You can change the colour of your hair, not your hair. Converging is what inquisitorial and adversarial systems rarely do
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You can change the color of your hair, but not your hair: convergence in inquisitorial and adversarial systems

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Introduction

Is it possible not to write about criminal systems? The answer is negative. New trends in criminal law question the direction and future of national criminal legal systems. What happens to an inquisitorial system, when the investigating judge stops investigating crime, a job he has been doing for decades, and becomes (nothing more than) a review or controlling judge? What happens to such a system when a multitude of out-of-court settlements become possible even when a case is already brought before a court? These are real developments, at least in the context of Belgian and Dutch criminal law. Authors label these developments as adversarial and often regret the turn away from the inquisitorial logic.1 The question that occupies us here is whether a criminal system can stop being inquisitorial? One can color one’s hair, but quid of changing hair color?

This contribution starts with a discussion of concepts such as ‘inquisitorial’, ‘accusatorial’ and ‘adversarial’ and defends a framework of analysis that only makes uses of the term ‘inquisitorial’ and ‘adversarial’ (rejecting the term ‘accusatorial). Informed by and respectful of Brants’ writings, we opt for relatively open definitions of ‘inquisitorial’ and ‘adversarial’. Three sections are needed to explore the main tenets of both systems.

Then we look at the different organization of the investigation phase in both systems and the distinct function of the criminal file. We also look at the organizing idea of ‘truth’ behind both systems, the respective duties of the parties to the process and the use and rationale of procedural safeguards in both systems. Our final section concludes that the distinctions between the two systems are real and not easily swept aside through peace-meal regulatory reform. The pillars of both systems as they take shape in the Western word remain largely unaffected by these reforms.

The concepts inquisitorial, adversarial and accusatorial

The terms *adversarial* and *accusatorial* are often used interchangeably to refer to the same model of criminal procedure and are used in opposition to *inquisitorial* procedures. Brants rightly proposes to avoid the term ‘accusatorial’, and to adhere to the terms *adversarial* and *inquisitorial*. The term, *accusatorial*, holds, is seldom correctly used, for instance in certain German writings where the term is used as a synonym for *inquisitorial*. Brants proposes to drop altogether the term *accusatorial*, especially in an analytical approach that aims to compare and contrast different legal regimes with regard to *inquisitorial* systems. The term *adversarial* nicely highlights the struggle between two (process) parties that stand in horizontal relationship to each other, as opposed to the configuration of process positions in the inquisitorial logic. We will come back to this fundamental distinction below, but already here we want to stress that this analysis will not result in an exhaustive list of constitutive elements of both systems. Such a view would suggest that there is such a thing as a single and unchanging concept of an inquisitorial or adversarial trial, which is not the case. What can be reasonably done is to sum up fundamental features that are characteristic for either the inquisitorial tradition or the adversarial tradition. Moreover, our conceptual analysis explicitly does not addresses specific national or international legal systems, but rather strives, in line with our main doctrinal sources, to define abstract models or analytical concepts as tools for further analysis. One author, in this context, speaks of Weberian ideal types.

Let us briefly return to our examples of incorrect use of available. Such an example is given by those writings that label certain procedural guarantees present in the Anglo-American systems as either *adversarial* or *accusatorial*. Although this presentation is rather common, we would like to distance ourselves from it. Indeed, closer analysis reveals that these procedural guarantees are not inextricably linked to the adversarial model and can be easily built/implemented in an inquisitorial model. Take for instance the right to legally contradict the prosecution and to participate in the decision-making process. We will see in the following pages that these rights are absolutely fundamental for inquisitorial procedures. Therefore, we strongly oppose the

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3 Ibid.
4 Ibid.
5 Brants, 2008, 31.
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labeling of unilateral procedures as inquisitorial and the participative procedures as adversarial (or accusatorial) (see below).

