

# International Journal of Evidence & Proof

2016

## Editorial

### Procedural traditions in flux

**Professor Jonathan Doak**

*Editor*

*Nottingham Trent University, UK*

*Email: [jonathan.doak@ntu.ac.uk](mailto:jonathan.doak@ntu.ac.uk)*

**Stewart Field**

*Cardiff University, UK*

**John Jackson**

*University of Nottingham, UK*

**David O'Mahoney**

*University of Essex, UK*

The collation of this special issue stems from two colloquia held at the University of Nottingham and Durham University exploring how procedural traditions have been adapted, interpreted and resisted against the backdrop of convergence and increasingly diffuse relationships between the local, the national and the global. Legal and policy "borrowing" or transfer of what is (rightly or wrongly) perceived to "work" elsewhere have become ever more apparent in recent times (Colson and Field, 2016; Jones, 2006; Pakes, 2014). This has duly highlighted a number of pressing questions concerning, *inter alia*, the role of "society", the "state", the "nation-state" and "tradition" within the broader global picture. Such trends are particularly evident in Europe, where the EU Area of Freedom, Security and Justice and the European Court of Human Rights have been instrumental in driving normative harmonisation which has arguably extended well beyond the contours of the continent. By the same token, however, the recent Brexit vote in the United Kingdom underlines the fragility and aberrations of convergence processes which can be sharply and unexpectedly undercut by developments at local or national level.

Such challenges underpin the need to re-examine the utility of certain long-standing models and labels which have long informed academic inquiry in the area. Perhaps the most apposite example can be found in the usage of the adversarial/inquisitorial dichotomy which--while never intended to act as a definitive taxonomy--has arguably been rendered partially redundant by the mutual tendency for systems to cherry-pick elements from each other. The rise of new normative paradigms and frameworks of analysis, such as managerialism, consumerism, crime control, popular punitiveness, human rights, restorative justice, etc. serves to underscore the plurality of forces which now bear influence on the evolution of national justice systems. In this sense, procedural traditions ought not to be regarded as fixed entities, but rather as fluid and porous concepts, which

are constantly being reinterpreted and reshaped by national and transnational social and legal movements (Field, 2009; Jackson, *this issue*).

The papers contained in this issue advance new understandings of both how and why procedural traditions have evolved in recent years within the context of social and political change as well as heralding fresh insights into some of the normative and practical solutions that may underpin future developments. As with many special issues, the papers included here range in their topical focus but engage, in various ways, with the themes alluded to above. They constitute a small but illuminating snapshot of the range of papers and informal contributions at the colloquia, and we take this opportunity to thank all delegates from the 11 different jurisdictions which participated.

The special edition opens with an article by Chrisje Brants and Stewart Field, who evaluate the significance of 'cultural trust' in relation to wrongful convictions in England and Wales and the Netherlands. While the inquisitorial tradition of the Netherlands has traditionally emphasised the active role of the truth-finding judge and the dossier, the adversarial tradition of England and Wales affords priority to autonomous party rights to collect the evidence, present it in a manner that suits them at trial, and challenge opposing witnesses through oral cross-examination. Arguing that procedural traditions are based 'critical points of trust where fundamental assumptions are made upon which the fact-finding capacity of the system is based', the authors warn that perceived strengths may, in fact, 'become points of weakness when the assumptions upon which they are built no longer correspond to reality'. The authors proceed to show how responses to wrongful convictions in both jurisdictions are shaped and limited by established procedural traditions insofar as 'the default reaction is to reinforce, not reform'. In conclusion, the authors argue for an increased readiness to borrow from the strengths of other procedural traditions, but warn that this must be accompanied by a comparative understanding of how 'institutions, traditions and formal and informal ways of thinking' shape the way that procedural rules are applied in practice.

Riccardo Montana picks up on the theme of cultural 'borrowing' in exploring the attempt by Italy to transplant adversarial procedural rules into a hitherto inquisitorial system. The reforms, introduced in 1989, encountered significant resistance from legal professionals and, in particular, sat uneasily alongside the traditional proactive role of the judge. The author provides a lucid and coherent account of the legal, cultural and socio-political factors which informed the adoption of the model and which, eventually, led to its demise. The key lesson, he concludes, is that wholesale adoption of rules and procedures which are culturally alien to a recipient jurisdiction is likely to prove highly problematic.

