Reforming Criminal Procedure:

Should Adversarial Systems of Justice Become More Like Inquisitorial Ones?

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“It is good to have an end to journey toward; but it is the journey that matters, in the end.”
— Ursula K. Le Guin, The Left Hand of Darkness

Introduction

To reform something means to improve it, to amend what is wrong or unsatisfactory. If ‘criminal law reform’ is not to become synonymous with mere change, we have to know what it is that needs improving, what it is that is wrong or unsatisfactory with our current laws and processes. In recent years, reforms to criminal procedure have been suggested on both sides of the Atlantic and in other adversarial systems, but before deciding that there is something wrong or some room for improvement, we first need to be clear about what it is that our system of criminal procedure is trying to achieve.

Those engaged in law reform often look to other jurisdictions for inspiration and ideas. Increasingly, reformers in many adversarial systems are drawn to aspects of continental European justice systems. Many of those who propose that adversarial systems of criminal justice should move towards a more ‘inquisitorial’1 approach believe that the purpose of the criminal trial is to attain a high degree of fact-finding accuracy, and that inquisitorial systems may be better at discovering ‘the truth’. This paper questions the wisdom of such an approach, and suggests that since adversarial and non-adversarial systems reflect two very different philosophies of justice, one should be very cautious about adopting a ‘pick and mix’ approach to law reform which transplants some features of one system into the other. It suggests that before embarking on radical reform we need to engage in deeper reflection on the aims of adversarialism, and on some of the core values which lie at its heart.

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1 This paper uses the terms ‘adversarialism’ and ‘inquisitorialism’ as a convenient shorthand, but is mindful of Chrisje Brants’ observation: ‘Given that almost all modern criminal justice systems combine procedural features of both traditions, it is better to consider them not as being totally adversarial or inquisitorial, but as positioned on a continuum. Indeed, rather than speak of inquisitorial or adversarial systems, it is more accurate to see modern jurisdictions as primarily “shaped by” the inquisitorial or adversarial tradition.’ (C. Brants, ‘Wrongful convictions and inquisitorial process: the case of the Netherlands’ (2012) 80 Cincinnati Law Review 1068, 1073). [All references to be checked.]
Criminal procedure reforms

The increasing number of exonerations revealed by various ‘innocence’ projects has led to the realisation that wrongful convictions occur more frequently in the US than had previously been supposed. Michael and Lesley Risinger are among a number of scholars who believe that the American justice system requires radical reform to better accommodate those who are ‘actually innocent’ (they did not commit the crime), as opposed to merely ‘not guilty’ (they committed the crime, but it cannot be proved that they did so). The Risingers propose a new post of ‘judicial officer’, a judge trained in investigative techniques with a responsibility to uncover the truth. This judicial officer would supervise police investigations and make all information collected by the police available to both the prosecution and the defence, pre-trial. These reforms would require an accused who insists that she is in fact innocent to testify at trial, thus waiving the Constitutional right to silence/the privilege against self-incrimination.

Christopher Slobogin also proposes a more active role for the judiciary. Under his scheme it would be for the trial judge, rather than the parties, to determine which witnesses are to testify, to lead the questioning of those witnesses at trial, and to appoint expert witnesses to assist the court. Slobogin would require the accused who maintains innocence to waive the right to silence during police questioning, and to give unsworn testimony at trial. In similar vein, Samuel Gross offers his vision of a special process for those accused who claim to be innocent, a process which mandates a more thorough investigation of such cases by the prosecution, pre-trial. He too would make it mandatory for those on his ‘innocence’ track to answer questions from state officials at the investigation stage and to give evidence at trial. Gross acknowledges that requiring an accused to testify on oath would breach the Fifth Amendment, but argues that the quid pro quo for benefitting from enhanced ‘actual innocence’ procedures is that the accused

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4 Risinger and Risinger, ibid, 882-883.

5 ibid.


7 ibid. 724.

8 ibid, 728.

