

Ninth Conference on the Future of Adversarial and Inquisitorial Systems



UNC
SCHOOL OF LAW

University of North Carolina at Chapel Hill

6 – 8 April 2017

*Thank You to Our
Sponsors*



University
of Basel



Erasmus+



CES

CENTER FOR EUROPEAN STUDIES
A JEAN MONNET CENTER OF EXCELLENCE



ALMA MATER STUDIORUM
UNIVERSITA DI BOLOGNA
DEPARTMENT OF LEGAL STUDIES

Rights and Remedies in Criminal Procedure: Examining the Nature of the Relationship

In this conference, we will consider the relationship between rights and remedies in criminal procedure in various aspects—including the contrasting approaches of adversarial and inquisitorial traditions and how this illuminates differences in the role of law across jurisdictions; new remedies developed through EU co-operation and ECHR rights-based approaches; and the challenges of international criminal law remedies, where the approach may differ from those operated at the national level.

As part of the Ninth Conference on the Future of Adversarial and Inquisitorial Systems, we seek to consider these issues in context. Is there a difference between adversarial and inquisitorial approaches, or do all the systems apply the criterion of the effective violation of a substantial right? In various systems, legislatures and courts have considered exclusionary rules (mandatory and discretionary), fines, victim compensation and injunctive relief in different contexts. Rights such as appointed counsel or discovery help shape the system as well, as they shape the regulation of investigation and prosecution. Different considerations may apply during the investigative and adjudicative phases of criminal cases, with the courts having more discretion to shape rights and remedies in areas within their exclusive domain.

What is the source of the rights and remedies—legislation or case law? Does case law play the prominent role, leaving to the legislator a secondary (and often ineffective) role? Does the legislator set out the general framework, while the details are regulated by judicial decisions? And if remedies are the subject of judicial law-making, how is accountability of judicial decisions ensured by the systems? How much flexibility may systems build into their remedial systems? Should courts grant a remedy whenever there is a violation of formal provisions, or should harmless error and deterrence guide decision-making?

THURSDAY, APRIL 6

Pre-conference for Young Scholars

1:00 p.m. - 2:00 p.m.

Panel One: Rights and Remedies in the Digital Age

2:00 p.m. - 2:30 p.m. Break

2:30 p.m. - 4:00 p.m.

Panel Two: The Practical Value of Exercising Rights Outside the Trial Framework

FRIDAY, APRIL 7

10:00 a.m. - 12:00 p.m.

Panel One: Transnational Rights and Remedies: Extraterritorial Jurisdiction over Foreign Companies

12:00 p.m. - 1:30 p.m. Lunch

1:30 p.m. - 3:30 p.m.

Panel Two: Comparative Approaches to Rights and Remedies in a Time of Austerity

SATURDAY APRIL 8

10:00 a.m. - 12:00 p.m.

Panel Three: The Comparative Rationale of Prophylactic Rules – The Exclusion of Evidence Through Mandatory and Discretionary Rules, Judicially Created or Enshrined in Legislation and Codes.

THURSDAY, APRIL 6: Pre-Conference for Young Scholars

PANEL ONE: RIGHTS AND REMEDIES IN THE DIGITAL AGE

- **Sharda Ramdewor**, Doctoral Researcher, School of Law, University of Warwick
 - Using Body Worn Video as evidence to combat disproportionate stop and searches/frisks.
- **Dario Stagno**, Research and Teaching Assistant, Law Faculty, University of Basel
 - “Your car knows what you did last summer – should officials know too?” Discussing the rights and remedies in criminal procedure with regard to digital evidence in Swiss law.
- *Moderator: Richard E. Myers II*, Henry Brandis Distinguished Professor of Law, UNC School of Law

PANEL TWO: THE PRACTICAL VALUE OF EXERCISING RIGHTS OUTSIDE THE TRIAL FRAMEWORK

- **Eisha Jain**, Assistant Professor of Law, UNC School of Law
 - Commodified Criminal Justice; discussing the effectiveness the right to counsel in a world where plea bargaining is subject to a schedule of sentencing discounts.
- **David Mühlemann**, Research and Teaching Assistant, Law Faculty, University of Basel
 - Corporate internal investigations and the privilege against self-incrimination – Do Swiss employees only have a right or also a remedy?
- **Divya Sukumar**, Ph.D. Student, Department of Psychology, University of Warwick
 - "Strategic Disclosure of Evidence in Police Interviews: Implications for Suspects and their Lawyers"
- *Moderator: Jacqueline S. Hodgson*, Professor and Director, Criminal Justice Centre, School of Law, University of Warwick

FRIDAY, APRIL 7: Conference, Day One

PANEL ONE: TRANSNATIONAL RIGHTS AND REMEDIES: EXTRATERRITORIAL JURISDICTION OVER FOREIGN COMPANIES

- **Sabine Gless**, Faculty of Law, University of Basel
- **Sara Beale**, Charles L. B. Lowndes Professor of Law, Duke Law
- **Krista Nadakavukaren Schefer**, Acting Director, Centre for Human Rights Studies, University of Zurich

