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Hearsay Evidence in Criminal Matters under Rwandan law: a Critical and Comparative Study

By

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DECLARATION

I, **NISHIMWE Chantal**, a student at the University of Rwanda, School of Law, Master's programme in International Criminal Justice and the Law of Human Rights, hereby declare that this final dissertation entitled "**Hearsay evidence in criminal matters under Rwandan law: a critical and comparative study**'' under the supervision of Dr. Evode KAYITANA, is my original product and has never been presented in any other academic or higher learning institution. Where other individuals' publications have been used, references have been provided and, in some cases, quotations shown. I therefore declare that the work presented is my own and it contributes to the fulfilment of the Master of Laws Degree.

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DEDICATION

I dedicate this project to God Almighty, my creator and my strong pillar, source of inspiration, wisdom, knowledge and understanding. He has been the source of my strength throughout this programme and on His wings only have I soared. I also dedicate this work to my parents; uncles and aunts, my brothers and sisters; my supervisor, and my workmate from Capacity development Unit who have encouraged me all the way and whose encouragement has made sure that I give it all it takes to finish that which I have started and who have been affected in every way possible by this mission. Thank you. My love, for you all can never be quantified. I dedicate this final project to you. God bless you.

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NISHIMWE Chantal

ABBREVIATIONS AND ACRONYMS

ACRWC : African Charter on the Rights and Welfare of Child

Art. : Article

Const. : Constitution

ECtHR : European Court of Human Rights

ICC : International Criminal Court

LLM : Degree of Master of Laws

NGO : Non-Governmental Organizations

O.G. : Official Gazette

P. /PP. : Page/Pages

RP : Role Penal

S.C : Supreme Court

TGI : Tribunal de Grande Instance

UN : United Nations

USA :United States of America

Vol. : Volume

TABLE OF CONTENT

ABSTRACT

The early debates by different scholars on use and exclusion of Hearsay rule and Evidence in Criminal Matters suggested that hearsay evidence have strong impact on fairness of justice process and that the hearsay rule is a product of a judicial desire to ensure that only reliable evidence is put to the trier of fact. This research provides a criticism on hearsay evidence under Rwandan criminal judicial proceedings in comparison with other jurisdictions specifically USA. It (this research) has the effect that it is useful for Rwandan criminal justice and court of trials, judicial policy makers to commit and adopt the strongest measures to end the promotion of hearsay evidence since it can be a tool that can prejudice the administration of justice.

This research also demonstrates how hearsay rules can be introduce into laws and regulation in Rwanda and the implication of exclusion rules in the conduct of criminal justice process. Additionally, this research also expressed via recommendation, the approaches that may be employed to design better policies in elimination of use of hearsay rules under Rwandan criminal justice.

Keywords: *Hearsay Evidence, criminal Matters, cross-examination, confrontation*

CHAPTER ONE

GENERAL INTRODUCTION

I.1. Presentation of the topic

John says: “My friend Henry told me that he was very afraid of Bob”. Let us assume that Henry is dead, and that Henry said to nobody other than John that he was afraid of Bob. Bob is facing a murder charge of Henry. If John’s declaration is tendered to prove its content, i.e. that indeed Henry was very afraid of Bob, it is hearsay and, as a general rule, not admissible in a trial. What approach should be taken where hearsay is the sole or decisive evidence against defendant?

Historically, it can be traced that at early common law the hearsay evidence was freely admitted,[1] and surely this was a result of the sixteenth century whereby the criminal trial was regarded as a proceeding of probe or appreciation.[2] To this end, during the time, witnesses did not get time to appear in court to provide their testimonies with full understanding of the facts, however, the jury was duty bound to find those witnesses so as to collect the information needed from them without necessarily to appear in court.[3] Nevertheless, with the evolution of trial, as from the investigative to adversary proceeding, therefore, hearsay evidence became a threat to the fact finding process , then judges became the trial of facts who referred to the testimonies presented before court of law. [4] Therefore, it was then developed a rule in courts excluding extrajudicial statements provided to attest the reality of a certain stated fact.[5] This means that by agreeing with those statements given as such, was not supported as they did not give such a meaningful probative force to convince judges whether the stated fact was true or not.

[1] Wigmore JH, “The History of the Hearsay Rule”, 17 *Harv. L. Rev* (1904), pp.437-443.
[2] Morgan EM, “Hearsay Dangers and the Application of the Hearsay Concept”, 62 *Harvard Law Review* (1948*)*, pp. 177-180.
[3] II F. Pollock & R. Maitland, The History of English Law, 2d ed (1968).
[4] Wigmore JH, *supra* note 1, p.1364,
[5] La Placa v. United States, 354 F.2d 56 (1st Cir. 1965).

The 18th century has been described as the century of consolidation[6] and although commentators writing in the early years of the century expressed a degree of caution on the hearsay rule status, with the mid-century hearsay rule was treated in courts as a recognized part of the law. Towards the 18th century, hearsay evidence was commonly admitted[7] and the effort to exclude hearsay evidence from courts was steady.[8] According to Landsman's research, it was shown that at in the early of the 18th century a more complicated rule was being applied in a wide range of cases.[9]

By the 19th century the hearsay rule had become well established and the emphasis was to move to the creation of exceptions to counteract the inflexibility of the original rule. The emerging exceptions would create a further difficulty in interpreting the rule because, rather than attempting to effect a wholesale rationalization of the rule in a principled manner, the courts appeared to be preoccupied with the need to formulate exceptions out of convenience and to ameliorate the rule's perceived harshness.

Despite laws were adopted to protect suspects from injustice and promote fairness of trial, under Rwandan criminal court proceedings, hearings are conducted following the approach of admitting hearsay evidence whereby the prosecutors present written "testimonies" (procès-verbaux d' audition) without bringing the witnesses in person, whereas the Rwandan law of evidence defines testimonial evidence as "statements made in court by an individual regarding what he/she personally saw or heard that is relevant to the object of trial".[10] It is against this background that the practice of prosecutors in the Rwandan judicial system presents a problem regarding the admission of hearsay evidence as clarified below.

I.2. Problem statement

Generally, the rule of hearsay evidence in criminal matters operates to curb a witness from giving information made by another person where the truth of any fact declared in

[6] Choo, *Hearsay and Confrontation in Criminal Trials* (Clarendon Press Oxford, 1996), p. 5.
[7] Landsman "The Rise of the Contentious Spirit: Advocacy Procedure in Eighteenth Century Englandǁ", 75 *Cornell Law Review* (1990), p. 497.
[8] Landsman, *supra* note 7, pp. 566-569.
[9] Choo, *Hearsay and Confrontation in Criminal Trials,* (Clarendon Press Oxford, 1996), p. 7.
[10] Art. 62, law n° 15/2004 relating to evidence and its production (*O.G* no special of 19/07/2004).

that statement is not capable of being established in a court. It was actually stated that next to trial by jury, there is, possibly nothing more well established in the Anglo-American law of evidence than the hearsay rule and such rule that prohibits hearsay evidence is warmly associated with adversarial approach to litigation.[11] The origins of this approach may be traced back to the early 13th Century where the need to exclude hearsay was first recognized.[12]

The exclusion of hearsay evidence from a trial can be motivated by various reasons, however three of them are summarised in this paragraph; first in principle, the testimonial evidence provider should be cross-examined but once hearsay was admitted, cross examination becomes inoperative and the of the trier of fact did not have such occasion to perceive the demeanour[13] of the person who originally made the statement.[14] Generally, demeanor includes witness's dress, attitude, behaviour, and manner, tone of voice, grimaces, gestures, and appearance. In other words, demeanour includes "all matters which 'cold print does not preserve.[15] Second, evidence was not regarded as relevant to substantive issue or a credibility issue and thirdly, the hearsay evidence was not admitted as to do so would compromise the fairness of the trial.[16]

In the United States of America, hearsay rule and right of accused to cross examine the contrasting witnesses were developed together at the beginning of 18th Century when the United States was under British colony.[17] During this time, hearsay rule became constitutional, this is justified by the fact that in the US constitution sixth amendment which

[11] Wigmore, *Evidence in Trials at Common Law*, 3rd ed (Little Brown & Co., 1974), pp. 20-28.
[12] Turner, *Kenny's Outlines of Criminal Law*, 19th ed (Cambridge University Press, 1966), p. 565.
[13] Demeanor is often used as part of the evidence probative of a witness's credibility. [The witness] was a squat, heavy-set man of medium height.... His swollen face, bleary eyes, puffy eyelids, and reddish-purple nose marked the habitual drunkard. His shaggy ... hair had been stranger to brush or comb for so long as to have become tangled and matted. His clothes ... were covered with dirt and grease. His huge hands.., were covered with grime.
[14] Broadcast Music, Inc. v. Havana Madrid Restaurant Corp., 175 F.2d 77, 80 (2d Cir. 1949); see also Dyer v. MacDougall, 201 F.2d 265, 268-69 (2d Cir. 1952) (acknowledging the conduct, manner, and appearance that make up a witness's demeanor).
[15] Broadcast Music, Inc. v. Havana Madrid Restaurant Corp., 175 F.2d 77, 80 (2d Cir. 1949); see also Dyer v. MacDougall, 201 F.2d 265, 268-69 (2d Cir. 1952) (acknowledging the conduct, manner, and appearance that make up a witness's demeanor).
[16] Art. 29, the Constitution of the Republic of Rwanda Of 2003 Revised In 2015 (*O.G* n° Special of 24/12/2015).
[17] Pollitt H. "The Right of Confrontation: Its History in Modern Dress" *J.Pub. L. (*1959), p. 395.

was adopted in 1970, confrontation clause was introduced in and it was provided that in criminal cases the accused shall enjoy the right to be confronted with the witnesses against him.[18]

Furthermore, as per Taylor, when examining the reason why the common law right of confrontation received constitutional protection, Taylor agreed with the views point introduced by Pollitt who states that there seems to be another reason that motivated this constitutionalisation.[19] In his text, Taylor mentioned that: "in the late 17th century, when the US Constitution and the Bill of Rights were adopted, the general rule against hearsay had been established in England", he further added that the suspicion of out of court statements that gave rise to the hearsay rule doctrine was present in the mind of the United States legislators or constitution framers.[20]

In Barber v. Page[21], the state brought a petition that transcriptions of an interview of some witnesses which were taken during the preliminary hearing should be admitted as evidence against the accused in lieu of oral testimony. [22] In this case, it was argued the admissibility of such kind of manuscripts on behalf of the accused constitutes a denial of the accused's right to confrontation and cross-examine with the witness against him/her, and the court took position that such admission does not provide these rights to the accused person.[23]

In reference to Rwandan laws specifically law relating to evidence and its production, hearsay evidence is not allowed in court as the abovementioned law states that testimonial evidence is statements made in court by an individual regarding what he or she personally saw or heard with that is relevant to the object of trial. [24] This means that every witness testifies as to what s/he saw or heard personally. This was illustrated in the

[18] Pollitt H., *supra note* 16.
[19] David H. Taylor, "Hearsay and the right of confrontation in American trials by Jury", a paper delivered at chosun University, June 3rd 2011, Pp. 18-21.
[20] David H. taylor, *supra note* 18.
[21] Barber v. Page, 390 U.S. 719, 725 (1968). Accessed at https://supreme.justia.com/cases/federal/us/390/719/ [18/07/2021]
[22] Barber v. Page, *supra note* 17.
[23] Barber v. Page, 393 U.S. 719, 725 (1968). Accessed at https://supreme.justia.com/cases/federal/us/390/719/ [18/07/2021]
[24] Art. 62, Law no15/2004, *supra* note 10.

case *Prosecutor vs Bazubagira Clémentine*[25] In this case, the court based on the book "*Droit des obligation la prevue*" by putting forward the reasoning that "i.e., it is agreed that it is the one that results from statements (testimony) made by persons (witnesses) who relate what they have seen and heard. This mode of evidence therefore presupposes the hearing of people who have witnessed a scene, come to relate what they have observed and certify its existence. Many authors like to quote BENTHAM's formula "Witnesses are the eyes and ears of justice. [personal translation]"[26]

Furthermore, article 119 of the law relating to evidence and its production in Rwanda also provides that in criminal cases, evidence is based on all grounds, factual or legal if parties have been given a chance to be present for cross-examination. The courts rule on the validity of the prosecution or defense evidence.[27] Article 62 of law relating to evidence and its production provides; a testimony is a statement made by a person who claims to have "personal knowledge" of the facts in issue.

It is therefore not allowed to recount what one was told by another person with regard to the facts in issue. It is the person who personally saw the event taking place or who personally heard something happening who must come to court and give testimony. Evidence given by a person who was told by another person about how, when, why or by what means a particular event took place is known as "hearsay evidence" and is not, in principle, admissible in Court. Thus, a party is not allowed to tender as evidence in court a document written by a "witness"; he must bring the witness before the court to narrate his testimony orally. The practice by prosecutors of reading written "testimonies" (procès-verbaux d' audition) without bringing the witnesses in person is contrary to the law and this practice may raise some critical questions as it seems to allow hearsay evidence in court while it is not allowed by the law, some questions can be raised and analysed

[25] RP 0005/16/TB/TWB.
[26] *Procureur Vs Bazubagira Clémentine,* (RP 0005/16/TB/TWB), https://www.judiciary.gov.rw/uploads/tx_publications/law_052efaa17161f1e1044249e7efc5b17f1468572707.pdf [02/02/2020].]. In its original words, "*On s'accorde à dire que c'est celle qui résulte des déclaration (témoignage) faites par des personnes (les témoins) qui reratent ce qu'elles ont vu et entendu. Ce mode des preuves suppose donc l'audition de personnes qui ont assisté à une scène, viennent relater ce qu'elles ont constaté et en certifier l'existence. Beaucoup d'auteurs se plaissent à citer la formule de BENTHAM « Les témoins sont les yeux et les oreilles de la justice".*
[27] Art. 119, law n° 15/2004 *supra* note 10

through this thesis to understand this issue and find out how it can be solved through comparing to the practice of judicial proceedings in the USA.