The term inquisitorial has unpopular antecedents, recalling religious persecutions in Spain and elsewhere in continental Europe. Which legal system today would like to be called inquisitorial? Should the term be avoided? Can a system cease to be inquisitorial simply by swapping names? The answer is negative in part. There is a strong interaction between a specific system of criminal procedure and the legal culture in which the legal system evolves.\(^8\) Not individual persons, but political and social conditions as well as dominant philosophical currents determine which system of criminal procedure a given society choses.\(^9\)

In this broader picture, one can link the adversarial model to legal cultures with minimal governments and strong individualism, with rights holders that cede as little as possible to governments.\(^10\) The inquisitorial model thrives well in societies with strong state structures. In the past this has led to excesses and oppression of individual rights, responsible for the negative image of inquisitorialism. However, the authoritarian version of inquisitorial systems of criminal procedure is only one out of many. A predominantly inquisitorial system of criminal procedure, as hereinafter further described, may operate as well as the adversarial model in the framework of a democratic state. It is therefore appropriate to distinguish between an authoritarian inquisitorial system and a liberal (or rule of law based) inquisitorial system. The first authoritarian version is not the primary focus of our conceptual analysis that only discusses the latter version.

Both the adversarial and the liberal inquisitorial system pursue the same objective to administer justice in a criminal context. In both systems adjudication and settlements of societal relevant conflicts are based on truth and fact-finding,\(^11\) but both systems structure these processes of truth-finding in a substantially different manner,\(^12\) horizontally in adversarial systems and vertically in inquisitorial systems.\(^13\)

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9 Note that the relationship is interactive: systems of criminal procedures give shape to the dominant legal culture in a certain context.


The basic distinction between adversarial and inquisitorial systems

After these preliminary clarifications, it is time for us to turn to the main distinctive features of adversarial and inquisitorial systems. The adversarial criminal proceedings are essentially party lead proceedings, with both parties – the prosecuting authority and the defense – in charge of defining the scope of the dispute and of investigating the facts, the result of which is then brought before the judge, that altogether can be seen as a passive stakeholder. The truth then arises from the confrontation of the two theorems and proofs of both the prosecution and the defense. This confrontation between the two parties in front of the judge only takes place in the final phase of the procedure, with the judge checking whether the rules of procedure are respected during this confrontation, and without any further active role. The procedure comes to an end with the verdict (spoken either by the judge or lay jury).

The inquisitorial process cannot be traced back to two separate, yet parallel investigations. There is only one investigation that is, in particular in the first stages of the investigation, entrusted to an investigative magistrate (often a judge). Its premise is that there is only one ‘ontological’ truth to be found, which should be discovered by a neutral body. Hence, there is no need for parallel investigations, either by the prosecutor or the defense. One investigation led by an investigating judge (in principle) suffices and is superior to investigations led by other actors. These ‘actors’ cannot be expected to detach themselves from a rather subjective or biased approach. At best they can have a secondary role and at any rate, they should be prevented from biasing the work of the investigating judge.14

The significance of the criminal file in the two traditions

The difference in the processes’ structure, discussed above, is at the core of the division in criminal family traditions. It is this vantage point that allows us to understand several tenets of the liberal inquisitorial and adversary procedural model. Let us turn, for instance, to the existence of a criminal file or better to ‘the idea’ of ‘the’ criminal file, so familiar to the inquisitorial logic. In an inquisitorial criminal investigation led by an independent (judicial) authority implemented with no involvement of the parties (prosecution and defense),15

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15 Labelling the prosecution authority as a party, calls for a preliminary remark. At least in the authoritarian inquisitorial model, it is not feasible to see the prosecuting authority as a party, since prosecuting and judging was done by the same entity. Nevertheless the separation of the roles of judging and prosecuting is necessary in order to create a liberal inquisitorial system, because both functions are rightly thought to be fundamentally irreconcilable. Historically, we had to wait for the Enlightenment and the subsequent Napoleonic codifications, to witness the separation of functions and the introduction of – in Jackson’s terminology – (the seeds for) a new ‘accusatorial trinity’
paper communication is the only available medium to inform these parties about progress and investigative measures. In such a configuration there is a strong need for a complete and reliable criminal file. Completeness and reliability are prerequisites and conditions for the liberal or rule of law type inquisitorial proceedings/procedure.\footnote{Jörg, Field and Brants, 1995, p. 47.}