This panel focuses on the relationship between rights and remedies in transnational criminal cases involving private actors. Public concern about the accountability of corporations and their managers has given rise to initiatives aimed at holding corporate actors accountable for certain rights violations committed in their business activities. At the international level, the UN Human Rights Council adopted the Guiding Principles on Business and Human Rights (UNHRC 17/4 of 16 June 2011, so-called *Ruggie Principles*). In Europe, the EU obliges Member States to report on human rights compliance (2014/95/EU EU Accounting Directive). NGOs in the U.S. are also pushing for a reporting obligation flanked with criminal penalties. But basically these “global rights” still lack remedies at the national level. Therefore, the focus of litigants has shifted to the general criminal and civil liability for companies and CEOs for offenses committed abroad. While German courts have accepted jurisdiction in a tort claim against a German retailer for alleged extraterritorial human rights violations, granting legal aid to the families of those killed when a main supplier’s factory burned, U.S. courts appear to be retreating from a once farreaching jurisdiction. For example, in *Daimler AG v. Bauman et al.*, the U.S. Supreme Court rejected a claim by Argentinian residents against Californian contacts of a Daimler subsidiary. Those litigants alleged that Daimler’s Argentinian subsidiary collaborated with state security forces to detain, kidnap and kill the plaintiffs or those closely related to them in Argentina’s ‘Dirty War’ of 1976-83.

PANEL TWO: COMPARATIVE APPROACHES TO RIGHTS AND REMEDIES IN A TIME OF AUSTERITY

- **Jacqueline Hodgson**, Professor and Director, Criminal Justice Centre, School of Law, University of Warwick
- **Michele Caianiello**, Professor, Department of Legal Studies, University of Bologna
- **Silvia Allegrezza**, Director of the Master in European Law, University of Luxembourg
- **Raphäele Parizot**, Professor, Paris Nanterre University

In this panel, we consider the different approaches of adversarial and inquisitorial procedural traditions to the guaranteeing of rights, and how the rise of managerialism and reduced budgets has impacted these guarantees in theory and in practice.

A. Rights are protected in different ways. In a party-based adversarial procedural model, (positive) fair

trial rights are an integral part of equality of arms for the defense. Inquisitorially rooted models have relied historically on the more neutral ideology of judicial officers responsible for investigation and prosecution, and this has created tensions with the recent strengthening of positive rights through EU directives (such as those implementing the so-called roadmap) and ECtHR decisions such as *Salduz v Turkey*. Some jurisdictions, such as France, regard the imposition of the right to counsel at the first stages of the investigation as rooted in the Anglo-Saxon tradition and so inappropriate for French criminal justice.

- B. The constant push for cheaper and speedier processes of criminal justice undercuts the protection of rights in both procedural models – from the resourcing of legal aid; to the time available to prepare the defense; to the ability of public prosecutors to oversee case preparation and the disposal of cases through alternatives to trial.

SATURDAY, APRIL 8: Conference, Day Two

PANEL THREE: THE COMPARATIVE RATIONALE OF PROPHYLACTIC RULES – THE EXCLUSION OF EVIDENCE THROUGH MANDATORY AND DISCRETIONARY RULES, JUDICIALLY CREATED OR ENSHRINED IN LEGISLATION AND CODES.

- **Richard Myers**, Henry Brandis Distinguished Professor of Law, UNC School of Law
- **David Gray**, Professor of Law, Francis King Carey School of Law, University of Maryland
- **Michele Panzavolta**, Professor of Criminal Law, University of Leuven
- **Charles Weisselberg**, Shannon C. Turner Professor of Law, Boalt Hall School of Law, University of California Berkeley

In this panel, we will consider the different approaches to the exclusion of evidence including the role of the legislator and of the judiciary; whether exclusion seeks to remedy a harm (in which case some prejudice must be shown) or deter behavior (in which case harmless error may result in exclusion); and the effectiveness of exclusion as a remedy in systems dominated by guilty pleas and so lacking in opportunity to challenge aspects of the state's case. It will also consider the appropriate role of judicially-crafted prophylactic remedies in a system of separated powers. In the United States, for example, the Supreme Court ruled in the landmark case *Miranda v. Arizona*, that the police must inform the defendant of their right to remain silent, that anything they say can and will be used against them in a court of law, that they have the right to an attorney, and that if they cannot afford an attorney, one will be appointed for them. These warnings appear nowhere in the Constitution, but the court required them to protect the defendant's right against compulsory self-incrimination. The courts now ban statements that were taken in violation of the prophylaxis, even where there was no evidence that the statement was compelled. This panel will consider the question in comparative perspective.