Part I
Evidentiary contexts

1

Evidence across traditions

1.1 Introduction: the convergence debate

Within the last 30 years there has been a renewal of interest among teachers and students in comparative criminal justice as a field of study.[1] With growing pressure on legal systems to respond to the demands of globalisation and cosmopolitanism,[2] penal law has become one of a growing number of areas of law that is engaging with comparative legal studies.[3] Much of the debate has centred on whether or not these demands are driving legal systems towards convergence. A combination of pressures would seem to be supporting the convergence thesis within criminal justice.[4] National legal systems plagued by common problems of rising crime, concern for victims and the growing cost and delay in processing cases through the courts would seem to have led to a willingness to seek 'foreign' solutions to similar problems. In addition to these internal pressures, there have been external pressures on states to find common transnational solutions to deal with the problems of organised crime and drug trafficking.

In addition to this, international terrorism and the growing ethnic and religious conflicts around the world pose a particular challenge for international law as to whether these problems can be resolved by international legal co-operation or whether as protagonists of the 'war on terror' would have it they are better met through the exercise of hegemonic power with international law

[1] See, e.g. R. S. Frase, 'Main-Streaming Comparative Criminal Justice: How to Incorporate Comparative and International Concepts and Materials into Basic Criminal Law and Procedure Courses' (1998) 100 *West Virginia Law Review* 773; and D. Nelken, *Comparative Criminal Justice: Making Sense of Difference* (London: Sage, 2010).

[2] On the effects of globalisation, see W. Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000). On cosmopolitanism, see P. Roberts, 'Rethinking the Law of Evidence: A Twenty-First Century Agenda for Teaching and Research' (2002) 55 *Current Legal Problems* 297.

[3] See P. Roberts, 'On Method: The Ascent of Comparative Criminal Justice' (2002) 22 *Oxford Journal of Legal Studies* 539.

[4] On the convergence thesis generally, see B. S. Markesinis (ed.), *The Gradual Convergence* (Oxford: Clarendon Press, 1994) 30. Others have been equally adamant that convergence is not taking place. See P. Legrand, 'European Legal Systems Are Not Converging' (1996) 45 *International & Comparative Legal Quarterly* 52.

being reduced to accommodate the demands of the most powerful states.[5] Those who would seek to deal with these problems through international law need to develop common legal solutions. An example of this is the effort made by the international legal community to deal with those who have committed war crimes and crimes against humanity through international criminal tribunals applying international criminal law.[6] But if this new international regime is to work successfully, there needs to be a consensus on the appropriate rules of evidence and procedure for holding such trials.[7]

It is at this point of reaching consensus on issues of evidence and procedure that there continues to be considerable suspicion of other systems and where the convergence thesis begins to unravel. To be sure, the success achieved by the international community in agreeing rules for trying those charged with war crimes and crimes against humanity in the ad hoc tribunals in The Hague and Arusha and, more recently, before the permanent International Criminal Court may be counted as a victory for convergence, although the delays in bringing those charged to justice is causing some to question whether the existing processes are not undermining the whole enterprise of international criminal justice.[8] But when national systems are asked to change their own laws of evidence and procedure or subject their citizens to those of others, there is often fierce loyalty displayed towards local traditions and a fierce resistance to change.

A good example is to be seen in Europe, where the existence of a single market within the European Union would seem to lead logically to close cooperation in criminal justice and a realignment of national systems of evidence and procedure, but where progress has been slow. Within the last decade there has been recognition that the traditional means of dealing with transnational crime through mutual assistance has been cumbersome and that there needs to be closer cooperation between enforcement agencies.[9] EU competence has been declared in the area of criminal justice,[10] giving recognition to two bodies:

[5] This age-old controversy as to whether international law is simply a disguise for international power politics has been given a new lease of life since the events of 9/11 and the invasion of Iraq. See, e.g. P. B. Heymann, *Terrorism, Freedom and Security* (Boston: MIT Press, 2003); and P. W. Kahn, *Sacred Violence: Torture, Terror and Sovereignty* (Ann Arbor: University of Michigan Press, 2008). For a discussion of how this debate relates to transitional justice discourses, see C. Bell, C. Campbell and F. Ni Aoláin, 'The Battle For Transitional Justice: Hegemony, Iraq and International Law', in J. Morison, K. McEvoy and G. Anthony (eds.), *Judge, Transition and Human Rights: Essays in Memory of Stephen Livingstone* (Oxford University Press, 2007).

