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15. Strength, weakness, or both? On the endurance of the adversarial-inquisitorial systems in comparative criminal procedure

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1. INTRODUCTION

This book has gathered essays by a group of distinguished comparative criminal procedure scholars who are mostly based in Europe and the United States. Given that comparative criminal procedure is a small academic field, the 14 chapters by these 17 scholars can be considered representative of the main trends in comparative criminal procedure scholarship today. In addition, because a substantial number of these scholars have been in legal academia for less than twenty years, they not only represent the current generation of comparative criminal procedure scholars, but also indicate which directions this scholarship is likely to take in the upcoming years.

Writing the epilogue of this Handbook provides a unique opportunity to make a general reflection on comparative criminal procedure as a field of research, inquiry and policy-making. This chapter will concentrate on the opposition between adversarial and inquisitorial systems in particular and between civil law and common law more generally, distinctions that have been at the center of comparative criminal procedure for a very long time. Contrary to claims that comparative criminal procedure is a new field, my first argument in this epilogue is that this collection of essays shows that contemporary comparative criminal procedure is an heir of this adversarial-inquisitorial and common law-civil law tradition. Ten out of the 14 essays make the distinction between adversarial and inquisitorial systems central to their analysis (Boyne, 2016; Grande, 2016; Hodgson, 2016; Iontcheva Turner, 2016; Mazzone, 2016; Thaman, 2016; Wen and Leipold, 2016) or structure their analysis as a comparison between civil law jurisdictions like France or Germany and common law jurisdictions like England or the United States (Cohen, 2016; Ross, 2016; Vogler and Fouladvand, 2016). The four remaining essays also use the

distinctions between adversarial and inquisitorial systems (Johnson, 2016; Kovalev and Thaman, 2016; Slobogin, 2016) or Anglo-American versus non Anglo-American jurisdictions (Khanna and Mahajan, 2016) in their analysis, even if these distinctions are less central.

I also argue that these essays show that the distinctions between adversarial and inquisitorial systems and common law and civil law still provide important insights for analysis of the criminal process from a comparative angle. I thus do not suggest that comparative criminal procedure should abandon the use of these categories. However, I also maintain that, in many contexts, the centrality of the adversarial-inquisitorial and common law-civil law distinctions have had blinding, blurring and distracting effects on comparative analysis of the criminal process. I illustrate these effects with examples taken from this collection's essays, as well as from other comparative criminal procedure contexts, such as the recent wave of Latin American adversarial criminal procedure reforms. Finally, I argue that in order to be an even richer field of research, judicial and legal analysis and inquiry and policy-making, comparative criminal procedure may have to transcend the adversarial-inquisitorial and common law-civil law dichotomies.

2. CONTEMPORARY COMPARATIVE CRIMINAL PROCEDURE AS AN HEIR OF THE ADVERSARIAL-INQUISITORIAL AND COMMON LAW-CIVIL LAW INTELLECTUAL TRADITION

Comparative criminal procedure has used the distinction between civil and common law for a long time. In the fifteenth century, the English judge and thinker Fortescue compared the criminal processes of common law and civil law (Fortescue, 1997) (on Fortescue's contributions to comparative criminal procedure, see Langer (forthcoming 2016)). In the eighteenth century, continental European commentators and policy-makers became deeply interested in English criminal procedure, discussed the differences between the criminal processes of England and the Continent, and considered the former as a model for reform (Schioppa, 1986).

At some point between the end of the eighteenth century and the first half of the nineteenth century, commentators started to use the expressions 'accusatorial system' and 'inquisitorial system' to refer to the Anglo-American and continental European criminal processes respectively (H., 1834; Hélie, 1853; Mittermaier, 1832, 1834). The accusatorial

system was defined as a criminal process controlled by the parties, with the court as a passive umpire. The accusatorial process did not try to elicit the defendant's confession to prove the defendant's guilt, and adjudicated criminal cases in an oral, public trial by jury. Adjudicators had to evaluate the evidence freely, according to their impressions of the case, and their verdict could not be appealed. In contrast, the inquisitorial system consisted of a criminal process controlled by the court, in which the court acted on its own initiative in investigating and adjudicating cases. The inquisitorial process tried to elicit the defendant's confession as part of its investigation of the case, and adjudicated criminal cases in written, secret proceedings by professional judges. Adjudicators had to evaluate the evidence of the case according to a system of legal proof, and their verdict could be appealed (H., 1834; Hélie, 1853; Mittermaier, 1832, 1834).

