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TITLE: Article: BETWEEN THE ADVERSARIAL AND THE INQUISITORIAL TRIAL

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TEXT: Abstract

This article discusses and deliberates the nature of the adversarial trial in a criminal proceeding based on both the Malaysian Criminal Procedure Code (Revised Act 593/1999) (the CPC') and its replica, ie the Syariah Criminal Procedure (State of Selangor) Enactment 2003 (the State Syariah CPC'). The Criminal Procedure Code is based on the Common Law tradition. The French Civil Law tradition which is notable for its inquisitorial system is also considered to give a more balanced perspective to the discussion and to compare it with the common law tradition by highlighting the relevant provisions under both the CPC and the Shariah CPC relating to investigation and trial. It is then possible to ascertain whether justice is substantially seen to be done to both the opposing parties under both legal traditions. In other words, in a criminal proceeding, whether the adversarial mode of trial under the Common Law tradition is compatible with Islamic Law. This article also enlightens readers how the different legal traditions operate, and the importance of the need to be doubly careful in doing a complete overhaul/revamp of the existing mode of trial and in being too eager to throw aside a particular legal system that has been proved effective.

The Civil Law Tradition

There are two notorious modes of trial existing in today's contemporary legal systems, ie the adversarial and the inquisitorial trial n1. In the inquisitorial system such as French, only when the *dossier* demonstrates that a case has been made out that a trial or hearing against the accused proceeds. The trial is chiefly a written one since evidence has by and large been documented during the *guarde a vue* by the local police and the investigating judge, and it forms the basis of the case against the accused. The *guarde a vue* is a procedure by which the judicial police may detain for interrogation and other investigative purposes, a person caught at the time or soon after the commission of an offence and suspected of having committed it. The investigation may relate to facts of the offence and the personality of the accused (including medical examination), from the accused and witnesses. Statements taken from each of them are written down as 'Record of Examination of Witness'. In the investigation, the police may search for relevant evidence

and do whatever they reasonably deemed necessary. The facts are then presented to the accused to explain any incriminating evidence that may stand against him if there are discrepancies. From these records, the police will then have a 'Synthesis Record of the Case' form which the police would then form an opinion whether the evidence as it stands is sufficient to justify charging the suspect of the crime in question. The suspect is then taken to the prosecutor for further action. The *guarde a vue* may be for 24 and extendable to 48 hours on the authority of the prosecutor.

The prosecutor then forwarded the matter to the investigative judge on the ground that there is serious presumptions that the accused is guilty of the offence and to issue a warrant for his detention. At this stage the judge knows that there is compelling evidence against him but the judge may independently verify or corroborates the case from the accused, and seeks the accused explanation. The investigating judge may warrant that fullest investigation is to be done to seek the manifest truth and may call that relevant reports by experts be submitted as part of the *dossier*. In this regard, he may instruct the police to do certain investigations and to assist anyone instructed for that purpose. The return of the evidence, such as vehicle, is by merely asking the judge in writing who then asks the prosecutor in writing whether he has objection against the return of such evidence. The aggrieved party to an offence may be joined as a civil party to the offence by writing to that effect to the investigating judge. It is a one for all panacea to the offence compared to the common law tradition which construed such matter as a separate issue to be done before the civil courts and not the criminal courts. The investigative judge also may order the reenactment and a reconstruction of the offence for clarity, and these were all documented and videoed.

Getting the *dossier* done is no easy task. It involves teamwork on the part of the police and the investigating judge, and of course the accused and witnesses. Be that as it may, it is still the police who do the investigation but not without control from the investigating judge. So the judge will make sure that the *dossier* is comprehensive (and off course his experience counts a lot) for his credibility may be at stake. The *dossier* has four parts, investigation into the personality of the accused; facts of the case (from the records taken during the *guarde a vue*) from various witnesses including expert witness; general matters; and the detention procedures. The *dossier* is available to parties who seek to have it.

The investigative judge then decides whether there is a '*primae facie*' case against the accused from the available records in the *dossier*. The accused goes to trial only if the evidence demonstrates a case against the accused of the offence, ie the *dossier* had demonstrated the existence of facts sufficient for a conviction and that the (exculpatory) statements of the defendant lacked coherence, and there was ground to accuse the defendant of the offence investigated against him for which he was sent to trial. It may be said that in the inquisitorial system, there is no presumption of innocence but simply that the accused has not been proved guilty which in itself makes sense too. This is so because the prosecution does not adduce evidence at the hearing but by the presiding judge, either by interrogating the witnesses or by reading from the *dossier*. In that sense, any burden of proof is on the court.

The court itself is responsible for presenting the case. Judges are fully cognizant of the evidence from the *copius dossiers* presented at the outset: Trial is documentary in nature. Though it will permit the parties to make out their cases and may rely on them to do so, it is for him to say what it is he wants to know, and questioning of witnesses at the trial is designed to supplement or test what they have already read in the paper work. Thus, avoiding the risk that one side will suppress evidence detrimental to its cause; counsels play a more subsidiary role. The court itself will pursue the facts, and avail itself of any sources, including the interrogation of the defendant. There is, however, the danger that the judge could have prejudged the case because of the contents of the *dossier* and the questioning by the judge may be influenced by the opinion that has already been formed. In France for example, an examining magistrate (*juge d'instruction* - half magistrate, half policeman) is used to carry out the pre-trial investigation in the small minority of cases which are classified as serious crimes. *Juge d'instruction* has been abolished in Germany in 1975 and in Italy in 1988 (Code of Criminal Procedure 1988), which is a boost to the adversarial system that is based on the notion that a judge who is too involved in the dispute faces difficulty in remaining impartial to the case.

