1 Adversarial Versus Inquisitorial Systems of Trial and Investigation in Criminal Procedure

John Gunn and Paul Mevis

1.1 Fundamental Differences in Approach to Protect the Same Values

Common law and civil law are terms used to distinguish two distinct legal systems and approaches to law. The use of the term 'common law' in this context refers to all those legal systems which have adopted the historic English legal system. Foremost among these is the United States, but many other British Commonwealth and former Commonwealth countries retain a common law system. The term 'civil law' refers to those other jurisdictions which have adopted the European inquisitorial system of law derived essentially from ancient Roman law, but owing much to the Germanic tradition and the French tradition of codification of systemised, written (substantial and procedural) law is based on the ideals of the French Revolution. Under the inquisitorial system or civil law approach, (we use the terms interchangeably), there are many differences between jurisdictions, for instance, in whether laymen are involved or not. There are also differences in the possibilities for and conditions under which a trial in absentia is possible. The trial judge may allow hearsay evidence in some jurisdictions. There is not 'a' civil law system, but the approach differs from the common law.

In this essay we will concentrate upon criminal law.

Both systems aim to find 'the truth' (i.e. an acceptable and reliable truth) (Brants [1], p. 1074) about a criminal offence in a 'fair' trial, leading to the conviction of those who committed a crime and the implementation of a 'just' and 'fair' sanction.

J. Gunn (✉)
King's College London, London, UK

P. Mevis
Department of Criminal Law and Criminal Procedure, Erasmus University Rotterdam, Rotterdam, The Netherlands
e-mail: mevis@law.eur.nl

© Springer International Publishing AG, part of Springer Nature 2018

K. Goethals (ed.), *Forensic Psychiatry and Psychology in Europe*,
https://doi.org/10.1007/978-3-319-74664-7_1

Moreover, both systems aim to avoid convicting the innocent. That makes a comparative study relevant.

In Europe, almost all countries in both systems have signed the European Convention on Human Rights, a treaty signed within the framework of the Council of Europe. Both systems acknowledge the right of every citizen to a fair trial. We are not trying to discern whether one system is fairer or better than the other. But we recognise that both systems are imperfect. For example, in Great Britain, there have been some notorious miscarriages of justice such as the wrongful conviction of alleged Irish terrorists which led to the setting up of the Royal Commission on Criminal Justice [2]. The Netherlands has also identified similar severe miscarriages of justice. In one recent case, the initial trial relied on the confession of the accused, but in retrospect it was decided that his mental situation made him confess (see Hoge Raad 2014, 2015).

1.2 Three Key Issues: Responsibility of the Judge, the Position of the Accused and the Influence of the Pre-trial Investigation

An illuminating description of the difference between the adversarial system and the inquisitorial system is given in *The Judge* by Patrick Devlin [3], a distinguished English academic jurist. He says that:

> the essential difference between the adversarial system and the inquisitorial system … is apparent from their names. The one is a trial of strength and the other is an enquiry. The question in the first is: are the shoulders of the party upon which is laid the burden of proof, the plaintiff or the prosecution as the case may be, strong enough to carry and discharge it? In the second the question is: what is the truth of the matter? In the first the judge or jury arbiters; they do not pose questions and seek answers: they weigh such material as is put before them, but they have no responsibility for seeing that it is complete. In the second the judge is in charge of the enquiry from the start: he will of course permit the parties to make out their cases and may rely on them to do so, but it is for him to say what it is that he wants to know.

A further description was given by the British Royal Commission on Criminal Justice which defined the adversarial system as a system which has the judge as an umpire who leaves the presentation of the case to the parties (prosecution and defence) on each side. They separately prepare their case and call, examine and cross-examine their witnesses and experts. In contrast to inquisitorial systems, the judge plays a major role in the presentation of the evidence at trial. Here the judge calls and examines the defendant and the witnesses and experts, while the lawyers for the prosecution and defence ask supplementary questions. It is the judge's responsibility to arrive at the 'correct' outcome of the case. It is his or her responsibility to examine the case laid out by the prosecution. Codified rules of procedure may say that the judge has to allow parties to hear witnesses, rather than allowing the accused to question the witness. The 'judge' has to guarantee the integrity of the decision, the procedure and the pre-trial inquiry of a criminal case at trial. So, in the inquisitorial system, the court is not only responsible for the right decision but also

for the investigation leading to the decision. The 'judge' may be a professional judge or layman (or a combination) or a jury.

