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## ACKNOWLEDGEMENTS

Numerous people have helped the writer in this paper.

### CONFESSION LAW - A CRITIQUE

A thorough empirical and psychological investigation of the philosophical assumptions embodied in the confession law.

I am especially indebted to various doctors who took time off from their pressing duties to educate me in the A dissertation paper submitted in partial fulfilment of the requirements for the Bachelor of Laws Degree, University of Nairobi.

A special word of thanks goes to my devoted supervisor, Mr. Sing'oro for his attention to intricate detail in the intricacies of the law. Tribute goes to Mr. G. K. Kibuu for his painstaking questions whose answers are of great benefit.

Fredrick H. Ngatia

I am under great obligation to the kind lady who has struggled with the endless work of transcribing and Nairobi, April, 1979. printing this manuscript.

Apart from the aforementioned, many other persons, too many to enumerate, rendered me assistance in the preparation of this paper. I wish to thank them all in their modesty without in any way diminishing their help.

Finally, may I also state that, as much as possible I

## A C K N O W L E D G E M E N T S

Numerous people have helped the writer in this paper.

Credit goes to my lecturer Mr. J. B. Ojwang who taught me Evidence Law and cultivated this intense passion for this branch of the law. I am also very grateful to the very helpful discussions I had with Senior State Counsels, William Mbaya, Kihara Muttu; State Counsels, Kirundi and Bwomwanga.

I am especially indebted to various doctors who took time off from their pressing duties to educate me in the intricate sciences of the mind.

A special word of thanks goes to my devoted supervisor, Mr. Ringera for his attention to precise detail in the thickets of the law. Tribute goes to Mr. G. K. Kamau for his mind-searching questions whose answers are of great moment.

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Apart from the aforementioned, many other persons, too many to enumerate, rendered me assistance in the preparation of this paper. I wish to thank them all in their anonymity without in any way demeaning their help.

Finally, may I also state that, as much as possible I

have acknowledged in the footnotes the sources of my information and quotations. I apologise for my omissions in acknowledging the source, for misinterpreting or misrepresenting anyone's ideas, and for errors in quoting other peoples' writing, where this might have happened without my knowledge.

The criminal law, which it professes to be for the common good. The criminal laws forbid certain kinds of conduct, threatening punishment if its injunction should be disobeyed. The state has a colossal edifice in the form of police, courts, prisons, etc whose main purpose is to punish those who offend against the criminal law. Relative to these organs the individual subject is weak and small. This makes him most vulnerable where a conflict arises between him and the state involving an alleged breach of the criminal law. It is against this background that the paper is based.

The state which punishes on the individual because the law says so although the law may be immoral is guilty of terrorism. Terrorism starts where punishment cannot be legitimately recognised or tolerated as punishment. It also starts where punishment has been stressed or executed beyond a reasonable maximum.

Corollary to this issue is where the retard weapon becomes a means whereby the state will almost certainly get a conviction of accused persons. There are many who agree to plead guilty (even if they are not) because it is a lesser evil to plead guilty than not to do so. Refusing to plead guilty may, for example, mean being kept in custody for several months or years and a serious disturbance of

## P R E F A C E

The state assumes the role of national trustee for people with the exclusive monopoly over the title to their general obedience. On that basis the state enacts laws, civil and criminal, which it professes to be for the common good. The criminal laws forbid certain kinds of conduct, threatening punishment if its injunction should be disobeyed. The state has a colossal edifice in the form of police, courts, prisons, etc whose main purpose is to punish those who offend against the criminal law. Relative to these organs the individual subject is weak and small. This makes him most vulnerable where a conflict arises between him and the state involving an alleged breach of the criminal law. It is against this background that the paper is based.

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Corollary to this issue is where the remand weapon becomes a means whereby the state will almost certainly get a conviction of accused persons. There are many who agree to plead guilty (even if they are not) because it is a lesser evil to plead guilty than not to do so. Refusing to plead guilty may, for example, mean being kept in custody for several months or years and a serious disturbance of

a person's opportunity to carry on with his usual job; while pleading guilty may simply mean paying a fine and carrying on as usual with one's daily work.

There are numerous difficulties in writing this kind of medico-legal paper. A research student will find his knowledge of the medical sciences inadequate to present a coherent paper. A corollary problem is the interpretation of the scanty scientific data available.

The other obvious obstacle is to interview the prosecution officials to get their honest opinions of various convictions whereof they were leading the prosecution. Aside with this is their almost fanatical belief that justice can never miscarry even when they are reminded of instances where justice did miscarry.

The paper is composed of three parts. Part one is an empirical and philosophical study of confession law. This study is undertaken from both a historical and also a modern perspective. Confession law simpliciter can be found in standard works on evidence. No attempt is made to reproduce it; instead this part attempts to search the philosophical assumptions of the law.

Part two is a study of the human being as an object which responds to extra-legal factors. Liberal use has been made of the medical sciences and historic events which show the human mind as susceptible to external factors to the extent of destroying the previous behaviour patterns.

Part three is a pragmatic approach to the question

whether the procedural <sup>rules</sup> ~~notes~~ are infallible. In other words, is there a great possibility of an innocent person being hanged? Given the existence of certain rules of procedure, what is its practical application in regard to the accused and the society in general?

The intellectual undercurrent of philosophical tendency - 'pragmatism' has greatly influenced this paper. ~~On~~ In the pragmatic approach, the criterion of the value and truth of an idea lies in its practical consequences. Every theory is valuable and true in so far as it allows us to co-ordinate our experience and put it to better use. A pragmatist turns away from abstractions and insufficiencies, from verbal solutions, from bad reasons, from fixed principles, closed systems and pretended absolutes and origins. He turns towards completeness and adequacy, towards facts, towards actions, towards powers. How the rules of law work, not what they are on paper is the cone of the pragmatic approach to legal problems.

Scots L. T.

Scots Law Times

Stanford L. R.