9 ibid. 728.

10 Gross, op. cit.

11 Ibid, 1024.

12 The Fifth Amendment to the US Constitution provides, inter alia, that: ‘No person … shall be compelled in any criminal case to be a witness against himself.’
has to waive certain rights, including not only the right to silence but also the right to object to illegally seized evidence, and to trial by jury. In turn, there would be greater pre-trial disclosure by the prosecution – but also by the defence. Tim Bakken proposes that the accused who insists on her innocence should be required to co-operate with the police investigation, submit to questioning, and waive her right to confidentiality regarding communications with her lawyer.

These authors’ proposals are radical ones, particularly where they encroach upon the confidentiality of lawyer/client communications and the defendant’s right to silence, two principles which many defence lawyers regard as sacrosanct. While the details of their proposals vary one from another, all embrace aspects of ‘inquisitorial’/continental European systems of criminal procedure. We see this in the Risingers’ suggestion that pre-trial procedures should be overseen by a judicial officer, and in Slobogin’s and Gross’s proposals for the trial judge to become a more active investigator. This seems very like the role played by a French investigating judge/‘juge d’instruction’. Slobogin acknowledges that his proposals are ‘a hybrid between pure adversarialism and pure inquisitorialism, one that moves closer to the procedural regime that exists in a number of civil law countries.’ His suggestion that the accused give unsworn testimony at trial is somewhat similar to the position in Germany and Switzerland, where an accused can lie without penalty or other adverse consequences. However, Slobogin would make such testimony mandatory, which is not a requirement in any European jurisdiction.

This should surely give us pause. Plucking just a few elements from one system of criminal procedure and transplanting them into another, quite different, system seems a recipe for disaster. Ronald J. Allen understands the desire on the part of many reformers for some sort of ‘magic bullet’ which will ‘fix’ all our problems, but argues that such fixes rarely work when directed at what he calls ‘grown orders’, rather than ‘made orders’. Made orders are fashioned whole, but grown ones are those which have evolved over many years: ‘The criminal justice system is a grown, not a made, order, just like the body is a grown, not a made, order. It is

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13 Gross, op. cit, 1023.
14 ibid. In the US, an accused person has a Constitutional right to a jury trial in serious criminal cases.
15 ibid, 1025-6.
17 Risinger and Risinger, op. cit, 882-883: ‘We … will be calling for the institution of the supervising magistrate’. See also 894.
19 Referring to the pre-trial role of the judicial officer, Blackstock et al conclude: ‘In 97 per cent of cases, this will be the public prosecutor (procureur); less than three per cent of cases, the most serious and complex, are handled by the investigating judge…’: J. Blackstock, E. Cape, J. Hodgson et al, Inside Police Custody: An Empirical Account of Suspects’ Rights in Four Jurisdictions (Intersia Ltd: 2013), 83.
largely for this reason that the search for the magic bullet to cure cancer has failed, and why the search for the magic bullet to cure the criminal justice system is likely to fail.\textsuperscript{22} Allen concludes that magic bullets which are shot into grown orders ‘have a way of producing lamentable results’\textsuperscript{23} and cautions: ‘If one is going to shoot a magic bullet, especially from a foreign land, care must be taken.’\textsuperscript{24}

US reformers are not alone in proposing that adversarial systems can learn much from inquisitorial ones. Scotland has already moved towards a more inquisitorial approach with pre-trial disclosure from both sides now mandatory in serious cases.\textsuperscript{25} While it seems fair and reasonable that the state ought to inform the defence of its case in advance of the trial, and inform the accused if it has any potentially exculpatory evidence, pre-trial defence disclosure is more controversial since it runs counter to the idea that it is for the state to prove its case, and the accused should not be required to co-operate in achieving this. Scottish legislation enacted in 2010 requires the accused to lodge a ‘defence statement’ with the court and prosecution before the trial.\textsuperscript{26} This statement must set out not only the nature of any defence,\textsuperscript{27} but also any matters of fact on which the accused takes issue with the prosecution and the reason for doing so,\textsuperscript{28} matters of fact on which the accused intends to rely at trial,\textsuperscript{29} and any point of law which the accused wishes to take.\textsuperscript{30} A similar system has operated in England and Wales since 1996.\textsuperscript{31} Such disclosure requirements put greater importance on the pre-trial stage, rather than on the trial itself. It also changes the role of trial judges from passive umpires to more active case managers, since they must now convene pre-trial hearings, designed to encourage both sides to narrow the


\textsuperscript{23} Ibid, 999.

