Making South African criminal procedure more inquisitorial[1]

NICO STEYTLER
Director: Community Law Centre, University of the Western Cape

1 INTRODUCTION

The main objectives of the criminal trial can be summarised as follows:

(a) The court proceedings must perform a truth-finding function – the outcome of the trial must be that the guilty are convicted and the innocent acquitted.

(b) The truth-finding process must be fair in respect of protecting both the rights of the accused and the interests of society.

(c) The two preceding objectives must be accomplished in an efficient and effective manner.

In the words of Van Dijkhorst J (1998:138): "Our aim is to arrive at the truth expeditiously and fairly".

These objectives are realised primarily through the application of the adversarial mode of procedure. However, the operation of this adversarial system impedes in some respects the achievement of these objectives. Where either the accused or the prosecution fails to perform their roles as competent adversaries, the proceedings, presided over by a passive judicial officer, are bound not to achieve the stated objectives. Even where the two adversaries are competent, their dominance of the proceedings may defeat one or more of the objectives.

The purpose of the paper is, first, to identify shortcomings in the adversarial process, second, to investigate whether there are ways of adapting the process in the interest of truth-finding, fairness, and efficiency.

The paper commences with an outline of the basic elements of the adversarial and inquisitorial modes of criminal procedure. Then to an exposition of how the operation of the adversarial system in South Africa impedes the realisation of the objectives of the criminal trial. This is followed by a sketch of the current approaches to these problems. In search of solutions, recent developments in international law and foreign jurisdictions dealing with similar issues are then surveyed. The paper concludes with some tentative proposals for further investigation.

1 This article is based on research that was commissioned by GTZ (German Technical Cooperation) on behalf of the South African Law Commission's Project Committee on the Simplification of Criminal Procedure.

2 ADVERSARIAL AND INQUISITORIAL MODELS OF CRIMINAL PROCEDURE[2]

It has been said that distinguishing between the two modes of procedure is "almost a 'metaphysical question' which is now sterile and obsolete" because "nowhere is the model any longer pure; it is, for better or worse, contorted, attenuated, modified" (Tulkens 1995:8). The basic differences between the two modes of criminal procedure are nevertheless useful reference tools for discussing developments in modes of criminal procedure.

The adversarial and inquisitorial modes of procedure have traditionally been linked to the Anglo-American common law system of procedure and the continental system respectively. Most procedures for the prosecution of crime reflect more or less some of the elements of both models. While some fall squarely in one camp, others are termed hybrids. The two systems do not differ on the goals of criminal procedure – that the truth be established in a way that is regarded as fair. This is exemplified in Europe where both the British adversarial and the continental inquisitorial systems have to comply with the fair trial requirements of the European Convention on Human Rights. The difference between the two systems has to do with their fundamental assumptions about the best way of achieving these goals (Jorg, Field & Brants 1995:42).

Models are per definition not reflections of reality, but a set of norms and principles that form a coherent structure to serve specified purposes. Outlining the key features of each model provides an analytical tool with which to assess specific features of a concrete mode of procedure.

The main difference between the systems is the role that the judicial officer plays in the proceedings (Albrecht 1996:90). The inquisitorial system is judge-centred while the adversary system is party-driven. The difference in judicial role description has profound implications for the way in which the objectives of criminal justice are pursued.

In the inquisitorial system, a judicial officer controls the pre-trial stage – the investigation and gathering of evidence. The dossier containing witnesses' statements and other materials is equally at the disposal of the prosecution and the defence. Evidence in the *dossier* is often given a higher value than the oral statement a witness may later make in court (Jorg, Field & Brants 1995:47). A judicial officer also decides whether there are grounds for instituting a prosecution. The judicial dominance continues during the open court proceedings. On the basis of the *dossier*, the judge determines which witnesses to call and conducts their questioning. As the judge is also the trier of fact, an open system of evidence is followed – all relevant evidence may be considered. Exclusionary rules are thus avoided. The process is likened to an inquest – the judicial officer attempts to establish the truth by his or her own efforts. The prosecutor and defence counsel play a relatively minor role of assisting the court; the production of evidence is thus not as a result of their efforts. Moreover,

2 See generally Damaska 1997; McEwan 1998 ch 1; Jorg, Field & Brants 1995; Osner, Quinn & Crown 1992; Jackson & Doran 1995 ch 3; Hatchard, Huber & Vogler 1996.

they cannot limit the court's field of inquiry through pleadings (McEwan 1998:4). It is thus said that the court establishes the "material" truth in contradistinction to the "formal" or "party-centered" truth produced in the adversarial system (that which the parties have presented in a partisan manner). The fundamental assumption underlying the judge-dominated system is the belief that a state official will proceed in an objective and professional manner to establish the truth and, at the same time, protect the interests of the accused.

The adversarial system is party-driven. During the pre-trial stage, each party conducts his or her own investigation and in a partisan way build a case. While there may be judicial control over whether a prosecution may be instituted, the trial process continues to be party-driven. The prosecutor must provide, independent of the accused, proof of any accusation made. The parties may determine the area of contest through pleadings (including bargaining over guilt). The key element of the trial is its orality – evidence is produced *viva voce*, with the written statements of witnesses given little value. The role of the judicial officer is to remain passive, intervening when called upon by the parties to ensure that the each party plays according to the rules. The umpire role of the judicial officer is the most refined where a jury is the trier of fact. The foundational assumption of the adversarial system is a scepticism about trusting the state to produce the truth and protect the interests of the accused (Jorg, Field & Brants 1995; McEwan 1998:2). Those goals are best secured by the parties themselves. However, for the system to work, there should be equality of arms between the parties.

3 ADVERSARIAL PROCEEDINGS AND CRIMINAL JUSTICE OBJECTIVES

In this section it will be argued that the operation of the adversarial trial proceedings in South Africa may in some respects impede the realisation of the objectives of truth-finding, fair process and the expeditious completion of proceedings.

3.1 Truth-finding

In terms of the logic of the adversarial process, the objective of truth-finding will be defeated if the parties are not equal. This will occur where an accused cannot adequately engage in the process of proof because he or she is not represented (or poorly represented). The same may happen where the prosecution is poor or inexperienced and the defence able. More fundamentally, in a well-matched contest, the truth may not emerge because of the partisan approach to evidence production.

With regard to undefended accused, an empirical study revealed that:

> "it is evident that the lower criminal courts routinely produced unjust practices and outcomes. It was also clear that this was a result of the legal structure's failure to guard adequately against the undesirable consequences flowing from an undefended accused's ability to be a competent adversary in highly professionalised adversarial proceedings. . . . The undefended accused failed to fulfil his role as an effective adversary to the prosecutor. He lacked the legal

knowledge, skill, and experience to make considered legal decisions, to test State evidence, to challenge the prosecutor's actions and to present an adequate defence case" (Steytler 1987:503–504).

The undefended accused's inability as an adversary is the most acute in the adversarial truth-finding process.[3] Where "we are operating the adversary system without the adversaries",[4] the truth will simply not come out. The consequence is inevitably that innocent accused may be convicted because they did not have the benefit of legal representation.

The same questions can emerge in the case of poor defence counsel. The truth will not out or rights be protected[5] when defence counsel is inexperienced or lacks commitment.[6] The latter may happen in legal aid cases where low rates of payment concentrate the mind on the quantity of cases handled rather than the quality of service rendered.

The converse may happen in defended trials. Where the prosecutor is inexperienced or incompetent, the contest model also collapses. The extent of this problem has recently received some judicial attention.[7] In *S v Motsasi*[8] the High Court conducted a far-reaching investigation into the undue delays in that trial. It emerged that one of the reasons was, in addition to a large number of vacancies, the presence of inexperienced and incompetent prosecuting counsel in the High Court.[9] The situation is likely to be worse in the lower courts,[10] as the case of *S v Manicum*[11] amply illustrates. The prosecutor showed a total lack of interest in or commitment to the prosecution. Despite the fact that the accused contradicted his explanation of plea in his evidence-in-chief, the prosecutor had no questions. The explanation by the magistrate of the purpose of cross-examination and the consequences of a failure to challenge the accused's exculpatory evidence was to no avail. On appeal the judge commented as follows on the conduct of the prosecutor:

> "When I said it was alarming I was not being extravagant with language. There were the two contradictory versions and to think that a prosecutor would in these circumstances have no questions, is incredible. It demonstrates a total lack of competence on the part of the prosecutor and a deplorable attitude of the authorities to put a case in the hands of a prosecutor who just did not care, did not want to care and who, even it she had cared, was not able to contribute a single morsel of cross-examination to assist the magistrate to unravel the issue."[12]

---

3 See also McEwan 1998:15.
4 Telford George, former Chief Justice of Tanzania, quoted in Twaib 1998:57.
5 See para 4.2 below.
6 See *S v Siebert* 1998 1 SACR 554 (A).
7 In *S v Van der Berg* 1995 4 BCLR 479 (Nm) O'Linn J said "in a developing country like Namibia, the prosecution suffers from all the constraints caused by lack of financial means, experience and proper qualifications".
8 1998 2 SACR 35 (W).
9 At 68.
10 See Van Dijkhorst 1998:136.
11 1998 2 SACR 400 (N).
12 At 405H–I.

