

Procedural Justice and the Discursive Construction of Narratives at Trial

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ABSTRACT

The structure and practices of justice systems in many parts of the world are undergoing what can be seen as a kind of revolution – and one not merely of professional interest to lawyers and judges. What we are seeing in nation after nation is a move from inquisitorial models of legal adjudication toward adversarial models. The discourses of adjudication in these contrasting types of trials are changing the ways in which lawyers, judges, and witnesses come to see their role in the process. The change has implications that extend far beyond the courtrooms in which trials play out, however. Because the shift from inquisitorial to adversarial justice models determines how legal narratives are created and deployed in trials, this change has the potential to impact popular perceptions of legal legitimacy, which in turn has implications for the relationship of citizens to their government and justice systems. This article will detail the global character of this change in the nature of the discourse used in legal adjudication and will explore its potential ramifications for legal professionals and for society more generally.

Keywords: adversarial, inquisitorial, narratives, procedural justice, trial models.

1. CONTRASTING THE ADVERSARIAL AND INQUISITORIAL TRIAL MODELS

Modern global justice systems have been classified by comparative legal scholars as falling into one or the other model. Adversarial systems trace their heritage to the English common law system, whereas inquisitorial systems originated in Roman law. While both adversarial and inquisitorial

systems share many characteristics, they are marked by essential contrasting features in how formal adjudication takes place and in the professional discourses that constitute its processes (van Koppen and Penrod 2003).

1.1. *Discursive characteristics of adversarial trials*

In the adversarial system, the trial is thought of as a kind of contest between two equally-situated contestants, each of which is striving to prevail. A common metaphor in adversarial justice is of the trial as a game in which the 'playing field' of the courtroom should ideally be a level one in which competing litigants are equivalently poised for the contest which will resolve the dispute. Just as it would be unfair in a sporting match to give one side an advantage in the game, the adversarial trial emphasizes the importance of the parties being treated as equals during the contest.

Discursively, live oral testimony by witnesses is the preferred means of presenting evidence at trial, and the process of taking that testimony is under the control of the parties, through their proxies, the lawyers. Lawyers bring out the testimony of the witnesses by asking a series of questions to which the witness supplies answers. After the lawyer who has called the witness to the stand finishes this question-and-answer sequence, the lawyer representing the opposing party can ask the witness additional questions in cross-examination, which is designed to surface contradictions, implausibilities, and qualifications in the testimony of the witness. During this process, the witness is limited to answering the questions asked by the lawyers. Witnesses are not permitted to give a free narrative of their evidence; nor can they comment on or argue with the questions that the lawyers put to them.

In this adversarial trial model, the judge plays an even more limited role in developing the evidence than do the witnesses. Judges are not involved in pre-trial investigation, but instead only come into contact with the case once the matter is ready to be tried. At the trial, judges make rulings about whether particular questions or answers are legally proper, but they do not decide what witnesses will be called or what evidence they will provide – that is the sole province of the lawyers. In fact, judges seldom interact directly with witnesses at all. If the adversarial trial is often metaphorically likened to a game, the lawyers are seen as serving in the role of athletic competitors, controlling the action of the match, and judges are limited to the passive role of the referee, simply deciding if the contestants are adhering to the rules of the game.

1.2. *Discursive characteristics of inquisitorial trials*

In contrast, the inquisitorial trial is imagined as a neutral inquiry conducted and controlled by a state official aimed at investigating and establishing the facts of a contested occurrence. Judicial officials, rather than the litigants and their lawyers, determine what information should be presented in the trial, in what order, and for what purpose. Although live oral testimony can be taken within the inquisitorial model, there is a much greater reliance on written statements in comparison with the limited role that written evidence takes in the adversarial trial. Even when live witness testimony is taken in the inquisitorial courtroom, the questioning is conducted mainly, if not exclusively, by the judge, and is far less directed and controlling than in the adversarial witness examination format. The role of the inquisitorial judge is far more active in all phases of the dispute resolution process than in an adversarial process – the judge takes a central role in the garnering and assessment of evidence before the trial begins, decides how much weight to assign to evidence based on an assessment of its reliability and credibility, and in the final analysis, is the ultimate fact-finder in the case. This active role in the decision-making contrasts with the much more limited role of the adversarial trial judge, who rules on whether evidence is legally proper to be admitted but not on whether it should be believed, which is the sole province of the lay factfinders of the jury. In the inquisitorial system, lawyers play a relatively marginal role in the creation of the discourse of adjudication in comparison to the dominant role of lawyers in the adversarial system.

