Cross examination: Some explanations about an alien features for continental lawyer

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Who might ignore what cross-examination is? Probably nobody. If one might not be familiar with the idiom, everyone does, however, know the concept it refers to. Movies, TV shows and literature have indeed made the world familiar with it. How many scenes have got their thrill from the verbal struggle between an attorney and the witness at the stand? Who does not remember a witness cracking down under the attorney's oral attacks? As it is, the whole world looks familiar with the concept, so the first question coming up would be why bother writing on something everyone knows. Perhaps because in the end it is not that familiar. Forget what is depicted by cinema industry. If cross-examination is indeed the examination of a witness by the opposing party to the one that called him[1], it cannot be summed up to something as simple as shown on screen. It is far more complicated that the mere questioning depicted in the cinema. It is an essential part of the so-called common law[2] procedure and as such is limited by strict rules and principles.

According to the literature, cross-examining is one of the most difficult and important task a lawyer must perform. It is the cornerstone of the presentation of evidence. It is said that when successful, it can be the winning card in a proceeding, whereas when not, it can bring the most powerful case down. However, from a continental point of view, it remains a strange institution. Why do our common law counterparts put such a big deal on questioning witnesses? Why it is so important to their case? These questions could remain purely theoretical and without true practical interest if cross-examination was not taking an international dimension forcing continental lawyer to learn and practice it. Furthermore, not satisfied by its international exportation, cross-examination is sneaking in continental legal tradition putting local lawyers in front of new challenges in their own national boarders. They, then, have to learn how to use this new device in order to provide an adequate defence to their clients. As Cross-examination is an alien concept to civil law traditions, comparative studies might be helpful in shading lights over the questions raised by is new tool.

Cross-examination is not concerned with substantive law, but with procedural law. It does not refer to the core of law, the rules that organize social life or regulate interactions. It refers to the framework, these rules that organize trials and regulate administration of evidence. Procedural law does not carry moral values, but is still essential. It is the score on which the music of law will be played. The techniques that will make substantive principles coming to life. As a technique, it can take several forms. Through history two main systems of legal process have developed, the accusatory or adversarial system ,of procedure and the inquisitorial, later referred as the continental, one. These systems are the two extremes on a scale that shows a spectrum of legal processes. Law is relative to the culture, history and people to which it applies. So pure systems are barely encountered and every civilisation, population, nation or group produces its own legal tradition. However, for the sake of simplicity and clarity, a particular procedure is classified as accusatory, if closer to that model, or inquisitorial, if closer to this one. Depending on the model,

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1 Blackstone , Legal dictionary

2 René David, the great specialist in comparative law, classified legal systems in 5 families according to the similarities they presented. Even if nowadays such classification is deemed not accurate by authors such as Zweigert and Kötz, it remains widely used in comparative law as a tool to explain and compare systems. See, David R., *Les Grands Systèmes de Droit Contemporains,* ; see also, Zweigert and Kötz

even if the outcome of the trial is always the same, i.e. put an end to a dispute by unfolding the truth, legal performance will be very different. Emphasis will be put on very different elements and proceedings will look totally different. Then, comes the reason why questioning a witness appears quite an easy task for a continental lawyer, whereas it appears to be anguishing and unmissable for a common lawyer.

Cross-examination is only a part of the accusatory procedure that refers to the presentation of evidence. So one could choose to focus only on it. However, it would not make any sense to discuss this institution without regards for the particular legal tradition in which it was born. One must understand the surroundings and atmosphere of accusatory system to apprehend and understand this particular institution. Hence before entering the arena of the what, why and how of cross-examination, a word must be said about the accusatory and more precisely the common law tradition that did not see it comes to life but has raised it until now.

This article will only deal with criminal procedure and trials. Not that civil ones are not of interest, but the aim and spirit of a civil trial are too different to be treated alike criminal proceedings. Moreover, although civil procedures in common law country are not fundamentally different from criminal one, it is very different in continental systems. It would then make no sense and achieve no purpose to desperately try a synthesis and comparison of what is not similar. Finally, this review dealing with war crimes, it would be a waste of resources to devote part of it to a out-of-bound matters.

A criminal trial, whatever the system considered, looks for the truth. In order to achieve this outcome, judicial actors will rely on evidence to unfold this truth. Evidence are therefore the centre of all the attentions as they will decide in criminal proceedings of the accused fate. All systems allow testimonial evidence, i.e. evidence given by third persons who have seen or heard what happens. Indeed, for years witnesses were the only way to know what happens as scientific and forensic evidence were almost non-existent. Evidence are gathered through investigations. The way investigations, the person in charge of it and the weight that will be given to their results will depend on the system considered. Witnesses, even if they fulfil the same role in any proceeding, are interrogated in a very different way in both system. To understand the core of the problem concerning cross-examination, one must outline the difference of approach between both systems (I). Once this done, a more understandable and practical approach of cross-examination can be done to the benefit of continental lawyer facing this unique feature of common law procedural law (II).

I. Accusatory and inquisitorial procedure: testimonial evidence in their respective framework

Before speaking of testimonial evidence, it is necessary to broaden the topic by presenting these two procedural systems through their historical development and to outline and emphasize their main differences (1). It would naturally lead the reader to the next step of the reasoning consisting in an attempt to qualify the system currently in place in most of the continental countries and at the international level (2).

1. Accusatory and inquisitorial systems: from history to contemporary legal systems

Historical development

When looking at a map, it appears that accusatory procedural law is present on the five continents. Inquisitorial system, on the other hand spread throughout western Europe and South America. This geographic limitation has its importance. Firstly, on a terminological point of view because the

term continental has started to mean inquisitorial in reference of the system in force in continental Europe by opposition to the one applied in the English islands. Secondly, It partially explains the success of adversarial on inquisitorial procedure. Although not the main reason, the fact that England had been at one time an empire on which the sun never fell down has led its legal tradition to spread everywhere.

On the historical scale, the accusatory system appears first. It was used in the ancient Greece and early Rome and is generally considered as the first step towards a state administrated justice in replacement of private vendetta[3]. Indeed, private justice being inconsistent with the will to maintain order in the society, Procedural law started its development as soon as an organized public authority started to assume the duty of ensuring public order[4]. Inquisitorial system appeared later in the Roman empire and was resurrected in the middle-ages by ecclesiastic courts with the view of correcting the shortcomings of the accusatory procedure currently in place[5].

As its name shows, accusatory system is based on an accusation. At the very beginning, it was taken by the aggrieved party, victim or family, against the other in front of a neutral passive arbitrator. It is the most natural way to dispensate justice as it placed full burden of proof on the parties, judge's role being limited to weight and balance the evidence. It is usually considered as fitting with democratic principles. Remember Socrate accused by Anytos debating of the accusation in front of an assembly of 501 jurors who will judge and finally condemn him[6] and you might have a good picture of what is the simplest civilised way to dispensate justice. Accusatory system has been like this almost untouched in its main principles.

Another way of dealing with justice has later developed to correct what was considered flaws in the system and bring justice to the party. It was the inquisitorial procedure. However, it must be outline that accusatory system had never been entirely replaced by inquisitorial procedure[7]. In adversarial procedure, justice is given to a party depending of his capacity to prove and present evidence. Back in the middle ages, the easiest way to prove his guilt or innocence was to rely on ordeals or duels[8]. In addition, in pure accusatory system, no rules apply as to the way investigation must be done and it was entirely left to parties. So witnesses could be paid or coerced to testify in a particular way and no or few control was possible. Considered that material evidence did not exist at the time, the equality between the parties only existed formally and was limited to the courtroom. Usually, the strongest, richest or often the luckiest won[9]. Proceedings were then deemed to be unfair. Such justice appeared soon to be undesirable and the Pope Innocent III decided to rely on another procedure used at the time of the Roman empire: the inquisitorial procedure. In this legal process, a professional investigator is in charge of the inquiry, neutrally seeking evidence and deciding the case upon his own finding. Then the *processus per inquisitionem* was seen as a new step towards a more civilised justice[10]. It was seen as bringing a real equality between the parties. Indeed, the outcome of the case was no longer in the hand of the parties, but in those of a single neutral actor looking for an objective truth. Nevertheless, there was a more political interest in this procedure as it suits authoritative powers in avoiding that too many respects be paid to parties' right[11] and allowing problems to be dealt with in secrecy.

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3 Bishoff, J. L., "Reforming the Criminal Procedure System in Latin America", 9 Tex. Hisp. J.L. & Pol'y 27, at p.32; see also, Bouloc, B., Stefani, G. & Levasseur, G., *Procédure Pénale,* 19th edition (2004), Dalloz: Paris, para 54 at p. 47

4 Bouloc, B., Stefani, G. & Levasseur, G., *Procédure Pénale,* 19th edition (2004), Dalloz: Paris, paras 52&53

5 Bishoff, J. L., "Reforming the Criminal Procedure System in Latin America", 9 Tex. Hisp. J.L. & Pol'y 27, at p.32, Bouloc, B., Stefani, G. & Levasseur, G., *Procédure Pénale,* 19th edition (2004), Dalloz: Paris, para 66 at p. 54

6 Socrate's trial in Wikipedia encyclopaedia http://fr.wikipedia.org/wiki/Socrate#Le_proc.C3.A8s_de_Socrate

7 Arbitration,

8 Chodos, R., *Law as dance, theater, or music: legal procedure and ritual*, 22 June 2002, on http://findarticles.com/p/articles/mi_m2096/is_2_52/ai_92285035

9 Some of these critics are still addressed toward almost pure accusatory system like the USA. Often, it is said that the outcome of the trial mainly depends on financial capacity of the party.

10 Merryman cited in Bishoff, J. L., "Reforming the Criminal Procedure System in Latin America", 9 Tex. Hisp. J.L. & Pol'y 27, at p.

11 Bouloc, B., Stefani, G. & Levasseur, G., *Procédure Pénale,* 19th edition (2004), Dalloz: Paris, para 65

England had been a notable exception in this pattern. Indeed, Henry the 2nd had already instated royal courts since 1160. These courts were applying customary law and using the traditional accusatory system. It must be recalled that in England law was early unified and procedural guarantees were given to the accused[12]. As a consequence, people were more likely to go to the royal justice which offered more guarantees. Hence, even if the ecclesiastic courts also adopted in England the inquisitorial system, it did not become the main system because an efficient and unified system was already in place. In addition, English king Henry the VIIIth separated from the Vatican quite early[13]. It subsequently took over religious power and imposed its own views to the clergy. The arbitrary and fragmented justice in continental Europe led people to go to ecclesiastic justice reputed more lenient and safer[14]. In addition, unification of continental countries occurred later and had been made with the help of the Catholic Church which had retained for long time important powers in every branch of the state. Later on, in the 1800's, French inquisitorial system had been codified and spread throughout Europe by Napoleon's conquests.

main features and differences

The distinguishing features of accusatory systems are their public, oral, and adversary nature, and the clear delineation of roles among accuser, defendant, and arbiter. It is generally associated with democratic, highly representative political arrangements that profess to subordinate the rights of the state to the rights of the individual. its basic form is much less technical than that of inquisitorial systems and is generally easier for ordinary citizens to understand. Traditionally, the aggrieved individual or his family would formally accuse the alleged wrongdoer; both parties to the litigation would then gather evidence to support their respective positions. A public and oral trial would follow in which the adversaries made arguments to a neutral arbiter and often a jury, and a largely illiterate citizenry observed the public trial. The judge had no authority to undertake his own pre-trial investigation or raise issues of his own authority; he rendered his decision based solely on the evidence presented by the parties at trial. As a result parties are equal in the proceeding.

Inquisitorial procedure, by contrast, is not adversarial. Its name derives from the Latin word "*inquisitio*" which later gave inquiry in English or "enquête" in French. Then, inquisitorial procedure central piece is the inquiry. It is secret, written, and the parties have generally passive roles. Inquisitorial structures emphasize technical procedural aspects and charge legal professionals, as opposed to lay persons, with the administration of justice[15]. A public official consequently replaced the private accuser as the initiator of the criminal action. The inquisitor, who later became the investigating judge, is the only truly active participant in the proceedings. He is in charge of discovering the truth by leading an investigation, hearing witnesses and looking for evidence. Usually, His findings are put in written and serve to determine guilt or innocence. Inquisitorial structures are archetypal of centralized political systems whose legal systems are successors to Imperial Roman and ecclesiastical law. As a result, the parties are the object of the inquiry and do not play any part in it. So today, modern inquisitorial procedure follows two phases. The inquiry lead by a judge in secret and the trial itself which is public and present the result of the investigation.