The central role of the two parties in the adversary criminal process however, does not allow (‘the idea of’) centralizing ‘the’ results of the investigations phase in one file. We saw that each party within this system builds up its own case and gathers its own evidence. These findings are then presented only later on when the case is brought before the judge,\footnote{Ibid., p. 48.} although moderate adversarial systems have introduced systems of disclosure or discovery to mitigate this. Generally speaking, there is no use of documentary evidence. The evidence is brought orally at the hearing, often through hearings of police, witnesses and experts.

Fully consistent with these different attitudes towards ‘the’ criminal file is the observation about the centrality of the preliminary stages in the inquisitorial system and of the trial phase in the adversary process. In the inquisitorial logic, court procedures are based and built around the findings of the preliminary investigation,\footnote{De Smet, 1999, p. 26; Brants, 2008, p. 228-229.} whereas the adversarial logic requires more open court procedures allowing different visions and versions of the facts and their legal implications to be advanced.

**Truth within the adversarial and inquisitorial system**

We briefly suggested above that inquisitorial systems are premised on the assumption of the existence of one single truth, in contrast with a more pluralistic approach in the adversary model.\footnote{Gutwirth and De Hert, 2001, p. 1059.}

In the inquisitorial model, the investigation is taken out of the hands of the parties and outsourced to an – independent and impartial – investigative agency whose purpose is, especially in the preliminary investigation, to uncover this one single truth. The result of the preliminary investigations are considered to reflect faithfully what happened. Truth-finding thus acquires a dogmatic character,\footnote{De Smet, 1999, p. 22.} with an ontological truth as a result.\footnote{E. Grande, ‘Dances of Criminal Justice: Thoughts on Systemic Differences and the Search for the Truth’, in: J. Jackson, M. Langer and P. Tillers (eds.), Crime, Procedure and Evidence in a Comparative and International Context. Essays in Honour of Professor Mirjan Damaska, Oxford: Hart Publishing 2008, p. 145-164, p. 146-147.} In the adversarial proceeding the truth is...
not found, but it is the outcome or an intrinsic consequence of a clash of ideas and a confrontation of arguments. From this battle of propositions – *thesis and antithesis* – a reasoned truth must follow. The process of finding the truth acquires thus a *dialectical* character. The aspiration to the truth on which an adversarial judgment is based is said to have a pragmatic and relative nature: *within the common law tradition, legal truth is seen as something which is contingent, existing not so much as an objective absolute, but as the most likely or plausible account, established after the elimination of doubt*. An inquisitorial trained observer would add to this analysis its dependency on the biased selection of facts by the parties, a selection that impacts the assessment of the case.

From this presentation of distinct approaches in truth-finding, it should not be inferred that the adversarial judgments are disconnected from the factual, underlying reality. In resolving disputes, the adversarial trial also falls back on the (legal) truth, but, contrary to its inquisitorial counterpart, this truth does not serve as an absolute truth, but as a rather pragmatic concept. Spencer rightly insists that English lawyers do not reject the idea of a single truth, but rather believe that the adversarial approach is the best method to discover this truth.

