to a different conclusion is either not taken seriously or dismissed as a fabrication. See Zuckerman *supra* (n 11).

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### **Public Policy-based Privileges**

The third group of privileges consists of excuses for withholding testimony on the vague ground of public policy. The law of evidence recognizes two classes, only one of which is relevant to criminal justice. The privilege which attaches to statements made as part of negotiations to work out a compromise settlement to a dispute, the so-called 'without prejudice' statements, is in its own class. It is not relevant to this discussion. Our concern is with state interest privileges, which were conceived of as Crown privileges in English law. As the descriptive title suggests, the privileges are vested in the State. Their exercise in criminal cases is potentially controversial and likely to harm the adjudication process in that the State is almost always a party to a criminal case. The State is of course a multi-departmental entity. There is always the possibility of one or more of the privileges in this class being invoked by the State in order to impair the ability of the accused, an adversary to defend himself. In order to appreciate this point, one should explore the nature and scope of state interest privileges. Sections 295 and 296 of the Criminal Procedure and Evidence Act are germane to them.

Section 295 provides that:

(no) witness shall, except (as provided in this Act) *be compellable or be permitted to give evidence in any criminal proceedings as to any fact, matter or thing, or as to any communication made to or by such witness, as to which, if the case were pending in the Supreme Court of Judicature in England, such witness would not be compellable or permitted to give evidence by reason that such fact, matter or thing or communication, on grounds of public policy and from regard to public interest, ought not to be disclosed and is privileged from disclosure (Emphasis added).*

The historical umbilical cord with English law on the subject was thereby retained. The scope of the privilege appears from the italicized words. In so far as it is directed at the testifying witness, the privilege is both a right and an injunction. It gives her a right to refuse to give the proscribed evidence. The section goes further to restrain her, if she is inclined to give that evidence, from doing so. Its terms imply that if the witness violates the injunction, she commits an offence, but curiously no penalty is stipulated. Section 295 is also addressed to other role players in the trial, namely the court, the prosecutor and the defence. None of them is to compel or permit the witness to divulge the proscribed evidence.<sup>39</sup> A useful 'mixed grill' of the scope of coverage of the privileges appears in section 10 of the Civil Evidence Act, which appears to be cognate to section 295.

In England the term Crown privilege has been superseded by the term public interest immunity.<sup>40</sup> In a unitary state such as Zimbabwe, one can identify two broad spheres of State activity to which immunity has been extended. These may be called a core sphere and a peripheral sphere.

39. See the commentary to section 233 of the South African Criminal Procedure Act, 56 of 1955 in Harcourt (ed) *Swift's Law of Criminal Procedure* 2 ed (1969) 421. The equivalent provision in the 1977 Act is section 202.

40. The English courts were of the view that the term privilege should only be applied to an excuse that was meant for the protection of a litigant and could therefore be waived by him. See *Duncan v Camell Laird & Co Ltd* [1942] AC 624 641. In *Air Canada v Secretary of State for Trade (2)* [1983] 2 AC 394 it was held that public interest immunity could not be waived even by the Crown. See also D Casson and I Dennis *Modern Developments in the Law of Civil Procedure* (1982) 63.

The former encompasses the core activities of central government, such as the political administration of the State at the highest level, other than the administration of the security and/or defence organs of the State. The matter of international relations with foreign countries also qualifies as a core activity. Tangible in the information falling under this category would be the minutes of cabinet meetings relating to these matters. In fact, a wider protection is granted to such minutes, on the rather imprecise ground that transparency of the goings on in that arena 'would create or fan ill-informed or captious public or political criticism . . . (from those who have) some axe to grind'.<sup>41</sup>

In the peripheral sphere are those activities performed by organs of state at a lower level, and in which effectiveness depends on confidentiality. Examples would include the routine administration of government, and the detection and prevention of crime. The latter in turn embraces two kinds of information, firstly information which would reveal the identity of a police informer and secondly, the communications exchanged between law enforcement officers in the course of an investigation.

While section 295 appears to be an absolute bar to the reception of evidence that may be important in a criminal case, it is now an established principle that the court has a discretion to overrule the objection that disclosure would be prejudicial to the public interest. Such discretion exists in respect of evidence generated in either sphere of governmental activity. The South African counterpart of section 295, section 233 of the Criminal Procedure Act, 56 of 1955 was interpreted in *Van der Linde v Calitz*.<sup>42</sup> The Appellate Division said that while a court may exclude the evidence without being asked, it would be preferable in debatable cases for a substantiated objection to be made by the executive. The evidence objected to must be described, and reasons advanced as to why disclosure would be in conflict with the public interest. If the court is not satisfied that the objection is justifiable or that it is based on reasonable grounds, the court should overrule it and let the truth be told. In order to inform itself fully the court may examine the controversial evidence.

