A World View of Criminal Justice

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Preface

Considering the sheer quantity of research materials on criminal justice emerging from every corner of the world, it is surprising that relatively so little effort has been made to analyse the subject from a global point of view. Perhaps the impossibility of achieving anything approaching genuine expertise in more than one jurisdiction is a deterrent. More probably, the very idea of writing about criminal justice around the entire world throughout the last millennium is simply over-ambitious! I have been inspired to try by the extraordinary scholarship of authors such as Adelhar Esmein, Mireille Delmas-Marty and John Langbein, whose interests have ranged widely across Europe and beyond and whose work I have admired deeply. The experience of teaching comparative criminal justice over the last decade and the contributions and the enthusiasm of my students have also been very important.

I would like to thank a large number of colleagues and friends who have assisted me, by reading text, by discussion or by general encouragement, including Kai Ambos, Craig Barker, Jane Henderson, Jackie Hodgson, John Hostettler, Barbara Huber, Phillip Kasaija, Susan Kreston, Nina Moodie, Ulrich Sieber and Steve Thaman (to name but a few and strictly alphabetically). My wonderful family have given me unerring support throughout. The generous-spirited librarians at the University of Sussex Library, the Institute of Advanced Legal Studies in London, the Radzinowicz Library and the University Library in Cambridge have all contributed immensely to this project by their kindness and patience. I am also particularly grateful to the staff and faculty at the Max Planck Institute at Freiburg where I spent two very happy and productive sabbaticals.

I will end with an inevitable apology. Anyone who attempts to write about criminal justice from a global perspective must rely almost exclusively on secondary sources and their own imperfect knowledge of many places which they may not even have visited. No one can possibly be a specialist in every jurisdiction and so my errors and misapprehensions will no doubt scandalise readers from different countries. For these I can only apologise unreservedly and try to do better in future.

Chapter 1

Understanding Criminal Process: A Three-Dimensional World View

The Hunger for Justice

Over nine million people are today being held in penal institutions around the world[1] and this year nearly four thousand others will be judicially executed.[2] Nothing is more striking in criminal justice than the extraordinary variety of ways in which these individuals reached the prison cell or the execution chamber. Some were condemned after public adversarial trials, others by their own confession under torture, others by secret committees or officials acting alone. In some cases the decision was reached by professional lawyers, sitting together or singly, in other cases by lay people, by political, military or religious panels. The diversity of criminal procedure in different parts of the world is simply astonishing. Yet, despite the importance of the undertaking, there appears to be no agreement whatsoever on what constitutes a satisfactory criminal process.

What follows is an account of this diversity and the relentless progress of criminal justice reform around the world, which has accelerated dramatically in the last few years. It is an important and sometimes disturbing history. A few years before his death, the distinguished criminologist, Sir Leon Radzinowicz, warned of the scale of the problem of criminal justice. 'There are at least four billion people in the world at present', he argued, 'as hungry for elementary criminal justice as they are for everyday essential commodities' (1991a, p.428). He noted, despairingly, the inexorable progress towards 'an authoritarian model of criminal justice' (*ibid.*, p.425) and went on:

> (i)n very many parts of the world, including Europe, the system of criminal justice is amorphous, disjointed and stagnant. ... Often there are pious proclamations of goals to be pursued which are flagrantly contradicted by ugly realities. ... overshadowed by the impact of rising crime, by financial restrictions, and by the pressure to invest limited resources in attempts to alleviate other, more appealing, social problems (*ibid.*, p.428).

Since this passage was written, the pious proclamations have redoubled. This is not to belittle the remarkable progress which has been made in the second half of the

[1] See Home Office (2004), *World Prison Population List Findings* (234). http://www.homeoffice.gov.uk/rds/pdfs2/r234.pdf.
[2] Amnesty International (2005), http://web.amnesty.org/pages/deathpenalty-index-eng.

20th century towards a global regime of human rights. Nor is it to undervalue the extraordinary achievements of contemporary criminal justice reform. In practice, however, the real impact of these changes is limited. Adherence to an idealised international or domestic code of rights will not necessarily prevent low-level, routine oppression, nor will it automatically transform authoritarian agencies or unfair procedures.

Some of the responsibility for this state of affairs must be attributed to the historical failure of the academic community to provide any consistent guidance on criminal justice process. In contrast to the extensive and innovative work on human rights, criminal law and criminology, the field of criminal procedure is largely undeveloped and continues to be dominated by sterile and atheoretical debates over the supposed opposition between different 'systems' of justice. Without a better and more sophisticated understanding of the working principles of criminal procedure, little progress can be made and national reform programmes will continue to be developed in isolation and without theoretical direction. The depressing result is that procedural integrity is eroded by undue pressure from donor nations, ill-advised transplants, haphazard or poorly thought-out reform and above all, the baleful influence of treasury-driven 'audit'.

The purpose of this book is to suggest possible means of addressing these problems by identifying principles of criminal procedure, based upon a comparative and historical account of our different institutions around the world. Since it is quite impossible to undertake such an immense task as this on a strictly chronological or geographical basis without becoming overwhelmed by data, the approach which I have adopted here is thematic. I will argue that the development of criminal justice can best be understood in terms of the continuing interaction of the three great, global trial methodologies of the modern period; inquisitoriality, adversariality and popular justice. The body of the text will sketch the progress of these methodologies, arguing that their historical interaction has important implications for the contemporary reform process.

Equally, this project cannot be undertaken without first establishing a clear theoretical basis for the choices indicated. I will argue that a successful model for the analysis of criminal justice procedure must be firmly based upon comparative and historical analysis and must meet certain fundamental requirements. First it must embody the different ideas about justice which are contested both within the institutions of criminal justice themselves and in the wider community. Secondly it must represent, in some way, the real institutions of criminal justice, the courts, the different modes of procedure and collective practices. Finally, and most importantly, it must have immediate relevance to the personnel involved in the system; victims, defendants, police, lawyers and judges and reflect their different interests and outlooks. The failures of existing models have arisen predominantly from their being confined purely to one level, for example, to the level of institutional procedure, or to the level of ideology. They have also been developed in many cases, from research within a single jurisdiction and with no understanding of historical development. Criminal justice can no longer be seen as a purely local

phenomenon. Its historical roots lie in the global communication of ideas and procedures in the great periods of imperial expansion and revolution. In the contemporary era of electronic communication, vastly increased international commerce and travel, our common interest in fair and efficient criminal procedure everywhere is all too apparent.

Before considering how any model of procedure could meet the requirements outlined above, it will be helpful to examine some of the existing attempts to analyse systems of justice, including criminal justice. I will review briefly some of the leading perspectives within the disciplines of comparative law and the sociology of law.

