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**DEMYSTIFICATION OF THE INQUISITORIAL SYSTEM**

LTC Harms\*

We are morally and constitutionally obliged to guarantee an accused a fair trial, but some see a fair trial as a lengthy trial, a trial where everything is in dispute. They do not consider that an efficient hearing is an important element of a fair trial and they still believe that a criminal trial is a game and that a judicial officer's position is that of an umpire to see that the rules of the game are observed by both sides or, better still, a figurehead.<sup>1</sup> They do not realise that speedy justice is another aspect of the right to a fair trial and that without efficiency it is impossible to provide speedy and cost-effective justice.

We are constantly reminded that we are at war with crime and we debate the question as to who is winning the war. Like the British at Magersfontein, we fight with outdated plans. We use obsolete weapons. But the enemy constantly revises its plans; it uses sophisticated weapons. The war is being lost while we cling to our beloved preconceptions as to how cases should be managed and trials run. Sometimes the police provide statistics to show us that the battle is being won and people who ought to know better tell us that these are statistics and not facts. Winning a battle is not the same as winning a war.

The main object of a trial is to determine the truth. How do we do it? In the Middle Ages there was a very simple method: tie the accused in a bag and throw her or him into a river. If she floats, it means that the Devil kept her floating and is on her side and she is guilty. If she sinks, she is not guilty – it is then merely a pity that the person drowned during the ordeal.

The adversarial trial has been compared to American football. The main object of the game is to block the other side from progressing. Every minute or so the game comes to a stop. The game of rugby is another example: if something goes wrong,

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1 See, *R v Hepworth* 1928 AD.

you may have a scrum, a lineout, a free kick, or a penalty kick. The players cannot know all the rules. They are even sometimes too complicated for the referee. And you keep your impact players, like your defence, until the last minute or so in reserve.

If we look for the truth, do we look for the objective truth or do we look for a sanitised truth? Continental jurists believe that one should determine the 'material truth', the actual facts. In order to find this truth, they argue, the matter cannot be left in the hands of the prosecution and the defence. If it is, a skewed picture is presented to the court. Evidence which is material is not led. Agreements on fact seldom reflect the true facts. In other words, our system permits the parties to determine the facts on which the court has to make a decision. Our judgments are based on assumed facts; on part of the facts; make-belief, an Alice in Wonderland story. We formalise truth and we know it.

On the other hand, it is a myth to believe that in any system the material truth can always or even usually be established. Truth is not absolute. A trial is not a scientific experiment. The process of finding truth must also be reasonable, fair and cost-effective; truth must be found within a reasonable time and it must be presented within a trial of manageable proportions.

Volk<sup>2</sup> compared the German criminal procedure to the pyramids: tremendous in size and conformity, perfect in form and meaning – and monuments to a dying era. I would like to draw a similar comparison between the South African Criminal Procedure Act 51 of 1977 (CPA) and the pyramids. Both are ancient: the CPA differs not much from its predecessor (Act 31 of 1917). Both the pyramids and the CPA used foreign builders: Moses claimed that his people built the pyramids. Some now say they were built by aliens from outer space. The CPA has its foundations in 19th Century English law. Both are filled with mummies, those of the CPA consisting of dead principles wrapped in old cloth. The rules of evidence, for instance, are based on the assumption that we still have jury trials; so too, the appeal system. Both have dead-end passages: the CPA has unused provisions like the unused chambers in a

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2 Klaus Volk "The Principles of Criminal Procedure and Post-Modern Society: Contradictions and

pyramid. Campion required a Rosetta stone in order to understand the hieroglyphics; the CPA is not much easier to understand. Both are over-designed: each pyramid was designed as the grave of one person, the classic example of over-design. The CPA, I suggest was also over-designed. It is becoming more and more like a text-book stating the obvious, and it does not distinguish between the simple and the difficult cases.

Why do we look at only common-law developments for comparative purposes? The common law is not the correct reference point because its criminal procedure is steeped in the jury system. Has the time not come to consider the strengths of the inquisitorial system to determine whether or not we can adopt at least some of them? The typical response of the typical South African lawyer to this question is conditioned in part by a fear of the unknown and in part by chauvinism: ours is the only system that can produce a just result.

This recalls the attitude of the United States (US) towards the International Criminal Court (ICC): the US believes that because the ICC does not have juries, its judgments cannot be trusted. But when the US tried war criminals (not their own) sixty years ago, it did not think of this point. And when the US had to consider the fate of the Guantanamo Bay prisoners, it also did not think of juries but of military tribunals. Moreover, when it comes to the President of Sudan, the US is in favour of the ICC as long as its own citizens are not subject to the Court's jurisdiction.

One tends to forget that most legal systems are inquisitorial, whether in the Arab world (because Napoleon was there before the British), the former East Block countries (because the British had not yet conquered them), South-America, non-English speaking Africa, non-English Asia, or on the European Continent. Is there any reason to believe that those people are more dissatisfied with their legal systems than we are with ours? Is there any reason to believe that their systems provide less justice than ours? Or that more innocent people are found guilty?

There are a number of myths surrounding inquisitorial systems that have to be

debunked before a sensible reference to that system can be made.