I.3. Research questions

This study intends to make a comparative study of hearsay evidence in criminal matters between Rwanda and the USA. The purpose is to discern lessons that Rwanda can take from the rich jurisprudence of American courts and the American law which has been amended over time in order to respond to the demands and realities of times.

In doing so, the following questions will guide this study:

1. Is hearsay evidence admissible before Rwandan criminal courts?
2. Is the admission of hearsay evidence consistent with constitutional and statutory guarantees of a fair trial?
3. What can the Rwandan judicial system learn from USA laws and jurisprudence in terms of exceptions to the strict inflexible rule against hearsay in order to strike a proper balance between the need to protect the accused person against unreliable evidence and the interest to protect the society against crime?

I.4. Objectives of the study

I.4.1. General Objectives

This research is generally conducted to achieve an academic purpose. It is a dissertation required to obtain the master's degree in law. It is also mainly aimed to improve on the existing body of knowledge of criminal law in Rwanda. This research is therefore meant to describe the enforceability of the right of confrontation provided under Rwandan criminal procedure law, considering the law of evidence *vis-à-vis* the practice of prosecutors during judicial proceedings. It will help to know how the hearsay rule is applied under Rwandan judicial proceedings compared to USA practice and to ensure its constitutionality.

I.4.2. Specific objectives

In broader sense, this dissertation is aimed to.

a. Describe the concept of Hearsay evidence and its admissibility,
b. Determine the practice prosecutors in judicial proceedings vis-à-vis the right to confrontation in Rwanda,
c. Compare the Rwandan and USA criminal proceedings in regard to application of hearsay rule,
d. Find possible solutions and recommendations on the implementation of right to confrontation and hearsay evidence rule under Rwandan criminal proceedings.

I.5. Research hypothesis

This study is built on the hypothesis that hearsay evidence is not admissible before Rwandan criminal courts. It is also assumed, however, that exceptions should be introduced to this strict, inflexible rule against hearsay. In this regard, it is assumed that there is a lot to learn from the exceptions that have been developed to this rule by American courts and legislation.

I.6. Research methodology

For the author to address the legal issues described in the problem statement and attain the objectives of this study, different techniques and methods have been used in this research project.

1.6.1 **Research techniques**

In order to collect data about the subject, this study has been carried out by using the documentary technique which helped the author to read various related international instruments, domestic laws, case laws, library books, on line books, journal articles, and any other useful materials as well as internet sources.

I.6.2 Research methods

The findings have been drawn using the following methods; exegetic method was useful in gathering information specially to interpret different legal provisions from various relevant legislations. The other important method for this research is analytical method which has been used to analyze different elements of data collected. Synthetic method is another one used for structuring data collected to improve coherency of the work, last but

not least, is the comparative method which was used to compare the practice Rwandan judicial system versus USA judicial proceedings.

I.7. Structure of the study

This research is comprised of 4 chapters that will be structured as follows: The first chapter which sets out the general introduction is made of presentation of the topic and background of the study, problem statement, research questions, research hypothesis, objectives of the study, the research methodology and the outline of the study. The second chapter is about conceptual and theoretical framework of hearsay evidence in which it details the meaning of hearsay in criminal law, its applicability in different legal systems, and its admissibility before criminal courts. The third chapter consists of analysis of hearsay evidence rule under Rwandan law whereby it talks about how Rwandan judicial personnel consider this kind of evidence, and the analysis of the practice of prosecutors in courts and its impact on the administration of justice. This shall make a comparative study of hearsay evidence rule between Rwandan and USA jurisdiction so as to make clarification on the application of hearsay rule and learn from good practices from USA judicial system to be applied under Rwandan jurisdiction. Finally, in the fourth chapter the conclusion and recommendation shall be made to complete the thesis.

CHAPTER TWO

CONCEPTUAL AND THEORETICAL FRAMEWORK

«Good my Lord, let my accuser come face to face, and be deposed».[28] This is a statement developed in the case of European Court of Human Rights, between Al-Khawaja and Tahery vs. The United Kingdom.[29] By this statement the defendant wanted that the witnesses against him, should appear face to face in court for him to have his right of cross-examination and right to confrontation. This saying was also introduced in the United Kingdom (UK) Supreme Court in 2009 in Horncastle case[30], as it was cried by Sir Walter Raleigh at his trial for high treason in 1603 by court of Queen Elizabeth I. His complaint was that he had been deprived of a centuries-old common law right, namely, that of an accused person to confront and cross-examine the witnesses against him or her.[31]

The origin of the rule against hearsay lies in the common law right of confrontation, number of interests, most notably, the defendant's interest in receiving a fair trial by being able to cross-examine the witnesses against him; and the court's interest in using the most reliable evidence to reach conclusions which are accurate, a witness's testimony being most reliable when it has been subjected to cross-examination.[32] This right of confrontation was, of course, not original to the common law but derived from Roman law, as the King James's Bible attests; "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him."[33]

The rule against hearsay is one of the oldest and best known of the common law exclusionary rules of evidence. Despite the reforms introduced by the 2003 U.K. criminal

[28] David J, *Criminal Trials:* vol. 1, London, (Charles Knight, 1832), p.427.
[29] *Al- Khawaja and Tahery vs. The United Kingdom*, European Court of Human Rights, APP. NOs. 26766/05 and 22228/06
[30] R v Horncastle and others [2009] UKSC 14 (SC)
[31] Metcalfe, E "Time for the UK Supreme Court to think again on hearsay' (the Guardian)" https://www.theguardian.com/law/2011/dec/15/uk-supreme-court-rethink-hearsay [15/03/2021].
[32] *Al- Khawaja and Tahery vs. The United Kingdom*, supra note 21.
[33] Acts, 25: 16. Emphasis added.

Justice Act, it also remains the most complex.[34] One major justification for excluding hearsay evidence was, therefore, that it would otherwise deprive the defendant of his right to confront the maker of the hearsay statement face to face. In 1790, for example, the Lord Chief Justice Lord Kenyon observed that part of the unfairness of using hearsay lay in the inability of the defendant to challenge its accuracy.

Despite common law rules, under Rwandan law, hearsay evidence is not in principle allowed. However, some practices in court especially for prosecutors; show the admissibility of such evidence. It is in this regard; this kind of evidence has long history in criminal jurisdiction in terms of conducting fair trial. Therefore, this chapter deals with the definition of key concepts that shall be used in the entire dissertation, the origin and rationale of hearsay rule, its applicability in different legal systems, and the admissibility of hearsay evidence in courts.

II.1. Definition of key concepts

For clarity and better understanding of the study, it is pertinent to provide the full meaning of some concepts that will be consistently used in this dissertation. The concepts that will be defined and discussed are evidence, hearsay, cross-examination, confrontation, suspect, witness, prosecution and testimony.

II.1.1. Evidence

Evidence is defined as any material which tends to persuade the court to the truth or probability of some fact alleged or asserted before it. There are four types of evidence namely: oral testimony, documentary evidence, real evidence and circumstantial evidence.[35] Furthermore, according to Cambridge Dictionary; evidence means one or more reasons for believing that something is or is not true.[36] Broadly speaking, evidence

[34] Birch, 'Criminal Justice Act 2003: hearsay – same old story, same old song?' (2004) Crim LR 556 at 573
[35] Senior Inspector Sehloho "NC *Law of evidence*, course notes, LLM, Police Training College" https://www.researchgate.net/publication/319243871_LAW_OF_EVIDENCE_SEHLOHO_NC [on 20th April, 2021].
[36]The Cambridge Dictionary "evidence" https://dictionary.cambridge.org/dictionary/english/evidence [20th April, 2021].

is anything that you see, experience, read, or are told that causes you to believe that something is true or has really happened.[37]

II.1.2. Hearsay

According to black's law dictionary, hearsay is defined as testimony given by a witness who relates, not what he knows personally, but what others have told him, or what he has heard said by others. It is in other words an out of court statement that is involving someone other than the person that is testifying.[38]

Hearsay is the legal term for testimony in a court proceeding where the witness does not have direct knowledge of the fact asserted but knows it only from being told by someone. In general, the witness will make a statement such as, " X told me Y was in Huye," as opposed to "I saw Y in Huye," which is direct evidence. Hearsay is not allowed as evidence in the United States, unless one of about thirty-eight exceptions applies to the statement being made.[39]

In the US, Federal Rules of Evidence (FRE), hearsay is defined by the rule 801 (1) as a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.[40]

II.1.3. Direct examination or Examination in chief

Direct examination or examination in chief is a legal concept usually used in common law legal system during court practices in civil and criminal matters. It entails the questing of witness during a trial that is conducted by the party for which such witness is acting as a

[37] Collins Dictionary "definition of evidence" https://www.collinsdictionary.com/dictionary/english/evidence [20th April, 2021].
[38] Black's law dictionary free online legal dictionary 2nd ed. What is HEARSAY EVIDENCE? definition of HEARSAY EVIDENCE (Black's Law Dictionary) (thelawdictionary.org) [22/05/2021]
[39] Anon "Hearsay in united states law" Hearsay in United States Law | Hearsay United States Law (liquisearch.com) [27/05/2021]
[40] Art. VIII, Rule 801 (c) of 2020 Federal Rules of Evidence.

witness for such party. It is the first examination of witness by the party to which he/she is sided conducted under an oath.[41] At this level of examination of witness by the party who called him, leading questions may not be allowed, unless on matters that are introductory to the witness's evidence or not in dispute with permission of the judge.[42]

II.1.4. Cross-examination

This is a concept used of court proceedings, to mean the opportunity for the attorney or an unrepresented party to ask questions in court of a witness who testified in a trial on behalf of the opposing party. The questions on cross-examination are limited to the subjects covered in the direct examination of the witness[43], but importantly, the attorney may ask leading questions, in which he/she is allowed to suggest answers or put words in the witness's mouth. Sometimes, a strong cross-examination can force contradictions, expressions of doubts or even complete obliteration of a witness' prior carefully rehearsed testimony. In this regard, repetition of a witness's story, vehemently defended, can strengthen his/her credibility.[44]

II.1.4. Confrontation

Usually, a confrontation is the direct expression of one's view (thoughts and feelings) of a conflict situation and an invitation for the other party to express her or his views of the conflict.[45] Actually confrontations involve describing behavior and one's reactions to that behavior, clarifying and exploring issues in the conflict (substantive, relational, procedural). It also involves the nature and strength of the parties' interests, needs, and concerns. Then, it contains the disclosure of relevant feelings.[46]

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[41] United Kingdom encyclopedia of law, 'examination in chief in United Kingdom' Examination-In-Chief | United Kingdom Encyclopedia of Law (lawi.org.uk) [22/05/2021].
[42] United Kingdom encyclopedia of law *supra note* 34.
[43] Examination of witness by the party that brought him to be testify on his side, and the leading questions are prohibited at this stage unless for some circumstances such as under judge permission, etc.
[44] Anon "Cross-examination"https://dictionary.law.com/default.aspx?selected=408#:~:text=cross%2Dexamination,behalf%20of%20the%20opposing%20party [25th April, 2021].
[45]Gregg W "Conflict management and constructive confrontation"https://oregonstate.edu/instruct/comm440-540/confront.htm [10th March, 2021].
[46] Richard D. F., "Truth and Its Rivals in the Law of Hearsay and Confrontation Symposium: Truth and Its Rivals: Evidence Reform and the Goals of Evidence Law" *Hastings L.J.* (1998), p. 554.