Another distinguishing feature between both systems is the jury. Accusatory procedure usually rely on a jury as the fact finder, while the judge is only guardian of the law ensuring that the parties are respecting the rules in presenting their cases to the jury. Jury derives from ancient Greece

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12 Article 20 of the Magna Carta, 15 June 1215

13 For a short history on the relations between Henry the eighth and the catholic church, See http://en.wikipedia.org/wiki/Henry_VIII_of_England#Major_Acts_in_the_Kingdom

14 For example ecclesiastic tribunals could not impose a sentence of death after the Third concile of Latran.

15 It also explains why inquisitorial procedure has developed in ecclesiastic courts. Indeed, Clergy members were educated and familiar with Roman Law. See Bouloc, B., Stefani, G. & Levasseur, G., *Procédure Pénale,* 19th edition (2004), Dalloz: Paris, para 66

democratic principle that only citizens could convict another citizen. In the pure inquisitorial procedure, juries are not a main feature, because there is no need for them. The trial did not serve the purpose of weighting evidence to determine guilt or innocence, but merely when there is public hearings to present the evidence supporting the guilt of the accused and to pronounce the sentence. Usually, the judge is the fact finder as well as the guardian of the law. In modern inquisitorial systems have implemented juries in certain proceedings[16], but the tendency had been on suppressing them.

In their pure form, these two systems are perfect opposite. While one emphasizes orality, publicity and adversariality, the other prefers written files, secrecy and non-adversariality. Therefore the role played by the legal professionals varied from one side of the spectrum to the other according to the system considered. Counsels have an active role in the accusatory system, whereas they are passive in the inquisitorial procedure. It is the contrary for judges, passive arbitrator in accusatory procedure, he is the central piece in the inquisitorial[17].

consequences on testimonial evidence

Both system admit the proof by testimonies that have been king of evidence for centuries. Today, witnesses retain a large importance in judicial proceeding, but they are more and more used in conjunction with material evidence which have been revolutionized by the development of scientific techniques of investigations. However, according to the system considered, witnesses will play a different role and the presentation of testimonial evidence will be totally different.

In the accusatory procedure, parties are in charge of gathering evidence. Each of them build its own case and trial serves the purpose of confronting both cases. Therefore, evidence are researched during the trial and the truth is supposed to unfold from this confrontation. Witnesses gives their testimonies at the hearings under examination by the parties. So by looking at trials in the USA, any continental lawyer would certainly be surprised by the importance given to testimonies. Oral evidence dominates material evidence. It is thought that the immediacy of the oral presentation and confrontation is the most appropriate way to unfold the truth as it allow the fact finder to appreciate the validity of the testimonies by observing witness' demeanour and consistency[18]. The importance given to testimonial evidence gives a specificity to the procedure and the course of the trial because in order to ensure that the testimony is reliable, the other party is provided with the opportunity to examine the witness and test its opponent case. Then, examination of witnesses are fundamental in accusatory systems and as such its legal framework is well-defined. Witnesses are answering questions, first from the party calling them and afterwards from the opposite party. As a consequence, witnesses cannot usually testify about what they heard from somebody else. Hence, Hear-say evidence are normally not admissible because this testimony cannot be tested.

In inquisitorial systems, parties play a more passive role. Evidence are gathered during the investigating phase, written down and put into the case file by an official professional investigator. Written evidence takes precedence on oral testimonies that usually are mistrusted and cannot support the judge findings alone. Testimonies must be corroborated by material evidence[19]. As a

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[16] In France, only the assize court relies on juror to assess guilt or innocence. However, it is a very different jury system than in the USA, as judges are deliberating with the jury and can then influence te outcome of the case see article of the CPC

[17] Field, S. & West, A, "A Tale of Two Reforms: French Defense Rights and Police Powers in Transition", 6 Crim. L.F. 473, at p.475

[18] Beresford S., Child Witnesses and the International Criminal Justice System: Does the International Criminal Court Protect the Most Vulnerable, *Journal of International Criminal Justice*, 3 (2005), 721 at 733

[19] Goguel, M.-A., "La preuve par témoignage : analyse comparée de la France et des Etats-Unis", 24 november 2006, on http://m2bde.u-paris10.fr/blogs/dpj/index.php/post/2006/11/24/La-preuve-par-temoignage-:-analyse-comparee-France-Etats-Unis-par-Marie-Amelie-Goguel

consequence, witnesses are not interrogated in the same fashion. In a pure inquisitorial system, witnesses do not testify in public, but make their statements in the judge office without the presence of the parties. Modern systems bear the traces of this original pattern. witnesses are not called by the parties but by the judge and usually testify in a narrative manner, telling all they know, have seen or heard, even from a another person, that are related to the case. In France, until recently, only the judge could after the witness exposé, ask shim questions for the sake of clarity. Parties could only ask the judge in written to ask the witness a particular question. The judge remained free to decide on the opportunity of the question and could without any justification not ask it. In 2000, Parties have been recently allowed to directly ask questions to witnesses at trial and in the judge's office[20].

2. The converging trend: towards inquisitorial adversarial procedural law?

Every system has its flaws and encounters problems. Remedies are usually found by looking on foreign experiences and adapting alien solutions into national law. In a global world, systems are more and more facing the same problems; find similar solutions; and as a consequence are getting closer from each other. Procedural law does not escape this pattern. If it is true that accusatory procedure borrowed and adapted some inquisitorial principles, on quantitative basis, inquisitorial-based systems have taken and are taking more from accusatory model than the latter has done from the former.

The success of the accusatory model

It appears today that evolution tends to go from inquisitorial towards adversarial and not too much the other way. Of course, accusatory systems have evolved in a sort of "mixed accusatory" structure. Accusation became run by professionals and no longer by the victims. Public Prosecution is now in charge of initiating criminal action on behalf of the aggrieved party. Then, assisted of a professional police force, prosecutor investigates the crime, gathers evidence, and conducts the criminal prosecution as a representative of society at large and not solely of a private interest. So like inquisitorial model, the state itself is at the same time the aggrieved and accusing body in modern accusatory systems. However, notwithstanding some inquisitorial-based adaptations, the system remains predominantly accusatory as other quintessential features have remained untouched: the trial is still oral, public, and adversarial, and the judge remains a neutral referee[21].

On the other hand, Modern inquisitorial systems have adopted many aspects from the accusatory model. Adaptations began in the XVIIIth century with the European revolutions and especially the French one that sought to put an end to the arbitrary system in place[22]. Thinkers and Reformers pointed to English procedure as superior because it guaranteed more rights for the accused which helped to curb judicial abuses. This assessment was probably accurate at the times. England already had several declaration of rights like the Magna Carta, the Bill of Rights and the Habeas Corpus protecting people from judicial abuses. On the other hand, on the continent, absolute monarch used their power to administrate justice in a discretionary fashion[23]. The French revolutionary power first step was then to give rights to the accused[24]. Since then, importation of adversarial principles and institutions has not stopped and even sped up, even in the most conservative countries such as France. Every procedural law reform in Europe has taken a step

[20] Article 36 of Loi n° 2000-516 du 15 juin 2000 renforçant la protection de la présomption d'innocence et les droits des victimes.
[21] Bishoff, J. L., "Reforming the Criminal Procedure System in Latin America", 9 Tex. Hisp. J.L. & Pol'y 27, at p.
[22] Bishoff, J. L., "Reforming the Criminal Procedure System in Latin America", 9 Tex. Hisp. J.L. & Pol'y 27, at p.
[23] One of the most criticized features of the absolute power was the "lettre de cachet" by which the king could order the arrest of a person and its imprisonment without trial or the opportunity to explain his position or present any defense.
[24] See the French declaration on human and citizen Rights of 1789

forward toward accusatory system. Especially, after world war II, either under the pressure of the allied-winners or simply because inquisitorial bears the shadow of totalitarianism in the common mind. Hence, Italy and Germany suppressed the investigating judge to be replaced by more party-looking prosecution. Italy criminal code of 1988 transformed Italian inquisitorial system in almost a full accusatory one, withdrawing the mission of investigation from judges' role[25]. As the benchmark of the inquisitorial system that spread throughout Europe and due to the fact that France was not on the looser side in 1945, one may think that its system has remained unchanged. Although it is one of the most conservative system in Europe, France has endured the same challenges than the other inquisitorial system. Reforms had been hard and are still difficult to achieve, but today French system if still the most inquisitorial, has moved toward its accusatory counterparts. These changes are mainly due to Human Rights influence and the ECHR exposure of French procedure flaws concerning defence rights[26]. Investigative judges remain in France as an untouchable institution[27]. However, the 1993 and 2000 reforms have introduced the adversarial principle into French law bringing along changes of accusatory nature. Hence, the accused had been given a much more active role in the proceedings. More recently, although from a continental tradition, Bosnia and Herzegovina made the choice of an accusatory system for its criminal procedure. This choice has its own logic as Bosnian courts will have to work with the International Criminal Tribunal for Yugoslavia, it made sense to implement a similar system than the one in place at the ICTY in order to avoid conflicts of procedure. However, it tends to demonstrate one more time the current success of the accusatory system.

The accusatory procedure seems to have got its final success at the international level. The International Procedural Law is accusatory in nature. The ICTY followed by the ICTR and now by the ICC made the choice of an accusatory orientated system[28]. Although presented as a mixed system of procedure, it seems closer to the accusatory model than the inquisitorial. Prosecution is left to a separate organ in charge of investigating and bringing evidence of guilt. On the other hand the Accused bears the responsibility to disprove prosecution case and Judges, even if empowered with the right to ask questions, are not as active as judges are in the inquisitorial model. Of course, the international system has some particularities distinguishing it from a purely adversarial system like the absence of jury.

Reasons for success

The first reason explaining the success of the accusatory procedure over the inquisitorial system is to be found in the development of Human Rights Law. Human Rights instruments have long tried to improve individual protection against arbitrariness. In order to achieve this outcome, it has develop procedural rights whose respect legitimate and ensure fairness in criminal proceedings. It appears that most of human rights instruments have consecrated accusatory features such as orality, publicity and adversariality. Article 6 of the European Convention of Human Rights (ECHR) embodies the adversarial principle, core of the accusatory procedure. According to the Court, it means that evidence must be presented in front of the accused in a public hearing with the purpose to discuss them[29]. In inquisitorial procedure, because the truth is thought as existing independently of the parties, the accused is only object of the investigations but not actors in it. Then, there is no need to give the accused opportunity to challenge evidence that have been

[25] Freccero, S. P., "AN INTRODUCTION TO THE NEW ITALIAN CRIMINAL PROCEDURE", 21 Am. J. Crim. L. 345, at p.384

[26] ECHR, Court (chamber), Delta v. France, no. 11444/85, 19 December 1990, paras 32-37

[27] Lastly after the Outreau judicial tragedy, the role and power of the investigating judge had been pointed out at the main reason for this catastrophe. However, the parliamentary commission set up to investigate and find solutions refused to suppress the function of investigating judge.

[28] About the ICC, see, Beresford S., Child Witnesses and the International Criminal Justice System: Does the International Criminal Court Protect the Most Vulnerable, *Journal of International Criminal Justice*, 3 (2005), 721 at 732; For ICTY, see ICTY annual report of 29 August 1994.

[29] ECHR, Kotovoski v. The Netherlands, 11454/85, 20 November 1989 at para.

gathered in an impartial investigation by a neutral investigator. Fairness results from the neutrality and impartiality of the investigations. Human Rights Law has clearly made a choice favouring accusatory principle to ensure fairness in criminal proceedings in involving the accused as an actor and not a mere figurant in proceedings. As a consequence of this choice, inquisitorial systems had had to made changes introducing accusatory features in their procedure in order to comply with their international obligations.

