

## IN THE CRIMINAL PROCESS BOWELS: FOR A DEMOCRATIC TURNING

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**Abstract:** The article intends to study, since the criminal proceedings, the subject of intensive historical and conceptual pressures of the criminal rule of power: the inquisitorialism. Besides the endless definitions, imperative to ask about the criterion that defines each styles that inspire aesthetic systems of criminal procedure. Asking the deleterious combination of accusatory senses with the simple presence of procedural actors, there is the 'index of inquisitoriality' located in the examination of devices that allow the activity evidence role of the magistrate, that contribute to the democratic political game due to the improvement of accusatory culture.

**Keywords:** accusatory system - criminal procedure - democracy – inquisitorialism.

## NAS ENTRANHAS DO PROCESSO PENAL: PARA UMA VIRAGEM DEMOCRÁTICA

**Resumo:** O artigo pretende estudar, desde o processo penal, o *motivo histórico-conceitual* hábil a perceber as intensivas pressões da *regra* do poder penal: o *inquisitorialismo*. Para além das infinitas definições, cabe perquirir sobre o *critério definidor* de cada um dos estilos que inspiram a estética dos sistemas processuais penais. Indagando a deletéria conjugação da *acusatoriedade* com a simples presença de partes processuais, deve-se destacar o *índice de inquisitorialidade* localizado no exame dos dispositivos que permitem a atuação probatória do magistrado, para que se contribua no jogo político democrático para o devido aperfeiçoamento da cultura acusatória.

**Palavras-chave:** sistema acusatório – processo penal – democracia – inquisitorialismo.

## 1. INTRODUCTION

Any historical reference about inquisitorial practices, in its various nuances, can not be apart and must invest in an irrevocable function: the one of creating a *historical-conceptual reason* able to notice intensive pressions - far from any adherence of a way

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intended to be simple register of an epistemological origin - that can impound *inquisitorialism*, which is the *rule* of the criminal power (cf. CARVALHO, 2008, pp. 77-78). Clarifying its true expression ways, in its different levels, is to capture the variants of the criminal practices. Therefore, from an interpretive perspective, there should be analyzed some dimensions that occur because of a trans-historical characteristic which exists inside the great functional mentality to justify different authoritarian juridic machines.

If we could consider an acquisition the deep treatment with materials taken from various procedures ambiances and their respective political values, now the expectation could tend to build some few definitions, or in other words, it could reverse some distinction between both *styles* of procedure performance and visual: accusatory and inquisitorial. Hence, some concepts can be clarified and some confusions can be solved. If we desired to offer definitions concerning to the classic *criminal procedures systems*, the task would be really hard. A consensus would be impossible and the largeness of points would have no limits. Since the defined historical, the aspects of both systems are immeasurable themes. The menu would endless; “*à la carte*”, limitless choices could only guide until an indigestion of any system. Over and above large descriptions, for the moment it worths to highlight, to invest and to search the *defining criteria* of each system.

First, we talk about *system*<sup>1</sup> referring to inspiration models, extremes, ideal types from Weber<sup>2</sup>, key ideas. Pure models just as a result of the effort on catching deposited sediments along different constitutions, in different places and times; characteristics of systems since a history of *criminal procedures styles*, obviously told by our guiding aim. Our efforts go into the study of a *criminal procedure structure*, through the perspective of the dual relation, which is intertwined (far from any contrast between

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<sup>1</sup> Kant will always be an useful reference, in the large tradition in the theme, when he combines, in the *architectonic of Pure Reason*, the notion of *system*: “With architectonic, I understand the art of systems. (...) With system, I understand the unity of several knowledge about an idea. This is the rational concept of the form of a whole, once, in the whole, either the scope of the different, either the respective place of the parts, are firstly defined.” (KANT, 2001, p. 657)

<sup>2</sup> About “ideal type”, see the classic WEBER, 1944 and, specially, before, in text from 1904, WEBER, Max, 1974.

form and substance), between social relations that create unaware structures, following the clues of a liable<sup>3</sup> anthropology.

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<sup>3</sup>Under the clue given by Levi-Strauss, first of all it is the *structure* that offers an aspect of *system*, consisting the clue of such elements that any change in one of them changes all the others. Secondly, every model belongs to a group of changes; thirdly, with the above properties, it is possible to predict how the model will react, in case of change in one of its elements. “Finally, the model should be built in such a way that its operation can explain all observed facts.” (LÉVI-STRAUSS, 2003, p. 316). But to escape from any (fake) accusation of formalism, this structural view, useful in some way, refuses to oppose the *concrete* from the *abstract*, not recognizing any privileged value in the last one. On one hand, form distinguishes itself by opposition from a subject that is foreign to it, but on the other hand *structure* does not have different substance: “she is the substance itself, apprehended in a logical organization considered as an element of the real”. (LÉVI-STRAUSS, 1993, p. 121). It must be always remembered that the relative aspect of the structure elements, which are the meaning and the value of each of them, depends on the position they take in comparison to the others. As a system of relations, *structure* refers to models built according to empirical reality. Thereupon, its notion did not confuse with the studied reality, with the empirical reality itself, but it would be a model of analyze, in other words, *social structure* and *social relations* do not confuse one with the other: “social relations are the raw material used to build the models which express the social structure itself.” (LÉVI-STRAUSS, 2003, pp. 315-316). It is interesting that models can be *conscious* or *unconscious*, and according to Levi-Strauss, particular aspects assumed by each culture would be responsibility of *unconscious mental structures*, hence the method proposed by the structural analysis in linguistic and anthropology: capturing such (unconscious) models which are accountable by the others (conscious) that are nothing more than deformed effects of the first ones. The conscious models, commonly called “rules”, are included among the poorer existent ones, once they just perpetuate beliefs and uses. Therefore the paradoxical situation caused by structural analysis: “the clearer is the apparent structure, the harder is to comprehend the deep structure, because of the conscious and deformed models placed as obstacles between the observer and the object.” (LÉVI-STRAUSS, 2003, p.318). The *unconscious reasons* why a custom or a belief is practiced are quite far from the reasons used to justify it, so that the unconscious activity of the spirit consists of imposing forms to a content. It must be touched the structure which stays near from each institution or custom into obtain a valid principle of interpretation, like the study of the symbolic function expressed in the language has clearly shown (LÉVI-STRAUSS, 2003, pp. 34-37). Hence, it would not even be necessary to say the reason of the kinship between the structuralist comprehensions of Levi-Strauss and the linguistic, essentially from Jakobson, and it will not be in vain all the dialogue of ideas, the sounds, and the inspiration given to the Lacanian psychoanalysis (about the symbolic effectiveness and the unconscious, which have great importance to the Lacanian psychoanalysis, especially the idea of “empty unconscious”, cf. LÉVI-STRAUSS, 2003, pp.215 ss.). Levi-Strauss says, initially, language is a *product* of culture and also a *part* of culture. But it is not all; language can be treated as a *condition of culture* because of a double reason: “diachronic, once above all it is through the language that somebody acquires the culture of the group (...). From a more theoretical point of view, language also appears as a condition of the culture, since this one has an architecture similar to the one of the language. Both of them raise themselves through oppositions and correlations (...).” (LÉVI STRAUSS, 2003, p. 86). However relations between *language* and *culture* move away extreme hypothesis: the one that do not exist any link between the two orders and the one related to a total correlation in all levels. That is why there is the intermediate position of Levi-Strauss: “some correlations are probably able to reveal, among certain aspects and certain levels, and, to us, it is about finding what are these aspects and where are these levels.” This would be the task of “a very old and very new science, an anthropology (...), a knowledge of the human that links several methods and several themes, and that will reveal one day the secret mainspring that guides this guest, present without being invited to ours debates: the human spirit.” (LÉVI-STRAUSS, 2003, pp. 98-99). Taking back an essential point, a question is made: how to arrive to this unconscious structure? Here *ethnological* and *linguistic* method find each other. On the other hand, far from any dual organization that separates the social group in two halves, a historical observation allows to distinguish something that preserves itself and that changes progressively, by a kind of filtering: single scheme, related to relations of correlation and opposition, doubtless unconscious. The structural elements themselves are these structures that are underlying to the multiple recipes. Finally, it is function of ethnology, without being indifferent from

