The Zimbabwe Electronic Law Journal

Commentary on Contemporary Legal Issues

2017 Part 1

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Have the procedural and evidential rules in criminal cases been properly aligned to the Constitution and are the new provisions on the death penalty for murder satisfactory?

By B. Crozier and G. Feltoe

Introduction

Criminal procedure is the body of rules governing the processes used to determine the guilt or innocence of persons accused of criminal offences. The rules seek to ensure that all accused persons receive a fair trial while at the same time ensuring that, as far as possible, criminals are punished and crime is suppressed. There are also rules of evidence that apply in criminal cases to ensure that only reliable evidence is used to determine criminal liability. In these procedural and evidential rules, the law tries to strike a balance between the rights of persons suspected and accused of crimes, on the one hand, and on the other the interests of society in maintaining law and order.

The 2013 Constitution contains many new provisions that enhance and protect the rights of persons suspected of committing crimes. It places constraints on police powers of search and arrest. It gives rights to those who are arrested and detained and those on trial.

Some of the most important provisions in the Constitution in this context are the following ─

section 50, which contains a detailed list of the rights of persons who have been arrested and detained;

section 70, which sets out the rights of persons who are put on trial for criminal offences;

section 46, which guarantees the right to life and provides for the death penalty to be imposed in limited circumstances;

section 69(1), which provides for the right to a fair and public trial within a reasonable time before an independent and impartial court.

Some of the most important rights in sections 50 and 70 that needed to be incorporated into the Criminal Procedure and Evidence Act (“the CP&E Act”) are set out below.

Section 50:

A person arrested has the right─

to be informed at the time of their arrest of the reason for the arrest;

to be permitted without delay to contact, at the expense of the State, their spouse, partner, relative, legal practitioner or anyone else of their choice and to be informed promptly of this right;

to be permitted – this time at their own expense – to consult in private with a legal practitioner and a medical practitioner of their choice and to be informed promptly of this right;

to be treated humanely and with respect for their inherent dignity;

to be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention;

to be released if not brought before a court within forty-eight hours of the arrest.

Persons arrested or detained have the right—

to remain silent;

to be informed promptly of their right to remain silent and of the consequences of remaining silent and of not remaining silent and not to be compelled to make any confession or admission;

at their first court appearance after being arrested, to be charged or to be informed of the reason why their detention should continue, or to be released.

Finally, persons who are detained pending trial for an alleged offence and who are not tried within a reasonable time must be released from detention, either unconditionally or on reasonable conditions to ensure that after being released they attend trial, do not interfere with the evidence and do not commit any other offence before the trial begins.

Section 70:

A person accused of an offence has the right—

to be presumed innocent until proved guilty;

to be informed promptly of the charge, in sufficient detail to enable them to answer it;

to be represented by a legal practitioner assigned by the State and at State expense, if substantial injustice would otherwise result; and they must be informed promptly of this right;

to remain silent and not to testify or be compelled to give self-incriminating evidence.

In any criminal trial, evidence that has been obtained in a manner that violates any provision of the Declaration of Rights must be excluded if the admission of the evidence would render the trial unfair or would otherwise be detrimental to the administration of justice or the public interest.

The Criminal Procedure and Evidence Amendment Act (Act 2 of 2016) (“the Amendment Act”) has made several changes to the procedures to be used in the investigation and trial of criminal cases and to some of the evidential rules used in criminal cases. The principal aim of these amendments, as stated in the explanatory memorandum to the Bill presented in Parliament, was to align the CP&E Act with the Constitution.

This article explores the extent to which the Amendment Act has successfully altered the procedural and evidential rules so as to conform to the Constitution. It will establish that, although some attempt has been made to reflect the constitutional provisions, there are many areas where the Amendment Act has failed to align the rules with the Constitution and that in some areas its provisions go contrary to the Constitution.

ARREST

Restrictions on power of arrest

Section 25(1)(b) of the CP&E Act prevents police officers below the rank of assistant inspector from arresting people suspected of committing any of the serious crimes specified in the Ninth Schedule to the Act, unless the officers have obtained permission from an assistant inspector or more serious officer. It is a mystery why such a provision was put into the Act in the first place: if a police constable or sergeant is unable to form a reasonable suspicion as to whether someone is committing a crime, even a serious one, then he or she should not be in the Police at all. The Amendment Act should have repealed this provision.

