

European Criminal Procedures

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1 Introduction

J. R. SPENCER

General: the scope of this book and how it came to be written

This book, as befits an academic project that was conceived in France, is constructed according to a *plan binaire*. The first part contains a description of the criminal procedure of five jurisdictions – in alphabetical order, Belgium, England and Wales, France, Germany and Italy – each analysed according to a common scheme. The second is a series of extended essays on themes that are of current interest and importance in all five: the roles of public prosecutor and police, judge, defendant and victim; the rules of evidence, negotiated justice and publicity.

It is an English version of a study that originally appeared in France in 1995 under the title *Procédures pénales d'Europe*.¹ Italian and Spanish versions have already appeared,² and at the time of writing it is also being translated into Chinese. This edition is, it should be stressed, an English *version* rather than a simple English translation. To make the book accessible to readers in the English-speaking world it was necessary to explain various matters which to continental lawyers need no explanation, and, to a lesser extent, to delete explanations of fundamental common law ideas which had had to be spelt out to non-English speakers. With that in mind this introductory chapter has been completely rewritten and very much extended.

The work is the fruits of the labours of a study group, brought together and directed by Professor Mireille Delmas-Marty of Paris I, who was at that time head of the Section des sciences criminelles at the Institut de droit comparé de Paris. The other members were four other

¹ *Procédures pénales d'Europe, sous la direction de Mireille Delmas-Marty* (Paris, 1995).

² *Procedura penale d'Europa; sintesi nazionali e analisi comparatistiche coordinate sotto la direzione di Mireille Delmas-Marty; seconda edizione italiana* (ed. by Mario Chiavario) (Padua, 2001); *Processos penales de Europa, Bajo la dirección de Mireille Delmas-Marty*, translated by Pablo Morenilla Allard (Madrid, 2000).

law professors, one Belgian, one English, one German and one Italian, three French *magistrats* and five French doctoral students: their names and further details are printed on page viii. A number of other people were subsequently involved in updating the work, as well as in carrying out the translation; their names are listed there as well. The study (and the translation) was financed by a grant from the European Commission to the Association de recherches pénales européennes (ARPE). This is the French branch of a group of national societies of criminal lawyers interested in European matters, which were founded under the wing of the European Commission and with the aim of encouraging mutual understanding and co-operation in the fight against transnational fraud, particularly on the EU budget.³

The object of the study was to explore the notion of a 'common model' of European criminal procedure. Are the criminal procedure systems of the different European countries really very different, as is usually believed, or do the apparent differences in fact conceal inner similarities? In so far as they truly differ, are these differences surviving or even multiplying? Or are the different systems being ever more forced into a common mould by external pressure, in the form of the demands of the European Convention on Human Rights and the European Union? The societies of Western Europe broadly resemble one another, and are beset by various common social problems, a number of which impinge on criminal justice: rising crime, increasing disquiet about the victims of crime, and ever greater pressure from the media. How are the different criminal justice systems of Europe reacting to these pressures? Are their reactions similar, thereby leading to further convergence – or is there yet greater divergence, as each system reacts in its own characteristic way? It was in the hope of answering at least some of these questions that this study group was formed, and this book was written.

The group met regularly at the Institut de droit comparé in Paris between 1990 and 1994. In the earlier meetings we evolved a common scheme according to which the workings of the five different systems could be analysed. To this end, the group devised a grid, with a list of powers down the right-hand side, and a list of participants in the process on the left; by drawing lines between participants and powers it was possible to show diagrammatically who in which system can do what, and how. This theoretical analysis was supplemented by a series

³ The sister English organisation is called ACFE: the Association to Combat Fraud in Europe. (It was originally called ALPFIEC: the Association of Lawyers for the Protection of the Financial Interests of the European Communities.)

of 'site visits' carried out by the younger members of the group, and a small survey carried out by one of the members who visited all the countries in the study and interviewed policemen, prosecutors, defence lawyers and other criminal justice professionals according to a standard questionnaire. (Further details about the grids and the interviews are set out in an appendix to this chapter.) No member of the group would presume to claim, however faintly, that this small empirical study gave a definitive picture of how the systems actually work, and what gaps exist between the theory and the practice. But it did provide a quantity of useful background information.

A word must be said about the choice of jurisdictions studied and, within those jurisdictions, the types of criminal procedure. The reason why this group of five jurisdictions was chosen was partly a practical one. We wished to make a detailed study, which necessarily meant limiting ourselves to a group of countries small enough to make this feasible. The five countries that we chose made sense in terms of the range of languages. Although not all members of the group were competent in all of French, English, German, Italian and Dutch, all of us were proficient in at least two of them and between us we covered them all. Whilst it would obviously have been better if we had included one of the Scandinavian countries, or Spain or Portugal, or one of the countries of the former communist bloc, our choice is still representative of two important traditions: the common law tradition, in the shape of England, and the Romano-Germanic tradition with some of its different branches (French, Belgian, German and Italian).

By way of a digression, the history of criminal procedure in Western Europe is in a sense the story of each tradition borrowing the other's ideas, either with or without attribution; and one way of presenting this history would be to show how, by a series of conscious reforms, the different systems in the Romano-Germanic tradition have swallowed larger and larger doses of the common law. Thus France and Belgium, the two systems most faithful to the original inquisitorial idea, borrowed from the common law at the time of the French Revolution the jury, the right to silence, public trials and the principle that the tribunal that finally decides on a person's guilt or innocence must be separate from the body that carried out the initial investigation. Germany then went further, later also borrowing from the common law tradition the principle that the court of trial must hear the witnesses orally, and reinforcing the divide between the functions of investigation and of judging by abolishing the German equivalent of the *juge d'instruction*.

