ZIMBABWE·LAW·REVIEW

Volume 5 1987

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Harare
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EDITORIAL

THE LAWS OF THE CONSTITUTION

Freedom and independence are the perennial persuits of the human being. Throughout the long history of human society people have ceaselessly struggled to free themselves from the fetters of nature and society. All the struggles that constitute the great epics of the history of mankind have been struggles to defend and to realise freedom. The history of the Zimbabwean people until recently had been one intense struggle to realise independence and freedom from foreign domination and racist subjugation. Our recent struggles have not only increased in real terms our personal freedom and the freedoms available to the masses of the people, but they have also enriched our spiritual and cultural love for the dignity and freedom of men. It is against this, our historical inheritance of love for the dignity and freedom of man, that this issue of the *Zimbabwe Law Review* and the scientific researches behind it have been put together. In other words, this special issue of the *Zimbabwe Law Review* yet again evokes and stimulates our desire as a nation to build a truly free and democratic society.

Lawyers are not and should not be mere technicians of the law. The Constitution is the fundamental thesis expressing the principles upon which our nation, or any nation, is built. The Constitution expresses all our values and therefore constitutes a measure of the level of our freedom and humanity. Its criticism is the criticism of the standards of its values. Lawyers play their part in making and advising on legal aspects of both the substance and the technical standards of constitutions. In order to do a better job of this or to express the democratic yearnings of the people, our lawyers must possess a high level of critical values to assist society as a whole to create more and better freedoms for the well-being and property of the people. These freedoms to be enshrined in the Constitution of the land.

We hope that in this issue, as Zimbabwe prepares to make its own new Constitution after 1990, that the researches and critical visions on constitutionalism made here by the various authors from various scientific and ideological vantage points will assist our people and our leaders in charting and further broadening the road of freedom and independence in the drafting of our own new and soverign Zimbabwe Constitution as we march forward towards the year 2000.

Issue Editors

TORTURE, INHUMAN AND DEGRADING TREATMENT AND THE ADMISSIBILITY OF EVIDENCE

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INTRODUCTION

Section 24 of the Constitution of Zimbabwe gives the Supreme Court the power to declare any law to be in violation of the Declaration of Rights and hence unconstitutional and invalid. This has not always been the position. Under s.26 (2)(b) as read with s.26 (3)(b) of the Constitution, no pre-existing law was to be held to contravene the Declaration of Rights until five years after the date of independence. A similar prohibition, but without the time restriction, was found in the 1961, 1965, 1969, and 1979 Constitutions.[1] Therefore, on 18 April 1985, for the first time a court in Zimbabwe was empowered to strike down a pre-existing law as unconstitutional. It was clearly the intention of the drafters of the Constitution that pre-existing laws should be reviewed, and if necessary, struck down. With this in mind, it is the purpose of this article to discuss the application of s.15 of the Declaration of Rights to the law of evidence. Section 15 provides "No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment." I will argue that existing laws which allow evidence obtained as the result of torture, inhuman or degrading treatment to be admissible are unconstitutional and must be struck down. First I will discuss the content of what is forbidden, i.e. the definition of torture, inhuman or degrading treatment. Next I will discuss the enforcement of the provision, particularly with regard to the law of evidence.

Definition of Torture, Inhuman or Degrading Treatment

The Constitution does not define torture or inhuman or degrading treatment. Torture has been defined by international law in documents which could be taken as declatory of customary international laws and as such part of Zimbabwe law in accordance with the principle enunciated in *Barker McCormack v The Government of Kenya*.[2] In that case the Zimbabwe Supreme Court applied the doctrine of restrictive sovereign immunity on the grounds that it was "generally applied in international law" and that "there are no decisions of courts of this country and no legislation inconsistent with that doctrine and it should be incorporated as part of our law." (p821F–G). In the same way with regard to the definition of torture and inhuman or degrading treatment, international law can be incorporated into our law as long as it is not inconsistent with our own case law or legislation. A definition of torture is found in Article 1 of the Declaration

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1 S. 16(3) of the 1961 Constitution, S.69(3) of the 1965 Constitution and S.125(3) of the 1979 Constitution.

2 1983(4) S.A. 817 (ZSC)

Against Torture, adopted unanimously by the UN General Assembly on 9 December 1975:

> "1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed, or intimidating him or other persons.
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> It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.[3]
>
> 2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."