In a common law system, 'truth' is believed to be found by a '*choc des opinions*' (battle of opinions) between equal parties before an independent umpire, i.e. a jury or a magistrate. The 'battle' concentrates on the facts and the opinions presented by the 'parties', unlike the judicial enquiry of the inquisitorial system where the accused and the prosecution don't bear any 'burden of proof' as such. They are only invited to make a contribution by the trial judge. They are not in a battle with each other.

The influence and structural position of the pre-trial investigation and its influence on the character of the trial differ significantly between the systems. Under the civil law, state authorities have many intrusive powers of investigation. These powers are based on written, democratically decided laws. In some jurisdictions, the judge takes part in the pre-trial investigation and can determine that, for instance, illegally obtained or unreliable evidence is not admissible,[1] and the state authorities responsible for the investigation also have to protect the rights of the accused. This double duty imposed on the state is probably why Packer's dichotomy due process-crime control[2] never seems to work very well in inquisitorial systems (see Brants [1], p. 1075); the decision to prosecute (and for what) is left to a public law official, usually the public prosecutor, sometimes a judge. The accusation is presented as a case that is to be tested by the judge, with the results of the pre-trial investigation in a dossier. The role of the trial procedure is not, therefore, as in the adversarial system, to produce all the evidence at the trial; the trial is a test, by the judge, of the accuracy of the prosecutor's case. The role of the defence is limited to casting doubt on the prosecutor's case, for example, persuading the judge of the necessity to call a witness to the trial, instead of relying *de auditu* on his or her statement during the pre-trial investigation.[3] 'De auditu' (hearsay) evidence is not forbidden in the civil law system. It is allowed as long as the judge sees no reason to hear the witness as part as his or her task to find the truth.

If the accused is extra vulnerable, for instance, in cases of mental disturbance, it is for the judge – and for the other authorities during the pre-trial investigation – to 'compensate' for this in the way the trial or the investigation is organised. There are very few cases in the inquisitorial system in which the prosecution is stopped because of 'unfitness to stand trial'. This is because it is the task of the judge to protect the accused from his or her weaknesses. For example, the judge may represent the accused against the prosecutor. Also, she/he has to be extra careful in evaluating evidence when the accused is not able to give his or her view on the facts. In a comparative study between Canada and the Netherlands, the 'umbrella-protection' of the judge was found to produce greater fairness and effectiveness in the prosecution of a mentally disordered defendant than in the adversarial system [4].

[1] Exclusion of illegally obtained evidence is, in the view of the European Court on Human Rights, not under all circumstances part of Article 6 (fair trial) guarantee of the convention.

[2] Packer constructed two models, the crime control model and the due process model, to represent the two competing systems of values operating within criminal justice [17].

[3] *De auditu* is the testimony of a witness obtained from third parties.

1.3 Convergence of Systems

The usual distinction made between the two systems is that the common law system tends to be case centred and hence judge centred, allowing scope for a discretionary, pragmatic approach, whereas the civil law system tends to be a codified body of general abstract principles which controls the exercise of judicial discretion. In reality, both of these views are extremes with the former overemphasising the extent to which the common law judge has discretion and the latter underestimating the extent to which continental judges have the power to exercise judicial discretion.

It is worth noting that the European Court of Human Rights, based on the European Convention on Human Rights, was established, initially, on civil law principles, but is increasingly recognising the benefits of establishing a body of case law. The court wants to see the rights of an accused being effectively protected in every system of criminal procedure and in every separate case. There is a clear 'common law' approach, for example, when the court underlines the right of the accused to question witnesses himself, preferably during the trial, as the best way to challenge the evidence, instead of relying on the professional opinion of the judge on the reliability of the statement of the witness. Another example is the recent jurisprudence on police interrogation. Instead of trusting the police to uphold the rights of the suspected citizen and to make a 'true' report of the interrogation, the Strasburg Court has underlined the right of the suspected person to have his or her lawyer present during police interrogation as a better means of preventing miscarriages of justice. The court went so far as to rule that 'the rights of the accused will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (ECHR 2008).' (for an analysis see Schwikkard [5]). The Dutch inquisitorial oriented police were rather upset by this ruling.

Separate from the Council of Europe, the EU recommendation on procedural safeguards for vulnerable persons[4] calls for several instruments to protect the accused in a criminal procedure, without any distinction between or differentiation in systems of (Common or Civil) law. This and other EU documents are discussed in Chap. 5 of this book.