II.1.5. Suspect

In criminal law, a suspect is under suspicion, often formally announced as being under investigation by law enforcement officials. Probable cause for an arrest exists when the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to believe that a suspect has committed, is committing, or is about to commit a crime.[47]

II.1.6. Probable cause for an arrest

Probable cause for an arrest is legal term mostly used to in criminal law, according to oxford dictionary of law, it is defined as reasonable grounds to believe that a particular person has committed a crime, especially to justify making a search or preferring a charge.[48]

Probable cause of arrest is in other words, a level of reasonable belief based on the facts that can be pronounced and which is required to arrest and prosecute a person in criminal court. The police or prosecutor must possess sufficient facts before arresting a suspected person to prove that the charges are true.[49]

II.1.7. Witness

In natural sense, the term witness means a person who is called to give testimony under oath or affirmation, in person or by affidavit or by transcripts in court of justice, tribunal or office created by law for that purpose, regarding any matter in respect of which an oath or affirmation may be required or so authorised by law.[50]

The term witness in legal sense, means any person competent to give evidence in a cause before a court of law, but has also been defined as one who has sufficient knowledge of a fact or occurrence to enable him or her to testify with respect to the matter

[47]Anon "Suspect" https://definitions.uslegal.com/s/suspect/ [10th March, 2021].
[48] Oxford dictionary of law
[49] Farlex, the free legal dictionary Probable Cause legal definition of Probable Cause (thefreedictionary.com) [22/05/2021]
[50] Anon "Witness definition" http://www.duhaime.org/LegalDictionary/W/Witness.aspx [11th March, 2021].

in court, and an eyewitness has been defined as one who has been called to attest to the matter of fact regarding what he/she has personally seen or heard.[51]

II.1.8. Prosecution

According to Rwandan law on criminal procedure of 2019, the term 'prosecution' means any act aimed at instituting legal proceedings in the court, summoning parties and appearing before court, preparing the hearing, litigating, and using appeal procedures.[52]

The people's law dictionary defines the prosecution as the process in criminal law, whereby the government attorney is charging and trying the case against a person accused of a crime. It is also referred to as a common term for the government's side in a criminal case.[53]

II.1.9. Testimony

According to Rwandan law of evidence and its production, testimony or testimonial evidence is defined as statements made in court by an individual regarding what he or she personally saw or heard with that is relevant to the object of trial.[54]

For a testimony to be admissible in court and for maximum reliability and validity, written testimony should in principle be produced by one or more persons who makes an oath or affirm the authenticity of his/her production under penalty of perjury. [55] Unless the expert witnesses who are called to testify as an expert, testimony in the form of opinions or inferences is generally limited to those that are rationally based on the perceptions of the witness and are helpful to a clear understanding of the testimonial evidence.[56]

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[51] Anon, *supra* note 35.
[52] Art. 3 (3º), Law nº 027/2019 of 19/09/2019 relating to the criminal procedure (*O.G.* Special of 08/11/2019)
[53] Gelard and K. hill "Prosecution" https://dictionary.law.com/Default.aspx?selected=1656#:~:text=prosecution,(has%20completed%20its%20case) [17th April, 2021].
[54] Art. 62 of law No 15/2004, *supra note* 10.
[55] Anon, *supra* note 39.
[56] Anon, *supra* note 39.

II.2. Rationale and origin of the hearsay rule

As far as this dissertation is concerned there is no common understanding on the rationale of the hearsay rule. However, different scholars tried to clarify the rationale by categorising such rationale into six major theories, in this dissertation, the author did not detail each theory among the six rather some of them are hereby discussed on by the following scholars; John Wigmore, John Langbein, Richard Friedman, Edmund Morgan, H.L.Ho, and Fredrick Koch. Within their respective manuscripts, they pointed out the discrepancies on the rationale of the hearsay rule which resulted in description of hearsay rule' s historical rationale into different languages. However, when the different methodologies are peeled away, the theories describe aspects of a common rationale.

By looking at each scholar's point of view to rationale of hearsay rule, according to John Henry Wigmore, the hearsay rule was established to discourage lay jurors from misconstruing the reliability of hearsay evidence. According to his theory, he took position that lay jurors will misevaluate testimony and his theory was the most accepted and referred to in Canadian jurisprudence.[57] However, he did not explicitly articulate his theory of the hearsay rule's historical rationale.

In his famous book, "the treaties on the Anglo-Amercan system of evidence in trials at common law", Wigmore emphasized on the fact that unsworn hearsay statements were frequently inadmissible and thus excluded from evidence by common law judges from 1670s.[58] he further explained that in the years of 1696s both sworn and unsworn hearsay statements were barred, only for the reason was the necessity of conducting cross-examination of the statement declarants. Moreover, in these utterances of the early 1700s, cross-examination began to be more valued and the reason put forward for this

[57] John HW, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of All Jurisdictions of the United States and Canada,* Vol. 4 (1904), pp. 1685-1686.
[58] John HW *supra* note 41.

distinction between statements made out of court and statements made on the stand is that "the opponent has no opportunity of a cross-examination". [59]

According to James Thayer, most common law exclusionary rules of evidence developed to prevent lay judges from misevaluating evidence and hearsay was one of several such types of evidence.60 His theory is that the common law exclusionary rules of evidence enhance fact-finding in judges' trials by rejecting testimonial evidence that will be overvalued by lay judges. He also believes that the exclusionary rules are not necessary in judge-alone trials because judges have a higher competence for evaluating testimonial evidence.[61]

The second theory is promoted by John Langbein, the latter agreed with Wigmore that frequently exclusionary rules of evidence including the hearsay rule, were developed by judges to protect against the perceived tendency of lay jurors to overvalue testimonial evidence but believes that the exclusionary rules relating to unsworn hearsay evidence developed later, in the 1700 and 1800s, as defense lawyers began to represent accused persons in felony trials.[62]

The third theory is also advanced by Richard Friedman, in his point of view, he challenged the proposition that the hearsay rule is a judicial control on the goodness of the trier of the fact. Friedman suggests that the core of the hearsay rule is to provide the accused the right to confront and challenge the witnesses against him/her during their testimony at trial.[63]

Freidman also put his concern on the right to confrontation and he emphasized on the right of confrontation and said that it was not efficiently applied in the time leading up to the 18th century, Freidman found that the courts did not efficiently enforced the right to

[59] Frederick WJK, *Wigmore and Historical Aspects of the Hearsay Rule* (PhD Thesis, Osgoode Hall Law School of York University, 2004) p. 90.
[60] Frederick, *supra* note 6, p. 62.
[61] James BT, *A Preliminary Treatise on Evidence at the Common Law* (1898), pp. 267-268.
[62] John H. Langbein, "The Criminal Trial Before the Lawyers" 45(2) U. *Chi. L. Rev. 263* (1978), pp. 306-315. [*Before Lawyers*]. Langbein did not challenge Wigmore's description of sworn hearsay.
[63] Richard D. Friedman, *No Link: The Jury and The Origins of the Confrontation Right and the Hearsay Rule*, (University of Michigan Law School Faculty 1988).

confrontation. [64] Freidman realized that the confirmation or denial of the right was never dependent on the jury's perceived ability to evaluate the hearsay evidence rather, it was the concern of procedural issue of whether the witness should give their testimony in open court, face to face with the adverse party. [65] Friedman recognizes that the right of confrontation is narrower than the scope of the hearsay rule. The right of confrontation, as conceived by Freidman, only extends to sworn statements taken for the purpose of serving as testimony.[66]

The fourth theory is advanced by Edmund Morgan, according to Morgan, hearsay rule is irrelevant to concerns about the evaluative capacity of the triers. He revealed in his research that there are several number of reason why for hearsay rule until 1700s and all of them are unrelated to jury.[67]

The inadmissibility of hearsay is grounded on the fact that hearsay is not information based on a witness' observations rather based on what the witness is trusting enough to believe, and legally speaking, it is a statement made out of oath.[68] Evidently, by hearsay, the opposing party in litigation is unable to benefit the opportunity to challenge a hearsay declarant through cross-examination and the trier as well is unable to test the declarant's sincerity, characters and perception of the statement in question.[69]

Cross-examination in criminal trials is a key principle and, in some jurisdictions, it became a constitutional right and other jurisdictions including Rwanda, it was legalized implicitly or explicitly. Cross-examination thus enables the opposing party especially the accused the opportunity to challenge the evidence of witnesses by testing the potential sources of unreliability and make them plain to the bench or trier of fact.[70] It allows the judges or triers to better weigh the relevance of oral evidence, but such perception into the reliability

[64] Richard D. Friedman, *supra* note 8, p.98.
[65] Richard D. Friedman, *supra* note 8, p.98.
[66] Richard D. Friedman, *supra* note 8, p.99.
[67] Edmund M. Morgan "Hearsay Dangers and the Application of the Hearsay Concept" 62 *Harv L Rev 177* (1948), pp. 182-183.
[68] Edmund M. Morgan "The Jury and the Exclusionary Rules of Evidence" 4 *U Chi L Rev. 247* (1936), p. 254.
[69] Erwin N. Griswold "Due Process Revolution and Confrontation", *Univ. of Pennsylvania L. Rev*. (1971), pp. 712-714.
[70] *R. v. B. (K.G.)*, [1993] 1 SCR 740; [1993] SCJ No 22 (CanLII).

of testimony is lost when hearsay evidence is admitted. According to Ho, he suggested that hearsay rule derived from a concern for the reliability of testimonial evidence brought a new dimension to the debate about the historical rationale of the hearsay rule.[71]

The sixth theory is advanced by H.L. Ho. According to Ho, fairness is the key player of the historical rationale of the hearsay rule, Ho claimed that hearsay is mainly based on the two conceptions of fairness and one of which is that it can bring the unfairness to the adverse party by assuming that the declarant would have proven his or her statement if he or she testified.[72]

In general, under the adversarial system, the party giving the witness as evidence in trial bears the risk that such witness will not be able to prove his or her expected evidence. Thus, several reasons why a witness' testimony may not prove their anticipated evidence were drawn up by H.L Ho in his book termed "a theory of hearsay" including but not limited to; the witness' conduct may prove faithless in their testimony in the opinion of the trier of fact. Other reasons is that the conception of fairness is the disadvantage to the adverse party by the production of hearsay evidence without giving that party the chance to remove the prejudice caused by that evidence.[73]

The hearsay rule's scope of application in some jurisdictions is limited by different factors. However, two of which are key features notably; the availability of the statement maker as a witness and the use of the out of court statement to prove the truth of its contents.[74] In Canadian law, hearsay evidence is defined as an out of court declaration by a person 'not called as a witness'[75] tendered in evidence to prove the truth of the declaration's contents in trial.[76]

[71] H.L.Ho, "a theory of hearsay rule" Oxford Journal of Legal studies (1999), PP.400-407
[72] H.L. Ho, *Supra note* 62, p. 403.
[73] H.L. Ho, *supra* note 52, p. 409
[74] Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *Sopinka, Lederman & Bryant – The Law of Evidence in Canada, 4th ed.* (Toronto: LexisNexis Canada, 2014) at 238
[75] what is meant by "not called as a witness" is the inability for contemporaneous cross-examination on the utterance. Otherwise, prior inconsistent statements would not be properly considered hearsay
[76] Alan W. Briant et. Al., *supra note* 63.

Nowadays, the hearsay rule is on a new long road, with a principled rule governing the acceptance of hearsay evidence. To be allowed into testimony, all hearsay proof must meet the dual standards of necessary and trustworthiness.[77] The absence of the hearsay document's substance is a requirement. In some circumstances the statements made by the person who are unavailable in trial can be rely on and declared admissible for instance, if the statement maker was deceased, attacked by serious illness that unable him/her to access the trial, incompetent to testify after making statement out of court, or otherwise unavailable, the court declares those circumstances as necessary to admit the statements as evidence as an exception to the hearsay rule and decide to rely on them of losing the evidence of an unavailable declarant. Hearsay evidence must be 'necessary' in this sense of being trapped to be admissible. Reliability is the ability to negate the likelihood that the declarant of a hearsay statement was mistaken or untruthful.[78]

II.3. Due process, crime control and hearsay rule

II.3.1. Due process

Due Process, the second model refers to put in places boundaries of powers of the government to bring investigation process and arrest person suspected of having committed a crime or crimes. It rejected the aspect from the crime control model which suggests a wide room and power for investigators without being pinned up by the legal technicalities. In due process views, some scholars mentioned that the suspects' confessions and admissions at the police custody are not accurate, rather they may be induced by physical or psychological coercion as well as intimidations, so that the police end up hearing what the suspect thinks they want to hear rather than the truth. [79] on the other hand, witnesses may be stimulated by a bias or interests that no one would care to discover.[80]

[77] *R. v. Smith*, [1992] 2 SCR 915, 1992 CanLII 79 (SCC), para. 33.
[78] *R. v. Smith*, [1992] 2 SCR 915, 1992 CanLII 79 (SCC), para. 33.
[79] Grimm P. W., et el., "The Confrontation Clause and the Hearsay Rule: What Hearsay Exceptions Are Testimonial?" *University of Baltimore Law Forum: Vol. 40: No. 2* (2010), pp. 155-165.
[80] Grimm P. W., et el., "*supra note* 65.

Packer's due process model is a counterproposal to the crime control model. It supports the main idea of protection of the suspect against any kind of violence or threat. In any case, due process model implies that the truth should be obtained through a very conducive way. No other way out.[81]

The following are its arguments which obviously oppose to the crime control discussed above.

1) The most important function of criminal justice should be to provide due process, or fundamental fairness under the law.
2) Criminal justice should concentrate on defendants' rights, not victims' rights, because the Bill of Rights expressly provides for the protection of defendants' rights.
3) Police powers should be limited to prevent official oppression of the individual.
4) Constitutional rights aren't mere technicalities; criminal justice authorities should be held accountable to rules, procedures, and guidelines to ensure fairness and consistency in the justice process.
5) The criminal justice process should look like an obstacle course, consisting of a series of impediments that take the form of procedural safeguards that serve as much to protect the factually innocent as to convict the factually guilty.