That approach was endorsed by Jarvis J in *Holman v Lardner-Burke*<sup>43</sup> as being consistent with English law. The English case of *Conway v Rimmer*<sup>44</sup> confirmed the correctness of that endorsement.<sup>45</sup> It is submitted that the residual judicial discretion enshrined in section 10 of the Civil Evidence Act applies to criminal cases as well. Excluding it from such cases would yield absurd results. In view of the fact that the two provisions relate to the same matter the result may well be that the same evidence which a civil court has permitted to be given, thereby letting it enter the public domain, could be censored by the criminal court. It is further submitted that in exercising its discretion, a court should strive to strike a balance between, on the one end of the spectrum, upholding the legitimate protection of

41. Per Lord Reid in *Conway v Rimmer* [1968] AC 910 952. The approach taken in that case on the issue of residual discretion to override a ministerial objection, was followed in *Holman v Lardner-Burke* 1968 (2) RLR 57, but ignored in *ARNI v Brookes* 1972 (2) SA 680 (R).

42. 1967 (2) SA 239 (A).

43. *Supra* (n 41).

44. *Supra* (n 41).

45. See also *Nkayi and another v Head of the Security Branch of the SAP* 1993 (3) SA 244 (A). The discretion can be exercised in favour of disclosure in the interest of justice. See *R v van Schalkwyk* 1938 AD 543 (where it would tend to establish the accused's innocence).

a demonstrable public interest and on the other, promoting political censorship. One can detect the reason for the uncharacteristically irresolute approach taken in section 295. The offence that it creates can only arise if a court makes a positive finding that the 'basic fact' has been established, i.e. that revealing the evidence is contrary to the public interest.

Section 296 is more specific in its scope. It relates to evidence impacting on the security of the State and entitles an unspecified government minister<sup>46</sup> to certify by affidavit the existence of the prescribed jurisdictional fact. The jurisdictional fact is that the evidence 'affects the security of the State and disclosure thereof would . . . prejudicially affect the security of the State.' In essence, this provision entrusts to a minister the sole and exclusive function to decide whether that fact exists. Whether the fact objectively exists is not a justiciable matter.<sup>47</sup> There could not be a clearer ejection of the judicial power of review.<sup>48</sup> The position is therefore that in matters affecting the security of the State, a ministerial objection is final and decisive.<sup>49</sup> There is a glaring incongruence between section 10 of the Civil Evidence Act and section 296. In civil cases, judicial discretion to overrule the minister even in matters affecting the security of the State is retained, but such discretion is excluded in criminal cases. It will be interesting to see how the courts respond to the 'absurdity' argument raised above. One can only suggest that the legislature should pre-empt the argument by bringing section 296 into line with section 10 of the Civil Evidence Act.

The overall effect of the plethora of privileges on criminal adjudication is that the process of getting to the truth can be impeded if not frustrated by a witness, or the accused, or the executive. When this happens it becomes somewhat hypocritical to proclaim that 'justice' has been done. At most, only 'relative justice' has been achieved.

### THE IMPACT OF CONTENTIOUS PROCEDURE

The distinguished jurist Roscoe Pound explored the causes of popular dissatisfaction with the administration of justice in a paper presented to the 29th Annual meeting of the American Bar Association in 1906.<sup>50</sup> Although he confined himself to the civil justice system, some of his observations can be extended to criminal justice. He dealt with the causes under four main heads. The first consisted of causes that could be generally applied to any legal system. The second grouped together those that could be traced to the peculiarities of the Anglo-American legal system. The third head consisted of causes lying in the American judicial organization and procedure, while the fourth discussed causes attributable to the environment of judicial administration.

46. The Criminal Procedure and Evidence Act is generally administered by the Minister of Justice, Legal and Parliamentary Affairs. See s 2. However, section 296 extends the power to object to evidence to "the Minister responsible in respect of such (evidence)". This must be a reference to other ministers, particularly as the administering minister is not responsible for matters of state security.

47. See *SA Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C).

48. *Minister of Law and Order v Hurlle* 1986 (3) SA 578 (A).

49. *Austin and another v Chairman, Detainees Review Tribunal and another* 1988 (1) ZLR 21 (5C) 36 B-C.

50. The paper is reproduced by S Glueck in *Roscoe Pound and Criminal Justice* (1965) 60. See also R Pound "The Causes of Popular Dissatisfaction with the Administration of Justice" (1906) *American Law Review* 729-749.

While Professor Pound's paper is generally very perceptive, it is his discussion of the causes under the second head that is of particular significance to this discussion. Among the causes highlighted under it was the common law 'doctrine of contentious procedure, which turns litigation into a game.' The doctrine has also been called the sporting theory of justice.<sup>51</sup> In a critical evaluation, he blamed this doctrine for causing some of the deficiencies evident in the civil justice system in his day. The general criticism was that it disfigures judicial administration. Specific attacks were directed at the practices that contentious procedure nurtured, including judicial indifference to the incongruity between justice and the truth, witness bias (especially noticeable in expert witnesses), sensational cross-examination, and the exaggerated importance given to errors of procedure. Many years before Roscoe Pound, English jurist Jeremy Bentham had also castigated the sporting notion of justice. Bentham drew parallels between a criminal trial and the sport of fox hunting.<sup>52</sup> He considered it iniquitous for the English criminal justice system to abandon a truth-oriented judicial system in favour of one in which the suspected offender should, as it were, be given a fair chance in a public contest to escape conviction like the beleaguered fox. In Bentham's view the objectives of the two processes were different, in that the goal of criminal justice was the achievement of correct decisions while the search for fun motivated fox hunting. The criminal justice system could only devalue itself by adopting methods suited to sport.