Stanford Law Review

U. S.

United States Law Reports

## ABBREVIATIONS

All E. R.	All England Law Reports
A. I. R.	All India Law Reports
A. C.	Appeal Cases
C. L. R.	Commonwealth Law Reports
Cr. App. R.	Criminal Appeal Reports
Crim. L. R.	Criminal Law Review
E. A.	East Africa Law Reports
E. A. C. A.	East Africa Court of Appeal
E. A. L. J.	East Africa Law Journal
Harvard L. R.	Harvard Law Review
Indiana L. J.	Indiana Law Journal
K. B.	Kings Bench Division
K. L. R.	Kenya Law Reports
N. Z. L. R.	New Zealand Law Reports
O. U. P.	Oxford University Press
Q. B.	Queens Bench Division
Scots L. T.	Scots Law Times
Stanford L. R.	Stanford Law Review
U.S.	United States Law Reports

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Confessions fall under two broad categories - judicial confessions i.e. plea of guilty at the trial and extra-judicial confessions. We shall first direct our mind to extra-judicial confessions.

A confession comprises words or conduct, or a combination of words and conduct which, whether taken alone or in conjunction with other facts proved, or inference may reasonably be drawn that the person making it has committed an offence.<sup>1</sup>

**CONFESSION LAW - NOT A CRITIQUE**

of S.29 changed the definition of confessions from that normally applied in East Africa<sup>2</sup>, although the definition was retained in S.32 for purposes of confessions implicating a co-accused. As it now reads, the definition presents considerable difficulty in interpretation and application, and the almost total absence of reported cases on the subject in the years since the enactment of the Act is, it is submitted, indicative of the hesitation of the courts, and also of counsel, to become too deeply involved in this legal thicket<sup>3</sup>. This section, therefore, can only present such guidelines as have been laid down to date and suggest an approach to solution of the problems presented.

The word 'confession' can have the following meanings:-

1. A clear admission of the offence or a direct acknowledgment of guilt
2. An admission of substantially all the facts which constitute the offence.

— 1 —

Formerly, under CHAPTER 1 in Section 10 of the Kenya Evidence Act

Confessions fall under two broad categories - judicial confessions i.e. plea of guilty at the trial and extra-judicial confessions. We shall first direct our mind to extra-judicial confessions.

A confession comprises words or conduct, or a combination of words and conduct which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.<sup>1</sup>

The Kenya Evidence Act by virtue of S.25 changed the definition of confessions from that normally applied in East Africa<sup>2</sup>, although the definition was retained in S.32 for purposes of confessions implicating a co-accused. "As it now reads, the definition presents considerable difficulty in interpretation and application, and the almost total absence of reported cases on the subject in the years since the enactment of the Act is, it is submitted, indicative of the hesitation of the courts, and also of counsel, to become too deeply involved in this legal thicket"<sup>3</sup>. This section, therefore, can only present such guidelines as have been laid down to date and suggest an approach to solution of the problems presented.

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1. A clear admission of the offence or a direct acknowledgment of guilt
2. An admission of substantially all the facts which constitute the offence.

Formerly, under the definition in Pakala Narayana Swami V. Emperor<sup>4</sup> an admission of a gravely incriminating fact could not, of itself, be a confession, for as the judicial committee said

Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession".

However, under the definition in S.25, an admission of a gravely incriminating fact, taken alone or in conjunction with other facts proved from which an inference may reasonably be drawn that the maker has committed an offence, is clearly a confession.

In order to distinguish between a confession and an admission, a simple test can be applied. If the statement by itself is sufficient to prove the guilt of the maker, it is a confession. If on the other hand the statement falls short of it, it amounts to an admission. Where there is a direct admission of guilt, it is not possible to treat the statement as an admission. There is a distinction between making a statement giving rise to an inference of guilt and a statement which directly admits guilt. Where the admission extends only to the acceptance of a circumstance from which an inference of guilt can be drawn but which is not conclusive to prove the guilt, it can be treated as an admission. The acid test which distinguishes a confession from an admission is that where the conviction can be based on the statement alone, it is a confession and where some

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supplementary evidence is needed to authorise a conviction, then it is an admission<sup>5</sup>.

Like other admissions, a confession is admissible under an exception to the rule against hearsay and is therefore admissible as evidence of the truth of its contents. Further such evidence is itself sufficient to support a conviction<sup>6</sup>.

However, for a statement to fall within the definition of a confession, the substance must not be tainted by any irregularity. To illustrate, we may take the case of exculpatory matter. Exculpatory matter in a confession is matter which is adapted or intended to free the maker from blame for the act admitted i.e. matter negating the offence alleged to have been confessed. Under the definition in Swami's case (supra) which still applies under S.32 Kenya Evidence Act, the inclusion of self-exculpatory matter in a statement causes it to fall outside the scope of the definition of a confession. If, however, the exculpatory matter did not actually negative the offence charged the statement could still be a confession<sup>7</sup>.

Confessions are relevant and admissible in evidence because no one ordinarily makes a confession admitting his own guilt unless he is guilty<sup>8</sup>. But this principle is not applicable to involuntary confessions. The classic formulation of the principle applicable to the admissibility of confessions appear in Lord Sumner's speech

"It has long been established as a positive rule of English criminal law that no statement by an

accused person is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority".

The burden of proving the voluntariness lies on the prosecution, and can only be discharged if the court is satisfied beyond reasonable doubt that the confession was voluntary.

The problem relating to the admissibility of confessions turns on two broad rules:

- 1. Confession rules
- 2. Judges rules

The distinction between these two rules is that the first is a legal imperative whereas the second is a rule of practice. The legal implication is that where a confession has been taken contrary to the judges rules, then there is a discretion for the trial judge to admit it as evidence. The judges rules are a code of conduct which was promulgated by judges and were last revised in England in 1964. They are for the administrative procedure, police practice etc.

For historical reasons, the confession rule evolved at the time when criminal procedure was at a much primitive stage of development and has been applied in a very liberal fashion, which has not commanded universal approval under modern conditions<sup>12</sup>. It has been said that "on the subject of confessions English law is not wholly rational". But



"the rule itself, though it has been repeatedly criticised ..... is far too firmly established to be modified except by the legislature. By the judiciary, though it ought not to be extended, it must by no means be whittled down".<sup>13</sup>.