When we talk about *inquisitorial system* and *accusatory system*, we should be in front of materials that still build them. This reconstruction can make evident functional relations that link several elements of each theoretical model, because in practice experience they never appear in *pure* state, but always mixed one with the other. There are deposited sediments over time, which not even a first glance could disregard them, in spite of a seeming and sutil chronological distance. Hence, there is the choice of arranging scattered elements, from a serie of emergencies and appearances over time, all of them, however, composed by a common escape line that ends up imposing itself: the place taken by evidences in some historical thought about criminal procedures, which is nothing more than a reveal in the ways of operating criminal procedure.

## **2. The close structure of criminal procedure: the misleading mash between accusatory aspect and division of parts**

The reference to *accusatory system* and to *inquisitorial system* has deep validity (CONSO, 1964, p. 07). Despite the implausible uniform, orthodox, and strict use of these terms, considering the large variability of denominations and apart from the historic facts, it is true that while these systems are still considered as *organic patterns in a logic perspective*, or as a *criteria of criminal politics in a legislative perspective*, or yet as a *method of evaluation in a positive perspective*, they will continue to conserve a great critical content.<sup>4</sup>

Certainly, we are not immersed in any analysis based on so called pure criminal procedure systems - all of them are, to a greater or lesser extent, mixed. Maybe it would not even be possible to question, from a historical view, if there were some pure system anytime. We are in front of analysis tools which are, at least, able to give the reason the

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history, to touch not only the conscious and always different image men do of their obligations, but also a list of unconscious possibilities (LÉVI-STRAUSS, 2003, pp. 37-39). The study of different societies and civilizations of human cultures, comprehended as the “ethnographic joint that, from the investigation point of view, presents, compared with others, meaningful distances” (LÉVI-STRAUSS, 2003, p. 335), at last, is the final aim of structural searches - studying the constants at these distances among different cultures, knowing that, even inside a collection of individuals, there is simultaneously the dependence of various culture systems.

<sup>4</sup> The idea will be not really useful if it has not as preferred escape the thought related to “inquisition” and “accusation” of the *concrete* models, which are less born from a coherent and organic “system”, than from a joint of complex interrelations between normative and behavioral reality, that is to say, a product of a changeable dialectic between ideal options and operative projects. See cf. CHIAVARIO, 2006, p. 12

power of moving away, for example, the well-known *mixed system*<sup>5</sup>. After all, what can define an accusatory *principle* and an inquisitorial *principle*? Besides the several differences between the mentioned systems, which are uniformless, we still can quote some key points in various approaches into, perhaps, answer to the requirement of defining what truly can exist of radically different between them.

Generally, to the theoretical legal common sense, to be a system considered accusatory, it is enough that accusation and judgment are done by different organs (*ne procedat iudex ex officio*). The turning point would be there. Essentially, the accusatory system would be a system of parts. Any analysis could only be so simplistically reduced if we ignored the structuration of the biphasic method of the mixed system and if it was noted the true fraud that served to Napoleon and his inquisitive restoration<sup>6</sup>. With the simple division between two stages (a pre-procedural one, which consists of preliminary investigation and, in Brazilian case, is normally represented by the police inquiry), the sore point of the question is just ignored and its detection becomes deficient. This is exactly where is hidden what is important to be highlighted. When we look after an inquisitorial style, at least since 1670, it is indispensable to check the complete lack of necessity that there are not procedural parts<sup>7</sup>, as on the other hand, the *two-head monster*<sup>8</sup> we find in the building of the so called French mixed system, which has been spread across the world and which deeply has an inquisitorial aspect<sup>9</sup>.

<sup>5</sup> It will never be too much to say that such french pattern, according to Goldschmidt, intends a diagonal line between inquisitorial and accusatory aspects of the procedure, which ends on characterizing a procedure which is "inquisitorial with accusatory shape", including the German criminal procedure as an example of a "semi accusatory" procedure. In a more specific way, reaching the heart of the discussion, Zachariae writes, in his work *Handbuch des deutschen Strafprocesses*, about a "inquisitorial procedure with accusatory fittings" (GOLDSCHMIDT, 1935, p. 70).

<sup>6</sup> To a deep and strict study, cf. CORDERO, 1986, pp. 54-74 e CORDERO, 2003, pp. 38-67.

<sup>7</sup> It is never too much to point out that "È falso che metodo inquisitorio equivalga a processo senza attore: nell'ordonnance criminelle 1670, monumento dell'ingegno inquisitoriale, il monopolio dell'azione spetta agli hommes du roi («les procès seront poursuivis à la diligence et sous le nom de nos procureurs»)" (CORDERO, 1986, p. 47).

<sup>8</sup> Pagano will ask: "Per adempiere a tante funzioni e solennità chi mai non ravvisa, quante dilazioni ne'giudizj siensi introdotte, e qual mescuglio abbian fatto i dottori delle romane, e delle moderne leggi, e stabilimenti; qual mostro; indi fia nato dall'accoppiamento dell'inquisitorio, e dell'accusatorio processo; e finalmente qual scampo ai rei quindi siasi aperto?" (PAGANO, 1787, p. 80).

<sup>9</sup> According to Carrara: "È impossibile definire 'tassativamente' li speciali caratteri che può avere il giudizio 'misto'; appunto perchè è nella natura di ogni essere 'misto' la perpetua variabilità, derivante dalla maggiore o minor prevalenza dell'uno sull'altro di cui si fa la mistura. (...). Il concetto generale del processo 'misto' non è la 'compenetrazione' dei due processi, per guisa che ne sorga un terzo metodo tutto speciale: non è la 'mixtio' in senso proprio: è piuttosto la 'riunione' e l'alternamento di ambedue le vecchie forme." (CARRARA, 1863, pp. 387-388).

Indeed, nothing of this gets close of a minimum foresight. It is scary that such register does not lead away, even in debates which are more interested in the atmosphere inspired by *democracy* - maybe here stays its political support and validity as a radically valid criteria to argument. So, let's escape from what seems consensual - the simple deceptive blend between the accusatory characteristic and the division of parts, which is commonly detected by the (initial) separation of functions in the procedure -, let's move from the pacified point and let's worry about discussing, over and above minimally solid historical and political events, if what supports and, at the same time, hides a certain stability of the *inquisitorialism* is not found at the same defining points. In other words, keeping the debate limited to these already untied knots, is just a contribution to the "blindness" of the hidden ones.