Myth number 1: inquisitorial systems are all the same. On the Continent alone there are three broad systems: the Code Napoleon-based system of France, Belgium and Holland, for example; the Germanic group in Germany and Austria, for example; and the Scandinavian system. Their differences may be subtle but they are real. The French system has investigating judges, something Germany does not have. Italy has moved away from this system. Moreover, within the same group there may be differences of major consequence. For example, Belgium has juries, Holland does not.

Myth number 2: the prosecution is part of the judiciary. The proposition is simply false. The investigating judge works independently from the trial court. There is probably not a real difference between a grand jury and the investigating judge. Harris *et al* explain:

In common law jurisdictions, the investigation of a criminal offence is conducted entirely by the police. In the typical civil law jurisdiction, the case is first investigated by the police, but then, when attention has focused on a particular suspect, handed over to an investigating judge, public prosecutor or other officer who questions the suspect and other witnesses, going over to some extent the ground already covered by the police. ... When it is complete, the investigating judge will decide whether a prosecution should be brought. A merit of the civil law approach is that the investigating judge is independent of the police and hence brings a fresh mind to the case.<sup>3</sup>

Myth number 3: there are no fair trial guarantees. The Continental countries all belong to the European Convention on Human Rights (ECHR), which has a fair trial provision and which is able to accommodate the Irish and British systems as well as those of France and even Turkey or Russia. The jurisprudence of the court at Strasbourg on this point is extensive.

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<sup>3</sup> Harris *et al* *Law of the European Convention on Human Rights* (Butterworths LexisNexis, 2005) 165.

Myth number 4: the accused is presumed guilty unless he or she proves otherwise. This myth is based on a misunderstanding of the underlying philosophy as explained by Volk, namely, that no-one is obliged to incriminate or to exonerate himself or herself. The accused does not bear any sort of onus. If a fact remains unproved, the accused has no obligation to fill the gap. Production of evidence is a matter for the court because the court must establish the truth *ex officio*. Once there is *prima facie* evidence, although the accused has no duty to adduce evidence, if he does not, the result may be to his detriment. Every system requires a legal rule for the situation when something remains unproven i.e., a rule regulating the burden of proof, and in criminal procedure the rule is *in dubio pro reo*. An efficient trial calls for the cooperation of the accused but professors tell aspirant lawyers all about the right to remain silent; and never tell them that there is no duty to remain silent, or that it may be bad tactics to remain silent. As Volk wrote:

In my opinion, [the right to silence] is overvalued in Germany. For a start, and when viewed quite practically, stony silence is seldom an intelligent defence. To me, this strategy is also extremely suspect. A confession is widely thought to mitigate punishment. The opposite conclusion, that a refusal to co-operate in any way exacerbates punishment, lies closer. The mere fact that a detrimental conclusion may not be drawn, does not remove the suspicion that it is practised, disguised and beyond proof, nevertheless.<sup>4</sup>

Myth number 5: the evidence is all on paper. Historically it may have been true in relation to many countries but the ECHR provides otherwise. Some say that the underlying principle of art 6 of the ECHR is that judicial proceedings must be adversarial. In many countries the judgment may be based only on the evidence given orally in court.

Myth number 6 – there is no cross-examination. Whether or not that is true historically need not be debated. The fact is that the ECHR expressly guarantees the right to cross-examine witnesses. How much it is used depends on the legal culture and the belief in the value of cross-examination. In my view it is grossly over-valued.

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4 Klaus Volk "The Principles of Criminal Procedure and Post-Modern Society: Contradictions and

The length of cross-examination in our system is commensurate with the size of the accused's purse and inversely proportional to the merits of either counsel or of the case.

Myth number 7: a person may be convicted on hearsay evidence. Once the ECHR requires orality, the use of hearsay is restricted, and hearsay can be used only in circumstances similar to those that apply in our law.

That convergence and cross-pollination are possible appears from the experience at the international criminal courts. Prosecutors, defence lawyers and judges from different legal traditions have to try cases in a similar way and reach compatible results; and they do. They have formulated rules that take the best from both systems. They focus less on the right to silence and more on effectiveness. Their procedures convince an accused that it is seldom in his interests to exercise this right, and that it is not his duty to keep silent. Disclosure is reciprocal. The case is managed throughout by a judge who does not conduct the trial.

An efficient trial requires that judicial officers cease to be passive onlookers and instead become actively involved in the management of the trial. To be passive is easy and not stressful; one does not have to concentrate; few decisions have to be made; one can place any blame on the lawyers; and one is safe from receiving reprimands from courts of appeal.

These rules, the detail of which is not discussed for present purposes, provide useful guidelines for the development of our criminal procedure, but this does not mean that we should adopt an inquisitorial system. It is simply not part of our legal culture. But our system should not be immune to improvement. It also does not mean that we cannot learn from others. Unfortunately, history is against us. The patchwork done by the South African Law Reform Commission to the CPA is gathering dust. And as the history of section 115 of the CPA shows, if the judiciary is uncomfortable with an innovation, judicial officers will either ignore it, emasculate it or allow the baby to die a cot death. Rather adapt than die.