Genealogical Approaches: The Contribution of Comparative Law

At the 1900 Paris Congress of Comparative Law, Raymond Saleilles set out the project for comparative law for the new century:

> ...to extract from the *ensemble* of particular institutions a common basis or at least points of community to facilitate, beneath the apparent diversity of forms, the basic unity of the universal juridical life (cited in Delmas-Marty 1995a, p.27).

A century later, leading comparativists such as Zweigert and Kötz (1998) and De Cruz (1999) are still engaged in this Darwinian endeavour, basing their analysis on the genealogical concept of 'families' of legal systems. Ingraham, for example, looking at criminal justice systems, claims to have identified:

> ... a basic skeletal structure of the criminal procedural system ... Here, as in the morphology of vertebrates, no matter how facially dissimilar, by which they can not only be recognized but also compared (1987, p.21).

This evolutionary model of legal development has led comparativists into more and more complex and bizarre typologies, grouping systems of law into patterns of family, racial, national or generic identity.[3] Esmein, in 1905, proposed the division of 'original systems of law' into Romanic (French), Germanic, Anglo-Saxon, Slav and Islamic families.[4] Arminjon, Nolde and Wolfe (1950-51) produced a modified typology, insisting on a division into seven family groups: French, German, Scandinavian, English, Russian, Islamic and Hindu, while David and Brierley (1985) reorganised the global heredity into three 'major legal systems' – 'Romano-Germanic, Socialist and Common law', with a residual category of orphans; Muslim, Indian, Far Eastern, African and Malagasy. Cole *et al* (1987), Reichel (2002) and Luna (2004), amongst others, have all adopted uncritically these or

[3] Tobenas (1988) notes no less than 15 different taxonomies developed during the century.

[4] Esmein, A. (1905). *Le Droit Comparé et L'Enseignement du Droit.* In *Congrès International de Droit Comparé*, 445.

similar classifications for their own studies of criminal justice systems, claiming that David's model offered a 'scientifically-based theory of criminal justice' (Cole *et al* 1987, p.23). Ancel, on the other hand opened up a serious rift amongst existing family members by insisting on a radical simplification of the dynastic arrangements into 'western' and 'socialist' variants (1984, pp.16-7).

As Langbein remarks, 'once René David has written, once you have Zweigert and Kötz on the shelf, there seems to be less reason to keep doing it' (1995, p.547). Before responding to this implicit question, it will perhaps be helpful to review the basis on which many of these jurisdictional children and their illegitimate siblings have been allocated to their appropriate families. The most striking feature in these genealogies is the lack of any consistent approach to classification. Sauser Hall, writing in 1913, insisted that 'race' was the fundamental factor (cited in Tobenas 1988, p.108). David and Brierley, after reviewing existing typologies (1985, p.20), propose two tests. First, can 'someone educated in the study and practice of one law ... be capable, without much difficulty, of handling another ...' Secondly, are they founded on broadly similar 'philosophical, political or economic principles' (*ibid.*, p.23). Zweigert and Kötz, by contrast, suggest a typology based upon 'styles' of law (1998, p.67).

The first difficulty with most of these classificatory processes as guides to criminal justice around the world is that they focus primarily upon textual law rather than the real practices of justice systems. Secondly, they are based upon research which is almost exclusively concerned with private law (Reimann 1998, p.638; Zweigert and Kötz 1998, p.65). Moreover, the models are unremittingly Euro-centric (Reimann 1998; Mattei 1997, p.10) and frequently consign non-western systems to residual categories of 'other' or 'mixed' (*ibid.*, pp.10-12). Above all the attempt to impose a single genealogical attribution on the 'layered complexity' of criminal process, let alone to an entire legal system, is fundamentally flawed. Even an author such as Mattei, who accepts that patterns of law within a legal system may derive from a variety of different sources, nevertheless insists upon the identification of a single 'hegemonic' pattern in each system. This conclusion leads him to attempt yet another macro-comparative typology, this time dividing the world between the 'rule of professional law, rule of political law and rule of traditional law' (1997, p.16).

Whilst these comparativists have sought to establish a universal typology for systems of law at the level of legal ideology, a further group have focused upon a similar project in respect of procedure and criminal justice institutions. The most significant practical manifestation of this unifying approach in criminal procedure is the development of the 'grid' or 'template' method of comparison. Whether universally or within families, 'an underlying structure common to all procedural systems' (Ingraham 1987, p.17) is presumed and laid out in a sequential series of categories as an analytical framework or 'grid' (*ibid.*, p.20). Delmas-Marty, in one such project involving European Union states, calls for '*une véritable grille d'analyse*' (a true analytical grid):

> ...written in a common language, partially inspired by the European Convention on Human Rights and neutral insofar as national judicial terminologies are concerned. The grid can be meaningful in all countries studied and each can apply its different procedure (1995a, p.44).

Adopting a standard methodology, teams of researchers administer questionnaires, undertake interviews and observations and review the legal codes and relevant literature in all the jurisdictions concerned in order to complete the common template for the country concerned.[5]

The problem with such projects is that the template is compiled using the norms, structures and procedures of an existing system or systems. Other systems may stubbornly refuse to be accommodated. Authors compiling particular sections are faced with the undesirable alternatives of either ignoring the common template or creating fictional equivalents for alien procedural stages or concepts. This is not to say that the 'template texts' which have proliferated in recent years have not contributed significantly to our understanding and awareness of different national forms of criminal justice. It is simply that accounts of different jurisdictions have inevitably been distorted by the dominant perspective. In the case of Van den Wyngaert (1993), Delmas-Marty (1995b) and Hatchard, Huber and Vogler (1996), the templates were drawn with continental European systems of procedure in mind, in the case of Ingraham (1987) and Bradley (1999) with that of the US. Quite simply, there is no universal global template for criminal justice procedure. For all that 'the tasks of criminal procedure are basically the same' (Ingraham 1987, p.20) the ways in which such tasks are accomplished are so various and so functionally different as to defy universal categorisation.

Parsons to Packer: the Contribution of the Sociology of Law

Much of the current research on criminal justice has adopted what John Baldwin has described as a 'stubbornly atheoretical approach' (2000, p.241), responding merely to the immediate requirements of funding and government agencies. This has not always been the case. A considerable body of work in the sociology of law, for example, has embraced the concept of the functional 'system' as the starting point for some very detailed theoretical approaches to criminal justice. The idea of viewing the different agencies of criminal justice collectively as a single 'system' is of relatively recent origin and derives largely from the work of Talcott Parsons (1949). Despite its complexities, the functionalist approach of Parsonian sociology has exercised an enormous influence on the analysis of criminal justice procedure.