Italy's quest for a more adversarial form of procedure has been followed in more recent times in Poland. In the third article of this edition, Andrea Ryan evaluates the attempt to 'adversarialise' the Polish criminal procedure. The reforms--which began in 2003--have led to an unwieldy criminal justice system which currently operates three different forms of procedure depending on the commencement date of proceedings. The legacy of the communist era is still evident across the system in many respects, with political power and cultural traditions still weighing heavily on the practical operation of the criminal justice system. The author questions the suitability of the adversarial label as a descriptor of the Polish procedure ('which may be more imagined than real') and argues that the Polish terminology adopted, '*kontradiktoryjność*', reflects more accurately the *principe du*

*contradictoire* which informs the inquisitorial models of western Europe. From the author's perspective, clarity is needed by revisiting this 'uncomfortable' translation and by defining more precisely what is understood by the 'adversarial' and '*kontradyktoryjność*' labels, and how such understandings map on to the fair trial standards of the European Convention.

The issue shifts focus for the fourth article, where Shane Kilcommins considers the drift in the Irish criminal justice system towards an 'assembly line' model. The author charts the 'tooling up' of the Irish state through the extension of the criminal law into the civil sphere, and analyses the resultant tension in the criminal courts between crime control on the one hand, and legal and constitutional liberalism on the other. Just as the preceding papers have identified underlying weaknesses in the use of 'adversarial' and 'inquisitorial' labelling, here the author questions the use of 'fashionable' binary labels which--whilst useful on a heuristic level--"can carve practices along artificial lines which do not replicate the messiness of practice'. In his view, criminal justice systems are best viewed "as comprising of mutually constitutive parts, where several, somewhat contradictory, principal features can coexist together'. Thus, the Irish system is simultaneously increasingly rights-based, yet increasingly illiberal; increasingly inclusionary, yet also increasingly exclusionary; increasingly adversarial, yet increasingly inquisitorial; increasingly supranational, yet also increasingly local.

The final paper in this edition turns to the thorny issue of secret courts or 'closed material proceedings'. Here John Jackson considers the growing role afforded to special advocates who are afforded access to sensitive national security material and make representations to the court on behalf of excluded parties. Originally introduced as an exceptional measure on national security grounds, their involvement in proceedings now extends to all types of civil litigation in the UK when disclosure of sensitive material might be 'damaging to the interests of national security' and where it is "in the interests of the fair and effective administration of justice' for proceedings to proceed on this basis. In the author's view, the use of special advocates poses a challenge to a number of facets of traditional adversarial procedure, namely the principle of open justice, the rights of the accused to know the case against them, their ability to effectively challenge the evidence and the duty of the lawyer to represent the client throughout the process. For Jackson, the adversarial tradition "is having to adapt ... to a new kind of advocacy, different from the conventional advocacy practised when one has constant access to the client, but advocacy nevertheless'. If the expansion of special advocates continues apace, consideration might be afforded as to how to bring the scheme "as close to conventional adversarial proceedings as possible'.

Taken together, the papers contained in this edition address common but fundamental questions relating to the multi-faceted and complex nature of the challenges currently facing procedural traditions across both common and civil law jurisdictions. Not only do they provide much-needed conceptual clarity pertaining to these questions, but they also highlight the continuing need to further interrogate long-standing values, processes and working cultures in an era where harmonisation and legal 'borrowing' seem set to intensify.

Colson R and Field S (2016) *EU Criminal Justice and the Challenges of Diversity: Legal Cultures in the Area of Freedom, Security and Justice*. Cambridge: Cambridge University Press.

Field S (2009) Fair trials and procedural tradition. *Oxford Journal of Legal Studies* 29(2): 365-387.

Jones T (2006) *Policy Transfer and Criminal Justice*. London: McGraw-Hill Education (UK).

Pakes F (2014) *Comparative Criminal Justice*. London: Routledge.

**Professor Jonathan Doak**

**Editor**

**Nottingham Trent University, UK**

**Email: jonathan.doak@ntu.ac.uk**

**Stewart Field**

**Cardiff University, UK**

**John Jackson**

**University of Nottingham, UK**

**David O'Mahoney**

**University of Essex, UK**

E. & P. 2016, 20(4), 263-265