A distinction is to be drawn between involuntary confessions. The ground for the rejection of confessions which are not voluntary is the danger that the accused may be induced by hope or fear to incriminate himself falsely<sup>14</sup>. One possible ground of exclusion is not "that there is any presumption of law one way or the other" but that "it would be unsafe to receive a statement made under any influence of fear".<sup>15</sup> Voluntary confessions are admissible because "what a person having knowledge about the matter in issue says of it is itself relevant to the issue as evidence against him".<sup>16</sup>

Another possible rationale for the rule is that its intended thereby to restrain "law enforcement agencies from oppressive behaviour".<sup>17</sup> For present purpose the question whether the rule is based on the reliability principle or the disciplinary principle ..... is only of academic interest. It does not touch the effect or undoubted validity of the rule<sup>18</sup>. The rule is often criticised as devised to meet circumstances which no longer obtain; but the remedy is no longer in the hands of the judiciary.

alleged to have held out an inducement must have been a person in authority i.e. someone engaged in the arrest, detection, examination or prosecution of the accused or someone acting in the presence and without dissent of such person in authority. The test to be applied in civil and (subject to certain exceptions) criminal cases in considering whether evidence is admissible or whether it is relevant<sup>19</sup>. If it is, it is admissible and the court is not concerned with how it

was obtained. Thus, the rule relating to the admissibility of confessions is essentially an exception to the general rule that relevant evidence is admissible notwithstanding that it is unfairly or illegally obtained.

A distinction is to be drawn between involuntary confessions where the lack of control by the suspect over his admissions is due to congenital factors or to his own act, and those where it is the actions of the interrogators which have brought about the confession. In the former case, there is no rule that such involuntary statements must be excluded,<sup>20</sup> although the trial judge may exclude such evidence in the exercise of his discretion. In some cases the nature of the accused is mental state or capabilities may be such as to render his confession so unreliable that it must be excluded.<sup>21</sup>

The exclusion of a confession as a matter of law because it was not voluntary is always related to some conduct on the part of authority which was improper or unjustified. The statement must be voluntary: that is to say, it should not appear to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused.<sup>22</sup> For the statement to be excluded under the principle governing the admissibility of incriminating statements the person alleged to have held out an inducement must have been a person in authority i.e. someone engaged in the arrest, detention, examination or prosecution of the accused or someone acting in the presence and without dissent of such

a person. There is no authority which clearly defines who does not come within the category of a person in authority.

Sometimes, fairly weak inducements may have the effect of rendering the statement inadmissible.<sup>23</sup> As Lord Reid stated:- "It's true that many of the so called inducements have been so vague that no reasonable man would have been influenced by them, but one must remember that not all accused are reasonable men or women, they may be very ignorant and terrified by the predicament in which they find themselves".<sup>24</sup>

The inducement that the accused avers must refer to a temporal benefit: for the hopes which are referable to a future state merely are not within the principle which excludes confessions obtained by improper influence.<sup>25</sup>

Where the inducements merely amount to a moral exhortation and does not refer to a temporal benefit the confession is admissible.<sup>26</sup>

From this empirical study, we can see that a number of philosophical assumptions underlie the admissibility of voluntary confessions. These are, first, "a free and voluntary confession is deserving of the highest credit, because it's presumed to flow from the strongest sense of guilt and it's therefore admitted as proof of the crime to which it refers. But a confession forced from the mind by the flattery of hope, or torture or fear comes, is so questionable a shade when it is to be considered as evidence that no credit ought to be given to it and therefore it is rejected".<sup>27</sup>

Second, society has an inherent feeling that the police must obey the law while enforcing it. This abhorrence of society to the use of involuntary confessions is not only based on their inherent untrustworthiness, but also on the policy consideration that there should be application of punitive measures to the police.<sup>28</sup> That in the end, life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.

The third policy consideration is that the accused has <sup>legal</sup> no obligation to help the police get information. The accused has a primary objective to secure himself. Therefore, the prosecution should not rely on men condemning themselves secretly under pressure in police stations, for there is a risk of agitated and frightened men lying even though they are innocent.<sup>29</sup>

The second broad rule on the admissibility of confessions is the judges rules. These rules are not, of course, applicable to the taking of statements by magistrates, since they are rules drawn up for the guidance of police officers engaged in the actual investigation of criminal offences. Since they are rules of practice, they are declared by a court of competent jurisdiction and are followed until that court or a higher court declares them obsolete: or are changed by legislation. The initial rules were adapted in East Africa, and when 'new' rules were adapted in England in 1964, the issue arose as to whether the old rules still represent the practice to be followed in the

criminal courts of Kenya.<sup>31</sup> It was decided that the 'old' rules still represent the practice in Kenya.

It has been authoritatively stated

"This court has said on many occasions that the judges rules have not the force of law but are administrative directives for the guidance of police authorities. That means, if the rules are not followed, the presiding judge may reject evidence obtained in contravention of them. If, however,<sup>32</sup> a statement is obtained in contravention of the judges rules, it may nevertheless, be admitted in evidence provided it was made voluntary".<sup>33</sup>

Subject to S.31, we can affirmatively state that if a statement which has been tendered in evidence has been obtained in contravention of the provisions of SS.26, 27 or 28 K.E.A., it will not be admissible in evidence regardless of whether the judges rules have been complied with.

The accused has a right to object to the admissibility of a confession although prima facie the confession was voluntary. The accused can either deny that he made the said confession, or aver that he was forced or induced to make the confession. These two grounds of objection are generally referred to as repudiated and retracted confessions respectively. An examination of cases dealing with retracted confessions shows the normal allegations of threat, physical violence etc. which are so commonly noted in African cases. For example, it has been known for an accused to be interrogated at length, breakdown and make a confession. After doing so, he is cautioned and the statement recorded. That is an illustration of a caution administered merely as a matter of form giving an entirely

false description and appearance of a voluntary confession.<sup>34</sup> The basic difference between a retracted and a repudiated statement is of course:- "that a retracted statement occurs when the accused person admits that he made the statement recorded but now seeks to recant, to take back what he said, generally on the ground that he had been forced or induced to make the statement, in other words that the statement was not a voluntary one. On the other hand, a repudiated statement is one which the accused person avers he never made".<sup>35</sup>

In Tuwamoi's case (supra) the court concluded this:-

"We would summarise the position thus - a trial court should accept any confession which has been retracted or repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particulars by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if its fully satisfied after considering all the material points and surrounding circumstances that the confession cannot be but true".<sup>36</sup>

It is well settled that the decision on any question of law or fact upon which the admissibility of any piece of evidence depends is for the court alone, and when the voluntary nature of a confession is challenged by the defence, the court should make a thorough inquiry.<sup>37</sup> The issue of voluntariness of the confession or whether it was in fact made if repudiated or retracted, raises the issue of admissibility which must be determined by the court before the statement is admitted in evidence.