[6] See generally G. Robertson, *Crimes against Humanity: The Struggle for Global Justice* (London: Penguin, 2002).

[7] See R. May and M. Wierda, 'Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, Arusha' (1999) 37 *Columbia Journal of Transnational Law* 725; and G. Boas, 'Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility' (2001) 12 *Criminal Law Forum* 41.

[8] R. Zacklin, 'The Failings of the Ad Hoc International Tribunals' (2004) 2 *Journal of International Criminal Justice* 541–5.

[9] See, e.g. Council of Europe Convention on Mutual Assistance in Criminal Matters (1959), EU Convention on Mutual Assistance in Criminal Matters (2000).

[10] See Art. 83(2) of the Treaty on the Functioning of the European Union (TFEU), [2010] OJ C83.

Europol, which has the power to request national police forces to commence investigations and participate in joint investigation teams; and Eurojust, to facilitate coordination of prosecutions where there is a cross-border element.[11] The EU has also begun to replace the principle of mutual assistance with the principle of mutual recognition, whereby decisions taken in one member state are accepted as valid in other member states and are acted on accordingly.[12] This stops short of requiring convergence between systems as it tolerates a degree of diversity, but it does require there to be an element of trust in each others' systems as a judicial decision issued in one member state must be recognised and executed in the requested member state. Although the first steps in this direction to establish a common arrest warrant and the mutual recognition of orders freezing property or evidence were limited in nature,[13] the European Evidence Warrant is much broader, requiring the mutual recognition of orders for obtaining objects, documents and data for use in criminal proceedings in the issuing state.[14] As yet, however, the proposal for an evidence warrant falls short of providing for the mutual admissibility of evidence in the courts of the member states, although there is an aspiration that this should occur.[15]

It is not surprising that an area of law long confined within the nation state should be so closely identified with the state and that resistance is met when attempts are made to modify features that are closely associated with national systems. Nor indeed should there be an uncritical eye cast towards such attempts. Issues of evidence in particular are not confined to the technical nuts and bolts of making a system run more smoothly, but go to the heart of the rights of individuals. If a person has no means to challenge the evidence against him or her, for example, that is not a 'mere' matter of procedure, but a matter of substance affecting the fundamental relationship between the state and the individual when the individual is charged with a criminal offence. What is perhaps surprising, however, is that instead of addressing such fundamental

[11] Europol was formally established through the Europol Convention 1995. Eurojust was established by a Council decision in 2002: see 2002/187/JHA OJ.

[12] At the Tampere European Council in October 1999, the principle of mutual recognition was highlighted as the 'cornerstone' of judicial cooperation in both criminal and civil matters. On the notion of mutual recognition in the light of the Treaty of Lisbon, see V. Mitsilegas, *EU Criminal Law* (Oxford: Hart Publishing, 2009) 156 ff. See also S. Peers, 'EU Criminal Law and the Treaty of Lisbon' (2008) 33 *European Law Review* 507.

[13] See Council Framework Decision on the European arrest warrant ([2002] OJ L190) and Council Framework Decision on the execution in the EU of orders freezing property or evidence ([2003] OJ L196) respectively.

[14] See Council Framework Decision 2008/978/JHA, 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for the use in proceedings in criminal matters. See further S. Gless, *Beweisrechtsgrundsätze einer grenzüberschreitenden Strafverfolgung* (Baden Baden: Nomos, 2007); and J. A. E. Vervaele (ed.), *European Evidence Warrant: Transnational Judicial Inquiries in the EU* (Antwerpen: Intersentia, 2005).