Once it goes to trial, the judge may asked for explanations from the accused evidence that may stand against him, and may also ask whether the lawyer and the prosecutor have anything to ask. The same goes with other witnesses. These questions and answers then form part of the *dossier* too. At the end of the trial, parties are allowed to make their

addresses (submission), judgment then follows suit. After taking a short break to indicate the end of the criminal trial, the trial then resume to hear civil claim by the aggrieved parties resulting from the commission of the offence, and accordingly to make the necessary award or damages n2. This saves time and costs.

In the civil law tradition, the hearing simply gives the investigation a public dimension for the *dossier* had often than not proven the accused's guilt, ie *primae facie* case. The investigation by the police and the investigating judge do no more than to collect material that will be presented if the case has to go for trial. So, once it goes for trial, chances are that the accused will be found guilty. As evidence is recorded in the *dossier*, the hearing is chiefly a written one for the witnesses that are called at the hearing are expected to confirm their depositions and reports as in the *dossier*. The advantage of the *dossier* over the adversarial trial in the common law tradition is very obvious. Evidence is collected and compiled soon after the occurrence of the offence when memories are still fresh. It circumvent any possibility that justice may be hampered as would be the case in the adversarial trial where there is a possibility that at the date of the trial, witness could not be traced or had died. In the Malaysian legal tradition which follows the Common Law tradition, though deposition from witness, especially ill person, who is thought to have a good possibility of dying, may be taken, this is seldom done or probably because many are unoblivious of the provision n3.

In the adversarial criminal trial, having a good lawyer (if one could afford) makes a lot of difference, but for the many who could not afford a lawyer, the inquisitorial system would be much better for them for they have quite as much a say as the judge in investigation into the case. Though, there are safeguards in the adversarial systems, often than not, they count to nothing as the judge tend to act too dumb' to an unrepresented accused.

In giving evidence, witnesses should not be interrupted by objections or because the evidence given is hearsay; it should be spontaneously made without prompting. A formal, structured cross-examination by counsel for either side is therefore, out of the question. All these are to ensure free and frank testimony from the witness when compared to the adversarial advocacy notorious 'ten commandments' in cross examination which among other things advise the counsel to lead the witness; do not let the witness explain; stop after getting what you want or do not ask one question too many.

The Common Law Tradition

The system is best understood by looking at the English legal system even though it is not truly adversarial. Unlike the inquisitorial system where the courts play a dominant role in investigating the facts and the law, and will give decision according to its own view of the justice of the case, in the adversarial system, much is left to the disputing parties who are given the liberty and discretion in putting their facts before the judge who operates in a factual vacuum; trial is oral in nature. The judge's function is to control the proceedings to ensure that the rules of evidence and procedure are obeyed. A judge is not permitted to call witnesses unless parties consent. The judge makes a decision that appears to be justified on the material presented in court, and are not expected to arrive at the truth by their own exertion but simply to ensure the truth of the facts material to the case n4.

The adversarial system is based on the notion, as Lord Eldon contended in 1822, that 'truth is best discovered by powerful statements on both sides on the question'. A judge who gets too involved in the disputations of the lawyers could be seen, according to Lord Green (1945), as descending into the arena and thus prone to have his vision clouded by the dust of the conflict.' In *Jones v National coal Board* [1957], a claim rising from fatal accident, a new trial was ordered where the trial judge had intervened so much in the case that both sides complained that they could not properly put their respective arguments. In *Gunning* [1980] a conviction was quashed where the judge asked 165 questions compared with 172 from counsel n5.

Theoretically, the adversarial system gives the judge the advantage of utter impartiality (judicial neutrality) arising from ignorance of the case. Although, it is not the responsibility of a party to present the tribunal with the truth, only with his or her case, it is argued that the vigorous pursuit of evidence to serve the same interest, when added to that of the opponent, is an effective means of discovering the truth, particularly since the tribunal witnesses the attack by each side upon the evidence of the other.

The English says that the best way of getting at the Truth is to have each party dig for the facts that help it; between them they will bring all to light...Two prejudice searches starting from opposite ends will between them be less likely to miss anything than the impartial searcher starting in the middle n6.

The risk still remains that the most effective advocate, rather than the truth, will win the day. In the adversarial trial, the advocates seem to control what the issues are to be and which witnesses and other evidence are to be produced, but also limit what is said by those witnesses, over whom they have strict editorial control. Thus, the material available to the tribunal of fact is selected by the advocates, who can then in court, control the narration. Witnesses are not entitled to add material which has not been asked for to their account, and so counsel can manipulate them in a manner most advantageous to their own case. For the prosecution, they have the discretion on what evidence they should call knowing fully well that the discretion if not exercise prudently is in itself an indiscretion which could prompt the court into drawing an adverse presumption or it may lead to a break in the chain of evidence to their case. Given the nature of the evidence in chief in the adversarial trial, cross examination is a necessary counter balance to the manner evidence in chief has been elicited. There may have been qualifications or explanations which the witness did not have the opportunity to add to his or her in chief testimony, and which can only be uncovered only by cross-examination. The adversarial system of trial is best sums up in the words of Lord Denning in *Jones v National Coal Board* :

In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question 'How's that' His object above all, is to find out the truth, and to do justice according to law; ... [Was it not] Lord Greene M.R. who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said Lord Greene, should himself conduct the examination of witnesses, he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict;

At p 64, he said:

The judge part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetitions; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; an at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well.

At p 65:

... a judge is not only entitled but is, indeed, bound to intervene at any stage of a witness's evidence if he feels that , by reason of the technical nature of the evidence or otherwise, it is only by putting questions of his own that he can properly follow and appreciate what the witness is saying.