1.4 Historical Roots

1.4.1 History of Roots of the Common Law: Adversarial System

A good guide to the history of the development of the adversarial system is the book by Potter [6], and this can usefully be supplemented by the biography of Sir William Garrow by Hostetler and Braby [7].

[4] Commission recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (2013/C 378/02).

How have two different systems developed within one continent which has much common history? After all, 1000 years ago, Britain and France were united, and one might have expected that their systems of justice would reflect this close connection. Well they do to some extent; both systems have some roots in Roman law. After the collapse of the Roman Empire, the written law seems to have disappeared in Britain for several centuries; grievances, feuds and other disputes were settled privately, often by armed conflict. The Anglo-Saxons reverted to codification, akin to Roman codification, at the end of the sixth century. The code set out a list of grievances and the compensation which they merited. Not only did everybody and everything have financial worth in this code, but every part of the anatomy did also, e.g. the loss of a big toe costs 10 shillings.

The disputes were administered by the courts of the hundreds[5] unless the alleged offences were quite serious when they were referred up to the county or shire courts. The shire courts were overseen by a representative of the king or a shire reeve (sheriff). The basis of the trial was the oath. To declare his or her innocence, the accused had to swear an oath and get people to come and testify to his or her honesty. Serious cases required more people to testify to his or her honesty, for example, a complaint of arson required 36 people to testify to the accused's honesty. This was potentially open to abuse, but most people were religious, and it was believed that if one made a false oath then one was liable to eternal damnation. At first there was no distinction between civil and criminal laws.

By the tenth century, the codes were more complex and also prescribed physical punishments including death for some offences. For example, anyone caught forging the common currency of England was to have his hand struck off. This was the beginning of the doctrine that any serious offence is an offence against the Crown. In common with the rest of Europe, the later Anglo-Saxons devised a new system of proof in the trial, the so-called ordeal. This was a way of inviting God into the trial. The ordeal was dangerous and painful but was not a punishment; it was a mode of proof. The idea was that God would come to the aid of the innocent, so if you failed the ordeal, you were then punished. The ordeals were supervised by the clergy. There were two main kinds of ordeal at the time, the first was being made to hold a red-hot poker; the hand was then bandaged, and after 3 days it was inspected to see if it had healed. If it had festered, you were guilty. The second kind of ordeal was by water; you were lowered into a pool of sanctified holy water; if you sank you were innocent, and if you floated it implied that the pure holy water had rejected you, and you were therefore guilty. Trial by ordeal was used for some centuries, although it was only used in cases which could not be settled in other ways, i.e. if there was no factual proof, for example, recovered stolen goods or appropriate marks on a person's body. These methods of trial were used throughout Europe. About half of those who subjected to trial by ordeal were found to be innocent.

When the Normans invaded England in 1066, they decided to keep the courts of the hundreds and shires, but they added a new system of ordeal; this was ordeal by combat. The winner is being declared the innocent. Most of the offences being tried

[5] Probably an area of land containing a 100 dwellings.

this way were capital offences, so the victor might as well finish off the loser at the end of a battle. If he didn't, the loser would be brought before the bishop or the sheriff to be sentenced to, for example, death or blinding or castration.

All was well with the Norman system until Stephen usurped the English throne, and civil war ensued, and the law broke down. Henry II came to the throne in 1154 aged 21. He sorted out the anarchy by strict imposition of the king's law and indeed is sometimes regarded as the father of the English common law. In 1166 he established a system of travelling justices who were significant friends or appointees of the king personally. These justices found that there were wide discrepancies in the efficiency with which the laws were administered in different counties (shires), and so the king sets standards which had to be followed, and he invoked the support of ordinary people by establishing juries of presentment. The jurors of presentment were to present to the courts all the suspected offenders in an area; they did this under oath.

The juries of presentment were 11 or 12 men from the hundreds and perhaps three or four selected more locally who had the responsibility of bringing anyone who was suspected of an offence to trial. If someone was suspected of stealing cattle, for example, they would be reported to the jury of presentment who would then try to ascertain the facts of the case as best they could and decide whether to progress the case further or not. If they decided that the accused person was likely to be guilty, they would pass them on to be submitted to one of the ordeals. They had considerable power however to filter out people for whom they thought the case was weak. This is a forerunner to the grand jury which is still used in the United States. A good account, using historical records, of the jury of presentment before 1215 is given by Groot [8] who points out that not only did the jurors investigate the facts of the actus reus (whether the early alleged sequence of events took place and the accused was implicated), but also they enquired into mens rea, i.e. they decided whether or not an action was deliberate.

