THE ACCUSATORIAL AND INQUISITORIAL MODELS OF CRIMINAL PROCEDURE: A HISTORICAL AND COMPARATIVE APPROACH*

Abstract
In most legal systems around the world, the administration of criminal justice follows one of two models: the accusatorial (also called adversarial) model and the inquisitorial model. While the former is the model of the Anglo-American countries, i.e. the Common Law world, the latter can be found on the European continent, i.e. Civil Law countries. This article traces the origins and developments of these systems of criminal procedure and explores the theoretical and practical differences and similarities of the two systems.

Keywords: Accusatorial, Inquisitorial, Criminal Procedure, Historical and Comparative Approach

1. Introduction
In most countries, including Rwanda, the administration of criminal justice follows one of two models: the accusatorial (also called adversarial) model and the inquisitorial model. While the former is the model of the Anglo-American countries, i.e. the Common Law world, the latter can be found on the European continent, i.e. Civil Law countries. As a result of colonisation, these two models of criminal procedure were also exported into Africa, Asia and South America. As Herrmann correctly says1, however, there are some important exceptions from this dichotomy. In the course of the last hundred years several Civil Law countries have reformed their justice systems by moving from the inquisitorial to the adversary model. Spain was the first country to do so in 1870 after a revolution had brought about an era of liberalism. In 1887 Norway passed a new legislation that was strongly influenced by English law. Denmark followed in 1916 and Sweden in 1946, each enacting integrated codes of criminal and civil procedure. After World War II Japan replaced its inquisitorial system which was modelled on German law by a new code that, to a great extent, followed the American system. This article traces the origins and developments of these systems of criminal procedure and explores the theoretical and practical differences and similarities of the two systems.

2. Early Developments
Both the accusatorial and inquisitorial systems were historically preceded by the system of private vengeance in which the victim of a crime fashioned his own remedy and administered it privately, either personally or through an agent. The vengeance system was a system of self-help, the essence of which was captured in the Old Testament biblical slogan "an eye for an eye, a tooth for a tooth."2 The very first form of litigation in post-primitive society in Western Europe was by means of an accusatorial process: instead of private vengeance, there was now an open confrontation between two equal parties, the complainant and the accused, before an impartial arbiter, the judge or tribal council. It was broadly the procedure in ancient Greece, in Rome, (in the case of delictaprivata)3 and among the Germanic tribes. The procedure was verbal and public, and there had to be a specific

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2 U Kayitesi and R Haveman, Rwandan Criminal Procedure, National University of Rwanda, Butare, 2008, p. 9.
3 Both the old Germanic and Roman laws, as well as other ancient legal systems, drew a distinction between purely (delictaprivata) and wrongs with which the community or its sovereign had to deal with (delictapublica).
complainant. The criminal procedure was identical to the civil procedure⁴. Towards the end of the middle ages the inquisitorial process gradually displaced the abovementioned procedure. This development culminated in the introduction of this procedure into the ecclesiastic courts by Pope Innocentus III towards the end of the thirteenth century, and later in the famous Constitutio Criminalis Carolina of Charles V in 1532⁵. The characteristics of this new process were the following: trials were mostly initiated not by a private complainant, but by the public authorities. The judge was an official who, in principle, investigated the case himself. The accused being a passive party, and merely the object of the inquiry, he could not challenge or contradict the contents of the protocol in the case drawn up by the judge. He had no procedural rights. The whole procedure was conducted in secret. One of the main purposes of the inquiry was to obtain confessions from the accused, even by torture, if necessary. The whole process basically amounted to a confrontation not between two equal parties (the accused and the complainant), but between the accused and the judge or court—a dual in which the weapons were obviously most unequal. Whereas the accusatorial system was devised to safeguard the interest of the individual, the inquisitorial system set out in the first place to uphold the interests of the society and the State⁶.

3. Inquisitorial Reforms
As a result of the liberal forces in German and the French revolution at the end of the eighteenth century, the use of torture was abolished, trial by jury, or by lay-judges, was introduced to counteract the power and malpractices or the official judges, and trials were once more verbally conducted in public. The duty of investigating the case, assembling the evidence and laying it before courts was entrusted to a separate agency, namely the state prosecution⁷.