Though, disclosure of evidence would thus in theory be repugnant to the adversarial system of trial, this is not the case as there is limited pre-trial discovery, and productions of facts/ documents which the court may order as a matter of relevancy. Recently n7, both the prosecution and defence must disclose to each other material facts so that on the one part, the accused will know precisely the nature of the case against him, on the other part, the defence must then inform the prosecution in general terms of the case it intends to present at the trial.

Malaysian Legal Tradition

There are two system of courts established under art 121 of the Malaysian Federal Constitution, ie the civil courts and the Shariah courts. In criminal trial, for the civil courts, the foremost statute is the Criminal Procedure Code (Revised Act 593/1999). The Shariah Courts of the respective states in Malaysia have their own Criminal Procedures which by and large replicates n8 the Criminal Procedure Code and thus, it suffices to just refer to the Criminal Procedure Code and some provisions in the Syariah Criminal Procedure (State of Selangor) Enactment 2003. Malaysia having being under English rule inevitably continues and still retains the Common Law tradition. Thus, its criminal trial is adversarial as in England. The Police do the investigations and witnesses are required to tell the truth save the evidence that will incriminate him n9. The suspect has the right to remain silent during interrogation and if given, the evidence must be obtained voluntarily and without oppression meted on the suspect n10. At the end of the investigation, a report is then forwarded to the Public Prosecutor who then determines whether the suspect should be prosecuted n11. The judge hears and determines the case in open court n12, take down the evidence n13, makes decision in the open court in the presence of the accused, to explain the judgment to the accused, and if the accused requests for a copy, the same should be given without delay to the accused free of charge n14. Thus, judges are expected only to listen and may ask questions for the purpose of seeking clarifications. If a judge descends into the arena of conflict or ask one question too many it can be a ground of appeal n15.

Parties call their own witnesses and the defence in turn has the right to cross-examine their evidence in chief. There is a formal structure of evidence in chief, cross examination and re-examination n16. Trial is oral in nature, and the prosecution have to establish a *primae facie* case (the evidential burden) before the accused can be called to enter his or her defence. There is limited pre trial disclosure n17 of documents such as police report and cautioned statements of the accused, the disclosure of any other documents during trial is subject to the rule of relevancy, and of course exclusionary rules such as hearsay, privilege etc. There is now an ongoing process to allow more disclosure as is being done in England. As a matter of fact, the nation human rights watchdog, ie Suhakam, and the Parliament Special Select Committee have been formed to make changes to the Criminal Procedure Code to meet with changing times. Though, trial is adversarial, like England, there are inquisitorial elements as provided by ss 256, 257 and 425 of the Criminal Procedure Code:

256 Court may put questions to accused
n18.

(1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may at any stage of a trial, without previously warning the accused, put such questions to him as the Court considers necessary.

(2) For the purpose of this section the accused shall not be sworn and he shall not render himself liable to punishment by refusing to answer the questions or by giving false answers to them, but the Court may draw such inference from the refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in the trial and put in evidence for or against him in any other trial for any other offence which those answers may tend to show he has committed.

(4) The examination of the accused shall be for the purpose of enabling him to explain any circumstances appearing in evidence against him and shall not be a general examination on whatever suggests itself to the Court.

(5) The discretion given by this section for questioning a prisoner shall not be exercised for the purpose of inducing him to make statements criminatory of himself.

(6) It shall only be exercised for the purpose of ascertaining from a

prisoner how he may be able to meet facts disclosed in evidence against him so that those facts may not stand against him unexplained.

(7) Questions shall not be put to the prisoner merely to supplement the case for the prosecution when it is defective.

(8) Whenever the accused is examined under this section by any Court other than the High Court the whole of the examination including every question put to him and every answer given by him shall be recorded in full in English, and the record shall be shown or read to him or, if he does not understand the English language, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(9) When the whole has been made conformable to what the accused declares to be the truth the record shall be signed by the presiding Magistrate

257 Case for prosecution to be explained by Court to undefended accused

n19.

(1) At every trial before the Court of a Magistrate if and when the Court calls upon the accused for his defence it shall, if he is not represented by an advocate, inform him of his right to give evidence on his own behalf, and if he elects to give evidence on his own behalf shall call his attention to the principal points in the evidence for the prosecution which tell against him in order that he may have an opportunity of explaining them.

(2) The failure at any trial of any accused to give evidence shall not be made the subject of adverse criticism by the prosecution.

173 Procedure in summary trials

n20.

The following procedure shall be observed by Magistrates in summary trials:

(a) When the accused appears or is brought before the Court a charge containing the particulars of the offence of which he is accused shall be framed and read and explained to him, and he shall be asked whether he is guilty of the offence charged or claims to be tried.

(b) If the accused pleads guilty to the charge, whether as originally framed or as amended, the plea shall be recorded and he may be convicted on it and the Court shall pass sentence according to law:

Provided that before a plea of guilty is recorded the Court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.

425 Power of Court to summon and examine persons

n21.

Any Court may at any stage of any inquiry, trial or other proceeding under this Code summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

In a criminal trial when the accused is brought to face a criminal charge, the charge needs to be framed; it must be read and explained to him in a language he is able to understand n22. The judge may amend the charge if it is defective n23 or discharge the accused if the charge is groundless n24. In accepting and recording the accused's plea of guilty, the judge must among other things ascertained that the accused understands the charge, and the consequences of pleading guilty n25 such as he has no right to appeal against the conviction by pleading guilty n26; the sentence likely

to be imposed; that not pleading guilty is not an aggravating factor in sentencing if at the conclusion of the trial the accused is found to be guilty beyond reasonable doubt; an accused bears not the legal burden to prove his innocence but it rests on the Prosecution to prove the case against an accused beyond all reasonable doubt n27.