Italy has gone further still, in 1988 introducing the notion of the guilty plea and (in principle at least) the notion – very foreign to the French tradition – that the contents of the dossier assembled during the investigation do not have the status of evidence at trial. But the borrowing has gone the other way as well. The most striking example is the public prosecutor – an institution that England borrowed from Scotland, which, according to one theory, had in turn borrowed it from continental Europe.⁴

In this study we confined ourselves to what might be called ‘ordinary procedures’. In every system there is a core of commonly used procedures by which run-of-the-mill offences are invariably dealt with. Of these, each country usually has at least two sets: one for serious offences, and another for those that are less serious. In England, for example, there is trial on indictment in the Crown Court for serious offences and summary trial in the magistrates’ courts for everything else. In some countries the position is more complicated – as in France, which has three types of procedure, one for offences categorised as *crimes*, another for those classed as *délits*, and a third for minor offences (*contraventions*). In addition, each system also has some kind of extra-simplified procedure for disposing of offences that are seen as very minor – such as the German *Strafbefehlsverfahren*, where the public prosecutor writes to the suspect and the court proposing a particular penalty, which is then imposed unless the defendant objects; and beyond these simplified procedures there are sometimes procedures even simpler still, which national law regards as administrative rather than criminal (although the European Court of Human Rights may not share this view⁵). At the other end of the scale, each system also has various special kinds of procedure for dealing with particular types of crime, or crimes committed by special categories of person. Thus all countries have special systems for prosecuting offences committed against military discipline by members of the armed forces. Some countries, such as France, have a special regime for terrorist offences,⁶ and some – like France again – have special procedures for offences committed by members of the government in the course of their official functions.⁷ This study is centred on the

⁴ See p. 30, n. 63 below. ⁵ Below, pp. 43–4. ⁶ Below, p. 231, n. 15.

⁷ The *Cour de justice de la République*, which in 1998 famously tried various ex-ministers for their part in the *affaire du sang contaminé* – the scandal about haemophiliacs being supplied with blood products contaminated by the AIDS virus. See generally J. Bell, ‘The criminal liability of politicians in France’, *Cambridge yearbook of European legal studies* 3 (Oxford, 2001), 65–78.

ordinary procedures. In the pages that follow, some incidental information is given about special procedures that the law of the country in question classifies as criminal, but nothing is said about those that are classified as administrative under national law.

Accusatorial and inquisitorial: the history of criminal procedure in Europe

It is commonly said that the English system of criminal procedure is ‘accusatorial’ whilst those in continental Europe are ‘inquisitorial’. Those who say this often seem to imagine that ‘accusatorial’ and ‘inquisitorial’ procedures are two categories that are completely separate and watertight – to the point where, at least on this side of the Channel, it is assumed that there is no point looking at any system in the opposite camp for ideas or inspiration. ‘That may work over there, *but of course on the continent they have the inquisitorial system.*’ In fact the matter is much more complicated because, although there are unquestionably two different traditions, the borrowings between the two have been so extensive that it is no longer possible to classify any of the criminal justice systems in Western Europe as wholly accusatorial or wholly inquisitorial. This point becomes clearer when the history of criminal procedure in Europe is considered.

THE EARLY HISTORY OF CRIMINAL PROCEDURE AND ORDEALS

In the early Middle Ages, criminal procedure throughout the whole of Western Europe seems to have been more or less homogeneous. For those caught in the act, or whilst running away, there was a barbarous summary procedure that could be called, by analogy with the term ‘citizen’s arrest’, a ‘citizen’s assassination’. F. W. Maitland describes the English version of it as follows:

When a felony is committed, the hue and cry (*hutesium et clamor*) should be raised . . . The neighbours should turn out with the bows, arrows, knives, that they are bound to keep and, besides much shouting, there will be horn-blowing; the ‘hue’ will be ‘horned’ from vill to vill. Now if a man is overtaken by hue and cry while he has still about him the signs of his crime, he will have short shrift. Should he make any resistance, he will be cut down. But even if he submits to capture, his fate is already decided . . . He will be brought before some court (like enough it is a court hurriedly summoned for the purpose), and without being allowed to say one word in self-defence, he will be promptly hanged, beheaded

or precipitated from a cliff, and the owner of the stolen goods will perhaps act as an amateur executioner.⁸

For those who were not caught red-handed but fell under suspicion later, there were more leisurely forms of procedure under which the victim of the offence – or, if it was a homicide, the relatives – made a formal accusation against the suspect. It was this procedure that gradually came to displace the crude summary procedure, which eventually died out.⁹

