

Opponent System in Criminal Procedure: Advantages and Disadvantages

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Abstract

As in the opponent system, also in the inquisitorial criminal justice, exclusive duty of proving the existence of a crime and the determination of the respective sentence is in the hands of the state and the main purpose of the two systems is to prevent self judgment by individuals. It is widely recognized that both systems have succeeded in achieving this goal. In another point of view, the purpose of the rules of criminal procedure in a democratic society is to ensure procedural fairness; which means to balance individual rights with the interests of society in general. In this context, the choice or change of the criminal justice model in each country relies mainly on the need to achieve these goals in the specific circumstances of that country. The article will discuss the advantages and disadvantages of the opponent system of criminal procedure, compared with the alternative of its most widely known: the inquisitorial system. The article will cover both the stage of criminal investigation and trial as well. In inquisitorial systems, these phases tend to merge into a single procedure, whereas in opponent systems, the scope of judicial control over the investigation phase is one of the most controversial points of the reform.

Keywords: *inquisitorial system, judicial reform, hybrid models of criminal procedure.*

1. Introduction

In this article are discussed the advantages and disadvantages of the opponent system, about the alternative of its most famous (and closely related), ie the so-called inquisitorial system, which is widespread in continental Europe and in a large number of other countries. Although the opponent system and inquisitorial one are placed facing each other as the opposite, in fact, the latter embodies in law the right of the accused to challenge the prosecution's evidence and to present evidence to prove his innocence; in this sense, this system is "contradictoire" (to use the French term) or opponent. More than the opposing nature of the procedure what distinguishes the two systems is the structure and organization of the process of collecting evidence or investigative method. In an opposing system, parties, acting independently and unilaterally are responsible for the discovery and presentation of evidence before a judge or a passive and neutral jury. In an inquisitorial system, the ultimate responsibility for finding the truth belongs to an official authority that operates with the judicial authority and collect evidence on culpability of the accused, but also the evidence in his favor. While players in an opponent system are equal adversarial parts in a inquisitorial system the accused is not a party in the procedure to the same extent.

2. The Initial Premise, Important for the Reform of Criminal Procedure

Both systems, as opponents and inquisitors have advantages and disadvantages. Discussions related to the fact that which system is better than the other, in general, focus on a single aspect of each system, in order to make a balanced assessment of the systems as a whole and, therefore, are useless and lead to wrong conclusions. However, in a detailed analysis, most of the advantages and disadvantages of each system can be easily identified. Although the overall effect of these disadvantages and advantages on the quality of justice is less easy to identify or assess.

The fact that, despite the significant differences in how the criminal law is administered, authorities in inquisitorial jurisdictions and opponent face similar problems, supports the argument just given. On one side, each system has its substantial structural flaws in terms of acceptable standards of prosecution, in terms of human rights and in terms of results. On the other side, each type of jurisdiction faces restrictions on the available resources, in the context of

criminalization in the growing of various acts and public concern about crime and victimization. It is interesting that the answers to these concerns follow general lines similar as in inquisitorial jurisdiction, as well as those opposing and have already resulted in a certain degree of compatibility between the two¹. As inquisitorial jurisdiction, as well as those opposing are engaged in the design of the reforms with the same sense of urgency and facing legal pressures from various quarters that require these reforms². There is little evidence for the general tendency only in one direction (ie in terms of adopting only inquisitorial models or only opposing models).

3. The Similarities in Concerns, Problems and Feedback

Both types of systems, inquisitorial and opposing, face serious internal criticism, and both are actively engaged in seeking solutions to perceived problems. It is clear that both deal with the increasing number of cases, due to the growing criminalization of different behavior and a growing number of crimes committed, in an environment with fewer and fewer resources.

Delays in judgments have always been of great concern to civil law jurisdictions, as well as in common law jurisdictions. In civil countries, it is said that the delay between the offense and the judgment of the author are due to the complexity of the system at the stage of investigation. In common law systems, the delays are due to the exercise of criminal prosecution as a party accompanied by considerations of strategic evaluations. Meanwhile, courts in both systems deal with resource insufficiency to judge all that load. The problem of delays is universal, because it always affects the quality of justice and results in huge financial and human cost.

Both systems deal with *internal criticism systematically* about justice, fairness and effective protection of the rights, although the emphasis can be placed on different issues. Thus, civil law systems are criticized for excessive support the assertion of the accused and for interference with his rights, in particular to the right to remain silent and the presumption of innocence, etc. Common law systems deal with criticism regarding equality of arms, the universal right to legal representation, inadequate methods of prosecution and collecting evidence, excessive pressures on witnesses, etc.

Both jurisdictions are characterized by a *growing concern for the rights and involvement in the process of crime victims*. In both jurisdictions, victims speak of a sense of helplessness and lack of respect and understanding in the criminal courts. There is also concern about the inadequacy of the compensation schemes available to victims of crime. At the same time, *both systems are engaged in the research of incentives acceptable for different alternatives to the judgment* and find, in these incentives, an acceptable balance between the amount of benefit and respect for human rights and freedom of choice for the accused.

Of interest is the development of hybrid models with international jurisdiction. Such a hybrid model resulted from the work undertaken on the basis of Article 15 of the Treaty of Rome establishing a permanent international criminal court³. Procedures designed borrow elements from both types of systems. This and other developments are creating space for the appearance of a branch of the criminal procedural law with common hybrid features, which can serve as a model in legal reform processes in different national jurisdictions.