A central court was established in Westminster; it was not an appeal court or a higher court, but it was the court from which the justices would set out on their journeys around the country and where the king could make his wishes known. It was a place where judges could meet and discuss cases and establish general principles which they could then take out into the shires. They wrote down some of their cases, and the first books of English law began to appear. This meant that the judges were establishing the basis of common law which is 'precedent', i.e. law is consistent and based on previous judgements.

The year 1215 was a landmark year in English law. Henry's son John embarked on disastrous military adventures in France and lost the nation its wealth. He demanded taxes from a nobility who hated him, and he seized lands arbitrarily. The barons rose against him and forced him to sign a Great Charter (*Magna Carta*) which outlawed arbitrary imprisonment and decreed that no one should be victimised except by lawful judgement of his peers or by the law of the land. It was a ground-breaking recognition that the English people had rights. The Charter was used in the English Civil War to curb the power of King Charles I. Later it formed the basis of the Constitution of the United States.

Trials by ordeal were eventually banned by Pope Innocent III who decreed that the judgement of God could not be manipulated by the judgement of men. This meant that the church withdrew from trial by ordeal, and the continent of Europe reverted to methods of proof that had been established by the Romans. Confessions were extracted from those accused, by torture if necessary. England chose to introduce instead trial by jury. The first known English jury trial took place in 1220. Juries in the thirteenth century were a development from the juries of presentment who were now expected to decide the verdict. They did not come to their verdict by weighing evidence but by using their own local knowledge. Trial by jury became one of the defining characteristics of English common law.

In Tudor England the common law became corrupted; juries were bribed, and local nobleman largely ran the judges in the courts. To counteract this corruption, the king developed a separate system of law which was held in the Star Chamber (literally a chamber with stars on the ceiling) without juries and thus not subject to bribery. The aristocracy in particular could be tried in the Star Chamber. Mythology tells us that the Star Chamber was tyrannical and frequently resorted to torture. In practice the Chamber was an inquisitorial system without a jury, used on the one hand to express the king's mercy, but on the other hand to deal with direct threats to the king, for example, the gunpowder plot to blow up Parliament. Torture was used, however, in unusual circumstances by virtue of powers deriving from the doctrine of sovereign immunity from legal action. This doctrine was totally repudiated by the common law and thus provided a long-running source of tension between the Crown and Parliamentary lawyers. Things came to a head in the reign of Charles I. The high-handed king forced disastrous wars and asked Parliament to raise the necessary funds. When this was refused, he disbanded Parliament and raised money by extortion from wealthy landowners. If a nobleman refused to pay up, he was arraigned before the Star Chamber. Arrested knights appealed to the common law for release from prison, but the king said he had unlimited powers because he ruled by divine right, and he dismissed Parliament.

However he had to recall Parliament to demand more money. Edward Coke devised a scheme whereby money was to be granted to the king so long as he signed a document giving full rights to the common people. The document is called the Petition of Right and may be second only in importance in English law to *Magna Carta*. Nobody could be compelled to pay taxes without parliamentary authority, and nobody could be imprisoned without cause. The latter is the principle of habeas corpus.

As soon as he had secured sufficient cash, King Charles I closed down Parliament again. He ruled without Parliament for over a decade until he fought an unsuccessful war against the Scots. In 1640 he was again forced to recall Parliament for more money. Parliament immediately made torture warrants, which the king had been using, illegally. In 1641 Parliament forced the king to disband the Star Chamber and its inquisitorial system. Neither torture nor the Star Chamber system has ever been re-enacted.

The English Civil War between King Charles I and Parliament broke out in 1642. The king was beaten but refused to submit to the will of Parliament in the slightest degree, and so he was executed. The ruler of the victorious Parliamentary army Oliver Cromwell also dismissed Parliament and in some ways behaved like his predecessor, for example, locking up people without due cause. Parliament regained the upper hand when Cromwell died, and the monarchy was restored.