Time has moved on since the days of these two jurists. Some of the trappings of the sporting notion of justice are however, still evident in our system. They may now be just more difficult to assail. This is partly because they are integral to a firmly entrenched legal system. Secondly, and perhaps of greater significance, is that they appear to have found a new avenue of legitimacy. Many of these trappings now derive their authority from universal and international human rights instruments. Before turning to the latter, one should examine the current influence of contentious procedure on Zimbabwe's criminal justice.

The concept of party autonomy examined above can be traced from the sporting notion of justice. Autonomy implies that the parties have relative freedom to negotiate the outcome of cases with very little, if any, judicial scrutiny. Thus, the prosecution as a party, has the unfettered right to decline to prosecute, even where there is sufficient evidence for a conviction.<sup>53</sup> Alternatively, if the prosecution decides to go ahead with the case, it can still decide to forgo trial by entering into a bargain on the charge or on the agreed facts. Section 271 of the Criminal Code,<sup>54</sup> which regulates proceedings in which the accused tenders a guilty plea envisages plea compromises of both descriptions. Its first two subsections both provide for the acceptance of the tendered plea by the prosecutor, which can only arise

51. Glueck, *op cit* (n 50) 64.

52. J Bentham *Rationale of Judicial Evidence* Vol 5 (1827) 238-240.

53. In terms of the principle of open discretion, the prosecution is at liberty to take account of matters of practical or political importance. See C Goredema "The Attorney-General in Zimbabwe and South Africa: Whose Weapon, Whose Shield?" (1997) 8 *Stell LR* 45 52-3. In a recent matter, the Attorney General of the Eastern Cape was reported to have declined to prosecute a young lady for shooting her father at point blank range. The decision conflicted with the inquest verdict that she was blameworthy. The *Sunday Times* dated 10 May 1998 reported that the Attorney General argued that a prosecution would not be justified, since even if a conviction resulted, the accused was likely to be let off with a lenient sentence.

54. It is common to refer to the Criminal Procedure and Evidence Act as the Criminal Code.

where a qualified plea is tendered. In a bargain on the charge, the accused offers a guilty plea to a less serious or alternative offence, while in a 'fact bargain' a guilty plea is offered on condition that the prosecution agrees to a modified version of the facts founding the charge. In either case, the resulting sentence is affected. In either case, there is potential for the truth to be compromised.<sup>55</sup>

Furthermore, in a public prosecution, the Attorney General is *dominus litis* until the verdict is given. This means he can stop the prosecution at any stage. If the accused has already pleaded, he is then entitled to an acquittal.<sup>56</sup>

The doctrine of contentious procedure determines the nature and scope of the criminal trial. While the trial may be an inquiry, its scope is limited, primarily by the nature of the charge formally laid against the accused. The charge determines the facts that may be revealed and the kind of evidence that can be given in support. The information selection process, which starts in the investigation stages of the case, continues at trial. On account of the operation of the rules of probative policy adverted to above, at trial the selection process is policed by the defence, if the accused is represented, and ultimately by the court.

### The Significance of Cross-examination

From the prosecution standpoint, the information which survives the selection process must withstand the scrutiny of cross-examination. Cross-examination is a characteristic feature of contentious procedure, an improvement on the archaic procedure of trial by battle.<sup>57</sup> As a process, it has been extolled as the greatest legal engine ever invented for the discovery of truth<sup>58</sup> but its efficacy in a multi-lingual setting has been questioned. In order to evaluate the contribution that cross-examination makes to the rectitude of judicial decision making, we need to examine the process from a variety of standpoints. In this discussion it will be examined from the standpoint of the court, the accused and the prosecution.

The ultimate function of a court that is called upon to decide a case in which there is a conflict between the accused's version of events and that of the prosecution is, as Chief Justice Gubbay put it, to determine 'a sufficiently complete and accurate history of the events in question'. Ideally, cross-examination should provide a mechanism by which contradictory evidence gets into direct confrontation. The value of such a confrontation stems from the appreciation that even the simplest evidence can only be accurately assessed if it is put into its context. There are certain recurrent flaws that have been found to affect witness testimony. These flaws can be attributed to four factors, namely faulty perception, erroneous memory, ambiguity and insincerity.<sup>59</sup> Since each of them can have an effect on the reliability of testimony, I will deal briefly with them.

55. See J Jackson "Truth and Compromise in Criminal Justice" *op cit* (n 31).

56. Section 9 of the Criminal Procedure and Evidence Act.

57. See P Schwikkard, A Skeen and S E Van der Merwe *Principles of Evidence* (1997) 2-3.

58. *Wigmore on Evidence* paragraph 1367, quoted in Hoffmann & Zeffertt *The South African Law of Evidence* 4 ed (1988) 456.

59. See D Morgan "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62 *Harvard LR* 177; L Tribe "Triangulating Hearsay" (1974) 87 *Harvard LR* 957.