By aggregating together the various different agencies of criminal justice into a coherent system with shared values, procedures and goals (Bottomley 1973,

[5] A Web template system has now been prepared by the U.S. Department of Justice, Bureau of Justice Statistics (1993) *The World Factbook of Criminal Justice Systems* at http://www.ojp.usdoj.gov/bjs/abstract/wfcj.htm.

pp.217-9), Parsons' successors opened up the possibility of a form of systems-analysis which could provide an overall and comparative assessment of procedure. Criminal justice could be viewed as a distributive system in which various inputs are processed and in which outputs could be measured and compared. With its tempting suggestions of productivity assessment and regulation and its apparent value-neutrality, this model has dominated both US and English writing on criminal justice process in recent years. Although Bredemeier (1962), Thibaut and Walker (1975; 1978), and Easterbrook (1983), for example, have all proposed system models of criminal justice, based on the apportionment of outcomes, systems theory has found its most enduring expression in the work of Herbert Packer.

Over the past 35 years Packer's formulation has been cited repeatedly[6] and uncritically by even the most radical and progressive of commentators.[7] His influence pervades, for example, the 1999 United Nations Global Report on Crime and Justice (Newman 1999, pp.71-2) and a succession of influential government reports in both the US and England.[8] Yet strangely his work is determinedly non-comparative and is unsupported by much in the way of evidence. Briefly, Packer presents two ideal types of criminal justice process; two normative models (1968, p.153) which he hopes will help explain the choices which underlie the details of criminal justice practice. The two alternative models are the '*crime control model*' (CCM) and the '*due process model*' (DPM). According to Packer, the CCM 'requires that primary attention be paid to the managerial efficiency with which the criminal process operates to screen suspects, determine guilt and secure appropriate dispositions of persons convicted of crimes' (*ibid.*, p.158). The complete freedom of action of the investigators, enabling them to establish an accurate prediction of guilt or innocence, is essential. Indeed, the model requires a rigorous initial screening process so that subsequent stages can be significantly abbreviated. Above all, the process must not be 'cluttered up with ceremonial rituals which do not advance the progress of a case' (*ibid.*, p.159). Although he does not mention it – and indeed has been repeatedly criticised for his failure to look beyond American procedure (Griffith 1970, p.360) – the model which he describes is remarkably close to Napoleonic criminal procedure (Mukherjee and Reichel 1999, p.71).

'If the crime control model resembles an assembly line', continues Packer, 'the due process model looks very much like an obstacle course' (*ibid.*, p.163). This model erects procedural barriers and is based upon a presumption of fallibility and error and a distrust of informal fact-finding methods. It is a system of quality control in which the reliability of the product takes precedence over the efficiency with which it is produced (*ibid.*, p.165).

Underlying the two positions is a conflict, to which Packer refers briefly, between the professional interests of the police and the prosecution and those of the

[6] See e.g. Bottomley (1973, pp.221-7); Bottoms and McClean (1976); McConville and Baldwin (1981, pp.3-18); Reichel (2002); Roach (1999).
[7] Choongh (1998); Hillyard and Gordon (1999).
[8] See e.g. 1981 Royal Commission on Criminal Procedure in England.

lawyers and judges. The importance of Packer's thesis over such an extended period indicates how successfully he has been able to give expression to the implicit understandings of those involved in the process. There is, however, a conspicuous and immediately apparent flaw in Packer's formulation which has accounted for a good deal of distortion. Put simply, crime control is patently an *objective* whereas due process is a *method*. In no sense can they be considered as polar opposites or 'antinomies' and to do so is to give unwarranted priority to the model which promises results over the model which merely describes a procedure. So far from being value-neutral, the terms of the argument are loaded from the outset.

There is also an unchallenged assumption in Packer's terminology that 'efficiency' in apprehension and conviction will necessarily result in crime control (Ashworth and Redmayne 2005, p.39). It may well be, on the contrary, that the ruthless efficiency of the CCM may alienate sufficient sections of the population to make crime control more difficult. A consensual DPM approach to justice might actually be more effective in restricting levels of offending and, as Roach has pointed out, 'due process is for crime control' (1999, p.688). Roach further attacks Packer for his failure to perceive the 'empirical irrelevancy' of his models, to the extent that 'the due process model begins to look like a thin, shiny veneer that dresses up the ugly reality of crime control' (*ibid.*, pp.687-8).

Surprisingly, in view of these all too evident limitations, subsequent commentators have been unable to resist the temptation to add more and more complex 'alternative models' to the original formulation. Griffith, for example, is critical of Packer's assumption that 'the essential nature of (the) problem is such as to permit only two polar responses' (1970, p.369). Rehabilitation and, more importantly for Griffith, conciliation are left entirely out of account in this conflict model of criminal justice. Griffith is therefore moved to offer a third model which he describes as a non-conflictual 'family model' (*ibid.*, p.373). Bottoms and McClean (1976), in a similar spirit, cannot resist adding an additional 'liberal bureaucratic model' and Choongh (1998), a 'social disciplinary model'. King takes this process to even greater lengths, insisting that a further three 'social models' are required for a comprehensive picture. These are 'the bureaucratic model', 'the status passage model' and 'the power model' (1981, p.29). To make matters worse, Davies, Croall and Tyrer, dissatisfied with King's mere six models, offer a record seventh, 'the just desserts model' (1998, p.25). Undeterred by the steadily accumulating number of Packer-inspired models, Roach has recently expressed concern that the original two models 'are becoming as out of date as other hits of the 1960s' (1999, p.673), failing to take account of the victimisation of women and minorities (*ibid.*, p.674). His solution is, inevitably, to add yet a further two models to the Packer originals. He proposes additional 'punitive' and 'non-punitive' models of victims rights and, with an impressive disregard for the mixed metaphor, designates these as the 'roller-coaster' and 'circle' models (*ibid.* pp.699-716).

This bewildering landscape of amendments demonstrates forcefully the inadequacies of the Packer mode of 'value-neutral' systems-analysis for evaluating

criminal justice process. Griffith, King, Choongh, Roach and others are all anxious to situate criminal justice in the wider social and political context and in contemporary debates which go far beyond the actual mechanisms of criminal justice. This may be desirable and necessary but it cannot be undertaken successfully merely by adding extra 'models' to the original Packer formulation – which is based upon a rigidly circumscribed sub-systems – analysis. Indeed, such strenuous attempts to rehabilitate Packer demonstrate, in as clear a way as possible, the poverty and parochialism of contemporary approaches to the understanding of criminal justice systems and the theoretical problems which may arise in the absence of any truly comparative or global perspective. The more recent work of Mirjan Damaska, however, seems on the face of it to address precisely these concerns and to unite the comparative law tradition of historical scholarship with a rigorous sociological analysis of contemporary justice.