Due process as defined by Packer, it is a compendious term that stands for all the complexes of activity that operate to bring the substantive law of crime to bear (or to avoid bringing it to bear) on persons who are suspected of having committed crimes. It can be described, but only partially and inadequately, by referring to the rules of law that govern the apprehension, screening, and trial of persons suspected of crime.[82]

Before going through the tension of the two models of the criminal process, it is better to understand well the meaning of the criminal process itself. Due process refers to a kind

[81] Ray Yasser "*Strangulating Hearsay: The Residual Exceptions to the Hearsay Rule*" *Tex. Tech. L. Rev*. pp. 587&589.
[82] Packer HL "Two Models of the Criminal Process" 113 *University of Pensylvania Law Review* (1964), p. 2.

of court conduct in criminal matters to conduct trials in accordance with the established rules and principles. It is hence the positive guarantor of the social freedom.[83]

Packer, further explained different perceptions that people get from the explanation of the criminal process that convictions based on coerced confessions may not be permitted to stand. In collecting evidence, the police violate rules of privacy and that the evidence obtained in that manner are excluded from the criminal process.[84] Packer detailed his motivation with a crucial example on the victimless offence[85] like fornication that is hard to investigate. However, if the suspect may be entrapped into committing this offence, if police may arrest and search the suspect without evidence that he has committed an offense, if wiretaps and other kinds of electronic surveillance are permitted, it should be much easier to detect the aforesaid crimes.[86]

From the above understanding, Packer made clear the two models underlying the fair criminal process. He submitted that effective models are ones that will only fortuitously tell us anything useful about how the system actually operates and that might emerge from an attempt to cut loose from the law on the books and to describe, as accurately as possible, what actually goes on in the criminal process would so subordinate the inquiry to the tyranny of the actual that the existence of competing value choices would be obscured. Ones that reflect the above description is the normative model that permits to recognize explicitly the value choices that underlie the details of the criminal process. Packer explicitly mentions the underlying two models which are Crime control and due process .[87]

[83] Packer HL, *supra* note 82, p.9.
[84] John G. Douglas "Admissibility as Cause and Effect: Considering Affirmative Rights under the Confrontation Clause" Quinnipiac L. Rev. (2001-2003) at 1047.
[85] Those are offences that do not result in anyone's feeling that he has been injured so as to impel him to bring the offense to the attention of the authorities.
[86] Packer HL, *supra* note 82, pp.4
[87] John W. Carins & Grant McLeod, eds. *The Dearest Birth Right of the People of England: The Jury in the History of the Common Law,* (Oxford: Hard Publishing, 2002), p. 93

II.3.2. Crime Control

Crime control refers to the need of the government to regulate the crimes through ex post facto clause of the Constitution that the function of defining conduct that may be treated as criminal. Packer clearly demonstrated that whatever the case, the state has an obligation to control crimes so as to avoid their paramount consequences in the society.

Crime Control Model is based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process.[88] The failure of law enforcement to bring criminal conduct under tight control is viewed as leading to the breakdown of public order and hence to the disappearance of an important condition of human freedom. As earlier stated, the criminal process is the positive guarantor of the social freedom. So, this freedom cannot be reached without regulating anything that is likely to undermine it. It is hence done through legislating laws that oblige or prohibit certain conducts and punish the violation of the same.

In so doing, Packer mentioned that efficient operation is required, which means that the state must have the system's capacity to apprehend, try, convict, and dispose of a high proportion of criminal offenders whose offenses become known.[89]

This core character of efficient operation is viewed as an obstacle because most states do not have efficient means to control crimes due to lack resources. This raises tension which in return affects the due process required as shall be explained below.

Administrative model: Packer argued that in clearing out the crime control, all underlying acts should be done administratively. The criminal process, on this model, is seen as a screening process in which each successive stage- pre arrest investigation, arrest, post arrest investigation, preparation for trial, trial or entry of plea, conviction, and disposition- involves a series of routinized operations whose success is gauged primarily by their tendency to pass the case along to a successful conclusion. Police and prosecution must

[88] Packer argued that the repression of crime should be the most important function of criminal justice because order is a necessary condition for a free society.
[89] Packer HL, *supra* note 80, p.10.

apply administrative expertness in early determination of the probable innocence or guilt emerges.[90] The probably innocent are screened out. The probably guilty are passed quickly through the remaining stages of the process.

The presumption of guilt allows the Crime Control Model to deal efficiently with large number. Once it is found that there is enough evidence of guilt so that the alleged person should be held for further action rather than released from the process, then all subsequent activities directed toward that person must base on the view that he/she is probably guilty.

In brief, against the background above, as per Packer's arguments on crime control, the following are its detailed characters that raise tension as far as the due process is concerned:

a. Repression of criminal conducts
b. Criminal justice should concentrate on vindicating victims' rights rather than on protecting defendants' rights.
c. Police powers should be expanded to make it easier to investigate, arrest, search, seize, and convict.
d. Legal technicalities that tie up the police should be eliminated.
e. The criminal justice process should operate like an assembly-line conveyor belt, moving cases swiftly along toward their disposition.
f. If the police make an arrest and a prosecutor files criminal charges, the accused should be presumed guilty because the fact-finding of police and prosecutors is highly reliable indicators of probable guilty.[91]
g. The main objective of the criminal justice process should be to discover the truth or to establish the factual guilt of the accused.

II.3.3. Cross-examination

[90] Packer HL, *supra* note 80, p.13.
[91] Richard D. Friedman "*'Face to face': Rediscovering the Right to Confront Prosecution Witnesses"*, *International Journal of Evidence & Proof* (2004) p.16.

Historically, the necessity of cross-examination was to enable the opposing party and provide him/her with the opportunity to examine those potential sources of unreliable evidence and expose them to the trier of fact. The current application of hearsay rule and exercise of right to confrontation were endangered by the admissibility of hearsay' s exceptions as well as introduction of out-of-court transcripts as they were during the rule's development in the 1600s and 1700s. Testing the reliability of hearsay evidence is believed to enhance the declarant's perception, memory, narration, and honesty, as well as observing the declarant's character.[92]

The hearsay rule assumes that cross-examination will generally allay the hearsay dangers. The basis of the assumption is Wigmore's belief that lay jurors overvalue the reliability of hearsay. The influence of demeanour evidence on the admission of hearsay is substantial, though it is sometimes subsumed by the role of cross-examination, in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him or her to stand face to face with the jury in order that they may look at him or her, and judge by his or her demeanor upon the stand and the manner in which he or she gives testimony whether he/she is worthy of belief.[93]

Professor Zuckerman reminds us of a fourth reason for excluding hearsay, in addition to the lack of cross-examination, the absence of an oath, and the lack of an opportunity to assess the witness's demeanour. While cross-examination has utilitarian value in testing the reliability of evidence, it also has intrinsic value in the notion of confronting one's accuser. In the United States, the accused's right of confrontation is a constitutional significance.[94]

In criminal proceedings, the main purpose of cross-examination by defense counsel is to eliminate the reasonable doubt on the evidence and to rule on the basis of reliable

[92] *R. v. B. (K.G.)*, [1993] 1 SCR 740; [1993] SCJ No 22 (CanLII).
[93] *Mattox v. United States*, 156 U.S. 237, pp. 242–43 (1895), accessed at https://supreme.justia.com/cases/federal/us/156/237/ [18/04/2021]
[94] Detailed discussion of the United States position on the accused's right of confrontation can be found in the United States Supreme Court's decision in *Crawford v Washington*, 124 SCt 1354 (2004) and paragraphs 11.10 to 11.13 of this paper.

evidence. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial judge and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.[95]

The accused has the right, guaranteed by Rwandan Code of criminal Procedure, to confront the witnesses who are to testify against him.[96] However, this right is explicitly guaranteed during the investigation process not in criminal proceedings which in principle should be exercised during the criminal case hearing. One of the guiding principles during the criminal case trials is that of adversarial proceedings and equality of arms before the laws.[97] The law does not clearly guarantee that the concerned parties shall enjoy the principle of adversarial proceedings. Thus, the rights of confrontation during criminal investigation which is well explained in the law of criminal procedure should also be guaranteed to be exercised during court hearings in criminal cases.

In many cases, the confrontation principle is the key basis of rules of evidence for the exclusion of hearsay evidence. An out-of-court statement also known as hearsay evidence is usually inadmissible because of the doubt and suspicion which is attached to the accuracy of such evidence. Different scholars agreed that denial of right to cross-examination which mainly deprives of the accused's right to confrontation with witness against him/her affects the truth-finding process though, certain statements are admissible even though they are hearsay, such as the statements by deceased persons against their interest as well as declarations made by declarant who is not available to testify in court .[98] The reason for the admissibility of the exceptions to hearsay is that such

[95] Art 68, Law Nº 027/2019 of 19/09/2019 relating to the criminal procedure, OG n° Special of 08/11/2019
[96] Art. 52 of law No 027/2019 of 19/09/2019, which states that "The investigator or prosecutor in charge of case file preparation, either on own initiative or upon request by any interested party may organize confrontation between the suspects themselves, between witnesses or between the suspect and witnesses, between the victim and witnesses or between the offender and the victim of the offence. Every confrontation is subject to a statement".
[97] Art. 126 para 4 of law No 027/2019 of 19/09/2019, *supra note* 61.
[98] Zeffertt et al, *supra* note, p. 381, regarding the status of the common law and statutory exceptions before the advent of the Law of Evidence Amendment Act 45 of 1988.

statements are made at a time and under such circumstances that they are unlikely to be false.[99]

In the United States, the right to confront prosecution and the witnesses also prevents the use of an out-of-court statements against the accused, unless such statements and circumstances around the given statements indicate that they are reliable and trustworthy i.e., with the indicia of reliability, and at the time the declarant is unavailable for trial.[100] Thus, the right to face-to-face confrontation in terms of the Sixth Amendment is not absolute but, the United States Supreme Court admit the validity of out-of-court statements as hearsay exceptions in many cases.[101]

It is a requirement of a fair hearing that the trial should take place in open court, and the accused has the right to see and know his accusers. Therefore, confrontation is fundamental to a fair trial. Any violation of the right to confrontation amounts to an irregularity, which will lead to a setting aside of the conviction.[102] The right to confrontation entails that the accused must be able to observe the witness whilst he is giving evidence against him.[103] The accused can thus test the recollection of the witnesses testifying against him through confrontation. The right of confrontation is said to be important to the fact-finding process because most courts presume that witnesses are less likely to lie in the presence of the accused.

[99] Estate De Wet v De Wet 1924 CPD 341. In the court findings, it ruled that the same principle regarding exceptions to hearsay, can be extended to statements made by an insolvent when something has occurred which may have caused him to wish to give a false impression of his previous state of mind as in this case. Thus, the court held that statements by an insolvent are original evidence and not hearsay, since they are tendered to prove the state of mind of the insolvent at the time and not the truth of such statements.

[100] Ohio v Roberts supra. In this case the court tried to make clears line to the issue of hearsay rule regarding to the confrontation. The court had indeed to take decision on the admission of statements made out-of-court by anonymous declarant. It therefore, reaffirmed that the use of out-of-court statements of an unavailable declarant does not violate the Confrontation Clause.

[101] Attox v US supra at 244-50 (1895). in this case, the court recognized the validity of exception of dying declaration (i.e. statement made by a declarant who is unavailable to testify in court) statements. However, The Florida Supreme Court decision in Conner v State, the court decided on the unconstitutionality of elderly hearsay exception as of section 90.803 (24) of the Florida statutes. In addition, this was also commented on by many scholars such as *University of Miami Law Review 583*, pp. 614-617.

[102] Ronald M., *Dworkin Taking Rights Seriously,* (1977), p.197.

[103] The right to present oral argument or confrontation between the accused person and accusers including prosecution, deals with the right to present and access urges in court from the bench of judges, prosecution, and witnesses as well. Not only that but it deals also with the right to receive these impulses.

A frequently arising problem in criminal litigation involves the relationship between the exceptions to the hearsay rule and the confrontation clause. The express language of the confrontation clause guarantees that the accused has the right to confront witnesses against him.[104] This is not only provided in the Rwandan law on Criminal procedure but also in the law on civil procedure in its article 72 paragraph 12 which states that parties are given an opportunity to react to testimonies, and where necessary, to cross-examine each other or engage in cross-examination with witnesses. The effect of a strict application of the confrontation clause is diametrically opposed to the introduction of evidence under a hearsay rule exception.

The primary object of the constitutional provision in question was to prevent depositions of *ex parte* affidavits. Being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him or her to stand face to face with the jury in order that they may look at him or her, and judge by his or her demeanor upon the stand and the manner in which he or she gives testimony whether he/she is worthy of belief.[105]

In the light of the above, hearsay is a fairly difficult subject in itself. From the outset, when we talk about hearsay, we are referring to a subject that is both very technical and difficult because it directly affects the basis of the criminal trial in its fundamental objectives of seeking the truth, respecting the fairness of the trial, the right of defense of the accused. This leads us to briefly discuss the rules determining the admissibility of hearsay evidence in criminal law. It is generally recognized by Anglo-Saxon authors that the hearsay rule finds its origin in the jury system. It is in England that the hearsay rule was developed in the wake of resounding miscarriages of justice. The English judges then thought that excluding hearsay would reduce the risk of untruth some proof.[106] Over the years,

[104] Art 52, Law Nº 027/2019 of 19/09/2019 relating to the criminal procedure, (*OG* n° Special of 08/11/2019).
[105] *Mattox v. United States supra* note 57.
[106] Jean P, *Droit Pénal Comparé,* 2e Éd. (Publisher, year) p. 459. Il montre que la distinction entre fait et droit pose des difficultés en common law, ou c'est le cas, on hésite parfois dans la détermination de ce qui constitue au fait et devra être en conséquence attribué au jury. S'agissant des questions de droit, elles sont du domaine du juge.

significant changes have, in the relevant jurisdictions, been effected whereby hearsay became admitted subject to the fulfilment of certain criteria of admissibility.[107]

II.4. Applicability of hearsay rule in different legal systems

Under this section, common law legal system and civil law legal system were examined regarding the applicability of hearsay rule and exceptions to be given much emphasis.

