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Saint Louis University School of Law

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David S. Clark
Willamette University
EDITOR

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Patents

See Intellectual Property, Doctrinal Issues in; Intellectual Property, Economics of; Intellectual Property, Sociology of

Penal Court Procedures, Doctrinal Issues in

There always has been a multiplicity of penal court procedures. The differences in how criminal wrongdoings are unraveled and settled often depend on the mode of their commission, the relationship between victim and perpetrator, and the seriousness of the offense. Three models for the resolution of conflicts arising from criminal wrongdoings have their roots in ancient procedures, roots that have perhaps been common to all cultures. All resolution models are attempts to avoid the primordial response to criminal wrongdoing: self-help and, in the case of homicide, blood revenge. All are relevant in understanding modern criminal procedure. The three procedural models are: (1) *consensual* semiprivate resolution of the conflict through negotiations between victim or prosecutor and the accused; (2) *adversarial* resolution of the dispute in a public oral trial often before a panel of lay judges (or jury); and (3) *inquisitorial* investigation and decision of criminal cases, conducted in its heyday by state officials who were tasked with ascertaining the truth.

All of these procedural modes are found in varying mixtures in most modern penal procedures, albeit in different combinations, usually with one procedural mode dominating due to cultural and historical reasons. They, and the principles that are derivative therefrom, provide the substance for the great contemporary discussions about criminal procedure reform in Asia, Latin America, the former Soviet Union, and elsewhere.

Criminal procedure consists of a sequence of acts or procedures conducted by officials aimed at determining whether or not crimes were committed, who committed them, and what the perpetrator's punishment, if any, should be. Criminal procedure reformers must assess the applicability of the three procedural models to six decisions or assessments. These are, whether or not, to (1) arrest and commence a preliminary investigation; (2) detain the suspect prior to trial; (3) charge a suspect with the commission of a crime; (4) assess pretrial the sufficiency of evidence to allow the case to proceed to trial (preliminary hearing); (5) determine guilt or innocence (the trial); and (6) determine posttrial whether there was sufficient evidence to convict, whether errors were made that require a new trial, or whether a person who has been acquitted may be retried.

History of Criminal Procedure Reform

Early modes of consensual and adversarial resolution of criminal disputes predominated in Europe until the late Middle Ages and during the Renaissance, and still exist in autochthonous communities in Africa, Asia, Latin America, and elsewhere. In both the early and contemporary systems, the victim (or his tribe) makes an accusation and the suspect-defendant responds. Thus, early adversarial systems were usually accusatorial in nature, that is, the victim as accuser initiated them. A variety of political and cultural influences led to the development of a new system of criminal procedure on the European continent. Politically, the rise of the nation-state and absolute monarchy led to a politicization of criminal procedure with the state replacing the victim as initiator of criminal proceedings. The vertical hierarchy of such systems was reflected in a similar hierarchy of courts and a royal judiciary to administer it.

Culturally, the Roman Catholic canon law's inquisitorial procedures and formal rules of evidence and the Italian universities' rediscovery of Roman law heavily influenced the law. Judges began to see themselves (or

to be seen) as truth seekers. Armed with the newly articulated Roman legal principles emerging from the Italian universities and with the rules of formal proof emanating from canon law, they could achieve a superior quality of justice than that achieved by the irrational forms of procedure used by the Germanic tribes: ordeals, oath helpers, duels, and lay decision makers.

The judges were royal officials beholden to the monarch and with no fealty to the communities in which their judgments would resonate. Punishments were considerably more Draconian than they were in the early Middle Ages. Procedurally, the most radical innovation was that of a formal preliminary investigation initiated ex oficio and conducted by a judicial official who would examine the suspect and the witnesses, conduct other investigative acts, and reduce all of his findings to writing. Because no accusation by the victim was required, the new procedure was called *inquisitorial.* Investigators compiled the written results of this preliminary investigation in an investigative dossier. This became the exclusive record on which the court would base the decision of guilt or innocence. If, under the formal rules of evidence, enough indicia existed to constitute, in the language of today, probable cause or reasonable suspicion that the suspect was guilty, then the investigating magistrate could order the suspect to be tortured if he refused to allow the court to examine him.