Ideal Types: Damaska and the Institutions of Justice

Damaska, a Yugoslav scholar working in the US, is widely regarded as having provided the most significant contribution to comparative justice studies in recent years (Nijboer 1995, pp.130-5; Feeley 1997, p.96). To many his analysis offers a 'fresh perspective' (Reimann 1988, p.208) or a 'neutral' comparative instrument (Nijboer 1995, p.131) in a field of study which for too long has been dominated by the outmoded adversarial/inquisitorial polarity. This traditional approach is dismissed by Damaska as 'cumbersome', unsupported by evidence and allowing unwarranted priority to the trial stage. Alternative attempts to explain differences in procedure based upon a Marxist analysis of economic forms are, to Damaska, equally illusory and over schematised (1986, pp.6-8). Instead, he has insisted, throughout his work, upon the importance of *structures* of judicial authority.

In two lengthy and scholarly articles in 1973 and 1975, Damaska proposed a pairing of organisational models which he terms 'hierarchical' and 'co-ordinate', arguing convincingly that the nature of the procedure itself is determined by the character of the institution which operates it. If a 'hierarchical' authority resembles a pyramid composed of carefully ranked officials, the 'co-ordinate' authority is a horizontal ordering of amateur participants who derive their social authority from outside the judicial system. From this central distinction between different relations of authority, all procedural forms follow. Damaska develops this interesting analysis yet further in his 1986 book *The Faces of Justice and State Authority*, by attempting to relate these two contrasting judicial formulations to an analysis of the state. Here, the two sets of judicial authority (hierarchical and co-ordinated) are viewed in terms of two different types of state form ('conflict-solving' and 'policy-implementing') in a complex interrelation. This taxonomy has been enormously influential, despite its theoretical shortcomings. Its relevance, therefore, to an analysis of contemporary procedural forms is worth exploring in greater depth.

Damaska's concept of the 'hierarchical' system of authority is the least contentious of the two models. It is characterised by the rigid professionalism of officials who are grouped in a pyramidal hierarchy (1975, pp.483-509; 1986, pp.18-23). This hierarchy includes, in criminal justice at least, police, public prosecutors and the judiciary (1975, pp.502-6), all of whom are organised in echelons. Power derives from above, trickling down the levels of authority and great inequalities among officials at different levels are characteristic (1986, p.19). Damaska argues that this structure of judicial authority is characterised by a developed network of appeals, minimal lay participation, a reliance on a complex written procedure and an officialdom dominated by a 'civil service' ideology. Officials are professionalised and retained in office for long periods, thereby creating a powerful sense of routine and a depersonalised and institutional authority. Uniformity and orderliness in decision-making is crucial and hence a technical mode of analysis is adopted which gives priority to consistency over the social and political ends of justice. Damaska describes this ideology as 'logical legalism'. The trial is simply one – by no means final – stage in a lengthy and continuous process which is held together by the mechanism of the *dossier*, the crucial instrument of collective memory:

> Like tributaries of an ever larger river, files kept by lower officials are incorporated into the evermore encompassing files of their superiors (1986, p.50).

Summaries and precis compiled by lower officials protect their superiors from drowning in detail and allow the latter to take an overall perspective. Within this civil service mentality, discretion is anathema.

Damaska's formulation owes a great deal to Weber's concept of bureaucracy. Unfortunately Damaska fails to develop these themes at length and nowhere gives us any sense of the real character of the officials, the institutions or the ideologies which he describes. The different class and social relations between groups of officials are ignored or treated as unproblematic and the role of those actors not within the Damaskan paradigm (for example, defence lawyers, probation officers, etc.) are left entirely out of account. Instead Damaska relies upon an eclectic selection of historical or theoretical examples.

Damaska's concept of the 'co-ordinate system' is even more perplexing. Here, he envisages a heterogeneous and transient body of independent amateur decision-makers, subject only to a 'mild' hierarchy and assisted by professionals who act in a merely supportive role. Their decision-making is flexible and based on common sense understandings and 'community values'. He explains:

> A candidate for office is preferably an established person who has made his mark on society, a problem solver attuned to community values (1986, p.17).

Since co-ordinate officials are exposed to large amounts of undigested detail, questions of uniformity and regularity take second place to the generation of a satisfactory solution of the problem in hand. In the absence of any file or written

record, the trial becomes the crucial arena of decision-making and hence the only significant event in the proceedings. In this formulation he appears to be aggregating lay juries in England and the US and lay magistrates in England (1975, pp.512-3) with elected or short-term judicial officers in the USA (1986, p.24) and professional judges in both countries. This conflation is difficult to maintain. Damaska goes on, moreover, to argue that the role of the professionals is merely to provide a reliable 'memory' for this shifting population of powerful amateurs. Such officials are themselves excluded from any exercise of power; their function is merely to support.

Whilst we must accept that such a model is purely theoretical, nevertheless if it bears little conceivable relationship to practice, its function as an ideal type is somewhat limited. Damaska points explicitly to the Anglo-American adversarial system as the major exemplar of this type. Yet, although Damaska concedes that England has deviated to a considerable extent from the model (1986, p.18) he cannot account for the basic dissimilarities evident in both systems. What system of authority could be more hierarchical and internally regulated than the English legal profession and the judiciary and in what sense could the English magistracy be described as outside the network of hierarchies? Damaska also fails to supply any convincing explanation for the emergence of his two paradigmatic systems of justice. The development of the co-ordinate model in England is described as a 'spontaneous growth' (1986, p.42) arising from the 'comparatively small-scale of operations' (*ibid.*, p.41) and the 'close collaboration in power amongst the well to do classes' (*ibid.*, p.38) and an 'openness to ordinary community judgements' (*ibid.*, p.42). Similarly, the hierarchical model in France is related to the growth of Capetian royal power and the development of absolutism in the 16th and 17th centuries (*ibid.*, pp.32-3).

This is very disappointing. Such explanations as we are offered are largely anecdotal, based on supposed national characteristics and demonstrate no sustained analysis of Anglo-American or continental social and political history. Damaska is clearly right to emphasise the relevance of historical development but he fails to offer a convincing account in context. Moreover, although Damaska's focus is clearly on criminal procedure, his 1986 work is intended to embrace civil justice as well. By attempting to bring these two very different procedures within a single analysis, a good deal of precision is lost. Equally, Damaska's state typology is naive in the extreme and demonstrates no apparent awareness of the extensive literature on the role and function of the state in contemporary society. On the contrary, the state is anthropomorphised and massively over-simplified. Nevertheless, despite these shortcomings, his work is to be welcomed for its radical attempt to broaden the debate and its engagement with different systems of justice.