II.4.1 common law legal system

In the common law legal system i.e. Anglo-American system whereby precedents or jurisprudences constitute binding source of law in courts, the oral arguments are presented in the courts cases are proven at trial. Hearsay rule approach is unclear and complex areas of law of evidence in common law legal system. It (the rule itself) is subject to complicated exceptions and by default inadmissible type of evidence.[108] Thus, in common law legal systems, verbal argument and persuasion are too emphasised, but those testimonies must be direct evidence to be relevant.[109] Because of lack of test of accuracy in hearsay evidence, some exceptions to the exclusion of hearsay rules are drawn.[110]

II.4.2. Civil law legal system

In civil law legal system, the limited role of litigants reflects the Civil Law system's bias against witness-based evidence. In this system, the judges commonly consider witness testimony one of the lowest standards of proof.[111] There is no general analysis of rules on admissibility of the testimonial evidence in civil law system, the judges have a discretion to decide on the admissibility of testimonies by applying their own personal evaluation.[112] In general sense , civil law system has no rule excluding hearsay evidence,

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[107] Jean P., *supra note*, 68.
[108] Anon "The hearsay rule: exclusion of hearsay evidence" htts 59 – The hearsay rule: exclusion of hearsay evidence (judicialcollege.vic.edu.au) [22/05/2021].
[109] K. debesu and A. Eshetu, Evidence in civil and common law legal systems" Evidence in civil and common law legal systems(abyssinialaw.com) [22/05/2021].
[110] Exception to the hearsay rules are detailed in the next chapters.
[111] C. M. Bradley, criminal procedure: a worldwide study 265 (North Carolina Press, 2nd Ed. 2007).
[112] K. debesu and A. Eshetu, *supra note* 86.

rather it (civil law system) left room for the court to decide the value of what have been said which at all (hearsay like other testimony) is viewed generally as the lowest form of proof.[113]

To small, there is no test of veracity of hearsay evidence in all systems to enable judges and the opponent party to know whether or not the witness is speaking the truth, therefore, cross- examination and physical presence of the real witness can be recommended irrespective of type of legal system, since those (cross-examination and presence of witness) those are the rights of the accused to confront his or her accusers in many countries' criminal codes including Rwanda.

II.3.1.2. Consideration of hearsay rule under different legal systems

The hearsay rule is specific to common law legal systems from where rules of admissibility of evidence are drawn. Prohibition of hearsay evidence in common law, founded in principle, interpreted in the extreme, leads to sophisticated rules. The traditional rule is that hearsay cannot be admitted into evidence. This general rule, over the years, has been affected by a series of exceptions, notably in the Canadian criminal law.

The view of the criminal procedure and criminal trials as primarily a truth-finding enterprise seems to enjoy a widespread support. Even a cursory look at literature reveals the importance of this objective regardless of whether a system is more interested in crime control or ensuring fundamental rights to its citizens; or whether it belongs to one legal tradition or another. Ashworth and Redmayne state that the 'purpose for having trials in the first place is to make accurate decisions.[114] Findlay also posits that 'In criminal cases, fact-finding accuracy is the driving objective and preventing conviction of the innocent is a paramount concern.[115] As Roberts writes about the English system, "the aspiration that judicial verdicts should conform as nearly as possible with the truth, not surprisingly, merits pride of place as the first principle of criminal evidence."[116] The United States

[113] A. Stadler, The Law of Civil Procedure, in Introduction to German Law 365-67, (Werner F. Ebke & Matthew W.Finkin eds.1996).
[114] Andrew Ashworth & Mike Redmayne, *The Criminal Process, 3rd Ed.* (Oxford University Press, 2005), p. 299.
[115] Keith A. Findley "*Innocence Protection in the Appellate Process*" 93 *Marq. L. Rev*. (2009), pp. 591- 592
[116] Roberts & Zuckerman, note 3, at 18.

Supreme Court in *Funk v. United States*[117] wrote of the rules of evidence: “The fundamental basis upon which all rules of evidence must rest if they are to rest upon reason – is their adaptation to the successful development of the truth. "Accuracy of fact-finding" or "ascertaining the truth" is held in similarly high regard in other systems.[118]

As the search for the truth is the main objective of criminal proceedings, the quest to discover the truth cannot be at any cost. All means are not acceptable to achieve this. This is the real dilemma of criminal law: the necessity, on the one hand, to punish the guilty and that, on the other hand, to protect the innocent. It is even of the dignity of the person which is a principle which admits of no exception. And especially when referring to the underlying principle that one cannot obtain proof at any price. Inhuman or degrading means are not tolerated, as well as those that can harm the physical integrity of the person. Moreover, this search for the truth can only be done by respecting certain principles. They include: the presumption of innocence, the principle of fair trial, and equality of arms, respect for the dignity of the person. The existence of these fundamental elements testifies the desire to provide the accused with maximum individual guarantees that we are entitled to from a criminal proceeding.

In order to effectively respect and reach the compromise approach of the inclusionary and exclusionary rules as advised by VAN DER MERWE and Cowen and Carter essay on evidence; the law should strive to balance the interests of citizens to be protected from illegal invasions of their liberty and the interest of the state to bring to justice persons guilty of criminal conduct.[119] They finally add that the attempt to reconcile those two interests that can obviously be in conflict will mean that sometimes illegally obtained evidence will be admitted and sometimes rejected.

In the United States, the accused legal right to cross-examination against the opposing witnesses legal right to cross-examination against the opposing witnesses originated from Roman Law used to be developed together with the hearsay rule throughout the beginning of 18th century when the U.S. at the time the latter became a British colony.

[117] Funk v. United States, 290 U.S. 371 (1933) U.S. Supreme Court.
[118] Eerik Kergandberg, *Üldmenetluse ja erimenetluste aheline pinge Eesti tänases kriminaalmenetlusõiguses ja kohtupraktikas*, Juridica 8 (2012), 579.
[119] VAN DER MERWE SE, “Compromise Between the Common Law and the Exclusionary Rule”, p. 205.

This right grew to be constitutional right during the same period. This is the case of 6th amendment (confrontation clause) of US constitution which was adopted in 1790 and which introduced the provision that "in criminal matters, the accused shall enjoy the right to be confronted with the witnesses against him/her".[120]

Taylor commenting on the reason why common law right to confrontation obtained a constitutional protection, he pointed out that he was in accord with the views expressed by Pollitt whereby he claimed that, there seems to be another reason that motivated this constitutionalisation, as he states that "in the late 1700's, when the United States Constitution and the Bill of Rights were adopted, the general rule against hearsay had been established in England. The same mistrust of out of court statements that gave rise to the hearsay rule doctrine was present in the mind of the framers of the Constitution".[121]

Furthermore, it looks that the constitutionalisation of the common law rights to confrontation was created out of worry and concern that hearsay evidence would prejudice an accused and that there was mistrust about whether states officials who were mandated to administer the law enactment would not protect this fundamental right. According to Taylor's views, it is evident that he supported the arguments of John Adams (US 2nd president) who was considered as the US constitution principal architect. In one case, John was representing a trader, and, in his views, he claimed that "examinations of witnesses upon interrogatories are only by the Civil Law. Interrogatories are unknown at Common Law, and Englishmen and Common Law Lawyers have an aversion to them if not an abhorrence of them.[122]

In 1895, the United States Supreme Court explained the rationale and gaols of the inclusion of right to confrontation in the US constitution and remarked that, the key point of constitutionalising the provision in question was to prevent the depositions of *ex parte* affidavits being used against the accused.[123]

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[120] H. Pollitt "*The Right of Confrontation: Its History in Modern Dress*" *J. Pub. L*.(1959) p.395.
[121] David H. Taylor "*Hearsay and the Right of Confrontation in American Trials by Jury*". A Paper delivered at Chosun University on June 3, 2011 p. 21.
[122] Draft of Argument in *Sewall v Hancock* (Oct.1768 – Mar.1769), in 2 Legal Papers of John Adams pp.194, 207.
[123] *Mattox v United States* 156 U.S. 237 (1895) pp.242-243.

Moreover, the *ex parte* depositions were described as such kind of transcripts that were admissible as evidence. In 2004, it was reiterated that the purposes of confrontation clause which seem not to have change over centuries, when J. Scalia announced that the principal evil at which the confrontation clause was directed was the civil law mode of criminal procedure, and particularly its use when Scalia J stated that the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. [124] It was these practices that the Crown deployed in notorious treason cases like Raleigh's [Sir Walter Raleigh was tried for treason, convicted, and later executed, largely based upon an out of court statement]; that the Marian statutes invited; that English law's assertion of a right of confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.[125]

According to Taylor's point of view, he examined the implications and consequences of introducing hearsay rule into the constitution and realised that it will become a constitutionally protected notion that the right of confrontation could no longer be changed in federal courts, this link between the hearsay rule and the rights of confrontation let Taylor conclude that these principles were intended to defend the same values.[126] By concluding his view, he claimed that both the right of confrontation and the hearsay rule reflect the belief that some evidence which might be of probative value should not be admitted unless the declarant has actually appeared in court and has been cross-examined.[127]

Hence, the constitutional provision of rule against hearsay safeguards the opportunity of accused to cross-examination of witnesses. According to Wigmore, he argued that cross-examination established three fundamental factors which the courts must take into consideration when faces a case involving the hearsay as evidence. He further, states that, the key device in determining hearsay was cross-examination of witnesses who give

[124] *Crawford v Washington* [2004] USSC 59; 541 U.S.36 (2004) p.50.
[125] *Crawford v Washington* , supra note 109.
[126] Draft of Argument in Sewall v Hancock*, supra* note 131, pp.22-23.
[127] Draft of Argument in Sewall v Hancock*, supra* note 131, p.15.

adverse evidence against an accused. He added that cross-examination proper and confrontation are the two components in determining hearsay rule. He also argued that, cross-examination was a vital device of confrontation and was one of the key components of the hearsay rule.

Furthermore, Wigmore was in view that the main issue to be considered in determining if the rights of confrontation was protected is know whether the accused was given an opportunity to cross-examine the witnesses. [128] Wigmore adds to these views and states that, "If there has been a cross-examination, there has been a confrontation. The satisfaction of the right of cross-examination disposes of any objection based on the so-called right of confrontation." [129]

Then, Wigmore concluded that if the above-mentioned components are proven, then the rule sanctioned by the constitution in consideration to 6th Amendment with regard to confrontation right is the hearsay rule as to cross-examination, with all the exceptions that may legitimately be found. He also examined what he termed the similarities and connection between the right of cross-examination and the right of confrontation and argued that:

> *"there never was at common law any recognised right to an indispensable thing called confrontation as distinguished from cross-examination. There was a right to cross-examination as indispensable, and that right was involved in and secured by confrontation; it was the same right under different names. This is very clear from the history of the hearsay rule, and from continuous understanding and exposition of the idea of confrontation. It follows that, if the accused has had the benefit of cross-examination, he has had the very privilege secured to him by the Constitution".*

Evidently, the constitutional rights to confrontation between the accused and the witnesses against him/her were protected and articulated in cross-examination. However,

[128] John H. Wigmore, *A General Survey of the History of the Rules of Evidence*, in 2 *Select Essays in Anglo-American Legal History* (1908) p. 27.
[129] John H. Wigmore, *supra note* 113.

these two terms (i.e., cross-examination and confrontation) were different though both protected the identical values. [130]

Another scholar who mentioned these rights, is Friedman who in addition identified what he termed "Values" or factors that can be effected when exercising the face-to-face confrontation between the accused and the accusers or witnesses. He further, mentioned that confrontation ensures truthfulness and honesty during the procedure. He further mentioned that confrontation right permits the accused to identify and expose the faults or failings of testimonial evidence towards the accused. Confrontation discourages deception and untruthfulness in testimonies. In the view of this author, he therefore realised that confrontation may be used as procedural device even as it additionally assists the court in discovering the conduct and behaviours of the witnesses, and at the same time exposes the fabrications in the statements. Nevertheless, it seems that Friedman was in accord with what was said by Wigmore in one thing, that " the right to confrontation as contained in the confrontation clause gives an accused with an occasion to cross-examine the witnesses offered by prosecution during trial".[131]

Additionally, Douglas while observing at the cause and the significance of the confrontation clause, he argued that confrontation indicates and implies deed and exploit and consists of severe and rigorous cross-examination. [132] These perspectives are in light with the ones expressed by Wigmore above on the primary objective of the right to confrontation. There appears to be overwhelming consensus by academics that the confrontation clause's essential goal is to defend the right to cross-examination and the constitutional rights of confrontation also includes cross-examination. In contrast, as was shown above, academicians have divergent views on the point of whether the confrontation clause has constitutionalised the hearsay rule. The following steeps was to examine how US Supreme Court has interpreted such constitutional provisions in cases

[130] John H. Wigmore, *supra* note 136, p.127
[131] Richard D. Friedman "*'Face to face': Rediscovering the Right to Confront Prosecution Witnesses"*, *International Journal of Evidence & Proof* (2004) p.16.
[132] John G. Douglas "Admissibility as Cause and Effect: Considering Affirmative Rights under the Confrontation Clause" Quinnipiac L. Rev. (2001-2003) at 1047.

where Hearsay rule was also seen to be pertinently applicable with a view to establishing the content and meaning of that provision.[133]

The residual hearsay exception, that enables the introduction and admission of hearsay evidence in the interests of justice, appears to be the main feature in legislative reforms regarding the hearsay rule in United States of America.[134]

In a nutshell, different authors and academicians agreed that confrontation clause's primary objective is to protect the right of the accused to cross-examination which is the constitutional right in United States. However, this was overwhelmed by the academic who have divergent views on the point of whether confrontation clause should constitutionalise the hearsay rule.