Despite claims that comparative criminal procedure is a new field (Grande, 2012; Roberts, 2002),¹ the chapters in this collection show that today's scholarship is a continued reflection of the nineteenth-century conception of these comparative categories of accusatorial (later also referred to as 'adversarial') and inquisitorial. Like nineteenth-century commentators, the authors of these chapters associate the adversarial system with Anglo-American jurisdictions and the inquisitorial system with Continental Europe (Boyne, 2016; Hodgson, 2016; Johnson, 2016; Mazzone, 2016; Wen and Leipold, 2016). The scholars in this collection also associate the differences between an adversarial system and an inquisitorial system with: party-driven versus impartially-driven procedure (Boyne, 2016; Grande, 2016; Hodgson, 2016; Iontcheva Turner, 2016; Thaman, 2016); passive versus active tribunals (Grande, 2016; Wen and Leipold, 2016); strong versus weak right to counsel (Boyne, 2016; Johnson, 2016; Hodgson, 2016; Wen and Leipold, 2016); strong versus weak protections against coerced confessions (Hodgson, 2016; Mazzone, 2016); oral versus written proceedings (Iontcheva Turner, 2016; Thaman, 2016); trial by jury versus trial by professional judges (Cohen, 2016; Grande, 2016); and limited versus broad appealability of verdicts (Cohen, 2016; Iontcheva Turner, 2016).

Nineteenth-century commentators associated the accusatorial and inquisitorial systems with different conceptions of truth and different types of social and political systems. Thus, a number of commentators considered that each system had its own way of gathering, producing and evaluating evidence, and of determining the truth about a case. According to one scholarly account, the accusatorial system had a 'synthetic conception' of investigating the truth, since each of the parties had to present evidence that supported its assertions. The accusatorial system

also assumed that proper evaluation of evidence only required the common sense, education and experience of any citizen. In contrast, the inquisitorial system had an ‘analytical conception’ of determining the truth, since each procedural step required clear indications that the defendant was guilty. In addition, the inquisitorial process required the government-appointed professional adjudicators to apply a system of legal proof assumed to be the product of scientific knowledge (Mittermaier, 1834).

Like commentators in the nineteenth century, the authors of these essays also conceive of the accusatorial and inquisitorial processes as systems (Grande, 2016; Iontcheva Turner, 2016; Johnson, 2016; Mazzone, 2016). One or more epistemological, social, or political principles underpin and connect the features of these processes.

For instance, in an elaboration of classical epistemological themes, Grande (2016) argues that at the core of the difference between adversary versus non-adversary proceedings would lie a very different attitude toward the search for the truth. The adversary system would embrace an interpretative conception of truth, capturing its skepticism about the possibility of an objective reconstruction of reality and based on the belief that the only realistically discoverable truth is a ‘second-best one’. In contrast, non-adversary proceedings would embrace an ontological conception of truth based on the belief that an objective reconstruction of reality is attainable (Grande, 2016).

Similarly, Professor Iontcheva Turner’s argument that the adversarial and inquisitorial traditions can explain some of the different limits that competing policies impose on the search for truth in different legal systems can also be considered an elaboration on this traditional theme. One of the classic arguments she invokes is that the inquisitorial tradition has a stronger preference for procedures that enhance accuracy and ensure the consistent application of legal norms (Iontcheva Turner, 2016).