On the evidential aspect, in *Muthusamy v Public Prosecutor*, Taylor J said:

It is the duty of the advocate to prepare his case with due regard to the real issues and with special care for the law of Evidence. If he cannot tersely show that a proposed question is relevant, he cannot complain, if a magistrate promptly excludes it under s 5 of the Evidence Act, which provides that evidence may be given of legally relevant facts and of no others. These words are mandatory n28.

Moreover, s 136 n29 of the Evidence Act 1950 empowers the Judge to ask whether the evidence that was sought to be adduced is legally relevant to the facts in issue (subject matter of the dispute). If the prosecution or the defence counsel is unable to do that, the evidence is excluded or prohibited. In *Dato Seri Anwar Ibrahim*, among the lists of prosecution's witnesses was the Prime Minister Dato Seri Dr Mahathir Mohd. He was not called as witnesses, but was tendered to the defence. Ariffin Jaka J. totally agreed with the learned Session Court's judge Datuk Augustine Paul J, and held that the court is competent to determine the relevancy of proposed witness well before the court's hearing or trial. Section 136 of the Act becomes operative whenever the court is alerted by any parties in the proceeding. In this respect, the procedure to be adopted is by either addressing the court from the Bar or through affidavits. It was also held that a conviction arrived at without affording an opportunity to the defence to produce relevant evidence is unsustainable. It was a fact that the witness (Azizan) had intimated to the Prime Minister how he was sodomised by the first accused (Dato Seri Anwar). However, the witness has given evidence on the sodomy allegations and his credibility can be assessed on that evidence and on the evidence given by the other witnesses. To call the Prime Minister would therefore serve no useful purpose. The Prime Minister's evidence would not only be highly prejudicial to the accused, but was also hearsay. Further, the Prime Minister's private and public statements of his belief as to what the first accused did was nothing more than an opinion and is therefore irrelevant. In short, the Prime Minister was not a relevant witness for the first or the second accused, and calling him would be a waste of the court's time n30. The 1st accused appealed to the Court of Appeal and the decision of Arrifin Jaka J. was upheld. The appellate court deliberated that any party has a right to call a witness who is prepared to give a material or relevant and may apply to the court for summons to be issued against persons in the list of witnesses that was submitted to the magistrate or registrar. Ultimately, it is the court to decide on the question of relevancy as stated by s 136 of the Evidence Act. The court will issue summon (ss 34 & 51) if it appears that the person to be summoned could give material or relevant evidence. A party therefore only has right to call a witness if the evidence propose to be given is relevant but not otherwise. Under s 165 n31 of the Evidence Act 1950, a judge may in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form at any time, of any witness or of the parties, about any relevant fact or irrelevant; and may order production of any document or thing.

Judges must also ensure that evidence should not be hearsay n32, the best evidence applies if proving is by documents, and the documents need to be authenticated before the same may be tendered in evidence n33. Judges must see that witnesses only give relevant facts and not their opinion unless it is expert evidence. n34 Where necessary, judges must be mindful of the need to have corroboration n35 or caution n36 when assessing whether the prosecution have proven their case. Thus, judges are not mere umpire but must seek to do justice according to law n37. Be that as it may, the common law tradition rest on the premise as stated by Lord Hewart CJ in *R v Sussex Justices; ex parte McCarthy 1924*:

Justice should not only be done but should manifestly and undoubtedly be seen to be done.

It is, however, misleading to say that inquisitorial trial has no place in Malaysia. The Penghulu (village) Court that deals with trivialities in the day to day disputes of residents of remote villages has power to impose very nominal fines

to offenders. The Village Head who double up as the Village Court inevitably has to perform three in one role as investigator, prosecutor, and judge n38. In disputes between employer and employee under the Industrial Relations Act 1967, wider inquisitorial powers are given to the President and chairman of the Industrial Court, and an advocate may be allowed to represent the disputants not as a matter of right but with the permission of the President or the Chairman of the Industrial Court. The Industrial Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form n39. The Small Claims Court n40, too, it is submitted, where trial is conciliatory, the inquisitorial approach rather than the adversarial should be applied, more so because lawyers generally do not get involved: The judge inevitably has to perform more inquisitorial role to ascertain the truth.

The Islamic Legal Tradition

In the Islamic legal tradition, it goes without saying that at all times, justice must not only be seen to be done, but must manifestly be seen to be done. Allah says in the Quran:

Allah commands that you be just and fair (adl) n41.

Allah commands that you render back your trust s to whom they are due and when you judge between mankind that you judge with justice n42.

...If thou judge, judge in equity between them; for Allah loveth those who judge in equity n43.

We have honoured the sons of Adam n44.

Allah commands justice, the doing of good and liberality to kith and kin, and He forbids all shameful deeds, and injustice and rebellion: He instructs you that you may receive admonition n45.

O ye who believe! Stand out firmly for justice as witness to Allah even against yourselves or your parents or your kin, and whether it be (against) rich or poor: For Allah best protecth both. Follow not the lusts (of your hearts), lest ye swerve, and if ye distort (justice) or decline to do justice, verily Allah is well acquainted with all that ye do n46.

Help ye one another in righteousness and piety, but help ye not one another in sin and rancour. Fear Allah; for Allah is strict in punishment n47.

Eschew all sin, open or secret; those who earn sin will get due recompense for their 'earnings' n48.