2. GLOBAL DISTRIBUTION OF THE INQUISITORIAL AND ADVERSARIAL TRIAL MODELS

The adversarial justice model has historically been the established system in both the United Kingdom, its birthplace, and in its colonies and former colonial possessions, including the United States and Canada in North America; India, Pakistan, Singapore, Malaysia, and Hong Kong in Asia; Australia and New Zealand in the South Pacific; and nations such as Nigeria, Uganda, Kenya, and Tanzania in Africa. The inquisitorial model, derived from the law of the Roman Empire, has historically held sway throughout continental Europe, as well as in countries that borrowed substantially in their modern legal systems directly or indirectly from those continental European systems, including the former Soviet Union and the Soviet bloc socialist countries, former colonies of continental European powers, and Japan, Korea, and China.

Those historical dividing lines have begun to break down in the past several decades. More and more countries that traditionally maintained inquisitorial systems have come to adopt in whole or in part many of the characteristics of adversarial systems. In Latin America, for example, which inherited the inquisitorial system from its Iberian colonial legacy, most countries today have adopted some version of an adversarial system to replace their former inquisitorial model, including the federal system of Argentina and a number of its provinces, Bolivia, Colombia, Costa Rica, Chile, the Dominican Republic, Ecuador, El Salvador, Guatemala, many states in Mexico, Nicaragua, Paraguay, Peru, and Venezuela (Pulecio-Boek 2014, 87-89). Panama began the phased process of transition to an adversarial model in 2011 (Watts and Ruff 2012), and a Mexican constitutional ruling requires all Mexican state and federal criminal justice systems to be converted fully to adversarial models by mid-2016 (Del Duca 2011, 131).

2.1. *Latin America as an example of changing trial models*

The Latin American example draws attention on how this transition from inquisitorial to adversarial justice models came about (see Langer 2007; Pulecio-Boek 2014, 86-91). Beginning in the 1970s, a number of Latin American law professors, led by Argentinians Alberto Binder and Julio Maier, began to push for adoption of an adversarial criminal justice model to replace the traditional inquisitorial system, which they saw as corruptible and anti-democratic. These scholar-activists, through the auspices of the Ibero-American Institute of Procedural Law, commenced a two-decade process of drafting what became the *Model Criminal Code for Ibero-America*, a code that once issued in 1988 proved highly influential in the wave of legal reform that followed in Latin America. This draft code coincided with efforts by the U.S. Agency for International Development to promote 'rule of law' projects throughout the world, including in Latin America (Langer 2007, 646-651; Pulecio-Boek 2014, 86). As a result of all of these reform efforts, most of the nations of Latin America adopted statutory models that replaced their historically traditional inquisitorial criminal justice systems with adversarial ones. As one scholar of Latin American court systems put it, "The current reforms constitute one of Latin America's best-ever opportunities for adopting institutional changes capable of improving quality of life" (Bischoff 2003, 53).

It must be borne in mind that local political, economic, social and cultural conditions exert a powerful pull on legal institutions in any country, and not surprisingly, local conditions affected – and continue to affect – the

implementation of legal reforms as they occurred throughout Latin America, so that the story of adoption and implementation of adversarial reforms in any particular Latin American nation bears the unique stamp of those specific conditions (see e.g. Hammergren 2007; Langer 2007; Pulecio-Boek 2014, 93-108). While the process of transitioning from one system to the next has not always been smooth and without controversy, there is no current significant opposition to the implementation of an adversarial justice model in the countries that have committed to the process. Whether we look at the process in Guatemala (Hendrix 1998) or Ecuador (Johnson 2013) or Mexico (Wright 2010) or Chile (Tiede 2008), the pattern remains the same: inquisitorial practices giving way to adversarial trial processes, particularly in the replacement of judge-led admission of written evidence by lawyer-conducted oral witness examination (Pulecio-Boek 2014, 100).