Commentators in the nineteenth century also associated the accusatorial system with a democratic or people’s conception of the state, aimed at protecting individual rights and liberties, and the inquisitorial system with an authoritarian or monarchical conception of the state, aimed at efficiently enforcing criminal law (Hélie, 1853; Mittermaier, 1834). Elaborating on this theme and relying on Mirjan Damaška’s work, Elisabetta Grande (2016) argues in her chapter for this collection that there was a relationship between the development of adversarial proceedings and Lockean political liberalism in England. Jacqueline Hodgson (2016) might also be touching on this theme when she argues that the adversarially-rooted tradition of England and Wales provides a stronger right to counsel than the inquisitorially-rooted tradition of France and the

Netherlands. Relatedly, David Johnson (2016) argues in his essay that the introduction of lay adjudicators in Japanese criminal justice can re-invigorate the ideals of democracy in that country.

Finally, nineteenth-century commentators understood the adversarial-inquisitorial distinction as a way to explain the institutional differences between, and different rules of, the criminal processes in common law and civil law jurisdictions. Similarly, all the chapters in this collection concentrate on the rules and institutions of the criminal process rather than on other aspects, such as who are the adjudicators, prosecutors, defense attorneys, defendants and victims in the criminal processes of different jurisdictions.

3. THE ADVERSARIAL AND INQUISITORIAL CATEGORIES AS A STRENGTH

The chapters in this collection not only illustrate that the distinction between adversarial and inquisitorial systems is both old and alive, but also that it still has important explanatory and heuristic value for comparative analysis of criminal processes.

The first reason for the persisting utility of these categories is that many of the elements of the adversarial and inquisitorial systems help explain important differences between the criminal processes of different jurisdictions. The categories thus constitute helpful theoretical tools to analyze criminal proceedings synchronically and diachronically (Langer, 2004, 2005; Langer and Roach, 2013).

For instance, in her chapter, Hodgson (2016) employs these categories and analyzes how England and Wales, Scotland, France and the Netherlands have reacted differently to the decision by the European Court of Human Rights in *Salduz v. Turkey* (36391/02 [2008] ECHR 1542), which held that a suspect has a right to have a lawyer present before and during police interrogation, and to European Union legislation establishing, among other things, the right of access to a lawyer.

Hodgson explains that England and Wales statutorily established the right to custodial legal advice in 1984, but that the other jurisdictions introduced reforms after *Salduz*. She describes important differences in the right to custodial legal advice in each of these jurisdictions, with England and Wales having the strongest conception of this right, followed by Scotland, and then by France and the Netherlands. In England, the lawyer is permitted to be present during the police interrogation of a suspect and may seek clarification of questions and object to inappropriate questions. In Scotland, those arrested and detained for questioning are

permitted to consult with a lawyer in private and to have a lawyer present during the police interrogation, and the lawyer may seek clarification of questions and object to inappropriate questions. However, in Scotland, lawyers prefer to speak to suspects by telephone, rather than in person, and are routinely absent from the interrogation. In France, the lawyer may be present during the police interrogation but must remain passive, legal assistance prior to questioning is limited to 30 minutes, and the lawyer is a 'duty lawyer', rather than the suspect's own lawyer. In the Netherlands, the lawyer may not be present during the police interrogation, legal assistance prior to questioning is limited to 30 minutes, and the lawyer is a 'duty lawyer', rather than the suspect's own lawyer.

Hodgson argues that these differences in the regulation and practice of the right to counsel can be explained using the adversarial-inquisitorial categories. In an adversarially-rooted jurisdiction like England and Wales, criminal procedure is conceived of as a contest between two parties. This has led to a stronger conception of the role of the defense attorney. In addition, the police act on their own during interrogation and custody, which makes the role of the defense lawyer central to ensuring that due process is respected. In inquisitorially-rooted jurisdictions like France and the Netherlands, criminal procedure has been conceived of as an impartially-driven investigation, and the police act under the hierarchical control of prosecutors who are, in theory, impartial officials. As a consequence, in these jurisdictions the role of the defense attorney would be more limited. As a mixed jurisdiction, Scotland falls somewhere in between the other three jurisdictions.