Use of force when arresting

The Amendment Act replaces section 42 of the CP&E Act with a new section intended to clarify the circumstances in which the Police and others may use force in order to arrest people. The new section says that "for the avoidance of doubt" the use of lethal force — i.e. force that kills a person — is legal only in certain circumstances, i.e. if the force is necessary to defend someone, or if there is a substantial risk that the person to be arrested will escape and cause death or serious injury to someone, or if the person to be arrested is likely to cause grievous bodily harm to others.

Under section 86(3) of the Constitution the right to life is sacrosanct. No law may limit it. The law cannot allow the killing of a human being in any circumstances whatever except in execution of a death sentence lawfully imposed by a court. However difficult it may be for police officers who have to arrest violent criminals, that is the law and they must obey it. This new section is unconstitutional.

Reasonableness of arrest

The CP&E Act sets out circumstances in which police officers and others are authorised to carry out arrests — for example, they can arrest anyone who is reasonably suspected of committing a crime, or who commits a crime in their presence, and so on. Nowhere does the CP&E Act say that an arrest must be reasonable, i.e. that although a police officer is authorised by the Act to make an arrest he or she may do so only if it is reasonable to arrest the person concerned. Our courts have said this repeatedly – see for example *Muzonda* v *Minister of Home Affairs & Anor* 1993 (1) ZLR 92 (S) and *Botha* v *Zvada & Anor* 1997 (1) ZLR 415 (S) at 418G. The CP&E Act should have been amended to include a provision to this effect so that police officers are made aware of the limits of their powers of arrest.

Information to be given to arrested persons

Section 50(1) of the Constitution provides that anyone who is arrested must be told of the reason for the arrest, of their right to remain silent and of their right to contact a relative, lawyer or other source of help. The Amendment Act inserts a new Tenth Schedule in the CP&E Act which helpfully sets out a form of words to guide police officers in explaining their rights to arrested persons. The Amendment Act also inserts a new section 385A permitting arrested persons, at the State's expense, to contact their relatives, advisers and other sources of help, in accordance with section 50(1)(b) of the Constitution.

Right to remain silent

Under sections 50 and 70 of the Constitution, people who have been arrested and detained, and accused persons in criminal trials, have a right to silence. Section 50(1) explicitly provides that a person arrested or detained has the right to be informed promptly of his or

her right to remain silent and of the consequences of remaining silent, and of not remaining silent, and not to be compelled to make any confession or admission.

This means that if they remain silent when being questioned by the Police, or if at their trial they refuse to outline their defence or give evidence, adverse inferences – that is inferences that they are guilty – cannot be drawn from their silence because they are exercising their constitutional right. If, however, the State establishes a *prima facie* case against the accused during a trial, the accused or his lawyer may be wise to put up a defence or risk being convicted. But the court cannot regard the accused person's silence, *in itself*, as indicating guilt.

In the CP&E Act as it stands—

> If suspects refuse to answer questions put to them by the Police, adverse inferences can be drawn from the refusal [section 257].
>
> Before evidence is led in a criminal trial, accused persons must outline their defence; if they fail to do so, adverse inferences can be drawn from the failure [sections 66 and 189].
>
> If accused persons decline to give evidence in a criminal trial, they may be questioned by the prosecutor, and the court may draw adverse inferences from their failure to answer the questions satisfactorily [section 198]
>
> If suspects are forced or tricked into confessing their guilt and, as a result of the confession, the Police find evidence against them – for example, if they are forced to show the Police where they hid stolen property – their confession cannot be revealed at their trial because it was not made voluntarily, but the Police can tell the court that they found the evidence as a result of what the suspects told them [section 258].

All these provisions are inconsistent with the constitutional provision guaranteeing the right to silence. They should have been amended or repealed by the Amendment Act, but the Act has not altered them.