There was no oral, public trial before a jury; instead, there was a secret written review of the findings of the investigating magistrate contained in the written investigative dossier. There was no right to counsel. There was no confrontation by the defense or public prosecutor (or victim).

Judges had no discretion to mitigate the harshness of the findings. Unlike the jury that continued to function in England, judges could not reject the result mandated by the rules of evidence and acquit against the strictures of the law. The system gradually eliminated the lay judges who dominated the earlier procedures, in favor of a purely professional and more administrative than litigious form of justice.

The oral tradition persevered, however, in England and to an extent in Scandinavia. Oral, public trials by a jury of twelve gradually had replaced ordeals and duels by the thirteenth century in England. Verdicts had to be unanimous; the ensuing judgments were final and did not allow for any posttrial review. Other than a brief examining of witnesses and suspects for purposes of determining release on bail, there was no preliminary investigation. Victims or their lawyers brought the case, and, until the eighteenth century, the defendant defended himself, usually without benefit of a lawyer.

With the advent of the French Revolution, these two systems confronted each other and led to a new mixed form of procedure on the European continent. French revolutionaries were inspired by Enlightenment criticism of the brutality of inquisitorial criminal procedure by such great thinkers as Cesare Beccaria (1738–1794), Charles-Louis de Montesquieu (1689–1755), and François-Marie Arouet (whose pen name was Voltaire, 1694–1778). They were also influenced by the antiauthoritarian credentials of the English jury trial provided by notorious acquittals in the seventeenth century of William Penn and other dissidents against the instructions of royal judges. Therefore, the revolutionaries introduced the public, oral English jury system, eventually grafting it on to the secret, written, inquisitorial preliminary investigation.

The French Declaration of the Rights of Man in 1789 and the American Bill of Rights of 1791 constituted the first great human rights revolution that had an impact on criminal procedure, leading to its gradual humanization by protecting the criminal suspect from the arbitrary and pitiless power of the state. The American Bill of Rights proclaimed protection against cruel and unusual punishments and unreasonable search and seizure, the privilege against self-incrimination, and a host of trial rights. These included the right to counsel, to subpoena witnesses for the defense, to cross-examine or confront the witnesses of the prosecution, and the right to a speedy, public trial by a jury of the defendant's peers. All of these rights were meant to protect against overreaching by the state—either by violating important rights of defendants during the gathering of evidence, or in assuring that the defendant would not be tried on the basis of written evidence prepared by the state in secret, without input or checking by the defendant through cross-examination. The French Declaration proclaimed the

presumption of innocence; in the United States, the courts held that presumption to be implicit in the due process rights granted by the Constitution's Fifth Amendment in the Bill of Rights.

Although English jury verdicts were final, French juries were asked to answer a list of specific questions related to the elements of the charged crimes and the defendant's guilt contained in a special verdict that sometimes contained dozens if not hundreds of questions. The inquisitorial, written tradition on the Continent preferred reasoned judgments; a particularized special verdict would make the jury's reasoning process clear and better facilitate appellate review of their verdicts. Often, the professional judges would actually themselves legally evaluate the substance of the jury's factual questions and themselves pronounce judgment, thus limiting the autonomy of the jury's finding of guilt. During the nineteenth century, nearly all European countries adopted the French jury model, in which a jury of twelve was presided over by three professional judges, and in which only a majority verdict was required. In Germany, a mixed court, composed of one professional judge and two lay assessors, in which all collegially decided questions of fact, law, guilt, and sentence, developed in the mid-nineteenth century for the trial of lesser offenses.