[15] Compare the Green Paper produced by the Commission, COM (2009) 624 final (which includes the 'mutual admissibility' element) with the Draft Directive regarding the EIO in criminal matters proposed by a group of Member States, 29 April 2010, Interinstitutional File 2010/0817 (COD), which does not.

matters of substance, comparative scholarship in the field has tended to reinforce the nationalist tendency of states to differentiate themselves from others by classifying systems of evidence and procedure into two discrete categories: one defined as 'adversarial' or 'accusatorial' and the other as 'non-adversarial' or 'inquisitorial'. This typology has enjoyed such a strikingly long lease of life that it is unusual even today for any work of comparative criminal evidence and procedure to eschew reference to these terms. Acknowledging that such systems are ideal types, scholars have proceeded to examine how 'adversarial' or 'non-adversarial' particular systems are and whether or not such systems are converging by reference to this dichotomy. It is widely assumed that this approach is not only a valuable heuristic tool for theorising about different influences at play in Anglo-American and continental processes, but that it also provides a useful independent standard for comparing different systems and determining how convergent or divergent they are.[16]

The convergence debate has therefore become fixated on whether systems are moving in an 'inquisitorial' or 'adversarial' direction, with little clarification of what these terms actually mean. Some commentators have detected a slow, gradual convergence in the evidentiary processes of common law and civil law systems towards a 'middle position' as the respective oral 'adversary' and written 'inquisitorial' traditions within each system are borrowed from each other.[17] The trends that have been identified in civil law countries include an increasing prominence given to parties and their lawyers, the diminishing authority of professional judges, a shift from pre-trial to trial phases of adjudication which has led to greater importance given to oral evidence and the right to confrontation, with less reliance on the accused as a source of testimonial evidence, and, finally, greater pressures to find 'consensual' alternatives to traditional trial processes.[18] Trends away from adversary excesses in certain common law countries, on the other hand, have been said to include greater judicial management over the

[16] For defences of the use of adversarial and inquisitorial models in order to analyse criminal procedure systems, see N. Jörg, S. Field and C. Brants, 'Are Inquisitorial and Adversarial Systems Converging?', in P. Fennell, C. Harding, N. Jörg and B. Swart (eds.), *Criminal Justice in Europe: A Comparative Study* (Oxford University Press, 1995) 41; L. Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford: Clarendon Press, 2001) 142; M. Langer, 'From Legal Transplants to Legal Translations: The Globalisation of Plea Bargaining and the Americanization Thesis in Criminal Processes' (2004) 45 *Harvard International Law Journal* 1; and P. Duff, 'Changing Conceptions of the Scottish Criminal Trial: The Duty to Agree Uncontroversial Evidence', in A. Duff, L. Farmer, S. Marshall and V. Tadros (eds.), *The Trial on Trial (1): Truth and Due Process* (Oxford: Hart, 2004) 31.

[17] Markesinis, *The Gradual Convergence*, 30. See, e.g. C. Bradley, *Criminal Procedure: A Worldwide Study* (Durham: Carolina Academic Press, 1998) xxi; and G. Van Kessel, 'European Trends Towards Adversary Styles in Procedure and Evidence', in M. Feeley and S. Miyazawa (eds.), *The Japanese Adversary System in Context* (Basingstoke: Macmillan, 2002) 225.