4. The Chief Characteristics of the Two Systems: A Comparative Overview
The special qualities of the two systems of criminal procedure are best observed at the trial stage. The trial that follows the adversary model is party-centered⁸ in the sense that the judge’s role at the adversary trial is mainly passive. He, in theory, has only to listen to the evidence that is presented to him and hear the arguments by the parties and render his decision accordingly. In other words, he merely adjudicates upon the matter presented in the light of the evidence placed before him by the

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⁵ Idem. The Constitutio Criminalis Carolina (sometimes shortened to Carolina) is recognised as the first body of German criminal law (Strafgesetzbuch). It was also known as the Halsgerichtsordnung of Charles V. The Carolina was agreed in 1530 and ratified two years later. Under the terms of the Constitutio Criminalis Carolina, actions such as murder, manslaughter, robbery, arson, homosexuality and witchcraft were henceforth defined as severe crimes. In particular the Carolina specified that those found guilty of causing harm through witchcraft should be executed with fire. It was also the basis for the use of obtaining confessions by torture. The aim of the Constitutio Criminalis Carolina was to unify the legal system of the Holy Roman Empire, and thereby put an end to the penal jurisdiction which had until then varied haphazardly between the Empire's states.

⁶ CR Snyman, op.cit, p. 102.

⁷ Idem, p. 103. Through the influence of such writers as Grotius and Pufendorf, who espoused the theory of natural law, Montesquieu, Rousseau and Voltaire in France and Beccaria in Italy, emphasis was placed in the new criminal procedure on the individual and his personal rights. In 1789 the Declaration of Human Rights in France materially protected the rights of an accused to a ‘fair trial’. Many of these ideas were incorporated for the first time in the French Code d’Instruction Criminelle of 1808.

⁸ J. Herrmann, op.cit, p. 5.
parties. The adjudicator (judge) is an umpire (referee or arbiter) whose role is to ensure that the parties abide by the rules, but is passive even in that regard; he or she intervenes only if there is an objection from one side against the conduct of the other. To prepare the trial, not only the prosecution but also the defence has to collect its own evidence. The parties are also entitled to limit the issues of the contest through plea-bargaining. In sharp contrast to the umpireal judge in the adversary system of criminal procedure, trials that follow the inquisitorial model are judge-centered. The prosecution and the defence play comparatively minor roles at the trial; the procedure can be considered a quasi-scientific search for the truth rather than a dispute. The judge is in no way bound merely to consider the facts and evidence adduced by the parties, but must (in accordance with the original meaning of the term inquisitio—a searching after) himself see that the information and considerations necessary to decide the issue are investigated and borne out at the trial.

Sometimes it is said that because of his wide powers, the judge in inquisitorial systems searches the material truth, whereas the judge in the accusatorial systems is merely bound to search for the formal truth, because he merely relies upon the information placed before him by the parties.

As almost all questioning of witnesses is done by the judge the distinction between examination-in-chief and cross-examination is unknown in inquisitorial systems. Because the office of the public prosecutor is not a party opposing the accused, in his search for the truth the investigating officer must also investigate or consider all factors, which may exonerate the accused. Both the prosecutor and judge must objectively consider and examine all evidence with a view simply of discovering the truth. Theoretically, in this pursuit of truth, the inquisitorial judge is as much an active party as the prosecutor and is in no way dependent upon the latter for his knowledge of the circumstances of the case.

5. Critique and Evaluation

Whether the “continental” modern inquisitorial systems afford a better method of finding the truth than the Anglo-American adversarial systems, has been the subject of considerable debate. A brief consideration of some points of criticism levelled by the one system against the other must be of some assistance in evaluating the merits of each of them. The main point of criticism against the continental inquisitorial system, is the double role which the judge must necessarily fulfil. He has to be both the investigator, himself searching for the material truth and especially all facts and circumstances necessary to build up a case against the accused, and, at the same time, the arbiter who must objectively evaluate all these facts and considerations. These two functions of the

