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Rent-seeking through litigation: adversarial and inquisitorial systems compared

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Abstract

This paper compares the adversarial system of adjudication, dominant in the common law tradition, with the inquisitorial system, dominant in the civil law tradition, using a rent-seeking, Nash equilibrium, model of litigation expenditure in which the litigants simultaneously choose their levels of effort with the goal of maximizing their returns from the case. The choice between the two systems is modeled as a continuous variable showing the equilibrium solutions of the game and their implications for procedural economy. The results are then utilized to characterize the optimal levels of adversarial and inquisitorial discovery with respect to the social benefits of truth-finding and correct adjudication, and the private and administrative costs of litigation.

> [A] common law trial is and always should be an adversary proceeding.
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> Hickman v. Taylor (1947), 329 U.S. 495, 516 (Jackson, J., concurring)

Scholars of comparative civil procedure often contrast American and continental European legal systems by reference to the distinctive functions fulfilled by judges and lawyers in the two legal traditions. A distinction is often drawn between "adversarial" and "inquisitorial" procedural systems. The two opposing paradigms refer to the different roles played by the judge in the conduct of a civil case.

In a typical inquisitorial proceeding, the trial is dominated by a presiding judge, who determines the order in which evidence is taken and who evaluates the content of the gathered evidence. In those proceedings, the court determines the credibility and relative weight of each

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piece of evidence without being constrained by strict rules in that respect. By contrast, in a typical adversarial system, the case is organized and the facts are developed by the sole initiative of the parties. The process develops through the efforts of the litigants before a passive decision maker who reaches a decision on the sole basis of the evidence and motions presented by the litigants.

Law and economics scholars have occasionally examined the various methods of discovery in a comparative perspective. The discussion has often invoked alternative ideological paradigms. Most notably, in a well-known debate, Posner (1988) and Tullock (1988) have taken opposite sides on this issue, defending respectively the adversarial and the inquisitorial systems, on a variety of grounds. Posner argues that the adversarial system is preferable because it allows the parties who bear the costs and benefits of the litigation to shape the litigation. Alternatively, the inquisitorial method shifts power to judges, and thus promotes an expansion of the public sector as well. Posner contends that it is doubtful whether such a shift would improve the performance of our judicial system.

In this paper I consider the strategic implications of these procedural alternatives, showing the impact of a change in the extent of the inquisitorial role of the judge on parties' incentives to expend in litigation. In Part I, I consider the key differences between the conduct of a case in an adversarial procedural system and an inquisitorial system. The analysis evaluates some general features of alternative modes of discovery. The results can be extended to both civil and criminal procedure, notwithstanding the different goals and concerns associated with civil and criminal adjudication. In Part II, I show the impact of the two procedural rules on the equilibrium expenditures on litigation for the two parties. The results suggest that both an increase in the weight attached to the judge-obtained evidence and an increase in judicial scrutiny of the adversary's arguments and evidence will have a negative impact on the equilibrium levels of litigation expenditures undertaken by the litigants. In Part III, I depict the optimal weight to be attached to the inquisitorial efforts of the judge as the value that maximizes the social benefits from truthful adjudication net of the private and administrative costs. The comparative statics of the model show how the optimal weights placed on the adversarial and inquisitorial components of the process vary with some key features of the cost and benefit functions. The results indicate that the optimal weight attached to the adversarial component of the process is positively related to the visibility and social relevance of the litigated case and to the judicial scrutiny applied by the court to the parties' evidence, while it is negatively related to the private cost of litigation for the parties, the relative efficiency of the court in obtaining and evaluating evidence, and the number of litigants competing for the adjudication of a fixed award. Part IV offers a few concluding remarks about the costs of the adversary system.

1. The adversarial and inquisitorial systems compared

The distinction between adversarial and inquisitorial systems finds its origin in twelfth century European law. Adversarial processes could only be initiated by the action of a private party (the so-called *processus per accusationem*), while inquisitorial proceedings could be triggered *ex officio* by the judicial system (the so-called *processus per inquisitionem*).