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CHAPTER 2

evidence of any injury should have resulted in substantial loss of blood. Therefore, the alleged confessions

As outlined in the last chapter, a free and voluntary confession of guilt by an accused person

The second example is Muguna & Others v. Reg.<sup>2</sup> In this case there was practically no evidence against the appellants save four inculpatory statements amounting to and satisfactorily proved, is sufficient to warrant a conviction without any corroborative evidence. We shall look at examples to see what a free and voluntary confession of guilt is in reality and what in truth is a free and contemporaneous assertion of guilt.

In Aneiko and Another v. Uganda<sup>1</sup> the appellants were convicted of murder on the identification of a witness who saw them only by night and on their alleged confessions. The appellants stated that they had been beaten and forced to sign pre-prepared statements. Medical evidence supported some violence to the appellants and the confessions referred to the deceased having had his throat cut and having bled copiously. In fact the deceased had died from concussion and strangulation. On appeal, it was held that if a material element in a confession, and one which must have been within the knowledge of the person making the confession is demonstrably untrue, the value of the confession as a whole is destroyed and it cannot be relied on. In

The third example is Ochieng v. Uganda.<sup>3</sup> On this case, the appellant was convicted of murder on evidence which consisted principally of a confession made by him that the car had to be washed. The medical evidence was that the deceased's throat was not cut and there was no

evidence of any injury that would have resulted in substantial loss of blood. Therefore, the alleged confessions were untrue.

The second example is Njuguna & Others V. Reg.<sup>2</sup> In this case there was practically no evidence against the appellants save four inculpatory statements amounting to confessions which they had made to a police officer between 8th May, 1954 and 13th May, 1954. They had been taken into police custody on 15th March, 1954 and remained in such custody until 7th June, 1954. On the strength of these confessions the trial judge found them guilty and sentenced them to death. On appeal the decision was set aside. This case is authority for three propositions: first, that it is highly improper for the police to keep a suspect in unlawful custody and prolong the questioning of him by refraining from formally charging him. Second, that the judge has a discretion to exclude a statement which has been obtained by improper means, even though it is not inadmissible under any specific rule: and third, that a formal caution is of little significance when given to a prisoner who has been in the police Officers' custody for weeks, and who has previously been induced by questioning to incriminate himself.

The third example is Ochieng V. Uganda.<sup>3</sup> On this case, the appellant was convicted of murder on evidence which consisted principally of a confession made by him to the police after he had been kept in custody for nine days and repeatedly interrogated. It was suggested that



the confession was not voluntary and should not have been admitted in evidence. It was held that there was no right to take a witness into custody pending an investigation into a crime. Secondly, although the necessary safeguards provided for by law had not been carried out following the arrest of the appellant, this would not of itself prevent a voluntary confession being accepted as evidence against him, provided the judge had properly directed himself on the law and on the facts and had especially borne in mind the possible effect that the prolonged detention might have had on the mind of the appellant.

The fourth example is the pathetic case of R. V. Ndegwa.<sup>4</sup> This case was in the rural areas where legal representation is rarely afforded. The accused was charged with the offence of stealing and an alternative charge of handling stolen goods. He pleaded not guilty to the first count but guilty to the alternative charge. While the first charge carries a sentence of three years, the alternative charge carries a sentence of seven years minimum. He was convicted on his own plea of guilty.

The recurring theme in these cases is that the convictions were based entirely on the alleged confessions. Let us assume in favour of the accused that he is innocent.<sup>5</sup> The question we pose is why an innocent person can make such inculpatory statement and it later transpires that although he states that he murdered the deceased, medical evidence suggests that the deceased did not die from such wounds.<sup>6</sup> An alternative way of asking it is

what is the mental effect of intense interrogation, duress and physical torture on an accused person who is in police custody.

"It is still a widely held but physiologically untenable dogma" writes Dr. William Sargant<sup>7</sup> "that no ill treatment that leaves a man with a whole skin, the use of his limbs and unimpaired senses can be construed as duress". The average man, in other words, perfectly understands physical pressure leading to breakdown but imagines that mental pressure is something that he, and therefore, everyone else, is capable of resisting.

This of course is not so, and has never been so. The methods of the Spanish Inquisition were not those of physical torture alone. The Inquisitors were as much concerned with the breakdown of the mind as that of the body; indeed the breakdown of the mind being the ultimate end, it could be achieved either directly by the mind, indirectly by the body or sometimes by a combination of both. Dramatic religious and political conversions have generally come about as the result of acute mental stress. Evangelists like John Wesley and dictators like Hitler found that by inducing in their audiences emotions of fear and awe, by exciting them beyond their capacity to be excited, the response was a complete breakdown of previous behaviour patterns and the substitution of new ones. Yet although persuasion of this sort has been practised throughout history, it has mostly been practised consciously. It is only in recent times that the technique

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of mind persuasion or, as it is now called "brain washing" has been discovered. The pioneer of it was the Russian scientist Pavlov. Pavlov discovered that anxiety states could be induced in dogs and that if these anxiety states were sufficiently prolonged breakdown would ultimately

occur. At the start of the interview the interrogator always There were various ways he did this. One was to make a point of discussing with the prisoner some apparently innocent details from his past life. As previous to the indicated food was ready. Beyond a certain voltage the dog would begin to break down. Another method was to prolong this satisfies his great need to talk and have relationships with another human being. This cements a bond of A third was to confuse the dogs by first giving them a regular pattern of signals which they would understand and effective tools of the interrogators. As the interview then follow this with a mixture of positive and negative proceeds the prisoner becomes more and more confused until signals varying in strength and time. The hungry dog would become uncertain what would happen next, and how to face from what might have happened. Towards the end of the these confused circumstances. This could disrupt its interrogations the prisoner undergoing an ordeal which is normal nervous stability, just as it happens with human profoundly unpleasant and apparently endless is highly beings. The lesson that Pavlov learnt is a lesson that motivated to seek some end to his misery. Finally as all the police forces of the world have learnt, that succumb and not only agrees to sign a confession prepared professional criminals have learnt. It is that dogs and/ for his but comes to believe in its validity. Even though humans who refuse to co-operate are in no danger, but those he may know that his confession carries with it an automatic who do co-operate are doomed.

his p It was as a result of Pavlov's experiment that without using physical violence at all, the interrogators of the

Although the word brain-washing is usually associated Russian treason trials of the thirties managed to obtain with communist indoctrination techniques in its general the confessions that they did. They did this by prolonged sense it is something we have all experienced. All questioning in circumstances of great discomfort at all advertising, for example, is a form of brain-washing, hours of the day and night. They discovered a victim's and many people will recognise the brain-washing technique secret fears (it might be a horror of snakes) and played of modern commercial traveller as humorously described by

on them. They picked on contradictions in previous statements, they eventually wore him down to such a state of mental confusion that he was quite ready to say, and indeed believed that black was white.

