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Collection and Evaluation of Evidence in Comparative
Perspective

COLLECTION AND EVALUATION OF EVIDENCE IN COMPARATIVE PERSPECTIVE

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I.

When comparing the structure of the criminal procedure in the civil and the common law systems, one is soon confronted with the widespread belief of deep differences between the “inquisitorial” tradition on the one hand, and the “adversary” on the other. Consequently, one would expect differences between the Israeli criminal procedure, as mainly based on common law tradition, and the German procedure, as an example of a continental civil law system. If one takes a closer look, however, it appears that those assumptions of deep differences, at least in view of the practical result, are to a great extent mistaken because of foregone prejudices.

Therefore, the message I would like to transmit here is that

- on the one hand, there are indeed quite a lot of differences between the two systems, but
- on the other hand, in the final analysis, they come very close together. The issue is more one of different instruments and safeguards rather than of basic goals and principles. Both systems strive for the same end: to convict the guilty and to discharge the non-guilty by seeking the truth by fair means.

Keeping in mind this fundamental accord with regard to the common goal, we should nevertheless not ignore the different approaches from and by which both systems try to reach their end. And it is in particular the balancing of the various interests in conflict with each other in a criminal proceeding which I would like to describe and compare, paying special attention to the problem of evidence as the main topic of this paper. This analysis will be carried out primarily by comparing the German with the Anglo-American criminal procedure. This is not due to simple disregard of the Israeli law, but because of my hopefully better

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acquaintance with the American law and, not least, because of the legal reason that the Israeli criminal procedure seems mainly based on British traditions and Anglo-American influences.

II.

With regard to the *aim of the evidence finding procedure*, the Anglo-American adversary jury system and the Continental-European *ex-officio* inquiry system are alike: At least nowadays, both are directed at reaching a substantively true decision by a fair trial in which the defendant has been conceded the status of a subject of the proceeding and is not merely an object of the inquiry.¹ For this reason, both systems have to struggle for the best possible complete collection of all accessible and potentially relevant pieces of evidence in the best possible form. In the Israeli Criminal Procedure Law, the judge is not necessarily bound by the evidence presented by the parties. Indeed, after the parties have concluded their presentations, which may include the testimony of the defendant and/or the examination of witnesses (sections 150 and 167), the court has the right to collect evidence on its own motion. And though directed at collecting evidence, in both systems due consideration has to be paid to the rights of those concerned as witnesses or possessors of evidence items as well as to the requirements of so-called "procedural economy". Furthermore, both systems require the same standard of proof: namely, "proof beyond a reasonable doubt",² and both require a

1 H.B. Kerper, *Introduction to the Criminal Justice System* (West Publishing Company, St. Paul Minn., 2nd ed., 1979) 202; H.J. Vetter & C.E. Simonsen, *Criminal Justice in America* (W.B. Saunders, Philadelphia/London/Toronto, 1976) 204; C. Roxin, *Strafverfahrensrecht*, Ein Studienbuch, (Beck, München, 24th ed., 1995) 106f.; W. Perron, "Rechtsvergleichender Querschnitt und rechtspolitische Bewertung", in W. Perron (ed.), *Die Beweisaufnahme im Strafverfahrensrecht des Auslands* (edition iuscrim, Freiburg i. Br. 1995) 549-608, at 578, 588f.

2 Up to this point, the defendant is considered innocent in accordance with the principle of *in dubio pro reo* (art. 6 II European Convention on Human Rights). For the German law on this point, see Roxin, *supra* n. 1, at 97ff.; Th. Kleinknecht & L. Meyer-Goßner, *Strafprozeßordnung, Gerichtsverfassungsgesetz, Nebengesetze und ergänzende Bestimmungen*, (Beck, München, 42nd ed., 1995), § 261 margin no. 26, p. 837; for the common law, see R. Card, *Criminal Law* (Butterworths, London/Dublin/Edinburgh, 12th ed., 1992) 89; St. Thaman, "Country Report USA", in W. Perron, *supra* n. 1, at 489-547 (506).

certain minimum quality of the evidence if used in favour of the charge and/or in disfavour to the defendant.