This definition deserves some exploration. It is important to note the following: Torture involves national acts of public officials. This restriction is undoubtedly because the UN deals only with Government, not private individuals. In Zimbabwe torture by private individuals would also be prohibited. Secondly, the pain and suffering inflicted must be severe in order to constitute torture. A certain amount of suffering for prisoners is expected, as is a certain amount of persuasion to induce confession. Third, the definition includes not only physical suffering but mental suffering as well. This therefore includes the many elaborate and sophisticated techniques of psychological torture developed in recent years, such as solitary confinement, hooding etc. Fourth, the purposes of torture are broad, including not only extracting information and confessions but also for punishment or intimidation. Finally, treatment arising from lawful sanctions is not torture, leaving a loophole for governments which may, as discussed below, be closed by the prohibition of inhuman or degrading punishments and treatment.[4]

Another definition of torture can be found in the Declaration of Tokyo, which provides guidelines for medical doctors concerning torture and other cruel, inhuman or degrading treatment or punishment in relation to detention and imprisonment, and was adopted by the 29th World Medical Assembly, Tokyo, Japan, 10 October 1975.[5] This definition reads:

> "For the purpose of this Declaration, torture is defined as the deliber-

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[3] Adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, these rules purport to "set out what is generally accepted as being good principle and practice in the treatment of prisoners and management of institutions".

[4] See Amnesty International, *Torture in the Eighties*, note 6.

[5] Text can be found at page 230 of the *South African Journal on Human Rights*, Vol. 2, Part 2, July 1986.

> ate, systematic or wanton infliction of physical or mental suffering by one or more persons acting alone or on the orders of any authority, to force another person to yield information, to make a confession, or for any other reason."

This definition is much broader that that of the Declaration Against Torture. To be torture an act may be deliberate, but it may also be systematic or wanton. The suffering may be either physical or mental, as in the UN Declaration, but this suffering is not qualified by the adjective severe. Whereas under the UN Declaration, the responsible person must be a public official, under the Tokyo Declaration it may be any person acting alone or on the orders of any authority. This is presumably because the UN Declaration regulates only State actions while the Tokyo Declaration is designed to cover any situation in which a doctor might find him or herself called upon to treat a victim of torture. Finally, under the Tokyo Declaration, an act may constitute torture regardless of the reason it is inflicted.

Some case law has also attempted to define torture. In 1976 the European Commission on Human Rights found unanimously that "the United Kingdom's combined use in Northern Ireland in 1971 of five techniques in support of interrogation (hooding, wall-standing, subject to continuous noise, deprivation of sleep and deprivation of food and drink) constituted (torture)."[6]

However, the European Court of Human Rights disagreed, holding that the five practices did not constitute torture but did constitute inhuman and degrading treatment.

The Zimbabwe Constitution forbids both torture and inhuman or degrading treatment. For the reason, the fine distinction between the two in the Northern Ireland case is not relevant. It is more important to define precisely the meaning of inhuman or degrading treatment, of which torture is an aggravated form.

Unfortunately, the term "inhuman or degrading treatment" has not been defined by international law. However, guidance can be found in a commentary to Article 5 of this U.N. Code of Conduct for Law Enforcement Officials which reads:

> "The term 'cruel, inhuman or degrading treatment or punishment,' has not been defined by the General Assembly but should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental."[7]

Other acts which are condemned by international law may indicate what falls

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[6] Amnesty International, *Torture in the Eighties* (1984) London: Martin Robertson.

[7] Ibid

within the definition of "inhuman or degrading treatment."[8] These are: flogging and punitive amputations, confinement in a dark cell [9], close confinement as medically fit [10], and medical experimentation including experimental techniques of behaviour modification.[11] It is the belief of Amnesty International that the determination of what is inhuman and degrading treatment must be made with regard to the following:

> "Consideration of the age, sex and state of health of the prisoner must be weighed as well as the duration of a particular treatment or punishment, its known or likely physical or mental effects on the prisoner, and the deliberateness of the act as evidenced by such things as discrimination shown toward particular prisoners. Reduction of diet, denial of adequate medical care whether deliberately or by negligence, forcible feeding, compulsory labour and numerous other undesirable forms of treatment or punishment may be rendered cruel, inhuman or degrading by the circumstances in which they are imposed."[12]

Amnesty concludes that "any punishment of a prisoner that damages his or her physical or mental health is thus prohibited."[13]

A recent Supreme Court judgment in Zimbabwe has considered the meaning of "inhuman or degrading." In *Ncube and Others v The State* [14] it was unanimously held that the definition of "inhuman and degrading treatment" includes the administration of corporal punishment to adult offenders.