The Court of Appeal did not fault the magistrate for not subjecting the accused to an examination, but placed the acquittal of the possible guilty person firmly at the door of poor prosecution. Such a state of affairs, the court concluded, will undoubtedly have the following consequences:

> "But if the prosecuting authorities wish to let inexperienced prosecutors loose on the public they must be prepared to pay the price of seeing possible guilty person being acquitted, a price which, I may say, at this time in our history, is one which society cannot afford to pay. Not only does it favour the criminal to an unreasonable extent, but it also frustrates the efforts of the over-strained police force and tends to lower their morale. Also, it understandably causes the law-abiding majority to lose confidence in the system of criminal justice. Furthermore, it is a waste of the court's time and competence to allow prosecutions to fall into the hands of incompetent, inexperienced prosecutors. At a time when the rule of law cries out to be supported, this state of affairs is to be deplored."[13]

The presence of a lawyer does not necessarily guarantee that the defence plays its proper adversarial role in establishing the truth. *S v Siebert*[14] is an example of where defence counsel failed to inform the trial court adequately about the accused's circumstances for the purposes of sentencing. The defence counsel also appeared not to be fully *au fait* with the rules relating to the sentence of correctional supervision.

Even where equality of arms between the prosecution and the defence is more manifest, the operation of the adversarial system may result in the distortion of the truth (McEwan 1998:14–15). This argument has been most forcefully made in respect of sexual offences (McEwan 1998:14). The ability of the skilled defence lawyer to confuse honest witnesses and distort the truth is well established and, with respect to child witnesses, cross-examination, the primary tool of the adversarial system, has been curtailed.[15]

Where an accused is acquitted when he or she is guilty of the crime charged and should rightly have been convicted, the trial is seen, and the entire criminal process perceived, as unfair. The public perceives the system as favouring the criminal at the expense of society. This could have serious implications for the Rechtsstaat when the Bill of Rights is seen as the criminal's licence to crime.

3.2 A fair trial

Distinct from the goal of truth-finding, and at times in conflict therewith, an accused's right to a fair trial has now been enshrined in the Bill of Rights, affording a considerable level of protection. However, as far as undefended accused are concerned, they are usually not aware of their rights and, even if informed about them, may not be able to exercise them effectively.

13 At 406A–C.
14 1998 1 SACR 554 (A) at 559B.
15 S 170A Criminal Procedure Act.

A similar argument is made with regard to poorly defended accused. Speaking from a Canadian perspective, Young argues that the defining characteristic of adversarial justice – that control of the process should be left in the hands of the litigants:

> "can undercut the foundation for the implementation of constitutional rights because so much will depend upon the good faith exercise of discretion of Crown counsel and the competence of defence counsel" (Young 1997:365).

He argues that the jurisprudence under the Canadian Charter of Rights and Freedoms has consistently placed the burden of assertion and proof upon the accused and his or her counsel. This assumption runs the risk of leaving the protection of the Charter in the hands of lawyers with varying degrees of competence, commitment and resources (Young 1997:367). He thus concludes that:

> "the excessive reliance upon competent defence counsel to uncover and present Charter claims may not be a simple affirmation of the basic values of our cherished adversarial system, but may actually be a major shortcoming of the Charter" (Young 1997:406).

Young thus argues that the only way of ensuring "institutional respect for constitutional rights is to ensure that all the players (eg police, Crown, defence and judge) share the burden of being vigilant in preventing constitutional violations" (Young 1997:366).

3.3 Efficient administration of justice

In the adversarial trial, the conduct of the trial is said to be in the hands of the litigants. This may result in prolonged trials. The prosecution may delay the process in marshalling sufficient evidence while the defence may employ delaying tactics to avoid the prosecution taking place.[16] Delays in seeing that justice is done may undercut the very objectives of the trial of establishing the truth and implementing penal policy effectively and expeditiously. Increasingly, the answer has been sought by making the presiding judicial officer interventionist to drive the proceedings to a satisfactory completion.

4 APPROACHES TO PROBLEMS WITH THE ADVERSARIAL SYSTEM

In the past five years, significant changes have been brought about in the administration of criminal justice. Many of them are directed at the problems caused by the adversarial mode of criminal procedure as outlined above. The reforms developed along two diverging tracks – the one seeks to strengthen the adversarial process, while the other leads to a more inquisitorial process. In this section the broad outlines of these developments will be sketched.

16 See Van Dijkhorst 1998:237.

4.1 Strengthening the adversarial process: The right to legal aid

The entrenchment of the right to legal aid in the Bill of Rights sought to ensure equality of arms within an adversarial trial. Section 35(3)(g) entitles an accused to have a legal practitioner assigned at state expense "if substantial injustice would otherwise result". Moreover, all accused must be informed of this right. This duty is also reflected in section 73(2A) of the Criminal Procedure Act.[17] While the Constitutional Court has not yet pronounced definitively on the meaning of "substantial injustice",[18] the present norm is to apply a multi-factor approach; the circumstances of the case, the ability of the accused and the seriousness of the offence, may give rise to the right.[19]

This right does not eradicate the problem of undefended accused. The right to legal aid applies only to those cases which may result in "substantial injustice". While a significant number of accused are currently represented by legal aid lawyers, a large number of accused still have to fend for themselves. Moreover, because of the cost of legal aid, there are considerable financial and political pressures to cut back on its provision.[20] The result is that a significant percentage of accused will remain undefended.

4.2 Strengthening the accused as a courtroom adversary

The difficulties encountered by undefended accused have been acknowledged over the years and provision has been made for some judicial assistance. Within the overall duty to ensure a fair trial, presiding officers are obliged to facilitate the accused's participation in the proceedings as adversaries by advising them of their rights and duties and assisting them in their exercise.[21] This duty has also been entrenched in the Bill of Rights. The Bill of Rights is premised on the notion that accused persons are not necessarily knowledgeable of their constitutional rights. Section 35(4) provides accused persons with a general right to be informed of the various rights in section 35. Specific duties of information-giving duties are also found in specific provisions, such as the right to legal aid.[22]

There are, however, limits to which this duty can ameliorate the difficulties of undefended accused. The information provided is often technical, and having access to the information does not translate in a skilled used of it.[23] The rules relating to hearsay illustrates the limits of equipping an undefended accused with legal knowledge.

---

17 Inserted by s 2 of Act 86 of 1996. See South African Law Commission 1995:§5.39.
18 *S v Vermaas* 1995 7 BCLR 851 (CC).
19 See generally Steytler 1998:307–13.
20 Legal aid budgets have also come under strain in Australia, for example. See Giddings, Dewar & Parker 1999:69.
21 See generally Steytler 1988:222.
22 S 35(3)(g).
23 Steytler 1987:505.

In *S v Ngwani*[24] Didcott J held that where the prosecution sought to admit hearsay evidence in terms of section 3(1)(c) of the Law of Evidence Amendment Act of 1988,[25] the accused, who was unrepresented,

> "had to have the effect of the subsection fully explained to him, in contrast with the legal position where it is not invoked. In particular, he had to be heard on the important one raised by para (vi),[26] the issue whether he would be prejudiced were it not to be invoked."

While the logic of the adversarial process imposes such a duty on the judicial officer, in practice it is most unlikely that an undefended accused, properly informed, would effectively employ the legal knowledge. There may be fairness in form but not in substance.

4.3 Prosecution disclosure – increasing truth-finding

Perhaps the most dramatic change in criminal law practice was the recognition of the right of access to information held in the police docket. In *Shabalala v Attorney-General of the Transvaal*[27] the Constitutional Court based prosecution disclosure on an accused's rights to a fair trial. With access to state witnesses' statements and other unused materials, defence counsel was fully informed of the case to meet. Not only could the reliability and credibility of state witnesses be challenged in the light of inconsistent statements, but also defence strategies could be devised. For prosecutors it become an onerous burden and in the case of bail hearings, the right was severely restricted.[28]

Prosecution disclosure can be viewed from two angles. One can argue that it is evidence to a more inquisitorial mode of procedure. The information gathered by the prosecution is no longer its property; the police docket becomes a dossier open to the defence. More important, openness of prosecution information furthers truth-finding. As it was said in the leading Canadian decision of *R v Stinchcombe*:[29] "the principle has been accepted that the search for the truth is advanced rather than retarded by disclosure of all relevant material". On the other hand, it could be said that disclosure is simply a reaffirmation of the adversary process in that it seeks to establish equality of arms. However one looks at prosecution disclosure, it has changed the position of the prosecutor as an adversary. Although the rhetoric has always been that the prosecutor was a disinterested combatant with only an eye for the truth, it was an unenforceable role as long as the police docket remained privileged. With full disclosure, it is for all to see whether the prosecution is indeed performing its impartial role.