Packer and Damaska differ significantly in their outlook. Whereas Packer is concerned with a functional analysis of criminal procedure, Damaska is more interested in the structures of authority in justice systems. What they share, however, is a strong sense of the dichotomy between, on the one hand,

authoritarian, 'hierarchical' systems which allow relatively unhindered investigation by state officials and, on the other, a model in which state power is interrupted by due process or the influence of powerful outsiders. It would be an oversimplification to identify this shared dichotomy too closely with that between inquisitorial and adversarial forms. Not only are both authors anxious to distance their work from these traditional categories, but in the case of Damaska, the terminology clearly fails to capture the concept of 'co-ordinate' authority exercised by 'established persons'.

It is also clear that the original formulations of both Packer and Damaska are inadequate because they seem to suggest that it is possible to produce a satisfactory analysis of justice systems in isolation from the social and political context in which such systems operate. In the case of Packer, this problem was addressed by the attempts of his numerous supporters to integrate his two models into broader perspectives. Damaska, in his own later work, aimed to locate his alternatives within different state forms. Unfortunately, in neither case was the effort particularly successful. Quite simply it is not possible merely to 'bolt on' a broad social analysis to one which was designed to explain an institutional form. Moreover, none of the work which has been reviewed so far offers a convincing historical perspective. None makes a sustained effort to cross disciplinary boundaries and, above all, none is intended to encompass the different perspectives of ideology, structure and agency set out above.

Three Paradigms

The comparative perspective which will be adopted throughout this book is derived from a variety of sources, including the analysis of Soviet law by Huskey (1991, p.54), African revolutionary justice by Sachs and Welch (1990, p.15), Islamic law by Kusha (2002, p.24) and western administrative law by Mashaw (1983, p.23). All of these authors adopt a similar, threefold classification which reflects fundamental Aristotelian concepts of community, state and individual. Huskey, for example, identifies three major influences at work in Soviet law, which he describes as 'nihilist, statist and legalist' (1991, p.54). Sachs and Welch had already proposed a similar formulation which they characterise as the 'liberating and freedom-enhancing aspects of community-based law', the state's defence of the revolution and 'internationally accepted norms of justice' (1990, p.15). Huskey (but not Sachs and Welch) acknowledges a considerable debt in the elaboration of these traditions (1991, p.58) to the ground-breaking work of Eugene Kamenka and Alice Tay.

In two essays written in 1980, Kamenka and Tay set out a similar[9] triangulation of legal forces (1980a, 1980b). A well-known passage explains:

[9] Huskey somewhat perplexingly asserts that the 'statist' approach to justice is compatible with Kamenka and Tay's 'social organization' paradigm, whereas these authors specifically indicate that *Gesellschaft* (social organization) '... has difficulty in dealing with the state or state instrumentalities' (1980a, p.17).

> In what follows, drawing rather loosely on two great figures in the history of sociological theory, Ferdinand Tönnies and Max Weber – we shall be suggesting that the modern developments in law and the modern crisis in legal ideals consist of a half-conscious confrontation between three great paradigms of social ideology, social organization, law and administration – each of them representing a complex but potentially coherent view of man, social institutions and their places in society. These paradigms we call the *Gemeinschaft* or organic-familial, the *Gesellschaft* or contractual commercial-individualistic, and the bureaucratic-adminstrative paradigms (1980a, p.7).

The three paradigms are not intended to reflect actually existing legal systems but tendencies, or Weberian 'ideal-types', linking institutions with the historical ideologies which support them (*ibid.*, pp.15-6). Before going on to examine the implications of the *Gemeinschaft/Gesellschaft*/administrative-bureaucratic triad for comparative method, it will be useful to establish exactly how Kamenka and Tay used their sources in arriving at this formulation.

As conceived by Tönnies, the *Gemeinschaft* form of social organisation 'represents the special social force and sympathy which keeps human beings together as members of a totality' (Loomis 1993, p.47). It is associated with the rural community, the village or household and agricultural production directly for use (Kamenka 1989, p.79). The *Gesellschaft* approach, on the other hand, is in all respects the opposite, based on social and geographical mobility, individualism, city-life, commerce and the rise of Protestantism and the bourgeoisie (Kamenka and Tay 1980a, p.17). Tönnies concludes:

> ...two periods stand thus contrasted with each other in the history of the great systems of culture: a period of Gesellschaft follows a period of Gemeinschaft (Loomis 1993, p.231).

In developing this polarity, Tönnies is reflecting a distinction between rural and urban life which has been common in Western European thought since antiquity (*ibid.*, pp.vii-viii) and which has formed the basis of speculation by authors as diverse as Maine, Marx, Weber and Durkheim (Loomis and McKinney 1993). Despite Tönnies' failings in the area of general theory (Cotterrell 1995, pp.326-8) his work has provided an important starting point for more recent accounts of specific institutions and ideologies, most notably in the area of law. Kamenka and Tay, like their predecessors, have adopted an extremely liberal interpretation of Tönnies' work. Not only have they translated his two historical periods into Weberian 'ideal types' of social organisation but they have also added a third (distinctly Weberian) concept of the 'bureaucratic-adminstrative'. This is described by them as 'a phenomenon of large-scale, non-face-to-face administration in which authority has to be delegated' (1980a, p.21). In contrast to the original Weberian concept, however, its ambit is apparently confined to state administration.[10]

[10] For Tönnies, conversely, the state was of essential and developing importance in the *Gesellschaft* tradition (Loomis 1993, p.259).

Their reasons for incorporating the third concept are not well explained. They assert merely that the simple *Gemeinschaft/Gesellschaft* opposition 'smacks unmistakably of the nineteenth century. It ignores the ever-increasing scope and power of the state and its bureaucracies, that have become so evident in the twentieth century' (*ibid.*, p.18). But as Kamenka notes elsewhere (1989) the importance of bureaucracy and the state form is scarcely confined to the 20th century. Moreover, the work of Tönnies on social organisation cannot simply be amalgamated with that of Weber on bureaucratic domination without substantial reconstruction work, none of which appears in Kamenka and Tay's writing.

Nevertheless, I will argue here that the juxtaposition of these tendencies, as reformulated, provides significant insight into the working of contemporary justice systems and the sheer complexity of social/legal traditions and practices. The Kamenka and Tay paradigms are useful for the task of comparison, not only because they are each associated with a particular ideology of law and justice, but because they also together represent the specific triangulation of forces which provides the historical necessity for criminal justice and which is crystallised in the procedure.

Three Types of Procedure

The striking contribution of Kamenka and Tay – a contribution whose potential has not yet been fully explored – was to link these concepts with actual forms of procedure and legal ideology, insisting that:

> (t)hey did not represent *prima facie* descriptions of any actual society or legal system in all its details but were a shorthand for three sets of divergent trends, each of them historically more important at some periods of time than at others (1980b, p.105).