At the start of the interview the interrogator always makes a point of discussing with the prisoner some apparently innocent details from his past life. As previous to the interview, the prisoner has been in solitary confinement, this satisfies his great need to talk and have relationships with another human being. This cements a bond of companionship between the two that can be one of the most effective tools of the interrogators. As the interview proceeds the prisoner becomes more and more confused until he becomes unable to differentiate what actually happened from what might have happened. Towards the end of the interrogations the prisoner undergoing an ordeal which is profoundly unpleasant and apparently endless is highly motivated to seek some end to his misery. Finally he succumbs and not only agrees to sign a confession prepared for him but comes to believe in its validity. Even though he may know that his confession carries with it an automatic sentence of death, he may prefer this to a continuation of his present hopeless state of misery.

Although the word brain-washing is usually associated with communist indoctrination techniques in its general sense it is something we have all experienced. All advertising, for example, is a form of brain-washing, and many people will recognise the brain-washing technique of modern commercial traveller as humorously described by

Jessica Mitford<sup>9</sup> - "in essence it consisted of a deft combination of mental torture and physical manipulation designed to reduce the subject to a state of hopeless passivity bereft of independent will, and ready to sign anything as a condition of freedom from torment."

And so from Pavlov's dogs, religious conversions breakdowns in war and peace and communist brain-washing techniques, we come to the methods of interrogation practised by today's police forces. And here we find that there is not very much difference, or rather what difference there is is one of degree rather than kind.

A famous British barrister<sup>10</sup> has said the police of Britain are scrupulously fair in their preliminary enquiries regarding murder, but once they have made up their minds whom they are going to charge, once the suspect becomes the accused, they are absolutely ruthless in their methods.

In Britain, it seems that between the public and the police there is a sort of tacit understanding that as long as convictions remain high, few questions will be asked as to the methods of obtaining them: for a high number of convictions is as necessary to the public for its security as it is to the police force for its existence. This licence is the price the public have agreed to pay for the maintenance of law and order: they trust the police not abuse it and on the whole their trust is justified.

In 1929 a report was published by the Royal Commission on Police Powers and Procedure and in his book Lord Devlin<sup>11</sup> "because I was fed up with the police questioning."

has summarised some of its conclusions - "they found no creditable evidence of confessions being obtained by violence or the threat of violence; but they found a volume of responsible evidence which it was impossible to ignore, suggesting the use of such devices for extracting statements as keeping a suspect in suspense (keeping him waiting for long periods) constant repetition of the same question, bluffing assertions that all the facts are known anyway, that a clean breast will enable them to make things easier at the trial" etc. And coming to the present times, Lord Justice Devlin (as he then was) says - "the fault to be looked for today, just as it was in 1929, is not the frame up but the tendency to press interrogation too hard against a man believed to be guilty".

The percentage of confessions depends on the examiner's confidence in himself and the method employed, his persuasiveness, perseverance and a sympathetic attitude towards the suspect. By one means or the other the examiners should impart to the subject the idea that he is certain of his guilt, as any indication of doubt on the examiner's part may defeat his purpose.

The Daily Express<sup>12</sup> reported a case of a young girl aged 19 being granted the Queen's pardon for a wrongful conviction of theft. It was found that the jewellery that she was thought to have stolen had never been stolen at all. Her conviction rested, as convictions often do, on her confession; and she had made a confession, she said:-  
"because I was fed up with the police questioning.

Dr. I was questioned three or four times for an hour or two at Lancaster Police Station. I kept telling them that I had not seen the rings I was supposed to have taken. But they said that it might be a serious matter for me. In the end I got fed up and thought it easier to say that I had taken the rings."

Let us now take a look at the list of emotions which according to the Chinese Communists are necessary for the pattern. Expressions of relief eg. 'It is a great relief to get it off my chest' are always the final sign of a successful brainwashing. Though not even the convert

**Anxiety and suspense:** the accused person is in a continuous state of anxiety from the time he is arrested or learns that the police are looking for him. He is anxious about his parents or his spouse, children, relatives etc.

It is the general habit of the police not to admit to the slightest departure from correctness. The public too does not want to do this for to admit the widespread corruption of policemen is the first step

**Awareness of being avoided:** the communists deliberately made their prisoner spend a period of time in solitary confinement in order to increase their sense of isolation and desire for human contact, and so make them more pliable when the time of interrogation comes. Doesn't this approximate both in form and in degree to the police practice of putting the suspects in cells for a few days before being charged?

**Increasing depression, fatigue and despair:** due to his isolation from mankind, the suspects builds in him a great need to talk, utter dependence on anyone who befriends and great need for approval of interrogators. to obtain what they want. This is not something peculiar

Dr. Sargant<sup>13</sup> sums the sequence of mental events: if a complete or sudden collapse can be produced by prolonging or intensifying emotional stress, the brain state may be wiped clean temporarily of its more recently implanted patterns of behaviour allowing others to be substituted more easily for them." This is the classic communist pattern. Expressions of relief eg. 'it is a great relief to get it off my chest' are always the final sigh of a successful brain-washing: though not even the convert himself realises that it is a relief at having confessed imaginary sins. In other words, he comes to believe temporarily in the false confessions he has made.