A few Latin American nations – Brazil, Cuba, and Uruguay – have not joined the parade of its neighbors turning to adversarial models as a way of reforming their criminal justice systems. In the case of Cuba, its socialist government is largely ideologically isolated from jurisprudence in the rest of Latin America. Uruguay, according to a number of Uruguayan scholars and legal experts, has had various reforms of its criminal justice system stymied by political reactions and counter-reactions to problems created by former dictatorial governmental regimes (Ronconi 2008).

Brazil, divided by language from other Latin American countries, was thereby insulated from the transnational legal activism of promoters of adversarial reforms like Alberto Binder, who traveled and lectured in Spanish-speaking Latin America in support of the reforms (Langer 2007, 653-654). Brazilian legal reformers like Ada Pellegrini Grinover concentrated their efforts on more piecemeal reform of the Brazilian justice system rather than on its wholesale replacement (Langer 2007, 665). However, the Brazilian Constitution of 1988, in Article 5, Clause LV, for the first time introduced certain adversarial elements into the otherwise fully inquisitorial criminal justice system by giving litigants the right to collect and present evidence in the fact-finding process (da Silva 2009, 14). This constitutional reform was later specifically implemented by a statute enacted in 2008 that explicitly guaranteed litigants the right to directly question witnesses at trial (other than the defendant, who continues to be initially questioned by the judge). Previously, only the judge could introduce evidence or question witnesses, with the litigants limited to merely suggesting questions to the judge, who might choose to ask them or not. Still, the current procedures as enacted are not fully adversarial, since judges are permitted under the 2008 statute to ask questions of witnesses for purposes of clarification, and judges still control the admission

of documentary evidence in trials (da Silva 2009, 37-38). A Brazilian legal scholar recently concluded that, notwithstanding these constitutional and statutory changes, the Brazilian system remains a largely inquisitorial one, since it is harder to change ingrained behaviors of judges and lawyers than it is to change the laws (da Silva 2009, 67-78, 80-81).

2.2. *European transitional models from inquisitorial toward adversarial trials*

Looking at continental Europe, the birthplace of the inquisitorial model, so many elements of the adversarial system are being integrated into European practice that some scholars (e.g. Bradley 1996; Ogg 2013) speak of European justice systems as becoming convergent with common law-derived adversarial models. In some cases, adversarial style evidentiary procedures have been added to systems where judges continue to play the prominent role that the inquisitorial system has traditionally reserved for them. In other cases, wholesale statutory reforms have displaced the traditional inquisitorial systems and replaced them with adversarial systems.

The example of Italy shows the challenges inherent in that kind of full-bore reform. In 1988, Italy statutorily implemented an adversarial justice system, requiring that live witness testimony be used at trial except in very limited circumstances. Judges no longer had a pre-trial investigatory role, and the presentation of evidence was vested in the hands of the lawyers rather than the judge (van Cleave 1997; Ogg 2012). Immediately there was pushback, primarily from judges unhappy about being displaced from their central role and from prosecutors who faced the burden of having to use live witnesses instead of the written witness statements that they formerly relied upon (Illuminati 2005, 573-574). Indeed, judges and prosecutors were natural allies in opposing adversarial reforms because of strong bonds of professional identity and solidarity; Italian prosecutors and judges share the same training and career trajectories, belong to the same professional association, and are regulated by the same body, whereas defense lawyers are instead trained and regulated in the same way that other non-criminal lawyers are (Grande 2000, 236). Judges and prosecutors appealed many of the provisions of the 1988 criminal procedure code to Italy's Constitutional Court, which in 1989 invalidated much of that code as unconstitutional (Panzavolta 2005, 597-599). In 1992, Parliament tried to implement a less sweeping version of adversarial reform, and again the Constitutional Court struck down the legislation as unconstitutional (Panzavolta, 599-600). Five years later, Parliament tried yet again, passing a

statute that abolished the use of written witness statements as a substitute for live testimony; not surprisingly, the Constitutional Court ruled these reforms unlawful the following year.