It is possible to say, the inmost structure of the criminal procedure is placed in the face of two extreme structural patterns (DIAS, 2004, p. 246), which are diametrically opposed: as points of reference, we can have the model placed in a *pure inquisitorial procedure*, such as it was generally thought from 12nd and 13rd centuries until 17th and 18th centuries<sup>10</sup>; and the one in a *pure accusatory system*, which match the classic form of the British criminal procedure. If in the first case, undoubtedly, the standard-example is considered a process without parts, once functions stayed exclusively in the judge's hands, the (seeming) advantage of this structure - the one according to which the judge, by having all tasks, could easily and largely be aware of *all* relevant facts - could quietly go forward and survive future structures without having its form denatured. In the classic British criminal procedural law, it could be found the opposite pole, essentially a genuine process of parts, in which the famous passivity of the British judge reflects itself in the behavior of the judge who not even collects any material evidence, because this is task of the parts and the judge should just guide the hearing. The aim of finding a material true loses space because of the desire of maximally ensuring to the accused respect for freedom and individual rights. "The process appears, so, as a dispute, a fight or a duel between the accuser and the defender, in front of the impartial view of the judge." (DIAS, 2004, pp. 247-248).

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<sup>10</sup> Considering all the large bibliography about the theme, see again: CORDERO, 1986, pp. 43-60 e CORDERO, 2003, pp. 21-38.



Moving toward some other possible pattern, less attracted by the thrust force of inquisition, means going into the Anglo-Saxon ambience, where the citizenship issue has narrow relation with the *common law*. The history of Law in Britain seems to be the history of the countries of the continent until 12th and 13th centuries. Britain was part of the Roman Empire until the 5th century - in spite of the little extension of Roman influence - and, from the 6th century on, German kingdoms were developed with their own "Barbarian laws", through invasions of peoples like the Anglo ones, the Saxons ones, and the Danish ones. Indeed, after the conquest of Britain, in 1066, through the battle of Hastings, by William I, Duke of Normandy, the way to feudalism gets opened (LOSANO, 2007, p. 324).

Since so, the dispute between kings and barons is identified, despite of the fact their successors have succeeded to keep and to develop the royal authority. The central power was not interested in the old German feudal practices, but in the reinforcement of the King's image. Since the 12th century, British Kings get to impose their authorities over the territory and to develop their own jurisdiction, damaging feudal and local ones. The King, initially, judged in his Court, called *Curia regis*, which soon has been prepared to treat different subjects: the Court of Exchequer (*Scaccarium*), the Court of Common Pleas, dedicated to processes related to the land ownership since 1215, and the Court of King's Bench, prepared to judge crimes against the kingdom's peace. The first two ones headquartered in Westminster and the last one had no head office, because it moved according to the moves of the King (*bench coram rege*) until the 15th century, when it started to be headquartered in the surrounding area of London. Anyone who wanted to ask for justice to the King could send him a request, through the Chancellor that, after examining it and if considering it reasoned, sent a command called *writ* (in Latin: *breve*; in French: *bref*) to a *sheriff* or to a *sir* to command the accused into answering the complainant. It is from this structure that, during the reign of Henry II (1154-1189), the *common law* appears like we know it today. He effectively organized the justice and the army.

Even if instruction techniques similar to the ones practiced in the continent also appear, the inquisitive method does not inspire there the same solutions. When it is verified the presence of the *inquisitio*, the itinerant investigation promoted by the bishop and the *synodus*, the meeting of confidants with the presence of the parish priest, both of

them are found. In this context, similar operations are done by the emissaries of the king. Equally, the royal politics demanded automatisms, inconsistent with private accusations. However, the Normans barons and the Saxon assemblies rejected the employee-accuser, like in France, where there were *procureus* and *avocats du Roi*. Radical difference. As mentioned, this method sophisticates a social control system from the end of the Carolingian time: the famous *Domesday Book* (the book where all the owners of immovable properties in England can be found and that was created because of fiscal goals) is a result of a great inquiry, in which officials, obeying the King, interrogate, in each district and village, some qualified juratores to say the truth (*veredictum*)<sup>11</sup>.

The tools ends up improved because of a joint of measures that tend to abolish divine judgments. In 1166, the king created a *Writ* called novel *disseisin*, which imposed to the itinerant royal judge (*sheriff*) the task of bringing together twelve men, who should decide about the impositive loss of the land ownership; that was how the king eliminated the judicial duel that had been practiced until that moment. In the same date, necessarily, the public accusation related to criminal matter should be presented to the local community, in stead of any official that could mean a kind of Parquet. The Clarendon jurors Courts dictated the originality: in each county, a big joint of 23 jurors (*Grand Jury*), among which there were 12 from each group of hundred, formulated the accusation of the most severe crimes (*indictment*) in front of the itinerant royal judges, and then they become the jury of accusations; as an organ of communitary decision, composed by 12 *homines probi* (*pretty jury*), they proceed to the judgment (*trial*) and they can consider the accused convicted or not (*guilty or innocent*); the jury was responsible to pronounce the truth (*vere dictum - veredicto*). The ones who refused to pass through this kind of judgement were submitted to the called *peine forte et dure*, according to the Statute of Westminster I of 1275. In this rudimentary process, under the comprehensions of a “communal-organic knowledge”, the accused *put himself on the country*, which means he left himself under the power of a collective judgment and this fact, somehow, created a habit of group decisions critically elaborated, so that it was demanded prudence of the called *vere dictum*. What prospered in the island, as an

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<sup>11</sup> To a complete historical approach, cf. GILISSEN, 2003, pp. 209-210 e 214.



alternative to divine judgments and duels, was a *trial by jury*, that was firm on the fight style on debate and that stopped the establishment of the inquisition (HÉLIE, 1845, pp. 19-20).<sup>12</sup>

Back to the main point, what has been established is: there is no more *pure systems*, every system is mixed, to a greater or lesser extent - to remember this is never too much. Nevertheless, this one is not the main question, yet. A need is to realize that, equally, we do not have a third criminal procedure model with this name: *mixed system*. The called *reformed system*, *Napoleonic system*, handled by a large doctrine as another *structure*, have not an acting way that differentiates it from a essentially inquisitorial<sup>13</sup> system. To be *mixed* means to be essentially *inquisitorial* or *accusatory*.<sup>14</sup>