\textsuperscript{24} Ibid, 1002.


\textsuperscript{26} Criminal Procedure (Scotland) Act 1995, s. 70A (solemn procedure), inserted by the Criminal Justice and Licensing (Scotland) Act 2010, ss. 124(3). There are similar provision for summary procedure in s. 125 of the 2010 Act, but these are not obligatory. Trials conducted under ‘solemn procedure’ have juries, while those employing ‘summary procedure’ do not.

\textsuperscript{27} Ibid, s. 70A(9)(a) of the 1995 Act.

\textsuperscript{28} Ibid, s. 70A(9)(b).

\textsuperscript{29} Ibid, s. 70A(9)(c).

\textsuperscript{30} Ibid, s. 70A(9)(d). It has been held that the mandatory nature of these requirements does not breach the European Convention on Human Rights (ECHR): Barclay v H.M. Advocate 2012 SCCR 428.

\textsuperscript{31} Criminal Procedure and Investigations Act 1996, s. 3(1) (duties on prosecution) and s. 5(5) (duties on accused to provide a defence statement). For a critique of the English law provisions see H. Quirk, “The significance of culture in criminal procedure reform: why the revised disclosure scheme cannot work” (2006) 10 International Journal of Evidence & Proof 42.
issues in dispute.\textsuperscript{32} Whatever the merits of these regimes in terms of saving time and money, there is little doubt that they constitute an attack on the adversarial ideal of a party contest.\textsuperscript{33}

Lord Carloway, Scotland’s most senior judge, has strong views on the need for fundamental reform of criminal procedure. He proposes that a video recording should be made when a witness first reports a crime at the police station, and that this recording should be used as evidence at trial in place of oral testimony.\textsuperscript{34} He dismisses concerns about the defendant’s right to cross-examine witnesses on the grounds that many inquisitorial jurisdictions do not require live testimony, instead relying on written statements in the form of a dossier.\textsuperscript{35} He also favours a more episodic approach to the trial; rather than the focal point when testimony is given from all the witnesses, the trial should mark the stage by which all relevant information ought to have been placed before the court. A recent Scottish Court Service research review, also led by Lord Carloway, expands on some of these themes and recommends reforms to the taking of evidence of children in advance of the trial. It ultimately favours the approach used in Norway where children and other vulnerable witnesses are questioned at a pre-trial hearing soon after a crime has been reported.\textsuperscript{36} These interviews are conducted in a Barnehus, a State Children’s House, and although the accused is not generally present (indeed, there may not be an identified suspect at this stage) prosecution and defence lawyers attend the hearing.\textsuperscript{37} The lawyers do not, however, question the witness; this is done by a specially trained police officer.\textsuperscript{38} The Review does recognise that adoption of the Norwegian model would require major changes to Scottish law, particularly since the current system provides for the cross-examination of prosecution

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\textsuperscript{32} As Johnston notes: ‘The evolution of the interventionist judge comes at a time when the nature of the criminal trial is shifting from its traditional adversarial roots. … The implementation of these ideas sits rather awkwardly in the adversarial process.’ E. Johnston, ‘All rise for the interventionist: the judiciary in the 21\textsuperscript{st} century’ (2016) \textit{Journal of Criminal Law} 201, 212.