All testimony which purports to report on observed data may be affected by errors of observation or recording. Eyewitness observation which courts are frequently asked to rely on may be affected by defective eyesight or by the conditions in which it is made. It may also be affected by unconscious bias. Do we not sometimes see what we expect to, or are conditioned to see?

It often happens that the observation of the event and the recounting of the observation to other people is separated by a period of time. Many things can occur during that time. Certain aspects of what was perceived can be forgotten. The observer can be influenced by fellow observers or complete strangers to the event. The report that is eventually made to the police, may in fact be an inaccurate reconstruction which combines elements of the observation, details picked up from others and evaluative conclusions. The evidence given to the court is substantially based on this statement to the police, which is probably because by the time the observation has to be repeated to the court the memory has faded even more.

Oral statements, detached from their broader context, can quite easily be misunderstood. A simple example is a report that 'That man killed his wife.' This could be meant to be a murder report. But it may also be an abbreviated way of reporting that the man's wife committed suicide on account of his infidelity. The correct meaning can only be discovered by inquiring about the way in which the accused brought about her death. Unquestioned one-sided narrations are fraught with this kind of danger.

The oath, which has been a part of our procedural system for generations, has evidently not eliminated witness dishonesty. Although there are no statistics as to the regularity with which witnesses try to pull the wool over the judicial system's eyes, it is common knowledge that sworn testimony is not necessarily honest testimony. The reasons for dishonesty are legion; bias, self-interest, embarrassment, malice, duress, and fear being only the most common.

It is in the court's interest to find out whether it can rely on the testimony given by any one of the witnesses. The court is placed in a better position to do so if the factors that may negatively impact upon his reliability are fully explored. Comprehensive cross-examination offers to put the court in that ideal position. While it lasts, it also provides the court with the opportunity to observe the confidence with which the witness sticks to the evidence given in chief.

The defence is at liberty to decide whether to cross-examine or not, and if so, what to cross-examine on. It also enjoys the independence to decide on the method, subject to ethical injunctions applicable to the defence of the admittedly guilty. In deciding on strategy and degree, the defence is guided by the incidence of proof. For the defence, cross-examination is not just a mechanism by which to assist the court make up its mind about the witness. Successful trial advocacy depends on the ability to control the witness. For his testimony, or its impact to be undermined, it is necessary for the witness to be controlled. The quest to achieve such control has earned the process of cross-examination various images, some of which are uncharitable.

It would be fair to say that the cross-examiner is not primarily guided by the enthusiasm to get to the bottom of the matter. He is not hired to investigate the case in court. If, for instance, the prosecutor neglected to go over some essential point with a witness, the last

thing that defence counsel will want to do is to take the witness through that evidence. It is more likely that counsel will steer the witness further away from it. Clearly, cross-examination can be used to obscure the truth. Occasionally, cross-examination could produce a picture which approximates the historical truth, but that result is often either incidental or inspired by the fact that the defence finds it in its interest to work to that end.

One must point out that in the absence of legal representation, the model portrayed here does not function in the manner suggested. Most accused persons who face trial in Zimbabwe do so without representation. Many of them find it difficult to understand the sequence and significance of the stages of an adversarial criminal trial. It is even more difficult to appreciate the nature of cross-examination, let alone the techniques of advocacy. An accused person in that position is not sure what areas of the witness's testimony will influence the court if left unchallenged, or how to place an unfavourable gloss on the testimony of the witness. Adding to these difficulties is the fact that most of the unrepresented do not record the evidence. The result is that some of the evidence which goes unchallenged in the trial of an unrepresented person may be tainted by the testimonial infirmities highlighted earlier. Admittedly, in such circumstances the court has a duty to test the witnesses' accounts by questioning them. The court is, however, never in a position to do a thorough job in this respect.<sup>60</sup>

In consequence of the domination of the criminal trial by the police and the prosecution, the trial itself is often an examination of the quality and reliability of the product of their investigation. Since those factors are judged on the basis of the impressions made on the mind of the court by the witnesses, a great deal of the trial prosecutor's time is devoted to the promotion of a favourable impression of State witnesses. This preoccupation tends to be reflected in the manner and direction of the average cross-examination of the accused. It is not uncommon for the accused to be asked to explain why a witness, who has no apparent motive to do so, implicated him in the offence. This line of questioning is directed more at boosting the image of the witness rather than discrediting the accused. While it may influence the court in choosing between conflicting versions of events, it contributes very little to what should be a forensic exercise.<sup>61</sup>

In fairness, it must be said that in evaluating credibility, the trial court takes into account the probabilities. The court's estimation of probabilities is informed by logic and experience lying outside the law. We must, however, not overlook the role that preliminary impressions formed about witness veracity play on the formulation of these probabilities. Probabilities are not formulated entirely independently of the evidence.

60. See the remarks by Didcott J in *S v Khanyile* 1988 (3) SA 795 (N). The adversarial system of criminal justice presupposes equality between the contestants. Where this is absent, the truth often corresponds with the view of the more powerful contestant. See R J Delisle *Evidence: Principles and Problems* 2nd ed (1989) 2.