In considering the definition of "inhuman or degrading", Gubbay, J.A. first noted the use of the word "or" and then favoured a disjunctive interpretation of s.15(1). Therefore, the section prohibits inhuman treatment *and* degrading treatment. He then discussed the meaning of the two words:

> "Inhuman" is defined in the Oxford English Dictionary as: "Destitute of natural kindness or pity, brutal, unfeeling, cruel, savage, barbarous," and to "degrade" as: "to lower in estimation, to bring into dishonour or contempt, to lower in character or quality, to debase."[15]

Most treatment which is inhuman will also be degrading, but there are some kinds of treatment which may be degrading but not inhuman.

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8 The following are compiled at p.16 of the Amnesty International report, *supra*, note 2.

9 UN Standard Minimum Rules for the Treatment of Prisoners.

10 Ibid

11 Article 7 of the International Covenant of Civil and Political Rights.

12 Amnesty International, *supra*, p.16.

13 Ibid

14 S.C. 156/87 (unreported)

15 At p.25 of the cyclostyled judgment.

Most authorities considering similar provisions have focussed on punishment as opposed to treatment. In the *Ncube* case, the learned justice considered the difference between the two:

> Treatment has a different connotation from punishment. It seems to me that what is envisaged is treatment which accompanies the sentence. In other words, the conditions associated with the service of sentences of imprisonment are now subject to the prescription.[16]

With respect, conditions associated with the service of sentences are surely not the only kind of treatment envisaged by s.15(1). One other major area of treatment which was clearly intended to be covered by the section is the treatment of witnesses, suspects and accused persons *before* the trial. Although they cannot legally be subjected to punishment, they are certainly the recipients of treatment, which must be controlled and tested by constitutional standards. For the purposes of this article, and for the purposes of the law of evidence, it is treatment before the trial which is important, because it is treatment at that stage which may affect the evidence presented at the trial. The major distinction between punishment and treatment, then, is that punishment is ordered by a court or some other official body as a consequence of a person's misbehaviour, while treatment covers actions in many other circumstances. This would include police trying to extract information or secure a confession, as well as treatment accompanying the sentence. Therefore, the use of torture or inhuman or degrading treatment to extract information or to secure a confession is prohibited by s.15 of the Declaration of Rights.

What actions fall into the category of torture, inhuman or degrading treatment? It is clear that serious physical assault is prohibited under any of the definitions presented. Flogging, if it is inhuman and degrading for a convicted prisoner, is even more so for an accused awaiting trial, a witness or a suspect. It is also clear that some forms of treatment not involving physical assault are also either torture or inhuman or degrading treatment. In the words of US Supreme Court Justice Warren, "the blood of the accused is not the only hallmark of an unconstitutional inquisition."[17],[18] In the *Ncube* case, Gubbay J.A. lists solitary confinement and starvation, along with the rack, the thumb screw and the pillory as "inherently inhuman and degrading."[19] He also considered the conditions of searches, denial of contact with family and friends outside the prison, crowded and unsanitary prison cells and the deliberate refusal of necessary medical care as examples of treatment which might be considered inhuman and degrading. Illegal treatment includes that which "by its very nature is barbarous, brutal or

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16 At p.22 of the cyclostyled judgment.

17 *Miranda v Arizona* 384 US 436 at 448.

18 See, Reikert, Julian, The Silent Scream: Detention without trial, solitary confinement and evidence in South African 'Security Law' Trials, South African Journal on Human Rights Vol.1 part 3 Nov.1985.

19 At p.22 of the cyclostyled judgment.

cruel" or "treatment which is calculated to, or in all probability will (not merely might) destroy the human qualities and character of the recipient".[20]

All such treatment, then, is forbidden for the witness, suspect, accused, or convicted prisoner. It is clear that collecting evidence by torture or by treating persons in an inhuman or degrading manner is illegal and unconstitutional. But how can this be enforced?