III.

However, with regard to the status and functions of the various parties involved in a criminal proceeding, i.e. the defendant and his counsel, the prosecutor as well as the judge and the jury, divergencies in the procedural structure may well lead to different consequences for collecting, rejecting and evaluating evidence.

1. When we examine the *common law system*, it may be fair to state in a general way that it relies quite heavily on a fair trial before a decision finder equipped with the best possible neutrality and independence from the prosecuting state: the jury.³

A main disadvantage of this system may be seen in the fact that the lay jurors are not capable of handling the case before them in a professional way, that they have to decide the case on an evidentiary basis *hic et nunc*, and that even if they were capable of doing so, they do not have to justify their verdict with explicit reasoning which would be reviewable in an appeal.

In addition, in such a system a particularly high degree of responsibility lies on the shoulders of the defence, because faced with an opponent — the prosecutor — who in an adversarial system has already one-sidedly made up his mind in favour of the charge, the defendant's right to protection from an unjustified verdict is almost completely in the hands of the defence.

Therefore, one of the first and most important needs of evidence law in such an adversarial system is to make sure that the defence is sufficiently equipped with rights and means in order to meet its extremely great responsibility. Furthermore, it is of particular importance that the defence be allowed to present any evidence which might be relevant for discharging the defendant, that the defendant have the right to be confronted with witnesses against him, and to have a compulsory process for obtaining witnesses on his behalf, as even constitutionally guaranteed in the 6th amendment of the U.S. Constitution.

3 See H. B. Kerper, *supra* n. 1, at 201f.; Thaman, *supra* n. 2, at 503f.

On the other hand, however, the defence can also draw tremendous benefit from acting before an *impartial* as well as *non-professional jury* of lay people, because this opens the possibility, by means of a cleverly performed scenario of cross-examining witnesses or introducing unexpected documents, to procure advantages on an emotional level which in an objective light would not be justified.

For these partly counteractive reasons, the law of evidence in an adversarial jury system such as the common law — and in the same vein also in Israeli criminal procedure — must be particularly interested in guaranteeing the objective quality and impartiality of evidence. As a result, the parties involved may be confronted with restrictions so far-reaching that they are difficult to comprehend, at least from a continental-European point of view.

The following are just a few examples of exclusions of evidence which are difficult to understand from — if I may say so — a less formalistic, less rule-bound perspective:

- the exclusion of *hearsay evidence*, although this “holy” rule in common law has already been broken by quite a few exceptions, as in the U.S. Federal Rules of Evidence (FRE 803) or in the Israeli Evidence Ordinance of 1971 (chapter 1, art. 2, sec. 10);⁴

- the requirement of presenting *original documents* or notes and not only copies, although this requirement, too, is softened by numerous exceptions (U.S. FRE 1003, 1004); in a similar way, the Israeli criminal procedure as well, at least in principle, requires the presentation of the original document for proving its contents (*cf.* — also to exceptions — Evidence Ordinance 1971, ch. 2, art. 6, sec. 41);

- the restrictions on the *admissibility of evidence with regard to a person's character* or conduct (U.S. FRE 404), although this may be well-founded as long as it provides for the protection of victims of sexual abuse (U.S. FRE 412);

- and not least, the *corroboration requirement* by which a verdict of guilt, in particular for perjury, has to be based on the incriminatory testimony of more than one witness — a certainly old and virtually antiquated rule which at least in Israel has been modernized in that a person cannot be convicted on the unsworn testimony of a minor, unless

4 For more on this point, see C. Allen, “Grundsätze und Methoden der Beweiserhebung im englischen Strafprozeß”, (1960) 72 *Zeitschrift für die gesamte Strafrechtswissenschaft* 650-676 (660ff.); Thaman, *supra* n. 2, at 509ff.