A compiler of Prophet Muhammad (pbuh) sayings, records in his *Sunan Ibn Majah* that judges are of three types, one of whom will go to paradise and two to hell. The one (the type of judges) who will go to paradise is a man who knows what is right and gives judgment accordingly; but a man who knows what is right and acts tyrannically in his judgment, he will go to hell; and a man who gives judgment for people when he is ignorant will go to hell n49.

During the Fatimids dynasty, a merchant filed a suit in the court of a Qadi against the Caliph al-Hakim who was summoned to appear before the court. On the Caliph's appearance, the Qadi treated him like an ordinary party to a lawsuit. The plaintiff merchant claimed compensation of 1000 pieces of gold for the fruit which had been destroyed by the officials of the government. The defendant Caliph stated in defence that the fruit destroyed were intended to be used for preparing drinks forbidden by the Quran, but if the plaintiff would swear that the fruit were not intended for the purpose, he would pay compensation in lieu of the destruction. Upon his statement, the plaintiff took the oath, and was accordingly paid compensation in the court, and also gave a formal receipt to the defendant Caliph. In this case, it is narrated further that the plaintiff merchant after receiving the compensation demanded a letter of protection from the defendant Caliph that he might not incur any retaliation for the suit and this was issued accordingly n50.

The importance of evidence in proving the case is equally stressed in the Quran:

..And conjecture avails nothing against truth n51.

The witness should not refuse when they are called on (evidence) n52.

Conceal not evidence for whoever conceals it, his heart is tainted with sin, and Allah knoweth all that ye do n53.

O ye who believe! If a sinful person comes to you with any news, ascertain the truth, lest ye harm people

unwittingly and afterwards become full of regret of what ye have done n54.

The Holy Prophet (pbuh) has also given great importance to evidence. It has been related on the authority of Wall ibn Hajr who said, 'A man from Hadaramaut (Yemen) and a man from Kindah came to the Holy Prophet, Hadrami said, 'O Prophet! This man has wrongfully possessed my land. 'Kandi said, 'this is my land and is in my possession. He has no right in it.' The Holy Prophet said to Hadrami, 'have you any proof.' He said, 'no'. The Prophet said, 'then you have to accept his oath n55.'

Once Caliph Ali lost his armour on his way to Siffin. After the termination of the war, he returned to al-Kufah, and there he saw his armour in the hands of a Jew, and told him: 'This armour is mine; I neither sold it nor gave it away,' The Jew replied: 'It is my armour and in my possession.' Later, both the Caliph and the Jew went to the court of Shurayh. Shurayh said: 'Proceed, O Prince of the faithful!' He said: 'Yes, this armour which is in the hands of this Jew is my armour - I neither sold it nor gave it away.' Shurayh exclaimed, 'What dost thou say, O Jew' He replied: 'It is my armour and in my possession.' Then Shurayh said: 'Hast thou any proof, O Prince of the Faithful?' He said: 'Yes, Kambar and al-Hassan are witnesses to the fact that the armour is mine.' Shurayh replied, 'The evidence of a son is not admissible (weighty) in favour of the father.' The result was that the judgment was given in favour of the Jew. At this, the Jew exclaimed, 'I testify that there is no god but Allah, that Muhammad is His apostle, and that this armour is thy armour n56.'

The right to be heard is also one of the fundamental principles of justice in a trial irregardless of the species. The Quran states:

We created man from sounding clay, from mud moulded into shape. And the Jinn (Genie) race, We had created before, from the fire of a scorching wind. Behold! Thy Lord said to the angels: 'I am about to create man from sounding clay, from mud moulded into shape: When I have fashioned him and breathed into him My spirit, fall ye down in obeisance unto him.' So the angels prostrated themselves, all of them together. Not so Ibliss; he refused to be among those who prostrated themselves. (Allah) said: 'O Iblis! What is your reason for not being those who prostrated themselves?' (Iblis) said: 'I am not one to prostrate myself *to man* whom Thou didst create from sounding clay, from mud moulded into shape.' (Allah) said: 'Then get thee out from here for thou are rejected, accursed. And the curse shall be on thee till the Day of Judgment n57.' (Emphasis added.)

And Solomon was David's heir. He said: 'O ye people! We have been thought the speech of birds ... ... and he took a muster of the birds, and he (Solomon) said: 'Why is it I see not the Hopooe? Or is he among the absentees? I will certainly punished him with a severe penalty, or execute him unless he brings me a clear reason (for absence without leave) n58.'

Ali reported: The Messenger of Allah sent me to Yemen as a judge. I said: 'O Messenger of Allah! You are sending me while I am young in years and there is no knowledge in me for judgeship.' He said: 'Verily, Allah will soon give guidance to your heart and make your tongue firm. When two persons come to you for a decision, don't pass a decree in favour of the first till you hear the argument of the other, because that is more necessary for the decision to become clear to you.' He said: 'I had afterwards never entertained any doubt in decision.' n59 It is related that Umar ibn Abd al Aziz said to one of his judges: 'When a disputant comes to you with an eye put out, do not be quick to rule in his favour. Who knows, may be the other party to the dispute will come to you with both eyes put out n60!'

Islam did not specify the mode for trial, it could be adversarial or inquisitorial or a combination of either more or less. As Glenn n61 rightly puts it that the process is not adversarial, in common law language, but neither is it investigative in the formal manner of civil law procedure. The Shariah did not specify a particular judicial framework but is best left to the government of the day to decide on the basis of justice and fair dealings. It could be adversarial or inquisitorial or the best of both n62. A *hadith* compiler Bukhari has reported that two men came to the Prophet (pbuh) for decision of their case. They had no proof except their claim, hence the Prophet (pbuh) said: 'I am only human, and

some of you come to me for adjudication. Perhaps some of you are cleverer in argument than others. If I should adjudicate in favour of a person against his brother depending upon the former's statements while the latter is in the right, then I would only be handing the former a piece of hell, let him not take it.' n63 In the History of the Qadis (Judges) of Qurtuba, al-Khashini reports that two men brought their dispute before Ahmad ibn Baqi. Believing that one of the disputants seemed to know what he was talking about while the other (who appeared to be honest and truthful) did not, he advised the latter to find someone to speak on his behalf. When the man replied that he spoke only the truth regardless of the consequences, the judge replied: 'It couldn't be worse than (your opponent's) murdering the truth n64.' These cases showed that the trial is adversarial.