In its original form, this type of procedure worked without anything that the modern lawyer would recognise as a rational evaluation of the evidence. The accusation was made in proper form and had to be supported by a necessary minimum amount of evidence. But if the person so accused denied the offence, the disputed question of his guilt or innocence was resolved in one of two essentially supernatural ways. In some situations, the accused was invited to clear himself by taking a solemn oath that he was not guilty, together with a group of ‘oath-helpers’; if he could muster the requisite number of neighbours sufficiently convinced of his innocence to risk eternal damnation by swearing with him, he was acquitted. And in other situations, the court appealed to God to provide the answer by making the accused person undergo an ordeal. Sometimes the ordeal took the form of a ‘trial by battle’, under which accuser and accused fought it out, God demonstrating where truth lay by whom He caused to win the fight. But more commonly the ordeal

took the form of fire or water. In the former, a piece of iron was put into a fire and then in the party’s hand; the hand was bound, and inspected a few days later: if the burn had festered, God was taken to have decided against the party. The ordeal of cold water required the party to be trussed and lowered into a pond; if he sank, the water was deemed to have ‘received him’ with God’s blessing, and so he was quickly fished out.¹⁰

Bizarre and irrational as ordeals may seem today, they remained in use for centuries because people generally believed they worked. As a rule, the only people who knew that an ordeal had condemned an innocent person were two: the person wrongly condemned, whom nobody

⁸ F. Pollock and F. W. Maitland, *The history of English law* (revised by S. F. C. Milsom, 2 vols., London, 1968), vol. II, 578–9.

⁹ Although forms of it survived surprisingly late: for the ‘Halifax gibbet law’ that survived into the seventeenth century, see J. F. Stephen, *A history of the criminal law of England* (3 vols., London, 1883), vol. I, 265 ff.

¹⁰ J. H. Baker, *Introduction to English legal history* (3rd edn, London, 1990), 5.

believed, and the person who should have been condemned, who presumably thought it wiser to keep quiet. Only in the twelfth century did public faith in ordeals begin to falter, and this was because doubt about them began to be expressed within the Church.¹¹ In 1215 these doubts had become so widespread that the Church officially condemned them at the Fourth Lateran Council – and as this meant that priests would no longer administer ordeals, it ceased to be possible to use them in criminal justice as the means of determining guilt or innocence.

THE ORIGINS OF THE INQUISITORIAL AND ACCUSATORIAL SYSTEMS; TRIAL BY JURY

The resulting gap was filled in different ways in different parts of Western Europe. In most parts of continental Europe the kings and princes took a lesson from the Church, and adopted the method of fact-finding used when investigating allegations of misdeeds against clergymen, and later accusations of heresy, namely to commission some trusted person to hold an investigation. This would take the form of questioning the suspect and the witnesses, recording their statements in writing, and eventually deciding the matter – either with or without the help of others – on the basis of the file of information so collected. This formal investigation, or *inquisition*, was the origin of what is now called ‘the inquisitorial system’. In England, however, a different solution was adopted. This was to summon a group of citizens from the place where the offence of which the suspect stood accused had taken place, and to force them to answer under oath the same question as God was formerly asked to answer through the ordeal: namely, is he guilty or not guilty? This was the origin of trial by jury, and its invention ensured the survival of a form of criminal procedure that was basically *accusatorial*, in the sense that the court of trial did not investigate the matter, but performed the more limited function of hearing an accusation brought against a suspect and deciding whether or not he was guilty of the offence of which he stood accused.

At first it was the inquisitorial procedure that was rational and civilised and the English jury trial that was crude and harsh. The continental inquisitor judged the case by seeking out evidence and applying reason to it. In the early English jury trial, however, there was no

¹¹ R. C. Van Caenegem, *The birth of the English common law* (2nd edn, Cambridge, 1988), ch. 3.

evidence. The jury were supposed to decide the question of guilt or innocence on the basis of their own knowledge, if they had any¹² – and if they knew nothing about the case, they still had to produce a verdict because the law refused to take ‘We don’t know’ for an answer. So instead of being convicted on the evidence, the English defendant risked being convicted on gossip, hunch or simply because the jury wanted to go home. In the course of several centuries, however, the English accusatorial jury trial improved and the continental inquisitorial procedure worsened.

In England, the judges eventually started to allow the parties to call witnesses to tell the jury what had happened when the jury did not know the case themselves.¹³ Thus the jury gradually assumed its modern role as a body of independent citizens who decide on the defendant’s guilt according to the evidence of witnesses called by the prosecution and defence. Then in the late seventeenth and eighteenth centuries a further development occurred. Stripped by Parliament of their prerogative powers to imprison subjects arbitrarily and of their special courts – the Star Chamber and the Court of High Commission – where their political opponents could be prosecuted with the virtual certainty of success, the kings of England who wished to lock up their political opponents were reduced to prosecuting them for various political offences in courts in which the question of guilt or innocence was determined by juries. Although such prosecutions were frequently successful, on a number of spectacular occasions they failed because juries acquitted.¹⁴ Through this process, the jury acquired a new symbolic role as a bulwark of the citizen against excessive royal power.

THE INQUISITORIAL SYSTEM DETERIORATES: *PREUVE LÉGALE* AND TORTURE

Meanwhile, the continental inquisitorial procedure had deteriorated by adopting the systematic use of torture. Paradoxically, this ugly turn of events was brought about with the best of intentions. To protect defendants against being wrongly convicted on insufficient evidence and to

¹² Although it seems that the jurors were originally encouraged to make their own inquiries before the trial: see Pollock and Maitland, *History of English law*, vol. I, 622, 625.

¹³ No one knows exactly when, but by the end of the fifteenth century it had become the usual practice: see T. Plucknett, *A concise history of the common law* (5th edn, Boston, 1956), 129–30.