4. Disadvantages of Opposing System

There can be identified some deficiencies in the opposing system, which can be grouped in the following themes:

1. criminal prosecution as a party and rules for evidence, that pursue the same goal;
2. equality of arms;
3. judicial management and supervision of the investigation phase.

In the opposing system, on the one hand, the rules of evidence require that evidence be brought to trial through witnesses and, on the other hand, the prosecution as a party creates clear opportunities for delaying strategy. The

¹For example, Phil, Fennell (ed) *Criminal Justice in Europe: A Comparative Study* (1995), Ch 19 (CONCLUSION: Europeanization and Convergence: The lessons of Comparative Study). See also, CM Bradley, "The Convergence of the Continental and the Common Law Model of Criminal Procedure" (1996), 7 *Criminal Law Forum* 471.

²The most striking example is the establishment of the criminal justice system opposing in Italy. But other inquisitorial jurisdictions are showing increased interest in opposing systems; See, for example, B De Smet, "Accelerating criminal proceedings with the consent of the Accused; is the introduction of a 'guilty plea' after the Anglo-Saxon model desirable", 1994, *Panopticon* 420.

³Rome Statute of the International Criminal Court (adopted by the Diplomatic Conference of Plenipotentiaries of the United Nations to establish an international criminal court on July 17, 1998).

combination of these two factors can have a detrimental effect on the capacity of the system to identify the truth. Moreover, the current imbalance of legal and factual funds between the parties results in an unfair advantage for the prosecution. On the other hand, they are often expressed concerns that the whole process of trial and procedural rules of evidence and, in fact, heavily leaning in favor of the accused.

In this context, the obvious solution, which in fact would result in an approximation to the inquisitorial system, could be the abolition of criminal prosecution as a party and orally and ongoing trials. However, it is undeniable that the rules for evidence in an inquisitorial system include significant guarantees for the accused. Thus, the complete removal of them may have harmful effects on the rights of the accused.

An acceptable solution would be one that would focus mainly on speeding up the trial process. Of course, the quick trials have important benefits for the accused, especially when he is in custody, and the victim and society as a whole. In many respects, delayed justice is denied justice.

In this way, the focus of reform should thus be criminal prosecution as a party, rather than the presentation of evidence in court and orally. The greatest judicial intervention during the first phase of the investigation could prevent the delay tactics of the case, may clarify the problems, may allow early identification of the most appropriate way to proceed, and can speed up trials.

Perhaps the most fundamental reason for the lack of equality of arms in the common law of criminal procedure is the great role played by the legal representative of the accused. Defense lawyers maintain a considerable responsibility, unlike inquisitors systems in which all the responsibilities of taking prosecution. Operating lawyer is the key to effective and fair system, because it has commitments to clients, as well as on the court. However, this also is a potential weakness of the system, no doubt as in cases where the accused is not represented, but even when it is under-represented.

A lot of great difficulty, which increases the potential for serious imbalance is that, often, clients of the criminal justice system have fewer financial resources and are less educated than the general population. This scenario is associated with increased criminalization, more severe penalties and removal of emphasis from rehabilitation, making the people who come into contact with the criminal justice system to be even less able to provide their treatment of fair and impartial within this system.

It is worth mentioning that, although the issue of equality of arms is a critical issue in opposing systems, it is equally problematic in the inquisitorial jurisdictions (but on a different basis), as stated in the jurisprudence of the European Court of Human Rights in conjunction with Article 6 of the Convention. The concern is that the inquisitorial system, which puts the accused in a second range, denies to the accused the right to tell his version of the case. In particular, the defendant is not able to effectively cross-examine witnesses or challenge evidence, nor to present his evidence in court independently⁴.

Because, in the civil jurisdiction, the phase of the investigation is secret and, usually, not contradictory, the accused has a large role to play in that phase. However, at this stage it has more judicial supervision of processes and procedures at that stage and the power of supervision is more systematic. Such supervision is lacking in opposing systems. However, supervision during the pre-trial is more important in inquisitorial systems than in those opposing, to ensure objective composition of the file, as the latter shall be communicated to the court in a less "contradictoire" than the presentation of evidence in a common law trial. The situation is different in opposing systems, and in them can be placed greater focus about the judicial management rather than on the judicial supervision, which may be less suited to such systems.

5. Conclusions

Some of the disadvantages of the opposing system are discussed earlier in this article. Despite these advantages and disadvantages, efforts to handle common problems of inquisitorial and opposing systems have given interesting comparative information. These efforts reveal important goals of contemporary criminal procedure: the creation of alternative procedures of equal value and on the basis of an appropriate classification of cases; development of an stimulating structure to motivate the accused to accept alternatives to the trial; maintaining effective guarantees for the

⁴ However, the Court has stated that, if the accused had, at least, an opportunity to challenge the evidence against him and to present evidence in his favor, then we can say that the procedural right has been guaranteed, even if objections and questions are made by the judge (quoted by De Smet, as above, footnote no. 4).

accused, that he renounce the judgment voluntarily and consciously; and maintaining a system of fair, effective and appropriate judicial review of cases. The conclusion widely accepted that the alternative proceedings to the judgment can be more effective, cheaper and faster highlights once again the existing need for more flexibility. But the choice and flexibility should be subject of the relevant provisions guaranteeing effective protection of the right of the accused to seek trial with all the guarantees of justice, civil rights and fairness that this implies.

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