Colonization, imperialism, and systematic borrowings spread the continental mixed system and the Anglo-American system of adversarial jury trial into Asia, Africa, and Latin America. Ironically, many of the Latin American countries that liberated themselves from Spanish and Portuguese rule in the early nineteenth century retained the purely written inquisitorial procedures conducted exclusively by professional judges, that is, the procedure prior to the French Revolution. Thus, they rejected the reforms that swept the European continent. Only Brazil, El Salvador, Nicaragua, and Panama introduced trial by jury, although they largely limited the jury to reading the contents of the inquisitorially prepared investigative dossier.

Jury courts were always controversial on the European continent; many jurists sought to abolish them or convert them into mixed courts. The totalitarian regimes of the first half of the twentieth century finally accomplished this, at which time juries vanished in many countries and were replaced by mixed courts or purely professional panels: this happened in Russia (1917), Italy (1931), Spain (1939), and Vichy France (1941). In Japan (1943), the courts suspended jury trials, which only had been introduced in 1928. Jury trials were eliminated in 1924 in Germany by decree, before the rise of Nazism, in favor of the mixed court.

After the defeat of Nazism and Fascism in World War II, France, Germany, and Italy did not return to the classic jury, preferring the mixed court. The mixed court cemented the dominance of the professional bench over its lay component by enabling the judge personally to influence the lay judges in how they decided the question of guilt. It also was more consistent with the necessity of giving reasoned judgments in all criminal cases.

The horrors of World War II—the Holocaust and the crimes of the totalitarian regimes—led to a new era of human rights with the United Nations adoption of the Universal Declaration of Human Rights (1948) and the acceptance of the International Covenant for Civil and Political Rights and the European, American, and African Conventions on Human Rights. The European Court of Human Rights has had great influence in the reform of European criminal procedure in interpreting the European Convention. In the wake of this revolution, and with the democratization of France, Germany, Italy, and Japan after 1945, and Spain after Francisco Franco's death in 1975, these countries began to eliminate systematically many of the negative vestiges of the old inquisitorial systems that had survived in mixed form since the French Revolution.

A distinct return to adversary and consensual procedures has been noticeable since the late 1980s. The 1988 Italian Code of Criminal Procedure introduced an adversarial trial system and several forms of consensual resolution of the guilt issue, without returning to trial by jury. Russia, alternatively, reintroduced adversary procedure with the jury in 1993, and then in 2001 introduced a form of consensual resolution of cases. The majority of the former Soviet republics have followed the Russian model, though none has yet introduced trial by jury. Spain strengthened the adversarial nature of its trial system by introducing trial by jury in 1995.

Making the Inquisitorial Preliminary Investigation More Adversarial

The centerpiece of inquisitorial procedure has always been the preliminary investigation, traditionally carried on by an investigating magistrate who was usually a member of the judiciary. Even after the inquisitorial systems reformed to include an oral trial by jury, most systems allowed reading of the reports contained in the investigative dossier before the jury (or the judge or mixed court where no jury was available). This constituted a prepackaging of evidence with no opportunity for the defense to see or confront the witnesses. Some countries allowed a minimal amount of participation of counsel. For instance, since 1897, France has allowed participation of counsel during judicial interrogations of the suspect, but this was of little help to the suspect, because the police interrogated him in secret, and he had no right to counsel.

Substantial changes in the inquisitorial preliminary investigation occurred only after the human rights revolution following World War II. People began to question the role of a judicial official as investigator: how can a judge, who is following her particular theory of guilt in a case, be independent, neutral, and judicial when issuing arrest, search, or wiretapping warrants? Since the police, in reality, did the lion's share of actual criminal investigation and the prosecutor was responsible in most countries for pressing the charges, reform efforts put the prosecutor in charge of the preliminary investigation. This reduced the judicial role to that of a liberty or control judge, a neutral arbiter of invasions of human rights (authorizations of arrests, seizures, searches, or wiretaps), who would also preside over interrogations. Courts in Germany took this step in 1974, courts in Italy in 1988, courts in Venezuela and other Latin American countries in the 1990s, and courts in Austria in 2004. In Spain, new legislation, such as the 1995 jury law, transformed the investigating magistrate into a more neutral pretrial judge by allowing her to investigate only in response to a request by either the public or private prosecutor (victim) or the defense.