that testimony has been corroborated (Evidence Ordinance 1971, ch. 4, sec. 53, 55).⁵

Taken as a whole, it seems to be of utmost importance to an adversarial, jury-based criminal procedure that an *adequate balance between prosecution and defence* be secured. This is necessary in order to prevent one side from exploiting the peculiar “artefact” artificially produced by a set, if not game, of evidentiary rules not easily perceived and understood by a non-professional jury. (Whether in this respect professional judges, as in the Israeli criminal court, are better equipped to understand and handle the intricacies of the common law rules of evidence, would certainly be an interesting point for discussion).

2. Contrary to this adversarial jury-based approach, which quite heavily relies on rather formalistic rules of evidence, the *continental-European approach*, mostly described as *inquisitorial*,⁶ basically relies on the objectivity and impartiality of professional judges, thereby leaving them broad discretion in collecting and evaluating the evidence.⁷ If this is called “inquisitorial”, however, this description is no longer correct; for, although originally based on the fact that the judge was both decision-maker and prosecutor at the same time, nowadays the continental-European procedure — at least since the introduction of a pre-trial investigation started and led by a prosecutor not identical with the judge — also provides a kind of adversarial struggle between the prosecution and the defence.⁸ Therefore the *ex-officio* function of the judge in ascertaining the truth on the basis of specific evidence may better be called “self-instructorial” instead of “inquisitorial”.

But whatever terminology one prefers, it is characteristic for this type of procedure that, in principle, the judge need not rely solely upon the evidence presented by the adversaries, that is, the prosecution and the defence, but rather that he himself has the official duty of ascertaining the truth⁹ and that, as a consequence, he is supposed to prepare himself for the trial by going through the files and dossiers already collected by the police, the public prosecutor and/or the judge d’instruction, if there

5 See Allen, *supra* n. 4, at 667f.

6 See e.g., Kerper, *supra* n. 1, at 202.

7 The German law on this point is codified at §261 Criminal Procedure Code (StPO).

8 See Roxin, *supra* n. 1, at 104ff.

9 In German law, this judicial duty, the so-called principle of *ex-officio* inquiries, arises from §§155 II, 244 II StPO.

is one (as is still the case in France, but no longer in Germany and Italy¹⁰). This right and duty of the judge — or of one of the judges, if the court is sitting as a chamber of three up to five judges (some professional, some lay), as may be the case in German trials¹¹ — does not necessarily mean that the court may use knowledge of a witness's pre-trial statement as an immediate basis for a verdict. For as will be explained further, the final basis for the judgment is not the pre-trial dossiers but what has been brought and proven within the oral and public trial.

Yet, as with the procedural system of the common law, the continental approach has its advantages and disadvantages as well, this however for some contrary reasons.

In the common law jury system, on the one hand, the jury may easily be misled by a clever prosecutor with detrimental consequences for a badly counselled defendant, or vice-versa, rather good evidence for guilt may be destroyed by a tricky defence counsel not sufficiently stopped by an incompetent public prosecutor; in this respect, a continental judge, due to his professional experience and knowledge of the files, may be less likely to be drawn into a trap. And since, in addition, the continental judge has to give a written opinion setting out the facts upon which he based his verdict and by which evidence he saw these facts proven,¹² both the prosecution and the defendant have a much better basis for an appeal. This is because they are not limited to speculations about what the judge thought might be the truth and, if so, why; the appealing party is, therefore, in a much better position to prove that the court's reasoning was inconsistent or at least inconclusive — and, thus, to reach a reversal of the verdict.

On the other hand, however, the continental tradition has an obvious disadvantage in that a judge, in preparing the trial by going through the files, may become prejudiced. If this is the case, it may be very difficult for the defendant and his counsel to overcome the prejudice in the trial itself.