Hodgson's analysis is particularly persuasive because it indicates that these differences in the right to custodial counsel are present not only in the letter of the law but also in the implementation of the regulations. She also goes beyond a general invocation of the adversarial and inquisitorial systems and articulates specific reasons why party-driven versus impartiality-driven proceedings and less or more hierarchical administrations of criminal justice would lead to different conceptions of the role of the defense attorney. Her analysis illustrates the usefulness of the adversarial and inquisitorial categories to describe and explain persisting cultural and power-distribution differences among different actors and institutions across several contemporary criminal processes (Langer, 2004).

Another example of the persisting explanatory usefulness of the adversarial and inquisitorial categories comes from Professor Boyne's chapter, which she presents as an indictment of the current validity of the adversarial and inquisitorial categories as normative models in the United States and Germany. Boyne (2016) persuasively argues that caseload

pressures have created incentives for prosecutors to dispose of criminal cases without full-fledged public trials and have thus led the American and German criminal proceedings to skew the structure and goals of their truth-finding processes and move away from their normative models.

But her analysis also illustrates that these systems' reactions to the pressures do reflect the social and institutional norms of the adversarial and inquisitorial conceptions of the criminal process (Langer, 2004). As Boyne acknowledges in her piece, in the U.S. system, in which the prosecutor is conceived of as a party and in which prosecutors have a 'conviction mentality', prosecutors are more likely to seek convictions through plea bargains. By contrast, in Germany, where the prosecutors are conceived of as objective officials and are isolated from politics by a bureaucratic apparatus, prosecutors do not view cases as an opportunity to 'win' in the courtroom. As a consequence, in response to caseload pressures, the initial instinct of German prosecutors is not to over-charge cases to gain leverage in the negotiating process as many American prosecutors do, but rather to find a way to close the file using one of the pretrial proceedings, in all except the most serious cases (Boyne, 2016).

Boyne also rightly acknowledges that other correlates of the adversarial and inquisitorial dichotomy, such as the strong versus weak right to counsel, of less versus more hierarchical organization of the prosecution service, and of an informal pretrial phase versus a written dossier, all help to explain differences between the U.S. and German pretrial phases in criminal proceedings, even when both jurisdictions experience similar caseload pressures (Boyne, 2016).

Grande (2016), too, shows the persisting usefulness of these categories, by arguing that, to this day, Anglo-American criminal proceedings are structured like a dispute between two parties, while Continental criminal procedures are structured as officially driven investigations. The adversarial/inquisitorial concepts enable her to analyze the extent to which Spanish criminal procedure changed with the introduction of the jury in 1995. Iontcheva Turner (2016) also shows how the adversarial and inquisitorial traditions may explain the ways in which different jurisdictions have regulated double jeopardy rules, plea agreements and other consensual arrangements, as well as trial verdicts.

A second reason why the adversarial and inquisitorial categories are useful tools is that they enable researchers to generate hypotheses to explain or account for differences between procedural regulations across jurisdictions. For example, based on the history of the hierarchical conception of the administration of justice in the inquisitorial systems of continental Europe, Professor Cohen (2016) hypothesizes that the European Court of Human Rights' decision in *Taxquet* establishes not (only) a

defendant's human right to understand his convictions, but (also) a mechanism to monitor trial judges through appeals. The generation of this type of hypothesis is useful even when the hypothesis is proven wrong or cannot be fully proven.

A third reason why the adversarial and inquisitorial systems are still useful theoretical tools is because, if carefully used, they enable scholars to discuss a large number of jurisdictions at once, which can be helpful in analyzing specific topics from a global perspective. Professor Thaman's chapter is an example. Thaman (2016) argues that the current regulation and implementation of trials and appeals in both civil law and common law jurisdictions – including the requirement that convictions be based on a reasoned judgment reviewable on appeal – are insufficient to prevent wrongful convictions. Employing the distinction between civil law and common law criminal proceedings and giving specific examples from each type of jurisdiction, Thaman illustrates his argument about the insufficiency of current regulations in both traditions. This enables him to articulate a global argument for the introduction of formal rules of evidence in serious criminal cases directed at jurisdictions in both traditions. These rules would include, for example, a negative corroboration rule in 'witness against witness', 'eyewitness identification' and 'confession' cases.