It was becoming apparent that the Italian Parliament was committed to criminal justice reforms in evidentiary practices and it was equally apparent that the Constitutional Court would not permit those reforms to be implemented. In 1999, the Italian Parliament amended the constitution to guarantee the right to adversarial evidentiary practices in criminal cases; these constitutional changes were followed in 2001 by amendments to the criminal procedure code giving specificity to the provisions added to the Italian constitution (Illuminati 2005, 577-578). In a series of cases brought before the Constitutional Court between 2000 and 2002, the Court held that the adversarial provisions in the criminal procedure code were constitutional, in light of the amendments made to the constitution (Panzavolte 2005, 615). While this ended the formal legal contest as to whether Italy would have an adversarial or an inquisitorial justice system, one must wonder whether the same social and ideological forces that propelled the contest between the court and the legislature may still be at play in the actual implementation of the current justice system in Italy (see Panzavolte 2005, 609 for argument that judicial ideology fueled this struggle between the legislature and the judiciary).

A number of other European nations have introduced aspects of adversarial practices into their justice systems to one degree or another. Russia, for example, has modified its inquisitorial systems by grafting substantial adversarial elements into their trial systems in its 2002 reforms (Thaman 2008; Mack 2012). Poland, which had begun to add adversarial evidentiary practices into its justice system in recent decades, has accelerated that trend by implementing a new criminal procedure code in 2013 (effective in July 2015) giving lawyers virtually full control over the admission of evidence and allowing judicial participation only under extraordinary circumstances (Roclawska and Bulut 2014). Across the European Union, the European Court of Human Rights has itself imposed some features characteristic of the adversarial system as essential to protect the human rights of European citizens (Bradley 1996; van Koppen and Penrod 2003). European commercial arbitration practices, like international commercial arbitration practices elsewhere in the world, are eschewing their traditional inquisitorial evidentiary practices for more adversarial ways of fact presentation. For example, the website of the Swedish Arbitration Association touts its arbitration procedures to potential arbitration litigants, saying “The procedure is principally adversarial as opposed to inquisitorial, with the parties themselves essentially controlling the facts and evidence to be introduced.

In particular, examination of witnesses is conducted by counsel for the parties” (Swedish Arbitration Association website 2016).

2.3. *East Asian evolution from inquisitorial toward adversarial trial models*

In East Asia, too, legal systems that had arisen through transplantation from continental European inquisitorial systems have begun to adopt more and more adversarial features. Japan has undergone several waves of structural legal reform (Feeley and Miyazawa 2002; Mack 2012; Nakao and Tsumagari 2012) that have brought many attributes of the adversarial model into their system. Taiwan implemented wholesale reforms of its criminal justice system in the process of its transition from authoritarian martial law to democracy (Wang 2002), culminating in the implementation of an adversarial justice system in its Criminal Procedure Code of 2003 (Lewis 2009; Li R. 2015). China can trace the roots of its modern legal system to German, Japanese, and Soviet models, such that the 1979 Criminal Procedure Code could fairly be described as a purely inquisitorial system where lawyers played at best a marginal role (Li L. and Ma 2010). However, the 1996 Chinese Criminal Procedure Code brought in a number of adversarial features in the taking of evidence at trial (Lancaster and Ding 2006; Peerenboom 2006, 844; Li L. and Ma 2010; McConnell 2011), and the 2013 significant amendments to that Code continued that process of change from a completely inquisitorial system to one with substantial adversarial characteristics (Ming and Dai 2014).

In the case of Japan, the most recent waves of legal reform in the 1990s and early 2000s have had significant impact on not only how litigation is practiced by legal professionals, but also how potential litigants have come to see litigation as a viable option for dispute resolution. In contrast to the traditional stereotype that Japanese culture serves to inhibit citizens from resorting to formal litigation, the last two decades have seen a dramatic rise in civil trial litigation (Ginsburg and Hoetker 2006). Reforms in Japanese legal education, namely, the importation of American-style lawyer training, have made lawyers more comfortable with lawyer-centered adversarial litigation (Wilson 2010), and the rapid expansion of the Japanese bar while the number of judges has remained relatively constant (Ginsburg and Hoetker 2006, 38) has tipped the balance of power between judges and lawyers, allowing more lawyer-centric adversarial processes to prevail over potential resistance on the part of judges to losing their position of discursive control over the courtroom.