[18] Van Kessel, 'European Trends', 227. These trends are by no means self-evident in the practices of all civil law countries. A counter-tendency to the shift from pre-trial to trial phases of adjudication, for example, is that the police have been gaining additional powers in certain jurisdictions at the expense of judicial authorities. See E. Mathias, 'The Balance of Power between the Police and the Public Prosecutor', in M. Delmas-Marty and J. Spencer (eds.), *European Criminal Procedures* (Cambridge University Press, 2002) 459, 481.

criminal process, greater disclosure requirements on prosecution and defence, in some cases a curtailing of the right of silence and greater reliance on pre-trial evidence for vulnerable witnesses.[19]

While these developments would appear to lend credence to the convergence thesis, others have pointed to counter-influences at work that are actually moving the systems further away from each other. Sceptics of convergence point to the unintended effects of 'transplanting' processes and procedures from one national and legal culture into another.[20] Institutional and cultural resistance within the receiving system sometimes proves too strong to achieve the impact intended, with the result that the character of the imported practice or procedure is altered in the new procedural environment. As Damaška has put it, 'the music of the law changes, so to speak, when the musical instruments and the players are no longer the same'.[21] Italy is often used as an example where a new criminal procedure code was drafted along 'adversarial' lines, but where this transplant has been met with a number of institutional obstacles.[22] But it is not merely the institutional context in which a transplant is introduced that determines its success: it is also the willingness with which the actors involved are prepared to embrace it. Consequently, it has been argued that the procedures that operate in common law and civil law systems may be understood not only as two ways of arranging legal procedure, but also as two different procedural cultures reflecting normative conceptions of how proceedings *should* be organised.[23] Attempts to import 'foreign' solutions often lead to practices being 'translated' in a different way and this can lead to fragmentation and divergence rather than convergence within the systems concerned.

Thanks to Damaška's influence, comparativists no longer look simply at rules of evidence and procedure in order to determine whether systems are converging. The analysis has become a deeper inquiry into the influence of

[19] Van Kessel, 'European Trends', 227; J. McEwan, 'Cooperative Justice and the Adversarial Criminal Trial: Lessons from the Woolf Report', in S. Doran and J. Jackson (eds.), *The Judicial Role in Criminal Proceedings* (Oxford: Hart, 2000) 171; J. Jackson, 'The Adversary Trial and Trial by Judge Alone', in M. McConville and G. Wilson (eds.), *The Handbook of the Criminal Justice Process* (Oxford University Press, 2002) 335; A. T. H. Smith, 'Criminal Law – The Future' [2004] *Criminal Law Review* 971, 972–3. Not all common law countries have been so susceptible to such changes, however. For the limited impact of continental-inspired reforms on the US criminal justice system, see J. H. Langbein, 'The Influence of Comparative Procedure in the United States' (1995) 43 *American Journal of Comparative Law* 545.

[20] On the notion of 'transplants' from one legal system to another, see A. Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd edn (Athens: University of Georgia Press, 1993). For sceptical views, see, e.g. N. Boari, 'On the Efficiency of Penal Systems: Several Lessons from the Italian Experience' (1997) 17 *International Review of Law and Economics* 115; and G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11.

[21] M. Damaška, 'The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments' (1997) 45 *American Journal of Comparative Law* 839, 840.

[22] See, e.g. W. T. Pizzi and M. Montagna, 'The Battle to Establish an Adversarial Trial System in Italy' (2004) 25 *Michigan Journal of International Law* 429; and E. Grande, 'Italian Criminal Justice: Borrowing and Resistance' (2000) 48 *American Journal of Comparative Law* 227, 232.

[23] Langer, 'From Legal Transplants'.

institutional and cultural factors.[24] But scholars have still continued to use the adversarial/inquisitorial dichotomy to guide their analysis. To borrow Damaška's metaphor, the musical instruments may have become more refined and the players more sophisticated, but the musical score remains the same. This is not to say that it is possible, or even desirable, to outlaw the terms altogether from the comparativist's lexicon. They are such a familiar part of this lexicon that it is exceedingly difficult to maintain any comparative study without some reference to them even if we wanted to.[25] We also do not seek to deny that these terms may be useful for identifying different procedural traditions within common law and civil law systems. As the terms are broadened out to include different political structures of authority and different legal cultures, they can be viewed as encompassing different normative expressions of how to conduct legal proceedings.[26] They may therefore retain some use historically as an expression of the two different procedural traditions systems that have dominated the common law and civil law world and as descriptions of how actors perceive their practices.