Barristers have existed in England since the thirteenth century, yet for five centuries, prisoners on indictment for treason and felony were not permitted to have counsel appear for them, even though the sentence for these offences was death. The reason for this was that in English criminal law, indictments of felony were always taken in the name of the monarch, and it was considered to be lèse-majesté for those indicted to be allowed to counsel against the monarch. Instead, in the trial the accused was allowed, indeed encouraged, to speak to the charges and to the evidence adduced against him, a system of trial they called 'the accused speaks'. The logic of the rule was to pressure the accused to speak in his/her own defence. The accused was regarded as an important source of information, and the jury was expected to judge the defendant's veracity and character by his/her performance in court. As Langbein points out, the judges believed that allowing the defendant to instruct counsel to speak for him/her would impair the jury's ability to weigh up the defendant for themselves.

The first breach in this barrier occurred after King James II had been ousted by the Dutch invasion of 1688 in the 'Glorious Revolution'. The new regime gave Parliament more power, and it introduced a Bill of Rights in 1689. The Bill established the principles of frequent parliaments, free elections and freedom of speech within Parliament (parliamentary privilege). It also included no right of taxation without Parliament's agreement, freedom from government interference and the right of petition and just treatment of people by courts. This provided for the right to trial by jury, the outlawing of excessive bail surety and excessive fines, as well as cruel and unusual punishments.

However, prisoners were still at a great disadvantage because the government sponsored a bounty system giving rewards to citizens who reported thieves. In some cases, when several thieves were caught, they would give evidence against each other in order to receive rewards and save their own necks. Judges thus came to believe that the scales were weighted too heavily against prisoners charged with the multitude of capital offences. As a consequence, from the 1730s, and without legislation, a few of them allowed counsel to appear for defendants and cross-examine prosecution witnesses: but barristers were still not permitted to examine their clients in court and were largely limited to cross examination. In theory this allowed the 'accused speaks' principle to continue. Nevertheless, in spite of this limitation, by skilled cross-examination lawyers could capture the courtroom and reduce the previously active role of the judge and jury who, respectively, became umpire and fact-finders. In this development a crucial role was played by William Garrow who appeared in over 1000 cases at the Old Bailey and established an aggressive and personal style of questioning prosecutors and their witnesses. This secured an

adversarial trial and also helped lead to the introduction of rules of evidence, such as the presumption of innocence, the 'best evidence rule' and a complex hearsay rule all of which were designed to give new rights to prisoners.

With counsel available to cross-examine prosecution witnesses, to examine defence witnesses, to raise evidentiary objections and to insist on the prosecution burden of production of proof, an effective defence no longer require the participation of the accused, so by the 1780s, the counsel had effectively silenced their clients. Trial became what it has remained, a proceeding whose primary purpose is to provide defence counsel with an opportunity to test the prosecution case. Adversarial procedure presupposed that truth would somehow emerge when no one was in charge of seeking it. Truth was a by-product [9].

1.4.2 History and Roots of the Civil Law: Inquisitorial System

The roots of the continental civil law system date back to the twelfth century. Before that, as in the common law countries, there was no distinction between civil and criminal law cases. Accusation of another person in a more or less formal procedure was possible. The accusation and the evidence were presented there. The accused (not a suspect) could purify himself from the indictment. The judge's main function was to guard the procedure and to apply the law. But from the twelfth century, the p*rocédure extraordinaire* (originally for treason trials), which was secret and could include torture, was developed. More and more of this procedure was used to try those alleged to have offended the sovereign, partly because of problems with the ordinary process which was liable to abuse and corruption and used severe and unjust punishments as well as the ordeal as a mode of proof. Although the latter, as we have seen above, was forbidden by the Catholic Church, the influence of this Church by prosecuting heretics contributed to the further development of the inquisitorial system in criminal law. The criminal process began not with an accusation but with a suspicion; the authorities had to prove a case against the citizen in a procedure before a judge. That meant an important shift in the burden of proof [10]. Thus civil law has its roots in a public policy approach relating to the rising power of the government.