It is the general habit of the police not to admit to the slightest departure from correctness.<sup>14</sup> The public too does not want to do this for to admit the widespread corruption of policemen is the first step to admitting the possibility of anarchy: and that is intolerable. But those who have studied these things know otherwise. They know that while the police are scrupulous in their efforts to avoid persecuting whom they believe to be innocent, they are absolutely ruthless in pursuing whom they believe to be guilty. They become highly selective in their gathering of evidence, accepting anything that confirms the theories they have formed, rejecting everything that does not. They bully, threaten, plead, ingratiate, keep some people waiting for hours, interview others in the middle of the night, and use every kind of psychological pressure in order to obtain what they want. This is not something peculiar



in this country. It is done by all police forces all over the world. There is evidence for it over and over again, in the histories of individual cases, in the articles and books of barristers and sociologists, in successive reports of the Royal Commission of the police. Nor is this attitude so difficult to understand; for the more convictions the police obtain, the better will society and superiors be pleased with them. Those who criticise the police for their methods do not seem to realize that without such methods the number of convictions would only be a fraction of what it is. Would society be prepared to accept this? It is a question which reformers are often apt to shelve.

Given that this is the reality hiding under the often quoted legal safeguards as seen in the procedural laws, it becomes needless to say that it is in complete disregard of the letter and spirit of S.72 of the Kenya Constitution. S.72 deals with the protection of right to personal liberty. Sub-section 3 states - Any person who is arrested or detained -

(b) Upon reasonable suspicion of his having committed, or being about to commit a criminal offence,

and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within 24 hours of his arrest or from the commencement of his detention the burden of proving (that)..... shall rest upon any person alleging that the provisions of this subsection have been complied with.

Although the law stipulates as outlined, the judges

in practice do not take policemen to task when this provision is not complied with. More often than not, the police state that investigations were still underway and they had not decided to charge the accused. In other words, the accused has to be locked up in police custody due to the inefficiency of the police. This procedure appears to show a complete disregard of a citizen's right to his personal liberty. This is a right inherent in man and the constitution has recognised it and given it the force of law.

It is a matter of grave concern if criminals go unpunished; it is a matter of equally great concern that the courts should administer justice according to law. The implications of these cases are indeed grave, suggesting as they do, the danger that the police force is tending to become a law unto itself. The courts will fail in their duty if they ignore or pretend not to see that danger when it is apparent on evidence before them.

declared:-

Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. One need only briefly to have dealt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by police."

It is contended that it is mere theory to say that

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CHAPTER 3

CONCLUSION

The relationship between the police and the public in this country cannot be said to be cordial. Indeed, the average man sees a policeman as a terror not a protector. There are several causes for this, chief among which is inadequate knowledge by some members of the police forces and the public of their respective rights and obligations.<sup>1</sup>

The argument for the exclusion of the evidence starts from the paramount importance of securing fair and legal practices on the part of the police. Freedom from arbitrary interference on the part of the state and its agents is one of the ultimate values of Western democratic society.<sup>2</sup> Totalitarianism is still too close a spectre to make it possible for us to tolerate the notion that the police are themselves above the law. As Jackson J declared:-

"Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. Among deprivations of rights, none is so effective in cowering a population, crushing the spirit of the individual and putting terror in every heart. One need only briefly to have dealt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by police".<sup>3</sup>

It is contended that it is mere theory to say that

police illegality is adequately restrained by proceedings in the courts.<sup>4</sup> Although illegal arrests, detentions and searchings are not uncommon, actions are rarely brought. The reason may be lack of resources or fear of victimisation or ignorance of the law, or a doubt whether the damages awarded will be worth the trouble and risk of suing or fear of publicity. These considerations operate even where the complainant had been acquitted. Where, as the result of an illegal search and seizure, he has been convicted and punished for the crime, he does not feel like another recourse to law by proceeding against the state. Whatever the reason, the fear of being sued is not an effective deterrent to the police.

The conclusion of this argument is that the theoretical remedies against the police are ineffective to restrain this form of illegality. On the other hand, an exclusionary rule of evidence is highly effective, because it deprives the past illegality of its fruit and future illegality of its purpose. All the efforts of the police in building up their case comes to nothing, and instead of obtaining a conviction, they are quite inevitably exposed to public censure. There can be no doubt of the value of such a rule for the purpose for which it is intended: and it has its effect on the police as a whole without penalizing individual officers otherwise than by bringing their conduct to public notice.

It is submitted that although the Evidence Act governs the questions of Evidence, nevertheless it is

the duty of the court to give consideration to questions of public policy to control or modify the statutory rules of evidence laid down by the Evidence Act and it is, therefore, contended that the court has inherent power, when it is face to face with conduct which is contrary to public morality or fair dealing, despite the strict rules of evidence to apply to such a case the principles of public policy, and to hold that the admission of that evidence would cause greater harm than its rejection and therefore, to refuse to receive such evidence. Therefore, when a police officer makes an illegal raid or search, and thereby discovers evidence against a person, it would in strict law be admissible against the person charged, nevertheless, this rule of public policy should cause the courts to say that in such circumstances they will not receive such evidence.<sup>5</sup> Or, better still, there should be an amendment excluding all illegally obtained evidence.

A line of supreme court cases involve the application of the due process clause of the 14th amendment to test confessions in cases arising in state courts.<sup>6</sup> In Brown V. Mississippi<sup>7</sup> the court quashed the conviction of three negroes by a Mississippi court. The confession which had been admitted by the trial court had been obtained by physical torture. Hughes G. J. stated that a trial was a mere pretence when the state authorities secured a conviction depending entirely on confessions obtained by violence. The court also quashed convictions in cases where confessions had been obtained by other terror

techniques, such as the threat of mob violence.<sup>8</sup> The invocation of due process in such cases has been explained on the footing that the admission of confessions so obtained would violate the fundamental fairness essential to the very concept of justice.

The confession cases are the result of the application of not one, but two constitutional standards. First, a conviction cannot stand if it is based on a confession which has been extracted by police methods which create too great a danger for falsity: the means used must be considered in relation to the accused and his probable power of resistance. Second, a conviction will be reversed when the confession is obtained by methods which themselves offend due process: here no inquiry into probable falsity is relevant.<sup>10</sup>

The argument is that after a point is reached further interrogation is incompatible with the answers being regarded as voluntary statements, and the law intervenes to safeguard the party questioned from possible self-incrimination. Just when that point of time is reached is in any particular case extremely difficult to define or even for an experienced police official to realise its arrival. There does come a time, however, when a police officer carrying out his duty honestly and conscientiously ought to be in a position to appreciate that the man whom he is in a process of questioning is under serious consideration as the perpetrator of the crime. Once that suggestion of suspicion is definable, then the suspect

should be cautioned and interrogation stopped unless he elects to say something. A voluntary statement is one which is given freely, not in response to pressure and inducement and not elicited by cross-examination.<sup>11</sup>

The anomaly is that the law does not afford any protection against self-incrimination at the preliminary stages of the judicial process although this right is granted to the accused during the trial.

