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Article

EVIDENTIARY BARRIERS TO CONVICTION AND TWO MODELS OF CRIMINAL PROCEDURE: A COMPARATIVE STUDY

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I. COMPARISON OF EVIDENTIARY BARRIERS TO CONVICTION

A. Activities Preliminary to Proof-taking

In both the civil law and the common law systems the judge must first decide what evidence will be examined at trial. It is here that we encounter one of the most often repeated generalizations in comparative discussion of the law of evidence. It is said that while common law systems are mainly concerned with the issue of admissibility, civil law systems admit all evidence that is logically relevant. It is tempting to hypothesize from this that on the common law side of our comparison the prosecutor experiences greater difficulties than his continental counterpart in transforming his informational sources into admissible evidence. As usual, closer examination tends to lead to qualifications and refinements. Do they destroy the generalization?

In seeking an answer to this question, two kinds of exclusionary rules will, for the sake of clarity, be held apart throughout my discussion of this initial phase of adjudicative factfinding. First, evidence may, of course, be excluded because of the belief that it may impede the pursuit of truth. But, second, it may also be excluded for reasons extraneous to truth-finding considerations and often at odds with them, as in the case of reliable evidence obtained in an illegal manner. I begin with evidence excluded under the first rationale.

1. Admissibility Rules Designed to Improve Factfinding Accuracy

Evidence which has passed the test of logical relevancy and has been found suitable for rational inference may still fail to be admitted under the common law rules of evidence. Some of these rules, more rooted in experience than inspired by logic, exclude certain classes of logically relevant evidence, largely on the theory that its impact on the trier of facts may be stronger than its actual probative weight. In contrast, continental law does not contain rules excluding relevant evidence on the ground that factfinders might erroneously assess its credibility and thus endanger factfinding precision. This is not the place to enter into a discussion of how much of this omission is due to the fact that continental decisionmakers are not solely untrained citizens and how much is due to other reasons. The fact is that lawyers trained in the civil law system are nearly unanimous in their rejection of this first type of exclusionary rules. They seem more optimistic than their common law brethren that the factfinders, lay or professional, will be capable of disregarding the influence of relevant but untrustworthy evidence--for example, some types of hearsay--and, having heard it, exclude it from the calculus of decision. Paradoxically, in view of their general attitude toward anticipating the future by legislation, they are more pessimistic than common law lawyers about the wisdom of framing general rules rather than relying on a case-by-case approach. They do not believe that it is possible to frame successfully legal rules based on expectations about the impact of certain classes of evidence. "These are good rules of thumb in an average case," they might say when confronted with common law rules of admissibility, "and perhaps professional judges could use them to

good advantage when debating evidence informally with lay judges, in situations in which the concrete circumstances of the case at hand seem to make the rules applicable. However, it is not wise to ossify them into rules of law." Obviously, then, common law lawyers will search the civil law in vain for the hearsay rule, rules excluding gruesome or inflammatory evidence, and similar rules of "auxiliary probative policy." They will also be surprised or even shocked to find that, although the defendant is said to have the right to lie, he is freely examined for evidentiary purposes and not required to take an oath. No matter how important the difference between the two systems due to the absence in civil law of these exclusionary rules, the distance may easily be overstated and even misunderstood. Various devices leading to the exclusion of relevant evidence were developed on the Continent so that not all evidence that is to a continental lawyer relevant is ipso facto admissible. The comparatist must detect these devices disguised by different labels and ascertain exclusionary side-effects of procedural rules designed by continentals to achieve other purposes.

Let me quickly survey some of these devices. In all continental jurisdictions the judge has the power, seldom defined with precision by written law, to refuse examination of evidence even though it appears logically relevant and there is no specific exclusionary rule in point. For instance, in many European jurisdictions the judge may refuse to hear witnesses if there is reason to believe that, even if the witnesses confirmed the contention of the party, their testimony would have no influence on the fact-determination. By means of this important power accorded to the continental trial judge, many items of evidence, inadmissible under the common law rules (such as, for example, multiple hearsay), will, as a rule, be inadmissible in the continental court as well.

Another continental device exerting an exclusionary effect is the so-called "principle of immediacy." It reflects a violent reaction against a much criticized feature of the medieval inquisitorial procedure. The examiner who conducted the secret "inquisitio" was required to put in the record every procedural step taken and all evidence heard. The official "dossier" (acta inquisitionis) thus contained minutes describing, among other things, the results of proof-taking. At the close of the investigation the file was, in all serious criminal cases, transmitted to a panel of judges who based their decision solely or primarily on evidentiary items contained in the dossier. The judges seldom, if ever, came into personal contact with the defendant or the witnesses. The realization that "original" evidence is more probative than evidence filtered through intermediary sources led to the adoption in modern continental procedures of the principle that evidentiary sources be examined by the decisionmaker in their original rather than derivative form. Perhaps the principle can best be explained to common law lawyers as an extension of the "best evidence rule" to all types of evidence. The precise meaning and reach of the principle vary as we go from continental jurisdiction to jurisdiction and it is generally one of preference only. But, no matter how restricted the meaning of the principle, it will often require the judge to examine the original declarant of a statement. Clearly, then, at least some evidence which is excluded in common law countries as verbal or written hearsay will be rejected by the continental courts as violative of the "principle of immediacy." Considering that on the common law side of our comparison there are numerous exceptions to the hearsay rule, with all the obscurity of their refinements, the gap between the two systems on the issue of using hearsay is not as wide as might appear at first sight.