**Tasks of the procedural protagonists in both systems**

The different structure of the adversarial and the inquisitorial criminal trial implies different duties and tasks of the protagonists. The adversarial model is *party-driven*, and thus parties to the trial play a central and determining role. The prosecuting authority and the defense necessarily define the boundaries of the criminal trial. A genuine, but secondary, role can also be attributed to the victim. Prosecution and defense have an autonomous role in truth-finding. In an extreme, theoretical adversarial model, prosecution would not have to disclose exculpatory elements or evidence, and the choice of defensive argument—

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29 In the Belgian criminal trial the victim claiming compensation can, generally speaking, actively intervene in criminal trial procedures. This party can even initiate prosecution if the public prosecutor does not. Dutch criminal procedure allows victims to challenge public prosecutor’s decisions not to continue prosecution.
tation would be the sole prerogative of the defendant and his or her attorney, substantiated by their own investigative and information-gathering activities. Only the defense would be in a position to state, argue and prove an element of defense.

Moreover, parties would stipulate that the criminal trial is restricted to only that which is not agreed upon.\(^{30}\) Going to trial, to face a judge (and possibly a jury as well), possibly passing sentence, is only one possibility out of many in the adversarial logic. Parties can mutually opt for other outcomes of an initial case: ending the prosecution or plea bargaining are perfectly valid options, that are not to be understood as alternatives to a criminal procedure, since they are of an equivalent nature.

Role-playing and role diversification between the prosecution and the defense is also present in the liberal inquisitorial model, but the roles are different. Parties bear no responsibility in the truth-finding process. As already mentioned, the duty and possibility of truth-finding is monopolized by a neutral and active judge, both in the pre-trial phase as well as at the trial. This judge must focus on exculpatory and incriminating elements, since he does not perform a partisan inquiry and exclusively seeks a neutral and objective truth.\(^{31}\) This explains why insistence on the judge’s impartiality and independence, is a main concern in the liberal inquisitorial model to avoid an authoritarian concentration of power in the magistrate.

The party protagonists – prosecution and defense – have no primary role in investigative and information-gathering activities in the liberal inquisitorial model. At best they have a secondary role. This secondary role allows them to supervise the ongoing or terminated inquiry, and to suggest additional investigative steps. However, they are in no position to unilaterally decide upon whether or not and how an investigation should be conducted.\(^{32}\)

Procedural safeguards in both systems

Given the vertical structure and the judge’s monopoly in the truth-finding process in the liberal inquisitorial model, several procedural safeguards are paramount. Two series of guarantees stand out: full transparency through the case file, as well as guarantees concerning the judge’s integrity, competence, impartiality and independence.\(^{33}\) Both requirements do not solely distinguish the

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\(^{31}\) Brants, 2008, p. 228.

\(^{32}\) Jörg, Field and Brants, 1995, p. 47.

liberal inquisitorial model from the adversarial model, but also distinguish liberal from authoritarian inquisitorial models.34

Besides these core features, a liberal inquisitorial model also needs to add, expressly, individual fundamental rights to its catalogue, in order to compensate the State’s display of power in investigative and information-gathering activities (and this as a matter of due process).35 Procedural equality of defense and prosecution are not automatic in liberal inquisitorial structures, and thus equality of arms needs to be explicitly added to the legal framework.36 Fundamental rights such as the privilege against self-incrimination and other fair trial rights do not automatically arise from the basic structure of the inquisitorial model, but are nevertheless absolutely required to make this model more liberal. The right to legally contradict and to participate in the decision-making process is equally necessary in this respect.

As said in the introduction of this contribution, we are opposed to the labeling of unilateral procedures as inquisitorial and the participative procedures as adversarial. This would a priori exclude any defense participation in an inquisitorial procedure. Participation and inquisitorial procedures are however not mutually exclusive.37 Defense participation is indeed possible in an inquisitorial procedure, albeit in a different form compared to the role of (private) parties in an adversarial model.