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<sup>12</sup> Thereupon, it was natural a centralization of power. At this time, we were already in the absolutist age, what caused conflicts with the barons (great vassals) and with the Church. The crisis, however, came with John Lackland, King of England and usurper to the throne of Richard the Lionheart (1189-1199), who took office after Henry II. He lost fiefs in France, which were dominated before by England, and he did not recognize the bishop of Canterbury, being consequently excommunicated and putting England in interdict by the Church. On the other hand, feudal lords tried to fight against the development of writs, which quickly became stereotyped forms given by the Chancellor against payment. By the Magna Carta of 1215, royal jurisdictions succeeded to interrupt the ones of barons and great vassals, and somehow appeared so the base of fundamental principles of the criminal procedure. The classic clause 29 prescribes: “*nullus liber homocapiatur vel imprisonetur aut disseisiatur de aliquo libero tenemento suo vel libertatibus vel liberis consuetudinibus suis aut utlagetur aut exuletur auti aliquo modo destruat nec super eum ibimus nex super eum mittemus nisi per legale iudicium parium suorum vel per legem terra. Nulli vendemus nulli negabimus aut differemus rectum vel justiciam.*” (NO Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the land. We will sell to no man, we will not deny or defer to any man either Justice or Right). In 1258, by the *Provisions of Oxford*, they conquer the prohibition of creating new kinds of writs, but the *Statute of Westminster II* (1285), essential history in the history of *common law*, conciliates the interests of King and Barons and imposes the *status quo*. The juncture consequently brings to everybody a bigger control of the King and causes the birth of a certain feeling of citizenship (HÉLIE, 1845, p. 110 e LOSANO, 2007, pp. 329-330). It is important to highlight that the *common law* structure, associated with the *writs* (judicial actions in the shape of king's orders), make it almost impossible to appeal to the Roman law as an alternative law. Furthermore, here the process is more important than the rules of the positive law: *remedies precede rights*. Law was truly created by the judges of the royal Courts of Westminster, who, at least since the 14th century, became professional judges; in addition of being technicians, graduated as litigants (*barristers*, lawyers), in stead of law experts graduated in the matter of Roman law, in Universities (GILISSEN, 2003, p. 213). It must be said yet that, during the 14th and 15th centuries, the *common law* became more technical, due to the rigid and strict aspect of the *writs*, which caused a new and more flexible to new rights jurisdiction: the *Equity*. Hence, the *Chancellor Lord* started to make decisions through equity, not thinking about the rules of the process and the *common law*, and based on a written process, which was inspired by the canon law and by principles commonly taken from the Roman law. In the 16th century, the King, inspired by the desire of absolut power, enlarged the equity jurisdiction, in stead of the traditional *common law*, so that a dual law system kept on existing until the fusion that occurred only in 1873 and 1875 (*Judicature Acts*), which defined that *common law* and *equity* should be ruled by the same Courts, which should accept equity in case of conflict between the two systems (LOSANO, 2007, p. 331).

<sup>13</sup> There is no new criminal procedure system in the Napoleonic inquisitorial alternative: “Concetti troppo radicati per dissolversi con il ripudio ufficiale della tortura: il «sudito» è ormai un «cittadino», e i nuovi

As the legislative scene of the Brazilian inquisitorial Code of Criminal Procedure helps to confirm, there is no uniting principle that can identify it, except by formal aspects, as a third system. Therefore, the limitation to the simple examination of the presence of procedural parts will not be enough - the idea of Bulgaro about *Iudicium accipitur actus as minus trium personarum: actoris intendentis, rei intentionem evitantis, iudicis in medio cognoscentis*, or, in the famous synthetical form, *Iudicium est actus trium personarum: iudicis, actoris et rei*, certainly, the inquisition prescinded, from the beginning, in its *pure* moment, however, the totalitarian impulses are independent of the standard-example of a process without parts, in which all the functions stay exclusively in the hands of the judge.

The inquisitorial method is noted pretty early<sup>15</sup> (to those who were ready to notice it) - and it improved itself, reached the top and its better portrait exactly into confirming its profile in 1670, and, then, it appeared disguised in 1808, by the presence

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orientamenti della gnoseologia giudiziaria impongono l'uso del contraddittorio; ma o la vischiosità delle tradizioni (che sono idee cristallizzate in abitudini) o l'eccesso di cautela hanno suggerito un espediente che nella storia degli istituti è fra i più singolari: approssimativamente, si può dire che sia stata conservata la struttura del processo inquisitorio (eccettuata la tortura), con l'innesto di un'appendice denominata 'dibattimento'; secondo la formula tramandata, il processo si compone di un'istruzione, scritta e segreta, e di un dibattimento orale e pubblico. (...) il dibattimento è ridotto ad un torneo oratorio sulle risultanze dello stadio anteriore. (...) l'idea del processo a due tempi - inquisitorio il primo e accusatorio il secondo - repugna alla ragione, per quanto possa sedurre i ricercatori del compromesso per vocazione." (CORDERO, 1963, pp. 716-717; the present article appears as chapter VII, three years later, in CORDERO, 1966, pp. 153-155).

<sup>14</sup> Giovanni Conso helps in a solution again. According to him, today, we only have mixed process, which are coordinated with the aspect of the two traditional systems: "Ed ecco progressivamente attenuarsi la purezza del sistema accusatorio, tramite l'infiltrazione di aspetti propri del sistema inquisitorio: infiltrazione più o meno intensa, a seconda dei popoli e dei momenti storici. Di qui il succedersi e moltiplicarsi di processi di tipo misto, non riconducibili ad uno schema preciso. Misto dicese, infatti, ogni ordinamento risultante dalla combinazione dei caratteri del sistema accusatorio con i caratteri di quello inquisitorio (...) in svariatisimi modi. (...) Naturalmente, pure i sistemi misti presentano graduazioni e consentono classificazioni". But, particularly, an important observation is that the distinction, like the author says, happens according to "a sfondo prevalentemente accusatorio o a sfondo prevalentemente inquisitorio". About the differentiation between the models, in the accusatory one, there is "esclusione di qualsiasi libertà del giudice nella raccolta delle prove sia a carico che a discarico", além de ser a "allegazione delle prove da parte dell'accusatore e dell'imputato", while, in the inquisitorial one predominates "piena libertà del giudice nella raccolta delle prove". (CONSO, 1964, pp. 09-10 e 07-08, respectively).

<sup>15</sup> "Quanto al modelo 'inquisitorio', lo si riconduce a sua volta a 'sistema', o a 'modelo', individuando talune caratteristiche specularmente opposte a quelle definite per l'accusatorio, anche facendo riferimento ad esperienze storiche di gestione del processo penale all'insegna dell'accentuazione del ruolo dell'autorità in una funzione di 'ricerca' o di 'indagine' (inquisitio), attraverso la quale giungere 'alla verità', ma soprattutto a 'mettere la mani' su (veri o presunti) colpevoli di reati" (CHIAVARIO, 2006, p. 12).

of procedural part responsible by the prosecution: the Public Prosecutor's office (Parquet).

Pointing out: the Public Prosecutor's office was born in France, in the 14th century scene, by characters like the *procureur* and the *avocat du Roi*; the first one has the function of persecution, and the second one the function of debating about the judicial order, and, as in criminal jurisdiction does not exist space to an oral skill, he ends up restricted to civil causes. It is a public actor with limited powers, because of the wide approach of the judge; even if the prosecutor is allowed to investigate, he is soon banned of the work of evidences, because the free initiative of the judge gradually becomes more common. So, as time goes by, the inquisitive automatism makes the system less congruent.