4. THE ADVERSARIAL AND INQUISITORIAL CATEGORIES AS A WEAKNESS: THEIR BLINDING, DISTRACTING AND BLURRING EFFECTS

Despite the continued utility of the distinction between adversarial and inquisitorial systems in particular and common law and civil law more generally, the centrality of these categories also has had negative effects on the comparative analysis of the criminal process.

The first of these negative effects is *blinding*. The centrality of the adversarial-inquisitorial distinction has made aspects of or perspectives on the criminal process invisible to comparative criminal procedure scholars (and judges and policy-makers). The second of these effects is *distracting*. Even when comparative criminal procedure scholars have been aware of unexplored issues around the criminal process, the centrality of the adversarial-inquisitorial categories has led scholars (and judges and policy-makers) to concentrate on certain topics, perspectives and methodologies to the detriment of others. The third of these effects is

blurring. The centrality of these categories has, in some cases, impoverished the analysis by comparative criminal procedure scholars (and judges and policy-makers).

Let me illustrate these effects with a few concrete examples,² mostly from this collection, starting with the *blinding* and *distracting effects*.³ First, comparative criminal procedure has been mostly interested in understanding and explaining the differences between Anglo-American and Continental European jurisdictions. While not its exclusive interest, this distinction has long been central to the discipline. The centrality of the association of the adversarial and inquisitorial categories with, respectively, Anglo-American and continental jurisdictions has likely contributed to the perpetuation of the geographical limitations of the field.

This association has conferred primacy on explaining England, the United States, France, Germany and Italy because the adversarial and inquisitorial systems were abstracted from these countries' criminal processes and/or because these jurisdictions are considered the most influential originators or adapters of adversarial and inquisitorial ideas and practices. This downplays the criminal processes of lower income countries and non-Western countries, making most comparative criminal procedure scholarship an enterprise to understand the developed West, rather than a truly global exercise.

This collection reflects this phenomenon, even if its first-rank editors have made a conscious effort to include chapters about India (Khanna and Mahajan, 2016), Japan (Johnson, 2016), Russia (Kovalev and Thaman, 2016), and Taiwan (Wen and Leipold, 2016), and even if two chapters use examples from around the world to discuss their topics (Iontcheva Turner, 2016; Slobogin, 2016). Still, eight of fourteen essays in this collection primarily analyze European jurisdictions and the United States (Boyne, 2016; Cohen, 2016; Grande, 2016; Hodgson, 2016; Mazzone, 2016; Ross, 2016; Thaman, 2016; Vogler and Fouladvand, 2016).

Another illustration of the blinding and distracting effects is that, though comparative criminal procedure has assumed that individual jurisdictions may be members of legal families and that jurisdictions may influence each other (Grande, 2016; Langer, 2004), it has been interested, almost exclusively, in a criminal process that investigates and prosecutes criminal cases within a single jurisdiction, most typically within a single nation-state. The prosecution of cases for which the crimes, persons or evidence are located outside the prosecuting jurisdiction has attracted the interest of transnational criminal law, international relations and international law scholars, but little attention from comparative criminal procedure quarters. This limited interest may relate to the shaping of the

discipline of comparative criminal procedure by the adversarial and inquisitorial categories, which occurred before transnational crime became an important phenomenon. Within the traditional comparative criminal procedure paradigm, the goal has been to explain differences in the way civil and common law jurisdictions prosecute and adjudicate their own domestic crime, rather than to understand how jurisdictions may interact with each other in the prosecution and adjudication of individual cases.⁴

This collection of essays reflects this narrow focus as none of the essays (with the possible limited exception of Ross (2016)) concentrates on the transnational dimensions of prosecuting and adjudicating crime.