¹⁴ As in the prosecutions of Miller and Woodfall in 1770 arising out of the ‘Letters of Junius’; see (1771–7) 20 Howell’s State Trials 870, 895.

ensure that the decision was as reliable as the one that was formerly thought to come from God, the courts decided early on that the defendant who did not confess his guilt could only be condemned on the evidence of two eyewitnesses. Around this idea grew up a complex and technical law of evidence, known to French lawyers as *la preuve légale*.¹⁵ This created an obvious impediment to justice in many cases, which the system then avoided by allowing defendants against whom there was a certain minimum quantity of evidence to be tortured as an encouragement to confess.¹⁶

The continental inquisitorial procedure was refined and eventually formalised in various codes, of which the most famous were the *Constitutio Carolina*, adopted for the Holy Roman Empire by Charles V in 1532,¹⁷ and in France Louis XIV's *Grande Ordonnance* of 1670.¹⁸ Although differences of detail existed from place to place, the procedure under these various codes was broadly similar. The procedure was secret: only the eventual punishment was carried out in public. The process centred around the creation of a written dossier that was eventually considered by the judges. Although there was a prosecutor, the task of actively investigating the case belonged mainly to the court, and (to put it in modern terms) there was no clear division between the functions of prosecuting and judging. And central to the proceedings was the interrogation of the defendant, who was required to take an oath and to answer questions, and who could – where sufficient *prima facie* evidence existed – be put to torture if he persisted in denying the offence.

Harsh and oppressive as this type of procedure seems today, it did not seem so at the time and place where it evolved. Torture, in particular, seems to have troubled public opinion in continental Europe little. For centuries, it seems to have been accepted on the Continent as an obvious method of discovering the truth, just as ordeals were universally accepted centuries earlier. However, from the end of the seventeenth century onwards, enlightened thinkers in continental Europe began to attack torture as both cruel and likely to lead to the conviction of

¹⁵ For a brief account, see A. Esmein, *History of continental criminal procedure, with special reference to France* (Boston, 1913), 251 ff. and Appendix B.

¹⁶ J. H. Langbein, *Torture and the law of proof* (Chicago, 1976).

¹⁷ Esmein, *History*, 306 ff.; J. H. Langbein, *Prosecuting crime in the Renaissance: England, Germany and France* (Cambridge, Mass., 1974).

¹⁸ Esmein, *History*, 211–50; there is a modern edition by N. Picardi and A. Giuliani as part of the series *Testi e documenti per la storia del processo* (Milan, 1996). The text is also printed in M. Isambert, D. Decrasy and F. A. Jourdan, *Recueil général des anciennes lois françaises depuis l'an 420 jusqu'à la Révolution de 1789* (Paris, 1823–33), vol. XVIII, 371–423.

the innocent.¹⁹ As on the Continent criticism of torture gained ground, so did admiration for English criminal procedure. The critics pointed to it as a system that, officially at least,²⁰ managed to operate without suspects being tortured, and also without the technicalities of *la preuve légale*. As the eighteenth century progressed, so the debate about criminal procedure on the Continent became entwined with the debate about constitutional reform, trial by jury being seen as an important limit on royal power. From continental admiration of English criminal justice at this time probably comes the idea – still firmly held by many common lawyers – that their system is in some way morally superior and that English criminal procedure is the envy of the world.

THE FRENCH REVOLUTION AND NAPOLEON'S *CODE D'INSTRUCTION CRIMINELLE*

One of the first things that the French revolutionaries did was to replace their country's existing criminal procedure with what they believed to be a copy of criminal procedure in England.²¹ The change, however, proved to be a disaster. The new procedure turned out to be largely ineffective to cope with the wave of crime and disorder that swept through France in the wake of the collapse of the existing social order. This uncomfortable fact, coupled with declining national enthusiasm for English ideas and institutions in the face of nearly two decades of war with Britain, led many Frenchmen to see the virtues of the authoritarian system of criminal procedure that the revolutionaries had abolished. Among them was the Emperor Napoleon. In 1808, as part of the great codification that he set in train, France acquired a new system of criminal procedure that combined what were then thought to be the advantages of the 'English' system introduced by the revolutionaries and the earlier system that it had replaced.

Napoleon's *Code d'instruction criminelle* of 1808 introduced a sanitised version of the old inquisitorial procedure – shorn, of course, of

¹⁹ Esmein, *History*, 351 ff.

²⁰ Until the Civil War, it was sometimes practised unofficially where the king signed a 'torture warrant' giving express permission: see Langbein, *Torture*. Contrary to popular belief (shared even by Sir William Holdsworth in his *History of English law*), the Star Chamber did not use torture as part of its pre-trial procedure (see G. R. Elton, *The Tudor constitution* (Cambridge, 1965), 170 n. 1), although it certainly imprisoned unco-operative defendants for contempt of court, and in several famous cases imposed sentences of mutilation following conviction.