The matter may be put in another way. The accused cannot be compelled to give evidence at his trial and submit to cross-examination. If it were competent for the police at their own hand to subject the accused to interrogation and cross-examination and to adduce evidence of what he said, the prosecution would in effect be making the accused a compellable witness and laying before the court at second hand evidence which could not be adduced at first hand. Even subject to all the precautions which are available for the protection of the accused at a criminal trial.

Chalmers V. H. M. Advocate<sup>13</sup> merits consideration here, both on the general ground that Scots law stands in special relation to the common law and on the specific ground that the decision reflects an interesting and significant approach to the subject. From the point of view of the law relating to confessions generally, Chalmers V. H. M. Advocate (supra) is also important because the whole approach there adopted is based on the assumption that the purpose of the exclusionary rule is to

control police practices. Nowhere is it suggested that the reason for excluding confessions is the likelihood of their unreliability.

The point is simply that successful prosecutions of the police must in the majority of cases be launched by the police, and its Utopian to imagine that there will be any inducement to do this in a case in which a policeman has been over-zealous in obtaining confessions. To leave the matter to private prosecutions is not to impose any real check on such conduct.

The problem, in the view of the writer, may be posed in this way: if it is not possible, and we do not believe it to be possible to control police practices in the matter of obtaining confessions by penal sanctions imposed directly on the police themselves, we have to ask whether society is the better for insisting on certain standards of police practice even at the cost of allowing some guilty persons to escape, or whether conviction of the guilty ought to be of paramount importance in all cases. This is a crucial question. It may be that in a lawless society the problem of maintaining order and security will loom so large that insistence on decent police methods may be regarded as too great a luxury. However, such considerations do not apply to the society in which we live. It is our opinion that in a stable and comparatively law abiding community such as our own it is better that a few guilty men and women should go unpunished than the encroachments of the police state should be tolerated or accepted. Such

strong as the temptation to do so is the hope of obtaining



encroachments inevitably involve the use of improper methods upon all suspects without possibility of discrimination between guilty and innocent. What constitutes an improper method will depend upon the degree of stability and civilization which the society in question has reached. In no society should a merely technical, and from the point of view of *notes* of that society, completely unobjectionable contravention of the law justify exclusion.

If a confession is unreliable this in itself is of course sufficient cause to exclude it. But if proper police methods - and by this is meant the police method which a society desires and for which it is willing to pay - are to be maintained, a confession, whether reliable or not, must be excluded if improperly obtained. The existence of any possibility that a confession, if likely to be true, will be admitted must constitute a standing temptation to the police to attempt to exact a confession in the hope that, once obtained, its reliability will be removed only by a rule that renders all improperly obtained confessions, however reliable, inadmissible, and then exaction therefore futile.

It is observed that precisely the same considerations ought to prevail in the attitude to be adopted towards the admissibility of evidence of facts discovered as a result of improperly obtained confessions.<sup>14</sup> The temptation to resort to improper methods in the hope of obtaining a lead to a profitable line of investigation may be just as strong as the temptation to do so in the hope of obtaining

a direct admission of guilt. Indeed it may be even stronger for whereas a confession, especially if made to a police officer in a police station, may be suspected, evidence of a fact subsequently discovered, which is dearly true and perhaps not known to the court to have been discovered as a result of the use of improper methods will tend to be very effective.

A case which warrants discussion at this point is Miranda V. Arizona,<sup>15</sup> This is a case which in the words of Warren C. J.

"raises questions which go to the roots of our concept of American criminal jurisprudence: the restraints society must observe consistent with the Federal constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements from an individual who is subjected to custodial police interrogation and the necessity for procedures which assume that the individual is accorded his privilege under the 5th Amendment of the constitution not to be compelled to incriminate himself".<sup>15b</sup>

The modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated earlier, it has been recognised that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition.<sup>16</sup>

Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. A valuable source of information about present police practices however may be found in

various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics.

The police officers are taught that the principal psychological factor contributing to a successful interrogation is privacy - being alone with the person under interrogation. The efficiency of this tactic has been explained as follows: if at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The accused should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell his indiscretions or criminal behaviour within the walls of his home. Moreover, his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law.<sup>17</sup>

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiners. This atmosphere carries its own badge of intimidation. To be sure, this is no physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles - that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings no statement obtained

from the accused can truly be the product of his free choice. *own mouth*

Thus we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. As a noble principle often transcends its *origins* the privilege has come rightfully to be recognised in part as an individual's substantive right, a right to a private enclave where he may lead a private life. That right is the hallmark of our democracy.

Decency, security and liberty alike demand that government officials shall be subject to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omni-present teacher. For good or for ill, it teaches the whole people by its examples. Crime is contagious. *police and the courts*

"If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies <sup>18</sup> the means ..... would bring terrible retribution."

In this connection, a distinguished jurist has pointed out that the quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law.<sup>19</sup>

The Kenyan accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent

labours, rather than by the expedient of compelling it from his own mouth.

In a nutshell, in our present political development, We have learned the lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizen's abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement then there is something very wrong with that system.<sup>20</sup>

When an accused is in police custody, the police can, and do refuse visitors to see him. This is commanding that the legal standards be applied so as to especially the case in the rural areas where the police are viewed as the law. A trial within a trial for the poor atmosphere of impartial justice is for example, subject ignorant man is nothing more than a delay in his eventual conviction.

One year illegally seized evidence may be admitted into evidence under a legal system subscribing to the rule of law and the next year it may not. A confession may be admitted into evidence at one point in time whether or not the suspect was informed of his right to counsel; at a slightly later point in time such a confession is found to violate constitutional protections. This although certain fundamental and relatively changeless principles of the rule of law are specifiable, the practical constraints on official conduct derived from these principles are always in a degree of flux. A legal order is never a fixed body to a justice of the peace who has been assigned to a district court. Even if such a confession

of rules, but an enterprise of governance by rule of law.

