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Richard Vogler
University of Sussex

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REFORM TRENDS IN CRIMINAL JUSTICE: SPAIN, FRANCE AND ENGLAND & WALES

RICHARD VOGLER*

I would like to begin by expressing a very respectful dissent from other speakers who have referred to different “systems” of criminal justice. I would argue, on the contrary, that there are three great global methodologies of criminal justice which have become progressively integrated *within* different systems.¹ First, is the adversarial method developed in the eighteenth century, which is strongly associated with due process, rights, and law. Second, is the inquisitorial method, which is much older and somewhat authoritarian, and which is based upon scientific and forensic inquiry in a very bureaucratic setting. The third method is popular participation in justice, which is characterized by pragmatism and common sense, and is currently represented in the jury system, but through other forms of popular participation as well. I would argue that these methodologies have historically inter-penetrated each other to such an extent that it is no longer possible for us to talk about distinct “systems.”

I am going to concentrate on only one of these: adversariality. Although I will be looking specifically at Spain, France, and England, these countries are part of a worldwide movement towards adversariality. Since the Second World War we have seen adversariality sweeping across Western Europe, Latin America, the former Soviet Union, and into the international tribunals. This movement has been described as a transformation similar to the reception of Roman Law in the *jus commune* period;² a transformation of such enormous importance that it is one of the most important cultural changes of our generation.

I would like to talk about France and Spain together, largely because both derive their criminal justice systems from the Napoleonic *Code d’Instruction Criminelle* of 1808 and, therefore, have strong structural

* Richard Vogler is a solicitor and senior lecturer in law at the University of Sussex in England. He is also involved in international legal reform, most recently in Georgia, but in several other countries as well.

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1. For a more detailed analysis, see RICHARD VOGLER, *A WORLD VIEW OF CRIMINAL JUSTICE* (Ashgate Aldershot ed., 2005) (forthcoming).

2. Wolfgang Weigand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229–48 (1991).

similarities. Along with Belgium, they are the only major European countries to retain substantial elements of the pre-trial *instruction* procedure, which was abandoned in Germany in 1976 and in Italy in 1988.

I am going to take a brief historical digression. In an uncharacteristic fit of Anglo-mania, the French adopted the English criminal justice system in its entirety during the Revolutionary period in 1791, including the radical new concept of adversariality, which was developed in England in the eighteenth century. After sixteen years of war with England, the French were probably less charitable toward us. So when we look at the 1808 codification by Napoleon, we find that the pre-trial of the 1670 *Code Louis*, which involved highly authoritarian, secretive, inquisitorial processes, was reinstated and married to the adversarial English trial phase.³ Thus, the 1808 *Code d'Instruction Criminelle* is a deeply conflicted system based upon a hybridization of the former inquisitorial 1670 pre-trial mode with the eighteenth-century English adversarial trial stage. Charles Ganilh, who was one of the revolutionaries opposed to this development, said,

It is proposed to you to make this occult and treacherous procedure the foundation of the grand jury's decision, and to infect our criminal procedure, one of the greatest blessings of the Revolution, with one of the greatest defects of the criminal procedure under the Monarchy! Such an impure mixture cannot be made . . . There can be no alliance between the oppressive forms of the Monarchy and the protective forms of the Republic. They are naturally repugnant to each other, and cannot concur in bringing about the same end.⁴

Yet, this is exactly what happened in the 1808 codification. As Esmein put it, as the defendant proceeds through the system, he passes from obscurity into the full light of day. There, the procedure was secret, written, and always favorable to the prosecution in pre-trial. Here, everything is publicity, oral trial, free defense and full discussion in the trial.⁵

It was just this *Code d'Instruction Criminelle* of 1808, a flawed and fundamentally oppressive hybrid, which has become the dominant form of trial around the world. Interestingly, the common law adversarial mode

3. See VOGLER, *supra* note 1, at 46–60.

4. ADHEMAR ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE WITH SPECIAL REFERENCE TO FRANCE 442–43 (John Murray ed., 1914).

5. *Id.* at 510.

flourished only in places where it was imposed by the British and nowhere else. New countries adopted the French Code largely, by translating it.

I say it is a “flawed” code because, in my view, the hybridization produces some anomalous results. In particular, the pre-trial phase is preoccupied with compiling a written dossier, which becomes functionally irrelevant during the oral trial stage. Judges must also perform the competing roles of investigator and impartial guardians of the rights of those they investigate. A rights-based adversarial importation, such as the presumption of innocence, is logically incompatible with a decision-making process based upon a forensic test of *intime conviction* (personal certainty) rather than proof beyond a reasonable doubt. Also, enacted rights of silence become impossible, even subversive, in a pre-trial phase that depends upon a constant dialogue between the accused and state officials. In short, the domination of the official inquiry in the pre-trial successfully subverts and undermines the basic methodology of the oral adversarial trial stage.