The inquisitorial system kept its main characteristics as a criminal law procedure after the Enlightenment and the French Revolution, but it was adjusted. Public law notions to protect the citizen against the powers of government and against arbitrariness were added. The systematic codification of the law emerged, fundamental rights to protect privacy were introduced, home and physical integrity were made constitutional rights (e.g. by banning the use of torture) that could only be breached by democratic written law, for instance, in the law on criminal procedure. These adjustments added a constitutional framework around the criminal procedure.[6] But not all civil law jurisdictions accept that criminal process should protect against

[6]The presumption of innocence in criminal cases is part of the French 'Déclaration des droits de l'homme' et du citoyen' from 1789.

breaches of constitutional provisions. In fact, the right to a fair trial, with its sub-rights, such as the presumption of innocence, in criminal cases is not codified in all civil law written constitutions. However, the situation changed after the fall of the Iron Curtain. Countries in Middle and Eastern Europe became member states of the Council of Europe and thus signed the European Convention on Human Rights, with its right to a fair trial in Article 6. They started to build up systems of constitutional rights and procedures on that basis. This has been difficult for countries using a more traditional, inquisitorial system of criminal procedure in which the right to a fair trial is supposed to be protected by the professional authorities behaving properly. It is not surprising that the European Court of Human Rights (ECHR) does often find breaches of the Convention. This is another example of two types of criminal procedure converging.

1.4.2.1 The Confession as a Gold Standard

One common factor in both the adversarial system and the inquisitorial systems is that the confession is still the gold standard for most prosecutors. At one level it is easy to see why if someone says ‘yes I took the bottle of whiskey from the supermarket and deliberately left without paying for it’, the procedure for dealing with such a person is simple and relatively inexpensive. However, most confessions are not like this, and criminals may deny responsibility in many ingenious ways. In a modern world, this means that the prosecuting investigation has to find corroborative evidence which places the criminal at the scene of the crime and is perhaps backed up by witnesses. All are very expensive and difficult to provide. It is very tempting therefore to resort, not to the physical torture of the past, but to psychological duress to try and get someone who is strongly believed to be guilty to say so. As with torture confessions in the past, this is a flawed process and produces the wrong answer quite frequently. A pioneering Icelandic/British psychologist Gisli Gudjonsson has developed techniques for showing how unreliable a confession obtained under duress can be [11]. Many countries have now determined that police interviews should be conducted formally and transparently recorded. Even then confessional evidence is probably not good enough in some cases; in many inquisitorial systems, it is forbidden to declare an accusation proved by a confession alone.

Britain had a spate of wrongful convictions following a series appalling atrocities carried out by the Irish Republican Army, a terrorist organisation, in the 1970s. The convictions were based on flawed confessions and flawed forensic science evidence. A Royal Commission recommended changes to the ways in which the police collect evidence, but an attitudinal sea change in the English legal system is needed if it is to get away from the notion that the police know best. The Netherlands has stuck to the notion that it is best to trust in the professional integrity of the police officer. Even so some cases have led to a rule that the interrogation should be audiotaped. The ECHR has introduced the right of the accused to have a lawyer present during police interrogation, and the European Union has said that this must be implemented by 2017 (see Ogorodova and Spronken [12] and Mevis and Verbaan [13]). This is another example of the trend towards the harmonisation of procedural law across Europe.

1.4.2.2 Psychiatric Evidence and Exclusion from Criminal Liability

Fortunately for psychiatrists, psychiatric evidence is rarely called to attest to the facts of a case. It can be, in strange situations where, for example, a defendant fabricates a story, but usually the facts are determined by other means. The facts may be a burglary, an assault even a murder. The psychiatrist is then asked for an opinion on the mental capacity of the offender.

The general public and therefore lawyers put a great deal of emphasis on the question of blameworthiness or ‘responsibility’ in any court setting. People wish to know whether a damaging act was deliberate i.e. intended, or accidental. An apparently deliberate act can be excused to some extent by immaturity, lack of comprehension or mental disorder. These excuses are ancient, vague and capricious. Psychiatrists may have something to say about these matters, and indeed they can describe, to some extent, an individual’s mental functioning. In Britain and in the Netherlands, however, it is clear that the psychiatrist cannot usurp the function of the court and decide whether someone is ‘responsible’ for a criminal act or not. Judges may ask them for an opinion on this central issue from time to time, but the jury or the judge (GB and the Netherlands, respectively) has the last word.

When the issue is ‘insanity’, a legal concept which doesn’t map very easily on to medical concepts the adversarial system, by and large, sticks with the McNaughton rules which were developed in the first half of the nineteenth century to explain to an outraged public how it was that a man who tried to kill the Prime Minister was found not guilty because of his mental health (see West and Walk [14]). Politicians demanded that the judges explain themselves and come up with an acceptable definition of insanity. They decided that:

> Every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

Thus delusions are no excuse if the accused knew, at the time of committing the crime, that she/he was acting contrary to the law.