The second reason, and perhaps the reason backing Human Rights favour toward accusatory procedure is to be found in dramatic excesses committed under inquisitorial regime. First, in the middle-ages, ecclesiastic Inquisitors sent a huge number of person to the pyre for heresy without giving them any chance to explain themselves[30]. Moreover, Inquisitorial procedure had been used for years to support absolute monarchy and dictatorial regime[31]. As a result, inquisitorial has soon become synonymous of arbitrary. This conclusion is probably not the fault of the system itself, but of the abuse that some person made of it. However, the conclusion of the US Supreme Court shows the fear that still carry along the word inquisitorial[32] . This conclusion is not totally unfounded. However, condemning a system because of the atrocities it allowed would be going too far. After all, democracy gave the power to the Nazis in Germany and nobody is condemning democracy for this excess. On the other hand, though from accusatory traditions, USA have allowed imprisonment of enemy combatants without guaranteeing them any rights. Both system are objectively good, but how successful they are is narrowly linked to the quality and probity of the people running it and of the independence and control given to the judiciary in completing its task.

Consequences on testimonial evidence

Article 6-3-d ECHR reads:

> "Everyone charged with a criminal offence has the following minimum rights: (...) d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him"

This article has been interpreted by the ECtHR as consecrating to cross-examine witnesses. Any accused must be given an adequate and sufficient opportunity to challenge testimony against him and to interrogate his author at the time he made it or later[33]. In France, in 1993, the Delmas-Marty commission which was charged with the mission of proposing criminal law reforms made a thorough analysis of human rights law concluding that the accused should have the right by himself or through his counsel to ask questions to the witnesses[34]. In a sense, it proposed a right to cross-examine as a fundamental guarantee offered by Human Rights Law.

Testimonial evidence tend to get more and more importance in inquisitorial procedure. It tends to supersede the written evidence and to transform the trial in a discovery phase like in accusatory systems. The immediate consequence of all these reforms has been the augmentation of Defence Counsels role in the procedure and the consecration of a certain form of cross-examination, even in some of the most conservative countries such as France.

In France, there is still no cross-examination as done in USA yet. Although the 2000 law has

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30 Inquisition in wikipedia, http://fr.wikipedia.org/wiki/Inquisition

31 Absolute monarchy, Fascism, Nazism are all born and lived using and abusing of inquisitorial devices.

32 Bishoff, J. L., "Reforming the Criminal Procedure System in Latin America", 9 Tex. Hisp. J.L. & Pol'y 27, at p. 32; see also Van Kessel, G., "adversary excesses in the American criminal trial", 67 Notre Dame L. Rev. 403 at p.410

33 ECHR, Kotovoski v. The Netherlands, 11454/85, 20 November 1989 at para. 41; Delta v. France, 19 December 1990, para. 36; Isgro v. Italy, 19 February 1991, para. 34

34 Field, S. & West, A, "A Tale of Two Reforms: French Defense Rights and Police Powers in Transition", 6 Crim. L.F. 473, at p.480

allowed parties to the proceedings to directly ask questions to witnesses[35], testimonies are still given in narrative form and the president is still questioning first, leaving few to say to the parties. As a result, people entering a courtroom in France are not seeing long and tough verbal struggle between witnesses and Defence counsels. According to Dufresne, the reason why cross-examination is not used in France is related to the fact that lawyers have not been trained yet[36]. However, the possibility does exist and it is worth betting that lawyers will soon get familiar with this opportunity to check the accuracy and the veracity of testimonies. Pre-trial phase is not escaping this trend as the 2000 Law allows parties to ask questions to witnesses heard in judges office which supposes an involvement of the accused also at the inquiry level.

On the other hand, Bosnia and Herzegovina has clearly made the choice of the accusatory procedure principles concerning testimonial evidence abandoning the old inquisitorial system almost entirely. The office of investigating judge had been suppressed replaced by a preliminary proceedings judge whose role is far more limited than an investigative judge. Indeed, he is not leading or taking part in the inquiry. As a result, oral evidence had taken precedence. Article 261 of the code of criminal procedure, although reserving the right for the judge to ask questions at any stage of the examination, clearly put the burden of eliciting information from the witness on the parties. This system is identical to the international system[37].

Then, it seems that cross-examination will soon become a universal feature of criminal proceeding. Continental lawyer will have to learn it. Training has only begun recently in most countries. The particular place of cross-examination and the centuries of practice that has developed it, make it a veritable challenge for continental lawyer.

II. Cross-examination: a real challenge for continental lawyer?

Testimonial evidence have lesser weight in the inquisitorial system than in the accusatory. As a consequence, it is really hard for continental lawyer to apprehend cross-examination. Not only the techniques of cross-examining, but also and maybe more importantly the aim and spirit of it. Indeed, it appears very different to put some questions to a witness after the judge has mainly done all the inquiry that to lead a thorough organized interrogation from the beginning to the end.

As we have shown, the developing system, even different from a purely adversarial model, still give precedence to live testimonies and examination of witnesses by the parties. It is then important to present cross-examination in its original framework as it is presented to common lawyer (1). It will allow the reader to understand what are the current challenges face by lawyers in the new developing system (2).

1. The original tasks and challenges

The purpose of cross-examination is to determine the value to be given to testimonies by allowing counsels to test witness credibility. In its original framework cross-examination aims at two different causes: advance the client case and undermining the opponent case. In the first case, the cross examiner seeks to elicit favourable testimony and to develop his case; in the second to limit or discredit the testimony or the witness[38]. So contrary to what comes up first to a continental mind, crossing does not firstly mean confronting, challenging or discrediting, but should also be viewed

[35] Law 2000 modifying article 312 CPC
[36] Dufresne, "Interrogatoire et Contre-Interrogatoire, Clés d'un Procès Pénal Equitable", Le Figaro, rubrique opinion, 5 April 2006
[37] See for examples the ICTY Rules of Presentation of Evidence (ROPE), rule 90; ICC ROPE, rule 140.
[38] Inns of Court School of Law, Institute of Law, City University, London, *Advocacy*, (2005), Oxford university press, Oxford.

as constructive. Cross-examination is part of an inquiry, so it must be done as such and this even if it is known that the witness is lying.

Cross-examination has been developed during centuries of practice. Then, several rules as to the its scope and form apply. These rules differ depending to the country considered but basically two main system cohabited: the English and the American. In England, there is a cardinal rule. A lawyer must put the case to the witness. It means that the witness must be aware of the aim counsel seeks to achieve before questioning starts. Such a rule seems to have been abandoned in the American practice. Indeed, it has been considered as giving unnecessary information to the witness allowing a bad-faithed witness to build up his story avoiding traps that counsel might set to discredit the witness.

The rules concerning the scope of cross-examination varied from the wide-open cross-examination to the restrictive approach through an intermediate one[39]. Some authors simplified the rules on scope of cross examination by upholding only two possible approaches[40]. In the first approach cross-examination is not limited to the matters raised in the examination in chief and is usually referred to the English rule. In this approach, leading questions are usually limited. In the second, the so-called American rule, matters examined on cross are limited to those raised under examination-in-chief, but leading questions are fully allowed. The practical effect does not touch the art of cross-examination, but the order of presentation of evidence. Hence, In the English approach, witness is called only once and can be tested as all the matters he might know about the case. In the American one, witness being called by one party, cross is limited to the information this party wishes to present, the other party bearing the possibility of recalling the witness as it own if it considered he might have additional relevant information to his case. Both systems have their assets and flaws. The English rule allows presentation of all the evidence at once time, but in doing so might lose the clarity of the presentation by addressing several matters mixing accusation and defence cases at the same time. The American rule preserve the sake of clarity, but at the cost of recalling the same witness several time, which in the case of foreign witnesses might mean a rise in proceedings costs. However, there is usually no restriction when questions aim at assess witness credibility. The aim of examination by the party and especially of allowing cross examination is to determine how reliable the testimonies is. Therefore, few limits are put when it comes to test witness credibility[41]. Judge usually retain discretion as to what goes beyond the scope of cross-examination[42].

As to the examination itself, the form of questioning varies according to the rules. Leading questions which are questions containing the answer only seeking approbation or reprobation from witness are usually permitted under cross-examination. However, depending on the rule followed, judges have more or less discretion on leading questions.

Examination is usually limited to what the witness personally knows. Hearsay doctrine prevents witnesses to tell on what they heard from other persons as it is impossible to inquire upon the credibility of such element.

The first thing common lawyers have in mind is to convince the jury[43]. Cross-examination is totally different whether there is a jury or not. Indeed, juries are composed of lay people reacting more sensitively than a professional would. So first of all, jury has to be considered for what it is: a pack of normal people probably as uncomfortable and impressed by the courtroom as the witness is.

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39 Pratter, D. D. & al., *Evidence: The Objection Method*, (1997), Michie Law Publisher: Charlottesville, Va, para 21, p.47

40 Broun, K. S., *McKormick on Evidence*, (2006), Hornbook Series, Thomson West: St Paul, Mn, p.20

41 Usual limits are harassing. nowadays new limits are appearing, especially concerning sexual offences, it is usually forbidden to ask questions on witness previous sexual experiences and practices.

42 Pratter, D. D. & al., *Evidence: The Objection Method*, (1997), Michie Law Publisher: Charlottesville, Va, p.47

43 La preuve par témoignage : analyse comparée de la France et des Etats-Unis - par Marie-Amélie GOGUEL

Then, jury shows a tendency to be very sympathetic and even empathetic to witnesses and would easily forgive witnesses' mistakes, approximations and behaviour. However, it would not do the same for the professionals and in a struggle between witness and lawyer, it is likely to take party for the former. So the first thing a lawyer has to remember is not to attack the witness, except he is absolutely sure he will break down. The best way to address a witness is to adopt a polite and courteous approach and appear business-like and quietly confident. It is fundamental to not antagonise the jury[44].

Jury and witness also needs to understand the case of the parties. Lawyers must then be aware that they are not addressing professionals familiar with legal concepts and vocabulary. Hence, questions must be put in an understandable way. It is recommended to formulate short and clear questions, avoiding getting in details unless necessary. Moreover, like examination-in-chief, it is important for understanding that cross-examination be built in a comprehensive and logical way. Hence, it is very important to ask all the questions related to each other. Short-cuts and jumping on conclusions must be avoided as if it is clear for lawyers' mind, it might lose the jury and even the witness.

Another challenge faced by cross-examiner is that contrary to the examiner-in-chief, he faces an hostile witness. Hence, cinema and literature usually present cross-examination as a struggle between lawyer and witness with the purpose of making one break down. In addition to avoid antagonising the jury by attacking witness directly, it is important to know the answer to the question or formulate in a closed manner if not. Indeed, witness will not necessary tell what counsel seeks. His answers might even been very harmful to the case defended by the cross-examiner. Therefore, it is first important to learn and cultivate a Poker face in order not to show the harm caused[45]. But, first of all, it is important to be well prepared and to know what purpose cross-examination seeks to achieve. No cross-examination without a precise purpose[46]. It is better sometimes to not cross-examine than to go unprepared and purposeless to the witness.

Then, the difference between cross-examination and continental interrogation resides in the preparation[47]. A continental lawyer even if he has to prepare his case, do not need to consider all these principles and can simply come-up with some simple questions seeking clarifications. On the other hand, examination in accusatory procedure seeks to elicit evidence and put the burden on the party to show its case are the truth. Truth are not an abstract concept that can be objectively assessed by a single investigator listening to evidence and making its own separation of evidence. Trials in common law system are the confrontation of two truths that success entirely rests upon the parties.

2. The modern tasks and challenges

Although it had been defended that the moderate system which is currently taking place at the international level and in most countries of the world is not bound by the legal traditions rules and principles regulating the borrowed concepts and institutions[48], it is hard to import an institution without the rules developed during centuries of practice. The choice of a mainly accusatory system of procedure consecrating the adversary principle has naturally lead to integrating cross-examination as it derives from the right of the defendant to face and challenge his accuser and the evidence brought against him.

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44 Inns of Court School of Law, Institute of Law, City University, London, *Advocacy*, (2005), Oxford university press, Oxford. p.164

45 Inns of Court School of Law, Institute of Law, City University, London, *Advocacy*, (2005), Oxford university press, Oxford. p. 175-176

46 Pratter, D. D. & al., *Evidence: The Objection Method*, (1997), Michie Law Publisher: Charlottesville, Va, p.56

47 Inns of Court School of Law, Institute of Law, City University, London, *Advocacy*, (2005), Oxford university press, Oxford, p.174; Pratter, D. D. & al., *Evidence: The Objection Method*, (1997), Michie Law Publisher: Charlottesville, Va,

48 UN General Assembly, 49th session, *ICTY annual report*, 29 august 1994, para. 71

Most of the rules and principles that have been developed above are therefore relevant and must be understood and practiced by continental lawyers to become adequate cross-examiner. However, this procedure shows some particularities that give lawyer's role some changes in comparison to their role in a purely accusatory system.