²¹ Esmein, *History*, 408 ff.

torture – for use in serious cases as a preliminary stage of the criminal process.²² A new judicial officer, the *juge d'instruction*,²³ interrogated the defendant and the witnesses in private, recorded their statements in writing, and prepared a dossier, which then formed the basis of the case against the defendant. Unlike under the old inquisitorial procedure, however, the judge who carried out the initial investigation was not then involved in making the final decision on guilt or innocence. This was now done at a public trial, held before new judges, sitting (in serious cases) with a jury, who were free to give such weight to the evidence as they thought proper, and were not (like courts before the Revolution) tied by the rules of *la preuve légale*. To the French, this was not a return to the old inquisitorial system, but the introduction of a new system that was neither accusatorial nor inquisitorial, and which they called (and still call) 'mixed'. This basic structure was retained when in 1958 the *Code d'instruction criminelle* was replaced by a new code, the *Code de procédure pénale*, which (with many modifications) is still in force today.

Napoleon's *Code d'instruction criminelle* was imposed on most of continental Europe during the French occupation. When the French left, the newly liberated countries either kept it (as did Belgium²⁴) or (like Italy and Germany) used it as the basis when constructing their own procedural code.

The subsequent history of criminal procedure in continental Europe is, in part, the story of how the countries that received the *Code d'instruction criminelle* gradually diversified and moved away from it.

One clear trend in this diversification is the tendency to abolish the character who, to common lawyers, is the very symbol and embodiment of the French system: the *juge d'instruction*. In Germany he disappeared in 1974 and in Italy in 1988. The reasons for his abolition are various. It was done, in part, in order to reduce delays, because to some extent his work was seen as a needless and time-consuming repetition of what had previously been done by the public prosecutor and the police. The reason was also partly ideological, because his status as a judge was thought to perpetuate an undesirable confusion between the functions of investigating and of judging, which undermines the notion of an independent court of trial, something that is essential to the protection of the accused. (To common lawyers this argument seems rather paradoxical, because

²² *Ibid.*, 462 ff.

²³ New, that is, in title; the pre-Revolutionary procedure had a *juge instructeur*.

²⁴ See p. 81, below.

when the *juge d'instruction* was abolished his investigative powers were given to the public prosecutor, who – though judicially controlled – became a more powerful player in the system.) In France itself, there have been two serious proposals to remove the *juge d'instruction*, the first in 1949²⁵ and the second in 1990²⁶ – at the very moment when one section of public opinion in Britain was advocating the introduction of the *juge d'instruction* as a protection against over-zealous prosecution leading to the conviction of the innocent. Although under attack in France, however, the *juge d'instruction* is a figure who also has his strong supporters. Unlike the public prosecutor, who in France can be given orders by the minister of justice, the *juge d'instruction* enjoys freedom from direct interference from the government – a freedom that has enabled a number of them to pursue investigations into offences involving politicians who, it is widely suspected, would have used their political influence to suppress them if they could.²⁷

To some extent, this move away from the Napoleonic model has taken the form of borrowing yet further ideas from the common law tradition. Thus Germany, influenced by writers such as Anselm von Feuerbach²⁸ and Carl Mittermaier,²⁹ borrowed the idea that the court of trial must always hear evidence from the key witnesses orally, and in 1988 Italy adopted the notion – fundamental to the common law of evidence but foreign to the French tradition – that written statements taken from the witnesses during the investigation must not be treated by the court of trial as evidence, together with another notion foreign to French practice but well known to English law, the guilty plea.

On the other hand, the move away from the Napoleonic model has also taken the form of abandoning or modifying one of the most important elements that the *Code d'instruction criminelle* had acquired from English law: the jury. In continental Europe, the idea that juries are essential to protect the rights of the citizen took an uncomfortable knock

²⁵ In the report of an official commission chaired by Professor Donnadiou de Varbres. See [1949] RSC 499, and J. Pradel, *L'Instruction préparatoire* (Paris, 1990), 37.

²⁶ Commission justice pénale et droits de l'homme, *La Mise en état des affaires pénales* (Paris, 1991).

²⁷ The most famous recent example is the case of Roland Dumas, former minister and close associate of President Mitterrand, who, after a lengthy investigation, in May 2001 received a two-year sentence (with eighteen months suspended) for pillaging the coffers of Elf, the State petroleum company, of 800,000 FF: *Le Monde*, 31 May 2001.

²⁸ P. J. A. Ritter von Feuerbach, *Betrachtungen über die Oeffentlichkeit und Mündlichkeit der Gerechtigkeitspflege* (Giessen, 1821).

²⁹ C. J. A. Mittermaier, *Die Mündlichkeit, das Anklageprinzip, die Oeffentlichkeit und das Geschworenengericht* (Stuttgart and Tübingen, 1845).

when, during the French Revolution, juries sent thousands of innocent people to the guillotine, and since the beginning of the nineteenth century there has been a general move away from juries (at least as they exist in England). The Dutch abolished juries almost the day after the French withdrew, since when their criminal courts have been entirely composed of professional judges.³⁰ In Germany, juries were abolished in 1924 under the Weimar Republic and replaced by courts composed of professional judges sitting with selected laymen (*Schöffen*), and a similar arrangement now prevails in Italy.³¹ Even in France itself the type of independent jury envisaged by the *Code d'instruction criminelle* no longer exists, having been replaced in 1941³² by an arrangement, still in force, under which a group of lay jurors sit together with three professional judges, with whom they retire to consider their verdict. Of the four continental countries in the present study, only Belgium retains, for the trial of serious offences, a jury of twelve lay persons who decide the question of guilt or innocence in isolation.