II.3.2. Hearsay evidence and rights of confrontation

Confrontation rights are basically trial rights which include both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness.[135]"Unjustified limitation of the defendant's right to cross-examine witnesses presented against him at trial may constitute a confrontation clause violation.[136]

The right of confrontation is legally provided in both laws of criminal procedures as well as civil procedures in Rwanda. However, the difference occurs regarding where such rights must be exercised. In the law on criminal procedure, the investigator and prosecutor are the only persons that the law allocates the right to organize confrontation whereas in civil matters it lays upon the presiding judges to organize confrontation i.e. in the conduct of trial. This is evident from the provisions of article 52 of the law on criminal procedures in Rwanda which reads as follows: "The investigator or prosecutor in charge of case file preparation, either on own initiative or upon request by any interested party may organize confrontation between the suspects themselves,

[133] Grimm P. W., et el., "The Confrontation Clause and the Hearsay Rule: What Hearsay Exceptions Are Testimonial?" *University of Baltimore Law Forum: Vol. 40: No. 2* (2010), pp. 155-165.
[134] Paizes A.P., *the Concept of Hearsay with Particular Emphasis on Implied Hearsay Assertions*, (a thesis, the Witwatersrand University, 1983), pp. 16-20.
[135] Douglas v. Alabama, 380 U.S. 415, 418 (1965)
[136] Barber v. Page, 390 U.S. 719, 725 (1968).

between witnesses or between the suspect and witnesses, between the victim and witnesses or between the offender and the victim of the offence. Every confrontation is subject to a statement". In addition, article 53 of the same law provides that the investigator or prosecutor may urgently conduct interrogation or confrontation if he or she has reason to believe that evidence can disappear. The causes of urgency are recorded in a statement.[137]

Whereas under civil procedure the law provides that "The presiding judge presides over proceedings and declares them closed. The hearing is conducted in the following order […] parties are given an opportunity to react to testimonies, and where necessary, to cross-examine each other or engage in cross-examination with witnesses".[138]

As stated above, the main purpose of legalization of the rights to confrontation is to prevent the depositions of *ex parte* affidavit by the absent persons -*such as admitted* in civil matters- to be used against the suspect. The rule against hearsay aims at attempting to acquire personal production in the stand by way of a personal examination and cross-examination of the witness, which offers to the accused an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.[139]

Both the confrontation clause of the sixth amendment' and the common law rule against hearsay evidence[140] restrict the admission of out-of-court statements in criminal proceedings. This statement is considered as an *ex parte affidavit* which in principle should not be admitted in Criminal matters. The confrontation clause guarantees the criminal defendant the right to face witnesses against him, while the hearsay rule prevents the admission into evidence of out-of-court statements made by persons not testifying at

[137] Art. 52 and 53 of law No 027/2019 of 19/09/2019, supra note 10.
[138] Art.72 (12) of law No 22/2018 of 29/04/2018, *supra* note 37.
[139] *Mattox v. United States supra* note 63.
[140] McCORMICK, *LAW OF EVIDENCE*, (2d ed. 1972), P. 584.

trial.[141] Although both standards appear to require the attendance and testimony of witnesses at trial, they are not co-extensive.

The US constitution provides that “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation”; “to be confronted with the witnesses against him”; “to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence”.[142]

The Supreme Court of the United States also has addressed the effect of the confrontation clause on otherwise admissible hearsay evidence on several occasions. Ohio Vs Roberts [143]case was a recent effort by the Supreme Court to clarify the standards for determining when hearsay evidence can be admitted without offending a defendant's confrontation right. In Ohio v. Roberts, the Supreme Court held that “the transcript was inadmissible because Robert’s daughter had not been actually cross-examined at the preliminary hearing and was absent at trial, the admission of the transcript thus having violated respondent's confrontation right”.[144]

To sum up with this chapter, various concepts related to evidence and specifically to hearsay have been defined to orient the reader of this dissertation. The origin and rationale of the hearsay rule were explained as it has been found that various theories determine its intent as a product of a judicial desire to ensure that only reliable evidence is put to the trier of fact and to ensure the right of confrontation. Then, the applicability of hearsay evidence in different legal systems was discussed under this chapter.

[141] GREENLEAF, *LAW OF EVIDENCE § 124*, (15th ed. 1892)
[142] US Const. Amend. VI. (Ratified 12/15/1791).
[143] Ohio v. Roberts “448 U.S. 56 (1980) November 26, 1979” Ohio v. Roberts :: 448 U.S. 56 (1980) :: Justia US Supreme Court Center [27/05/2021].
[144] Ohio v. Roberts “448 U.S. 56 (1980) November 26, *supra note* 125.

CHAPTER THREE

ANALYSIS OF THE RULE AGAINST HEARSAY UNDER RWANDAN LAW

The purpose of this chapter is the analysis of hearsay evidence before criminal courts under Rwandan law. It mainly talks about how Rwandan judicial personnel consider this kind of evidence, and the analysis of the practice of prosecutors in courts and the impact of that practice to the administration of justice.

This chapter consists of the following main sections; Due process right, the meaning of testimonial evidence in law, legal status of *procès-verbaux d' audition* by prosecutors, judicial consideration of hearsay evidence.

III.1. What is testimonial evidence in law?

The substance of the rule against hearsay is that a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of the fact(s) stated.[145] Stephen sets out the principle that "a statement, oral or written, made otherwise than by a witness in giving evidence and a statement contained or recorded in any book, documents or record whatever, proof of which is not admitted on other grounds, are deemed to be irrelevant for the purpose of proving the truth of the matter stated."[146]

Under the law of evidence and its production in Rwanda, "testimonial evidence" is defined as statements made in court by an individual regarding what he or she personally saw or heard with that is relevant to the object of trial.[147] This means that for a statement to be admissible as testimonial evidence before Rwanda courts, two principles in addition to oath should be respected namely, it has to be made in court by one with personal knowledge of the truth thereof.

First, the statement to be admissible must be made in court. A party should not be allowed to present documents or written statements made by or on behalf of a witness as evidence

[145] Cross R., *evidence*, 5th ed. (1979), p. 462.
[146] Stephen J.F., *A digest of the law of evidence*, p. 15., see also Ewaschuk E.G., "Hearsay Evidence" *Osgoode Hall Law Journal* (1978), p. 409.
[147] Art. 62 *supra* note 10.

in court rather that party should bring the witness in person before the court to narrate his/her testimony verbally. In contrast to this provision of the law, the practice by prosecutors of reading written testimonies (*procès-verbaux d'audition*) without taking in person such a witness before court is contrary to the provisions of law.

Secondly, a testimony is defined/taken as a statement made by a person who claims to have "personal knowledge" of the facts in issue. It should not be permitted for a narration to be made of what one was told by another person regarding the facts in issue. As a rule, it is the person who personally saw the event taking place or who personally heard voices or noises of something happening who must appear in court to give testimony thereof. Evidence given by a person who was told by another person about the occurrence of the event is known as "hearsay evidence" and is not, in principle, admissible in court.[148] Hearsay Evidence is no Evidence!

III.2. Admissibility of hearsay evidence in criminal courts

Judicial consideration of testimonial evidence under Rwandan law lays under the control of judges as to its admissibility or rejection.[149] The law states that only the court has the power to establish that testimonial evidence is relevant, valid and of probative value to be admissible or rejected. It should not be influenced by the amount of witnesses. Rather it shall mainly consider their knowledge of facts shall mainly consider their knowledge of facts and the objectivity and sincerity of their testimonial proofs.

III.2.1. legal status of *procès-verbaux d' audition* by prosecutors

Procès-verbaux d' audition includes but is not limited to "statement of witnesses". Hearsay statements are not subject to cross examination which is considered as the greatest legal engine ever invented for the discovery of the truth.[150] The absence of material evidence in some criminal cases involving prosecution such as an eyewitness to a criminal incident

[148] Anon "Hearsay evidence is no evidence!" Hearsay Evidence is No Evidence ! - SRD Law Notes [28/05/2021].
[149] Art. 65, *supra* note 10.
[150] JH Wigmore, *Treatise on the Anglo-American system of evidence in trials at common law* (1940) par 1367.

which is considered to be a material witness because he/she can give credible and material evidence in respect of the incident is critical in terms of due process rights provided under the Rwandan Constitution.[151]

In criminal cases, the accused is not given the opportunity to hear and challenge the testimonies from the witness. The prosecution may refer to the written testimony from the investigation and recount the stories without clear information. The judges sometimes also rely on such kind of evidence and sentence an accused which is practically not fair. In accordance with Rwandan law on criminal procedure, the prosecution has the right to summon the witness and make a statement.[152] On the other hand, the investigators also have the same rights.

The rights provided by the law about confrontation between the parties involved in criminal matters in Rwanda are not sometimes respected. The law provides that the investigator or a prosecutor in charge of preparation of case file, either his/her own initiative or upon request by an interested party my organise confrontation between the suspects themselves, between witnesses or between the suspect and witnesses, between the victim and witnesses or between the offender and the victim of the offence. Every confrontation is subject to a statement.[153]

Furthermore, the law guarantees the rights for cross examination, under article 127 para. 10 of the Rwandan law on criminal procedure which provides that parties or counsels can cross-examine witnesses of the other party. Where necessary, the prosecution or the defendant can re-examine the witnesses invited in the court; […] in case there are witnesses, they are examined on individual basis after taking an oath. If necessary, they are given an opportunity to cross-examine each other in front of the parties or in the absence of parties, if their presence can prejudice truth;[154] and thus paragraph 13 of this article provides “parties are given an opportunity to respond on the testimony, and where necessary, to cross-examine each other or between them and witnesses”.

[151] Art. 29, *supra* note 83.
[152] Art. 32, law No 027/2019 of 19/09/2019, *supra* note 66.
[153] Art. 52, law No 027/2019 of 19/09/2019, *supra* note 66.
[154] Art.127 law No 027/2019 of 19/09/2019, *supra* note 66.

Besides these provisions of the law, the judicial hearing records show that those rights are not regularly offered to the accused to cross-examine witnesses in order to demolish the testimony given before investigation, to discredit the state witness(es), to detect and expose discrepancies, to elicit suppressed facts which could support the case of the accused, or to give an opportunity to the accused to call witness(es). These cases are largely heard based on hearsay, fabricated evidence, and presumptions. In one case the prosecutor presented *procès-verbaux d'audition* of witnesses on what they have heard from police before the Muhanga Intermediate court and the court sentenced the accused to life imprisonment. The accused appealed up to the Supreme Court which pronounced the accused not guilty and decided immediate release of the accused due to the fact that the previous courts (Muhanga Intermediate court and High Court) failed to prove beyond reasonable doubt that the accused committed the offence.[155]

From the above case, the prosecution presented the evidence from the investigation including the testimony of witnesses without bringing them before the court to personally testify to what they saw or heard in person. Thus, the courts may sometimes refer to such evidence and sentence the accused. This should in principle be contrary to the law and should be considered as hearsay evidence and accordingly inadmissible.

Normally, when a witness is giving testimonial evidence in court, he/she cannot use what someone else has said as evidence. This is considered as hearsay which should indeed not be considered as credible evidence to be admissible though in some cases such evidence is admissible. The court must hear from the persons themselves to consider it as evidence. For example, if you are a witness in a trial, you cannot give the following evidence, "X told me she/he saw the accused at 3 PM. This evidence of a statement made out of court and is considered to be hearsay. For that evidence to be introduced , X would have to take the stand and describe what she/he personally saw/heard herself/himself. Thus, as general rules, hearsay evidence should not be admitted in court of trial. This means that, if a person is giving evidence and start to say something

[155] *Prosecutors V Ngarukiyintwari Ibrahim*, RPAA 0011/14/CS, Supreme Court (05/10/2018), Para 22.

that amounts to hearsay evidence, he/she can be interrupted and asked to stop by one of the people in the case or by the judge.[156]

The main purpose of the hearsay rule is to make sure the evidence at trial is as reliable as possible. Criminal defendants face dire consequences, and courts don't want them convicted on the gossip flying around town.[157]

However, not all out-of-court statements are hearsay. Under some circumstances, testimonial evidence of the person who is not direct witness are admissible. For example, if an accused claim that he/she is dumb, a person can give testify that he/she saw or/and heard the accused saying "I want an ice-cream". This evidence is not being introduced to prove that the accused wanted an ice-cream, but to prove that he/she can speak and thus evidence claimed to be admissible.