61. The adversary setting in which fact finding takes place and the methods used have long been criticised as unscientific. It has been argued that, unlike scientists and historians, judges in the common law world confine themselves, in deciding questions involving factual data, to a choice between two sets of existing data proffered to them by rival claimants. The proposed hypotheses are not tested against objectively demonstrated facts. See P Brett "Legal Decision making and Bias: A Critique of an Experiment" (1973) 45 *University of Colorado LR* 1 23.

The absence of gainsaying evidence from the accused tends to fortify conclusions which are adverse to the defence. Permissive statutory provisions make it possible to draw conclusions of guilt on the basis of a non-responsive attitude by the accused in the face of a police accusation. The accused may suffer the same fate if he is found to have been inexplicably dilatory in coming forward with a defence or is non-responsive in court. In those circumstances, there is very little incentive for the court to go beyond the prosecution's case to unearth the objective truth.

Contentious procedure has been weakened in three ways in Zimbabwe. Firstly, an attempt has been made to create a kind of pre-trial discovery in criminal cases. In *S v Sithole*<sup>62</sup> Devittie J held that the accused had a right of access to statements made to the police by prosecution witnesses. The prosecution had an obligation to make them available unless there were circumstances justifying concealment, such as the fear of witness intimidation or elimination. The onus was on the prosecution to justify non-disclosure.

Secondly, the court is not confined to playing the role of an umpire during the criminal trial. It can inquire into areas that may have been glossed over by the protagonists. Using this power, the court can also afford witnesses the opportunity to explain incomplete or vague answers.

Thirdly, the court is empowered to call witnesses. In terms of section 232 of the Criminal Procedure and Evidence Act, the court has the discretion to call a witness at any stage of the trial. If the witness' evidence appears to be essential for the just decision of the case, the court is obliged to call her. The thinking behind this provision was explained in *R v Hepworth*.<sup>63</sup> Curlewis JA said that a criminal trial was not 'a game where one side was entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides.' He also made the point that a judge is 'an administrator of justice, he is not merely a figurehead, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.'<sup>64</sup> In a recent decision a Namibian court held that this function should be used in order to discover the truth.<sup>65</sup>

These intrusions into the adversarial character of our system of criminal justice hold out the promise that the ascertainment of the truth may prevail over other considerations. They should not, however, be considered in isolation from the value system of criminal justice. Pre-trial discovery in criminal cases has to take cognisance of the presumption of innocence. The *Sithole* case may be useful to the defence, but its efficacy appears to be conditional on legal representation. Furthermore, the case does not go so far as to compel the defence to reveal its case.

The judicial power to call and examine witnesses is also tempered by principles of auxiliary and extrinsic probative policy. The court cannot use this power in order to circumvent the admissibility rules. Neither can the court call an incompetent witness. It is not open to the

62. 1996 2 ZLR 575.

63. 1928 AD 265.

64. 277.

65. *S V Van den Berg* 1995 (4) BCLR 479 (Nm).

court to override a privilege. It is considered to be improper for the court to assist an inept prosecution by invoking section 232.<sup>66</sup> While it provides a mechanism by which to ensure that justice is done, section 232 is meant to assist the court to do justice according to the prevailing standards and customs. As we have seen those standards are not for the trial court to determine, as that has been done elsewhere. The standards take into account, and occasionally give precedence to, purposes other than the discovery of the truth.<sup>67</sup>

One can read from the Chief Justice's address a yearning for an approach which does not undervalue the role of the truth in the criminal justice system. In my view such an approach can only come about in consequence of a comprehensive review of the system. In anticipation we should perhaps examine a system that claims to be guided by this dominant principle.

#### **THE CUSTOMARY CRIMINAL JUSTICE SYSTEM AS AN ALTERNATIVE FACT FINDING MODEL**

The indigenous criminal justice system over which the colonial system was imposed continued to co-exist for decades with it. As colonialism became more and more intrusive into local government, the indigenous system was stealthily marginalised.<sup>68</sup> The centre of customary judicial power in criminal cases gradually migrated from the traditional tribunals, first to the district commissioner, then to the 'conventional' judiciary. By the time of independence, the criminal jurisdiction of indigenous tribunals was only being exercised in respect of minor criminal offences. This position was adopted and consolidated by the 'independence Constitution' of 1980.<sup>69</sup> A new structure of courts, called primary courts, was created and vested with the limited criminal jurisdiction that remained in the hands of customary tribunals. There were two tiers of the new courts, village courts and community courts. Only the community courts had criminal jurisdiction. That situation has continued to this day.

In deciding cases of whatever nature, community courts are enjoined to have regard to 'customary judicial practices' and conduct proceedings in 'as simple a manner as is reasonably possible and as, in the opinion of the presiding officer, seems best fit to do substantial justice'.<sup>70</sup> It is unfortunate that not much use has been made of the limited criminal jurisdiction, which makes it difficult to analyse the simple manner prescribed by the legislation. One can however examine the judicial practices that prevailed in the courts which preceded the primary courts. Certain themes emerge from a study of customary judicial practices of the Shona people.