\textsuperscript{33} It seems that the prosecution and defence ‘are expected to move from an atmosphere of adversarial competitiveness to one of cooperation’, F. Garland and J. McEwan, ‘Embracing the overriding objectives: difficulties and dilemmas in the new criminal climate’ (2012) \textit{16 JIE&P} 233, 234. The authors conclude: ‘…we have a system that has introduced profoundly non-adversarial elements that sit awkwardly with professional obligations predicated on adversarial processes’ (at 262).


\textsuperscript{35} Commenting on the right to examine witnesses, guaranteed by Art. 6(3)(d) of the ECHR, Lord Carloway argues that ‘although the right is undoubtedly one permitting a party … to test the evidence, there is no absolute right to cross-examine every, or indeed any, witness in the manner which is in common use in this jurisdiction and, in particular, to do so in open court. Were there to be such a right, very many systems in Europe, where oral testimony does not feature, or is at least a rarity, would be regarded as not being Convention compliant. In other systems, a written statement of a witness presented at trial may constitute that witness’s evidence.’


\textsuperscript{37} \textit{Next Steps}, \textit{ibid}, para 2.52.

\textsuperscript{38} \textit{ibid}, para 2.54.
witnesses by the defence lawyer at the trial itself. The Review argues that cross-examination is ‘essentially destructive, aiming to undermine or discredit the witness and their testimony’, and as such it is no longer appropriate to subject young or otherwise vulnerable witnesses to it.\(^{39}\)

Concluding that the examination of all witnesses need not be conducted at the trial itself, so long as this is supervised by an impartial judicial authority,\(^{40}\) the Review reiterates Lord Carloway’s proposal that the Scottish Parliament enact legislation to allow pre-recorded witness statements to replace oral testimony.\(^{41}\) Further examination of the witness at the trial could be permitted on application to the court, but the form and content of this ‘need not follow current adversarial practice’.\(^{42}\)

### The attractions of inquisitorialism

It has been said that: ‘When the defence must disclose its case prior to trial, criminal procedure moves further towards a truth-oriented model’.\(^{43}\) For many reformers any movement in such a direction is to be welcomed. After all, they argue, the purpose of the criminal process is surely to determine ‘the truth’, to find out what ‘really happened’. There is also a sense among many that the adversarial system is actually not that good at determining ‘the truth’, and that fact-finding would be improved if we were to adopt some aspects of criminal procedure more commonly employed by our European continental cousins.

Misgivings about adversarialism’s ability to discover ‘the truth’ are not, of course, a recent phenomenon. Both Jerome Frank in the 1940s\(^{44}\) and Marvin Frankel in the 1970s\(^{45}\) raised similar concerns, the latter stating: ‘We proclaim to each other and to the world that the clash of adversaries is a powerful means for hammering out the truth. … That the adversary technique is useful within limits none will doubt. That it is “best” we should all doubt if we were able to be objective about the question.’\(^{46}\) Likewise, the limitations of adversarialism at discovering the truth is the motivating force behind the reform proposals being championed by the Risingers, Slobogin, Gross, Bakken and others: for instance, according to Slobogin ‘in its Americanized form, the process of allowing the parties to control examination of witnesses is a highly flawed mechanism for promoting accuracy’;\(^ {47}\) while Bakken argues that ‘a search for truth is the most effective means through which to discover innocence. Unfortunately, however, this premise

\(^{39}\) *ibid.* para 3.44.

\(^{40}\) *ibid.* paras 3.40 and 3.41.

\(^{41}\) *ibid.* para 3.62.

\(^{42}\) *ibid.*


\(^{46}\) *ibid.*, 1036.

\(^{47}\) Slobogin, *op. cit.*, 704.
does not currently underlie the adversarial system...". The Scottish reform proposals are similarly motivated by the desire to improve truth or fact-finding accuracy: the Carloway Review criticises the current law on the basis that Scottish criminal trials ‘do not operate in a manner best suited to the ascertainment of fact’. Indeed, it is clear from the Review’s first paragraph that its evaluation of the criminal process is conducted through this instrumental lens, claiming that ‘the trial process is about the ascertainment of the truth’ and that the Review’s purpose is ‘to explore and identify the best possible methods for ascertaining the truth’.