---

24 1990 1 SACR 449 (N).

25 Act 45 of 1988.

26 "Any prejudice to a party which the admission of such evidence might entail".

27 1995 12 BCLR 1593 (CC).

28 S 60(14) Criminal Procedure Act, inserted by Act 85 of 1997. In *S v Dlamini et al* 1997 7 BCLR 771 (CC) § 84 Kriegler J for a unanimous Constitutional Court, gave a restricted reading to s 60(14) which undercut the absolute language of the legislation.

29 (1991) 68 CCC (3d) 1 (SCC).

4.4 Imposing more inquisitorial duties on the presiding officer

Endowing judicial officers with inquisitorial powers is not a new phenomenon. A presiding officer has the power to question witnesses. Furthermore, section 167 of the Criminal Procedure Act[30] (CPA) empowers the court to examine any person other than the accused who has been subpoenaed to attend or who happens to attend the proceedings, and to recall any witnesses who has testified. The court is obliged to do so if it appears "essential to the just decision of the case", and commits an irregularity if it fails to do so.[31] Section 186 of the CPA, in turn, imposes a similar power and duty with regard to the calling of witnesses.

The entire trial is not conducted in adversarial fashion. The sentencing process, for one, is not conducive to adversarial argument;[32] the role of the court must be inquisitorial in order to establish an appropriate sentence.[33] In *S v Siebert*[34] Olivier JA captured this duty as follows:

> "In this field of law public interest requires that the court play a more active inquisitorial role. The accused should not be sentenced unless and until all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court."

This duty also applies to defended cases, because, in the words of Olivier JA, "[a]n accused should not be sentenced on the basis of his or her legal representative's diligence or ignorance".[35]

Appellate proceedings have also been likened to an inquisitorial process: the bench engages with counsel on the issues which it would like to hear (Malleson 1997). The extent to which English judges participate in the hearing often amounts to a "dialogue" between judges and counsel which closely resembles an inquisitorial hearing. The appeal thus appears to be "a joint problem-solving enterprise between counsel and the judges" (Malleson 1997:178).

Bail proceedings have also been placed in an inquisitorial mould. Commencing with the decision in *Ellish v Prokureur-Generaal, Witwatersrand*,[36]

---

30 Act 51 of 1977.

31 *S v Mayiya* 1997 3 BCLR 386 (C) at 395C.

32 Jackson and Doran (1995:59) writes that "the judge's role changes from one resolving conflict between two sides into a problem-solving mode requiring the implementation of sentencing policy".

33 A more traditional adversarial process was followed in *S v Hlangomva* 1999 1 SACR 173 (E). An undefended accused volunteered information about his previous conviction after the prosecutor chose not to prove any. On review, the judge held that the magistrate did not have the licence to pose questions relating the precise nature, dates and other information of the previous conviction. The magistrate was restricted to invite the prosecutor to reconsider his stance. If the prosecutor declines to do so, the magistrate was compelled to treat the accused as a first offender.

34 1998 1 SACR 554 (A) at 558I-559A.

35 At 559B.

36 1994 5 BCLR 1 (W). Followed in *Prokureur-Generaal, Vrystaat v Ramakhosi* 1996 11 BCLR 1514 (O); *Bolofo v Director of Public Prosecutions* 1997 8 BCLR 1135 (Lesotho CA).

and followed by Parliament,[37] bail proceedings were cast within an inquisitorial mode. In *S v Dlamini et al*[38] Kriegler described the underlying policy as follows:

> "Although societal interests may demand that persons suspected of having committed crimes forfeit their freedom pending the determination of their guilt, such deprivation is subject to judicial supervision and control. Moreover, in exercising oversight in regard to bail, the court is expressly not to act as a passive umpire. If neither side raises the question of bail, the court must do so. If the parties do not of their own accord adduce evidence or otherwise produce data regarded by the court as essential, it must itself take the initiative. Even where the prosecution concedes bail, the court must still make up its own mind. In principle, that policy of the CPA, and the consequential provisions mentioned, are in complete harmony with the Constitution".[39]

The endorsement of an inquisitorial procedure in bail hearings as being in harmony with the Constitution is a significant comment. The inquisitorial duty cuts two ways – the court carries the responsibility to ensure that those who should be released on bail are so released, and those who are not are detained despite what the parties may agree among themselves. The active pursuit of the interest of justice – the basis of the bail decision – becomes the court's duty; and the adversarial process cannot be trusted to provide the correct answer.

4.5 Ensuring an efficient process

Flowing from recommendations of the South African Law Commission (1995), recent amendments to the Criminal Procedure Act[40] have given further legislative form to presiding officer's management role of court proceedings.[41] To ensure the expeditious completion of proceedings, section 342A mandates the court to "investigate any delay in the completion of the proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness".[42] It is important to note that the court is not merely tasked to give effect to an accused's constitutional right to a speedy trial,[43] but to see to the expeditious completion of the proceedings in the interests of all parties concerned. Note further that the court is bound to "investigate" any unreasonable delay; it may not remain passive until one of the litigants complains about a delay caused by the other party.[44] The Act provides a court with specific remedies in order to eliminate or prevent delay and prejudice, including costs orders against the state and the defence.[45]

---

37 S 60(3) CPA, inserted by s 3 of the Criminal Procedure Second Amendment Act 75 of 1995.
38 1999 7 BCLR 771 (CC) §10.
39 §10.
40 Act 86 of 1996.
41 See also South African Law Commission's proposal regarding the role of the court in plea bargaining (South African Law Commission 1995:§10.85.
42 S 342A(1).
43 S 35(3)(d) Constitution.
44 See *S v Motsasi* 1998 2 SACR 35 (W).
45 S 342A(3).

Linked to the overall duty to secure the expeditious completion of proceedings, the court's powers to curtail and direct cross-examination have been spelt out.[46] The court may, if it appears that cross-examination is being "protracted unreasonably and thereby causing the proceedings to be delayed unreasonably", request the cross-examiner "to disclose the relevancy of any particular line of examination and may impose reasonable limits" with regard to both the length and line thereof.[47] While it has been suggested that these powers were implicit in the common law (Pretorius 1997:256–260), the amendment is significant as it indicates that the legislature is willing to articulate the managerial role of presiding officers in detail.

4.6 Child justice – the proposed "inquiry magistrate"

The most far-reaching adoption of an inquisitorial mode of procedure has been the recent proposals by the South African Law Commission's Project Committee on Child Justice. With the aim of diverting as many juveniles from pre-trial detention and the criminal courts, a specially trained magistrate, called the "inquiry magistrate", is to fulfil the primary function of making placement decisions (pending plea, trial or resolution of a matter) and final diversion decisions.[48] All cases, bar minor ones where diversion decisions are made by the police or probation officers, are to be brought before the inquiry magistrate, who must hold a preliminary inquiry. At the inquiry, conducted by the magistrate in his or her chambers, a free system of evidence, including the child's previous convictions or evidence of previous diversion, is recommended.[49] Where a case cannot be diverted because the child contests guilt, the magistrate must decide whether there is sufficient evidence to put the child on trial.

This proposal was drafted fully alive to South Africa's current infrastructure and available human and financial resources, and conscious that the creation of completely new structures would have been far too expensive and ultimately unrealistic.[50] Within these constraints, the committee was of the view that the practicable way of protecting the best interests of the child was to place its faith in an active inquisitorial judicial officer.

4.7 Conclusion

The unmistakable trend that is emerging from these developments is that, apart from the right to legal aid, the trial process is becoming less party-centred. Even where the accused persons are represented, the court is playing an increasingly important role in establishing a factual basis for making decisions with regard to bail and sentencing, ensuring that the

46 See recommendation of the South African Law Commission 1995:§6.37.
47 The court may also order that any submission regarding relevance of cross-examination be heard in the absence of the witness (s 166(3)(b) CPA).
48 §9.3.
49 §9.26.
50 §9.1.

principles of a fair trial are observed, and that the court process is managed efficiently. With regard to truth-finding on the guilt or innocence of an accused person, the development has been uneven. While the full disclosure of the police docket has certainly increased the truth-finding capacity of the proceedings, the lack of reciprocal defence disclosure has the capacity of distorting the process.

The question that this paper seeks to address is whether truth-finding instruments, including giving the presiding officer a more inquisitorial role, should be further developed with respect to the focal point of the trial – the determination of guilt or innocence. In answering this question, it is useful to reflect on some of the developments that are taking place in international law and domestic jurisdictions on this question.

5 INTERNATIONAL AND COMPARATIVE LAW DEVELOPMENTS

The most significant development must surely be the establishment and operation of international criminal tribunals, which had to grapple with divergent modes of procedure. Important changes have also occurred in some domestic jurisdictions where the effectiveness and fairness of both the adversarial and inquisitorial systems were questioned.