Prior to the 1990s in the Soviet Union and in former socialist Eastern Europe, it was the public prosecutor who not only generally directed the preliminary investigation, which was in the hands of an investigator provided by the ministry of the interior, but who also authorized all invasions of protected human rights of suspects. Those former socialist countries have since ratified the European Convention of Human Rights, and have gradually introduced new legislation requiring judges to perform these important functions.

The famous U.S. Supreme Court decision, *Miranda v. Arizona* (384 U.S. 436, 1966), greatly influenced other countries concerning the protection of suspects from secret and custodial counsel-less interrogations. Today, most of the formerly inquisitorial systems of continental Europe, the former Soviet Union, Latin America, and the Republic of Korea require that law enforcement officials advise suspects of their right to remain silent and of their right to counsel before those officials question them. Many new codes of criminal procedure, such as those of Italy (1988) and Venezuela (1998), require counsel to be present during all interrogations.

Increased recognition of the right to confront witnesses, guaranteed by article 6(3)(d) of the European Convention of Human Rights, led formerly inquisitorial countries to require presence of the defendant or defense counsel during the examination of prosecution witnesses during the preliminary investigation, where possible. The European Court of Human Rights has repeatedly condemned the use of written statements where they are the sole or main evidence of guilt in criminal cases if the defendant had no chance pretrial to confront and examine the witness. The 1988 Italian Code requires the prosecutor to initiate a hearing to preserve witness testimony in cases where there is fear the witness may not be available for trial at which the defendant and victim have a right to be present and examine the witness; in absence of this hearing, attorneys cannot admit the statement at trial. Similar provisions exist in the 1995 Spanish Jury Law and in new Latin American codes of criminal procedure. Thus, procedure in formerly inquisitorial countries is approximating that in the United States, where the inadmissibility of written statements has been strengthened even further following the decision of the U.S. Supreme Court in *Crawford v. Washington* (541 U.S. 36, 2004).

In Italy, and in cases subject to Spain's new jury law, the preliminary investigation is not supposed to be the stage for preparing evidence for the trial, but only for determining whether sufficient probable cause exists to charge the suspect. Any evidence that attorneys could present at trial and that is not required for a showing of probable cause is unnecessary during the preliminary investigation. In this sense, the preliminary investigation tends to resemble the American grand jury or preliminary hearing. In principle, attorneys cannot use the investigative dossier during the trial as a source of evidence. The court compiles a special trial dossier, including the accusatory pleading and any evidence that has been properly preserved for trial, guaranteeing defense rights of confrontation.

Some formerly inquisitorial countries have gone a step farther, however, by allowing parallel defense investigations, such as those that exist in the United States. The 1988 Italian Code provides for defense gathering of evidence in preparation for the trial phase; in addition, Code amendments in 1999 provide for detailed procedures to regulate the gathering of this evidence and its eventual unification with the prosecution evidence in a common investigative file. The Russian Code of 2001 has also taken the step to allow defense investigations.

Decline of the Inquisitorial Trial Judge

The trial judge in the nineteenth century mixed systems on the European continent acted as the quintessential investigator. After reviewing the investigative dossier, he decided which witnesses he would call and examined the witnesses at trial. Since he had reviewed the investigative dossier and had it at hand, he was aware of the inculpatory premises put forward by the investigating magistrate and had usually adopted them, for he had to decide pretrial whether there was sufficient evidence to set the case for trial. It stretches the imagination to believe that such a trial judge actually entertained a presumption of the innocence of the defendant in such a procedure. Not surprisingly, the written judgment would often closely follow the language of the written accusatory pleading.