Bringing persons before court within forty-eight hours

Section 50(2) and (3) of the Constitution provides that an arrested or detained person must be brought before a court of law as soon as possible but not later than forty-eight hours after the arrest or detention. The forty-eight hour upper limit applies whether or not the period ends on a Saturday, Sunday or public holiday. If the person is not brought before a court within this period the person must be released immediately unless the detention has earlier been extended by a competent court. Here the Amendment Act has properly aligned the CP&E Act with the constitutional requirement. This was done by section 9 of the Amendment Act which amends section 32 of the CP&E Act.

Detention without arrest

Section 11 of the Amendment Act gives police officers, in the exercise of their "socially protective function", a power to apprehend people who are found drunk or apparently mentally disordered and to detain them for up to twenty-four hours before releasing them without charge. This provision, though probably well intentioned, may cause problems.

First, it is not clear what “socially protective function” the Police have, apart from combating crime, and this needs to be clarified. Secondly, the Police already have power to arrest persons who are found drunk in public [section 116(1)(k) of the Liquor Act] or who, whether drunk or not, refuse to leave land or premises when asked by the occupier to do so [section 132 of the Criminal Law Code]. And the Police have adequate powers under the Mental Health Act to apprehend mentally disordered people and get them treated in a health institution. So it is not clear what real purpose the new provision will serve. Furthermore, the main function of the Police is to enforce the law. Drunkenness in public is a crime under the law, and people who break the law should be arrested and charged according to law rather than detained administratively.

Persons seeking to contact arrested persons

The new section 385A which section 44 of the Amendment Act inserts in the CP&E Act obliges officials responsible for detaining arrested persons to tell their relatives, advisers and other interested parties if they make an enquiry, where and why those persons are being held. However, the new obligation is imposed only on the officials who are holding the arrested persons, so lawyers who want to find out where their clients are being held will have to search unaided until they locate the right place, and only then will they find officials who are obliged to reveal that the clients are indeed being held at that place – but only if those officials are asked about the arrested persons.

It would have been better if a more general obligation had been imposed on senior police officers at a central point to reveal the whereabouts of detained persons.

Warrants of arrest: who may issue warrants

Section 33 of the CP&E Act is amended by section 9 of the Amendment Act so as to prohibit justices of the peace who are police officers from issuing warrants of arrest. This is a welcome amendment because it will prevent one police officer from issuing a warrant for a fellow police officer.

Warrants of arrest: reasonable suspicion

The amendment to section 33 of the CP&E Act does not require persons who issue warrants to have a reasonable suspicion that the person named in the warrant is guilty of an offence; under the section at present, they need merely be told by the person applying for the warrant that he or she has a reasonable suspicion.

This is unconstitutional as the person issuing the warrant must himself or herself have a reasonable suspicion that the person whose arrest is sought has committed an offence.

Warrants of arrest: bringing arrested persons to court

As pointed out earlier, section 50(2) of the Constitution states that anyone who is arrested for an alleged offence must be brought before a court as soon as possible and in any event within 48 hours. Section 8 of the Amendment Act inserts a provision to this effect in the CP&E Act (it is the new section 32(3) of that Act) but, although the provision is couched in general terms, section 32(3) of the CP&E Act deals with arrests without warrant, and the provision can be construed as applying only to such arrests, not to arrests carried out on the authority of a warrant of arrest.

No equivalent provision has been inserted in sections 33 to 38 of the CP&E Act, which deal with warrants of arrest. Such a provision should have been inserted into one of those sections, to guide police officers.

BAIL

Section 50(1)(d) of the Constitution provides that anyone who is arrested must be released unconditionally or on reasonable conditions, i.e. on bail, "unless there are compelling reasons justifying their continued detention". The Constitution does not define "compelling reasons" but the Amendment Act tries to do so by reference to sections 115C(1) and 117(2) of the CP&E Act as amended by section 28 of the Amendment Act. In effect, "compelling reasons" are equated with the reasons which since 2006 have justified a court in refusing bail in the interests of justice. These grounds are:

That the accused person is likely, if released:

> to endanger the safety of the public or of an individual;
>
> not to stand trial or appear to receive sentence;
>
> to try to interfere with the evidence; or
>
> to "undermine or jeopardise the objectives or proper functioning of the criminal justice system" (whatever that means); or
>
> that in exceptional circumstances the release of the accused will disturb public order or undermine public peace or security.