5.1 International criminal tribunals

International law practice suggests that the adversarial process has become the dominant mode of criminal procedure. In the international criminal tribunals set up for the former Yugoslavia and Rwanda, the first after Nurenburg, the mode of procedure was decidedly adversarial. While the International Criminal Court, envisaged by the international treaty concluded in Rome in 1998, also adopted a predominantly adversarial approach, some inquisitorial elements have been included. To the extent that the international human rights instruments[51] lean toward the adversarial process (Bassiouni 1993:277), this outcome was to be expected.

5.1.1 *International Criminal Tribunals for the former Yugoslavia and Rwanda*

The structure of the pre-trial and trial procedures greatly resemble adversarial proceedings. The prosecution has to prove the guilty of an accused beyond reasonable doubt.[52] A significant exception was the use of a free system of evidence; the admission of evidence fell within the discretion of the tribunal.[53] Hearsay evidence is thus admissible (Jones 1998:300).

---

51 Universal Declaration of Human Rights of 1948; International Covenant of Civil and Political Rights of 1966.

52 Rule 87(A).

53 See Rules of Procedure and Evidence, Section 3 Rules of Evidence, rule 89:
"(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

[continued on next page]

The tribunals have also been given some inquisitorial powers. A judge may at any stage put any question to a witness[54] and "may order either party to produce additional evidence".[55] It may also summons witnesses and order their attendance. Moreover, the tribunals were not bound by the parties' view of proof. In the *Tadic* case, one of the issues was whether there was sufficient evidence to link certain injuries to the causation of death.[56] Although the defence did not raise the inadequacy of proof on this issue, the tribunal held that it was nevertheless duty bound to consider it *mero motu*, and in the event found that the prosecution failed to establish the link beyond reasonable doubt.

5.1.2 *International Criminal Court (ICC)*

The statute of the ICC establishes a predominantly adversarial mode of procedure (Cassese 1999:168; Sweeney 1997:254). The investigatory process is entrusted to the prosecution, which searches and collects evidence. The evidence is then presented by the prosecution in oral proceedings before a tribunal. The detailed trial procedures, including evidential rules,[57] are yet to be formulated.

The envisaged adversarial system reflects also the recent development in common law countries of reciprocal discovery duties on both parties.[58] The presiding judicial officer may require from the prosecution "the disclosure to the defence within a sufficient time before the trial to enable the preparation of the defence, documentary or other evidence available to the Prosecutor, whether or not the Prosecutor intends to rely on the evidence".[59] The presiding officer may also make an order "providing for the exchange of information between the Prosecutor and the defence, so that the parties are sufficiently aware of the issues to be decided at the trial".[60]

More than in the case of the international tribunals for the former Yugoslavia and Rwanda, there was an attempt to weld elements of the inquisitorial mode into the adversarial system (Cassese 1999:168–171).

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

(E) A Chamber may request verification of the authenticity of evidence obtained out of court."

See also Mann 1996:368

54 Rule 85B.

55 Rule 98(A) ICTY, Rule 98(A) ICTR.

56 *Tadic Opinion and Judgment* Trial Chamber II on 7 May 1997, quoted in Jones 1998:299.

57 Cassese (1999:171), a lawyer in civil law tradition, expresses the hope that when the Rules of Procedure and Evidence are drafted, the best features of the inquisitorial model would be welded into the adversary process. This would probably include a free system of evidence. On the difficulties that hearsay evidence poses in war crimes trials, see Mann 1996.

58 See Sweeney 1997:253.

59 Art 27(5)(b).

60 Art 27(5)(c).

Cassese, a presiding judge in the International Criminal Tribunal for the former Yugoslavia, identifies a few fundamental elements typical of an inquisitorial system which have been included in the procedure (1999:168–169). First, the prosecutor is obliged to be an impartial truth seeker. Article 54(1)(a) provides that:

> "[i]n order to establish the truth [the prosecutor] shall extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute and, in doing so, investigate incriminating and exonerating circumstances equally."

Second, during the pre-trial stage, the prosecutor acts under the scrutiny and authorisation of a judicial officer (called the Pre-trail Chamber) with regard to matters such as initiating an investigation, preserving evidence and so forth.[61] Third, victims are given standing in the proceedings. In particular, they may use the trial to claim reparation for injuries sustained. Fourth, a presiding judicial officer may "order the production of evidence in addition to that already collected prior to the trial and presented during the trial of the parties".[62]

5.2 Foreign jurisdictions

In Europe, the home of both the common law adversarial and the continental inquisitorial systems, changes are occurring in both systems, which "point more to convergence than to divergence" (Jorg, Field & Brants 1995:54). The continental systems have taken on board basic adversarial due process procedures during both the pre-trial and trial stages, while Britain is using increasingly inquisitorial instruments of truth-finding (Jorg, Field & Brants 1995:54). In the former case, the jurisprudence of the European Court of Human Rights has had a profound effect; secret pre-trial inquiries have been overturned[63] and, in court, "in principle, all evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument".[64] The jurisprudence of the European Court of Human Rights may have the converse effect with regard to the inquisitorial elements introduced in Britain. These elements may not fall foul of the court's jurisprudence which is embedded in the continental tradition of inquiry.[65]

5.2.1 *Italy – an inquisitorial system becoming adversarial*

Italy radically reformed its criminal procedure in 1988, superimposing an adversarial mode of procedure on an inquisitorial system.[66] This reform was driven by perceived problems of corruption and intimidation of

61 See arts 15(3), 18(2), 18(6), 19(6).
62 Art 64(5)(d).
63 *Lamy v Belgium* 30 March 1989 Series A no 151. See Tulkens 1995:9.
64 *Kostovski v the Netherlands* 28 Nov 1989 series A no 166 §20.
65 See Sharpe 1999: 278–9; Steyn 1999:56.
66 See generally Cirese & Bertucci 1993.

judges and the inefficiency of the Italian system (McEwan 1998:8).[67] A key feature of the Criminal Code of 1988 is the disappearance of the investigating judge (*giudice istuttore*) and the emergence of the prosecutor as the principal actor in the pre-trial stage (Chiavario 1995:35). The system of compulsory prosecution has been relaxed and a system of plea bargaining is explicitly accepted (Pizzi & Marafioti 1992:11). The trial process has also become more adversarial, ascribing to the presiding officer a predominantly passive role of ensuring respect for the new rules of evidence. A court may adduce additional evidence after the parties had closed their cases only when it is "absolutely necessary" (Chiavario 1995:37).

The crisis in the expeditious completion of proceedings, which prompted the reform, is enduring. This has been attributed not to the new procedure but to the "chronic incapacity of the politicians to devote adequate resources to the system coupled with the equally chronic incapacity within the system to organize itself, given the available resources" (Chiavario 1995:38).

5.2.2 *Britain – adversarial system becoming more truth-seeking*

Developments in Britain have been dominated by a crisis in confidence that the criminal process can produce the truth. The miscarriages of justice, evidenced by the Birmingham Six, the Guildford Four and other cases where innocent persons were convicted due to biased pre-trial investigations, put the adversarial pre-trial process in question. At the same time, there was a perceived increase in crime. A Royal Commission on Criminal Justice, chaired by Viscount Runciman, was appointed. While no drastic changes to the common law system were proposed, greater transparency in the system was advocated. The legislation that followed included more truth-finding measures by imposing disclosure duties on accused persons. With the passing of the Human Rights Act of 1998 which obliges English courts to interpret domestic law in compliance with the European Convention on Human Rights,[68] these developments will be judged not only in Strasbourg, but also domestically.

5.2.2.1 *Police questioning*

Commencing with the Northern Ireland Evidence Ordinance of 1988, the Criminal Justice and Public Order Act 1994 introduced in England and Wales the provision that, in certain circumstances, adverse inferences can be drawn from an accused's silence under police questioning.[69]

---

67 The numerous violations of the right to a speedy trial in the case law of European Court of Human Rights exemplified the problem. See Pizzi & Marafioti 1992:6; Chiavario 1995. A similar process is underway in South and Central America, where the drive towards a more adversarial process is motivated by the experienced inefficiency of the received inquisitorial system dating from the previous century.