Admissibility

Although the Constitution is clear that torture and inhuman or degrading treatment is forbidden, it does not specify how this prohibition is to be enforced. There are two major ways of enforcing such a provision and ensuring that police and others in a position to use torture do not do so. The first is to use the criminal law and prosecute those who torture. Article 4 of the Convention Against Torture approved by the UN General Assembly on 10 December 1984, reads:

> "1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
>
> 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."[21]

That physical torture is illegal under the criminal law of Zimbabwe is without question. Whether those criminal laws are being adequately enforced is beyond the scope of this article, but is of course a major consideration in assessing the effectiveness of the constitutional provision. As for other forms of inhuman or degrading treatment, including mental torture, it is clear that many forms are not specifically illegal under the criminal law. For instance, prolonged periods of solitary confinement, declared by Gubbay J.A., in the *Ncube* case to be "inherently inhuman and degrading", would not be illegal under the criminal law. However, under s.24 of the Constitution any person who alleges that the Declaration of Rights has been or is likely to be contravened in relation to him may apply to the court for "redress", which is not defined.[22]

The second means of enforcing the constitutional provision prohibiting

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20 At p.26 of the cyclostyled judgment.

21 Full text available in *South African Journal of Human Rights* Vol.2, part 1, March 1986.

22 For a full discussion of the remedies available in the event of a violation of the Declaration of Rights see G. Feltoe and P.Lewin, "Remedies for Unlawful Interference with Personal Liberty" in this issue.

torture and inhuman or degrading treatment is to take away the incentive of such treatment by declaring any evidence obtained as the product of torture or inhuman or degrading treatment to be inadmissible in a court of law. This method is expressed by Amnesty International in the following way:

> "... has the government explicitly instructed all prosecuting authorities not to submit in evidence before the court confessions or other evidence which may have been obtained as a result of torture or oppression of the defendant or any other person? Does the law require judges to exclude all such evidence? By consistently excluding such evidence, judges would provide the investigating and prosecuting authorities with an objective disincentive to torture."[23]

These two methods of enforcing s.15(1) are not mutually exclusive. Both the criminal law and the law of evidence could and should be used at the same time. I will, however focus on the latter because it is a method which is not used in Zimbabwe due to the provisions of the Criminal Procedure and Evidence Act and the common law.

Statutory law

The Criminal Procedure and Evidence Act (hereinafter, the Code), provides at s.242 that any confession or statement of an accused must be made freely and voluntarily and without undue influence in order to be admissible in a criminal trial. This is also the position of the common law. Any statement induced by the use of torture or inhuman and degrading treatment would clearly not meet the requirements of s.242. The two usual tests used to determine admissibility under that section are:

1. "is it clear the confessor's will was not swayed by external pressure, improperly brought to bear upon it, which are calculated to negative the apparent freedom of volition."

and

2. "was the inducement such that there was any fair risk of a false confession?"[24]

Any treatment which is destructive of human dignity or by its very nature barbarous and cruel, would certainly be an external force which negates freedom of volition. The statement would be unreliable because of the risk that it was made simply in an effort to stop the offending treatment. However, it is clear that there are other statements which will be inadmissible, although not offending

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23 Amnesty International, *supra*, p.81.

24 Report of the Court Inquiry Commission 1971, Government Printers, Harare, p.90.

against s.15(1). The most obvious example of this would be where the accused was offered an incentive to induce him to confess. The accused's confession would not be free and voluntary, and would therefore be inadmissible, but his constitutional rights have not been infringed. Therefore, all statements offending against s.15(1) will be inadmissible under s.242, but not all statements which are inadmissible under s.242 offend against the Constitution.

Where a statement has been induced by torture or inhuman or degrading treatment, and therefore offends against both s.15(1) and s.242, there are two policies at work. The policy of the law of evidence is primarily that of ensuring that evidence is reliable. This is why we have the various rules of hearsay, requirements of corroboration and the cautionary rule, and why statements of an accused are inadmissible if they resulted from an inducement or a threat. A statement induced by torture or inhuman or degrading treatment is excluded under s.242 because it is unreliable. The second policy, the primary policy of s.15(1) of the Constitution, is that the State's actions should be controlled and that torture and inhuman and degrading treatment should not be allowed. Since under s.242 an accused's statement obtained as a result of torture, inhuman or degrading treatment is inadmissible on grounds of unreliability, the second policy, that of the Constitution, does not have to be considered.