CHANGES IN ENGLISH CRIMINAL PROCEDURE: THE INVESTIGATION AND THE PRE-TRIAL PHASE

Since the end of the eighteenth century English criminal procedure has undergone a series of changes that are no less fundamental than the ones that have happened on the Continent – although without either a political revolution or a new procedural code the changes have been piecemeal and less obvious.

The first concerns the means by which criminal offences are investigated and brought to trial. In the eighteenth century England had neither a professional police force nor a public prosecutor, and, in the absence of both, the enforcement of the criminal law was largely a matter of private enterprise. In a tiny number of high-profile political cases, and also murders, the prosecution was conducted by the organs of the state in the form of the attorney-general and his deputy, the solicitor-general. For all other offences, the prosecution was brought by private citizens: the victims of the offences or their families, and sometimes other people who were tempted to prosecute in the hope of obtaining a reward. In their efforts they were aided, to a minimal extent, by lay magistrates, part of whose function in those days was the collection of

³⁰ G. J. M. Corstens, *Het Nederlands strafprocesrecht* (3rd edn, Deventer, 1999), ch. 3.

³¹ See below, chapter 6, pp. 355–6.

³² R. Merle and A. Vitu, *Traité de droit criminel* (4th edn, Paris, 1989), § 523.

evidence and arresting suspects, backed up in normal times by a creaky medieval system of elected constables, and in times of riot by the army. At this point in history it was literally true, and not empty rhetoric, to say that the enforcement of the criminal law was in the hands of the citizens themselves, and not the central organs of the state.

By the early nineteenth century it was becoming increasingly obvious that this antique system was no longer able to cope with the facts of urbanisation and rising crime, and that what was badly needed was a professional police force, as in France and many other parts of continental Europe. Despite this, the idea of introducing professional police in England initially met strong resistance from those who looked uneasily at what went on in France under the Bourbons and then Napoleon, and thought that professional policemen – and public prosecutors – were organs of dictatorship and tyranny that would undermine civil liberties and quickly turn the country into a police state.³³ This resistance was eventually overcome, and legislation between 1829 and 1856 created professional police for all parts of England and Wales. However, in order to try to meet some of the objections of principle, the police forces so created were different from their counterparts in continental Europe in several significant respects. In the first place, they were locally organised and – except for the Metropolitan Police – not under the direct control of the central government. Secondly, they did not operate under the direction of any kind of official public prosecutor, because at this stage in English history there was none. Thus when the new police caught criminals, they prosecuted them themselves; and the theory was that they did so, not as agents of the state, but ‘as private citizens’.

This was, of course, a fiction, and as a system of prosecution it had a number of obvious disadvantages. In an attempt to overcome them, the office of Director of Public Prosecutions (DPP) was created in 1879 – although at this point and for 100 years afterwards he did not ‘direct’ public prosecutions but merely played the part of guide and adviser to the police.³⁴ In 1985 came the creation of the Crown Prosecution Service (or CPS), a centralised service of full-time public prosecutors, operating under the orders of the DPP, who in turn acts ‘under the superintendence of the Attorney-General’.³⁵ The main function of the CPS is to take over, and thereafter run or drop, the prosecutions that the police have started. No longer is it possible to argue, however faintly, that in

³³ See generally L. Radzinowicz, *A history of English criminal law* (5 vols., London, 1948–56), vol. III; D. Hay and F. Snyder, *Policing and prosecution in Britain, 1750–1850* (Oxford, 1989).

³⁴ See chapter 7, below. ³⁵ Prosecution of Offences Act 1985, s. 3(1).

England, unlike in continental Europe, the detection and prosecution of offences is the function of the citizen and not the state.

The arrival in the English system of professional policemen and public prosecutors eventually led to another change of some importance. Traditionally, the centre of English criminal procedure was the trial. In principle, the trial was the stage at which the major decisions were taken. What went on before was less important, and was comparatively unregulated by the law. But the arrival of professional policemen and public prosecutors in England has led to the emergence of a practically important, and increasingly closely regulated, 'pre-trial phase'.

In the days when the job of investigating and prosecuting crime was done by private citizens, the law understandably gave them little in the way of coercive powers – and at first, few if any extra powers were given to the police. Such powers as existed were in practice insufficient, with the consequence that, to get their job done, the police almost systematically exceeded them. When the police obtained evidence by breaking such rules as there were, the courts in practice tended to condone the breach of rules by admitting it. This was long felt to be an unsatisfactory state of affairs, and in 1984 parliament passed the Police and Criminal Evidence Act, which at once codified the coercive powers of the police, and considerably extended them, in particular by giving them the power known in France as *garde à vue*: the power to detain suspects at the police station for questioning. Once the police had acquired what might be termed the 'legal tools to do the job', the courts began to take the limits of police powers seriously, and became increasingly willing to exclude evidence they had obtained by exceeding them.

At the same time, the trial phase has been displaced, at least to some extent, as the central point in English criminal procedure at which the key decisions affecting the accused are made. For many years the trial was truly central, because most cases, whether weak or strong, ended in a final hearing in a courtroom. Although at trial the case had to be proved beyond reasonable doubt, the amount of evidence necessary to launch a prosecution was minimal, and it was generally accepted that the detection and elimination of weak cases was something that took place at trial. However, with the arrival of professional police forces and an official public prosecutor, it gradually became accepted that it is part of the duty of these bodies to weed out weak cases before they come to trial, and even to weed out strong cases where it is 'not in the public interest' to proceed. In consequence, many cases that in former times would have ended up in court disappear from the system before they

get there. Around this important change has grown up an increasingly important body of new legal rules about such matters as the exercise of the discretion to prosecute, and the diversion of cases from the court system by the police 'cautioning' offenders instead of prosecuting them.