Firstly, there is no jury at the international tribunal. Most of continental countries has abandoned the jury. Some notable exceptions would be the assize court in France or the recent Spanish interest in reinstating juries[49]. However, even when there is one, juries are very different in continental countries and cannot be compared with the American jury system where truly lay people are deciding the case. In Bosnia and Herzegovina, the upheld system is closer, almost twin, to the international system. Moreover, in most of continental systems, judges are either leading the examination or are provided with the right to ask questions to the witness. As a consequence, cross examination must be differently apprehended. Indeed, contrary to jurors who are lay people unable and usually unauthorized to ask question or made their own research, judges are experienced legally trained professional. They are then able to understand and weight testimonies as professionals and less prone to react and decide upon their feelings as jurors do.

Does it mean it is easier to cross-examine before professionals. Certainly, the risks to loose the case on one bad cross-examination is far lower than in front of jurors. However, as professionals judges will be far more difficult to convince and much more demanding about the qualities of the questioning and the elicited information.

Another flaw for cross-examiner concerns the strategy. Whereas when a jury is the fact finder, it may happen that cross-examining counsel ask forbidden questions that would be struck out by the judge on objection from the opponent with the purpose to obtain an answer the jury would hear, even if later asked to not consider it, such behaviours is impracticable before professional judges who will disregard the answer anyway and probably take offence of such manners.

The professionalism of this moderate accusatory system has an impact on the scope of cross-examination. In France, there is still few or no limit as to the scope because questioning is still barely develop and testimonies are still given in a narrative manner. Moreover, when it comes to the questioning the judge being the first to ask, it determine himself what the scope will be. In Bosnia and Herzegovina, the code of criminal procedure explicitly retain the American rule by limiting the scope of the cross to the matters addressed in chief[50]. However, it temporizes this principle by allowing judges to ask at any stage of the examination the witness appropriate questions. If in practice, judges refrain to ask too many questions and let parties do examination-in-chief and cross-examination before asking any remaining questions they might have, this exception could lead to a situation similar to the French one and close to inquisitorial system as to the presentation of evidence. Scope of cross-examination is then closely depending on judges' will and interest in hearing the testimony.

Professionalism has also an impact on hearsay evidence. Hearsay doctrine is still unknown in the French system. Indeed, judge as professional are deemed to be able to determine the probing force of each evidence[51]. In Bosnia and Herzegovina, the criminal procedure code is silent on hearsay evidence, but it seems that the developing practice is going toward allowing reported speech. There is a logical explanation in allowing hearsay testimonies in the case of Bosnia because in the case dealt before the war crimes chamber, most of the witness testified about what they lived but also for those who are unable to talk. There is also a procedural explanation

[49] Thaman, S. C., "Spain Returns to Trial by Jury", 21 Hastings Int'l & Comp. L. Rev. 241

[50] Article 262 of the Criminal Procedure Code of Bosnia and Herzegovina

[51] Goguel, M.-A., "La preuve par témoignage : analyse comparée de la France et des Etats-Unis", 24 november 2006, on http://m2bde.u-paris10.fr/blogs/dpj/index.php/post/2006/11/24/La-preuve-par-temoignage-:-analyse-comparee-France-Etats-Unis-par-Marie-Amelie-Goguel

because of the presence of professional judges.

Therefore, contrary to the American need to test witness credibility with the ultimate purpose of convincing the jury rather unfolding the truth[52], the developing system seeks more the elicitation of information on the inquisitorial model. However, it does not mean that cross-examination is becoming easier for continental lawyer. Indeed, the main change is that even moderate, cross-examination imposes an active participation of counsels that are in charge of the presentation of evidence.

Therefore, all the tips usually given to common lawyer at law school remain necessary to learn and practice. Examining is an art that demands practice. So what has been said on the way cross-examination must be prepared and executed remains accurate for continental trained lawyer. Preparation is the key. Examination must have a purpose and there is no need to go cross-examining a witness that will only reiterate the harm it has caused in chief. On cross, it is important to keep in mind is case. A thorough preparation will allow counsel to orientate his examination. He will either try to elicit new information relevant to his case or to discredit the testimonies or the witness[53]. The first task is one of the most difficult to achieve in the Americanized system limiting cross-examination to the matters raised in-chief as it supposes to go on new matters. However, it is still possible to consider whether there is any area of consensus between the witness' recollection and his case. The second task is more usual as it aims at undermining the case presented by the other party and supported by the witness. However, there is no need to go straight to the witness' credibility. So the first step is to limit the testimony. Indeed, witness usually see only part of an incident. Then, the idea is to limit the part they saw by putting it in a broader context. The second step, to go further, would be to discredit the testimony. It does not mean attacking the witness. All witnesses are not chronic storytellers. However, human brain, especially when stimulated by fear or surprise, needs to fill the gaps in order to have a complete picture of events. Usually, it is not conscious lies but mere subconscious attempt to understand what happened in a comprehensive manner. Then, a clever cross-examiner will test the limits of the witness' perception: was he able to see or hear without any obstruction?; his memory and especially is capacity to remember details; and finally his power of communication: interrogate the witness about is capacity to report, to estimate time and distances[54]. On seldom occasion, it might be possible to go even further and to discredit the witness himself. Discrediting must be distinguish of impeaching the witness which tend to show perjury by showing bias, interest in the outcome of the proceedings, motive to testify in a particular manner, or previous convictions or bad acts. Discrediting a witness might also be done by showing inconsistencies between witness previous depositions, with other testimonies or with facts.

All these tips, how useful they can be, will not replace practice. Examining a witness and even more cross-examining is an art for sure, but first of all it requires particular skills from lawyers. They must stay humble in front of the witness and never underestimate him by drawing sharp conclusions or rushing into any weakness the witness might have. The first quality cross-examiner must have is a good knowledge of human nature. He must also be ready for everything and quick in his decision.

Conclusion:

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[52] Goguel, M.-A., "La preuve par témoignage : analyse comparée de la France et des Etats-Unis", 24 november 2006, on http://m2bde.u-paris10.fr/blogs/dpj/index.php/post/2006/11/24/La-preuve-par-temoignage-:-analyse-comparee-France-Etats-Unis-par-Marie-Amelie-Goguel

[53] Inns of Court School of Law, Institute of Law, City University, London, *Advocacy*, (2005), Oxford university press, Oxford, p.168-174

[54] For examples see Inns of Court School of Law, Institute of Law, City University, London, *Advocacy*, (2005), Oxford university press, Oxford. p. 171

It is always hard and somehow unnatural to conclude. Conclusion means literally to put an end to something. It is maybe a local thing, but law student in France are taught not to make conclusions as it is considered as they have forgotten to say something. It has at least one virtue, it leaves the discussion open. Hence, I would like to use the opportunity of concluding to leave the questions addressed in this paper open to discussion, but also to ask new related questions.

Cross-examining is like playing Russian roulette. No matter how prepare you are, there is still a part of luck. Cross-examination complexity derives from human beings' complexity. As soon as human traits are involved, it appears impossible to gain certainty on outcomes. Cross-examination cannot be abstractly dealt with. It is a case by case and even more a witness by witness challenge. Each of them is unique and must be dealt with as such. However, the fact there is no recipe for an all-time successful cross-examination does not mean there is no basic rules to respect. Finally, one may be prepared to have some very bad, some very successful and finally a lot of not really successful, but not totally unsuccessful cross-examination in a career. Time and practice are probably the best allies in getting the skills and the feelings of this powerful device. It must never be forgotten that it is only a device, not an obligation. Lawyers must learn to refrain going on cross-examination for other purposes than the good of their case.

In the end, testimonial evidence in the common law system are not that different from testimonial evidence in the continental law tradition. What fundamentally changes though is the role devoted to the judicial actors. While in one case the parties are in charge of eliciting evidence from witnesses, this role is played by the judge in the other. The ultimate outcome always remains the same, only the forms of achievement change. Legal procedure is a question of legal philosophy. Looking at the USA, the report would be that there is a lot of criminal trials with at the end few convictions, while looking at France, it would be the exact contrary few trials and few acquittals. The reason is to be found in the way investigations are made. Whereas in France the investigating judge decides at the end of the investigations if there are enough evidence to prosecute and usually, if the case is sent to trial a conviction would follow[55] ; in the USA, there is not such a pre-trial, I would be tempted to say a pre-judgement.

The mixed-system taking form nowadays is not the victory of one over the other. We are witnessing a true convergence as it takes the best of both system. Of course, it is clear that for the past fifty years, accusatory principles have made it through and deeply changed the physiognomy of continental legal procedure. The implementation of the adversarial principle, whatever the reason for it, in most international instruments has truly lead to that result. However, wind might change and some authors call for reinstatement of inquisitorial devices[56]. It looks like a quest for the perfect system. However, perfection does not exist as it will always have to do a improbable balance between opposite interests. Indeed, how to conciliate involvement and equalities of the parties and in the same time speed up proceedings? Increasing and protecting defence rights and victims rights? Public trial and the necessary need to protect to some extend privacy? All these questions have found very different answers according to the legal tradition they belong to. Today, International law and legal cooperation is trying a synthesis. As far as testimonial evidence are concerned, it seems nevertheless that the international procedure definitely upheld the right for both parties to directly examine witnesses. However, it would be hard to say it is a pure common law examination as judges are also authorized to ask questions fundamentally modifying the traditional parties orientated approach of accusatory system.

Another point that is changing the deal is the striking place that are taking material evidence.

[55] even if in theory the presumption of innocence applies at trial, it must be objectively noted that a kind of pre-judgement is made by the investigating judge decision to send the suspect to trial.

[56] Van Kessel, G., "Adversary Excesses in the American Criminal Trial", 67 NTDLR 403, at 405-409

Scientific methods of investigation are revolutionizing the approach on evidence. However, even if scientific evidence are taking more and more place in criminal proceedings, oral evidence will probably retain their importance forever. Speaking evidence make more sense and is more talkative than cold scientific results. Witness are living proof able to explain with passion and feelings what happens, what they saw. They humanize proceedings for the best and the worst. Therefore, continental lawyer have to learn this new task devoted to them. Eliciting evidence is no longer judge's prerogative and it belongs to lawyers to assist the discovery of the truth in order to ensure the best defence possible to their client. Moreover, a new kind of witness is taking a central importance: expert-witnesses. As law as its interpreters, science needs its own and their opinion may vary opening a new opportunities for defence lawyers.

To go a bit further on equality between the parties. Investigating judges could be useful to consider. The main argument against them is the pre-judgement. Indeed, it is true that in French practice when this judge decides that the case should be remanded for trial, a conviction follows. However, it saves time and money and ensure a better equality between the parties that the one provided in today's accusatory system. Indeed, if at the very beginning of accusatory systems, criminal proceedings involved two private parties one accusing the other, it is no longer the case today. Prosecution has become a state administration that is using public resources to carry investigations and gather evidence of guilt. On the other hand, there is a private party that must disprove prosecution case by doing his own investigation using his own means. Of course there is legal aid and a bunch of other means that tend to reduce this inequity, but it still exists. Investigating judges are supposed to do a thorough neutral investigation using state resources for both parties. Correctly supervised it could be a good mean to reinstate a true equality between the parties.

Teorija i razvoj unakrsnog ispitivanja

Pripremio Thomas Margueritte

Uvodno razmatranje

Malo je onih koji u ovom momentu ne znaju šta je to unakrsno ispitivanje. Čini se da je svijet u ovom trenutku upoznat sa konceptom, pa se postavlja pitanje zašto bi se neko zamarao pisanjem o nečemu što svi već znaju. Naime, unakrsno ispitivanje nije ono što nam prikazuje filmska industrija. To je bitan dio postupka prema precedentom pravu, koji je kao takav ograničen striktnim pravilima i načelima. Prema stručnoj literaturi, unakrsno ispitivanje je jedan od najtežih i najvažnijih zadataka koje advokat mora da izvrši. To je kamen temeljac izvođenja dokaza. Ako je unakrsno ispitivanje uspješno, može biti dobitna karta u postupku. Ako unakrsno ispitivanje nije uspješno, može oboriti i najjači predmet.