At times, the inquisitorial approach was taken given the circumstances of the case. A person came to the Prophet (pbuh) and informed him that he has disclaimed the child of his wife, because the child was of dark complexion. The Prophet (pbuh) asked him whether he had camels. He replied in the affirmative, and then the Prophet (pbuh) asked him what the colour of those camels was? He said that the colour was red, and then the Prophet (pbuh) asked him whether there was any grey colour. The person again replied in the affirmative. Then the Prophet (pbuh) questioned, from where did this grey colour came? Then the person replied that probably there were some grey camels in the line of its ascendants. The Prophet (pbuh) then remarked that the same reason was possible in the case of his black son and prevented him from disclaiming the child n65.

The function of the Qadi (judge) is to resolve dispute in accordance with Islamic Law, and the process is characterised by a high degree of integrity and impartiality, Umar b. al-Khattab, the second Caliph, he appointed Abu Darda as a judge with him in Medina, Shurayh as judge in Kufa, Abu Musa al-Ash ari as a judge in Basrah, and 'Uthman ibn Qays as judge in Egypt. In appointing Abu Musa, he wrote to him the famous letter that contains all the laws that govern the office of a judge, and is the basis of the administration of justice. He wrote:

Now the office of the judge is a definite religious duty and generally followed practice. Understand the depositions that are made before you, for it is useless to consider a plea that is not valid. Consider all the people equal before you in your court and in your attention, so that the noble will not expect you to be partial and the humble will not despair of justice of you. The claimant must produce evidence; from the defendant an oath may be exacted. Compromise is permissible among the Muslims, but not any agreement through which something forbidden is permitted, or something permitted is forbidden. If you gave a judgment yesterday, and today, upon reconsideration, you come to the correct opinion, you should not hesitate by your first judgment from retracting; for justice is primeval, and it is better to retract than to persist in worthlessness. Use your brain about matters that perplex you and to which neither the Quran nor the Sunnah seems to apply. Study similar cases and evaluate the situation through analogy. If a person brings a claim which he may or may not be able to prove, set a time limit for him. If he brings proof within the time limit, you should allow his claim; otherwise you are permitted to give judgment against him. This is the better way to forestall or clear up any possible doubt. All Muslims are acceptable as witnesses against each other, except such as have received a punishment provided for by the religious law, such as are proved to have given false witness, and such as are suspected of partiality on the ground of client status or relationship, for God, praised be He, forgives because of oath and postpones punishment in face of evidence. Avoid fatigue and weariness and annoyance at the litigants. For establishing justice, God will grant you a rich reward and give you a good reputation. Farewell n66.

Conclusion

The Shariah did not specify a particular judicial framework but is best left to the government of the day to decide founded upon fair dealings and justice and depending whether it is a criminal case, a civil case, a domestic inquiry etc. It could be adversarial or inquisitorial or the best of both. What is important is to seek for the manifest truth (the civil law tradition), and ensure at all times that justice must not only be done but must be manifestly seen to be done (the common law tradition).

The adversarial trial and the inquisitorial trial have also undergone necessary changes or convergence by adopting

certain elements from each other to ensure better justice. By allowing more disclosure and interventions by the judge to call witnesses not called by parties for the essentiality of justice, the adversarial trial is not truly adversarial in the adversarial sense of the word. Likewise, allowing parties to have more say in the way they put their case and doing away with the investigating judge indicates that the inquisitorial trial is not truly inquisitorial in the inquisitorial sense of the word. Both the Common Law tradition and the Civil Law tradition have undergone some transformation akin to the Islamic legal tradition, as Glenn says, a process that is not adversarial in common law language, but neither is it investigative in the formal manner of civil law procedure. In 1996, the People's Republic of China amended its Criminal Procedure Law and among them are the mode of court trial was moved from originally an inquisitorial one towards an adversarial one which helps balance the strength between the prosecution and the defence, and further enhances judges' neutrality, during trial; the prosecution and the defence are responsible for the production of evidence instead of the judge; and there is a formal structure of examination in chief and cross examination of witnesses during trial n67. What is evident is that the common law tradition, civil law tradition and the Islamic law tradition all have one thing in common i.e. justice must be transparent or seen to be done. Thus, the Malaysian Criminal Procedure Code that by and large follows the common law tradition is also unwittingly acting in accordance with Islamic law, a legal tradition that dates way back to the 7th century; a legal tradition that has existed ages before the common law and the civil law traditions. As a matter of fact, it is submitted that the Islamic legal tradition is the rejuvenation of the tradition enjoined upon civilizations that have existed very much earlier. The Quran states:

Say (O Muhammad): 'Verily my Lord hath guided me to a way that is straight, a religion of right, the path (trod) by Abraham - the true faith, and he certainly joined not gods with Allah n68.

The same religion has He established for you as that which He enjoined on Noah, that which We have sent by inspiration to thee and that which We enjoined on Abraham, Moses and Jesus. Namely that ye should remain steadfast in religion, be not divided therein (my emphasis) n69.