Nevertheless, in the modern age, the Public Prosecutor is a Napoleonic product, inherited from the inquisitive restoration; and, after converted into an official of the government, who acts in a bureaucratic structure, he starts to have the monopoly of the criminal process (CORDERO, 2003, p. 189). There are few to doubt about the link between *inquisitive system* and the *Public Prosecutor*. The State could not abandon the power of punishing in the hands of private people and, by looking after the repression monopoly, the restoration separates the process among phases and disguises the inquisitorial measures. For this purpose, the State *produces* a "part", different from the judge, but also responsible by the criminal action and maybe giving an *upgrade* to the desirable inquisitorial aspect:

"l'interesse pubblico alla repressione esige ordigni indipendenti dagli umori delle parti. Quest'automatismo è variamente concertabile. (...) nell'apparato inquisitoriale duecentesto, ecclesiastico e laico, l'impulso viene dal'organo giudicante; in Inghilterra agiscono veintiquattro esponenti della comunità locale con un 'vere dictum' giurato; nell'area francese nasce un organo a funzione persecutoria, distinto dal giudice." (CORDERO, 1986, p. 155).

Here, it can be noted the historical fault related to the intended impartiality of the Public Prosecutor, as announced by Carnelutti: building an impartial part would not be like squaring a circle? It is impossible to hide that the public prosecutor has a function of truly accuser, so that wishing that he composes an impartial organ ends up

on a damaging and useless duplicity<sup>16</sup>. Furthermore, about the prodigious idea of saying the Public Prosecutor is not part, but a “justice organ”,

“basta escogitare un segno verbale (che per di più non dice molto) per truccare la realtà; il pubblico ministero formula domande (...), contraddice nel dialogo: il sostantivo «parte» non significa nient’altro che questo. Ora, che simili funzioni siano cumulate con altre tipiche del giudice, è un’anomalia che nessuno può negare, finché il senso della realtà e la logica non siano banditi dal processo.” (CORDERO, 1963, p. 718 ou CORDERO, 1966, pp. 156-157).

Goldschmidt will say more (GOLDSCHMIDT, 1935, pp. 28-29) about the fact that, when the name “Public Prosecutor” is defined, referring to an official organ with the mission of promoting the criminal action, it is not possible to require impartiality from the accuser, which causes the same *psychological fault* of the inquisitive process, in other words, the one of practicing so opposing functions like the accusation and the defense - this emotional overload is also found among judges who think they can make the *evidence management* without damages to their functions.

Conso (CONSO, 1964, p. 09), on his turn, maybe moves toward what is vital. He emphasizes that, with the development of the public accuser, that is to say, of the accusation as the exercise of a public work attributed to someone as a representant of the impacted society, hard conditions to conserve some *equilibrium* between accusation and defense have been developed, because judge and accuser become organs of the State, placed as neighbors that chat, “con il pericolo di una sovrapposizione dei rispettivi compiti e di una confusione delle rispettive funzioni”, because in front of a supposed interest of the society, “gli interessi dell’individuo tendono inevitabilmente a passare in seconda linea”. Here, it is started an extremely important unstable land.

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<sup>16</sup> “Se c’è figura ambigua nel processo (...) è il pubblico ministero (...) la sua ambiguità mi ha colpito a tal segno da farmi venire in mente la quadratura del circolo: non è come quadrare un circolo costruire una parte imparziale? (...). Il pubblico ministero è un giudice che diventa parte. Perciò invece di essere una parte che sale, è un giudice che discende. (...) Concluendo, (...) la parte non può non cercare di non essere parte, cioè di essere imparziale: di trasformarsi in giudice, insomma. Il che, almeno se è fatto sinceramente, indebolisce la sua opera di parte. Ora ciò di cui giudice ha bisogno, soprattutto, nella discussione, è che la parte sia parte; ha bisogno, insomma, della sua parzialità. Qui riaffiora l’idea del dubbio e, insieme, quella del duello. Il pubblico ministero, se fa il giudice, invece che la parte, tradisce il suo ufficio (...). Lo schema ideale della discussione è questo: il pubblico ministero espone le ragioni dell’accusa e il difensore quelle della difesa (...). Il risultato del loro duello dev’essere il dubbio; nient’altro che questo. (...) Solo coltivando il dubbio si rende possibile il germogliare del giudizio.” (CARNELUTTI, 1953, pp. 257-264; also in CARNELUTTI, 1994, pp. 209-218; in addition, cf. CARNELUTTI, 2004, pp. 218-220).

### 3. The moment of the inquisitorial turn

Continuing, like Montero Aroca says, if we could ever talk about an inquisitorial *procedure*, except as an argumentative rhetoric, since it would mean a *contraditio in terminis*<sup>17</sup>. All these points take the problem into a much more complex and important stage, once the essential characteristic of the *inquisitorial system* is identified in the evidence management essentially trusted to the judge, like says Miranda Coutinho<sup>18</sup>, by way of Cordero<sup>19</sup>. Here, we arrive to the fundamental nucleus, the vital point of its identification. Therefore, we can have an *inquisitorial procedure* with parts, as, it is important to highlight, the present Code of Criminal Procedure is. Besides: we equally can have a procedure that keeps on being inquisitorial, in which the (initial) division of activities is established, associated with other principles like the use of oral skills, publicity, *res judicata*, free motivated persuasion, and so on.

<sup>17</sup> According to the author: “no existen dos sistemas por los que pueda configurarse el proceso, uno inquisitivo y otro acusatorio, sino dos sistemas de actuación del Derecho penal por los tribunales, de los cuales uno es no procesal, el inquisitivo, y otro sí es procesal, el acusatorio.” (MONTERO AROCA, 1997b, pp. 28-30 e MONTERO AROCA, 1997a, pp. 106-107). Obviously, from some point, this extreme opinion that says “los llamados sistemas procesales penales son conceptos del pasado, que hoy no tienen valor alguno, sirviendo únicamente para confundir o para enturbiar la claridad conceptual” ends up on diluting/spraying the structural differences between the both styles, since it does not tolerate or suppose an inquisitorial pattern with parts. Tightening this point, it would be enough that, phenomenologically, we were face to face to a any asymmetrical division into having an accusatory procedure, that is to say, in front of parts and an “impartial” third person. Hence, it would always be superfluous to refer to this fact. If, on one hand, it seems hastily easy to deal with concrete systems, which nowadays are always mixed (when the criminal action is not responsibility of the judge, but of another organ), on the other hand, on what should be relevant the interference of an evaluation tool like the *evidence management by the judge*, the inquisitorial aspect would always appear as a noise in the system, in stead of appearing like its main characteristic.

<sup>18</sup> In his several works, but, specially, in COUTINHO, 2001b, p. 24 e COUTINHO, 2001a, p. 28. In the same vein, some critical doctrine can be found in: LOPES JR., 2012, pp. 134-138; ROSA, 2006, pp. 313-316; PRADO, 2005, p. 104 ss. e AMARAL, 2008, pp. 125-133.

<sup>19</sup> “Gli aggettivi ‘inquisitorio’ e ‘accusatorio’ (di cui si fa un uso insistente nelle discussioni de ‘jure condendo’) sono i termini di una antitesi costruita sul rapporto parti-giudice; ma nemmeno qui il significato delle formule è unívoco: esso varia secondo che si consideri l’iniziativa nell’instaurare il processo ovvero le modalità di acquisizione delle prove. In un senso, si dice processo inquisitorio quello che si risolve nella relazione giudice-imputato (l’imputazione e la sentenza sono opera di uno stesso organo); nell’altro, la medesima parola designa un processo nel quale le prove siano raccolte segretamente. La prima direttiva non implica la seconda, sicchè conviene precisare caso per caso il valore dell’aggettivo: è immaginabile un processo instaurato ‘ex officio’, nel quale il difensore assista alla formazione delle prove; ed è pure possibile che; malgrado la distinzione organica tra accusatore e giudice; l’imputato sia estraniato dallo svolgimento dell’iter istruttorio (...). La storia del processo inquisitorio (nel modello offerto dalla prassi italiana nei secoli del Rinascimento) rivela un complesso fondo culturale, in cui si mescolano scrupolo di verità e spirito formalistico.” (CORDERO, 1963, p. 715 or CORDERO, 1966, p. 152).