Danas je unakrsno ispitivanje poprimilo međunarodnu dimenziju, što advokate koji djeluju u sistemu kontinentalnog prava primorava da ga nauče i koriste. Osim toga, unakrsno ispitivanje, prevazilazi opseg međunarodnog 'proizvoda' i polako se uvlači u pravnu tradiciju kontinentalnog prava stavljajući nove izazove pred advokate na lokalnom nivou. Kao potvrda tome, novo krivično zakonodavstvo BiH iz 2003. godine je formalno usvojilo mehanizam unakrsnog ispitivanja u njegovoj izvornoj formi te je stvorilo obavezu bh branilaca da se upoznaju sa njegovom upotrebom i budu u stanju da ga efikasno upotrijebe u odbrani predmeta pred sudovima u BiH. Ipak, naša praksa pokazuje da unakrsno ispitivanje i dalje predstavlja nedovoljno istražen institut.

Unakrsno ispitivanje se ne odnosi na materijalno pravo već na procesno pravo, to jest na ona pravila koja uređuju proceduru suđenja, te postupak uvođenja dokaza. Tokom historije je došlo do razvoja dva pravna sistema: akuzatorski ili adversarni i inkvizitorski ili kontinentalni sistem. Zavisno od modela koji se koristi, čak i ako je cilj krivičnog postupka uvijek isti, sam postupak ostvarenja tog cilja se razlikuje. Naime, svaki pravni sistem naglasak stavlja na veoma različite elemente zbog čega i sam postupak izgleda potpuno drukčije. Upravo ta različitost sistema čini da ispitivanje svjedoka predstavlja relativno jednostavan zadatak za advokata u sistemu kontinentalnog prava, a istovremeno izuzetno zahtjevan zadatak za advokata u sistemu precedentnog prava.

Mnogi poznavaoci ove materije, slažu se u stanovištu da pretpostavka za uspješnost unakrsnog ispitivanja nije samo u poznavanju tehnika unakrsnog ispitivanja već upravo svrhe i duha istog. Upravo zbog toga u ovom referatu će biti riječi o teoriji i prirodi nastanka unakrsnog ispitivanja, a kroz prizmu osnovnih postulata inkvizitorskog i akuzatornog pravnog sistema. Naime, potpuno shvaćanje instituta unakrsnog ispitivanja zahtjeva osvrt na tradiciju precedentnog prava u kojoj je institut nastao, značaj pravne snage usmenog iskaza sa aspekta svakog od pravnih sistema, te kvalifikaciju sistema koji je trenutno zastupljen u većini evropskih zemalja kao i na međunarodnom nivou, a koji preferira elemente akuzatornosti i predstavlja čvrst oslonac za primjenu tehnike unakrsnog ispitivanja. Nakon toga čitalac će preći na izazove koje domaćim pravnim sistemima nameće novija evolucija prava na međunarodnom nivou te na analizu same teorije unakrsnog ispitivanja.

I. Akuzatorski i inkvizitorski sistemi: od prvobitnih do modernih pravnih sistema

Suđenje u krivičnom postupku, bez obzira u kojem pravnom sistemu, ima za cilj utvrditi krivnju. Da bi se došlo do ovog ishoda, akteri u sudskom postupku će se oslanjati na dokaze. Svi sistemi dozvoljavaju usmene iskaze svjedoka tj. dokaze koje daju lica koja su vidjela ili čula šta se desilo. U biti, godinama su svjedoci bili jedini način saznanja o nekom događaju, jer naučni i forenzični dokazi do skora gotovo i nisu postojali. Sam način na koji se vrši istraga, način uzimanja izjave i ispitivanje svjedoka, kao i ocjena istih, ponovo zavisi od toga o kojem se sistemu radi. Upravo zbog toga, naredni odjeljak otpočinjemo historijskim pregledom akuzatorskog i inkvizitorskog sistema, te njihovim glavnim karteristikama i različitostima.

Historijski pregled

Historijski gledano, prvi se pojavio akuzatorski sistem. Taj sistem se primjenjivao u staroj Grčkoj i

ranom Rimu i to je bio prvi korak ka pravdi koju kroji država, a ne lična osveta[1]. Svakako, lična pravda nije bila u skladu sa voljom za održanje reda u društvu, pa se procesno pravo počelo razvijati čim je organizovana javna vlast počela preuzimati dužnost obezbjeđivanja javnog reda[2]. Kako mu i samo ime kaže, akuzatorski sistem se zasniva na optužbi. Na samom početku, optužbu je pred neutralnim, pasivnim arbitrom pokretala oštećena strana, žrtva ili porodica protiv neke osobe. To je u skladu s vremenom, i po mnogim autorima sa demokratskim principima, bio najprirodniji način da se izvrši pravda jer je na stranama bio cjelokupan teret dokazivanja, dok je uloga sudije bila ograničena na ocjenu i balansiranje dokaza. Manje više, akuzatorski sistem je ostao ovakav i do današnjih dana i njegovi principi su uglavnom nepromijenjeni.
Drugi način provođenja pravde, tzv. inkvizitorski sistem se pojavio nešto kasnije u Rimskom carstvu da bi ga crkveni sudovi ponovo uveli u srednjem vijeku kako bi se ispravili nedostaci akuzatorskog postupka i zadovoljila pravda. U akuzatorskom postupku, pravda se dijeli u zavisnosti od mogućnosti stranke da dokaže i prezentira dokaze. Pored toga, u čistom akuzatorskom sistemu, nisu postojala pravila za provođenje istrage i ovaj postupak je zavisio od volje stranaka u postupku. Svjedoci su mogli biti potplaćeni ili prisiljeni da svjedoče na određeni način, a kontrola gotovo da i nije bila moguća. S obzirom na nepostojanje materijalnih dokaza, u to vrijeme jednakost između strana je postojala samo formalno i bila je ograničena na sudnicu. Pobjeđivali su najjači, najbogatiji ili često najsretniji[3]. Takva pravda je uskoro postala nepoželjna i papa Inocentije III je odlučio da se osloni na drugi postupak koji se tada koristio u Rimskom carstvu: inkvizitorski postupak. U ovom pravnom postupku, profesionalni istražitelj je bio zadužen za ispitivanje, neutralno traženje dokaza i odlučivanje o predmetu na osnovu svojih utvrđenja. Taj *processus per inquisitionem* je smatran novim korakom ka civilizovanoj pravdi[4]. Smatralo se da donosi pravu jednakost među stranama. Od tog momenta, ishod predmeta više nije bio u rukama strana već u rukama neutralnog pojedinca koji je tražio objektivnu istinu. Pored toga, postojao je i veći politički interes za ovom vrstom postupka koji je pogodovao organima vlasti, jer se strankama u postupku nije davalo previše značaja[5], a bilo je moguće riješiti probleme u tajnosti. Engleska je predstavljala očigledan izuzetak od ovog šablona. Henri II je 1160. godine uveo kraljevske sudove. Ovi sudovi su primjenjivali precedentno pravo i koristili tradicionalni akuzatoski sistem. Treba napomenuti da je englesko pravo u ranoj fazi bilo unificirano i optuženima su pružane proceduralne garancije[6]. Zbog toga je bilo vjerovatnije da će se stranke obratiti kraljevskom sudu koji je davao više garancija, odnosno efikasne mehanizme zaštite. Naposlijetku, engleski kralj Henry VIII se prilično rano odvojio od Vatikana[7] te preuzeo vjerske ovlasti i svoja stajališta te i sam pravosudni sistem nametnuo sveštenstvu. Istovremeno sa ovim dešavanjima na otoku, proizvoljna i rascjepkana pravda u kontinentalnoj Evropi dovela je do toga da su se stranke obraćale crkvenim sudovima jer se vjerovalo da su oni blaži i sigurniji[8]. Naime, relativno kasno ujedinjenje kontinentalnih zemalja ostvarilo se uz značajnu pomoć Katoličke crkve koja je još dugo vremena po ujedinjenju, zadržala utjecaj u svim aspektima države pa tako i sudstvu. Ova epoha u razvoju pravnog sistema okončava s početkom IX vijeka, Napoleonovom vladavinom i osvajanjima kad dolazi do kodifikacije francuskog inkvizitorskog sistema i do njegovog širenja u cijeloj Evropi.

Glavne karakteristike i razlike

Karakteristike **akuzatorskog sistema** su javnost, usmenost i kontradiktornost, te jasno podijeljene uloge tužitelja, tuženog i arbitra. Općenito se povezuje sa demokratskim, izuzetno reprezentativnim političkim rješenjima koja tvrde da se prava države podređuju pravima pojedinca. Njegova osnovna forma je manje tehničke prirode u odnosu na inkvizitorske sisteme i obični građani ga općenito lakše razumiju. Po tradicionalnom principu, oštećeni pojedinac ili njegova porodica bi formalno optužio navodnog krivca; obje strane u sporu bi onda prikupljale dokaze u prilog svojim tvrdnjama. Nakon toga bi uslijedilo javno i usmeno suđenje tokom kojeg su suprotne strane iznosile argumente pred neutralnim arbitrom, a često i porotom, dok bi mahom nepismeno stanovništvo, posmatralo javno suđenje. Sudija nije imao ovlasti da sam provede istragu prije početka suđenja ili da pokrene određena pitanja; donosio bi odluku isključivo na osnovu dokaza koje strane izvedu tokom suđenja. Takav pristup je imao za posljedicu ostvarenje jednakosti strana u postupku.
S druge strane, **inkvizitorski postupak** nije kontradiktoran. Naziv se izvodi iz latinske riječi

„inquisitio“ iz koje je kasnije izvedena riječ *„inquiry“* (istraga, istraživanje) u engleskom jeziku ili *„enquete“* u francuskom jeziku. Prema tome, u inkvizitorskom postupku, centralno mjesto zauzima istraga. On je tajnovit, vodi se u pisanoj formi i strane obično imaju pasivne uloge. Inkvizitorske strukture naglašavaju tehničko-procesne aspekte i zadužuju pravne stručnjake, a ne laike, da provode pravdu[9]. Shodno navedenom, javni službenik je zamijenio privatnog tužitelja u smislu pokretanja postupka. Inkvizitor, koji je kasnije postao istražni sudija, je jedini stvarni aktivni učesnik u postupku. On je zadužen za otkrivanje istine putem sprovođenja istrage, saslušanja svjedoka i traženja dokaza. Obično se njegovi nalazi stavljaju u pismenoj formi i služe za utvrđivanje krivnje ili nevinosti. Inkvizitorske strukture su arhetipi za centralizovane političke sisteme čiji pravni sistemi su nasljednici imperijalnog rimskog i crkvenog prava. U ovom sistemu, strane su objekat istrage i nemaju nikakvu ulogu u samom postupku. Zbog toga, u modernom inkvizitorskom postupku postoje dvije faze. Istragu u tajnosti vodi sudija, a samo suđenje je javno i slijedi rezultate sprovedene istrage.

Druga razlika između ova dva sistema je **porota**. Akuzatorski postupak se obično oslanja na porotu u smislu utvrđivanja činjenica, dok je sudija samo čuvar zakona koji osigurava da se strane pridržavaju pravila prilikom iznošenja svojih argumenata pred porotom. Porota potiče od demokratskog principa iz stare Grčke koji je omogućio da samo građanin može osuditi drugog građanina. U čistom inkvizitorskom postupku, porote nisu glavna karakteristika, jer za njima nema potrebe. Svrha suđenja nije vaganje dokaza u utvrđivanju krivnje ili nevinosti, već jednostavno kada postoje javna suđenje da se prezentuju dokazi koji podupiru krivnju optuženog i da se izrekne kazna. Obično je sudija pronalazač činjenica i čuvar zakona. U modernom inkivizitorskom postupku se koriste porote u određenim postupcima[10], ali postoji tendencija da se ovo ukine. U svojoj čistoj formi, ova dva sistema su savršeno suprotna. Jedan naglašava **usmenost, javnost i kontradiktornost**, a drugi favorizuje **pismenu formu - spise, tajnost i nekontradiktornost**. Prema tome, uloga koju imaju pravni stručnjaci varira u zavisnosti od posmatranog sistema. Pravni zastupnici imaju aktivnu ulogu u akuzatorskom sistemu, a pasivnu u inkvizitorskom postupku. Sudije su u drugačijoj situaciji: nepristrasni arbitri u akuzatorskom postupku, a glavne figure u inkvizitorskom postupku[11].