In Britain, it is so difficult for an accused to convince the jury of this misfortune that the defence is rarely used. A more usual plea is ‘diminished responsibility’ in murder trials where the defence argues that the charge should be reduced to manslaughter because of an abnormal mental state at the time of the killing. But this also rarely succeeds, as psychiatric mitigation is not popular with juries. The bald truth is that most mentally abnormal offenders who commit serious crimes go to prison with its inadequate psychiatric services rather than to a secure hospital.

The difficulty of the plea in the Netherlands is reflected in the question as to whether there might be a lack of evidence to prove that the accused acted with intent. ‘Intent’ is a substantial part of the definition of almost all serious crimes. The

plea of lack of evidence of intent[7] based on a lack of mental capacity is, in the ruling of the Dutch Supreme (Criminal) Court, only acceptable if the accused at the time of the crime lacked any sense or notion of the range and possible consequences of his/her act.

McCauley [15] and Simon and Ahn-Redding [16] give a comparative analysis of the different means of different concepts of insanity in the civil law systems. McCauley begins with what he calls the psychopathological approach which he says exists in Finland, Norway, Greece and Spain. Such an approach reduces the issue of insanity to a diagnosis of mental illness or mental deficiency. The guiding question is: does the accused suffer from a clinically diagnosed mental illness or from mental deficiency when he did the act that forms the basis of the charge against him? McCauley says that the principal criticism of this system is that it trades on the essentially fluid concept of mental illness which is too vague to satisfy the constitutional requirements of legality yet too wide to secure the preventive aims of the criminal law. Looking at Spain, he says that in practice, the Spanish courts have all but abandoned the psychopathological approach in favour of a mixed approach, combining the psychiatric diagnosis with an assessment of the impact of the mental disorder on the accused's reasoning powers.

The psychological approach is practised in France, Belgium and the Netherlands. The approach is in two stages. The first stage is concerned with the question of whether or not the accused is suffering from a serious mental illness, mental illness being defined by codified criteria and not by psychiatric classifications, so insanity is not equated with psychiatric diagnosis. The second stage is to decide whether the mental disorder prevented the accused from understanding the significance of his or her actions or from acting in accordance with such understanding. Stage two was designed to take account of the fact that serious physical psychiatric illness can profoundly alter the accused's capacity to act rationally without impairing his or her freedom of choice. These countries import the concept of *démence*[8] from the code Napoleon, for example, the Belgian penal code allows the insanity defence to anyone who was in a state of *démence* at the time of the act or who committed the act under the influence of an impulse she/he was unable to resist. To reiterate *démence* does not denote a particular psychiatric illness or diagnosis the central issue may be whether the mental condition has undermined his or her autonomy as a moral agent. As McCauley says 'not surprisingly, this formula has not been easy to apply, as its effect has been to replace one set of contentious ideas (the categories of clinical psychiatry) with another (the philosophical concepts of personal autonomy and moral agency)'. The principal difficulty has been to give concrete legal form to the abstract notion of personal autonomy. The French and Belgian penal codes do not require proof of a causal link between the accused's state of mind and the alleged offence; it is enough that he or she was in a condition that qualifies as 'a state D-' at the time of the act.

[7] In distinction to 'lack of criminal responsibility' based on a lack in mental capacity.

[8] Dementia, impaired mental capacity.

A striking feature of the psychological approach is that a successful insanity defence leads in some jurisdictions to an unconditional acquittal. In some jurisdictions, like the Netherlands and Germany, safety measures are nevertheless possible against the former accused if and in so far they can be seen as a threat to public safety, a ground for compulsory measures in (Dutch) mental health law.

1.4.2.3 Sentencing

When it comes to sentencing, there is little difference between the two systems. The trial judge decides what sentence should be applied. The decision is based on an analysis of all the relevant information, mostly gathered during the pre-trial investigation including an examination of the mental capacity of the accused in the civil law system. In the British system, there is very little advocacy from the prosecution, which leaves the judge to decide on the sentence using the facts of the case and the formal sentencing guidelines which are established within the justice system as well as listening to any mitigation that the defence counsel puts forward. The sentencing phase in both can be regarded as inquisitorial; the criminal court has some discretion to tailor the sanction to the evidence available in order to decide on a 'proper' or 'just' sanction.