What, then, are the institutional forms which Kamenka and Tay saw as corresponding with, or produced by, these three 'divergent trends'? First, *Gemeinschaft* social regulation, we are told, found its expression in Chinese legal procedure, the Russian peasant *mir* or proceedings before the early English jury (Kamenka and Tay 1980a, p.15). To this could be added the English magistracy, the German *Schöffengericht*, the 'native assessors' of British imperial practice, the 'popular judges' of socialist legality and, above all, of the village courts, township courts and other forms of unmediated public participation in criminal justice. As Tönnies himself remarks:

> Neighbourhood, the fact that they live together, is the basis for their union; it leads to counselling and through deliberation to resolution (Loomis 1993, p.257).

Procedural rules and legal formality serve only to undermine such direct involvement which, for its most successful functioning, requires complete freedom

of action, lack of normative review and, in short, a form of Huskey's 'legal nihilism'.

The *Gesellschaft* approach, on the other hand, 'emphasizes formal procedure, impartiality, precise legal provisions and definitions, the rationality and predictability of legal administration' (Kamenka and Tay 1980a, p.17). It reflects the abstract rights enshrined in the French and American constitutional documents of the 18th century which underpin the whole concept of the *Rechtstraat* and the rule of law (*ibid.*). It entails a form of procedure which is based upon the norms of due process and adversariality (*ibid.*, p.18) and is resistant to the institutionalisation of status. In short it establishes the legal conditions of free contract and free litigation which are necessary for the circulation of commodities within the capitalist mode of production.

The bureaucratic/administrative tendency, finally, is associated by Kamenka and Tay with state-dominated forms of justice process: the Star Chamber and the prosecutor and investigating magistrate of continental European procedure (*ibid.*, p.20). Moreover, its development can be observed not only in the great historical flowering of the inquisitorial 'Roman-canon' method of criminal trial from 1215 but also in modern authoritarian justice.

The great flexibility of the triangular model described above arises from the fact that, although each 'tendency' finds its origins in specific practices in specific historical periods, together over a period of time they nevertheless have come to overlap and interpenetrate. In an accretive formation such as the criminal justice system, bearing the residues of repeated historical interventions at every level, no analysis can afford to ignore the relative balance of influence of particular ideologies and procedural preferences. Before beginning the process of comparison, however, the personnel who represent and promote each of these approaches within criminal justice, must be identified.

Three Types of Control

In their well-known 'psychological analysis' of procedural justice, Thibaut and Walker reached the conclusion that the distribution of control over the process was the most important determinant of fairness and therefore of preference for procedures. It could also provide a useful tool of comparative method (1975, p.2). Their experimental research was based upon a typology of control relationships ranging from the 'autocratic' (judge-controlled) to equal 'bargaining' between the parties. In the event they claimed to have established that the adversary procedure was superior to other classes of procedure based upon its operating capabilities and on subjective and normative appraisals of its capabilities (*ibid.*, p.118).

However, from a wider point of view, it is possible that their concept of a 'continuum of control' might prove a fruitful means of assessing criminal justice systems specifically. Ashworth, while attempting to establish his own theoretical framework for the evaluation of the English criminal process, proposed five

different 'standpoints' within the procedure (1998, p.40). This formulation is perhaps over-elaborated and could be simplified to encompass only the state officials, civil society and the individual subjects of the process. It is their competing interests which are negotiated within criminal procedure and the criminal trial is the primary arena in which conflicts between them are symbolically resolved. It will be argued here, following Thibaut and Walker, that an understanding of the balance of interests between participants within the criminal justice process is essential to comparative analysis in this area.

It may be objected that, from the point of view of criminal procedure, this threefold formulation, reflecting as it does the triangulation of forces set out by Kamenka and Tay, and the historical modes of procedure which have been identified, eliminates the distinct and independent role of the victim within the process. This is exactly the point made by Roach in his critique of Packer when he notes that '(n)o one has yet managed to develop a victim-centred model which is also consistent with due process and crime control' (1999, pp.707-8). However, undeniably, one of the great achievements of criminal justice since the Middle Ages has been the assumption, by the state, of the rights and duties of private vengeance and it would be catastrophic to reverse that process. The interests of the state, however, are clearly not congruent with those of the victim, which in some cases may best be represented separately by lawyers invoking due process rights on their behalf. I will argue here that the victim does not and should not exercise an independent position in the conflict of forces within criminal justice. His or her interests may be represented by the state in some cases or by independent lawyers in others, but to create a separate category of interest would be to give unjustified double privilege to their role and to unbalance the crucial relationship between state, civil society and the defendant.

This relationship establishes a basic methodology of comparison in criminal justice and can be represented schematically as follows:

Form of Social Organisation	**Institutional Procedure**	**Dominant Participants**
Gemeinschaft	Popular Justice	Juries, *Schöffen*, lay magistrates, assessors and direct participants
Gesellschaft	Adversarial	Lawyers (for the defendant and victim)
Administrative/ Bureaucratic	Inquisitorial	Judges, prosecutors, police and other state officials

I am very far from suggesting that any criminal justice system may be characterised as falling wholly or even predominantly within any one of these paradigms. Instead, the aim of this book is to explore the development of the three great traditions of criminal justice and to identify their divergent influences on contemporary practice. Every system, at different historical epochs, has experienced the gravitational pull of each of the three trial modes and has responded accordingly. Every system, in its current structure and practice, crystallises their relative influence to a greater or a lesser extent. The central argument of this book is that whatever mode of procedure is operated, it should not seek to exclude, significantly limit or disable the participation of any of these three legitimate interests in criminal justice. The next step is to examine, in sequence, the development and the current manifestations of the three great trial modes. The first in importance, if not in chronology, is the concept of inquisitorial justice.

PART I

THE INQUISITORIAL TRADITION

Authoritarian Justice and the Concept of the Inquisition

Inquisitorial methodology has been the dominant model in world criminal justice over the last eight hundred years and, despite the extraordinary advance of adversariality in recent decades, it still exercises a tenacious influence. Unlike adversariality, it developed independently in various parts of the world and there are marked differences between its various regional traditions. The account which follows is not intended to be exhaustive and will be focused primarily on the globally important European tradition of inquisition-process, from its 13th century origins to its modern formulations, particularly during its ascendancy under 20th century totalitarianism. Two parallel and considerably older traditions (both of which have been significantly modified in recent years under the influence of European inquisition-process) will also be reviewed, in order to give some idea of the extent and diversity of the inquisitorial methodology around the world. These are Chinese justice and Islamic justice.

Before looking at the development and global spread of inquisitoriality, it is important to define its fundamental characteristics. I will argue that there are four essential features. The first is that it is based upon a hierarchical system of authority in which power is delegated downwards through a chain of subordinate officials of decreasing status. As Damaska (1975) has noted, each level of officials is expected to exercise authority over those below them, whereas cases themselves are filtered upwards to provide repeated review by successively more powerful functionaries. This approach to justice was equally as attractive to the feudal European monarchies of the high Middle Ages as it was to the Chinese imperial authorities and the Abbasid and Ottoman caliphs. It was a system which was perpetuated under modern absolutist and, later, totalitarian rule. In short, the first and most essential characteristic of inquisitorial method is that it is authoritarian.