We have sent thee inspiration, as We sent it to Noah and the Messengers and after him: We sent inspiration to Abraham, Ismail, Isaac, Jacob and the descendants, to Jesus, Job, Jonah, Aaron and Solomon and to David We gave Psalms n70.

Nothing is said to thee that were not said to the messengers before thee n71.

To Thee We sent the scripture in truth confirming the scripture that came before it, and guarding it n72.

Which is better, the inquisitorial trial or the adversarial trial? The answer is 'blowing in the wind.' It is dangerous to do a complete volte face and be too eager to throw aside what has been proved effective. An open mind is what is needed as change can either be for better or worse. For this reason, Islam did not take side whether one goes for divergence or convergence. What it ultimately calls for is to see that at the end of it, there is justice.

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FOOTNOTES:

n1 Read Jenny Mc Ewan, *Evidence and the Adversarial Process - The Modern Law*, Hart Publishing, Oxford, 2nd Edition (1988) - for an analytical and quite thorough discussion of the two legal traditions; Gary Slapper & David Kelly, *The Cavendish Q & A Series: English Legal System*, at pp 36-40, Cavendish Publishing Limited (1993, 2nd Reprint); Susan McKenzie & S.Kunalen, English Legal System (Q&A), Blackstone's Law (questions & Answers), Blackstone Press Ltd, London (1996), at pp 100-107; *An Anatomy of a French Murder Case* from p 527, the American Journal of Comparative Law, volume 45 number 3, summer 1997, for a detailed insight of the inquisitorial system.

n2 Under s 426 of the Malaysian Criminal Procedure Code, the court does have the power to order the

convicted accused for payment of the costs of prosecution and to pay compensation to the victim. Perplexingly, however, these powers are hardly used.

n3 See s 395 (witness that is dangerously ill), s 396 (witness intending to leave jurisdiction) of the Malaysian CPC that could pre-empt the loss of material evidence pending the trial.

n4 Read *Thomson v Glasgow Corporation* 1961 SLT 237, by Lord Justice - Clerk Thomson at p 246.

n5 These are quoted from Gary Slapper & David Kelly, *The Cavendish Q & A Series: English Legal System*, at p 37, Cavendish Publishing Limited (1993 - 2nd Reprint)

n6 P Devlin, *The Judge* (Oxford University Press, Oxford 1979), p 61 - cited by Jenny Mc Ewan, *Evidence and the Adversarial Process - the Modern Law*, at p 4, (2nd Ed), Hart Publishing, Oxford (1998).

n7 See the Criminal Procedure and Investigations Act 1996.

n8 See for example, the Shariah Criminal Procedure (State of Selangor) Enactment 2003.

n9 See s 3(3) of the Police Act 1967; ss 107-120 Criminal Procedure Code; ss 54-66 of the State Syariah CPC.

n10 Section 113 of the Criminal Procedure Code; s 61 of the State Syariah CPC.

n11 See ss 376 & 120, Criminal Procedure Code. Sections 66 & 181 of the State Syariah CPC.

n12 Section 7 of the Criminal Procedure Code; s 5 of the State Syariah CPC.

n13 Sections 173(C), 264-272A Criminal Procedure Code; See s 96(c), (d), (e) & (l) and ss 111- 117 of the State Syariah CPC.

n14 Section 273 and 279 Criminal Procedure Code; ss 118-120 of the State Syariah CPC

n15 See: *Teng Boon How v Pendakwa Raya* .

n16 See s 173 of the Criminal Procedure Code; Chapter X of the Evidence Act 1952; See s 96 (c) & (e) of the State Syariah CPC.

n17 Section 51 of the Criminal Procedure Code; See s 42 of the State Syariah CPC.

n18 See s 105 of the State Syariah CPC which replicates s 256 of the CPC.

n19 See s 106 of the State Syariah CPC which replicates s 257 of the CPC.

n20 See s 96 (a) & (b) of the State Syariah CPC which replicates s 173 of the CPC.

n21 See s 219 of the State Syariah CPC which replicates s 425 of the CPC.

n22 See s 173(a) Criminal Procedure Code; *Huang Chin Shiu v R* - High Court, Penang; See s 96(a) of the State Syariah CPC.

n23 Section 158 Criminal Procedure Code; See also s 83 of the State Syariah CPC.

n24 Section 173(g) Criminal Procedure Code; See also s 96(g) of the State Syariah CPC.

n25 Section 173(b) Criminal Procedure Code; See also s 96(b) of the State Syariah CPC.

n26 Section 305 Criminal Procedure Code; See s 136 of the State Syariah CPC.

n27 Section 101 of the Evidence Act 1950; s 173(m) Criminal Procedure Code; *Mohammad Radhi bin Yacob v PP* .

n28 ; s 5 of the Malaysian Evidence Act 1950 is also replicated under s 5 of the Syariah Court Evidence (State of Selangor) Enactment 2003.

n29 This section is replicated under s 90 of the Syariah Court Evidence (State of Selangor) Enactment 2003.

n30 - KL High Court: Arrifin Jaka J.

n31 This section is replicated under s 118 of the Syariah Court Evidence (State of Selangor) Enactment 2003.

n32 Section 60 Evidence Act 1950; see s 47 of the Syariah Court Evidence (State of Selangor) Enactment 2003.

n33 Sections 61-73 of the Evidence Act 1950; ss 48-56 of the Syariah Court Evidence (State of Selangor) Enactment 2003.

n34 Sections 5-55 Evidence Act 1950; ss 5-42 of the Syariah Court Evidence (State of Selangor) Enactment 2003.

n35 See ss 134, 133A, 34 of the Evidence Act 1950; see s 226 of the State Syariah CPC that stresses on the need to ascertain the quality and truthfulness of the evidence and witnesses. See also ss 83-88 of the Syariah Court Evidence (State of Selangor) Enactment 2003.