I say “oppressive” because the 1808 Napoleonic Code, with very little modification, proved to be the weapon of choice of European totalitarianism in the first half of the twentieth century, particularly in Soviet Russia and Nazi Germany, where it needed very little reform to make it serviceable to them.⁶ In Vichy, France until 1944 and in Francoist Spain until 1975, the Napoleonic Code permitted Fascist militaries to manipulate and even dominate the ordinary processes of justice. Since that time, authoritarianism in the European justice system has proved much more intransigent and resistant to reform than political authoritarianism in Europe. This has particularly been the case in Spain and France, both of which have been among the slowest European countries since the last war to adopt due process reforms. For example, in Spain, as late as 1975, political defendants could be diverted to secret military courts, *Tribunales de Orden Público*. And at the same time the Spanish courts and judiciary, were dominated by the paramilitary police, and, therefore, by the army. The procedure in the courts was described as secretive, inquisitive, and summary. Similarly, in France during the 1960s Algerian crisis, military tribunals along Vichy lines, were re-established. Incredibly, for three decades thereafter, up to the 1990s, French police stations remained substantially unregulated by law and completely impenetrable by lawyers.

However, in the last twenty-five years, these countries have made highly significant changes. The situation in Spain was transformed in the

6. VOGLER, *supra* note 1, at 62–89.

1980s, although, in France the changes took longer, which is surprising given France's history of political liberty. Here, the changes did not come about until the decade of 1993 to 2004.

I will start briefly with Spain. After the death of Franco, a new liberal constitution was enacted in 1978, which is hailed, rightly, as one of the most progressive in Europe, and includes provisions requiring oral trial. These provisions clearly conflicted with the criminal procedural law, a conflict that was slowly resolved by a series of organic laws between 1984 and 1992. The incredible transformation of the Spanish system in that period is well illustrated by the Barbera & Messegue trials of 1981 to 1994.⁷ The original 1981 trial was a summary bureaucratic affair conducted before a judge wearing a fascist party badge. The entire investigative file, including statements obtained through torture, was received into evidence without formally being read out in court. After a lengthy appeal process, the European Court of Human Rights condemned Spain for failing to respect the principles of orality and the presumption of innocence. The defendant was subsequently acquitted and compensated after a retrial in 1993, which was, according to some, adversarial and fair, and marked the immense distance traveled by Spain in that period. Between 1978 and 1983, a regime of rights at the police station was established; by 1986 the police were demilitarized. Habeas corpus was introduced in 1984. Finally, a system was set up for the representation of defendants at the police stage and in court shortly thereafter.

These fundamental changes were violently opposed at the time and were highly contentious in Spain. They are only now beginning to settle in, and I doubt that more reform change is now possible. For example, the State Pact for the Reform of Justice of May 2001, which was the blueprint for further reforms to Spanish criminal justice, made no mention of adversariality and, unfortunately, delegated procedural rights to a fairly low priority. Emphasizing, in the first stage of reform, a more streamlined, abbreviated procedure.

Opposition to the introduction of adversariality was even fiercer in France. In 1949, reforms were proposed by the distinguished jurist Donnedieu de Vabres, not unlike those later achieved in Italy and Germany, but were subsequently abandoned because of the level of official opposition. Forty years later, similar controversy attended the publication of the Human Rights Commission Report, under the direction

7. Barbera, Messegue, & Jabardo v. Spain, 11 E.H.R.R. 360 E.C.H.R. (1989). See Dennis P. Riordan, *The Rights to a Fair Trial and to Examine Witnesses Under the Spanish Constitution and the European Convention on Human Rights*, 26 HASTINGS CONST. L.Q. 373 (1999).

of Mireille Delmas-Marty, where the same kind of adversarial approach to the pre-trial was suggested. In 2002, French scholars still complained of the constant siren voices of the Anglo-Saxons, which were now becoming so clamorous that scarcely a day passed without the American criminal justice system being held up to us as an ideal model.⁸ There has been tremendous resistance to these “siren voices” in France, expressed most pithily by Madame Gigou, the former justice minister:

The adversarial system of justice is by nature unfair and unjust. It favors the strong over the weak. It accentuates social and cultural differences, favoring the rich who are able to engage and pay for the services of one or more lawyers. Our own system is better both in terms of efficiency and the rights of the individual.⁹