Usmeni iskaz u akuzatorskom i inkvizitorskom sistemu

Oba sistema dopuštaju usmene iskaze koji su vijekovima bili glavni dokazi. Danas svjedoci još uvijek imaju važnu ulogu u sudskom postupku mada se oni sve više koriste u vezi sa materijalnim dokazima koji su napredovali razvojem naučnih tehnika istraživanja. Međutim, zavisno od posmatranog sistema, svjedoci imaju različite uloge te će način izvođenja usmenih iskaza biti potpuno različit.

U akuzatorskom sistemu, strane su zadužene za prikupljanje dokaza. Svaka strana priprema iznošenje svoje argumentacije, a svrha suđenja je suočavanje te dvije argumentacije. Prema tome, dokazi se ispituju tokom suđenja i istina bi se trebala otkriti nakon tog suočenja. Svjedoci daju svoje iskaze na ročištu i ispituju ih obje stranke u postupku. Ako se posmatraju suđenja u SAD-u, svaki advokat iz sistema kontinentalnog prava bi zasigurno bio zatečen činjenicom kolika važnost se pridaje usmenim iskazima. Usmeni dokazi dominiraju nad materijalnim dokazima. Smatra se da neposrednost usmenog izvođenja i suočenje predstavljaju najprikladniji način da se otkrije istina i utvrdi krivnja jer se time omogućava onome koji utvrđuje činjenice da cijeni valjanost usmenih iskaza tako što će posmatrati držanje i dosljednost svjedoka[12]. Važnost koja se pridaje usmenim iskazima, postupku i toku suđenja daje specifičnost ovom sistemu jer da bi se osigurala pouzdanost svjedočenja, druga strana ima pravo da ispita svjedoka i testira argumentaciju suprotne strane. Svjedoci odgovaraju na pitanja i to prvo pitanja koja postavlja strana koja ih je pozvala, a nakon toga i pitanja suprotne strane. Kao posljedica toga, svjedoci obično ne svjedoče o nečemu što su čuli od nekoga. Zato su dokazi po čuvenju, u pravilu, nedopustivi jer se takvo svjedočenje ne može testirati[13].

U inkvizitorskom sistemu, strane imaju pasivniju ulogu. Dokazi se prikupljaju tokom istražne faze, popisuju i ulažu u spis od strane službenog profesionalnog istražitelja. Pisani dokazi imaju prednost nad usmenim iskazima kojima se obično ne poklanja vjera i sami po sebi nisu dovoljni da

potkrijepe nalaze sudije u postupku. Svjedočenja moraju biti potkrijepljena materijalnim dokazima[14]. Kao rezultat toga, svjedoci se ne saslušavaju na isti način. U čistom inkvizitorskom sistemu, svjedoci ne svjedoče javno, nego izjavu daju u kancelariji sudije bez prisustva drugih stranaka. Moderni sistemi nose tragove ove originalne šeme. Svjedoke ne pozivaju strane već sudija, a obično svjedoče u narativnoj formi, pričaju o svemu što znaju, šta su vidjeli ili čuli čak i od druge osobe, a u vezi sa predmetom. U Republici Francuskoj kao krajnji primjer kontinentalno-pravne, inkvizitorske prakse, je sve donedavno samo sudija mogao postavljati pitanja svjedoku nakon što svjedok završi svoje izlaganje i tražiti određena pojašnjenja. Strane su se mogle samo pismeno obratiti sudiji kako bi svjedoku postavile određeno pitanje. Sudija je imao diskreciono pravo da odluči da li će dopustiti pitanje i mogao je ne dopustiti takvo pitanje bez ikakvog obrazloženja. Stranama u postupku je tek 2000. godine dozvoljeno da direktno postavljaju pitanja svjedocima[15].

Trend približavanja prema inkvizitorsko-akuzatorskom procesnom pravu

Svaki sistem ima svoje nedostatke i manjkavosti. Problemi domaće prakse najčešće se prevazilaze analizom iskustava stranih jurisdikcija te inkorporiranjem tuđih rješenja u domaće zakonodavstvo. U globalnom svijetu, pravni sistemi se sve više susreću sa istim problemima i pronalaze se slična rješenja. Kao rezultat, sistemi se približavaju jedni drugim. Ova pojava nije mimoišla ni procesno pravo. Naime, bliža analiza razvoja pravnih sistema ukazuje na to da su procentualno, inkvizitorski sistemi više posudili iz akuzatorskog sistema nego što je to slučaj obratno. Razlog proizilazi iz same praktične uspješnosti akuzatorskog modela.

Danas se stiče dojam da evolucija ide više u pravcu od inkvizitorskog ka akuzatorskom, a manje u suprotnom pravcu. Naravno, i sam akuzatorski sistem evolvirao je u moderniju formu. Optužbu zastupaju stručne osobe, a ne žrtve. Javno tužilaštvo je zaduženo za pokretanje radnji u krivičnom postupku u ime oštećene strane. Zatim, uz pomoć službenih lica, tužioci istražuju krivična djela, prikupljaju dokaze i vode krivično gonjenje kao predstavnici cijelog društva, a ne isključivo radi nekog privatnog interesa. Poput inkvizitorskog modela, i država je u isto vrijeme i oštećena strana i tužitelj u modernim akuzatorskim sistemima. Međutim, bez obzira na određena prilagođavanja koja se zasnivaju na inkvizitorskom postupku, sistem ostaje pretežno akuzatorski s obzirom da su zadržane suštinske karakteristike: suđenje je i dalje usmeno, javno i kontradiktorno i sudija i dalje ostaje neutralni arbitar[16]. Moderni inkvizitorski sistem je usvoijo mnoge aspekte iz akuzatorskog modela. Prilagođavanja su započela u XVIII vijeku sa revolucijama u Evropi, naročito Franuskom revolucijom kojoj je cilj bio da ukine proizvoljni sistem koji je bio na snazi[17]. Mislioci i reformisti su ukazivali na superiornost engleskog postupka jer je potonji garantovao više prava za optuženog čime se pomoglo pri suzbijanju zloupotreba u sudstvu. Ova ocjena je tada vjerovatno bila tačna. Engleska je već imala nekoliko deklaracija o pravima poput *Magna Carta, Bill of Rights i Habeas Corpus* koji su štitile osobe od zloupotreba u sudstvu. S druge strane, na kontinentu, apsolutni monarhi koristili su svoju moć da na diskrecioni način sprovode pravdu[18]. Prvi korak vlasti nakon Francuske revolucije bio je da se optuženima daju prava[19]. Od tada preuzimanje akuzatorskih principa i instituta nije prestajalo već se čak i ubrzalo, uključujući najkonzervativnije zemlje kao što je Francuska. Svaka reforma procesnog prava u Evropi napravila je korak naprijed ka akuzatorskom sistemu, naročito nakon Drugog svjetskog rata ili pod pritiskom saveznika-pobjednika ili jednostavno zato što za laika pojam inkvizitorski ima prizvuk totalitarizma. Zbog toga su Italija i Njemačka zamijenili istražnog sudiju sa optužbom koja više predstavlja stranu u postupku[20]. Italijanski krivični zakon iz 1988. godine je transformisao italijanski inkvizitorski sistem u skoro potpuno akuzatorski sistem, ukidajući ulogu sudije u istrazi.

Naposlijetku, Bosna i Hercegovina, iako pripada kontinentalnoj tradiciji, se u posljednjim izmjenama krivičnog zakonodavstva (2003.) jasno priklonila principima akuzatorskog postupka u pogledu usmenih iskaza i gotovo u potpunosti odustala od starog inkvizitorskog sistema. Istražnog sudiju je zamijenio sudija za prethodni postupak čija uloga ima znatno više ograničenja od uloge istražnog sudije i on u biti, niti vodi niti učestvuje u istrazi. Kao rezultat toga, usmeni dokazi su preuzeli primat. Član 261. Zakona o krivičnom postupku, premda zadržava pravo sudije da postavlja pitanja u bilo kojoj fazi ispitivanja, je na strane stavio teret dobijanja informacija od

svjedoka. Ovaj sistem je identičan takozvanom međunarodnom sistemu[21].
Naime i međunarodno procesno pravo je po prirodi kombinacija akuzatorskog i inkvizitorskog principa i premda je postupak pred MKSJ, a zatim ICTR (Međunarodni krivični sud za Ruandu) i ICC (Međunarodni krivični sud)[22] zvanično predstavljen kao mješoviti, stiče se dojam da je isti bliži akuzatorskom nego inkvizitorskom modelu. Dojam se stiče iz činjenice da je optužba poseban organ zadužen za istragu i pronalaženje dokaza o krivici, optuženi snosi odgovornost za pobijanje argumentacije tužilaštva, a sudije, čak kad imaju ovlasti da postavljaju pitanja, nisu toliko aktivne koliko su aktivne sudije u inkvizitorskom modelu. Naravno, treba imati na umu da međunarodni sistem ipak ima određene specifičnosti po kojima se razlikuje od čisto akuzatorskog sistema a to je na primjer, činjenica da nema porote. Glavni razlog koji objašnjava uspjeh akuzatorskog u odnosu na inkvizitorski postupak nalazi se u propisima o ljudskim pravima. Instrumenti za zaštitu ljudskih prava već duže vrijeme pokušavaju da poboljšaju zaštitu pojedinca od arbitrarnosti. Da bi se ostvario ovakav ishod, moralo se razviti procesno pravo putem kojeg će se osigurati legitimnost i pravičnost krivičnog postupka a kroz principe usmenosti, javnosti i kontradiktornosti. Dobar primjer je član 6. Evropske konvencije o ljudskim pravima (u daljem tekstu: Evropska konvencija) o pravu na pravično suđenje, koji obuhvata samu suštinu akuzatorskog postupka, to jest **princip kontradiktornosti**. Prema Evropskom sudu za ljudska prava, ovaj princip znači da dokazi moraju biti izvedeni pred optuženim u javnom suđenju a sa ciljem diskutovanja istih[23]. Osim toga, Član 6. stav 3. tačka d) EKLjP: "*Svako optužen za krivično djelo ima najmanje sljedeća prava: (...)da ispituje svedoke protiv sebe ili da postigne da se oni ispitaju i da se obezbedi prisustvo i saslušanje svedoka u njegovu korist pod istim uslovima koji važe za one koji svedoče protiv njega".* Evropski sud za ljudska prava tumači ovaj član kao dozvoljavanje unakrsnog ispitivanja svjedoka. Svakom optuženom treba dati odgovarajuću mogućnost da pobija iskaze protiv njega i da ispita osobu koja je dala takav iskaz u momentu davanja istog ili kasnije[24].
S druge strane, u inkvizitorskom postupku, osumnjičeni, to jest optuženi je samo predmet istrage ali ne i aktivni učesnik. To znači da nema potrebe optuženom dati mogućnost da pobija dokaze koji su prikupljeni u nepristrasnoj istrazi od strane neutralnog istražitelja. Neutralnost i nepristrasnost istrage garantira pravičnost ishoda, te isključuje potrebu pobijanja dokaza.
Kao što je vidljivo iz primjera Evropske konvencije, pravo ljudskih prava jasno daje prednost akuzatorskom postupku, a kao rezultat toga, inkvizitorski sistemi su morali načiniti izmjene te u cilju ispunjenja međunarodnih obaveza, uvesti karakteristike akuzatorskog modela u svoj postupak. Dodatni razlog favoriziranja akuzatorskog postupka, se nalazi u dramatičnim situacijama koje su se desile pod inkvizitorskim režimima. U srednjem vijeku, inkvizitor je slao veliki broj osoba na lomaču zbog hereze pri čemu tim osobama nije data prilika da objasne svoje postupke[25]. Nadalje, inkvizitorski postupak je godinama korišten kao podrška apsolutnoj monarhiji i diktatorskim režimima[26]. Kao posljedica svega, inkvizitornost je postala sinonim za proizvoljnost. Ovaj zaključak vjerovatno ne proizlazi iz nedostataka samog sistema već predstavlja posljedicu zloupotrebe istog od strane pojedinaca. S druge strane, iako iz akuzatorske tradicije, SAD i danas dozvoljavaju zatvaranje neprijateljskih boraca bez garancija bilo kakvih ljudskih prava, te ruši osnovne premise vlastitog sistema sudovanja. U osnovi, oba pravna sistema su dobra, a koliko su dobra uveliko zavisi od kvaliteta i čestitosti osoba koje rukovode tim sistemima kao i od profesionalnosti i neovisnosti sudstva u datim državnim okvirima.