This dissatisfaction with adversarialism’s fact-finding functions is also to be found in Australia. Reflecting on the defence duties of pre-trial disclosure in New South Wales, Line et al note that ‘inquisitorial characteristics have been increasingly adopted in recent years in pre-trial criminal case management. In this sense, criminal procedure reform may be seen as shifting away from a traditional and purely “adversarial” approach.’ They do not, however, lament this change, quoting Chief Justice Paul de Jersey as saying: ‘I believe we have long passed the point where the defence should be permitted to withhold disclosure of its intended trial approach. A criminal proceeding should not in this 21st century amount to a game where players may keep their cards up their sleeves.’ This analogy is an interesting one: players who keep cards ‘up their sleeves’ are not abiding by the rules of the game. They are cheats. This reflects a sentiment — no doubt shared by many in other adversarial jurisdictions — that defence solicitors are somehow abusing the system, that they are not playing ‘the game’ as it should be played. The Chief Justice’s words are also reminiscent of those used by Lord Justice Auld in his review of English criminal procedure in 2010: ‘A criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth...’

Asking the right question

Are non-adversarial systems of criminal procedure superior to adversarial ones at ‘getting at the truth’? Are they better able to discover ‘what really happened’, thereby convicting the guilty and acquitting the innocent? It may be that those who champion the adoption of inquisitorial approaches have a somewhat optimistic view of how these systems operate in practice. For example, empirical studies have suggested that judicial oversight in France is not necessarily a

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48 Bakken, op. cit., 547-548.

49 Lord Carloway, Murrayfield lecture, op. cit., 10.

51 Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013 (NSW).


guarantee of greater truth-finding accuracy, and similar criticisms have been made of the Dutch system. Of course, it is not possible to determine which system is better at achieving the ‘right result’; we cannot say that inquisitorial systems are better at truth-finding than adversarial ones, or vice versa, since we have no way of knowing how many factually innocent people are convicted in either system, nor how many of the factually guilty are acquitted.

It may be, however, that we are not asking the right question. As previously stated, adversarial and inquisitorial systems reflect two very different philosophies of justice, and one should be very cautious about transplanting some features of one system into the other. This issue is of importance not only in relation to domestic law reform, but also for international criminal law. The International Criminal Tribunal for the former Yugoslavia and the International Criminal Court have each developed hybrid procedures which contain aspects of both inquisitorialism and adversarialism. If we want to determine whether these mixed procedures are fit for purpose, we must first consider the ideologies of the two very different types of processes from which they are drawn. Crucially, the ideology of adversarialism embodies non-instrumental values, some of which may even be inimical to the finding of the truth. The idea of ‘due process’ in the sense of procedural fairness — that the journey is as important as the destination — is an important concept in adversarialism. We must be wary lest we ‘reform’ our criminal procedures in a way which weakens these process values.

**Due process concerns**

For inquisitorialism, the criminal process is a search for the truth. For adversarialism, the purpose of the process is to rigorously test the prosecution case. These are not synonymous. While both systems are concerned to ensure that the innocent are acquitted and the guilty convicted, adversarialism regards the acquittal of the innocent as the more important goal. When we assess aspects of criminal procedure solely through the lens of truth-finding, we gain a distorted picture and may fail to appreciate their importance. The final part of the paper considers

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59 I am using ‘due process’ here in a broader sense than that used in the US Constitution, which I take to mean the right of an individual to reasonable notice, and to be heard, before important decisions are taken which affect that individual. Rather, the terms due process and procedural fairness ‘refer not to the legal rules of procedures but to the values which justify those rules.’ D.J. Galligan, Due Process and Fair Procedures: A Study of Administrative Procedures (Oxford: 1997), 75.