Another example of the blinding and distracting effects is that comparative criminal procedure has maintained its focus on doctrine, institutions and roles. The field has been mostly interested in explaining why civil and common law jurisdictions have different rules and institutions to prosecute and adjudicate crime, and why prosecutors, judges, defense attorneys and other actors are assigned different roles in each type of jurisdiction; in explaining the principles or rationales that may underlie these rules, institutional arrangements and roles; in using these doctrinal, institutional and role differences to analyze specific criminal procedure issues; and in evaluating which set of rules, institutional arrangements and roles is most appealing. These differences between rules, institutions, and professional roles are the salient features for observers interested in contrasting adversarial and inquisitorial systems.

All of the essays in this collection fit into this narrowly focused perspective. For instance, none of them gives us a sense of the class, educational background, gender, immigration status or race of the main players in the criminal processes across jurisdictions, such as defendants, victims, witnesses, judges, prosecutors, defense attorneys, and others.

A final illustration of the blinding and distracting effects is that, despite its fixation on institutions and roles, comparative criminal procedure scholarship has shown interest mostly in a limited set of criminal justice institutions and actors – those related to the formal process of prosecution and adjudication. Once again, the lingering influence of the adversarial and inquisitorial processes may result in highlighting differences in institutions and actors such as the office of the prosecutor, the courts, and the bar, rather than in other institutions and actors that play a role in the criminal process, such as the police, diversion/probation officers, post-conviction and post-appeal proceedings, and administrative agencies, just to mention a few.

As one example, comparative criminal procedure has arguably done little to explain the police as an institution. To be sure, the legal powers

of the police and the rights of suspects during police investigation are often covered in comparative analyses of the criminal process (Bradley, 2007; Thaman, 2008), as Hodgson (2016), Ross (2016), Slogobin (2016) and Vogler and Fouladvand (2016) illustrate in this collection. Professor Ross has also done important work on covert policing (Ross, 2007, 2008). However, we know little about how different law enforcement agencies employ criminal process across disparate social groups, how police departments are structured as organizations, the demographics of police departments, or the array of functions police departments perform in different jurisdictions. The limited attention paid to the police may be a consequence of the police world-wide being, by definition, inquisitorial, in the sense that they investigate cases on their own initiative and in relative secrecy. The adversarial-inquisitorial opposition may fail to trigger interest in and study of the diverse configurations of these inquisitorial institutions.

Similarly, we know very little about what types of administrative agencies (other than police) play a role in the prevention, investigation and prosecution of crime in different jurisdictions, and how these administrative agencies perform these roles.

As for possible illustrations of the *blurring effect* of adversarial and inquisitorial systems, it is important to note that the adversarial and inquisitorial systems are multi-dimensional models. In other words, the adversarial and inquisitorial systems include many features, such as party-driven versus impartial procedure, passive versus active tribunals, strong versus weak right to counsel, strong versus weak protections against coerced confessions, oral versus written proceedings, trial by jury versus trial by professional judges, and limited versus broad appealability of verdicts. Even when these multiple dimensions are reduced to a few underlying variables, those variables themselves are often multiple. For instance, adversarial and inquisitorial features are often reduced to sets of opposing variables, such as dispute versus inquiry and day-in-court versus sequential process (Damaška, 1986; Langer, 2004).

My point is not to dismiss multi-dimensional models. Comparative criminal procedure has produced many positive insights through these models and should keep using them when they are appropriate to describe or analyze a phenomenon. For example, relying on multi-dimensional models can be a very helpful tool for identifying and analyzing interrelated features of a given social or institutional practice, such as a procedural culture or power arrangement (Langer, 2004, 2005).