It is also easy to attach too much significance to the absence in the civil law of rules excluding the defendant's prior criminal record and evidence of other crimes of which he has not been convicted. Continental judges will agree with their common law brethren that the defendant's prior criminal record per se should not play a part in the guilt determination as proof of a propensity toward criminal activity. The explanation will, however, be different, exemplifying the fact that some problems, which in common law jurisdictions would be posed as questions of admissibility, are treated by civilian lawyers as problems

of logical relevancy. For example, continentals would simply say that the prior criminal record per se, that is, without regard to its possible value as circumstantial evidence, is irrelevant because it is unsuitable for logical inference. Only if, as in proof of modus operandi, a prior conviction permits rational inferences, will continental judges use it for evidentiary purposes. Further, the continental judge will refuse to hear evidence of other crimes with which the defendant has not been formally charged or of which the defendant has not yet been convicted. The presumption of innocence will be said to preclude the possibility of according any weight to as yet undetermined criminal activity, and the latter cannot be determined in court as it was not charged. In contrast, common law jurisdictions admit such evidence under certain circumstances. Thus, though continental law, unlike the common law, contains no express prohibition against introduction of these sorts of evidence, it may be that, as a practical matter, it is more restrictive than the common law in this regard. The fact remains, however, that the continental judge will always be familiar with the defendant's prior criminal record in advance of the decision on guilt. It is not too farfetched to imagine that this knowledge may tip the scales against the continental defendant in some close cases where the common law defendant would be acquitted, despite the proclamation of the continental legal folklore that the prior record is logically irrelevant.

It thus appears that the two systems are not so far apart concerning this first type of admissibility rules. Counter-tendencies to basic orientations narrow the gap on both sides. Yet there is no gainsaying that a great deal of information, inadmissible under common law evidentiary rules, reaches the continental adjudicators. Consequently, the prosecutor in the civil law system will often find it less difficult than his common law counterpart to squeeze his informational sources into the corset of technical rules of evidence.

For our purposes, perhaps the most important residual difference is the relatively greater ease with which the continental prosecutor can introduce evidence of out-of-court declarations of witnesses. In virtually all jurisdictions testimony recorded at the pre-trial examination, and often even prior to that, during the initial police inquiry, may be used in court for substantive evidentiary purposes. The continental prosecutor is, therefore, capable of "freezing" a great deal of crucial incriminating evidence well in advance of the trial. The extent to which this circumstance explains the difference in attitudes toward actual and potential witnesses in the two systems is too apparent to belabor.

An argument may be anticipated here that no matter what the differences between the two systems on this score, they are irrelevant for our purposes. Exclusionary rules of the type now under discussion make it more difficult to prove factual propositions. These, however, can be favorable as well as detrimental for the defense. Accordingly, the argument continues, if exclusionary rules create special obstacles to the prosecution, they also affect the defense in the same way. The conclusion is that these difficulties cancel each other out and the difficulties in obtaining a conviction remain the same.

Whether the first type of exclusionary rules affect both parties in the same way is not easy to say. The constitutional right of the American defendant to confront witnesses, for instance, could, if stretched to its full potential, prevent the prosecution from using quite a number of hearsay exceptions while still allowing the defense to use all of them. This would then mean that admissibility rules hamper the prosecution more than they do the defense. However, this potential of the confrontation rule, advocated by some, has not been realized. Besides, many cognoscenti suspect that hearsay exceptions display a prosecutorial bias to start with. The outcome of these and some other opposing tendencies is unclear, and the argument about the mutually cancelling effect may perhaps be correct. But when we place the issue in the context of trial mechanics, a new dimension appears. The prosecutor at common law is the first to

produce evidence and, in order to reach the trier of fact at all, he is the first to be stretched out on the Procrustean bed of the exclusionary rules. Prior to trial, in contemplating whether to bring charges formally against a defendant, he must ask himself whether the logically revelant information he has gathered will successfully undergo the legal metamorphosis into technically competent evidence. This, I submit, is a problem which the continental prosecutor does not face at all, or, if he does, not nearly in equal intensity. But here I am getting ahead of my story. Before considering the problem of the prosecutorial burden to establish a prima facie case, I must return to admissibility rules and discuss their second type.