10 See A. Eser, "Entwicklung des Strafverfahrensrechts in Europa, Orientierung an polizeilicher Effektivität oder an rechtsstaatlichen Grundsätzen?", (1996) 108 *Zeitschrift für die gesamte Strafrechtswissenschaft* 86-127 (88f., 96f.) with additional references.

11 §§76 I, 122 I, 139 I Constitution of Courts Act (GVG).

12 The German law on this point is codified at §267 StPO.

In order to avoid this possible bias, one of the principal tasks of the *ex-officio* instructorial procedure is, firstly, to guarantee what in German doctrine is called the “immediacy” of the trial, meaning that only evidence which was directly and orally brought into the trial and in that way to the knowledge of all judges of the bench may be used as a basis for the verdict,¹³ and secondly, to give the defence sufficient operative rights and possibilities to convince the court that the picture as it may appear from the pre-trial investigation is not reconcilable with the evidence which has been brought forward in the trial and which is, in fact, the only evidence upon which the verdict may be based.

But even with this important goal in mind, the continental system would not rely so much on formal exclusionary rules but would rather give both the prosecutor and the defence as broad an opportunity to bring in evidence reconcilable with the human rights of the defendant and/or the witnesses, and would expect a professional judge to be more able to distinguish evidence of greater relevance and reliability from evidence given by witnesses who are partial or evidence whose quality is for some other reason suspect.

Therefore, if we compare the exclusionary rules, mentioned before as characteristic of, if not “holy” in, the common law system, with the handling of those topics, for example, in the present German law of criminal procedure, we would see that the results are quite similar, although the means of reaching them are different:

- As the first example mentioned before, *hearsay evidence*, i.e., the examination of “indirect witnesses” in the sense that they have not personally witnessed the commission of the crime but can only testify of findings or reports by other — again not necessarily immediate — witnesses, in principle excluded in common law, is in principle admissible according to German case law, this however only under certain conditions: with due respect to the principle of “immediacy”, the court must not resort to hearsay evidence as long as there is a chance to get direct evidence. Therefore, a judgment may be based on hearsay evidence only if immediate evidence is not accessible; but even in this case the

13 §261 StPO, see Roxin, *supra* n. 1, at 335ff.; Kleinknecht & Meyer-Goßner, *supra* n. 2, at §261 margin no. 5, p. 831.

court has explicitly to justify in its written opinion why it relied on the credibility of the hearsay evidence despite its less valuable quality.¹⁴

- Basically the same holds true for our example of *original documents and notes*: Here, too, German criminal law admits copies if the originals are out of reach. This, again, is not considered a breach of the principle of immediacy because the principle does not require the exclusion of alternative evidence. Similarly, according to the German adjudicature, copies of documents may be brought in as evidence. Here, too, however, certain conditions have to be observed: most importantly, the judge has to be aware of the lesser evidentiary quality of the copy and therefore has explicitly to state in his written opinion why he was convinced that the copy in its relevant contents was identical with the original.¹⁵

- As to our example of *testimony regarding a person's conduct*, in particular with regard to victims of sexual abuse: Again, our system does not have to resort to the exclusion of that sort of witnesses because, by having the examination performed by the judge who may not ask offensive questions,¹⁶ and by offering the possibility of excluding the public from portions of the trial,¹⁷ the witness is afforded sufficient protection of his privacy and of similar personal values.

- And finally as to the *corroboration requirement*: Instead of requiring a certain number of witnesses, our procedure relies on the apparent quality of a witness and the reviewable reasoning given by the judge for his conviction.

14 The practical significance of these issues is especially great when police undercover agents are involved, i.e., persons (be they undercover officials, other persons acting undercover or informers from the fringes of the criminal scene) who work together to prevent and to clear up criminal activity, primarily in matters of national security and in the areas of drug and gang crime. For more on these issues, see Roxin, *supra* n. 1, at 342f. and *Entscheidungen des Bundesgerichtshofes in Strafsachen* (BGHSt) 17 (C. Heymanns, Köln/Berlin, 1962) 382-388 (386); BGHSt 36 (1990), pp. 159-167 (166 f.).