The real problem only arises in s.243 of the Code. That section provides that evidence obtained as a result of an inadmissible statement will be admissible. Therefore, evidence obtained as a result of a statement extracted through torture, or through inhuman or degrading treatment, will be admissible. For instance, if in his confession the murder accused reveals where the murder weapon is located, that weapon will be admissible evidence even though the accused's statement is not.

The provision reads:

> "(1) It shall be lawful to admit evidence of any fact, otherwise admissible in evidence, notwithstanding that such fact has been discussed and come to the knowledge of the witness who gives evidence respecting it only in consequence of information given by the person under trial in any confession or statement which by law is not admissible in evidence against him on such trial, and notwithstanding that the fact has been discovered and come to the knowledge of the witness against the wish and will of the accused."
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> (2) It shall be lawful to admit evidence that anything was pointed out by the person under trial or that any fact or thing discovered in consequence of information given by such person notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him on such trial.

Subsection (1) is fairly straightforward. Evidence discovered as a result of an inadmissible confession is admissible. However, no part of the accused's

statement is admissible. Of course the evidence is valuable to the State only if it is linked to the accused. Therefore subsection (2) specifically provides that the State may prove that the evidence discovered as a result of the statement was discovered because of the information supplied by the accused.

The reasoning behind s.243 is that evidence discovered by means of an illegally-induced statement does not have the same element of unreliability that the statement itself has. In other words, if you torture a person and he confesses to murder, his confession is unreliable because he has a motive to make a false confession — the motive being to stop the torture. But it you torture a person, he discloses the location of the deceased's body, and you inspect the place, and find the body, then the information he gave you is far more reliable because it is corroborated by the fact that the body was where he said it would be. The Code, therefore, follows the policy of evidence reliability to the exclusion of the second policy, that of controlling illegal state action.[25] In *S. v Bvuure* [26] it was held that evidence is admissible regardless of the manner in which it was obtained.[27]

Common Law

Under the common law, evidence obtained as a consequence of illegal police actions is admissible in the courts of Zimbabwe. Both statutory provisions and

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25 However, s.243 also offends against the policy of evidence reliability. In *R. v Moyo* 1967 (4) SA 618 (R) it was held, following *R. v Tebetha* 1959 (2) SA 337 (AD) that subsection 2 permits the prosecution to introduce evidence that the accused pointed out evidence, even when no evidence was discovered by the pointing out. A pointing-out obtained by illegal treatment, which does not result in the discovery of evidence, is unreliable in that the accused has been forced against his will to point out something, and there is no corroboration provided by the fact that evidence is actually discovered by the pointing out. He may be brought to a location and assaulted until he points out the correct item, and yet still that item would be admissible into evidence. This is why Schreiner, J., dissenting in the *Tebetha* case, noted that when the vital element of discovering something as a result of the illegal confession was missing, to allow evidence of the pointing out would be extending the law beyond the intention of Parliament in enacting the provision. However the majority in the *Tebetha* case, and the Zimbabwean court in *Moyo* disagreed, basing their judgment on the simple meaning of the words of the statute, "it shall be lawful to admit evidence that anything was pointed out . . ." which did not require that the thing pointed out be actually discovered.

26 1974(1) S.A. 206 (R)

27 South African Law, interpreting an identical provision [Dec 298(2) of the Criminal Procedure Act 1977], seems to be full of contradictions at the moment. See *S. v Magwaza* 1985(3) S.A. 29 (A) at 39 F-1 where it was said that a pointing out is inadmissible if the court has certain knowledge, not only that it forms part of an inadmissible confession but also of the precise content of the confession, and *S. v Masilela and others* 1987 (a) S.A. 1(A) where although the facts were distinguished from those of *Magwaza*, the correctness of the ruling in the earlier case was questioned. Of course, in South Africa there is no Bill of Rights in the Constitution, and therefore the Constitutional arguments in this article do not apply.