The second characteristic is that of continuous, bureaucratic process. The hierarchical structures of authority described above depend upon written communication between different levels (in the European model, through the use of a *dossier*), operated by a bureaucracy. Apart from the increasing status of decisions by superior officials, there is no essential privileging of any stage of the procedure (as in the adversarial model). Instead, the trial process is a continuous forensic examination conducted by different levels of officials, each supervised by those above them in the hierarchy. This examination often involves relatively simple forms of categorisation and the later models of inquisitorial process, influenced by doctrines of mass production and management efficiency, handled cases collectively by lists rather than individually. This permitted the processing of large numbers of defendants, for example, under Soviet or Nazi *Inquisitionsprozess*.

The third characteristic is the use of different forms of intolerable pressure against defendants in order to achieve co-operation. All early forms of inquisitorial method employed physical torture extensively, often regulated by complex rules of operation which ensured that, even in cases where it was not actually put into effect, the threat would hang over the proceedings. The effect of this institutional

terror was magnified by the complete secrecy of proceedings and the isolation and passivity of the accused. By the late 18th century in Europe, physical torture was replaced by more effective psychological methods, but these still depended for their impact upon the rigorous isolation and the helplessness of the accused. Moreover, physical torture enjoyed a revival in the procedures of 20th century totalitarian states and is still strongly associated with inquisitorial method.

Finally, the ideology and ruling dynamic of inquisitoriality is not law but rational deduction and forensic enquiry. In one sense, this neutrality has contributed to the longevity of inquisitorial method, making it a convenient vehicle for ideologies as diverse as the scholastic logic of the Roman-canon procedure, Islamic theology, the royal absolutism of the *Code Louis*, bourgeois individualism under the Napoleonic *Code d'Instruction Criminelle* and even Soviet 'social defence'. Whereas inquisition-process and adversariality might seem, superficially at least, both to be law-based systems, the apparent similarity in their use of law is misleading and it is clear that the nature of the proceedings also determines the character of the rules which govern them. Inquisition-process requires a system of regulation which might be described as 'conformity rules'. These are designed to ensure the effective delegation of authority from the central power to subordinate officials, aimed at ensuring a standard decision-making methodology and making it easier for decisions to be reviewed and controlled. Examples of such conformity rules might be the 'half-proofs' and 'full-proofs' methodology of Roman-canon practice, the 'nullity' jurisprudence of contemporary French procedure or the four/two witness rule in Islamic *hudud* offences. Appeal, which was central to the development of inquisition-process, was intended only as a review of correct procedure and the professional and effective conduct of judges. Such rules are not due process protections (although they can, in some cases have this effect). On the contrary, their primary aim is to ensure continuity and accuracy in decision-making and to support regulatory review of subordinate officials. Adversariality, on the other hand, has generated a set of 'protective rules' associated with the great due process revolution of the 18th century and which are aimed at interrupting and frustrating the power of the state and providing a defence for the individual. Only incidentally do they offer any guarantees of accurate decision-making or give the opportunity for the review of delegated authority.

Inquisition-process is deeply engrained in all criminal justice systems and without the use of its methodology, it would be impossible for any state or para-state agency to conduct rational investigations. On the other hand, the consequences of unrestrained inquisitoriality are catastrophic and, as will be evident from what follows, its history is steeped in oppression and bloodshed. In looking at European inquisition-process, it is possible to distinguish progressive stages of development. The first is represented by the work of the medieval schoolmen who created a powerful system of investigation and enforcement which was of immense practical importance to the feudal and religious authorities of early Europe. Despite the addition of refinements such as the development of the prosecutor and a continuing elaboration of the Roman-canon rules, there was comparatively little change during this period, even in the great codifications of the 16th century such as the *Carolina* of 1532 and Villers-Cotterêts of 1539. It was

only with the development of experimental method and the Cartesian revolution in the 17th century that inquisition-process underwent significant development. The new methodology, most powerfully expressed in the *Code Louis* of 1670, was based upon the techniques of rigorous scientific enquiry and rational experimentation.

In its third stage, represented by the Napoleonic *Code d'Instruction Criminelle* of 1808, inquisitoriality was to enjoy almost complete global domination. This code powerfully conveyed the encounter of European inquisitoriality with the new methodology of post-Enlightenment adversariality, which it had not only managed to resist but had successfully subsumed within its own rules of operation. The resulting hybrid married the traditional inquisitorial techniques of terror and rigorous scientific enquiry with sufficient elements of due process and human rights, to make the authoritarianism of the *Code Louis* ideologically acceptable to bourgeois liberals. The ascendancy of the Napoleonic Code remained unchallenged until the Positivist movement launched a ferocious attack upon the surviving due-process provisions in the last few years of the 19th century. This cleared the way for a reversion to a fully authoritarian model of inquisition-process in the criminal practices of the Soviets after 1917, the Nazis and European fascists after 1933. This final variant was rendered more powerful and more terrible by the new scientific techniques of mass management and psychological conditioning. It represented the logical terminus of the inquisitorial methodology and provided the perfect vehicle for 20th century campaigns of mass extermination. Since the collapse of totalitarianism between 1945 and 2000, inquisitoriality has been everywhere in decline, with the significant exception of Islamic justice.

The aim of this account of inquisitorial justice is not to suggest that the methodology has no place in a contemporary system of criminal procedure – on the contrary, it is an essential and wholly legitimate expression of state authority – but to explain its historical modalities and to warn against the dangers of excessive reliance on its precepts. Inquisitoriality, expressing professionalism, rigorous truth-finding and deductive reasoning, is highly seductive. The sanguinary and terrifying history of its long development should alert us to its shortcomings.

Chapter 2

The European Inquisitorial Tradition

Origins of the European Inquisition

Inquisitorial justice (*processus per inquisitionem*) was a revolutionary new form of trial developed in the late 12th and early 13th centuries in Europe. Its origins were primarily intellectual, being the self-conscious creation of medieval schoolmen. In practice, however, it was driven forward and promoted by the great magnates of the church and secular authorities. At its heart was the concept of the judge-inquisitor, endowed with wide-ranging powers but constrained by complex rules of practice: the so-called '*ordo juris*' of the Roman-canon method. Moreover, by contrast to the clumsy and arbitrary processes which preceded it, inquisitorial justice was 'a brilliant and much needed innovation in trial practice, instituted by the greatest lawyer-pope of the Middle Ages' (Kelly 2001, p.450).