The inquisitorial version of defense participation is – contrary to the role the defense plays in an adversarial procedure – it is not based on the party’s own investigations, but rooted in the results of the central inquiry. We can therefore say that inquisitorial participation is responsive.38 The defense can use its powers and powers to intervene to perform a watchdog control and can make limited suggestions without having to carry out its own investigations.39 In the adversarial model, an active role of defense is a condition sine qua non for a fair and fully dialectical truth-finding. Defense participation in the inquisitorial model on the other hand is ‘merely’ a useful tool.40

In an adversarial trial, procedural guarantees follow a different conceptual logic. The adversarial model is based on party autonomy and the criminal procedure provides only a procedural framework in which parties can settle their dispute if they choose to have a fully-fledged criminal process, while plea bargaining is an equivalent possibility. The structure of the adversarial model implies that the equality of arms and the right to participate have to be provided. These

36 Jörg, Field and Brants, 1995, p. 50.
39 Jörg, Field and Brants, 1995, p. 47.
40 At the latest at the moment of the trial in court, a liberal inquisitorial procedure should provide a defendant a responsive possibility of participation (Brants, 2008, p. 229; De Smet, 1996, p. 21). One could however find good arguments to argue in the name of efficiency and defense rights that parties in inquisitorial systems should be able to intervene at an earlier stage.
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requirements are absolutely necessary in a fair adversarial trial. Equally necessary and flowing from the horizontal structure are safeguards such as the privilege against self-incrimination.

Conclusions and illustration

It is time to conclude. This contribution’s purpose is to develop a conceptual analysis of what inquisitorial and adversarial stand for. The models outlined above, provide, so we believe, an instrument for analysis of existing procedural systems. Our discussion of inquisitorial and adversarial systems is abstract and theoretical, and does not correspond with actual current systems of criminal procedure. Criminal justice systems in Western countries today combine elements of both models, but this need not render an analysis unnecessary. The models establish a continuum with the liberal inquisitorial and the adversarial model at both ends of the spectrum. Analyzing a national system thus starts with positioning that system on the continuum. The framework subsequently provides the basic forms to understand existing systems and reforms and evolutions.

We note that reforms in criminal procedure are seldom conceptually neutral. These reforms often bring about shifts towards one or the other pole of the continuum. Such shifts may necessitate additional changes in order to maintain – or to restore – a system’s balance. Both the liberal inquisitorial and the adversarial model consist of a coherent set of assumptions. Superficially combining features might create certain risks.

These risks might occur due to reforms of pre-trial investigations in the Netherlands and in Belgium in the last decades. Even though procedural law initially did not provide – or hardly provided – a possibility for prosecuting authorities to perform an investigation of their own, preliminary investigations being the sole prerogative of an investigating judge, both the Dutch officier van justitie and the Belgian procureur des Konings today perform complete pre-trial investigations. In legal systems that were built on the autonomous investigating authority of an investigating judge, such shifts throw a procedure out of its conceptual balance. The mere codification of this legal practice tolerating such pre-trial investigations by prosecuting authorities, does not resolve this issue. In fact, when the prosecution – the prosecuting party – is granted the possibility, or even the task, of performing pre-trial investigations, an unbalanced shift in adversarial direction is at hand. Such a shift can conceptually be balanced by providing defendants and their legal representatives an actual possibility of pre-trial investigation. Such measures have recently been taken in the Netherlands.

43 Wet versterking positie rechter-commissaris (December 1st, 2011).
but not in Belgium.\footnote{See more in detail: T. Decaigny and P. De Hert, ‘Evolueren het Nederlandse en het Belgische strafproces naar adversaire systemen?’ Strafblad 2013, Issue 1, p. 54-66.} We hope to contribute to this kind of critical analysis with the proposed terminology and characterization of systems and wish to express our gratitude to Chrisje Brants for having opened up this line of research for us. A difference might lay in our intuition that even radical reforms are unable to make inquisitorial systems adversarial and vice versa. Understanding the coherence of each model, in particular for us (writing in Continental Europe) of the liberal inquisitorial model, helps to preserve the delicate balance needed to make systems just or to find the right hair color. Changing hair is not an option and nor is the idea of converging criminal systems.