Not all these grounds are "compelling" as envisaged by the Constitution. To the extent they are not, they are unconstitutional.

In section 28, the Amendment Act requires an arrested person who is charged with certain serious crimes to satisfy the court that there are compelling reasons for his or her release, whereas it is clear from the Constitution that the prosecution should establish compelling reasons for detaining the person.

The shifting of the onus of proof in this regard is unconstitutional.

The Amendment Act does not touch sections 32(3a) and (3c) and 34(4) of the CP&E Act, which prohibit a court from granting bail for 21 days to persons who have been arrested for serious offences.

These sections are manifestly unconstitutional – the fact that a person has been arrested on suspicion of committing a serious offence is not in itself a compelling reason for denying him bail. The sections should have been repealed.

SEARCH AND SEIZURE OF PROPERTY

Power of search and seizure

In regard to the powers of the Police to search for and seize articles that constitute evidence or that have been used to commit crimes, the Amendment Act makes several changes:

Section 50 of the Act is amended to prevent police officers who are justices of the peace from issuing search warrants. As with warrants of arrest, this will prevent the Police issuing warrants “in-house”.

Police officers who conduct searches without a warrant, or enter premises to interrogate suspects and witnesses, will now have to disclose their identities to interested parties; if they do not, they commit a criminal offence [sections 18 and 20 of the Amendment Act]. This, one hopes, will make them more careful to act within their powers.

Police officers who seize articles from arrested persons or from premises they have searched must issue full receipts for the articles that are taken — and if they do not do so they will commit a criminal offence [section 16 of the Amendment Act]. This will make police officers more accountable.

The power of police officers to stop and search people at night are restricted so that the officers are allowed to search only persons whom they reasonably suspect are carrying goods illegally [section 19 of the Amendment Act]. Arbitrary searches, in other words, are no longer permitted.

Procedures for the disposal of seized articles are made more elaborate so as to increase transparency and reduce corruption.

PRIVATE PROSECUTIONS

Section 16 of the CP&E Act provides that no private person can institute a prosecution unless the Prosecutor-General had issued a certificate to the effect that he or she — the Prosecutor-General — declines to prosecute the case. The Amendment Act replaces section 16 with a new one that gives the Prosecutor-General a very wide discretion whether or not to issue such a certificate and prevents companies and other bodies corporate from instituting private prosecutions. This will nullify the decision of the Supreme Court in *Telecel Zimbabwe (Pvt) Ltd* v *Attorney-General* 2014 (1) ZLR 47 (S) where the court held that the Prosecutor-General had to issue such a certificate so long as the private prosecutor could show a real interest in bringing a prosecution, and that companies were entitled to institute private prosecutions.

It is most undesirable that the Amendment Act has overturned a decision of the Supreme Court in this way. Furthermore, abolishing the right of companies to institute private prosecutions effectively denies them access to a court, which is a right guaranteed by section 69(3) of the Constitution. For that reason, the amendment is unconstitutional.

CONTEMPT OF COURT

The Amendment Act leaves intact section 9 of the CP&E Act, which prevents courts from punishing people for contempt of court committed outside a courtroom. Only the Prosecutor-General can institute proceedings against such people in terms of section 9A(2). The section was originally enacted to prevent the High Court from taking action against the present Minister of Finance after he had criticised a decision of that court.

This is an undue limitation on the powers of the courts to protect themselves against abuse, and the Amendment Act should have repealed the section.

TRIAL RIGHTS

Proof of statements made by accused

The general rule of our common law is that if the prosecution wants to prove that an accused person made a confession or other statement, the prosecutor must prove beyond a reasonable doubt that the accused made it freely and voluntarily and without undue influence.

For the most part the CP&E Act as it stands adopts this rule, but in section 256 it makes two exceptions:

The fact that an accused was compelled by law to make the statement does not render it inadmissible.

If the statement has been confirmed by a magistrate before the accused's trial, then it can be handed in at the trial by the prosecutor and it is up to the accused to prove that he did not make it freely or voluntarily.