In both these two respects, English criminal procedure has become a little more like criminal procedure on the Continent, where a closely regulated pre-trial phase has long existed, and where it has also long been accepted that only those cases where there is a strong chance of conviction ought to be allowed to reach the stage of the final public hearing.

ENGLISH CRIMINAL PROCEDURE – CHANGES IN THE TRIAL

Since the middle of the eighteenth century the trial phase itself has undergone a change that is truly fundamental.³⁶ In 1750 almost every case was tried by jury, and both guilty pleas and summary trial were virtually unknown. But in those days jury trial was very different from the situation today. There were virtually no rules of evidence, and in the great majority of cases there were no lawyers (either for the prosecution or for the defence). In felony cases the defendant was not allowed to have one, and in practice usually did not have one even in those cases where he could; and the private citizens who in those days brought most of the prosecutions were usually unrepresented, too. In consequence a jury trial was a truly summary affair, in which the dominant role was played by the judge. It was, in fact, rather similar to the sort of trial that used to take place until quite recently in the English magistrates' courts, in the days when the police still prosecuted their own cases and legal aid for summary trials was virtually unknown – except that magistrates, unlike eighteenth-century judges, did not sentence convicted criminals to death. From the eighteenth century onwards, however, judges became rightly worried about miscarriages of justice. As the legal historian John Langbein explains:

Into the early decades of the eighteenth century the judges seem to have remained confident that this system was working well, and they must have prided themselves on the immense caseloads that they were able to discharge in a few trial days per year. Beginning, we think, in the middle third of the eighteenth

³⁶ On this subject, see, *inter alia*, the extensive writings of J. H. Langbein, and in particular his articles 'The criminal trial before the lawyers' (1978) 45 *University of Chicago Law Review* 263; 'Shaping the eighteenth-century criminal trial: a view from the Ryder sources' (1983) 50 *University of Chicago Law Review* 1; 'The prosecutorial origins of defence counsel in the eighteenth century' (1999) 58 *CLJ* 314.

century, the judges became aware that there might be grievous flaws in the criminal process, although we cannot say with any precision when and why the doubts set in strongly.³⁷

Behind this disquiet lay a number of crude devices by which the legal system sought to secure the prosecution and conviction of criminals without a body of professionals dedicated to the task, all of which were capable of serious abuse. These included offering rewards for information that led to the conviction of criminals,³⁸ and dubious deals with criminals who were willing to 'turn King's evidence', both of which occasionally led to innocent people being falsely accused. As a reaction to this:

The courts admitted defence lawyers, initially for the sole purpose of helping the criminal accused probe the prosecution evidence. And the courts began to develop rules of evidence, such as the corroboration rule and the confession rule, designed to prevent the riskiest kinds of prosecutions from going forward.³⁹

In consequence of this, in the course of the nineteenth century the pace of jury trial slowed dramatically down and became, as Langbein puts it, 'unworkable as a routine dispositive procedure'. To meet the resulting risk of criminal justice simply collapsing, two immensely important steps were taken. Parliament, on the one hand, passed a series of Acts that hugely increased the scope of summary trial. The judges, for their part, reversed their long-standing attitude towards guilty pleas. Originally they positively discouraged them, being unwilling to sentence people against whom the evidence had not been heard.⁴⁰ But during the nineteenth century they gradually departed from their traditional practice and took to positively encouraging them – finally inventing the 'sentencing discount' for those who were prepared to admit their offences and thereby relieve the court of the need to hear the evidence.⁴¹

³⁷ 'Shaping the eighteenth-century criminal trial'.

³⁸ The Macdaniel scandal attracted great attention. Macdaniel and his associates made a living by falsely accusing innocent persons of highway robbery and pocketing the official rewards payable to those whose evidence secured the conviction of highwaymen. As a result of their activities a number of innocent persons were sentenced to death and executed. When they were eventually detected there was an unsuccessful attempt to prosecute them for murder, followed by successful proceedings for perjury. Their sentences included standing in the pillory, where the mob set upon them and stoned one of them to death. The story is told by Sir Leon Radzinowicz in his *History of English criminal law*, vol. II, 326–32.

³⁹ Langbein, 'Shaping the eighteenth-century criminal trial', 133.

⁴⁰ Langbein, 'The criminal trial before the lawyers', 278–9.

⁴¹ The precise point when the change of judicial attitude took place in England appears to be unknown. However, observers writing about English criminal procedure at the

The consequence of all this is that jury trial ceased to be the central route by which criminal cases are disposed of, to the point where nowadays only some 1 or 2 per cent of all cases are finally disposed of in this way. Today the routine method is summary trial in the magistrates' courts, usually accompanied by a guilty plea.

These changes have made English criminal procedure more like the French-influenced continental ones in one most important respect, which is that when the English courts finally dispose of cases they, too, now typically do so on the basis of written rather than oral evidence. In a fought case, there is, of course, a 'trial' at which the evidence is given orally; but where the defendant pleads guilty, the court usually finds such facts as it needs to know from the file of written witness-statements taken earlier by the police. An observer who finds himself in an English courtroom where the judge or magistrates are dealing with defendants who plead guilty may spend the whole day there without hearing any witnesses give oral evidence – much as he may in the *tribunal correctionnel* in Paris.