But we would argue that the dichotomy is increasingly unhelpful in describing actual systems of justice and as a heuristic tool for gauging whether or not systems are converging as the 'ideal-types' increasingly diverge from real-life processes.[27] It is commonly assumed that the essence of the contrast lies in arranging proceedings around the notion of a dispute or contest between two sides – prosecution and defence – in a position of theoretical equality before a court which must decide on the outcome and arranging them around the notion of an official and thorough inquiry driven by court officials.[28] The difficulty here is that as procedures have been changing within the last 30 years, it is becoming increasingly doubtful whether this essential contrast still has much explanatory force within different common law and civil law systems. If we take as an example the Swiss system, which is commonly perceived to fall within the inquest model, in common with a number of other new procedural codes on the Continent,[29] Swiss judicial authorities no longer take centre stage in

[24] See in particular M. Damaška, *The Faces of Justice and State Authority* (New Haven: Yale University Press, 1986).

[25] The authors owe this thought to Paul Roberts.

[26] See S. Field, 'Fair Trials and Procedural Tradition in Europe' (2009) 29 *Oxford Journal of Legal Studies* 365, 372.

[27] See the analysis in J. Jackson, 'The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment' (2005) 68 *Modern Law Review* 737, 740–7.

[28] See, e.g. M. Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1973) 121 *University of Pennsylvania Law Review* 506, 563–5; and P. Roberts and A. Zuckerman, *Criminal Evidence*, 2nd edn (Oxford University Press, 2010) 49.

[29] See J. R. Spencer, 'Evidence', in Delmas-Marty and Spencer, *European Criminal Procedures*, 625, discussing France and Belgium. For an overview of the criminal procedural reforms in Austria, see R. Moos, 'Die Reform des Vorverfahrens im österreichischen Strafverfahren', in H. Müller-Dietz, E. Müller, K.-L. Kunz, H. Radtke, G. Britz, C. Momsen and H. Koriath (eds.), *Festschrift für Heike Jung zum 65. Geburtstag* (Baden-Baden: Nomos, 2007) 590.

the handling of evidence. In Switzerland, the investigating judge is now the prosecutor and, in common with a number of other continental systems, the position of the investigating judge has been abolished altogether.[30] In the pre-trial process, the prosecutor now arranges the confrontation hearings and is responsible for conducting them.[31] There is no impartial third party present, just the prosecution and defence, and the defence has the chance to question the witnesses. Indeed, a novel feature in a number of so-called 'inquisitorial' systems now is that the prosecution and defence may reach an agreement over the outcome of the case, with the result that the court no longer plays any meaningful role in fact-finding at all.[32] This is not to say that there are not still quite considerable differences between common law and civil law systems. One difference that is still significant is that for all the possibilities for plea bargaining, the trial is still generally the only forum in common law systems where evidence can be effectively challenged by the defence. Within civil law systems, the defence has the opportunity and is expected to challenge evidence before trial in the various pre-trial phases, even though in many instances there may not be a judge present to oversee fairness in the process. This suggests that the contrast between the systems is better found in the stage at which 'adversarial' testing takes place than in any fundamental difference between 'adversarial' and 'inquisitorial' proceedings.

1.2 Comparative evidence scholarship

The adversarial/inquisitorial dichotomy has had a particularly baneful effect on evidence scholarship. Evidence scholarship has enjoyed something of a renaissance within the last 30 years, taking an 'interdisciplinary turn' away from purely doctrinal scholarship towards inquiries into the psychology of witnesses and fact-finders, forensic science and theories of probability and proof, taking in new perspectives from the domains of feminist theory and law and economics.[33]

[30] E.g. in Germany, Portugal and Italy, see C. Van Den Wyngaert, *Criminal Procedure Systems in the European Community* (London: Butterworths, 1992). On the decline of the investigating judge, see H. Jung, 'Der Untersuchungsrichter – ein Nachruf?', in R. Moss, U. Jesionek and O. F. Müller, *Strafprozessrecht im Wandel: Festschrift für Roland Miklau zum 65, Geburtstag* (Innsbruck: Studienverlag, 2006).