II. Unakrsno ispitivanje: izazov za advokata u sistemu inkvizitorskog prava?

Suđenje u sistemu precedentnog prava predstavlja suočenje dvije istine i uspjeh strana u velikoj mjeri zavisi od njihove uspješnosti u prezentiranju usmenih iskaza vlastitih svjedoka, te osporavanju dokazne vrijednosti onih od suprotne strane. Za razliku od akuzatorskog sistema, usmeni iskazi imaju manju težinu u inkvizitorskom sistemu. Zbog toga je advokatu iz izvorno inkvizitorskog sistema teško da shvati unakrsno ispitivanje u njegovom punom smislu. Pri tom se ne misli samo na tehnike unakrsnog ispitivanja već, što je možda važnije, svrhu i duh istog. Dodatnu poteškoću predstavlja činjenica da današnji pravni sistem u BiH jeste kombinacija inkvizitorskog i akuzatorskog sistema i kao takav ima vlastiti identitet određen specifičnostima okruženja i tradicije. Polazeći od toga, naredno poglavlje posvećeno je teoriji unakrsnog ispitivanja

u svom izvornom obliku, onako kako se prezentuje advokatu u sistemu precedentnog prava. To će omogućiti čitaocu da shvati aktuelne izazove s kojima se suočavaju advokati u novom sistemu koji se upravo razvija.

Prvobitni zadaci i izazovi

Svrha unakrsnog ispitivanja je da se utvrdi vrijednost iskaza tako što će se strankama dozovoliti da testiraju vjerodostojnost svjedoka. U svom prvobitnom okviru, unakrsno ispitivanje je usmjereno na dva različita cilja: unapređenje argumentacije svoje strane i podrivanje argumentacije suprotne strane. U prvom slučaju, onaj ko vrši unakrsno ispitivanje nastoji da dobije povoljan iskaz i poboljša svoju argumentaciju; u drugom slučaju se ograničava ili diskredituje iskaz ili svjedok[27]. Dakle, nasuprot onome što prvo padne na pamet nekome ko potiče iz inkvizitorskog sistema, unakrsno ispitivanje ne znači samo suočavanje, pobijanje ili diskreditovanje već se treba posmatrati kao nešto konstruktivno. Unakrsno ispitivanje je dio ispitivanja situacije i okolnosti i mora se provoditi kao ispitivanje čak i ako se pouzdano zna da svjedok ne govori istinu.

Unakrsno ispitivanje se razvijalo tokom stoljeća prakse. U pogledu njegovog obima i forme važi nekoliko pravila. Ova pravila se razlikuju od zemlje do zemlje, ali su u suštini postoje dva glavna sistema: engleski i američki. Ključno pravilo engleskog sistema je da advokat mora izložiti predmet svjedoku. To u principu znači da svjedok mora znati cilj koji advokat želi da ostvari prije postavljanja pitanja. U Americi se odustalo od takvog pravila jer se smatra da davanje nepotrebnih informacija svjedoku koji ne svjedoči u dobroj namjeri, omogućava da pripremi svoju priču i izbjegne „zamke" koje bi mu advokat mogao postaviti radi diskreditovanja.

Pravila koja se odnose na obim unakrsnog ispitivanja variraju od široko postavljenog unakrsnog ispitivanja preko umjerenog do ograničenog[28]. Neki autori su pojednostavili pravila o obimu unakrsnog ispitivanja tako što su zagovarali samo dva moguća pristupa[29]. Prema prvom pristupu, unakrsno ispitivanje nije ograničeno na pitanja iz direktnog ispitivanja i obično se zove englesko pravilo. Prema ovom pristupu, sugestivna pitanja su obično ograničena. Prema drugom pristupu, tzv. američkom pravilu, pitanja u unakrsnom ispitivanju su ograničena na pitanja iz direktnog ispitivanja, dok su sugestivna pitanja dozvoljena u cjelosti. U praktičnom smislu to ne utiče na umješnost unakrsnog ispitivanja već na redoslijed izvođenja dokaza. Dakle, prema engleskom pristupu, svjedok se poziva samo jednom i može se testirati u vezi svih stvari koje on zna o predmetu. Prema američkom pristupu, unakrsno ispitivanje je ograničeno na informacije koje strana koja poziva svjedoke želi da iznese, a suprotna strana ima mogućnost ponovnog pozivanja svjedoka kao svog svjedoka ako smatra da bi taj svjedok mogao imati dodatne bitne informacije za tu stranu. Oba sistema imaju prednosti i nedostatke. Englesko pravilo omogućava izvođenje svih dokaza odjednom, pri čemu se može izgubiti jasnoća izvođenja tako što se rješava više pitanja miješanjem argumentacije optužbe i odbrane. Američko pravilo zadržava jasnoću, ali na račun pozivanja svjedoka više puta, što u slučaju stranih svjedoka, može značiti povećanje troškova postupka.

Svrha svakog ispitivanja, a naročito svrha samog unakrsnog ispitivanja, je da se utvrdi pouzdanost iskaza. Pri tome, u oba sistema sudije zadržavaju diskreciono pravo da odluče šta prevazilazi okvir unakrsnog ispitivanja[30]. Sugestivna pitanja koja sadrže odgovor, a kojim se od svjedoka traži slaganje ili neslaganje, su obično dozvoljena tokom unakrsnog ispitivanja. Međutim, zavisno od pravila koje se koristi, sudije manje-više imaju diskreciono pravo odlučivanja u pogledu sugestivnih pitanja.

Saslušanje je obično ograničeno na ono što svjedok lično zna. Doktrina dokaza po čuvenju sprečava svjedoka da kaže ono što je čuo od drugih osoba jer je nemoguće ispitati vjerodostojnost takvog iskaza i informacije.

Prvo što advokat u sistemu precedentnog prava treba imati na umu je da ubijedi porotu[31]. Unakrsno ispitivanje je potpuno drugačije zavisno od toga da li sistem predviđa učešće porote ili ne. **Porotu** čine laici koji reaguju emotivnije nego što bi to uradilo stručno lice. Prije svega, porota se mora posmatrati onakva kakva jeste: skup običnih građana koji se, kao i svjedok, vjerovatno osjećaju nelagodno i koji su pod dojmom sudnice. Porota pokazuje tendenciju saosjećanja i poistovjećivanja sa svjedocima, lako im oprašta „greške", približne ocjene situacije i nesigurno

ponašanje, te se u verbalnoj „borbi" između svjedoka i advokata, najčešće zauzima za svjedoka. Dakle, prvo što advokat mora da zapamti jeste da ne napada svjedoka osim ako je apsolutno siguran da će se ovaj slomiti. Najbolji način obraćanja svjedoku je pristojan i uglađen pristup uz ostavljanje dojma poslovnosti i tihe pouzdanosti. Od osnovne je važnosti ne izazivati nezadovoljstvo kod porote[32].

Nadalje, kao i u direktnom ispitivanju, bitno je i da unakrsno ispitivanje bude razumljivo i logično. Dakle, veoma je važno da sva pitanja budu u vezi jedno s drugim. Moraju se izbjegavati prečice i prejudiciranja kojim bi se ukazivalo da je za nekog ko je pravnik sve jasno, jer se tako može izgubiti porota, pa čak i svjedok. Također, vrlo je važno da porota i svjedoci razumiju argumentaciju strana. U komunikaciji sa stručnim licima koja su upoznata sa pravnim konceptima i pravnim vokabularom, advokati se trebaju obraćati na način razumljiv poroti, to jest laicima. Preporuka je da se formulišu kratka i jasna pitanja bez zalaženja u detalje osim ako je to neophodno.

Dodatni izazov s kojim se suočava onaj koji vrši unakrsno ispitivanje je da se ispitivač, za razliku od direktnog ispitivanja, suočava sa neprijateljskim svjedokom. Filmovi kao i stručna literatura obično prikazuju unakrsno ispitivanje kao borbu između advokata i svjedoka s ciljem da se neko od njih slomi. Međutim, u stvarnosti treba izbjegavati izazivanje nezadovoljstva kod porote direktnim napadanjem svjedoka. Važno je znati odgovor na pitanje ili, ako se isti ne zna, formulisati pitanje na takav način da je to blisko mogućem odgovoru. Naime, ne mora da znači da će svjedok reći ono što advokat traži. Njegovi odgovori mogu i štetiti predmetu koji zastupa onaj koji vrši unakrsno ispitivanje. Prema tome, prvo je bitno da se nauči i vježba zadržavanje hladnokrvnog izraza lica kako se ne bi pokazao obim nanesene štete[33]. Ali, prije svega, važno je biti pripremljen i znati šta se želi ostvariti unakrsnim ispitivanjem. Nema unakrsnog ispitivanja bez određene svrhe[34]. Nekad je bolje ne vršiti unakrsno ispitivanje nego biti nepripremljen i ispitivati svjedoka bez svrhe. Istovremeno, advokat u inkvizitorskom sistemu, iako mora pripremiti predmet, ne mora uzeti u obzir sve ove principe i može postaviti nekoliko jednostavnih pitanja sa ciljem pojašnjavanja izjave date u direktnom ispitivanju. Prema tome, jedna od razlika između unakrsnog ispitivanja i ispitivanja prema inkvizitorskom sistemu je u pripremi[35].

Savremeni zadaci i izazovi

Iako se tvrdi da mješoviti sistem koji je trenutno prisutan na međunarodnom nivou i u većini zemalja svijeta nije vezan pravnim tradicijama i principima koji regulišu posuđene, domaće koncepte i institute[36], teško je uvesti neki institut bez pravila koja su nastajala tokom viševjekovne prakse. Prihvatanje principa kontradiktornosti dovelo je do širokog prihvatanja unakrsnog ispitivanja kao mehanizma koji proizilazi prvenstveno iz prava optuženog da se suoči sa onim ko ga optužuje i da pobija navode tužioca i njegove dokaze. Većina gore navedenih pravila i principa precedentnog prava su relevantna i advokati u inkvizitorskom sistemu ih moraju razumjeti i praktikovati kako bi usavršili unakrsno ispitivanje. Međutim, novonastali mješoviti postupak pokazuje neke specifičnosti uloge advokata u poređenju sa njihovom ulogom u čisto akuzatorskom sistemu. Kao prvo, u međunarodnim sudovim kao što je MKSJ, Međunarodni krivični sud (ICC) nema porote. Šta više, većina evropskih zemalja odustala je od sistema porote. Izuzeci su porotni sudovi u Francuskoj i nedavno izraženi interes Španije da ponovo uvede sistem porote[37]. Međutim, čak i gdje postoji sistem porote, porote su veoma različite u evropskim zemljama[38] i ne mogu se porediti sa američkom porotom gdje laici odlučuju o postojanju krivnje.

Nadalje, u većini inkvizitorskih sistema, sudije rukovode ispitivanjem ili imaju pravo da postavljaju pitanja svjedoku. Kao posljedica toga, unakrsno ispitivanje poprima drugačiji smisao. To jest, nasuprot porotnicima koji su laici i koji ne mogu (i obično nemaju ovlasti) da postave pitanja ili da sami istražuju, sudije imaju iskustvo i prošli su pravnu obuku[39]. Oni mogu razumjeti i cijeniti iskaze kao stručna lica i kao lica koje su manje sklona reakcijama i odlučivanju po osjećaju kao što je to slučaj sa porotnicima. Da li to znači da je lakše vršiti unakrsno ispitivanje pred stručnim licima? Naravno. Rizici da se izgubi predmet zbog jednog lošeg unakrsnog ispitivanja su daleko manji nego kad se radi o porotnicima. Međutim, bit će mnogo teže uvjeriti sudije koji su mnogo zahtjevniji kao stručna lica u pogledu kvaliteta ispitivanja i pribavljenih informacija.

Još jedan nedostatak za osobu koja vrši unakrsno ispitivanje u porotnom sistemu tiče se strategije.