That pope was Innocent III, whose Lateran Council of 1215 must be seen as the decisive moment in the adoption of the inquisition in Europe. This chapter will review the origins of the inquisition and its development in the German *Carolina* of 1532 and the French *Code Louis* of 1670. However, before considering the intellectual movement which originally gave rise to *processus per inquisitionem*, and seeking to establish why it made such spectacular progress in continental Europe but gained no sustained foothold in the secular courts of England, it is important to understand the nature of the existing criminal trial process.

Criminal justice on the eve of the inquisitorial revolution was everywhere seen as a patrimonial duty, exercised in the seigniorial courts of the great magnates, in the royal courts within the crown's estates, in the municipal courts in the towns and, above all, in the canon courts of the church. The procedure in each form of court was broadly the same; communal and accusatorial. The right to initiate procedure by accusation belonged to the victim or to his or her close kin or feudal lord. Procedure was public, oral and relatively formal, with courts sitting in the open air and superintending one of the major forms of proof. These were, generally, oath-taking by the accuser and compurgators, combat or the ordeals. Nothing could occur without the active participation of the accuser and it was only in respect of offenders apprehended *in flagrantia* or by an arrest on suspicion that the judge could act alone. In the latter case, the arrest would end if no accuser came forward (Esmein 1914, pp.54-77). Central to many of these pre-feudal modes of trial throughout the Germanic kingdoms of western Europe were the ordeals and other divinely inspired interventions (*ibid.*, pp.32-6).

The ordeal flourished in Europe throughout the period 800-1200. Originally restricted to the ordeal by boiling water, the variety of ordeals developed significantly during the period, although, according to Bartlett, the main techniques were:

> ... the trials of fire and water: holding or walking on hot iron, immersing the hand in boiling water, or complete immersion in a pool or stream. Such practices have two important features in common. They were all unilateral, usually undertaken by only one party in the case; and they all required that the natural elements behave in an unusual way, hot iron or water not burning the innocent, cold water not allowing the guilty to sink (1986, p.2).

Ordeals were used only when other forms of proof, such as arbitration, witnesses or duel, were not available and they had to be conducted under priestly supervision and after elaborate ritual. The aim of the ordeal was to reveal the Divine will, in a 'world inhabited by the *praesentia* of God and his saints' (Jacob 1996, p.69; Olson 2000). Recent scholarship has discounted the developmental approach which viewed the ordeals as a primitive and irrational trial process which would be swept away by 'the rationalisation of proofs in Europe' at the time of the inquisitorial revolution. Instead, the ordeal is increasingly seen as a ritualised instrument of consensus in small-scale, localised communities (Brown 1975; Hyams 1981; Jacob 1996, p.46). They were to give way to early feudal domination in the 'shift from consensus to authority' (Bartlett 1986, pp.34-6).

Langbein (1974, pp.129-39) has argued, following van Caenegem, that it was the intellectual and governmental revolution produced by the so-called '12th century renaissance' which led to the destruction of the ordeals. This revolution had two aspects; scholarly and institutional. On the one hand it is clear that the intellectual arguments made by the scholars of the Bologna and Paris schools were hugely influential in the change (Baldwin 1961). The work of Peter the Chanter and others in destroying the legitimacy of the ordeals, the publication of Gratian's *Decretum* (*ibid.*, pp.618-20) and the line of authorities which culminated in Durantis' *Speculum Judiciale* in 1271, established an unanswerable case for the introduction of the Roman-canon method. Well-publicised cases of error were seized upon by the Romanists of the Bologna and Paris schools as evidence for the Augustinian principle that no-one should tempt the deity while there was a rational means at his disposal. There was, moreover, no authority for the use of ordeals in the Roman jurisprudence, which had recently been reconstructed by the work of the academic Glossators (Langbein 1974, p.211). On the other hand, it was not until the papacy had developed a sufficiently powerful and universal bureaucracy in the 13th century that it had the authority to implement the long-cherished scheme for the suppression of the ordeals. Clearly, they did not simply fade away from lack of use but continued in popularity until they were destroyed by a papal 'policy decision'. As Bartlett puts it, '(t)here was no decline of the ordeal; it was abandoned' (1986, p.100).

The fourth Lateran Council of 1215, by its canon 18, moved to undermine existing practices by withdrawing its support from the ordeals. Since a priest was required to bless the elements of the ordeal in all cases, the prohibition on the ordeal was intended to extend to secular as well as ecclesiastical procedure. The legacy of the ordeals on the trial processes which succeeded them was clearly tenacious. Their influence on the development of common law trial by jury has been widely recognised (Olson 2000) as has their role in inquisition-process. As Jacob notes, the spiritual dimension of judgement continued to impregnate very deeply the continental European conception of the judge (1996, p.44) and the ordeal became 'judicialised' in the rituals of torture (Foucault 1975, pp.39-40).

Inquisition-Process and the Medieval Church

The relationship between the Roman-canon method and Catholicism cannot be overstated. In its concept of moral authority and hierarchy, in its sense of spiritual investigation according to a complex discipline and above all, in the idea of the divinity of judgement, *processus per inquisitionem* was deeply marked by its association with the medieval church. Andrews notes the profound Catholic imagery of the process, notably the penitential and spiritually 'purgative' role of torture (1994, pp.429; 451) and as Langbein has pointedly remarked, the procedure was considerably more 'canon' than it was 'Roman' (1974, p.138).

When the Lateran Council met in 1215, the Albigensian Crusade in Languedoc was at its height (Ruthven 1978, pp.75-97) and the papacy was preoccupied with the problem of heresy. In contrast to existing 'open' offences of violence or appropriation, heresy was a secret, intellectual form of deviancy involving groups of individuals mutually bound by obligations of confidence (Ruthven 1978, pp.51-2; Peters 1985, pp.51-4). Since no injured party was likely to come forward, traditional forms of accusatorial trial were clearly ineffective as a means for penetrating these walls of silence. The Council therefore willingly embraced the more sophisticated Romanist proposals which were already gaining ground in the ecclesiastical courts.

The most well-known early exponent of this new mode of trial, and the one which was to assume a central place in common law demonology, was the Papal Inquisition, established in 1233 by Pope Gregory IX and the Emperor Frederick II (Lea 1963, pp.55-120; Hamilton 1981, pp.31-9). The procedure adopted by the Inquisition can be regarded as the most extreme early variant of the Roman-canon method. Hearings, conducted by the Franciscan and Dominican Inquisitors, took place in private after suspected heretics had been denounced by the deposition of witnesses. The emphasis was always upon repentance and informants who confessed voluntarily and named their associates were often rewarded with a considerable mitigation of penalty. Repeated interrogations of the suspect were recorded by a notary, the only other person present with the inquisitor (Lea 1963,