15 For two German Federal Supreme Court decisions on point, see (1986) 6 *Neue Zeitschrift für Strafrecht* 519-520 and 14 (1994) 593.

16 The German law on this point is codified at §68 Criminal Procedure Code.

17 §§171 a, 171 b, 172 GVG.

Seen on the whole, therefore, the handling of these situations in German procedural law seems very similar to the case of a *bench trial*,¹⁸ as practised in the common law procedure.

IV.

In summing up this necessarily short, as well as certainly oversimplified comparative perspective, we could perhaps state that both procedural systems here considered have the same basic goal in common, at least insofar as both require the judgment to be based on truth proven by evidence which has been collected according to certain rules.

These rules, however, may be quite different in reach and scope. For, as observed by Nijboer¹⁹ in a comparative analysis, whereas the common law of evidence may be understood as a set of *admissionary* and *exclusionary* rules, in the continental system evidentiary rules are rather perceived as *decision-finding* rules. An exception must be made, however, for those rules which are not so much directed at ascertaining the truth but rather which serve the protection of personal rights and secrets, as, for instance, the exclusion of evidence gained by illegal means (§136 a StPO) and the exclusion of evidence contained in highly intimate notes (such as a personal diary).

Apart from such "evidence prohibiting rules" (*Beweiserhebungs- und Beweisverwertungsverbote*²⁰) where the ascertainment of the truth — and, thus, the conviction of a potentially guilty defendant — is obviously put second to other higher interests, the continental law does not "strangulate" the production of evidence by a special set of admissionary and/or exclusionary rules.

If certain common law procedures still seem to need a more "formalistic" network, this may be explained by the fact that with a non-

18 A trial held before a judge sitting without a jury, see Black's Law Dictionary (West Publishing Company, St. Paul/Minn., 6th ed., 1990) 156. The defendant (with the consent of the prosecutor) may waive his right to have the question of his guilt settled by a jury. If he does so, the trial is held before a single judge. See Perron, *supra* n. 1, at 503.

19 J. F. Nijboer, *Een verkenning in het vergelijkend straf- en strafprocesrecht* (Gouda Quint BV, Arnhem, 1994) 51.

20 For more on this point, see Roxin, *supra* n. 1, at 163ff.

professional jury a corrective “filter” for ruling out unreliable evidence is lacking.

By comparison, the Continental-European tradition in the meantime has reached the stage where it seems it can afford to give more discretion to professional judges with regard to distinguishing between evidence which is more, and evidence which is less, reliable.

Both systems obviously have their advantages and disadvantages. To make a choice is more than a purely technical question. It is dependent not only on the whole political and judicial system of a country, but also on the different cultural traditions and socio-psychological attitudes represented there.²¹ For these reasons it would require a much broader analysis than is possible here, and at this point, I would not venture any recommendations.

21 With regard to the last point, a comparison involving different kinds of sports suggests itself. On the one hand, it is characteristic of European soccer that the players seek out a path to the goal that is as direct as possible and that the flow of the game be held up by as few rules as possible. As a result, spectators are annoyed when referees interrupt the game on account of rule violations. In contrast, in American football, the setting up of and compliance with a complicated set of rules seems almost to be a central goal of the game. The impression created by the American criminal trial — with its complicated rules of evidence that lead to endless interruptions — when compared to the Continental-European system, in which the judge is hindered only by comparatively few rules from pursuing an investigation of the truth that is free from interruption, is not much different. William Pizzi was so fascinated by this comparison of European and American systems of criminal procedure and sports, which I voiced in a conversation with him in late 1993, that he has since subjected it to a closer analysis. See W.T. Pizzi, “Soccer, Football and Trial Systems”, (1995) 1 Colum. J. European L. 369-377.