However, multi-dimensional models can be problematic when used to analyze other types of social or institutional phenomena. For instance, in analyzing why different jurisdictions have different levels of pretrial

detention, the adversarial and inquisitorial systems have been proposed as the main independent variable under the hypothesis that the more inquisitorial a jurisdiction, the higher the levels of pretrial detention (Binder, 1993). But even if there were a correlation between inquisitorial systems and levels of pretrial detention, the problem with this hypothesis is that the inquisitorial system may have multiple features that may affect the levels of pretrial detention, such as a weaker presumption of innocence, a more formalistic process with a written dossier that leads to longer time between arrest and conviction, investigating judges that may be conflicted between their prosecutorial and adjudicatory roles, and a secret pretrial phase. Using the inquisitorial and adversarial systems as independent variables would not enable us to tease these four elements apart to determine whether it is one of them, a combination of them or none of them that leads to higher levels of pretrial detention.

To use an example from this collection as further illustration, in her informative and thought-provoking chapter, Professor Cohen (2016) argues that the introduction in France of the requirement that juries give reasons may not be a way to safeguard defendants, but a tool to control trial judges by monitoring their decisions through appeals. She articulates this hypothesis based on the civil law and inquisitorial hierarchical conception of the administration of justice predominant in France, in which superior judges control lower-court judges through different mechanisms. But, relying on this same tradition, which not only established hierarchical controls of adjudicators but also distrusted lay adjudicators, could it not be true that the new requirement suggests instead a distrust of lay decision-makers, rather than an attempt to control lower professional judges? I am not saying that Professor Cohen's hypothesis has less explanatory power than this alternative one – she knows the French legal system better than I do. But if the basis for articulating her hypothesis is the French inquisitorial history and tradition, multiple features immediately come into play.

Another possible example of the *blurring effect* comes from the fact that comparative criminal procedure analyses based on the adversarial and inquisitorial systems have tended to emphasize certain factors, such as different types of political regimes, theories of truth and cultural factors, to explain why different jurisdictions have different criminal procedure rules and institutions, and assign different roles to the main actors in the criminal process. Using the adversarial and inquisitorial systems as central categories thus may lead to overvaluing the influence of these factors compared to the many other factors that may affect the criminal process.

In their important chapter discussing a jurisdiction under-studied by comparative criminal procedure, Professor Wen and Professor Leipold (2016) argue that Taiwan's Continental tradition, with its rule of mandatory prosecution, may help explain why prosecutors have brought weak cases, especially against politicians. But as I read their chapter, I wondered whether other factors, such as the strength of institutions, incentives for prosecutors or contemporary politics in Taiwan, may be more important in explaining why Taiwanese prosecutors brought those weak cases against politicians. Professor Wen and Professor Leipold know Taiwan's criminal justice and political systems much better than I do, so I am probably wrong about the explanatory power of these alternative variables. However, my questions still illustrate my broader point.

A final example of the *blurring effect* comes out of the normative use of the adversarial and inquisitorial categories. Many scholars and policy-makers have framed the choice between adversarial and inquisitorial systems as the central normative choice in criminal procedure. The wave of criminal procedure reforms in Latin America over the last twenty-five years provides an illustration of this phenomenon. Policy-makers and scholars argued that shifting Latin American criminal proceedings from an inquisitorial to an adversarial system was crucial to reducing corruption of the main actors in the criminal justice system and to improving due process standards as well as the efficiency of the criminal process in investigating and prosecuting crime (Langer, 2007).

For example, reformers argued that re-defining judges as passive umpires instead of active investigators would enable them to evaluate guilt, pretrial detention, arrests, and searches and seizures more impartially. However, it is unclear that defendants tried by passive judges feel that they are treated more fairly than those tried by investigating trial judges (Bergman and Langer, 2015). The fairness of proceedings may depend not only on factors associated with the adversarial-inquisitorial dichotomy, such as a judge's role at pretrial and trial, but also on other factors, such as the quality of indigent defense systems or the level of social and educational gap between criminal defendants and the professional actors of the criminal justice system. In addition, even if Latin American criminal procedure reforms have generally reduced the percentage of inmates in pretrial detention, this result seems to have been achieved mostly by introducing and implementing guilty pleas, with attendant reductions in the time it takes to adjudicate cases, rather than through more impartial decision-making by pretrial judges (Bergman and Langer, 2015).