*Principle* here is seen not as a simple rank, but as a method of establishing differences. At least in some degree, the one who decides, accumulating functions, anticipates the judgment and, so, any “warmth” (either in the more superficial sense of *being touched*, either in the deep quality of *valuation*) in relation to the contradictory is missed by treason - it is murdered even before happening. Aborted contradictory, stillbirth. In brief: the *inquisitorial sign* is located in the examination of rules that allow the action of the judge in evidence issues - certainly, not only these rules, but also any *ex officio*<sup>20</sup> move -, which will have effects on his function as part.

This is an irrefutable step that must be faced by a research able to capture the waves of inquisition that permanently runs in the criminal procedure. Opinions which accept the reduced aspect of the previous separation of functions err because of the oversimplification, like if such functions, trusted to different juridic actors, could not be in themselves confused. The thought of the *accusatory system* since the impartiality principle without the presented vision is a great mistake.

Under a brave horizon, Ferrajoli (FERRAJOLI, 1995, pp. 563-567) pretty succeeds on defining a panoramic view about the consolidated critical trend, emphasizing that the dichotomous distinction between *accusatory* and *inquisitorial system* can have a theoretical aspect, or simply a historical one. Concerning the *accusatory system*, the strict division between judge and accusation, the equality between accusation and defense, publicity and the oral aspect of the judgment are part of the historical tradition of its model, as well as of its theoretical base. On the other hand, typically of the *inquisitorial system* are the initiative of the judge in evidence issues, inequality of powers between accusation and defense and the written and secret aspect of the process’ composition. According to him, the differentiation becomes first of all useful to the formation of two patterns of judgment and judge. It can be called

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<sup>20</sup> The *initial* separation between the activities of accusing and judging, with the Public Prosecutor promoting the first one, will be little useful, if over the procedure the judge takes an *active role on the search of evidences* or practices *typical acts of the accusatory part*, as it is noticed in our system, when it is allowed to the judge: the determination *ex officio* of a pre-trial detention (311), of search and seizures proceedings (242), of a sequestration of goods (127); it is allowed that he promotes the hearing of more witnesses than the mentioned ones (209), interrogates again the defendant anytime (196), freely determines diligences during the procedure and even during the preliminary investigation (156, I and II), points out aggravating circumstances that were not yet claimed (385), convicts even if the Public Prosecutor requests the acquittal (385), changes the legal framework of the fact (383), allows the so called *ex officio* appeal (574, I and II - all of them from the Code of Criminal Procedure), and so on.



*accusatory* every criminal procedural system that places the judge as a *taxable person* strictly separated of the parts and the judgment since a conflict between equals, started by accusation, responsible for bringing evidences that will be set against the defense in a contradictory, oral, and public judgment, which will be decided according to the free persuasion of the judge.

On the contrary, *inquisitorial* would be every criminal procedural system in which the judge proceeds *ex officio* to the research, the gather and the appraisal of evidences, so that the judgment happens after a secret and written instruction, from which the contradictory and the right of defense are excluded, or, at least, limited. This fact do not obstruct to say that the separation between judge and accusation is important constitutive element of the entire accusatory theoretical model and logical/structural assumption of the others. But here the author gives the sign that, mainly, it means the update and the increasement of what is needed to the guarantee of the separation of the parts: this guarantee means, on one hand, an essential condition of impartiality (terzeità – “a la ajenidad del juez a los intereses de las partes en causa”, FERRAJOLI, 1995, p. 580), as an organic warranty of the judge about the parts; on the other hand, it is an assumption of the accusation and the evidence, which are the first procedural warranties of the judgment.

The identification of the fundamental nucleus, that is to say, the perception of the *dispositive principle* that sets the accusatory system, stays at the *evidence management in the hands of the parts*, concurrently with a *viewer judge, referee, taxable person and uninterested* about the accusation functions. Otherwise, in case of the management of the parts in the judge's hands, and, so, of an actor-judge, it will be founded an *inquisitorial system*. From the premise of respecting the “rules of the game”, supported by the idea of separation of the tasks of defending and judging, extraneous to the accomplishment of the obtained result (as in the *inquisitorial procedure*), in the *accusatory procedure* it is over the defense of fundamental rights that should stay the called “formalismo acusatorio: quanto meno spazio occupa l'organo giudicante, tanto più pesano i riti” (CORDERO, 2003, p. 99). So, what will differentiate the several procedural models are the acts practiced by these subjects. The evidence management and the accusation are activities that must be seen according to whom comply them, so that it will be verified if they are practicing extraneous tasks to their functions or not.

From a dictatorial logic, the *inquisitorial procedure* consists of concretizing the material criminal law, in other words, implementing the power of punishment of the State, which, through this perspective, is considered the implementation of a supposed *right of punishing*. A tradition which affixes the dictatorial conceptual base of a *subjective right of punishing* (*ius puniendi*) against an object which is the sentence (from a legitimating perspective), and which could be pretty well systematically represented, at least since Arturo Rocco. According to him, the *technical-legal* determination (line that also inspired the Italian Code of Criminal Procedure from 1930, and ours from 1941) of the concept of *right of punishing* as a *subjective right* is strictly connected with the legal relation established between State and defendant.

At large, it must be remembered that Rocco had worked inspired by Karl Binding<sup>21</sup>, according to whom the *subjective right of punishing* would be a *criminal political power* disciplined by the rules of criminal law and now converted into a *juridical power* of turning into an action the search for this aim. Thereupon, the *right of punishing* appears as a *public* (of the State) *subjective right*, which is linked, according to the author, with a peculiar *right of supremacy*, that is to say, an idea that comes from a general status of *subordination* and *political obedience* in relation to the state-owned entity. Obviously, in this context, the object of this *right of punishing* is the subject subordinated to the State, while considered the author of violating a criminal legal precept: “el derecho de punir es, pues, un ‘derecho sobre otra persona’” (ROCCO, 2003, pp. 19-22).

According to Rocco, the subjection of the defendant to the State should be so complete that it would *destroy his personality*. As an euphemism, however, he says it should not be absolute, because the positive law protects some dignity to the person. This guarantee happens even to ensure, in a theoretical formulation and imagining the equality stage of conditions in this situation, a supposed right of the defendant against the State (*right of freedom* - like it was a *simples right*, in stead of a *fundamental principle*). Now, in the accused, not only the characterization of the *object*, but also of

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<sup>21</sup> Rocco writes: “derecho subjetivo de punir (*ius puniendi*) es la facultad del Estado de accionar en conformidad con las normas de derecho (derecho penal, en sentido objetivo) que garantizan el alcance de su objeto punitivo y de pretender para otros (reo) esto a que está obligado por fuerza de las mismas normas” (ROCCO, 2003, p. 17).