case law follow the rule of *Kuruma, Son of Kanju v R* [28] which held that evidence is admissible if it is relevant, regardless of how it is obtained: "it matters not how you get it, if you steal it even, it would be admissible in evidence." Courts do, however, have a limited discretion to exclude otherwise admissible evidence, *Fox v Chief Constable of Gwent* (1985) 1 ALL ER 230 However, the *Kuruma* case, and other English cases from which the Zimbabwean cases derive authority for the admissibility of illegally obtained evidence, do not consider constitutional provisions and the admissibility of evidence obtained unconstitutionally. This is because there is no written constitution in England. English cases deal only with evidence obtained in contravention of the criminal law. Zimbabwe does have a written constitution and it is argued here that that distinction is crucial

Evidence obtained in violation of the constitution stands on a qualitatively different footing than evidence obtained in violation of the criminal law. It is therefore submitted that, since 18 April 1985, laws permitting the admissibility of evidence obtained in contravention of specific provisions of the Declaration of Rights must be declared unconstitutional and of no force and effect.

Arguments for and against admissibility

In any discussion of the admissibility of illegally obtained evidence there are two important conflicting policies. The first policy is that is is necessary to punish those who commit criminal offences. The likelihood of an offender being acquitted on a "mere technicality" decreases the public's respect and trust in the law, as well as endangering citizens who might be the next victims. The second policy is that there is a public interest in protecting individuals from unlawful and unfair treatment at the hands of the authorities. This is the policy explicitly ennunciated in the constitution.

These policies have been voiced in various ways in different jurisdictions. Courts of England have preferred the former policy saying, "It would be a dangerous obstacle to the administration of justice if we were to hold, because evidence was obtained by illegal means, it could not be used against a party charged with an offence."[29] But, as noted above the English courts did not have to consider a constitutional provision specifically forbidding the illegal activity in question.

Courts in the United States, on the other hand, have stressed the second policy, that of protecting the individual from illegal treatment, based on specific constitutional protection. *In Olmstead v U.S.*[30]

> "It is desirable that criminals should be detected and to that end all available evidence should be used. It is also desirable that the govern-

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[28] [1955] AC 1977, [1955] 1 ALL ER 236

[29] *Jones v Owen* (1970) 34 JP 759 (involving an illegal search)

[30] (1928) 277 US 438, 470.

> ment should not itself foster and pay for other crimes, when they are the means by which the evidence is obtained. We have to choose, and for my part I think it a less evil that some criminals should escape than that that the government should play an ignoble part."

And in *Mapp v Ohio* [31]:

> "...the purpose of the exclusionary rule is to compel respect for the constitutional guarantees in the only effective way by removing the incentive to disregard it."

In Scotland it appears that illegally obtained evidence is excluded, and in Ireland and Australia that the judge has a discretion to exclude it. In South Africa, illegally obtained evidence is admissible.[32]

What are the arguments? In favour of admissibility, it is argued that the need to convict criminals is paramount. As the (then) Rhodesian Courts Inquiry Commission said in 1971, "not only is it a miscarriage of justice for an innocent man to be convicted, but it is also a miscarriage of justice for a guilty man to be acquitted."[33]

And as Glanville Williams has noted: "The evil of acquitting a guilty person ... frustrates the arduous and costly work of the police who, if the tendency goes too far, may either become daunted or resort to improper methods of obtaining convictions."[34] It is argued that the public pays too high a price by excluding reliable evidence.

On the other side, it is argued that if illegally obtained evidence is admissible, the law making it illegal becomes meaningless. With regard to the law discussed in this article, it means that the constitutional right to be free from torture and inhuman and degrading treatment would be ineffective and meaningless. There is little likelihood of a criminal conviction for an infringement of these rights because it is unlikely that the prosecution could secure enough evidence to prove the infringement beyond a reasonable doubt. As was said by the US Supreme Court in *Miranda v State of Arizona* "Interrogation... takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms."[35] Added to that, the only possible witnesses are other policeman, who are themselves likely to have been involved. Without either the fear of criminal conviction, or the fear that the evidence will be inadmissible, the temptation, particularly to the young and

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31 (1961) 367 US 656.

32 *Cross on Evidence*, Fifth Edition (1979) London, Butterworths, pp. 318–32) and Hoffman and Zeffertt, *South African Law of Evidence*, op. cit.

33 *Supra*, at p.88.