[31] Art. 147 Swiss Code of Criminal Procedure: see W. Wohlers, 'Art 147', in A. Donastch, T. Hansjakob and V. Lieber (eds.), *Kommentar zur Schweizerischen Strafprozessordnung (StPO)* (Zurich: Schulthess, 2010). For criticism, see P. Albrecht, 'Was bleibt von der Unmittelbarkeit?' (2010) 128 *Schweizerische Zeitschrift für Strafrecht* 180 ff; and S. Arquint and S. Summers, 'Konfrontationen nur vor dem Gericht' (2008) 2 *Plädoyer* 38 ff.

[32] See, e.g. T. Weigend, 'The Decay of the Inquisitorial Ideal: Plea Bargaining Invades German Criminal Procedure', in J. Jackson, M. Langer and P. Tillers (eds.), *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Mirjan Damaška* (Oxford: Hart, 2008), 39. See also G. Gilléron, *Strafbefehl und plea bargaining als Quelle von Fehlurteilen* (Zurich: Schulthess, 2010).

[33] M. Saks and R. C. Park, 'Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn' (2006) 47 *Boston College Law Review* 1. For further analyses of modern evidence scholarship, see W. Twining, *Rethinking Evidence: Exploratory Essays*, 2nd edn (Cambridge

When it comes to comparative law, however, evidence has been largely neglected. When comparative issues of evidence are debated, they tend to revolve around the old debate as to whether adversarial or inquisitorial systems are better at finding the truth. Some contributors have brought the insights of modern psychology and economics to bear on this debate, with the result that defects have been detected with each system.[34] On one view, 'adversarial' systems are deeply flawed because the parties responsible for gathering and presenting the evidence are deeply partisan, with the result that the informational sources used are highly selective and become distorted. This partisan manner of collecting evidence is carried into the trial where the process of examination and cross-examination imposed upon witnesses results in a highly skewed picture of reality being conveyed to the triers of fact. The winner in such a contest is not the party with the most truth on his side, but the side that has the most wealth to marshal the best legal resources.[35] The triers of fact, meanwhile, are forced to maintain a position of neutral passivity in such a contest and are unable to harness the contest towards the kind of active inquiry that would be required to make the enterprise a serious truth-finding endeavour. In another vivid metaphor, Damaška has compared the limited vision that this whole process sheds upon the facts in dispute to a car driving at night, with two narrow beams illuminating the world presented to the adjudicator from the beginning until the end of trial.[36] But Damaška has also been critical of certain aspects of continental procedure, particularly the risk in judge-driven procedures that triers of fact will form hypotheses too early.[37] Other critics have pointed out that although 'inquisitorial' fact-finders have the freedom to mount their own inquiries, there are insufficient incentives for fact-finders to generate a sufficiently strong evidential base for making accurate judgments, with the result once more that hypotheses might be formed too early.[38]

Although the insights of cognitive science and economics can do much to enlighten debates on different fact-finding modes, rigorous empirical and

University Press, 2006); R. Park, 'Evidence Scholarship: Old and New' (1991) 75 *Minnesota Law Review* 849; J. Jackson, 'Analysing the New Evidence Scholarship: Towards a New Conception of the Law of Evidence' (1996) 16 *Oxford Journal of Legal Studies* 309; Symposium, 'New Perspectives on Evidence' (2001) 87 *Virginia Law Review* 1491–2081; J. D. Jackson, 'Modern Trends in Evidence Scholarship: Is All Rosy in the Garden?' (2003) 21 *Quinnipiac Law Review* 893; and P. Roberts and M. Redmayne (eds.), *Innovations in Evidence and Proof* (Oxford: Hart, 2007).