As previously mentioned, the police station was almost completely closed to lawyers until 1993, when representation was possible after twenty hours of detention. In regard to these reforms, the Minister of Justice announced, “I rejoice to see my country rejoin the community of civilized nations. This reform is a real revolution.”¹⁰ Unfortunately, the reforms were immediately largely overturned by the right-wing government that had come into power. It was not until 2000 that a French defendant could actually see a lawyer at the time of arrest and due process provisions were embedded in the system. Furthermore, the procedural code, as amended in 2000, announced at the outset that the new criminal procedure should be fair and adversarial. February of this year saw retreat, to some extent, from these provisions by extending the police phase and the provisions for exclusion of lawyers in organized crime cases. Yet, this exclusion also includes all homicides committed by more than one person and has made the police stage inaccessible to lawyers for periods of up to ninety-six hours in terrorism cases, and forty-eight hours in jointly-committed homicide cases. There has been a great deal of controversy about this new procedure in France. The head of the Lille bar said recently, “Four days of police custody, that is four days of the Middle Ages, cut off from the world; that is incredible regression.”¹¹

So both countries have preserved the instruction procedure. Both countries have also made a vigorously contested attempt to introduce more

8. SERGE GUINCHARD, & JACQUES BUISSON, PROCÉDURE PÉNALE 143 (2000).

9. Jacqueline Hodgson, *Codified Criminal Procedure and Human Rights: Some Observations on the French Experience*, CRIM. L. REV. 165–82, 175–76 (2003).

10. LE MONDE, Dec. 21, 1992, at 6.

11. LIBÉRATION, Feb. 11, 2004.

adversariality and perhaps have achieved a degree of success by firmly entrenching a rights regime in the pre-trial, particularly regarding a defendant's right to have access to lawyers. Unfortunately, there have been recent attempts to turn back from this progress.

In England and Wales, the situation is different. England and Wales have had an adversarial system for much longer. What we see in England and Wales is the move to what I call "third-stage adversariality." In the period since the Second World War, we have lawyerized our pre-trial, created a professional prosecution service, and entrenched a network of pre-trial procedural rights under the Police and Criminal Evidence Act of 1984.

As I have indicated, there has been a considerable reaction since that time, but I think the 1984 Act was a major achievement for us, echoing many of the advances which were established by the Warren Court here in the United States in the 1960s. It was created largely by the lawyer's colonization of the pre-trial in the post-war period following from the developments of mass legal aid. In our case, indigent defence, is conducted not by public defenders but by publicly-funded private lawyers. In the 1960s and 1970s in the UK lawyers poured into the pre-trial stage and created a competitive market. They overturned the 1912 Judge's Rules which had hitherto provided only very limited regulation of the pre-trial.

Partly as a result of a number of miscarriages of justice cases and the Royal Commission in 1981, a completely new regime of rights was established in our pre-trial. These include codified rights on arrest and detention, stop and search, fairness of interrogation, conduct at the police station, and videotaping of interrogations. This new regime put in place a network of procedural rights that has—in my experience having worked as an advocate during that period—completely revolutionized our pre-trial. In many ways, I would hold the current regime up as a model, despite recent problems such as cuts to legal aid.

Taken as a whole, I think we can see the new pre-trial regime, created between 1984 and the enactment of the Human Rights Act in 1998 in England, as an important national achievement. Aware that the main provisions of the Police and Criminal Evidence Act of 1984 were irreversible, senior police and conservative allies are now attempting to reintroduce elements of compulsion on the accused, which one would associate with more inquisitorial methodologies. For example, the right of silence, despite two Royal Commissions that advocated its retention, was significantly qualified by the Section 34 of the 1994 Criminal Justice and Public Order Act, which permitted adverse inferences to be drawn in court when defendants rely on facts not disclosed to the police. Fortunately, it is

now clear from the empirical research that this measure has had very little practical effect. The same could be said of the changes introduced by Section 5 of the Criminal Procedures and Investigations Act of 1996. This section requires the defense to alert the prosecution to the general lines of defense. We all thought, at the time, this was an absolute catastrophe. In fact, the judges have not rigorously enforced these provisions against the defence.

So, in respect of this brief *tour d'horizon* of reform in Western Europe, I would say that the changes that have occurred since the Second World War have been hugely important and were driven both by the American hegemony in law and legal practice as well as the jurisprudence of the European Court of Human Rights. But, I would not necessarily characterize this as an Americanization of European criminal practice. I think that, to a certain extent, we are going back to our historical roots in the Enlightenment, because the ideas about adversariality emerged specifically from the European Enlightenment. They were destroyed by European totalitarianism in the first half of the twentieth century, but they are now experiencing a clear revival. And despite current problems, such as the war on terror, which is having a serious impact, these are momentous developments with far-reaching implications for our democracies and we should welcome them warmly.