We will take the administration of criminal justice by a chief's court as an example. The tribunal was composed of the chief, a number of counsellors and other court officials. The framework in which justice was administered was dominated by what Nhlapo has called the community principle. He contends that the individual was not autonomous or possessed of rights above and prior to society.<sup>71</sup> The interest of the public in the administration of justice was accorded visible recognition by the permissible scope for public participation during the presentation of evidence.

The proceedings assumed the form of a wide socio-judicial inquiry, and the testimony was not limited to the immediate cause of action. It could include the historical cause of the conflict. As Holleman observed, the trial was not just a public contest between the embittered parties. It also provided an opportunity for the vindication of their social conduct and esteem in the community.<sup>72</sup> Neither the complainant nor the accused could shelter behind the concept of party autonomy. Interested members of the audience could play a role by questioning the participants. They could draw upon their own knowledge of relevant facts, circumstances and personal relations to 'query inconsistencies in the various testimonies, to add useful information, and generally to expound their views on the matter'.<sup>73</sup> There was a recognition of the importance of knowledge of local circumstances in fact finding. The other theme which emerges is the belief that it should not be left to the protagonists to decide on, or limit, the sources from which the truth is to be extracted.

Customary judicial practice took the view that questions of relevance of evidence could not be decided in advance of its presentation. A system of 'free proof' prevailed, in the sense that witnesses were expected, indeed encouraged, to speak openly and desist from concealing anything. In that sense, this system was somewhat more conducive to speaking 'the truth, the whole truth and nothing but the truth' than the common law system with its litany of exclusionary rules.

Furthermore, indigenous law presumed that every adult was familiar with both the substance of the law and the procedures by which matters were adjudicated. There was therefore no need for legal representation. Neither was there a need for a cult of judicial experts in whom the responsibility to adjudicate would be vested. The audience regularly played the role of co-adjudicators.<sup>74</sup>

In the social setting in which it operated, the customary judicial system probably achieved accurate fact finding. It was certainly influenced by, and reflective of, the ideas, values and priorities that prevailed in the community which it served. There can be no doubt that it prioritised truth discovery as a central purpose. That purpose was also regarded as being complementary to and not potentially in conflict with, the welfare of the community. In this regard, it took a different approach to the present, Anglo-centric criminal justice system.

The major question arising from this overview is whether customary judicial practices hold some lessons for the common law system. Some might argue that the suggestion to

71. See R T Nhlapo "The International Protection of Human Rights and the Family : African v Variations on a Common Theme" (1989 *International Journal of Law and the Family* 1, 4.

72. J Holleman "Disparities and Uncertainties in African Law and Judicial Authority : A Rhodesian Case Study" (1979) 17 *African Law Studies* 1.

73. Holleman, *op cit* (n72) 7.

74. See T Bennett *Human Rights and African Customary Law* (1995) 1-3.

implant some aspects of such practices is far-fetched, since the two systems proceed from such discordant premises. There are several reasons why I do not share the pessimism.

Firstly, there is a clear need for reform. Unless we bury our heads in the sand, we have no option but to acknowledge the deficiencies of the present system. The beacon on which we are to set our sights is the achievement of harmony between criminal judgements and the historical reality. The customary system provides a rational method by which to attain the goal of truth discovery. Secondly, even a limited integration of the two systems would involve a shift from a procedural system that a significant number of people is not familiar with to a system which, by reason of its incorporation of aspects of customary practices, they could become conversant with relatively easily.<sup>75</sup> The process offers an opportunity to produce a criminal justice system that is superior to either of the constituent systems. Thirdly, the inquisitorial judicial systems which have existed on the European continent and in African ex-colonies such as Mozambique and Cameroon,<sup>76</sup> which exhibit some elements evident in customary judicial practice, should provide illustrative models. Inquisitorial systems are generally reputed to be much more committed to the discovery of the truth than common law systems.<sup>77</sup> Our adversarial criminal justice system has already incorporated some inquisitorial aspects, in respect of plea and trial proceedings. It may well be that we will not really need to re-invent the wheel after all!

### **Are Customary Judicial Practices Inimical to Universally Recognised Human Rights?**

I pointed out above that the interconnection between the value system inherent in Anglo-American criminal justice and codes of international human rights could impose limitations on the extent of reform. It may be claimed that values such as individual autonomy, the right to confront adverse testimony, due process, and trial by an impartial tribunal have acquired a universal character. Accordingly it will be argued that the ranking of values and priorities in criminal justice is not a matter lying solely within the purview of municipal law.<sup>78</sup> Any reform of criminal justice may not eliminate these, lest it attract the disapproval

75. See Mwansa "The Status of African Customary Criminal Law and Justice" *op cit* (n3) 37.

76. Cameroon provides an interesting example of a mixed jurisdiction. On account of its colonial history, one part of the country inherited French law while the rest continued to follow English law. In addition to the colonial systems there was indigenous law, a combination which prompted one commentator to describe Cameroon as a "laboratory of comparative law". See P Bring "The Abiding Influence of English and French Criminal Law in one African Country: Some Remarks Regarding the Machinery of Criminal Justice in Cameroon" (1981) 25 *JAL* 1.