In general, it is assumed that a person standing in the court would not make a statement against his/her own interests, so such a statement is claimed to be true. Therefore, emphasis to the exception to the hearsay rule in some jurisdictions is admission or confession evidence made against a person's own interest.[158]

The meaning is that a person can give testimonial evidence that the accused told him/her that on the day the victim died, "I did it. I killed him/her". In normal sense, this would be hearsay evidence in its general meaning because the statement was not made before the court and thus an "out-of-court statement" and it has been introduced in court to prove that the accused killed the deceased. Therefore, because confession

[156] Anon "Hearsay evidence: citizen information " https://www.citizensinformation.ie/en/justice/evidence/hearsay_evidence.html#l23f7d [16/05/2021].
[157] A. Kelly "Hearsay in Criminal Cases" https://www.nolo.com/legal-encyclopedia/hearsay-criminal-cases.html [16/05/2021].
[158] Roger C. P., The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson, Minn. *L. Rev*. (1986), pp.1059-1060.

is an exception to the hearsay rule as explained in previous paragraph, that evidence can be admitted in court of trial.[159]

III.2.2. Practical development of hearsay evidence in Rwandan criminal proceedings: case of prosecution

As mentioned in the previous chapter, the law nº 027/2019 of 19/09/2019 relating to the criminal procedure provides for the rights to confrontation only during criminal investigation and criminal proceedings as well whereby it provides that "[T]he investigator or prosecutor in charge of case file preparation, either on own initiative or upon request by any interested party may organize confrontation between the suspects themselves, between witnesses or between the suspect and witnesses, between the victim and witnesses or between the offender and the victim of the offence. Every confrontation is subject to a statement.[160] However, article 126 of the same law sets out the guiding principles during the conduct of hearing and among which 'adversarial proceeding and equality of parties before the law'.[161]

Apart from the law on criminal procedure, article 119 of the law of evidence also provides that in criminal cases, evidence is based on all grounds, factual or legal provided parties have been given a chance to be present for cross-examination. The courts rule on the validity of the prosecution or defence evidence.

In addition, article 68 of the law on evidence and its production in Rwanda provides that every witness is heard separately in the absence of other witnesses, either in the presence of parties or if necessary, in their absence, if they have appeared previously before the court.

In the light of the above, obviously, a witness might give a testimony only in court. And that a party is not allowed to present in court a document written by witness as evidence

[159] Peiris, GL. "The Rule against Hearsay and the Doctrine of Res Gestae: a Comparative Analysis of South African, English and Sri Lankan Law." *The Comparative and International Law Journal of Southern Africa* vol. 14, no. 1, 1981, pp. 1–33.

[160] Art. 52 of law nº 027/2019 of 19/09/2019, *supra* note 41.
[161] At.126 para. 4 of law No 027/2019 of 19/09/2019, supra note 128.

to prove the occurrence of offence, rather he/she must a party wishing to rely on the testimonial evidence must bring the witness before the court to narrate his testimony orally. By contrast, the prosecutors, practice of reading written testimony produced in writing (*procès- verbaux d' audition*) without bringing the witnesses in person is contrary to the law. Hence, this practice from Rwandan jurisdiction can be compared as well with the United States to learn from it as it is more illustrated by courts and in the Constitution.

Even though Rwandan laws are silent about hearsay evidence and its admissibility, the practice of prosecutors regarding the presentation of written statements made by the witnesses during investigation and prosecution process are deemed extra-judicial statement and thus "hearsay". The prosecutors' practice of using extra-judicial statements or persons' assertions shows that it is not necessary to bring in person the witness to testify in court on the stand where he/she can be probed and cross-examined and therefore leading to the promotion of hearsay use in Rwandan trials.

Therefore, the practices by Rwandan prosecutions of reading written testimonies by witnesses (procès-verbaux d'audition) from investigation without bringing the witnesses in person before the court trial are in principle contrary to what are provide by the law that "A witness must give his testimony in court during trial after making an oath if the conditions are met. Thus, the fact that a party is not allowed to tender as evidence in court a document written and signed by a "witness"; rather, he/she must bring the witness before the court to recount his testimony orally on the stand is the only practice that should be granted legal protection and developed in Rwandan judicial system.[162]

The indirect promotion of use of hearsay rules in Rwandan judicial system is justified also by the fact that, if "a testimony" is a statement made by a person who claims to have "personal knowledge" of the facts in issue (or relevant or collateral facts),the prosecutors should bring the witnesses before courts to testify in person what they personally have knowledge of. However, the practice in Rwanda is that the prosecutor presents what was said by others (witnesses) without the persons who have personal knowledge of the fact

[162] Dr. E. Kayitana, L. Gatete and N.Umuhoza, *organization and evidence law* , UR, Faculty of law (2014-2015), P.11.

is a point to be criticized. The lack of “personal knowledge” as provided by the law during hearing gives currency to hearsay.

According to the provision of article 62 of law on evidence and its production in Rwanda and to the principle that a witness by his/her personal knowledge must be in court to tell what he/she has knowledge of, it should therefore not be allowed to recount what one was told by another person with regard to the facts in issue. It is rather the person who personally saw the event taking place or who personally heard (voices or noises) something happening who must come to court and give testimony. Evidence given by a person who was told by another person about how, when, why or by what a particular event took place is known as “hearsay evidence” and is not, in principle, admissible in court.[163]

Despite developments of the Rwandan legal system over the years, it seems that parties in criminal justice still have misconceptions on whether hearsay evidence is admissible in criminal proceedings in Rwanda or isn’t.

III.2.3. Hearsay evidence in United States Laws

The hearsay rule is an analytic rule of evidence that defines hearsay and provides for both exceptions and exemptions from that rule. There is no all-encompassing definition of hearsay in the United States. However, most evidentiary codes defining hearsay adopt verbatim the rule as laid out in the 2020 Federal Rules of Evidence, which generally defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[164]

Historically, in United States like many other jurisdictions where rules against hearsay are applicable, the rule’s purpose is to prohibit the use of another person's statement, as equivalent to testimony by the witness to the fact. Unless the second person is brought to testify in court where they may testify after making the legal oath that what he/she is

[163] Dr. E. Kayitana, L. Gatete and N.Umuhoza, *supra* note 151.
[164] D F Binder, *Hearsay Handbook*, 2nd ed., (McGRAW-HILL, Colorado, 1983), p. 94

going to testify are true and that if she/he makes a false statement to prejudice the court shall be legally liable.[165]

As stated above, according to US federal rules, “Hearsay” means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.[166] However, the US federal rules also provides the exceptions of statements that are not considered as hearsay, whereas it is provided that “A statement that meets the following conditions is not hearsay: (1) A Declarant-Witness’s Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement: (A) is inconsistent with the declarant’s testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (B) is consistent with the declarant’s testimony and is offered: (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or (ii) to rehabilitate the declarant’s credibility as a witness when attacked on another ground; (C) identifies a person as someone the declarant perceived earlier”.[167]

The US Supreme Court interpreted these constitutional provisions in the cases where the hearsay rule was seen to be applicable with a view to establish the content and the sense of this provision.

First, in *Barber v Page*, the State brought an application that writings or records from interviewed witnesses which were taken before hearing or during preliminary hearing has to be admitted as evidence against the accused in lieu of oral testimony. It was argued that on behalf of the accused that the admission of these records or transcripts would be a denial to the accused of his/her rights to oppose the witnesses against him/her. And therefore, ruled that by admitting these transcripts is denying not only the rights to be

[165]Art. 72 (11) law No 22/2018 relating to the civil, commercial, labour and administrative procedure (*O.G.* nº Special of 29/04/2018).
[166] Art. VIII, rule 801-807 , *supra* note 30.
[167] Art. VIII, rule 801-807, *supra* note 30.

confronted with witnesses against him/her but also the accused's rights to cross-examination as well.[168]

Second, in *Crawford v Washington*, the court after examining the content, intention and meaning of the confrontation clause in the light of the hearsay rule, it held that this clause was fulfilled and realised through cross-examination.[169]

Third, in *Idaho V Wright,* in this case, the court had to establish whether testimony which was given by a child to a paediatrician denied the accused's right to be confronted with the witnesses against him/her. By considering the of the rights against hearsay rule, the court held that the accused's right to be confronted with the witnesses against him was deprived of by admitting such statement and has to be excluded for different reasons among which, the absence of an opportunity to cross-examine the declarant of the transcripts.[170]

Fourth, like the *crowd vs Washington* case, in *Pointer v Texas*, the court had to discover the meaning and intention of the constitutional right to confrontation and the hearsay rule and then ruled that cross-examination and the right to confrontation shaped the vital section of the constitutional rights. The court's decision also was matching with the views that the right to be confronted with witness against him/her included cross-examination.[171]

Consequently, considering the scope and application of hearsay rule, the court's explanation on the accused's right to be confronted with witnesses against him/her seems to be consistent in the finding that this right includes mainly cross-examination.

Furthermore, the hearsay rule in the US has undergone legislative modifications in recent years, resulting in the introduction of the residual hearsay exception, which allows for the admission of hearsay evidence in the public interest, as previously demonstrated. This revision is reflected in the Federal Rules of Evidence which was enacted in 1975. The

[168] *Barber v Page*, 390 US 719 p. 725.
[169] *Crawford v Washington,* [2004] USSC 59; U.S. 36 pp. 61-62.
[170] *Idaho v Wright,* [1990] USSC 128; 497 U.S. 805 pp. 813-827.
[171] *Pointer v Texas* [1965] USSC 68; 380 U.S. 400 p.403.

Federal Standards of Law included residual hearsay exclusions that allowed trial judges to admit hearsay that did not fall within special provisions to the hearsay rule under civil law in certain instances.[172]

Moreover, Federal Rules of Evidence 803(24) and 804(b)(5), shows that they contain the residual hearsay exceptions when they state that:

> *"Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the opponent can produce through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence…."*

In brief terms, the persistent hearsay exception that enables witness testimony to be admitted in the public interest, appears to be the most prominent aspect of the USA legislative amendments to the hearsay rule.

Under section 3(4) of the South African Law of Evidence Amendment Act, No. 45 of 1988 (LEAA), hearsay evidence is defined as "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence". Comparing to English common law relating to hearsay evidence and its admissibility, these two judicial systems (south Africa and English common law) possess some similar provisions.[173] Considering section 114 of the Criminal Justice Act 2003 which reads as follows: "Admissibility of Hearsay Evidence"

[172] Ray Yasser "*Strangulating Hearsay: The Residual Exceptions to the Hearsay Rule*" *Tex. Tech. L. Rev*. pp. 587&589.
[173] MHLANGA p.v., *an analysis of the impact of the admission of hearsay evidence on the accused's right to a fair trial,* (LLM Thesis*,* University of South Africa, 2016), pp. 94-95.

(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if-[174]

a. any provisions of this Chapter or any other statutory provision makes it admissible,
b. any rule of law preserved by section 118 makes it admissible,
c. all parties to the proceedings agree to it being admissible, or
d. the court is satisfied that it is in the interests of justice for it to be admissible.

(2) In deciding whether a statement not made in oral evidence should be admitted under subsection (1)(d), the court must have regard to the following factors (and to any others it considers relevant) [175];

a. how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case.
b. what other evidence has been, or can be, given on that matter or evidence mentioned in paragraph (a);
c. how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;
d. the circumstances in which the statement was made.
e. how reliable the maker of the statement appears to be.
f. how reliable the evidence of the making of the statement appears to be.
g. whether oral evidence of the matter stated can be given and, if not, why it cannot.
h. the amount of difficulty involved in challenging the statement.
i. the extent to which that difficulty would be likely to prejudice the party facing it.'[176]

[174] H. Malhangu, "South Africa: Admitting Hearsay Evidence: The Legal Principles" Admitting Hearsay Evidence: The Legal Principles - Employment and HR - South Africa (mondaq.com) [18/05/2021].

[175] H. Malhangu, *supra note* 174.

[176] H. Malhangu, *supra note* 175.

III.3. Exclusionary rule versus inclusionary rule and the rule against hearsay

III.3.1. Exclusionary rule

Exclusionary rule implies that the evidence illegally obtained is refuted from being used in the proceedings. It is a rule which excludes real, documentary and oral evidence unconstitutionally obtained by those officials who are responsible for the prevention, detection, investigation and prosecution of the crime. It is largely viewed in Due Process model as it is concerned with the legality in the criminal process.[177] It is required that criminal conduct be investigated and prosecuted in accordance with constitution prescripts.

For instance, under the South Africa Constitution of 1993 in section 35 (5), illegally obtained evidence is inadmissible if its admission would render the trial unfair or detrimental to the administration of justice.[178] Hence, the admission of the illegally obtained evidence must pass through these two tests so as to be valuable before the court. Good faith is one of the factors rendering illegally obtained evidence admissible. Merwe explained this using USA and Canada jurisdictions' rulings.[179] In USA, such evidence is considered in case the police reasonably and in good faith relied on a search warrant issued by a judicial officer but later found defective.[180]

The purpose of the exclusion rule is, among others, to discourage the unconstitutional police conducts. It plays a preventive effect towards infringements of human rights as well as fair trial. Thus, this rule is world-wide recognized as an effective means of ensuring that police officials or investigators respect fundamental rights of an individual.[181]

[177] VAN der MERWE SE, Unconstitutionally Obtained Evidence: Towards a Compromise Between the Common Law and the Exclusionary Rule", *Stellenbosch Law Review* (1992), pp. 173-206.
[178] VAN der MERWE SE "The 'Good Faith' of the Police and the Exclusion of Unconstitutionally Obtained Evidence" *South African Journal of Criminal Justice* (1998), p. 462.

[179] VAN der MERWE SE, *supra* note 102, p. 464.
[180] United States vs Leon 468 US 897 (1984).
[181] Naude B.C., *Testimonial: hearsay and the right to challenge evidence*, (SACJ, 2006), pp. 328- 333.

This purpose underpins the logic of the application of good faith. Good faith applies in case no significant preventive function would be served by the exclusion.[182]

The second factor is when illegally obtained evidence shall be detrimental to the administration of justice. In S vs Naidoo, Merwe explained this factor using an example of providing evidence based on interception and concluded that the admission of the intercepted conversations would not only render the trial unfair but also be detrimental to the interests of justice.