*taxable person* in relation to the right of punishing of the State are combined: “el derecho de punir se explica así, en un determinado momento, ‘respecto’ del reo y ‘hacia’ el” (ROCCO, 2003, p. 26). This moment where there is a right over the defendant is what is called *legal pretension* and it matches to an *obligation* - so, a juridical relation with obligatory character (a legal duty) is established. It is an obligatory legal relation, and so *punitive*, which obliges the defendant. If on one hand the rule gives to the State a *punitive pretension*, on the other hand it imposes to the accused a respective *legal duty* found at the interest of subjecting himself to the penalty: “uno de ellos es la ‘pretensión jurídica’ penal (...), el otro, el correspondiente deber jurídico del reo de someterse obligatoria y coactivamente a la pena.” (ROCCO, 2003, p. 31).

Besides being the *subjective right of punishing* the practice, as a *pretension*, of a *demand*, naturally, from this, not so democratic, point of view, it is about a *social or collective interest*, essentially *preventive*, which is exercised through the *repression*, according to the more mistaken theories of legitimation of the penalty. The legitimated action to punish the defendant becomes an *ethical or moral* duty of the State, linked with categories of the so called *civic rights*, as the Italian author mentions (ROCCO, 2003, p. 50). So, in general terms, but with few space to faults, considering this pillar (why not?) of a fascist criminal procedure, we would be in front of a *public subjective right* detained by the state in relation to someone who disrespects a rule of material law. The criminal procedure, not as a constitutional tool of great effectiveness of the fundamental rights, would exist just to accomplish the *punitive pretension* provoked by the violation of a criminal rule/the injury to a legal asset. According to this requirement, the State, through the Public Prosecutor, would become a lender, like it happens in the private law (civil procedure), of a penalty, possible to exist through the criminal procedure, this one seen only as tool to protect that *subjective right of punishing*.

Thus, we quickly go toward the schizophrenia of a State which authoritatively possess a triple right: one of punishing, other of moving a criminal action, and another of sentencing. Among other reasons, this is one to the deep critic made by Goldschmidt about the *punitive requirement* of Binding: “la consecuencia jurídica del Derecho penal ‘no es la pena’, sino ‘el derecho subjetivo de penar’ y (...) este derecho no puede ejercerse fuera del proceso” (GOLDSCHMIDT, 1935, pp. 22 e ss.; cit. p. 26). And we

still deeply linked with this, by the presence of materials that build a dictatorial criminal procedure, as the simple attribution of the existence of *conflict* in the criminal procedure, badly knowing the connection made (how can we talk about conflict if, from the injury against the legal asset, is caused not a *ius puniendi*, but an *accusatory pretension*, the power of imposing a process against someone; and much less it would exist any right to be recognized through a punitive requirement, so that any conflict of interests is moved away, except by the conflict between *ius puniendi* and *status libertatis?*), and walking around the punitive pretension, which, in the same rhythm, still being largely accepted in doctrine lessons.

In a contemporary thought of the authoritarian criminal culture, the use of the State-judge like a tool to apply the objective criminal law in the concrete case only corresponds to asking for public security to the judge. The attribution of the power of producing evidences and other activities *ex officio* by the judge, as already said, besides deforming the dialectical structure, provokes a fusion with the *accusation tasks* - of supporting and supposing the *accusatory pretension*. In this point, the *accusatory pretension* represents the expression of the worry of an epistemological identity, correctly put as the object of the criminal procedure.

Even if the accusatory process has been formulated according the model of the civil procedure, as an *actus trium personarum*, the sense of this political measure should not provoke a mechanic observation of the criminal procedure based on the civil procedure, because it is fundamental to understand that, in the criminal procedure, the situation of the active part is completely different from the one of the author in the civil procedure. As already mentioned, in the criminal procedure, the Public Prosecutor does not impose through its recognition a self right, such as the author does in the civil procedure, but the organ acts like Goldschmidt explains, “afirma el nacimiento del derecho judicial de penar y exige el ejercicio de este derecho que al mismo tiempo representa un deber”, a duty of the State, because it is the one with the power of punishing, represented in the judge and which will become concrete only through the process (GOLDSCHMIDT, 1935 p. 28).

If, since primary, the criminal procedure should persecute its own categories, different of a general theory of procedure<sup>22</sup>, the plan that serves to the definition of the functions of accusation is full of traps, and, naturally, the same occurs in what concerns to the definition of the *object/content* of the criminal procedure. First, it is needed to suppress the attempt of keeping the *conflict* as a common characteristic of the processual branch.

So, in regard to the concept of *conflict* from Carnelutti, which made possible the construction of common elements to the procedural types, it is important to clarify, at least, the three clear modifications in the thought of the Italian Master<sup>23</sup>. The doctrine generally kept as the substance of the criminal procedure an *interests conflict*, and the main discussion was about these ones. In 1936, in his book *Sistema di Diritto Processuale Civile*, the author starts to propose a new aspect to the institutes that begins from the *pretension*, which is now seen as “esigenza della subordinazione dell’interesse altrui all’interesse proprio”, and, so, tries to build a new concept of *conflict*, nearer of an uniform and especific construction: “chiamo lite il conflitto di interessi qualificato dalla pretesa di uno degli interessati e dalla resistenza dell’altro”. Hence, demonstrating the existence of a conflict of interests would not be hard to the criminal procedure, “non

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<sup>22</sup> “Firstly, it will not be formulated a theory, and even less a general one, when the semantic references are different and, consequently, they do not tolerate a common denominator. If only the mentioned cases are observated, that is to say, the criminal and the civil procedure laws, between which are different the uniting principle, the system and the substance, what results in a general theory of the procedure full of holes and mistakes, many of them naturally insuperable in the criminal procedure. So, it is necessary a general theory of the criminal procedural law independent of the lack of opportunities of the general theory of the civil procedural law, at least to be obtained a more coherent base in the moment of a reform which does not intend to be just superficial.” (COUTINHO, 2002, p. 140). Despite of the mistaken analogies related to the civil procedure, which are predominant yet, because of the so spread *General Theory of Procedure* (divulgated in Brazil as content of the criminal procedural, by Liebman in the post-war, through the Escola Paulista de Processo - ALCALÁ-ZAMORA Y CASTILLO, 1992, pp. 527-528), Figueiredo Dias writes: “the age of the great general theories seems to be, to the legal thought, a definitely past time, on account of the fact that, in them, it is latent the danger of breaking the link between the legal order and the life and social reality to which the first one is directed, which should be increasingly nearer” (DIAS, 2004, p. 54; cf., in the same vein, CONSO, 1964, pp. 3-4). In Brazil, the pioneer spirit of Lauria Tucci about the criticism of the general theory of the procedure must be pointed out, especially concerning to the idea of making the criminal procedure “civilized”: “indeed, that was one of (...) the negative aspects of the great study of José Frederico Marques, by transferring (...) elements of civil procedure to the criminal procedure, in a clear adaptation of ‘Elements of criminal procedural law’ into ‘Institutions of civil procedural law’. (...) And, undoubtly, the sin has become bigger, due to, considering the recognized authority of the nostalgic master, many procedure scholars have followed him, carelessly or unquestioningly, assuming a prolix or confusing comprehension, which could be called ‘civil theory of the criminal procedure’.” (TUCCI, 2003, p. 54).