77. Mirjan Damaska carried out a comparative study, and reported his impressions in his classic work, *Faces of Justice and State Authority* (1980). Following a similarly comprehensive study, Barton Ingraham concluded that :

"inquisitorial" systems emphasize abstract truth and substantive justice, believing that justice is impossible without truth. "Adversarial" systems, on the other hand, stress the autonomy and dignity of the litigant (even if morally he is in the wrong) and insist on a "fair fight" under procedural rules that are so designed that there is a fair distribution of wins and losses, regardless of merit.

See B Ingraham *The Structure of Criminal Procedural Law and Practice of France, the Soviet Union, China and the United States* (1987) 25.

78. See *S v "A" Juvenile* 1989 (2) ZLR 61 (SC) 72; *Government of the Republic of Namibia v Cultura* 2000 1994 (1) SA 407 (NmSC) 411.

of international human rights law. If customary judicial practices are inconsistent with these values, they cannot be integrated with the common law system.

The answer to this weighty argument is that the principles underpinning customary judicial practices are consonant with the norms that human rights law aspires to protect. The rights stressed in Article 7 of the African Charter on Human and People's Rights, namely to be presumed innocent pending the determination of a competent tribunal, to be defended by counsel, and to be tried by an impartial tribunal within a reasonable time, can be reconciled with such practices. The perception that customary judicial practices are inimical to human rights may be attributable to the observation of instances of distortions, such as occurred in the politically inspired traditional courts during the Banda era in Malawi.<sup>79</sup> It might also arise on account of the belief that there is no place for lawyers in a customary judicial setting. The belief is fed by a misconception: namely that a lawyer can only play a role in an adversarial setting. There is a role for a lawyer even in an inquisitorial system. There is ample proof of this fact in many countries on the continent of Europe. While it may be true that lawyers work in a different environment, by no means can it be said that they do not defend clients. It would be fallacious to assume that only a system which allowed contentious procedures accommodates these values.

#### THE SCOPE OF CRIMINAL JUSTICE REFORM

Criminal justice reform should undertake a review of the entire body of auxiliary rules of probative policy. In some jurisdictions, actuarial rules such as the rule against hearsay have been found to impede the process of fact finding. In South Africa, a discretionary approach to the admissibility of hearsay was adopted in 1988.<sup>80</sup> A scientific study of the impact that evidence of character or of similar fact has on decision making might compel a reconsideration of the validity of English law principles on these concepts. The influence of empirical studies in psychology on certain hallowed evaluative approaches to evidence is beginning to be felt. Examples can be seen in the spheres of the treatment of the evidence of complainants in cases involving sexual assault.<sup>81</sup> The exclusionary rule relating to self-corroborating extra-judicial statements may also be due for re-evaluation. A general review of all rules of auxiliary probative policy is preferable to a piecemeal approach.

The review of exclusionary laws that are based on, and express extrinsic policies is also important. These laws often operate to set the criminal justice system against itself. Quite a few of them are ill defined. In some cases one has to refer to a foreign legal system in order to find out whether a particular exclusionary law may be invoked or not. Section 295 is an example. Others are grounded on policy arguments of questionable validity. The marital privilege is an example. Judicial ambivalence to the right of silence is reflected in

79. See P Brietzke "Murder and Manslaughter in Malawi's Traditional Courts" (1974) 18 JAL 37.

80. Law of Evidence Amendment Act, 45 of 1988.

81. See Ebrahim J's laudable judgement in *S v S* 1995 (1) SACR 50 (ZS) and the Namibian decision in *S v D and another* 1992 (1) SACR 143 (Nm). In a decision handed down in March 1998, in *Jackson v S* (Unreported 35/97), the Appeal Court in South Africa did away with the cautionary rule in cases of a sexual nature, on the basis that it was based on "an irrational and out-dated perception". In the judgement, (pp.7-8) Olivier JA referred to six common law jurisdictions in which the rule has been abolished. In most of them this was done by statute.

the approach to evidence obtained by the police with the forced help of the suspect. There is an inconsistency in the treatment of what the Americans would call the two generations of 'fruits of the poisonous tree', if the first generation is accepted to be the coerced confession itself while the second consists of the evidence derived from the confession, either by a pointing out or further investigation. In Zimbabwe, a rule of extrinsic policy controls the admission of the first generation. Volition must be established and reliability is not the touchstone for admissibility. For that reason, the truth of the confession is often irrelevant. The second generation is not similarly regulated. The view is that the confession can be severed from the evidence derived from it. The rejection of the confession will not necessarily mean the rejection of the derivative evidence.<sup>82</sup> An eminent American academic has argued that the exclusion of the fruits of illegal police action is based on sound principles of political morality.<sup>83</sup> One should not readily assume that these principles are universally accepted. It is submitted that, in the interests of formulating a consistent policy, their legitimacy should be assessed.