60 See Redmayne, op. cit., 93.
two aspects of procedure to illustrate this general (and somewhat tentative) thesis: the exclusion of evidence and the right to cross-examine witnesses.

The exclusion of evidence

It is axiomatic that adversarial systems have many rules concerning the exclusion of evidence, while inquisitorial systems are more inclined to adopt a free-proof approach which regards relevance and reliability as the sole criteria of admissibility.\(^{61}\) Consider the approach a legal system takes to evidence which has been obtained from torture or threats of torture. If the sole goal is to determine ‘the truth’, would torture evidence necessarily be inadmissible? Some might say that it would be, since evidence obtained by torture is generally regarded as unreliable and therefore not likely to enhance truth discovery. But what if the torture leads to some other evidence, whose reliability is not in doubt? What if, for example, the accused is threatened with violence and confesses to murder, and in doing so reveals some hitherto unknown information which is highly incriminatory. In the Scottish case of Manuel v. HM Advocate\(^ {62}\) the appellant confessed to murder, and this confession included details of where the police would find the body and shoe of one of his victims. Clearly such discoveries allow us to place increased confidence in the reliability of the confession itself. If we regard the trial as purely a search for the truth, then any and all reliable evidence should be admitted. If, however, we decide that the fact-finder cannot take the confession into account in determining its verdict, then we do so for other reasons, but there can be little doubt that its exclusion does not further the truth-finding process. Adversarialism champions these other reasons. Torture evidence should be the antithesis of what the criminal trial is trying to achieve, since torture is intrinsically evil and it would be wrong for a state to sanction it or benefit from its use.\(^ {63}\)

Torture is, of course, an extreme example. It could be argued that even the most ardent of those who believe that the trial’s purpose is to determine the truth accept that there has to be some limits on this. None would condone the torture of members of a suspected murderer’s family, even if we believe that the family members would thereby provide highly accurate information about the murder. But the way we view other aspects of criminal procedure is also dependent on whether we approach it from an instrumental/fact-finding stance, or from a broader concern for other due process values.

The right to cross-examine witnesses [this needs more work]

The European Convention on Human Rights guarantees those who are accused of criminal offences the right to ‘examine or have examined’ witnesses against them.\(^ {64}\) This right offers another example of the different approaches which can be taken to aspects of the criminal

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\(^{63}\) Thus the question recently posed to President Trump was the wrong one. Rather than ask: ‘Does torture work?’ we should be asking: ‘Is torture morally legitimate?’

\(^{64}\) ECHR art. 6(3)(d).
process, depending on whether one adopts a truth finding or due process stance. For those who believe that the truth-finding function is paramount, the value of cross-examination lies solely in its ability to uncover the truth. However, whether or not cross-examination is ‘the greatest legal engine for the discovery of the truth’ is of secondary importance if we move away from this instrumental approach and perceive that cross-examination has an important process value: it allows a person who is accused of having committed a crime to confront her accusers face-to-face. This has intrinsic process value, irrespective of whether it assists the fact-finder to determine the verdict. [More examples needed….]

**Conclusion**

There is a perception that the adversarial criminal process is inefficient; in a time of economic austerity, trials cost too much money. We could reflect on the fact that the world has become increasingly complex, leading to a large and equally complex corpus of criminal law. Perhaps the time has come to rid the statute books of unnecessary offence provisions, or to consider more imaginative alternatives to prosecution. Instead, the drive to improve fact finding efficiency has led reformers to champion the adoption of aspects of inquisitorialism, but this fails to recognise the due process values which are at the heart of the adversarial approach.

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66 See I. Dennis, “The right to confront witnesses: meanings, myths and human rights” [2010] *Crim Law Review* 255. See also the Sixth Amendment to the US Constitution which provides that in all criminal prosecutions, ‘the accused shall enjoy the right … to be confronted with the witnesses against him’.

67 A Griffin, ‘Robot judges could soon be helping with court cases’, *The Independent*, 26 October 2016.