Both these exceptions are unconstitutional and should have been repealed by the Amendment Act. In regard to the first exception, if a person is compelled to make a statement, whether by compulsion of law or because he or she has been assaulted, the statement cannot be said to have been made freely and voluntarily: see the judgments of the South African Constitutional Court in *Ferreira* v *Levin NO & Ors; Vryenhoek & Ors* v *Powell NO & Ors 1996 (1) SA 984 (CC)*.

As to the second exception, shifting the onus of proof on to the accused violates the presumption of innocence laid down in section 70(1)(a) of the Constitution, and the presumption of innocence is an essential element of the right to a fair trial guaranteed by section 69 of the Constitution. See the South African case of *S* v *Zuma & Ors* 1995 (2) SA 642 (CC) at 659G-I.

Assistance to unrepresented accused

Although section 34 of the Amendment Act obliges judges and magistrates to inform accused persons of their right to legal representation, as required by section 70(1)(f) of the Constitution, the section does not go further and require judicial officers to assist unrepresented accused persons at all stages of their trials by explaining their rights and the options open to them.

This is essential if unrepresented accused persons are to get a fair trial as required by section 69(1) of the Constitution. The Amendment Act should have included such a provision.

Detention of persons who are deaf and unable to speak

People living with a disability that renders them deaf and unable to speak may be unable to conduct their defence properly if they are charged in a criminal court. Section 193 of the CP&E Act provides a drastic way of dealing with them: the judicial officer does not have to decide on their guilt or innocence but can simply order them to be detained in prison indefinitely at the President's pleasure.

Imprisoning a disabled person who is perfectly sane and who has not been convicted of a crime is grossly unjust and violates the person's rights to personal liberty and human dignity

conferred by sections 49 and 51 of the Constitution. The Amendment Act should have repealed section 193 of the CP&E Act.

Separation of trials

If two or more people commit a crime together, they are very often tried together in the same trial. Sometimes, however, a joint trial may prejudice one or other of the accused persons – for example, if evidence against one of them is inadmissible against the other – and in that event the court can order the accused to be tried separately in the interests of justice. However, the court can only do so in terms of section 190 of the CP&E Act if either the accused or the prosecutor applies for separation of trials; the court cannot order separation on its own volition.

This can cause injustice, particularly when the accused is not represented by a lawyer and is not aware of his right to ask for a separate trial. The Amendment Act should have amended section 190 to allow courts to order separation without being asked.

SENTENCE

Corporal punishment

In 1989 the Supreme Court declared that sentences of whipping imposed on boys under the age of 18 were unconstitutional in that they were inhuman and degrading (*S* v *A Juvenile* 1989 (2) ZLR 61 (S)). The Government promptly amended the then constitution to allow such punishments to be imposed. The present Constitution does not incorporate this amendment, however, so juvenile corporal punishment – i.e. the whipping of boys – has once again become unconstitutional. The High Court has ruled to that effect, i.e. that corporal punishment is unconstitutional, in *S* v *C (a juvenile)* 2014 (2) ZLR 876 (H) and *S* v *M & Ors (juveniles)* HH-409-15. The Constitutional Court has not yet given its ruling on the question.

The Amendment Act should have pre-empted the issue by repealing section 353 of the CP&E Act, which gives courts power to impose corporal punishment.

The death sentence

Section 48 of the Constitution provides that a law *may* permit the death penalty to be imposed for murder, but only where the murder is committed in circumstances of aggravation. It further provides that the law must permit the court a discretion whether or not to impose the penalty in cases of murder committed in such circumstances and the death penalty may not be imposed upon a woman or a person over 70 years old or a person who is less than 21 years old when the offence was committed.

Sections 42 and 43 of the Amendment Act amend sections 336 and 337 of CP&E Act to conform to the constitutional provisions by providing that the death sentence may only be imposed by the High Court for murder committed in aggravating circumstance and may not be imposed on a woman, a man older than 70 or a person who was under 21 when the offence was committed.

In addition to the amendments made by the Amendment Act, Part XX of the Schedule to the General Laws Amendment Act, 2016 (Act No. 3 of 2016) repeals section 47(2) and (3) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Criminal Law Code") and

substitutes new provisions that provide that the death sentence can only be imposed for murder when committed in aggravating circumstances. The new provisions go on, however, to set out a non-exhaustive list of circumstances that a court must ("shall") regard as aggravating; these circumstances include:

> that the murder was committed in the course of committing another crime such as terrorism, rape, kidnapping or housebreaking, or was connected to any act constituting an essential element of such a crime;
>
> that the murder was one of a series of two or more murders committed by the same person;
>
> that the victim was murdered in a public place in such a way as to endanger other people.