3. ADVANTAGES AND DISADVANTAGES OF ADVERSARIAL
VERSUS INQUISITORIAL TRIAL MODELS

Given this sweeping global trend, one must ask whether the replacement of inquisitorial systems with adversarial ones is a good thing or a bad thing. Comparative legal scholars have often debated the question of which type of system is preferable. The answer to that question depends, of course, on what one means by labeling a system 'preferable.' Some scholars have asked, which system produces the most factually accurate verdicts? In other words, will an adversarial or an inquisitorial system result in the fewest miscarriages of justice? Some (e.g. Slobogin 2014) have argued that inquisitorial systems are less prone to erroneous verdicts, while others (e.g. Park 2003; Brants 2012) have maintained that adversarial systems are better at reaching correct results. One fact is clear – both inquisitorial and adversarial systems have been shown to sometimes fail when scientific evidence such as DNA results prove the fallibility of verdicts obtained (van Koppen and Penrod 2003). Because we have no verifiable way of measuring the ultimate accuracy of fact-finding, probably we can never know for certain which system is a more reliable route to true factual findings.

Other scholars, recognizing that we cannot determine which system might be more accurate, have asked instead the question, which system is more efficient? That is, does either the inquisitorial or the adversarial system impose lower economic costs on society? Again, economists have lined up on both sides of the argument (cf. Block 2000; Froeb and Kobayashi 2012), so an economic analysis of this question turns out likewise to be unclear as to which might be better.

3.1. *Procedural justice implications of moving from inquisitorial to adversarial trials*

In this section, I will focus on a slightly different aspect of the question of which system might be preferable, by asking which system might provide greater procedural justice. Answering that question will first examine the contrasting ways in which legal narratives get created in each system, and will lead to a consideration of which typology of narrative construction is likely to be more satisfying to those who participate in and experience the results of the justice system. In other words, it is necessary to weigh the contrasting procedural justice implications of both systems in assessing their relative merits.

3.1.1. Procedural justice contrasted with substantive justice:
what makes people think a legal system is fair?

Procedural justice differs from substantive justice. Substantive justice is done when the verdict of the court is factually correct, that is, when an accurate determination of the facts occurs and the law is correctly applied to those facts. Procedural justice, on the other hand, addresses a very different aspect of fundamental justice, one which is directly tied to litigant satisfaction with the process itself through a belief that the system has operated in a fundamentally fair manner (Thibaut and Walker 1978; Solum 2004). One might well ask, why care at all about procedural justice? Isn't it enough if trial verdicts end up being factually and legally correct? To understand why procedural justice might matter, social psychologist Tom Tyler in the 1970s began a lifelong study of analyzing why people obey the law. What he discovered through thousands of survey questionnaires (Tyler 1990) was that people obey the law, not because they fear being punished if they break the law, but because they feel the law and its attendant legal processes seem fair to them. When the legal order seemed to the respondents to be unjust, unfair, inaccessible, or corrupt, they thought of the legal system as illegitimate, and tended to evade the laws when they thought they could get away with doing so. On the other hand, when they imagined the workings of the legal system to be fair, they tended to obey the law even when they did not necessarily agree with its substance.

This discovery then raised for Tyler a second question: what makes people think that their legal system is a fair one, worth obeying even when the respondents believed they could flout the law without being caught? One intuitively appealing idea is that those who had prevailed in legal disputes would come to think of the legal system as just and fair, while losers in disputes would conclude that the system is unjust and unfair. Surprisingly, however, this is not what Tyler's survey research found. Instead, people who felt that the process had treated them fairly had positive feelings, even if they had not won their cases, whereas even winners did not feel positively about the system if they felt they had been treated unfairly in the process. Being treated fairly, according to the survey answers, had three components: that the party felt able to give voice to their side of the story; that the adjudicator gave evidence that they had been listened to; and that throughout the process, the party felt that they were treated with dignity and respect. Other research (see summaries of this research in MacCoun 2005) replicated Tyler's findings in both civil and criminal cases, and in a variety of countries and cultures. For example, researchers studying litigants in American small claims courts – where lawyers are not

permitted and litigants plead their own cases – found that litigant satisfaction with the process was highest when litigants felt they had had a fair opportunity to tell their side of the story and that they were listened to by the judge. Ironically, many of these litigants presented narratives that were insufficient to satisfy the legal elements of their cases, but losing the case did not appear to sour their perception of the fairness of the process (O’Barr and Conley 1985). Winning or losing one’s case, it appears, may not be the major determinant in how people judge the fairness of their legal systems.