34 Glanville Williams, *The Proof of Guilt* (3rd Ed., 1963)p.189.

35 *Supra*, at p.448

inexperienced police officer, to take the easy way out by extracting information by illegal treatment is too great. He is rewarded for his infringement of the prisoner's Constitutional rights by evidence which is admissible and ultimately by a conviction. There are, presumably, sufficient legal means of collecting evidence to result in conviction for accused persons. It is better to improve legal methods of evidence collection, than to encourage illegal ones.

Second, it is argued that respect for the law and for the State diminishes when the State is seen to participate in illegal activity and to be rewarded for it. When public officials deliberately breach the Constitution, and other public officials — judges and magistrates — accept this breach by hearing evidence obtained in consequence of the breach, illegality is being condoned by the very persons who are expected to enforce the law.

Thirdly, the framers of the Constitution of Zimbabwe clearly had it in mind that the provisions of the Declaration of Rights, and in particular s.15(1), should be endorsed to the fullest extent possible. This is clear by s.24 which allows a court to declare a pre-existing law invalid under the Constitution. It is also clear because the framers of the Constitution did not include a savings clause to exclude evidence law from Constitutional control. This could have been done, and was done for some rights. For instance,with regard to the right to silence found in s.18(8) of the Constitution— s.18(13)(e) specifically states that a law will not be held to be in contravention of the right to silence to the extent that it allows a court to draw inferences from that silence. The fact that such a savings clause does not exist for s.15(1) indicates that the law of evidence, as well as the criminal law, should be used to enforce that provision.

Finally, there is some case law which indicates that unconstitutionally obtained evidence would not be admissible in court in Zimbabwe. *S.v Slatter*[36] involved evidence obtained as a result of unconstitutional actions. In that case a statement was obtained in contravention of two constitutional provisions.: it was alleged that the accused had asked for and been denied legal representation,[37] and that the statement had been obtained as a result of torture. First, the accused had asked the police for legal representation, had been denied, and his statement had been confirmed.[38] The constitutional issue for decision was whether the

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[36] 1983 ZLR 144

[37] The Constitution provides at s.13(3) for the right of an accused to access to a lawyer.

[38] Confirmation proceedings under s.1058-E of the Criminal Procedure and Evidence Code allow the prosecution to bring the accused before a Magistrate in advance of the trial to confirm the accused's confession. The Magistrate must satisfy him or herself that the confession was made freely and voluntarily and without undue influence. If the confession is confirmed, then under 242(1a) of the Code at the time of the trial it will be admissible upon its mere production by the prosecution, and it will be up to the accused to prove on a balance of probabilities that the statement is in admissible, *S v Gwaze* 1978 RLR 13. These sections, then, have the effect of shifting the burden of proof on a confession from the

confirmation proceedings were vitiated because the accused was denied his constitutional right to access to legal representation. Dumbutshena JP (as he then was) held that they were, and therefore that the statement was not confirmed and that the question of the admissibility of the statement had to be considered *de novo*. He then went on to consider the admissibility of the confession under s.242 of the Code. It was held that the statements made by the accused were involuntary both on the ground of torture and on the ground of denial of access to a lawyer.

Although the *Slatter* case turned on the issue of voluntariness, the infringement of the accused's constitutional right would have been enough, by itself, to render the statement inadmissible.

Conclusion

This article has presented a discussion of a s.15(1) of the Constitution and its relevance to the law of evidence. I have argued that there are two basic policies at work: the general policy of the law of evidence, which is to exclude unreliable evidence, and the policy of the Constitution, which is to prevent actions which contravene the Declaration of Rights. Until 18 April 1985, the first policy was the only important one for the admissibility of evidence, since pre-existing laws could not be struck down as in contravention of the Constitution. Now, however, the policy of the Constitution must prevail. That policy must be enforced by excluding all evidence obtained as a result of a breach of the Constitution, in particular evidence obtained as a result of torture, inhuman or degrading treatment.

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prosecution to the accused. The rationale of confirmation proceedings is that "the shifting of the *onus* of proof in relation to a confirmed statement is justified on the ground that there has been a thorough investigation before confirmation by a 'judicial officer." *S v Munukwa and Others* 1982 (1) ZLR 30 and *S v Slatter (supra.)*