Ako porota utvrđuje činjenice, može se desiti da branilac tokom unakrsnog ispitivanja postavi pitanje koje nije dozvoljeno i koje će sudija brisati po prigovoru od suprotne strane, s ciljem dobijanja odgovora koji će porota čuti čak i ako se poroti kaže da ga zanemari. Takva strategija branioca nije primjenjiva u suđenju bez porote jer će sudije u svakom slučaju zanemariti odgovor i smatraće takvo ponašanje odbrane neprihvatljivim. Upravo ovo „profesionaliziranje" umjerenog akuzatorskog sistema to jest isključenje porote, značajno utiče na obim unakrsnog ispitivanja. Na primjer, specifičnost BiH sistema je to da je Zakon o krivičnom postupku Bosne i Hercegovine izričito zadržao američko pravilo tako što je ograničio unakrsno ispitivanje na pitanja prethodno postavljena tokom direktnog ispitivanja[40]. Međutim, ovaj princip također omogućava sudijama da u svakoj fazi ispitivanja svjedoku postavljaju odgovarajuća pitanja i time utiču i na obim unakrsnog ispitivanja i izvode ga izvan granica onog što je dobijeno tokom direktnog ispitivanja.

Profesionalizam je također uticao na dokaze po čuvenju. Doktrina dokaza po čuvenju je još uvijek nepoznata u francuskom sistemu. Zaista, smatra se da sudije kao profesionalci mogu utvrditi dokaznu snagu svakog dokaza[41]. Zakon o krivičnom postupku Bosne i Hercegovine ne govori ništa o dokazima po čuvenju mada se čini da praksa ide u pravcu dozvoljavanja prepričavanja. Postoji logičko objašnjenje za dozvoljavanje iskaza po čuvenju u slučaju BiH, a to je zato što u predmetima pred vijećem za ratne zločine većina svjedoka svjedoči ne samo o onome što su proživjeli već svjedoče i za one koji ne mogu da govore. Postoji i procesno objašnjenje za prisustvo profesionalnih sudija.

Prema tome, umjesto američke potrebe da se testira vjerodostojnost svjedoka s krajnjim ciljem uvjeravanja porote cilj je doći do istine[42], sistem koji je u razvoju više se oslanja na inkvizitorski model prilikom dobijanja informacija. Međutim, to ne znači da unakrsno ispitivanje postaje lakše za advokata u inkvizitorskom sistemu. Zaista, glavna izmjena je da čak i umjereno unakrsno ispitivanje nameće aktivno učešće advokata koji su zaduženi za izvođenje dokaza.

Prema tome, neophodno je naučiti i primjenjivati sve savjete koje advokat u akuzatorskom sistemu dobije na pravnom fakultetu. Ispitivanje je umjetnost koja zahtijevu praksu. Ono što je rečeno za način pripreme i izvršenja unakrsnog ispitivanja važi i za advokata koji je prošao obuku u inkvizitorskom sistemu. Ključ je u pripremi. Saslušanje mora imati svrhu i nema potrebe unakrsno ispitati svjedoka koji će samo ponoviti štetu koja je načinjena tokom direktnog ispitivanja. Tokom unakrsnog ispitivanja, važno je imati na umu predmet. Detaljna priprema će omogućiti advokatu da usmjeri svoje ispitivanje. On će pokušati da dobije nove informacije koje su bitne za njegov predmet ili će diskreditovati iskaze ili svjedoke[43]. Prvi zadatak je jedan od najtežih zadataka u amerikaniziranom sistemu koji ograničava unakrsno ispitivanje na pitanja koja su se pojavila tokom direktnog ispitivanja jer je pretpostavka da se ide na nova pitanja. Međutim, još uvijek je moguće razmotriti da li postoji podudaranje između sjećanja svjedoka i njegove argumentacije. Drugi zadatak je uobičajeniji jer ima za cilj da oslabi argumentaciju koju iznosi suprotna strana i koju potkrijepljuju svjedoci. Međutim, nema potrebe da se odmah ide na vjerodostojnost svjedoka. Dakle, prvi korak je da se ograniči iskaz. Zaista, svjedok obično vidi samo dio nekog događaja. Zatim, namjera je da se ograniči dio koji su oni vidjeli tako što će se to staviti u jedan širi kontekst. Drugi korak bio bi da se diskredituje iskaz. To ne znači napad na svjedoka. Svi svjedoci nisu hroničari. Međutim, ljudski mozak, naročito ako ga stimulišu strah ili iznenađenje, treba da popuni praznine kako bi se formirala cjelovita slika o događajima. To obično nisu svjesne laži već podsvjesni pokušaji da se na razumljiv način shvati ono što se desilo. Nakon toga, pametan ispitivač će testirati granice percepcije svjedoka: da li je on mogao vidjeti ili čuti bez ikavih problema; njegova memorija, a naročito sposobnost da se sjeti detalja; i konačno njegova sposobnost komuniciranja: ispitati svjedoka oko njegove sposobnosti da prenese ono što je vidio, da procijeni vrijeme i razdaljine[44]. U rijetkim situacijama će biti moguće ići i dalje i diskreditovati samog svjedoka. Diskreditovanje treba razlikovati od izuzimanja svjedoka, što bi ukazalo na lažno svjedočenje zbog pristrasnosti, interes za ishod postupka, motiv da svjedoči na određeni način, ili na prethodne osude ili loša djela. Svjedok se može diskreditovati i tako što će se ukazati na razlike između prethodnih izjava u odnosu na iskaz ili činjenice.

Svi ovi savjeti, bez obzira koliko korisni, ne mogu zamijeniti praksu. Ispitivanje svjedoka, a

pogotovo unakrsno ispitivanje, zasigurno predstavlja umijeće koje, prije svega, zahtijeva da advokat posjeduje posebne vještine. Oni moraju biti skromni pred svjedocima i nikad ih ne trebaju potcjenjivati tako što će izvoditi oštre zaključke ili požuriti da iskoriste eventualne slabosti svjedoka. Prva osobina koju osoba koja vrši unakrsno ispitivanje mora imati je dobro poznavanje ljudske prirode. On također mora biti spreman na sve i brz pri donošenju odluka.

Zaključna razmatranja

Unakrsno ispitivanje je poput ruskog ruleta. Bez obzira koliko se priprema, još uvijek je jedan dio sreća. Kompleksnost unakrsnog ispitivanja potiče od kompleksnosti ljudskih bića. Kada je umiješan ljudski faktor, čini se nemogućim ostvariti siguran ishod. Upravo zbog toga, o unakrsnom ispitivanju se ne može govoriti apstraktno. To je izazov koji se pojavljuje od predmeta do predmeta ili preciznije, od svjedoka do svjedoka. Svaki od njih je jedinstven i kao prema takvom se treba ophoditi. Međutim, činjenica da ne postoji univerzalno uputstvo za uspješno unakrsno ispitivanje ne znači da ne postoje osnovna pravila kojih se treba pridržavati. Vrijeme i praktično iskustvo su vjerovatno najjači saveznici branioca u savladavanju ove vještine. Branioci moraju naučiti da se suzdrže od upotrebe unakrsnog ispitivanjima u slučajevima kada to može naškoditi njihovom predmetu.

Na kraju, bitno je istaći da se usmeni iskazi u tradiciji akuzatorskog sistema bitno ne razlikuju od usmenih iskaza u tradiciji inkvizitorskog sistema. Ono što je drugačije jeste uloga pravosudnih funkcija. Dok su u jednom slučaju stranke zadužene za prikupljanje dokaza, to je u drugom slučaju uloga sudije. Konačni ishod je uvijek isti, razlikuju se samo metode koje se koriste u postizanju cilja. U Bosni i Hercegovini, svjedoci smo nastajanja sistema koji preuzima najbolje karakteristike ova dva sistema. Međutim, za razliku od čisto inkvizitorskog sistema, pribavljanje dokaza više nije isključiva nadležnost sudije i na braniocima je da ih pronađu i obezbjede najbolju moguću odbranu svojim klijentima.

Naposlijetku, nepobitna je činjenica da su dokazi izneseni usmeno smisleniji i impresivniji od hladnih naučnih rezultata. Svjedoci, kao živi dokaz, mogu sa strašću i osjećajima objasniti šta se desilo, i šta su zapazili. Upravo svjedoci svakom postupku daju ljudski oblik. Zbog toga je nužno da pravnici iz nekad izvorno inkvizitorskog sistema savladaju vještine zastupanja i aktivno učestvuju u formiranju efikasnog i prije svega, pravičnog postupka.

1 Bishoff, J. L., "Reforming the Criminal Procedure System in Latin America" (Reforma krivičnopravnog sistema u Južnoj Americi), 9 Tex. Hisp. J.L. & Pol'y 27, str. 32; vidi također, Bouloc, B., Stefani, G. & Levasseur, G., *Procédure Pénale,* 19. izdanje (2004), Dalloz: Paris, t. 54, str. 47.

2 Bouloc, B., Stefani, G. & Levasseur, G., *Procédure Pénale*, 19. izdanje (2004), Dalloz: Paris, stavovi 52 i 53

3 Neke od ovih kritika se još uvijek upućuju gotovo čistim akuzatornim sistemima kakvi su u SAD-u. Često se kaže da ishod suđenja zavisi uglavnom od finansijske moći stranke u postupku.

4 Merryman kojeg citira Bishoff, J. L., "Reforming the Criminal Procedure System in Latin America", 9 Tex. Hisp. J.L. & Pol'y 27, at p.

5 Bouloc, B., Stefani, G. & Levasseur, G., *Procédure Pénale,* 19th edition (2004), Dalloz: Paris, t. 65

6 Član 20. *Magna Carta*, 15.6.1215. godine.

7 Za kratku historiju odnosa između Henrija VIII i Katoličke crkve, vidi http://en.wikipedia.org/wiki/Henry_VIII_of_England#Major_Acts_in_the_Kingdom

8 Npr. crkveni sudovi nisu mogli izreći smrtnu kaznu nakon trećeg Koncila u Latranu.

9 To je objašnjenje zašto se inkvizitorni postupak razvio u crkvenim sudovima.Članovi crvve su bili obrazovani i upoznati sa Rimskim pravom. Vidi Bouloc, B., Stefani, G. & Levasseur, G., *Procédure Pénale,* 19th edition (2004), Dalloz: Paris, t. 66

10 U Francuskoj, samo se porotni sud oslanja na porotu koja odlučuje o krivici ili nevinosti. Međutim, tu se radi o sistemu koji je različit od sistema porote u SAD-u jer sudije vijećaju s porotom i mogu uticati na ishod predmeta; vidi član ZKP

11 Field, S. & West, A, "A Tale of Two Reforms: French Defense Rights and Police Powers in Transition" (Priča o dvije reforme: prava odbrane u Francuskoj i policijska ovlaštenja u tranziciji), 6 Crim. L.F. 473, str. 475.

12 Beresford S., Child Witnesses and the International Criminal Justice System: Does the International Criminal Court Protect the Most Vulnerable (Djeca svjedoci i međunarodni krivičnopravni sistem: da li Međunarodni krivični sud štiti najosjetljiviju populaciju), *Journal of International Criminal Justice*, 3 (2005), 721 at 733

13 O doktrini dokaza po čuvenju, vidi *infra*

14 Goguel, M.-A., "La preuve par témoignage : analyse comparée de la France et des Etats-Unis", 24.11.2006. godine, on http://m2bde.u-paris10.fr/blogs/dpj/index.php/post/2006/11/24/La-preuve-par-temoignage-:-analyse-comparee-France-Etats-Unis-par-Marie-Amelie-Goguel

15 Član 36. Loi n° 2000-516 du 15 juin 2000 renforçant la protection de la présomption d'innocence et les droits des victimes

16 Bishoff, J. L., "Reforming the Criminal Procedure System in Latin America", 9 Tex. Hisp. J.L. & Pol'y 27, at p.

17 Bishoff, J. L., "Reforming the Criminal Procedure System in Latin America", 9 Tex. Hisp. J.L. & Pol'y 27, at p.

18 Jedna od najviše kritikovanih karakteristika apsolutne vlasti je bila "lettre de cachet" kojima je kralj mogao narediti hapšenje neke osobe i njeno pritvaranje bez suđenja ili mogućnosti za objašnjenje svog položaja ili iznošenja odbrane.

19 Francuska deklaracija o ljudskim i pravima građana iz 1789. godine.
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