In addition, the court called the defendant to answer the charges at the beginning of the trial in front of the jury, and asked her to give a statement before any other witnesses were called or evidence presented, seemingly belying the fact that the burden was on the state to prove the charges. The judge then examined the defendant, using the materials in the dossier to guide her in the so-called search for the truth. The prosecutor and defense counsel would be able to submit questions (often only in writing to the presiding judge) to supplement the judge's examination. If witnesses did not appear, the presiding judge would merely read the statements the witnesses had made to the investigating magistrate during the preliminary investigation.

As long as European systems still had juries, the trial judge was not a judge of the facts, and therefore the fact that the judge was not neutral did not necessarily directly affect the outcome of the case. However, eliminating the jury in favor of professional or mixed panels—which most European systems and Japan did, and which meant that the judge who investigated the case at trial by using his inquisitorial skills and who had adopted the findings of the investigating magistrate also decided the case—violated the presumption of innocence.

This system, which still largely exists in Belgium, France, Germany, the Netherlands, and other countries, is gradually being replaced by the adversarial model. Under this model, the prosecution and defense are responsible for preparing and presenting the evidence and questioning the witnesses; the judge assumes a more passive role of deciding questions of admissibility of evidence and making sure the parties have equality of arms in presenting their cases.

The Italian Code of 1988 was the first to take the radical step of eliminating the preliminary investigation dossier from the courtroom. Spain followed suit in its 1995 jury law, as did Venezuela in 1998. Italy also eliminated the presiding judge's duty to determine the truth; this was an important step because, unlike in Spain and Russia, Italy did not return to the jury, meaning that the judge remains a trier of fact. In 1992, the Russian Constitution was amended to provide for adversarial procedure and trial by jury; the 1993 jury

law, and later the 2001 Code of Criminal Procedure, have implemented these changes in the entire country (except Chechnya). Most of the former Soviet republics have followed Russia's lead, and several (including Armenia, Azerbaijan, Georgia, and Ukraine) intend to introduce trial by jury.

Since 1990, most Spanish-speaking Latin American countries have moved away from the pre-Napoleonic inquisitorial systems to an accusatorial-adversarial system. Latin America, however, has largely remained with professional judges, although Bolivia, Córdoba (a province in Argentina), and Venezuela have introduced mixed courts. El Salvador and Nicaragua have modernized their inquisitorial jury systems within new adversarial codes of criminal procedure, and the courts in Argentina are discussing the jury. Japan will introduce a new mixed court in 2009, and the Republic of Korea is discussing the use of a jury or mixed-court system. The Soviet mixed court, which replaced the Russian jury court in 1917, was adopted in nearly all countries in the worldwide socialist bloc following World War II. Most of these countries, whether or not they have become democracies, continue to use a court composed of one professional judge and two lay assessors in criminal cases (for instance, China, Czech Republic, Hungary, and Vietnam).

The search for truth at all costs during the criminal trial goal has also suffered because of a growing recognition that evidence gathered in violation of the human rights of criminal suspects should not be used even if such evidence is otherwise relevant and credible evidence of guilt. These violations usually intrude on the right to privacy, the right to human dignity, or the privilege against self-incrimination. The United States took this step in 1961 with the landmark decision of *Mapp v. Ohio* (367 US 643, 1961). In most Western countries (including Australia, Canada, England and Wales, Germany, and New Zealand), however, the search for truth still prevails in the end because the courts take a cautious approach to exclusion of evidence, engaging in an elaborate balancing process that in the end only excludes evidence gathered in the most egregious ways. In Italy and Spain, legislatures have passed laws that require exclusion of such evidence, yet only the Spanish courts have enforced this law with any vigor. The Russian Constitution of 1993 mandates exclusion of illegally gathered evidence, as do most of the new post-Soviet constitutions and many new Latin American constitutions.

—*Stephen C. Thaman*

See also Becarria, Cesare; Civil Liberties; Consensual Penal Resolution; Defense Lawyers; Evidence and Proof, Doctrinal Issues in; Human Rights, International; Judges; Juries; Lay Judges; Montesquieu, Charles-Louis de; Prosecutors; Torture; Transitional Justice in Post-Communist Nations; Trials, Criminal; Wrongs, Customs of

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