In a nutshell, in our present political development, the question of confessions should be settled once and for all. There is a lot of time wasted in determining whether statements made by accused persons are confessions or admissions: whether they were made voluntary or through inducements. There is further time wasted in going through a trial in the case of a repudiated confession. It is the writer's opinion that a trial within a trial is of little use, if any. This is due to the fact that nearly all the cases<sup>21</sup> it will be the word of the accused against that of experienced, fluent policemen who can easily swear that white is black. When an accused is in police custody, the police can, and do refuse visitors to see him. This is especially the case in the rural areas where the police are viewed as the law. A trial within a trial for the poor ignorant man is nothing more than a delay in his eventual conviction.

It is suggested that confessions to the police should be made inadmissible and the system prevailing in Tanzania adopted. This is to say that all confessions should be made to and recorded by Magistrates. The Tanzania provision is contained in schedule to: The Primary Courts (Evidence) Regulations 1964 - Rule 13 (2) which is reproduced here below:-

"No evidence may be given in a case against a person accused of an offence of any confession made when he is in custody unless the confession was made directly to a magistrate or to a justice of the peace who has been assigned to a district court. Even if such a confession

is made to a magistrate or such justice of the peace, no evidence may be given of the confession if it was caused by a threat or promise."

A practice note can be added to the effect that the magistrate recording the confession should first satisfy himself that the accused or suspect has not been coerced, threatened or induced in any other way to make such confession against his will.

Before a magistrate convicts on the strength of only a plea of guilty, he should warn himself of the grave danger of doing so. History has taught us that man is a creature which is susceptible to what may be termed as irrational conduct. For example, in 1666, London was destroyed by fire and a man - Hubert - claimed to have done it. It is a fact that Hubert was not responsible at all but his claim was based on an assumption that he will gain fame and be a household name.

Hubert, though innocent had made a false confession that he was guilty. Back home, the example of stock theft is illustrative. The people usually involved in this kind of activity are Masai, Kuria, Kisii, Pokot, Turkana, Ngorokos etc. These are tribes who seriously believe in stock-theft rustling as a way of life or as a proof of manhood.<sup>22</sup> It will be the epitome of a Masai moran manhood if he is convicted for stock-theft for when he finally comes out from the 'prison law school' he might become the General of stock thieves in his particular tribe. The danger is convicting on his plea of guilty is that he may be innocent but he pleads guilty to

acquire status among his tribesmen.

One may also consider the petty offences triable by summary jurisdiction. In the police swoops, a lot of innocent citizens are arrested and to avoid embarrassment of releasing the people the following morning, the police charge them for being drunk and disorderly, soliciting for immoral purposes etc. Most of these people cannot afford the time taken by courts in hearing cases neither can they afford engaging a lawyer. They, therefore, opt for the lesser evil - pleading guilty - hoping that the magistrate will impose a nominal fine. A lot of people are accumulating petty criminal records for no wrong they have committed.

By way of conclusion, we may summarise the major tenets of this paper. The procedural safeguards embodied in confession law are in total ignorance of certain aspects of human nature and human mind. Every human being is a puzzle and to assume that all people conform to certain standards is the height of hypocrisy. The poor, ignorant, weak in body and in mind should be equally protected, for it is absurd to assume that they are not what they are.

The courts have vigously followed the English law. This is explained by the fact that most judges seek cultural guidance from Britain. But to do this is to deny the citizens the fruits of the constitution. Independence constitution brought a new moral order and the societal aspirations should be seen in this cherished document. Needless to say, Britain has no written con-



stitution and most of the rules in evidence are derived from common law as evolved of course out of the British society. Judges in Kenya should uphold and apply the constitution not only in principle but also in spirit. Therefore, a judge should feel a primary obligation to the rights as defined in the constitution. We should, therefore, be more in line with United States in cases involving rights of a person and aspirations of the society.

It is a contradiction of terms to expect the police to be honest while carrying out investigations and interrogations. It is even too much to expect them to be only fair. It is Utopian to imagine that they would give the accused a tutorial on his rights and tell him that he is not bound to say anything whatsoever. This is due to the fact that the police are understaffed and they are desperate to finalize a case as soon as possible and without regard to the irregularities that may be occasioned.<sup>23</sup> Further, the police prosecutor regards a conviction as a 'kill' and would even suppress evidence which would be abortive to his case.

The writer submits that the zeal of police prosecutors would be diminished had we an independent prosecution branch. Its independence would ensure that a police chief cannot dictate to the branch that he wants nothing but a conviction in a particular case. This would be going further than the present system of installing a few state counsels here and there. In all fairness the state

this exposition will be a positive contribution to a

counsels have been a failure because firstly, they are too few and secondly, their intimate working with the police have hindered their vision. The intentions of having state counsels is praiseworthy, but in reality these intentions have not been realised.

Before these long awaited changes are effected, one may state this to all the Kenyan Police: the judges rules are clear and precise. If we may paraphrase the rules the effect is that:- you are entitled to ask questions for your information as to whether you will charge the person suspected of committing a crime. But the moment you have decided to charge him and practically get him into custody, then, in as much as a judge or a magistrate or a magistrate cannot ask a question, it is ridiculous to suppose that a policeman can.<sup>24</sup>

In a nutshell, the writer submits that criminal and related proceedings in which an individual may lose his liberty, his reputation, or his property constitute the principal indicator of the character of a society. More than that, the very idea of judicial process - of a disinterested, fair and intelligent hearing when claims of rights are presented constitutes the underlying idea of a society that subscribes to governance by the rule of law.

Our investigation of the physical and psychological factors against whose background the rules of criminal evidence should operate reveals inadequate judicial and legislative appreciation thereof. It is hoped that this exposition will be a positive contribution to a

better understanding of the issues at stake: to continue following or to reform a branch of the law replete with half-truths engendered by a benign unconcern for the liberty of persons who find themselves on the receiving end of law enforcement.

Our firm conclusion is that this branch of the law is overdue for reform. For unless the principles under which police investigations are carried out are adhered to with absolute strictness, the anchor of the entire system for the protection of the public will very soon begin to drag.

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A dissertation paper submitted in partial fulfillment of  
the requirements for the Bachelor of Laws Degree,  
University of Nairobi.

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Nairobi, April, 1978.



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