3.1.2. Trial discourse and procedural justice

These studies on procedural justice suggest that discursive differences between adversarial and inquisitorial systems that relate to procedural justice factors – being able to tell one’s story, being listened to, and being treated with respect in the process – might be significant in judging which system is preferable, and even in determining which features of each system should be considered desirable to best promote public perceptions of fairness and legitimacy in a legal system. The contrasting manners in which legal narratives are constructed in each system result in discursive regimes that may have significance for the procedural justice perceptions of the parties and the public. Lawyer control of presentation of evidence in the adversarial system can be contrasted with the inquisitorial trial in which legal narratives are second-order constructions of judges, fashioned from written information obtained largely outside the courtroom process.

Inquisitorial discursive practices inherently provide less opportunity for litigants to shape their cases and control the legal narratives in the trial. Since the judge decides what information will be presented at trial, the legal narrative constructed at trial of what happened and what it means is exclusively within the control of the judge. Parties have no control over the judge’s narrative and cannot seek to construct their own narrative, even as a potentially competing narrative to that of the judge. Under those circumstances, the litigants and other witnesses have no space in which they can attempt to have their stories heard, so that they lose both voice – the opportunity to tell the court what matters to them – and the chance to be listened to as well, and thus to be accorded respect through the process of being deemed worthy of being formally heard. True, the inquisitorial judge can choose to open a space for litigants to express their side of the story, but if this occurs, it is as a kind of grace or favor, not as of right. And, given the preference of inquisitorial courts for written witness statements over oral testimony, parties and witnesses in practice seldom have the chance for

such grace to be shown to them. Since their oral testimony is not needed, they are symbolically and literally excluded from the fact-finding process. Procedural justice research would predict that this exclusion from the process of the construction of the legal narrative that gives meaning to the case would leave the witnesses and parties to such proceedings less likely to conclude that the process was essentially fair, regardless of the outcome. Indeed, this is precisely what was found in a study (Sevier 2014) in which European respondents were asked to assess proposed dispute resolution practices for extra-legal community disputes. Despite the respondents having come from countries with historically inquisitorial practices, which we might expect they would tend to favor out of familiarity, most subjects instead favored more adversarial processes when they were asked to choose which kinds of processes they thought would be most fair.

In contrast, adversarial systems – at least in theory – would seem structured to enhance procedural justice perceptions of litigants. Adversarial processes vest the creation of legal narratives with the lawyers, who are structurally the agents of the litigants and act in their interests and under their direction. Presumably, the litigants should be able to exercise control over the lawyer-directed construction of legal narrative in court in a way which is impossible in an inquisitorial court. Even witnesses who are not parties to the litigation are more central to the dispute resolution process in the adversarial system – since witness testimony is overwhelming when provided orally in court – as opposed to inquisitorial systems, in which most evidence is admitted at trial only through written statements produced outside the trial process. If being able to tell one's story directly and be listened to is central to inculcating a sense of procedural justice, then adversarial processes seem far more likely to result in positive perceptions of procedural justice by those who participate in them than would inquisitorial systems.

3.1.3. Lawyer-centered trial discourse as a barrier to achieving procedural justice in adversarial trial systems

Unfortunately, in practice there are barriers within the norms of trial practice in many adversarial systems that undermine that structural advantage in procedural justice. In particular, the practices in the United States fail to deliver on the potential that adversarial systems could provide with respect to procedural justice. The reason is simple: adversarial trials as actually practiced vest the creation of legal narratives, not with the litigants and witnesses, or even with the neutral judges, but instead with the parties' lawyers. Despite the ideological norm that lawyers act under the direction