Conclusion

The inquisitorial system tends to rely on the results of the pre-trial investigation; its advantage is the possibility of a debate at the trial. A possible threat to the inquisitorial system is a trend to forgo the debate at the trial. Adequate psychiatric reports can enhance the debate in both systems. The adversarial system depends upon scrupulous honesty including both the defence and the prosecution revealing their weak points as well as the strong ones. Sometimes the competitive urge to win can compromise this honesty. Judges have to be very alert to ensure that all the rules of the trial kept and fairness are maintained.

Our general conclusion is that, in the end it is not the system of criminal procedure that decides whether the outcome is fair and just, but the way in which the lawyers and others including, sometimes, psychiatrists work adequately together. If a lawyer and doctor in a psychiatric case don't understand each other, then both systems can result in an unfair result.

Take-Home Messages

- A take-home message from this debate is that the two main legal systems even with differences in historical developments have had confessions as the gold standard of proof. These days confessions have to be treated with circumspection and should be supported by scientific evidence. Where in the present times legal systems interact within Europe, convergence of rules, type of procedures and standards will be approached.

- A further point, which follows from this, is that all practitioners should recognise that no one system has achieved perfection or has all the answers; discussion, especially international discussion will be beneficial.
- Psychiatrists should remember that a courtroom in any legal system, be it more inquisitorial or more adversarial oriented, is not a clinic room. But nevertheless, it is perfectly possible to satisfy both medical ethics and the demands of the legal oath provided the limitations and biases of medical evidence are fully acknowledged where psychiatrists are involved in criminal pre-trial and trial investigations and procedures concerning questions of criminal liability, evidence and sentencing.
- It is not the system of criminal procedure that decides whether the outcome of a trial is fair and just, but the way in which the lawyers, the psychiatrists and others work together within the given system.

References

1. Brants C. Wrongful convictions and inquisitorial process: the case of the Netherlands. University of Cincinnati Law Review. 2012;80(2012):1069–114.
2. Royal Commission on Criminal Justice. Report. The Royal Commission on Criminal Justice, cm 2263 London, HMSO; 1993.
3. Devlin P. The judge. Oxford: Oxford University Press; 1979.
4. van der Wolf M, van Marle H, Roesch R. Understanding and evaluating contrasting unfitness to stand trial practices: a comparison between Canada and The Netherlands. International Journal of Forensic Mental Health. 2010;9:245–58.
5. Schwikkard PJ. Possibilities of convergence. An outside perspective on the convergence of criminal procedures in Europe. Deventer: Kluwer; 2008.
6. Potter H. Law, liberty and the constitution, a brief history of the common law. Woodbridge: Boydell Press; 2015.
7. Hostetler J, Braby R. Sir William Garrow, his life, times and fight for justice. Hook: Waterside Press; 2009.
8. Groot RD. The jury of presentment before 1215. The American Journal of Legal History. 1982;26:1–24.
9. Langbein JH. The origins of adversary criminal trial. Oxford: Oxford University Press; 2003.
10. van Caneghem RC. Geschiedenis van het strafprocesrecht in Vlaanderen van de XIe tot de XIV eeuw, Brussels; 1956.
11. Gudjonsson GH. The psychology of interrogations and confessions: a handbook. Chichester: Wiley; 2009.
12. Ogorodova A, Spronken T. Legal advice in police custody: from Europe to a local police station. Erasmus Law Review. 2014;4(2014):191–205.
13. Mevis P, Verbaan J. Legal assistance and police interrogation. Erasmus Law Review. 2014;4(2014):175–90.
14. West DJ, Walk A. Daniel McNaughton, his trial and the aftermath. London: Gaskell Books; 1977.

15. McCauley F. Insanity, psychiatry and criminal responsibility. Dublin: The Round Hall Press; 1993.
16. Simon RJ, Ahn-Redding H. The insanity defense, the world over. Oxford: Lexington Books; 2006.
17. Packer HL. Two Models of the Criminal Process, 113 U. Pa. L. Rev. 1; 1964. http://scholarship.law.upenn.edu/penn_law_review/vol113/iss1/1

Legal Cases

ECHR 27 November 2008, Appl. no. 36391/02 (Salduz v. Turkey).
Hoge Raad der Nederlanden (Dutch highest court in criminal cases), 2 december 2014, ECLI:NL:HR:2014:3473.
Hoge Raad der Nederlanden 26 May 2015, ECLI:NL:HR:2015:1326.