2. Admissibility Rules Governed by Considerations Extraneous to Truth-finding

The second type of admissibility rules, leading to exclusion of evidentiary material irrespective of its reliability, is not unknown to the civil law systems. However, it would be erroneous to assume that both systems exclude roughly the same amount of evidence by virtue of the operation of these rules. Even if we confined our inquiry solely to comparing statutory proclamations and formal doctrine, it would soon become obvious that exclusionary rules are more numerous and surely much more elaborate in America than they are in any civilian jurisdiction. True, in the field of testimonial privileges the scope of exclusionary rules will not differ significantly. But, as we take a closer look at exclusionary rules concerning defective interrogation of the defendant, the impressions begin to change. Many continental provisions regulating the interrogation of defendants are silent as to the admissibility of testimony obtained in violation of proper interrogation procedures. This is a significant silence indeed when compared with express exclusionary rules relative to the defective interrogation of persons other than the defendant. Only a small number of continental countries have adopted express legislative provisions rejecting illegally obtained testimony of the defendant.

But the greatest contrasts by far exist in the law of search and seizure. Exclusionary rules in this area are a rarity in continental law and the "poisonous fruit" doctrine sounds almost fantastic to civil law lawyers. This is all the more remarkable in view of the fact that the continental law of search and seizure is much less restrictive than that of most common law jurisdictions. Thus, for instance, the police can always conduct a warrantless search if there is "danger in delay."

More important than the black-letter law is, of course, the problem of its practical implementation. Are exclusionary rules more vigorously enforced in common law than in civil law jurisdictions? In the absence of reliable comparative data it is difficult to answer this question. If one were to seek to determine the frequency and vigor with which exclusionary rules are actually implemented on the basis of academic discussions or in the light of the case law emanating from the highest courts, one would be led to believe that the concern over practical implementation, at least in America, greatly exceeds the concern evident in civil law jurisdictions. The volume of American constitutional law on exclusionary rules is clearly without precedent anywhere. Many will argue, however, that academic discussion and Supreme Court decisions are poor indicators of what happens at the trial court level. Let us assume, therefore, that the actual significance of exclusionary rules in America diminishes as we descend from the level of the Supreme Court. Even making allowance for this, there is still ample evidence to the effect that exclusionary rules have, at least in America, a much greater practical significance than in any civil law country.

In America techniques have been developed to insulate the adjudicator of guilt from the impact of evidence adduced in litigating admissibility. There is concern that the adjudicator of guilt, having heard

strong evidence of guilt, will be incapable of ruling impartially on the issue of exclusion, or that the adjudicator, having declared evidence inadmissible, will not be able or willing to disregard it. Consequently, for instance, preliminary hearings prior to trial on motions to suppress illegally obtained evidence are quite common in American jurisdictions, and are indicative of the practical impact of exclusionary rules. Even those in America who deplore the frequency of cases in which illegal evidence reaches the adjudicator of guilt will not dispute statistics revealing numerous cases in which incriminating evidence has been ruled inadmissible with the consequent dismissal of charges. What happens on the Continent? Surely the structure of the continental tribunal, where lay and professional judges sit together, makes it somewhat less natural to separate issues of admissibility from issues pertaining to the merits of the case. Even so, just as in American non-jury cases, procedural devices could be developed. This, however, has not been the general course of development in civil law jurisdictions.

Although there are no comparative statistics on this point, I believe that I can state with a great deal of confidence that motions to exclude illegally obtained evidence are much less frequently made in continental courts than they are in America. Even where such motions are made on the Continent, the preliminary issue of whether illegalities occurred is determined in a somewhat cavalier manner by American standards. Small wonder, then, that cases in which exclusionary rules lead to acquittals are much more rare on the Continent than they are in America. Let us imagine for a moment that it were proposed in a typical continental jurisdiction that a hearing before another judge on the issue of admissibility be ordered whenever the latter issue arose. Serious criticism of this suggestion would probably begin with arguments centering on administrative inconvenience and on the injection into the criminal case of too many "collateral issues" which tend to overshadow the adjudication of the merits. Also, the danger of having the same person decide the question of admissibility and the ultimate issue of guilt would seem less plausible. But I believe that, if pressed far enough, continental lawyers would admit that their opposition to consistent and vigorous enforcement of the second type of exclusionary rules rested in the final analysis largely on their fears that "obviously" guilty defendants may finally have to be acquitted. This to them would appear intolerable. This reaction is, of course, shared by many lawyers brought up in the Anglo-American legal orbit. Even so, I believe that a pronounced attitudinal difference remains, and that it reflects a larger contrast regarding views of restraints placed on the pursuit of truth in the criminal process.

3. An Overview

At this point I should attempt to pull the threads together. How does the operation of both types of exclusionary rules affect the prosecutor's chances to obtain a conviction? If my analysis of the two types of these rules is correct, the common law of evidence presents much more formidable obstacles to introducing incriminating evidence than does the civil law governing the identical initial phase of adjudicative factfinding. As with American television, which has fewer lines than the European, the informational sources the common law prosecutor can use are less numerous than those of his continental colleague. But, to continue the metaphor, does the quality of the picture on the screen depend solely on the mass of relevant information? Surely not. But only the rejection of some sources of information by the common law can be explained by a desire to improve factfinding reliability. The rejection of others is clearly a conscious sacrifice of factfinding accuracy for the sake of other values.