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9 CR Snyman, op.cit, p. 103.
10 J Mc Ewan, Evidence and the adversarial process—the modern law, 1992, p. 4.
11 J Herrmann, op.cit, p. 5.
12 CR Snyman, op.cit, p. 103.
13 Ibidem.
14 In adversary systems law, cross-examination is the interrogation of a witness called by one's opponent. It is preceded by direct examination (in England, Australia and Canada known as examination-in-chief) and may be followed by a redirect (re-examination in England, Australia, and Canada). The main purposes of cross-examination are to elicit favourable facts from the witness, or to impeach the credibility of the testifying witness to lessen the weight of unfavourable testimony. Cross-examination frequently produces critical evidence in trials, especially if a witness contradicts previous testimony.
15 CR Snyman, op.cit, p. 103
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An inquisitorial judge contradicts each other, critics say. In addition, critics say, it is difficult for the inquisitorial judge to be completely unprejudiced against the accused, if he virtually has to be both prosecutor and judge at the same time. Even if one defends the inquisitorial system with the argument that the judge also actively has to look for circumstances in the accused’s favour, one still has the position that in the eyes of the accused, the judge is not wholly impartial, but is rather associated with the state prosecuting authority, of which he is seen to merely be a representative. The judge is therefore regarded by the accused as his opponent.

Moreover, in the English-speaking world the term “inquisitorial” often seems to imply vestiges of the old inquisitorial procedure with secret proceedings, the duty of the accused to make a confession, and enforcement of that duty by torture. This is however not true. As said above, during the first half of the nineteenth century on the European Continent the old inquisitorial procedure was replaced by reformed inquisitorial systems which were based upon liberalism and human rights. The Anglo-American accusatorial system, on the other hand, has been branded as being too much a contest between two parties opposing each other. In order to give his verdict, the judge merely relies on what he has been told by the parties, and they, in order to favour their own cases, can manipulate the truth. The result is that the final verdict of the judge cannot be described as reflecting the “material truth”, but at most-so it has been described-the “formal truth”. The aim of each party, critics say, is to “win the case”, regardless of whether the outcome of the case is in accordance with truth and real justice.

As Professor Christopher Snyman rightly says however, to describe the judge in the Anglo-American system as merely a passive referee, who decides merely on issues and considerations presented to him by the parties, is to oversimplify the system’s basic character to the extent perhaps of even distorting it. It is also in these systems the task of the court or judge to ascertain the truth and to do justice according to law. In the adversarial systems, it is the prerogative of the judge to decide on the admissibility of all evidence tendered by the parties. He may rule evidence to be inadmissible even when there has been no objection thereto by any of the parties. He may ask questions to all witnesses and for this purpose may even interrupt the questioning of a witness by one of the parties. He may call back witnesses who had already given evidence in order to ask them additional questions, and, what is most important, he may even in certain circumstances himself call a witness, who has not been called upon to give evidence by any of the parties.

All these considerations clearly indicate the extent to which the purely accusatorial character of the Anglo-American criminal procedure is qualified by inquisitorial traits. In fact, some commentators have argued that the theory of an “active inquisitorial judge” is in practice nothing more than a myth. In most cases, the ‘inquisitorial judge relies entirely on the facts and evidence contained in

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17 Idem, p. 108.
18 J Herrmann, op.cit, p. 4.
19 J Herrmann, op.cit, p. 4.
20 CR Snyman, op.cit, p. 108.
21 Ibidem.
22 Ibidem, p. 110.
23 Ibidem, pp. 110-111.
the dossier that has been compiled by the police and the prosecutor. They argue that in practice, much of the ‘inquisitio’—that is investigation—is done by the police because it them who learn about the crime first and are better trained than prosecutors or judges to use the technology of fact finding. It thus appears that in practice, the ‘inquisitorial judge’ is not more active than his British or American counterparts.²⁴

6. Conclusion
This article has traced the historical origins and developments of the inquisitorial and accusatorial models of modern systems of criminal procedure and assessed the special qualities of one system as compared to the other. It was noted that today reality all over the world is, a mixed system, with some countries tending more towards the inquisitorial model (Europe and most of its former colonies), and others tending more towards the adversarial model (Great Britain and most of its former colonies, as well as the United States). It was found that existing criminal systems follow the adversary or the inquisitorial model in a more or less strict manner, some systems being more adversary or inquisitorial than others. Whether the Accusatorial or the Inquisitorial system presents the best way of discovering the truth will always be the subject of debate. As Snyman²⁵ correctly points out, no system of procedure, being the product of human beings, can claim to be so devised as to reveal the absolute truth, or truth at all costs.

²⁵Ibidem.