68 S 3.

69 Ss 34–38. See McEwan 1998:173 *et seq.*

In *Murray v United Kingdom*,[70] the European Court of Human Rights, dealing with the Northern Ireland provision, held that drawing adverse inferences from pre-trial silence was not necessarily incompatible with the right to remain silent as the right was not absolute. The court held that the way the accused behaved or has conducted his defence was relevant in evaluating the evidence against him. However, the prosecutor must have first established a *prima facie* case against him before any inference could be drawn from his silence. Furthermore, a conviction cannot be based "solely or mainly" on the accused's silence or on a refusal to answer questions or to give evidence. On the basis of this decision, Lord Steyn (1999:56) is of the opinion that it is debatable whether the Human Rights Act will necessarily have much effect on pre-trial disclosure, because many continental countries have more far-reaching duties of disclosure.[71]

5.2.2.2 *Judicial questioning*

The judicial questioning of an accused soon after arrest was first introduced in Scotland in 1980[72] as a result of the Thomson Committee on Criminal Procedure.[73] The committee argued that if an accused could remain silent, he or she could come forward with a defence which might have been shown to be false had he or she been examined at an early stage of the proceedings. The aim of judicial questioning was thus, first, to afford an accused an opportunity, at the earliest possible stage, of stating his or her position as regards the charge, second, to prevent the later fabrication of a defence, and, third, to protect the interest of the accused, by ensuring that any answers or statements given to the police were fairly obtained.[74]

The Criminal Procedure (Scotland) Act of 1995 repeated the provisions relating to the questioning of an accused before a judicial officer. In petition proceedings, an accused may be brought on arrest by the prosecutor before a sheriff (a judicial officer) for judicial examination.[75] The questioning by the prosecutor must be directed towards "eliciting any admission, denial, explanation, justification or comment" which the accused may have regard to the charge.[76] The question must aim, *inter alia*, at determining whether any account which the accused gives "ostensibly disclose a defence" and the nature and particulars of the defence.[77] The questions may thus include those aimed at achieving self-incrimination (Bradley & Shiels 1996:46–50). The accused may be represented at the examination[78] and may consult with his or her lawyer before answering a

70 Decision of 8 Feb 1996, (1996) 22 EHRR 29.
71 See also Ashworth 1999:267; Pattenden 1998:161–4.
72 Criminal Justice (Scotland) Act 1980.
73 Criminal Procedure in Scotland (Second Report) Cm 6218, October 1975.
74 See Scottish Home and Health Department 1994:§8.18.
75 S 36(1).
76 S 36(1).
77 S 36(2).
78 S 35.

question.[79] As the role of the judicial officer is to control the reasonableness of the questioning,[80] the lawyer's role is limited to asking questions in clarification.[81] The accused may decline to answer any question but then an adverse inference may be drawn "only where and in so far as the accused (or any witness called on his behalf) in evidence avers something which could have been stated appropriately to that question".[82] The other side of the coin is that the prosecutor must secure the reasonable investigation of any ostensible defence disclosed by the accused,[83] a duty to which no sanctions are coupled for its neglect (Brown 1996:47; Bradley & Shiels 1996:46–50). The two striking features of judicial questioning are first, the accused's duty to co-operate and, second, the prosecutor's duty to perform the independent investigative function.

5.2.2.3 *Defence disclosure*

The Runciman Commission was of the opinion that the judicially imposed duties of prosecution disclosure went too far. Not only did the prosecution have to disclose all material which it intends to adduce as evidence, but also all "unused material". This not only imposed a heavy burden on the prosecution to comb through large masses of material, but also allowed the defence to cause delays by successive requests for more material.[84] To strike a "reasonable balance"[85] between the duty of prosecution disclosure and the rights of the accused, the commission proposed, first, an automatic primary duty of prosecution disclosure of "all material relevant to the offence or to the offender or to the surrounding circumstances of the case, whether or not the prosecution intends to rely upon that material",[86] second, a duty on the defence to disclose its line of defence, and third, depending on disclosure by the defence, secondary disclosure by the prosecution.

The Commission advanced the following reasons for defence disclosure:

> "If all the parties had in advance an indication of what the defence would be, this would not only encourage earlier and better preparation of cases, but might well result in the prosecution being dropped in the light of the defence disclosure, and earlier resolution through a plea of guilty, or the fixing of an earlier trial date."[87]

It would also keep "ambush defences" to a minimum.[88] Defence disclosure would entail the "disclosure of the substance of their defence in advance of the trial or to indicate that they will not be calling any evidence but will simply be arguing that the prosecution has failed to make

79 S 36(6).
80 S 36(5).
81 S 36(7).
82 S 36(8).
83 S 36(10).
84 Ch 6 §42.
85 Ch 6 §50.
86 Ch 6 §51.
87 Ch 6 §59.
88 Ch 6 §59.

out its case".[89] As sanction for non-disclosure, adverse inferences could be drawn.[90] The Commission was convinced that the duty did not compromise the accused's right against self-incrimination. It was merely disclosing the substance of a defence sooner rather than later.[91]

These recommendations were endorsed by the Home Office. In a consultation document,[92] the argument was couched essentially in a truth-finding framework:

> "By clarifying the issues before the trial starts, these proposals should help to ensure that those who are guilty are convicted, without prejudicing the acquittal of the innocent. If the Defendant is telling the truth in the line of argument he discloses, that will trigger prosecution disclosure of any material which tends to support that defence and thereby enable the defence to run its case more effectively."[93]

The recommendations were duly enacted in the Criminal Justice and Investigations Act of 1996 (CPIA). This extended the disclosure duty already existing in serious or complex fraud cases[94] to all Crown Court trials.[95] The prosecution duty of disclosure with regard to unused materials, is restricted to such material which in its view, "might undermine the prosecution case".[96] The defence is then compelled to provide a statement setting out the defence in general terms, the matters in dispute, and the reasons why the matters are placed in dispute.[97] Upon such disclosure, the prosecution is subject to a duty of secondary disclosure of any further material "which might be reasonably expected to assist the accused's defence as disclosed by the defence statement."[98]

The Act provides no sanction against the prosecution for failing to act properly (Corker 1996:§5-24; Sharpe 1999:280–281). For the success of prosecution disclosure, Corker (1999:§5–23) remarks that the CPIA "assumes that prosecutors will act in a more fastidious and counsel-like manner, acting in a detached objective way as ministers of justice". This assumption is, of course, highly contested. Sharpe (1999:281) writes that an adversarial system "should not operate on the premise that the Crown is a neutral seeker of the truth and that there will therefore be a total transparency between police, prosecutors and the courts".[99] In contrast, the sanction of defence failure to disclose is that adverse inferences can

89 Ch 6 §66.
90 Ch 6 §70.
91 Ch 6 §60.
92 Home Office *Disclosure. A Consultation Document* (1995) cm 2864, quoted in Corker 1996:§5-02.
93 § 27. See also McEwan 1988:18–9.
94 S 9(5) of the Criminal Justice Act 1987 permits the judge to order an accused in a case of serious or complex fraud to provide a statement in writing setting out in general terms the nature of his or her defence. See Corker 1996 §2-07.
95 S 1 CPIA.
96 S 3(1)(a) CPIA.
97 S 5(6) CPIA.
98 S 7(2)(a) CPIA.
99 See also Corker 1996:§5-46.

be drawn.[100] However, a defence statement does not become evidence on which the prosecution case can be built.[101]

In specific cases the defence disclosure must go even further. In the case of an alibi defence, the accused must give particulars of the alibi, including the name and address of any witness the accused believes is able to give evidence in support of the alibi.[102] In the case of long or complex cases, a judge may order a preparatory hearing in which case statements may be required from the prosecution and the accused.[103] The defence case statement must include in general terms the nature of the defence and indicate the principal matters on which issue is being taken with the prosecution, objections to the prosecution case statement and any points of law it intends taking.[104] The obligation does not, however, include the disclosure of the identities of defence witnesses.[105]

The question remains whether the defence disclosure was compatible with the European Convention on Human Rights, now directly applicable through the Human Rights Act of 1998. Although some argue that the duty runs "fundamentally counter to adversarial theory in weakening the privilege against self-incrimination" (Sharpe 1999:277), others regard it as legitimate in view of full prosecution disclosure (Jackson & Doran 1995:62; McEwan 1998:18–19). In the light of the European Court's decision in *Murray v United Kingdom*,[106] which holds that the right to remain silent was not absolute silence and remaining silent through the proceedings has implications for the evaluation of inculpating evidence, the conclusion is that compelled defence disclosure after primary prosecution disclosure will not fall foul of article 6(2) of the Convention.[107]

Sprack (1998:230) commented that the question of whether there should defence disclosure is no longer on the legal of political agenda; there is consensus that defence disclosure is desirable "particularly because of its powerful potential as a tool for trial management". The question has moved to the limits of the duty and how to make it compatible with the "golden thread of English criminal justice" that the burden of proof rests squarely on the prosecution (Sprack 1998:231).