In the interests of due process, though there might have been a serious crime, the police violation of standards of investigation is a failure. Crime control is useful. However, there must be efficient, honest, respected police force, capable of enforcing laws. Due process is more reflected in exclusionary rules as the rule itself encourages police not to violate fair and an honest way of investigation. The same rule apprehends that, illegal methods of investigations can only bring the administration of justice into disrepute particularly when they impinge upon the basic human rights the constitution seeks to protect.[183]

It is not in the interest of justice to permit the police to deliberately flout rules which govern their investigative powers. To ensure the respect of the due process, bad faith must weigh heavily in favor of the unconstitutionally obtained evidence.

Merwe used S vs MPHALA to explain how admission of illegally obtained evidence would be detrimental to the administration of justice. In this case the attorney would assist the suspect during the interrogation without having met him/her before. The Attorney, therefore called the police warning them not to interrogate the suspects before he met them and without his presence. The attorney also asked for information about when the interrogation was supposed to start so that he would be in time. However, the police lied about the exact time; consequently, the attorney arrived after the statement had been given.

[182] However, Merwe criticized this exception of good faith may provoke police to be ignorant of their legal duties, constitutional rights of the suspects, arrested and the accused.
[183] S vs NAIDOO at 94C-94G, in the Merwe's. The 'Good Faith' of the Police and the Exclusion of Unconstitutionally Obtained Evidence, p. 467.

Having regard to the required due process of investigation mainly in interrogation, the judge excluded that statement as the police did not respect fundament rights of the suspect of being represented by the attorney, being informed their rights to be keep silent where necessary. The judge motivated the ruling arguing that that illegally obtained evidence would mislead the justice as what was contained therein, would have an adverse effect to the ruling.[184]

Briefly, the role of the exclusionary rule is entirely articulated on deterring effect (in a sense that it provides the occasion for judicial review) and gives credibility to the constitutional guarantees. This rule respects the principle known as "inseparability of rules of evidence and constitutional entitlement" hence it reflects the due process model.[185] The rule further attempts to affirm the rule of law in the criminal process which states that it is a mechanism which serves to protect due process system.

III.3.2. **Inclusionary rule**

Contrary to the exclusionary rule which sustains the inadmissibility of the evidence obtained out of constitutional due process, as exceptions, such evidence can be admissible under circumstances that are going to be discussed in this part. The admission of such evidence follows the inclusionary rules and it is mostly seen in the perceptive of crime control more than the due process.[186]

As per the American approach, the violated value of the police officers during the investigation must be evaluated by the court taking into account the conditions and circumstances existing in its own jurisdiction from time to time and the facts of the case before it.[187]

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[184] S vs MPHALA 1998 (4) BCLR 494. in VAN der MERWE SE "The 'Good Faith' of the Police and the Exclusion of Unconstitutionally Obtained Evidence" *South African Journal of Criminal Justice* (1998), pp.468-469.

[185] VAN der MERWE SE, Compromise Between the Common Law and the Exclusionary Rule" *Stellenbosch Law Review* (1992), pp.173-206.

[186] VAN der MERWE SE, in the work "Unconstitutionally Obtained Evidence: Towards a Compromise Between the Common Law and the Exclusionary Rule" p. 184, VAN made clear the reflection of the two models within the two rules. The inclusionary rule is largely crime control oriented whereas exclusionary rule is largely due process oriented.

[187] VAN der MERWE SE, *supra* note 73*,* p. 177.

Public safety is an admissible defense in favor of considering the evidence no matter what the violation of constitutional rights happened in collecting the same.[188] The emphasis of this exception to the Miranda warnings,[189] had been strongly pointed out in different cases.[190] Merwe used case of S vs Madiba known as Madiba case. The police, in this case, forcibly entered the house of the suspect of firearm and seized it as evidence. The suspect invoked that the police had violated his privacy which renders the evidence inadmissible. However, judge Hurt J. ruled that for the sake of public safety, the police officer ought to act in so far as to prevent the concealment of the gun that would endanger public health. In New York vs Quarles, the Judge Rehnquist J. added that this exception is not underpinned by the motivations of individual officers concerned.

What should be retained, in both cases, is that the police officers should over-step the constitutional line in collecting evidence, in so far as it is necessary to eliminate the respective public safety risks encountered by them.[191]

Briefly, the reflection of the two models of criminal process within the two rules is that the inclusionary rule is largely crime control-oriented whereas exclusionary rule is largely due process oriented. However, VAN DER MERWE warns that the crime control and the due process models are not necessarily rivals. Both seek to vindicate the goal of substantive criminal law.[192]

Note that the goal of a sound criminal justice system is not merely to secure the conviction of an accused but to ensure that conviction takes place in terms of procedure which duly and properly acknowledges rights of an accused at every critical stage, during pre-trial, trial and post-trial.

III.3.3. Compromise approach to the inclusionary and exclusionary rules

The two rules explained above oppose each other in a sense that inclusionary rule accepts illegally obtained evidence whereas exclusionary rule refutes evidence reached

[188] VAN der MERWE SE, *supra* note 73, p.471.
[189] Miranda vs Arizona
[190] S vs Madiba and New York vs Quarles (ruled by the supreme court of Amerca in 1966).
[191] MHLANGA p.v., *an analysis of the impact of the admission of hearsay evidence on the accused's right to a fair trial,* (LLM Thesis, University of South Africa, 2016), pp. 120-127.
[192] VAN der MERWE SE "Unconstitutionally Obtained Evidence: Towards a Compromise Between the Common Law and the Exclusionary Rule" 1992 *Stellenbosch Law Review* 173-206, p.184.

in such a way. Besides, there is compromise approach that combines the two rules. This one allows the court the use of procured evidence irrespective to the manner in which the same has been obtained, however under some circumstances.

The essence of the presence of compromise approach, as discussed by VAN der MERWE SE is to ensure that:

- The interest of the citizens to be protected from illegal or irregular invasions by their authorities
- The interest of the state to secure that the evidence bearing upon the commission of the crime and necessary to enable justice to be done shall not be withheld from the courts of laws on mere formal or technical ground.[193]

Compromise approach between the two rules implies that the court should not be concerned with the manner in which the evidence has be procured.[194] In S vs NEL case, the court admitted the tapped telephonic conversation despite the fact that the prosecution failed to prove the authorization of the interception.

III.3. Motivation of the inclusionary rule

The rationale of the inclusionary rule mostly lies in the fact that the probative value of the evidence is not impaired by the unlawful method employed in acquiring such an evidence and the relevance of such evidence cannot be affected by the mere fact that it was unlawfully procured.[195]

The Canadian act of 1982 is a good example. Its section 25(2) states that if the court is satisfied that evidence was obtained in a manner which infringed or denied any rights or freedoms granted by the charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of such evidence would bring the administration of justice into disrepute.

[193] The perspective on this assumption is that the court that excludes all illegally obtained evidences due to not respecting formalities or techniques, might in the effect be condoning unlawful acts.
[194] VAN DER MERWE SE, *supra* note 117, p. 178.
[195] VAN DER MERWE SE, *supra* note 117, p. 180.

From that provision, illegally obtained evidence, under certain circumstances, can be admissible as it can be excluded. In this case, Merwe, gave evidence in form of electronic surveillance. Such evidence is admissible despite an infringement of an important charter right and despite that the same evidence could have been procured without infringing the charter.[196] The basis of admission in this case is that the infringement was neither deliberate nor flagrant and that the police acted in good faith in accordance with what they had reasons to believe was the legal position.

III.3.3.2. Motivations of exclusionary rules

The exclusionary rule in the compromise approach implies that all illegally obtained evidence might not be rejected. However, there also must be conditions to exclude them. The argument in favor of the exclusionary rule lies on the belief that the truth need not and should not be ascertained by all costs because there are higher values that illegally obtained evidence should in principle not be admitted.[197]

The jurisprudential validity of a constitutional exclusionary rule allows room for consideration of the two factors: *public policy* or *disrepute* due to the following reasons:

- This rule makes a clear break with the common law inclusionary rule and which can be invoked to protect guaranteed rights, having regard to the specific circumstances of each case.
- This rule can form part of and protect a due process value system as it corrects the abuse of internal levels.
- It allows adequate room for promotion of the social justice.
- This rule has both preventive and educative effect.
- It supports the principle of legality in the criminal process.
- It seeks to strike a balance between the two aforesaid interests.[198]

[196] *R vs DUARTE*
[197] John H. W, *A Treatise on the Anglo-American Systems of Evidence in Trials at Common Law* (1940), para.1364.
[198] Law shelf education media "The Exclusionary Rule" Foundations of Law - The Exclusionary Rule (lawshelf.com) [28/05/2021]

It would be unfair to conclude with this chapter without having a little background on the parties involved in criminal court trial and the principle of equality of arms or fair play though this principle is not explicitly provided in Rwanda. This principle is one of the components of the right to a fair trial and an element of criminal procedure. One can conclude that if the prosecution is the party in criminal case, it should not recount what was told by other parties as evidence or read what was written by investigation from the witness since such statements can be qualified as hearsay.

CHAPTER FOUR:

GENERAL CONCLUSION AND RECOMMENDATIONS

4.1. General Conclusion

The study primarily focused on the critical study of hearsay evidence under Rwandan law of criminal procedure**,** using Rwandan case law and literatures. Throughout the research, the researcher tried to answer several questions that deal with the issue at hand.

The first question was to examine the admissibility of hearsay evidence before Rwandan criminal courts. The answer to this question lies in the fact that though both the Constitution of the Republic of Rwanda of 2003 as revised in 2015 as well as other laws and case laws provided a clear line of fair trial and due process of trial especially in criminal matters whereby the witness must be in person before court during trial to give testimony of his/her personal knowledge. However, some practices by prosecutors and judges show that they can base on the statements made by the witness and decide on the case without bringing the statement owners in trial to be cross-examined and challenged by the suspect. However, some courts' good practices refused to refer only to the statement but rather to request the prosecution to call the witness(es) to testify in court.

The other question that was examined in this thesis is the reliability of hearsay evidence with constitutional and statutory guarantees of a fair trial. To this question, the thesis found that the law guarantees some rights and procedures to be followed for fair trial during hearing especially in criminal cases such as rights to cross-examination of witnesses, having witnesses in person to recount what they personally saw or heard instead of submitting the story of the event in writing to be recounted by others (prosecutors). Thus, the practices of the prosecution which in principle show a general tendency to recount the statement written down by witnesses through investigation or prosecution without bringing them on trial to testify themselves violate the legal procedures and fair trial rights as provided in the Constitution and other legal instruments and laws of Rwanda.

The last question but not least was to examine whether there are good procedural practices that the Rwandan judicial system can learn from US laws and judicial decisions in terms of exceptions to the strict inflexible rule against hearsay in order to strike a proper balance between the need to protect the accused person against unreliable evidence and the interest to protect the society against crime. The thesis concluded that, there are different practices from USA criminal procedure in the elimination of barriers on the use of hearsay evidence, case laws to learnt from USA jurisdiction that can be adopted to reduce the development of use of hearsay evidence in Rwandan criminal justice , the main and important one is the reformulation of law on criminal procedures or adoption of new law to clearly prohibit the use of hearsay evidence and put in place exceptions if necessary as alternative to use of written statements by prosecutors.

Finally, the author found that the use of hearsay evidence is being promoted indirectly and can increase if nothing is done. The relevant practices of the prosecution are in contrast to the laws and therefore should be stopped. The accused should be given the right to face the witnesses and cross-examine them to challenge them and help the judge to take decision appropriately. According to William Blackstone, “better that 10 guilty men go free than to convict a single innocent man”, therefore, criminal justice should be conducted with due diligence, no person should be punished only basing on the written statement made by the witness during investigation process or before prosecutors, he/she must be given opportunity to challenge the witness who accuse them.

Obviously, it has been found throughout the research that hearsay evidence is used in Rwanda trials and is given authority by judges to the extent that, the judges sentence a person basing only on the written statement presented by prosecutors.

4.2. Recommendations

In light of these negative consequences, this thesis recommends that Rwandan criminal justice and court of trials, judicial policy makers have to commit and adopt the strongest measures to end the promotion of hearsay evidence since it can be a tool that can prejudice the administration of justice. Specifically, this thesis thus makes the following

recommendations to the Government of Rwanda and Parliament as well as other justice sectors in the light of the conclusions of this study:

Therefore, the Republic of Rwanda is one of the countries which have put a considerable effort not only to good leadership but also the good conduct of justice and fair trial. The courts are especially encouraged to render justice basing on the facts proved beyond reasonable doubt in criminal matters. Therefore, there is a need to place the emphasis and focus on the prevention of violation of legal rights to fair trial and seek the solution to limit the indirect use of hearsay evidence by the prosecutors before courts.

The recommendations should be addressed to the courts whereby criminal courts in Rwanda should sit and re-think the way they conduct criminal hearings or if not possible, the Parliament has to adopt the new laws or regulations on hearsay rules. If the courts continue to sentence persons basing on written statements instead of bringing witnesses in person before the courts to be cross-examined by the accused, this will continue to be a critical point in the eyes of lawyers and other legal thinkers as the lack of fair trial.

Thirdly, the court must focus on the provisions of laws which guarantee the accused the right to cross-examine the witnesses, to avoid the violation of legal rights that can make criminal justice a critical sector in accordance with the rights of fair trial. Therefore, the provisions of law must be respected and considered with due diligence, to fully guarantee the accused's rights to fair trial with due process of law.

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