n36 Identification evidence (The Turnbull guidelines), child witness, victims of sexual offence; accomplice etc.

n37 See ss 156, 419, 421, 422 Criminal Procedure Code are provisions to ensure that non-compliance to the procedures may be condoned if it occasions no miscarriage of justice. See the equivalent ss 82, 205, 206, 207 under the State Syariah CPC.

n38 See s 94 of the Subordinate Courts Act 1948.

n39 See ss 27-30 of the Industrial Court Act 1967; see also s 3 of the Industrial Court Rules 1967

n40 See ss 90 & 92 of the Subordinate Courts Act 1948; O 54 r 2 of the Subordinate Court Rules 1980 provides that the amount in dispute must not exceed Malaysian Ringgit RM5,000. Order 57 r 7 of the Subordinate Court Rules 1980 stipulates that no party shall be represented by an advocate and solicitor.

n41 Sura al-Nahl verse 90.

n42 Chapter 4: sura al-Nisa (the women) in verse 58.

n43 Chapter 5: sura al-Maidah (the repast) in verse 42.

n44 Chpater 17: sura al-Isra' (the night journey/children of Israel) in verse 70.

n45 Chapter 16: sura al-Nahl (the bees) verse 90.

n46 Chapter 4: al-Nisa (the women) verse 135.

n47 Chapter 4: sura al-Maidah (the repast) in verse 2.

n48 Chapter 6: sura al-An 'am (the cattle) verse 120.

n49 Ibn Majah, Sunan, 168 - cited by Ghulam Murtaza Azad, *Judicial System of Islam* (1987) Islamic research Institute, International Islamic University Islamabad (Pakistan) - ISBN 969 408 116 5.

n50 Qadri, Anwar Ahmad (1980) *Justice in Historical Islam*, SH. Muhammad Ashraf, Lahore (2nd reprint) at p 64.

n51 Chapter 53 sura al-Najm (stars) in verse 28.

n52 Chapter 2: sura al-Baqarah (the heifer) in verse 282.

n53 Chapter 2: sura al-Baqarah (the heifer) in verse 283.

n54 Chapter 49: sura al-Hujurat (the chambers) verse 6.

n55 Anwarullah, Dr (1994) *The Islamic Law of Evidence*, Shariah Academy, International Islamic University, Islamabad.

n56 Cited by Qadri Anwar Ahmad (1980) *Justice in Historical Islam*, SH Muhammad Ashraf, Lahore (2nd Reprint) at p 27.

n57 Chapter 15: sura al-Hijr; verses 26-42.

n58 Chapter 27: sura al-Naml [ants] verses 16-21.

n59 Riwayat Abu Daud, Sunan Abu Daud - Cited in Qadri, Anwar Ahmad (1980) *Justice in Historical Islam*, SH. Muhammad Ashraf, Lahore (2nd Reprint), at p 11; Cited by Taha J. al- Alwani, *The Rights of the Accused in Islam (Part 2)* pp 504-518 at p 505, *The American Journal of Social Sciences*, volume 11, Fall 1994, Number 4 - published by the Association of Muslim social Scientists and the international Institute of Islamic Thought.

n60 Cited by Taha J al- Alwani, *The Rights of the Accused in Islam (Part 2)* pp 504-518 at p 505, *The American Journal of Social Sciences*, volume 11, Fall, 1994.

n61 Glenn, H. Patrick (2000) *Legal Traditions of the World*, Oxford, University Press Incorporation, New York, at p 163.

n62 Ibn Khaldun, al-Muqaddimah - cited in Taha J. al- Alwani, *The Rights of the Accused in Islam* pp 348-364 at pp 349-351, *The American Journal of Social Sciences*, volume 11, Fall 1994, Number 3 - published by the Association of Muslim social Scientists and the international Institute of Islamic Thought.

n63 Cited by Muslehuddin (1991), *Judicial System of Islam its Origin & Development*, Islamic Publications (Pvt) Ltd, Lahore, at pp 28 & 67; Cited by Taha J. al- Alwani, *The Rights of the Accused in Islam (Part 2)* at pp 505-506.

n64 Taha J al- Alwani, *The Rights of the Accused in Islam (Part 2)* at p 506.

n65 Cited by Khan, Mohd. Hameedullah (1991) *The Schools of Islamic Jurisprudence (A Comparative*

Study), Khitab Bhavan, New Delhi, India, at pp 52-53.

n66 Cited by Qadri Anwar Ahmad (1980) *Justice in Historical Islam*, SH. Muhammad Ashraf, Lahore (2nd reprint) at pp 19-20; Taha J. al- Alwani, *The Rights of the Accused in Islam* pp 348-364 at pp 349-351, *The American Journal of Social Sciences*, volume 11, Fall 1994, Number 3 - published by the Association of Muslim social Scientists and the international Institute of Islamic Thought.

n67 Tom X Fu, *Criminal Defence in China: Present Situation, Analysis and Recommended Reforms*, 3rd Asian Law Institute Conference - The Development of Law in Asia: Convergence versus Divergence, at East China University of Politics and Law, Shanghai, China, 25-26 May 2006, in Volume 1, at p 116; See also article 6, Criminal Procedure Law, People's Republic of China.

n68 Chapter 6: sura al-An'am in verse 162.

n69 Chapter 42: al-Shura (consultation) in verse 13.

n70 Chapter 4: al- Nisa (the women) verse 163.

n71 Chapter 41: sura al-Fussilat (expounded) verse 43.

n72 Chapter 5:al-Maidah (the repast) verse 48.