5.2.2.4 *Strengthening inquisitorial powers*

The Runciman Commission also recommended that judges play a more active role in the production of evidence and the management of trials. A study conducted on behalf of the Commission revealed that, in 19 per cent of contested cases, trial judges reported that they knew of one or

100 S 10(3) CPIA.
101 S 11(5) CPIA. On the evidential difficulties surrounding the defence statement, see Sprack 1998.
102 S 5(7) CPIA.
103 S 29 CPIA.
104 S 31(6) CPIA.
105 S 33(1) CPIA.
106 Decision of 8 Feb 1996, (1996) 22 EHRR 29.
107 1999:285.

more important witnesses had not been called by either side.[108] The Commission noted that if the power to call witnesses is exercised more often, it "might constitute an incentive to counsel to ensure that the jury are allowed to hear all the relevant witnesses in a case".[109] The following recommendation was thus made:

> "Judges should be prepared, in suitable cases, to ask counsel why a witness has not been called and, if they think it appropriate, urge counsel to rectify the situation. In the last resort judges must be prepared to exercise their power to call the witness themselves."[110]

It also recommended that hearsay evidence should be more readily admitted[111] and that presiding officers exercise greater control over cross-examination.[112]

5.3 Conclusion

From the cursory review of international law and some European jurisdictions, four important conclusions can be drawn. First, the adversarial system certainly dominates the international law scene. If anything, a similar process is occurring with respect to continental systems under the influence of international human rights instruments. Second, the adversarial system is becoming more transparent with full disclosure by both parties. The notion of a trial as a sporting game is giving way to greater truth-finding. Third, in the adversarial system the passive role of the court is being transformed towards a more proactive one with regard to both truth-finding and procedural fairness. Fourth, developments in Europe indicate growing trends towards hybrid systems in pursuit of greater efficiency. Italy moved towards the adversarial system to make it more efficient. Common law jurisdictions make the presiding judicial officer more active towards the same goal. In conclusion, the confluence of these tendencies seems to suggest that the optimal system is the hybrid one; it is only through the collective effort of all the players that the three goals of the criminal justice system can be achieved.

6 PROPOSALS FOR REFORM

With regard to the central truth-finding objective of the criminal trial, it has been argued that the adversarial system routinely produce inadequate results. Undefended accused are usually not competent adversaries and may be wrongly convicted as a result. The same would apply to poor defence counsel. Unskilled prosecutors may result in unjustified acquittals. Where there is an equality of arms in terms of competent adversaries,

---

108 Study by Zander and Henderson *Crown Court Study*, Royal Commission on Criminal Justice Research Study 19 1993; Royal Commission Report ch 8 §18.

109 Ch 8 §18.

110 Recommendation 185.

111 Recommendation 189.

112 Recommendations 180, 181 and 182. The recommendations were not dissimilar to those contained in the South African Law Commission's interim report of 1995.

truth-finding may be distorted by unilateral prosecution disclosure. In this section it will be argued that one way of ameliorating these problems is to articulate with greater precision judicial officers' inquisitorial powers and to require reciprocal defence disclosure.

It should be immediately stressed that tinkering with the accusatorial system will not solve all truth-finding problems or ensure fair trials. The trial as the visible manifestation of the broader process of crime detection, investigation and prosecution, can only be as good as those hidden elements of the criminal justice system.

6.1 Judicial truth-finding

Judicial officers have well-recognised inquisitorial powers of questioning and calling witnesses. The question is, then, whether these powers can and should be elaborated on to ensure better truth-finding.

6.1.1 *General principles*

In interpreting the power and duty to question and call witnesses for the "just decision" in a case,[113] the approach for the past 70 years has been the celebrated dictum of Curlewis JA in *R v Hepworth*:[114]

> "By the words 'just decision in the case' I understand the legislature to mean to do justice as between the prosecution and the accused. A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and the Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are applied to both sides. A Judge is an administrator of justice, not merely a figure head, he has not only to direct and control the proceedings according to recognized rules of procedure but to see that justice is done . . . The intention of section 247 [s186 CPA 1977] seems to me to give a Judge in a criminal trial a wide discretion in the conduct of the proceedings, so that an innocent person be not convicted or a guilty person get free by reason, *inter alia*, of some omission, mistake or technicality."[115]

This approach was again confirmed by the Supreme Court of Appeal in *S v Gerbers*.[116] The court's duty pertains to the establishment of the truth irrespective of whom the court's action benefits or prejudices.

6.1.2 *Assisting the defence*

In the case of the undefended accused, it has now been been widely accepted that the judicial officer may be more interventionist, questioning state witnesses in order to establish the truth. In *S v Mosoinyane*[117] the Court quoted with approval the following passage (Steytler 1998:150):

---

113 S 167 and s 186 Criminal Procedure Act.

114 1928 AD 265 at 277.

115 See also *R v Omar* 1935 AD 230 at 323 where Wessels CJ said when interpreting s 247 of the CPA of 1917 that the task of the judicial officer "to see that *substantial justice* is done, to see that an innocent person is not punished and that a guilty person does not escape punishment" [emphasis added].

116 1997 2 SACR 601 (SCA) at 606B.

117 1998 1 SACR 583 (T) at 595A–D.

> "Participating in the testing of the State evidence does not *per se* compromise the court's impartiality. To the contrary, by remaining aloof where the accused is unable to test the State evidence, the judicial officer would actually be siding with the prosecution by letting the latter draw an unfair advantage from the accused's inept cross-examination."

The same applies with regard to calling witnesses that may be of assistance to the defence (Steytler 1998:75–77).

6.1.3 *Assisting the prosecution*

The more difficult question is whether a judicial officer may intervene where it may be to the prejudice of the defence. In the case of *S v Manicum*,[118] the magistrate was confronted with a prosecutor unwilling or unable to cross-examine the accused on his conflicting statements. The Court of appeal recognised that this situation placed the presiding magistrate in a "difficult position":

> "He was well aware of the legal duties imposed on a judicial officer. He knew he could not enter the arena and cross-examine the appellant. He knew he could not assume the role of prosecutor and endeavour to establish that the appellant's version fell to be rejected. He did ask a few questions. These were not leading questions and they were not designed to discredit the accused."[119]

There are two issues involved – the first is conceptual, the other is one of perception.

6.1.3.1 *A court may not perform the function of the prosecution*

Is it conceptually in order that judicial intervention may be to the prejudice of the defence? If the court does so, is it performing a prosecutorial function in conflict with its judicial role? In principle, judicial intervention to the prejudice of the defence is not *per se* irregular. In *S v Gerbers*[120] the Supreme Court of Appeal approved the following dictum from *R v Hepworth*:[121]

> "The discretion and power under s 247 [s 186 CPA 1977] can be exercised by a Judge, whether the effect thereof be in favour of the Crown or the accused person. I see no reason to distinguish between the exercise of that power on behalf of the accused or of the Crown, provided the power is exercised for the purpose of doing justice as between the prosecution and the accused."

In questioning the accused the Supreme Court of Appeal was of the same opinion. While "judicial harassment" of an accused is unacceptable, it

> "does not mean that a court may not ask an accused questions which he may find difficult to answer without doing damage to his case. Nor is the perception of partiality justified merely because a court's questions have the result that answers damaging to the accused emerge."[122]

---

118 1998 2 SACR 400 (N).
119 At 404B–C.
120 1997 2 SACR 601 (SCA) at 606E.
121 At 278.
122 At 608H–J.

Questions that show that a witness was giving false evidence or was unconvincing, do not indicate that the questions were unfair or partisan.[123]

There is, however, clear authority that the judicial officer may not assume the role of the prosecution. How is the court's legitimate truth-finding role to be distinguished from performing an unacceptable prosecutorial role? This question is pertinently raised in the context of the court's duty of ensuring an undefended accused a fair trial by discharging him or her *mero motu* if there is no evidence at the end of the state case.[124] How can a presiding officer be compelled to fill in the gap in a prosecution case, yet at the same time be under a duty to discharge an accused where there is no case to meet because there are gaps in the prosecution case?

Case law gives some indications how an appropriate distinction can be drawn. In *S v Jada*[125] Eksteen AJP held that the purpose of section 186 is not to place the presiding officer in the position of the prosecutor by calling witnesses from the outset in order to prove the allegations contained in the charge sheet. In *S v Kwinika*[126] the court made a similar distinction. Where no evidence whatsoever was advanced by the prosecution, the court was not at liberty to call a witness in terms of section 186, but had to discharge the accused *mero motu*. By contrast, the court may call for evidence which has been omitted by mistake or is necessary in order to rectify some technical deficiency.[127]

Where there is no evidence against the accused, an interventionist judicial officer would be playing the role of the prosecutor. Where it is apparent that there is no case for the accused to meet, the court must order a discharge. Where a reasonable suspicion has been established, but falling short of a *prima facie* case, it should be acceptable for the court to call a witness who may easily fill in the missing link. The court may thus perform a supplementary or complementary role to that of the prosecution in the interest of justice. Where there is nothing to supplement, intervention would be wrong.

The recent decision in *S v Matthys*[128] provides a good example of the difficulties in drawing these distinctions. The accused was charged with murder in the regional court. The first state witness testified that the accused struck the deceased with a *knobkierie* on the chest whereupon the latter died on the spot. The post-mortem report (presumably handed in as evidence) indicated a fracture of the skull. When the prosecutor indicated that there were no further witnesses, the court suggested to him that he call the district-surgeon to testify whether the head wound was old or could have been caused by the accused falling as the result of a blow to the chest. The Court on appeal responded as follows to this judicial intervention:

---

123 *S v Van Dyk* 1998 2 SACR 363 (W) at 379A.
124 *S v Becket* 1987 4 SA 8 (C); *S v Mathebula* 1997 1 SACR 10 (W); *S v Jama* 1998 2 SACR 237 (N) at 242J; *S v Ndlangamandla* 1999 1 SACR 391 (W). See also Steytler 1988:154.
125 1985 2 SA 182 (EC) at 184G.
126 1989 1 SA 896 (W).
127 *R v Hepworth* 1928 AD at 277.
128 1999 1 SACR 117 (C).