Similarly, Latin American reformers claimed that separation between prosecutors and judges (an adversarial characteristic) combined with enhanced prosecutorial powers would improve the Latin American criminal justice systems' ability to lead complex criminal inquiries because prosecutors would be able to concentrate on their investigative and prosecuting functions (Binder, 1993). However, it is unclear that the reforms have made any substantial improvements in this respect (Barrera Nieto and Hernando, 2009: 261–263; CEJA, 2010, 2013). This may be unsurprising if we assume that the capacity of the criminal justice system to investigate complex crimes may depend not only, or not mainly, on features associated with the adversarial-inquisitorial dichotomy, such as the definition of the role of prosecutors, but also, or rather, on other features, such as the capacity of the police and other administrative agencies to investigate these crimes, and their institutional incentives and independence for doing so.

It is thus important that we distinguish between form and substance. The adversarial and inquisitorial systems are ways to implement the principles and goals of the criminal process, but they should not be confounded with the principles and goals themselves. Instead of starting by asking which system, adversarial or inquisitorial, is normatively superior, we should start by asking which principles and goals we value in the criminal process and then we should discuss the best ways to implement those principles and goals in specific jurisdictions (Langer, 2014).

5. CONCLUSION

This chapter has argued that contemporary comparative criminal procedure is descended from the adversarial-inquisitorial and common law-civil law tradition. These categories have been used to conceptualize the criminal process as a system of rules and institutional roles and practices that are connected by and to different conceptions of truth and different types of social and political arrangements.

These categories are still helpful tools for describing and analyzing certain aspects of the criminal process. However, this essay also argues that these categories have *blinding*, *distracting*, and *blurring* effects on comparative analysis of criminal procedure.

As I already explained, I am not advocating that comparative criminal procedure abandon the adversarial and inquisitorial systems and the common law-civil law categories. As several chapters in this collection demonstrate, these categories still can be used alone or in combination

with other variables and perspectives to shed light on criminal process. I am also not ‘trashing’ any of these essays. Each of these essays includes insightful points for our comparative understanding of criminal process around the world. Similarly, I am not ‘trashing’ the Latin American criminal procedure reforms that I have used to illustrate the *blurring* effect of the adversarial and inquisitorial systems. These reforms brought some improvements to Latin American criminal justice systems in: transparency, by introducing oral and public trials and pretrial hearings; efficiency, by reducing the length of criminal proceedings; and due process standards, by strengthening defendants’ rights.

Rather, my point is that comparative criminal procedure, like any other field, has operated within a certain intellectual tradition that has strengths and weaknesses. Being aware of this tradition and its strengths and weaknesses may enable comparative criminal procedure to become an even richer and stronger field of research, judicial and legal analysis and inquiry and policy-making.

NOTES

- * I would like to thank Jackie Ross for her feedback over an earlier version of this piece and Elyse Meyers for her edits on it.
- 1. Grande (2012) (characterizing comparative law as being born and developed within the private law arena and paying almost no attention to criminal justice in its modern foundation); Roberts (2002) (arguing that by the 1990s, comparative legal scholarship was undergoing a third major transformation and fired a new (or at least reinvigorated) sociological imagination, while penal law joined the traditional canon of private and commercial law topics).
- 2. Some of these examples are taken from Langer (2014).
- 3. I analyze the *blinding* and *distracting effects* together because it would require more space than this piece allows to tell these effects apart in individual cases. This is because these two effects lead to similar consequences – the omission of certain perspectives and phenomena from analysis – though for different reasons. In the case of the *blinding effect*, the scholar, judge or policy-maker does not even see other perspectives and/or phenomena. In the case of the *distracting effect*, the scholar, judge or policy-maker is aware of the omitted perspectives and phenomena, but concentrates on the perspectives and phenomena that the adversarial-inquisitorial categories highlight instead.
- 4. For recent exceptions, see Keitner (2011) and Langer (2011).

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