and control of their clients, the reality is that lawyers themselves determine the unfolding of trial evidence with little or no such client control (Park 2003). Lawyers in court ask precise, detailed questions that, especially during cross-examination, witnesses can merely assent to or reject. Limited to saying “yes” or “no” in response to the lawyers’ questions, witnesses are deprived of the ability to tell their story in the terms they think are significant. In essence, the language in which the testimony is given in adversarial courtrooms is provided by the lawyers, not the witnesses. Witnesses cannot volunteer information but must instead wait for the lawyers to ask questions of them, even when the witnesses feel that important evidence has been left out of their testimony. Lawyers see the process of questioning witnesses as merely the vehicle through which they establish the raw data needed to argue their theory of the case in closing argument, not as a mechanism to discover information that the fact-finder will need in order to reach a true verdict (see, e.g., trial manuals offering advice to trial lawyers, such as Jeans 1999; Mauet 2007). Even in a recently-published lawyer training manual that claims to be promoting less rigid lawyer control over witness questioning, the sample cross-examinations that it provides to the reader consist of sequences of lawyer questions that allow little scope for witnesses to determine the shape of their testimony (McComas 2011). It is the very dynamics of the lawyer-centered adversarial model that ensure that the content of witness testimony is almost exclusively under the direction and control of the lawyers.

It is true that witnesses and litigants in inquisitorial systems may feel estranged from the process through which their cases will ultimately be resolved because the development of legal narratives in inquisitorial courts is literally distant and indirect from their participation. However, lawyer control over legal narratives in adversarial courts is more obvious to the witnesses and litigants, who sit present in court while the lawyers maintain their iron grip on the construction of the legal narratives at trial. Worse yet, lawyer exertion of control over testimony can constitute a personal face-threat to the witness (cf. Goffman 1955) because the examining lawyer has the power to select the precise language through the questioning format in which the witness testimony will be given. Witnesses who experience this process are forced to agree with characterizations provided by the lawyer; they in effect have words ‘put into their mouths’ by the lawyers.

Tight lawyer control over the process of the development of witness testimony is compounded when it is the sole province of the lawyers to organize the admitted testimony into a coherent legal narrative, such that witnesses may feel that the lawyers have distorted, ignored, or reframed

their experiences in this process. Although inquisitorial trials also exclude witnesses from this process of the framing of a coherent legal narrative at trial, this interpretive work is done by judges, out of the presence of the witnesses, and so may be less jarring to the witnesses' perceptions of the fairness of the trial. A witness in an inquisitorial courtroom never sees the reframing of her written witness statement and may be forever unaware of the ways in which the judge has distorted the written evidence through that interpretive reframing process.

4. CONCLUSION

In conclusion, the wide-spread adoption of adversarial trial practices in many parts of the world will undoubtedly have some kind of impact on how the participants in those trials – both legal professionals and litigants – experience and evaluate the trial process. Of course, it must always be borne in mind that the consequences of importing any kind of significant change into any dynamic system such as a legal system are not at all a foregone conclusion. When those changes come from the outside, the end results are even more indeterminate, as we have already observed in the case of mixed results of the importation of adversarial practices into the legal systems of Asia, Latin America, and Europe. As Mirjan Damaska (1997, 839) put it, when rules and practices get imported into a legal system, “unintended consequences are likely to follow in living law. And while some of these consequences can turn out to be a pleasant surprise, others can be very disappointing”. There will be no single outcome as many national legal systems come to incorporate adversarial evidentiary practices into their law, but rather a panoply of possible outcomes, sensitive to local contextual factors.

Recognizing that, it must be understood that adversarial processes have the potential to promote positive perceptions in the public of the procedural fairness of the justice system by giving litigants and witnesses a more direct experience of being able to shape their own legal narratives and of having an opportunity to have their stories heard and respected in court. That advantage, however, will be undermined when tight lawyer control of the trial process occurs, as has historically been the case in many common law adversarial nations such as the United States. For the greatest enhancement of procedural justice, the newly developing and emerging adversarial systems might consider how to rebalance the control of legal narratives by giving witnesses and litigants greater discursive control over their own testimony.

At a junction in history in which concepts of legal legitimacy and the rule of law are being questioned even in Western liberal democracies, legal systems can ill afford to ignore the procedural justice consequences attendant to the discourse regimes in which their legal systems dispense justice.

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