> "Suggesting to the prosecutor in the manner in which he did, was, with respect, grossly irregular inasmuch as he was telling the prosecutor what the 'missing link' was, or put differently, the regional magistrate provided the prosecution with an opportunity of strengthening a link which he knew to be weak."[129]

If a more inquisitorial role is to be formulated for judicial officers, then this type of intervention should not necessarily be labelled as grossly irregular. There was a reasonable suspicion that the accused was linked to the death of the deceased and an independent expert may have provided support for either the accused's or the prosecution's case. It would appear that the regional magistrate intervened because the prosecutor too readily abandoned the prosecution in the face of incriminating evidence and the availability of a crucial witness. It was a clear case for judicial truth-finding.[130]

In the instant case, the court did not call the district surgeon but suggested that the prosecutor should do so. Does the irregularity lie in the fact that by telling the prosecutor how to conduct the prosecution, he created the perception of bias?[131] This brings us to the second obstacle in the way of a more inquisitorial role for judicial officers – the problem of perceiving judicial bias or partiality.

6.1.3.2 *The court may create the impression of partiality*

It is established law that the conduct of a presiding officer must not create the impression that he or she is biased in favour of the prosecution. Commenting on the lengthy cross-examination of the accused in *S v Matthys*[132] Hlophe ADJP said the following:

> "The conduct of the learned regional magistrate was, with respect, shocking. His conduct was clearly in conflict with the wholesome English principle which is part of our law that justice should not be done but should manifestly be seen to be done, and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'".[133]

The critical question is, of course, how perceived bias is established. As searching for the truth should not *per se* be equated with bias, the usual references to English cases are inappropriate on two scores. Jackson and

---

129 At 119F.

130 This case also highlights the dilemma judicial officers face when they are confronted with the prospect of having to acquit a patently guilty person because the prosecution or court *a quo* has not done their job properly. While the court on appeal strongly disapproved of the regional magistrate's conduct (which was patently motivated by the prospect of the accused getting away with murder), they appeared to have fallen in the same trap. The correct outcome of the successful appeal should have been that the proceedings are set aside; the gross irregularity of the magistrate repeatedly entering the arena constitutes a failure of justice and the conviction should be reversed without reference to the evidence. The court proceeded, however, to convict the accused, on the basis of his own evidence, of assault with the intention to do grievous bodily harm. Rather than seeing the accused walk free of a self-confessed offence, the court responded to mete out punishment on an unprincipled basis.

131 Cf *S v Mosoinyane* 1998 1 SACR 583 (T) at 594H.

132 *Supra* 120i.

133 At 120C.

Doran (1995:109) have pointed out that the required judicial passivity was developed in the context of jury trials. Should the presiding judicial officer (who in the true sense presides over the proceedings not being the trier of fact) intervene to the detriment of the defence, it could easily have influenced the jury.[134] Furthermore, many of the leading cases on the proper judicial role, for example *Jones v National Coal Board*,[135] stem from civil litigation where the umpireal role is most appropriate (Johnson & Doran 1995:99). Even in England, the notion of passive judicial officer is under scrutiny, and a more interventionist role was also recommended by the Runciman Commission.[136]

Where the judicial officer calls a witness to the prejudice of the accused, that act by itself should not be construed as bias. The issue of bias is more real when it comes to the judicial questioning of witnesses, because such intervention lends itself more easily to charges of bias. Again, the mere fact that the consequences of the court's questions are prejudicial to the accused does not constitute bias.[137] Furthermore, the length of questioning alone is a relatively neutral factor.[138] The decisive factor is the manner in which the questioning take place.[139] In the words of Marais JA:

> "It goes without saying that objectively legitimate questions may be put so belligerently or intimidatingly or so repetitively or confusingly as to amount to judicial harassment and therefore an irregularity."[140]

These may very well be some of the characteristics of cross-examination – questioning from a partisan perspective.[141] It is well-established that judicial questioning may not amount to cross-examination.[142] In contradistinction with the partisan nature of cross-examination, judicial questioning must exhibit "open-mindedness".[143] A dismissive attitude towards a witness, portrayed by adverse comments on his or her evidence, may be legitimate cross-examination but not judicial questioning.[144]

The tension between truth-finding and perceptions of bias will always be there, but that should not preclude the court from performing its truth-finding duty. As Marais JA pointed out in *S v Gerbers*:

> "There is obviously potential tension between the need to fulfil the role of a judicial officer as described in *Hepworth*'s case *supra* and the need to avoid

---

134 In their study of the Diplock courts in Northern Ireland, Jackson and Doran (1995:75) point out that, in the absence of the jury, "trial judges may take on a more directorial, or inquisitorial, role in the trial, even though in theory they still be performing a merely umpireal role". With reference to the United States, Damaska (1997:135) notes that, with the marginalisation of jury trial, there is a greater involvement of the court in fact-finding activities.

135 [1957] 2 QB 55, 64 per Lord Denning.

136 Recommendation 185.

137 *S v Gerbers* 1997 2 SACR 601 (SCA) at 608I.

138 *S v Gerbers* 608H.

139 *S v Gerbers* 608H.

140 *S v Gerbers* 608H.

141 See *S v Sallem* 1987 4 SA 772 (A) 795A; Steytler 1988:150.

142 *S v Matthys* 1999 1 SACR 117 (C) 120H.

143 *S v Rall* 1982 1 SA 828 (A) at 832H.

144 *S v Aspeling* 1998 1 SACR 561 (C) at 569.

conduct of the kind which led to the characterising of the judicial officer's behaviour in cases such as *S v Rall* 1982 (1) SA 828 (A) as irregular and resulting in a failure of justice. Nonetheless, it remains incumbent upon all judicial officers to constantly bear in mind that their *bona fide* efforts to do justice may be construed by one or other of the parties as undue partisanship and that difficult as it may sometimes be to find the right balance between undue judicial passivism and undue judicial intervention, they must ever strive to do so."[145]

6.1.4 *Structuring the court's truth-finding activities*

While *Hepworth* established the principle that the role of the judicial officer is to ensure "substantial justice" between the accused and the prosecution, the practice may vary considerably. The proposal is to build on the Hepworth principle by nudging judicial conduct in the direction of a more truth-finding role where the effort and skill of the litigants fail to do so adequately. There should be a clear duty that would have obliged the magistrate in *S v Manicum*[146] to have examined the accused on his conflicting statements. This duty should also safeguard convictions which were returned despite the fact that the judicial officer "filled in the missing link" in the prosecution case.

A more inquisitorial judicial approach would affect undefended accused both favourably and adversely; favourably where the court tests the reliability of state witnesses, adversely where the accused and defence witnesses are examined. The writer has previously argued that it was the proper duty of the court to test the reliability of state witnesses where the accused was unable to do so, but that a similar duty was inappropriate with respect to the accused and his or her witnesses because, since "[t]he State is represented by a professional and competent adversary, there is little need for the court to deviate from its established role" (Steytler (1988:175). As the latter assumption is suspect, the argument also falls away.

If the argument is accepted that presiding officers should perform a more truth-finding role, the issue then becomes how such a role can be implemented and structured.

6.1.5 *Legislative guidelines*

Although the courts have wide inquisitorial powers in terms of sections 167 and 186 of the Criminal Procedure Act, their application in practice varies considerably. To implement a greater truth-finding role within the present legislative framework may encounter two difficulties. The first is that a judicial officer steeped in an adversarial culture may not easily change habits.[147] In Northern Ireland, for example, the introduction of

145 At 607B–C.

146 1998 2 SACR 400 (N).

147 Cf South African Law Commission 1998:§6.36. Although presiding officers always had the power to control cross-examination, the commission was of the opinion that this power should be specifically expressed by statute. One of the reasons advanced was that since "our lower courts especially are hesitant to exercise this power [to curtail

[continued on next page]

bench trials did not significantly alter the passive approach required of judges in jury trials (Jackson & Doran 1995).[148] The second difficulty would be that unguided judicial intervention may result in legitimate complaints of partisan behaviour. To signal a change in approach to proceedings, the inquisitorial powers in sections 167 and 186 could be amplified with guidelines.

6.1.6 *Judicial attitude*

By establishing a more inquisitorial role, the danger is there that presiding officers may subsume the role of the prosecution, giving rise to legitimate claims of bias. How can the correct balance be struck? The answer to this question does not lie in the law, but in judicial appointment and training. Drawing magistrates not from the ranks of prosecutors may be a partial solution. Judicial training in the proper execution of the truth-finding function would be necessary for both current and new judicial officers. The focus of the training would be to ensure judicial intervention which does not comprise a court's well-established duty to be open-minded, impartial and fair.[149] This is a balance that the continental system has achieved. We should not share the Anglo-American scepticism that any state intervention is partisan by nature and should therefore be avoided.