The passing of these provisions effectively re-instated the death penalty for murder, but this was done without any prior debate on whether the death penalty should be retained in Zimbabwe. It is submitted that the provisions should not have been passed until Parliament had fully debated the issue of whether the death penalty should remain as a penalty for murder. The use of the word "may" in section 48 of the Constitution gives a discretion to Parliament to decide whether the death penalty should continue to be used as a permissible punishment for murder. A parliamentary debate on this issue was required, especially in the light of the publicly expressed opinion by the Vice-President responsible for the Ministry of Justice that the death penalty should not be imposed in murder cases.

The General Laws Amendment Act's list of circumstances which courts must regard as aggravating is unconstitutional. The constitution-makers did not attempt to define the phrase "aggravating circumstances" and almost certainly wanted to leave the courts free to determine, on a case-by-case basis, what it means. If Parliament tries to pre-empt the courts in this regard it encroaches on the judicial function and breaches the constitutional principle of separation of powers. Moreover, by laying down a mandatory list of aggravating circumstances, the General Laws Amendment Act suggests – though it does not say so – that courts must impose the death penalty in murder cases where those circumstances are present.

The Act does not make it sufficiently clear that the death penalty is not mandatory − even if those circumstances are present − that the court must still take into account any mitigating circumstances and decide whether, on balance, the death penalty is justified. In other words, by providing that the death penalty should only be imposed where there are aggravating circumstances, the Constitution envisages that the death penalty will only be imposed where the murder is exceptionally grave or heinous. But even where the murder is exceptionally grave or heinous, there may still be significant mitigating circumstances which justify the court imposing a penalty other than the death penalty.

The amendment should also have contained provisions explicitly laying down that the onus is on the State to prove the presence of aggravating circumstances and to provide that the court must take account of all possible mitigating circumstances that have been pleaded or that have emerged from the evidence in the case.

The only crime for which the Constitution permits the death penalty to be imposed is murder. Hence there is a need to amend the provisions in the Criminal Law Code and other

legislation which still allow the death penalty to be imposed for other crimes. These provisions are:

Section 20(1) of the Code, which currently provides that a person convicted of treason can be sentenced to death or to imprisonment for life.

Section 23(1) of the Code, which currently allows the death penalty to be imposed for the crime of insurgency, banditry, sabotage or terrorism where the commission of this crime results in the death of a person. However terrible the crime may be, and however many persons the accused person may have killed, and however aggravating the circumstances, the accused cannot be sentenced to death unless he or she is charged with and convicted of murder.

Section 4 of the Genocide Act [*Chapter 9:20*] which implicitly allows the death penalty to be imposed on anyone convicted of genocide involving the killing of a person [the implication arises because life imprisonment is the penalty for genocide that does not involve killing].

Section 3 of the Geneva Conventions Act [*Chapter 11:06*], which allows the death penalty to be imposed for committing a grave breach of a Geneva Convention.

The General Laws Amendment Act does not touch any of these provisions.

REPORTING OF CRIMES

There are circumstances in which it is difficult or inappropriate to report a crime at the police station nearest to the scene of the crime, but nonetheless the Police generally insist that crimes be reported there rather than at some other police station.

Their insistence can cause trouble and sometimes considerable distress to victims and their families. This is particularly so in the case of rape and other sexual crimes which cause victims immense trauma. The procedures for reporting such crimes must be sensitive to the victims' needs so as to avoid causing them further distress. Currently, however, it is the practice for police officers, at some stations at least, to insist that victims must make their reports to the police stations within whose area the crimes were committed.

The Amendment Act should have amended the CP&E Act to require the Police to be more sensitive to victims of such crimes and to allow them to make their reports at any police station they choose.

CONCLUSION

It is clear from what has been said in this article that the Amendment Act and the General Laws Amendment Act, in so far as it affects the criminal procedure laws, fall far short of aligning the CP&E Act with the Constitution.