One further important respect in which English criminal procedure has moved towards the continental tradition concerns appeals in criminal cases – an institution historically foreign to the common law tradition, although now well established, as is explained below.⁴²

COMMON RESPONSES TO COMMON CONCERNS: DEFENCE RIGHTS, AND RISING CRIME

A final point to mention in this historical overview is that many of the changes in both continental and English criminal procedure since the time of the French Revolution have been driven by similar concerns, and to some extent this has led to similar solutions.

One major concern has been to improve the position of the defendant. A consequence of this has been a general move to give the defendant better access to legal representation and advice. A major change in English criminal procedure, as seen above, was the abolition of the long-standing rule that those accused of felonies were not allowed lawyers

beginning of the nineteenth century still said guilty pleas were rare, whereas in 1903 the Select Committee on the Poor Person's Defence Bill reported that 40 per cent of prisoners pleaded guilty. Much information about the history of guilty pleas is contained in Albert W. Alschuler, 'Plea bargaining and its history' (1979) 79 ColLR 1. In England the old practice of discouraging guilty pleas lingered on in capital cases until the end of capital punishment.

⁴² See below, pp. 202–4.

to defend them at the trial – a rule that was first eroded in practice, and then finally abolished by Parliament in 1836. More recently, an issue much discussed in all parts of Western Europe has been the matter of allowing suspects to have legal advice at an earlier stage in the proceedings, in particular while they are being questioned by the police. Of the countries in the present study, Germany and Italy were in fact the first to guarantee this right: Germany in 1964 and Italy in 1971. England and Wales came next, in 1984, and France nine years later in 1993. Belgium is now the only member of the group that still formally denies it.⁴³ In similar vein, there has been a general move to improve the defendant's right to information. The move in England towards making the prosecution to disclose 'unused material', which eventually led to the Criminal Procedure and Investigations Act 1996, has had a parallel in France in a series of changes to allow the defendant's lawyer more extensive *accès au dossier*.⁴⁴

As well as being concerned to improve the guarantees offered to defendants, all five countries in the present study have been simultaneously concerned about the increasing workload of the criminal courts, and the delays to justice that this causes. To some extent this, too, has led the different jurisdictions to seek similar solutions, becoming more similar to one another in the process. However, in Germany and Italy, the guiding principle is supposedly 'compulsory prosecution': the authorities are obliged to prosecute any offence for which sufficient evidence exists, and do not have (as in England and Wales, France and Belgium) a general discretion to prosecute or not. In Germany, the law now officially gives the public prosecutor a discretionary power to drop certain types of case, and in Italy the overburdened public prosecutors sometimes adopt practices which have the same result.⁴⁵ Similarly, there has been a marked tendency in all the countries in this study to bypass the slower and heavier types of procedure that are meant for serious cases and to divert an ever-greater slice of the work through the quicker and less solid forms of procedure that were originally designed to deal with minor cases. Just as in England jury trial in the Crown Court has become statistically the exception, so in France a smaller and smaller proportion of cases now proceeds down the traditional route of an investigation carried out by a *juge d'instruction*. Between 1960 and 1988, the proportion of prosecutions handled by a *juge d'instruction* fell from 20 per cent to less than 10 per cent. In so far as this process reduces the

⁴³ See chapter 10, below. ⁴⁴ See further chapter 4, pp. 265–6, below.

⁴⁵ See chapter 7, below.

delays in justice it is undoubtedly good; but bypassing the heavier forms of criminal procedure also can be bad for defendants, in so far as the heavier forms usually offer him the better guarantees against wrongful conviction. Obviously, the desire to secure a fair deal for defendants and the need to do justice speedily and economically tend to conflict.

With increasing concern about rising crime on one side and increasing concern about protecting human rights on the other, criminal justice in Europe has been thrown into a state of turmoil. In most parts of Europe, the last few years have seen a constant flow of legislative reforms, to the point where keeping abreast of developments in the five countries in this study has been one of the major difficulties in preparing this book. Throughout Europe, criminal justice is in something like Chairman Mao's preferred state of 'perpetual revolution'.

Accusatorial and inquisitorial: the meaning of these concepts today

From the previous section of this chapter it should be clear that, although criminal procedure in Western Europe stems from two distinct traditions, it is no longer accurate to talk in terms of continental Europe having something called 'the inquisitorial system', while in England there is something entirely different called 'the accusatorial system'. But is there some residual sense in which it still conveys something meaningful about the five criminal justice systems in the present study to attach the labels 'inquisitorial' or 'accusatorial' to them? The answer to this question must be 'Not without further explanation'. This is because the ingredients of the terms 'inquisitorial' and 'accusatorial' mean so many different things to different people, and confusion consequently abounds as to what the essence of the distinction between them is.

THE STATE AS OFFICIAL PROSECUTOR

To some continental lawyers, the essence of the distinction revolves around who prosecutes: an inquisitorial system is one where the function of prosecuting is carried out by organs of the State, whereas in an accusatorial system the job is done by one citizen bringing a formal accusation against another. Under this definition, none of the present-day systems of criminal justice in Europe are truly accusatorial. English criminal procedure was 'accusatorial' in this sense before the days of