6.1.7 *Prosecution disclosure and truth-finding*

The prosecutorial duty to disclose the content of the police docket has advanced the truth-finding process in the case of defended cases. Defence counsel can test the reliability of state witnesses with reference to their police statements and unused disclosed materials may indicate evidence favourable to the defence. While the duty to disclose deviations in state witnesses' testimony and exculpating evidence to the defence was firmly entrenched prior to 1994, their enforceability depended ultimately on prosecutorial discretion. With access to the police docket now a constitutional right, the major defect in the system has been cured by placing the docket in the hands of the defence. Placing the police docket in the hands of the court would enable it to play a more effective truth-finding role. In the case of the undefended accused, the court would at least be able to evaluate the reliability of state witnesses where the accused manifestly neglects to do so or call exculpating evidence. The court would also be aware if the prosecution fails to call a key state witness.

Disclosing the police docket to the court would resemble the key position the *dossier* assumes in inquisitorial systems. Introducing this inquisitorial element in a mainly adversarial system does not give rise to insurmountable difficulties in our law. At present any material in the

---

cross-examination], the Commission feels that it would be useful to embody it in legislation which will, at the same time, lay down basic requirements for its application" (§6.36). See also Jackson (1997:334) on changing judicial behaviour.

148 See also Doran, Jackson & Seigel 1995.

149 *S v Rall* 1982 1 SA 828 (A) at 832H; *S v Gerbers* 1997 2 SACR 601 (SCA); *S v Aspeling* 1992 1 SACR 561 (C) at 571C.

police docket disclosed to the defence becomes part of the court record only on being properly admitted in terms of the usual admissibility criteria of the law of evidence.[150] When the testimony of a state witness differs from his or her police statement, the defence may seek to hand in the statement as an exhibit for the purposes of cross-examination. Conversely, a statement of a person who is not testifying is not to be admissible. By placing the docket before the court, the same rule would apply, its content does not become evidence unless it must be properly placed before court. It is not unusual for a court to have access to information which does not form part of the record. The clearest example is a confession which is held to be inadmissible. Where a court acts on the information contained in the docket, it must be properly admitted to the record.

6.2 Defence disclosure

Prosecution disclosure may hamper truth-finding. With the full prosecution case disclosed, the defence, by withholding its line of defence, may seek to pick holes in the prosecution case and trim the sails of its defence as the prosecution case unfolds. Defence disclosure as a response to prosecution disclosure seeks to meet this negative consequence.

In 1995 the South African Law Commission disapproved of a proposal that a defence disclosure should be obligatory (1995:§8.43). The argument was based on the view that such a duty would have been in violation of an accused's right to be presumed innocent and the right to remain silent. As the law then stood, that view was no doubt correct. However, since the right to prosecution disclosure has been firmly established, defence disclosure during trial proceedings would be justifiable where full prosecution disclosure has taken place. As Van Dijkhorst J (1998:138) has recently observed:

> "I fail to see how the full disclosure of the versions of both state and defence at the outset and the elimination of evidence on that which is common ground can be regarded as unfair. We are, after all, attempting to arrive at the truth, not to obfuscate it."

With the weight of opinion that the English legislation on defence disclosure will not fall foul of the European Convention on Human Rights, a similar provision may pass constitutional muster in South Africa.

Sources

Albrecht HJ Policy options in crime, criminal justice and criminal law reform in Namibia Unpublished issue paper Ministry of Justice Namibia 1996

Ashworth A Article 6 and the fairness of trials *Criminal Law Review* 1999

Bassiouni M Human rights in the context of criminal justice: Identifying international procedural protections and equivalent protections in national constitutions *Duke Journal of Comparative and International Law* 3 1993

150 *S v Tsbalala* 1999 1 SACR 163 (T).

Bradley I & Shiels R *Criminal Procedure (Scotland) Act 1995* Edinburgh: W Green/Sweet & Maxwell 1996

Brown A *Criminal evidence and procedure: An introduction* Edinburgh: T&T Clark 1996

Cassese A The Statute of the International Criminal Court: Some preliminary reflections *European Journal of International Law* 10 1999

Chiavario M (ed) The criminal process in Italy in *The criminal process and human rights: Towards a European consciousness* edited by Mireille Delmas-Marty Dordrecht: Martinus Nijhoff 1995

Cirese V & Bertucci V *The new Italian criminal procedure for foreign jurists* 2ed Rome: Senia trl Italia 1993

Corker D *Disclosure in criminal proceedings* London: Sweet & Maxwell 1996

Damaska M *Evidence law adrift* London: Yale University Press 1997

Doran S Jackson J & Seigal M Rethinking adversariness in nonjury criminal trials *American Journal of Criminal Law* 23 1995

ELSA (European Law Student Association) *Handbook on the International Criminal Court* 2ed ELSA 1998

Findlay M *The criminal laws of the South Pacific* Buffalo NY: William S Hein 1997

Giddings J Dewar J & Parker S Being expected to do more with less: Criminal law Legal Aid in Queensland *Criminal Law Journal [Australia]* 23 1999

Hatchard J Huber B & Vogler R *Comparative criminal procedure* London: British Institute of International and Comparative Law 1996

Jackson J & Doran S *Judge without jury: Diplock trials in the adversary system* Oxford: Clarendon Press 1995

Jackson J Truth and compromise in criminal justice: A critique of trial practice and lawyers' ethics *Northern Ireland Legal Quarterly* 48 1997

Jones J *The practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* Irvington-on-Hudson NY: Transnational Publishers 1998

Jorg N Field S & Brants C Are inquisitorial and adversarial systems converging? in *Criminal justice in Europe: A comparative study* edited by Phil Fennel Christopher Harding Nico Jorg & Bert Swart Oxford: Clarendon Press 1995

Malleson K Decision-making in the Court of Appeal: The burden of proof in an inquisitorial process *International Journal of Evidence and Proof* 1 1997

Mann K Hearsay evidence in war crimes trials in *War crimes in international law* edited by Yoram Dinstein & Mala Tabory The Hague: Martinus Nijhoff 1996

McEwan J *Evidence and the adversarial process: The modern law* 2ed Oxford: Hart Publishing 1998

Osner N Quinn A & Crown G (eds) *Criminal justice systems in other jurisdictions* Report of the Royal Commission on Criminal Justice London: HSMO 1992

Pattenden R Silence: Lord Taylor's legacy *International Journal of Evidence and Proof* 2 1998

Pizzi W & Marafioti L The new Italian Code of Criminal Procedure: The difficulties of building an adversarial trial system on a civil law foundation *Yale Journal of International Law* 17 1992

Pretorius J *Cross-examination in South Africa* Durban: Butterworths 1997

Royal Commission on Criminal Justice (Runciman Commission) *Report* Cm 2263 London: HMSO 1993

Scottish Law Commission Evidence: Report on documentary evidence and proof of undisputed facts in criminal proceedings no 137 Edinburgh: HMSO 1992

Scottish Office Home and Health Department *Firm and fair: Improving the delivery of justice in Scotland* Report presented to Parliament by the Secretary of State for Scotland Cm 2600 Edinburgh: HMSO 1994

Sharpe S Article 6 and the disclosure of evidence in criminal trials *Criminal Law Review* 273 1999

South African Law Commission *Simplification of criminal procedure* Project 73 Interim Report Pretoria: South African Law Commission 1995

Sprack J Will defence disclosure snap the golden thread? *International Journal of Evidence and Proof* 2 1998

Steyn Lord The role of the bar, the judge and the jury: Winds of change *Public Law* 51 Spring 1999

Steytler N The undefended accused on trial: Justice in the lower courts Unpublished PhD thesis University of Natal 1987

Steytler N *The undefended accused on trial* Durban: Butterworths 1988

Steytler N *Constitutional criminal procedure* Durban: Butterworths 1998

Sweeney D International standards of fairness, criminal procedure and the International Criminal Court *Revue Internationale de Droit Penal* 68 1997

Tulkens F Criminal procedure: Main comparable features of the national systems in *The criminal process and human rights: Towards a European consciousness* edited by Mireille Delmas-Marty Dordrecht: Martinus Nijhoff 1995

Twaib F Lawyers and the availability of legal services in Tanzania mainland *Recht in Afrika* 57 1998

Van Dijkhorst K The criminal justice system in jeopardy: Is the Constitution to blame? *Consultus* 136 November 1998

Van Ness D *International standards and norms relating to criminal justice* Maryland: Pike & Fischer 1998

Young A Adversarial justice and the Charter of Rights: Stunting the growth of the "living tree" *Criminal Law Quarterly* [Canada] 39 1997