Any proposed reform should also deal with the question of whether the monopoly over the adjudicative function in criminal justice by the judiciary should persist. I have pointed out the difference in views between the formal and the customary systems on the matter of cognitive competence. The formal system rejects the idea that knowledge of the law is widely shared. It takes what is at best, a sceptical attitude about the ability of non-specialists to resolve a factual contest.<sup>84</sup> In contrast, the customary judicial system accepts the idea that adults of sound mind are universally cognitively competent, as regards both legal and factual issues. The jury system can be regarded as a median position. If the procedural law is to be weaned from its adherence to the 'cult of the expert', a system which adopts this element from the latter two systems has to be considered.<sup>85</sup>

A related issue is the expense which can be expected to be imposed on the national resources by an administration which will possibly involve a larger number of adjudicators and a relatively less restrictive procedural system. One of the functions of the current system is to ensure that criminal adjudication is performed in an economical way. Enlarging the

82. See *R v Moyo* 1967 RLR 317; *S v Bouure* (1) 1973 (2) RLR 171; *S v Ndlovu* 1988 (2) ZLR 465 (SC). In Ndlovu's case, the accused was alleged to be a member of a group of insurgents (called dissidents during the disturbances in Western Zimbabwe in the early eighties). A soldier had been killed in a firefight involving the accused's group. A villager had also been stabbed to death. The accused was charged with murder. Following his arrest, the accused made certain statements and pointed out an ant-bear hole near the deceased villager's home. The deceased's body was found there. The court held that the evidence of the pointing out could be separated from the statements preceding and accompanying it. Section 243(2) of the Criminal Procedure and Evidence Act allowed evidence of the fact that the accused was able to lead the police to the hole near the deceased's home.

83. For the arguments in detail, see A Kamisar "On the Fruits of Miranda Violations, Coerced Confessions and Compelled Testimony" (1995) 93 *Michigan LR* 929.

84. Although it is open to the courts to engage the services of lay assessors in criminal cases, in practice they are only called upon to sit in High Court trials.

85. In suggesting that some thought be given to the wider use of lay participants in adjudication, I should not be understood to be advocating for the return of the jury. I find the fact that the jury is not given a running record of the case, or obliged to justify its decision, quite objectionable. In my view, this detracts from the fact finding capacity of the jury. Furthermore, it enables the jury to vent political disapproval of the offence charged or the possible punishment. See M Damaska "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure" (1973) 121 *University of Pennsylvania LR* 504 584-5.

bench invites extra personnel, thus increasing the costs.<sup>86</sup> Removing the restrictions on the admissibility of evidence increases the number of issues to be resolved and certainly extends the duration of the trial.<sup>87</sup> The costs factor may work against the slide to a 'free proof' system and compel the retention of the current approach to issues of relevance. It may also affect the size of the adjudicating tribunal.

### CONCLUDING REMARKS

It is clear that there are immense difficulties in the design of a system of criminal justice to decide cases according to what the truth decrees. At the same time no adjudicator can comfortably live with the knowledge that his decision is founded on a fabrication, or an incomplete portrayal of the facts. When one examines the framework within which our criminal justice works, in particular the rules of evidence which restrict the probative information to be considered by the decision maker, it emerges that there are formidable barriers to the discovery of the truth. The call for systemic review of that framework and those rules is not new. It echoes the misgivings expressed by Jeremy Bentham, repeated at the beginning of this century by Roscoe Pound and more recently expounded by William Twining.<sup>88</sup> In between numerous other voices have been added to the chorus.<sup>89</sup>

What might be new in the Zimbabwean context is the suggestion that the judicial systems of the colonised polities should be considered in the formulation of criminal justice theory.<sup>90</sup> They do have something to contribute to the review of the colonial system. Steeped as it is in the cultural orientation of the indigenous people of the country, Zimbabwean customary criminal law is part of the institutional and social situation within which discourse about law reform should be set. The consideration of reform will inevitably demand a discussion of the core function(s) of the criminal justice process as well as the role(s) of the various functionaries within it. It is my hope that customary law will have something to say about those issues. One cannot deny that customary concepts of criminal procedure and evidence have not been sufficiently researched. It is likely that we will not be able to call upon a body of local jurists in that area. Partly for that reason, and partly on account of the nature of the subject, non-lawyers will have to be involved in the reform process. If it achieves nothing else, I hope this article will provide some stimulus for research into the potential for inter-system cross-fertilisation.

86. This probably explains the reluctance of the Minister of Justice to allow the regular use of assessors in the magistrates court.

87. See *Delew v Town Council of Springs* 1945 TPD 128.

88. W Twining "Freedom of Proof and the Reform of Criminal Evidence" (1997) 31 *Israel LR* 439.

89. See J B Weinstein "Some Difficulties in Devising Rules for Determining Truth in Judicial Trials" (1966) 66 *Columbia LR* 223-246; D S Greer "Anything But the Truth? The Reliability of Testimony in Criminal Trials" (1971) 11 *British Journal of Criminology* 131-154; R Brandon "Innocents in Jail" in Baldwin and Keith (eds), *Criminal Justice Selected Readings* (1982) 182; and the review of M Damaska's *Evidence Law Adrift* by J Redmayne in (1998) 61 *MLR* 123-6.

90. A similar call has been made in relation to the criminal justice system of Cameroon. See O Munzu "Cameroon's Search for a Uniform Legal System: The Example of Criminal Justice" (1989) *African Journal of International and Contemporary Law* 46.



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