[34] For economic approaches, see G. Tillock, *Trials on Trial: The Pure Theory of Legal Procedure* (New York: Columbia University Press, 1980); and R. Posner, 'An Economic Approach to the Law of Evidence' (1999) 51 *Stanford Law Review* 1477. For cognitive approaches, see C. Callen, 'Cognitive Strategies and Models of Fact-Finding', in Jackson, Langer and Tillers, *Crime, Procedure and Evidence*, 165.

[35] For trenchant critiques of adversary procedure, see J. Langbein, 'The German Advantage in Civil Procedure' (1985) 52 *University of Chicago Law Review* 823; and J. Langbein, *The Origins of the Adversary Criminal Trial* (Oxford University Press, 2003).

[36] M. Damaška, *Evidence Law Adrift* (New Haven: Yale University Press, 1997) 92.

[37] Damaška, *Evidence Law Adrift*, 95–6.

[38] R. A. Posner, *Frontiers of Legal Theory* (Cambridge, MA: Harvard University Press, 2001) 340–1.

conceptual inquiries are required in order to reach definitive conclusions as to which model is better suited for truth discovery.[39] Too often, however, the debate has tended to degenerate into highly partisan views as to the merits of one mode of proof over the other, with little common ground as to whether the supposed models actually translate into the reality of real-life processes.[40] Much of the debate, moreover, has focused on civil procedure and there has been little examination as to whether the models that are used for the purpose of comparison reflect real-life criminal processes. It is questionable as we have seen whether the differences lie any longer in some essential contrast between party-dominated or judge-dominated procedures.

Beyond this debate, the adversarial/inquisitorial dichotomy would seem to have encouraged the view among evidence scholars that the gulf between the common and civil law systems is simply too great to admit any serious study. Within 'adversarial' systems, the law of evidence is viewed as a highly regulated system of rules for the admission of evidence at the contested trial. By contrast, civil law systems operating under a court-dominated inquiry are assumed not to have a law of evidence at all.[41] We shall see that these simple assumptions are a distortion of the way in which evidence has evolved in common law and civil law systems. For now, it is important to see that this narrow view of the law of evidence obscures two important truths about any system of adjudication which subscribes to the importance of evidence and proof. Firstly, any system which gives triers of fact the task of evaluating evidence must subscribe to some extent to a doctrine of 'free proof'; and, secondly, any adjudicative system must have *some* rules of evidence and proof. Taking the first point, historical analysis is now showing that even the highly regulated systems of evidence such as the old Roman canon systems were limited in their capacity to interfere with 'natural' processes of reasoning of fact-finders.[42] By the same token, those averse to regulation, like Jeremy Bentham, who have called for a 'natural' as opposed to a technical system of proof, still must subscribe to certain rules of evidence in order for a system of adjudication to function at all.[43] Indeed, any fact-finding enterprise has to have rules and procedures for carrying out its

[39] See M. Damaška, 'Presentation of Evidence and Factfinding Precision' (1975) 123 *University of Pennsylvania Law Review* 1083; and P. Tillers, 'The Fabrication of Facts in Investigation and Adjudication' (2006), available at http://ssrn.com/abstract=962241. For an economic approach, see Tillock, *Trials on Trial*.

[40] See the acrimonious exchange between R. Allen, S. Kock, K. Riecherberg and D. T. Rosen, 'The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship' (1988) 82 *Northwestern University Law Review* 705; and J. H. Langbein, 'Trashing the German Advantage' (1988) 82 *Northwestern University Law Review* 763.

[41] For a recent statement of this view, see South African Law Commission, *Sexual Offences: Process and Procedure* (2002) Discussion paper 102 (Project 107), para. 12.11.3.1.4.

[42] See, e.g. M. Damaška, 'The Death of Legal Torture' (1987) 87 *Yale Law Journal* 860; and M. Damaška, 'Rational and Irrational Proof Revisited' (1997) 5 *Cardozo Journal of International and Comparative Law* 25.

[43] For discussion of Bentham's 'anti-nomian' thesis, see W. Twining, *Theories of Evidence: Bentham and Wigmore* (London: Weidenfeld & Nicolson, 1985).