<sup>23</sup> Concerning the considered stages of the thought of Carnelutti, from which the original quotes have

può essere dubbio che in fondo del processo penale sai costituito dal conflitto di interessi tra l'imputato e la parte lesa. (...) Dunque il conflitto di interessi dev'essere qualificato da una pretesa contro l'imputato; altrimenti il processo non avrebbe ragione".

The most noticeable change in Carnelutti, however, which operates in the criminal procedure - besides the controversies with Piero Calamandrei, Giulio Paoli and Francesco Invrea -, comes in 1941, when in *Istituzioni del Processo Civile Italiano*, even if maintained the structure of the previous position, he assumes a less strict and decisive behavior, which, by a certain way, takes away the tranquility of his dreamed *general theory of procedure*. He recognizes, so, the previous mistake and begins, in this moment, to explain the situation of the criminal procedure in a different way, which is "posizione intermedia tra il processo contenzioso e il processo volontario". Yet, he sees the existence of a conflict between the accused and the State, this one being the holder of a public interest on imposing the criminal penalty, based on the requirement of subordination of the defendant to the State's wills, considering the *punitive pretension*.

Approximately, here is how the *criminal conflict* has stabilized itself, as conflict of pretensions, simple and synthetically between *jus puniendi* and *status libertatis*, and indispensable to the criminal procedure. The judge would compose a litigation of interests between State and citizen, being the first one the holder of the punitive right that he concretizes through his *pretension*, which appears when the rule that defines a crime is violated, and by the action of the Public Prosecutor, which is the capable organ.

Nevertheless, it is in the first edition of *Lezioni sul processo penale* in 1946 that Carnelutti goes against the mistakes of the two previous positions (the one of the *litigation character* and, then, the one of *middle type between litigation and volunteer procedure* about the criminal procedure). In the Italian Master's opinion, there, is where the *conflict* in the criminal procedure, the mentioned conflict of interests, completely disappears, and, without it, the criminal procedure could not be considered a *litigation*. Hence, in its new organization, the procedure would have a mixed character, in other words, it would be a *litigation in relation to the civil procedure* and a *voluntary procedure in relation to the criminal matter*. So, the procedure drives away from an *unified theory of procedure*.

It is from the same time (1946) another paradigmatic text (CARNELUTTI, 1946; cit. in the sequence, pp. 75-76 e 78) that confirms this new condition, in which



the author adverts not only to the secondary role of the criminal procedure in comparison with the criminal law itself, but also and mainly to the inferiority of *the criminal procedure science in contrast to the civil procedure science*, defending a parity between both. Certainly, as the Italian master already proved, around ninety per cent of the way of the criminal procedure comes from the adaptation to its phenomenon of concepts built to the study of the civil process, a kind of *pancivilism*, in the same vein of Bettiol, which puts the theory of the criminal procedure under the clear dependence of methods brought from the civil procedure (we should not forget that, like Guarneri attests, it had been the *pancivilism*, even in penal law themes before, the way used by Carnelutti for a long time, specially while studying the crime, by applying the concepts of legal affair; this revealed the intense fight existent, due to the relatively late development of the criminal science, compared with the roman-civilists sciences, and the trend of these last ones of imposing themselves over the other branches of the legal knowledge)<sup>24</sup>. However, in its maturity, the criminal procedure will be seen in its weak identity, like Cinderella, the childish fairytale, and like the one who “giusto, si contentava delle vesti smesse dalle sue più fortunate sorelle.” Generally, the reasons for this neglect are related to the appearance of each procedure: while the civil procedure is the one of owners, or at least a process of people who want to own something, “è il processo ‘del mio’ e ‘del tuo’”, in the criminal procedure not only the propriety is discussed, but the discussion is about freedom. Thus, in the civil scope, the debate is about having, and, in the criminal one, is about being, and, in a society like ours, “chi tra noi riesce a pregiare piuttosto l’essere che l’avere?”<sup>25</sup>.

Hence, especially by occupying previously the criminal procedural space with concepts extraneous to the civilist spirit, surpassing the mentioned punitive pretension

<sup>24</sup> About the scene, see GUARNERI, s/d., pp. 17-19.

<sup>25</sup> This change of the mixed character of the procedure, a *litigation in relation to the civil procedure and a voluntary procedure in relation to the criminal matter*, only has been possible and occurred because of an already told reason, because it is about the same substrate of, for example, his interpretation about torture - mistaken thought, identified in the greater thinkers, illuminists or liberals, from any time -, about the *good nature of the penalty*, because the thought of those who think different would be “influenced by the generalized mistake about the nature of the penalty, which is created as a harm, not as a good” (CARNELUTTI, 2004b, p. 209). So, in the same way, he talks about the illusion of a wrong conception of penalty, to move his opinion to a more optimist one, and to abandon the *conflict*, once, on this stage, the defendant would have the interest on suffering the sentence and solving the personal disorder that made him commit a crime (CARNELUTTI, 2004a, pp. 159-163). Thereupon, the conflict would not be between the parts, but it would be internal, in the soul of the accused.

of Karl Binding is the possibility of building, like Lopes Jr. does, based on Guasp, Goldschmidt and Gómez Orbaneja, the called *accusatory procedural pretension* (a request declaration that exists an impositive right of accusation and that it is correct the applying of the punitive power of the State) as an *object* of the criminal procedure. (LOPES JR., 2012, pp. 143-170).

In the same line of this point and without losing anything said, it can be briefly said that in the criminal procedure the accuser exercises the *ius ut procedatur*. Gomez Orbaneja with Herce Quemada says, while defining the criminal action as a capacity of procedural initiative: “la acción como el derecho meramente formal de acusar. Mediante la acusación no se hace valer una exigencia punitiva, sino se crea tan sólo el presupuesto necesario para que el órgano jurisdiccional pueda proceder a la averiguación del delito y de su autor e imponer la pena al culpable.” (GÓMEZ ORBANEJA; HERCE QUEMADA, 1987, pp. 89-90). In other words, they talk about an abstract right of process, the *impositive right of accusing* (*accusatory pretension*), as long as the legal requirements are present. On the other hand, it is the judge who detains the power of punishing, which is dependent of the complete and appropriate exercise of the accusation. It is concluded that saying that the *accusatory pretension* - whose ownership is detained by the Public Prosecutor’s office, to whom corresponds an invocation power - is the *object* of the criminal procedure means to point out the existence of a capacity of requesting the jurisdictional tutelage, based in a crime, so that it is possible to see in concrete the punitive power applied by the judge. An invocation power corresponds to the accuser.

Above all, what should be pointed out is the contour of what would be called “right of action” (more properly, *power of accusing*<sup>26</sup>), its elements and components, so

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<sup>26</sup> According to Goldschmidt, in the criminal procedure, the necessity of its own able categories to realize the weakness of the conception of punitive requirement is fundamental. Against the violation of a criminal rule, nothing would appear from the exercise of a *requirement as pretension*, as a right to be recognized in the criminal procedure. Directly, it means: from the criminal procedure (understood it as a “derecho justicial material”, GOLDSCHMIDT, 1959, pp. 20-21), there is, as a consequence, a *subjective right of sentence*, which is a judicial power that can only be linked with the process. Because of this, Goldschmidt does a deep critics about the *punitive requirement* of Binding: “la consecuencia jurídica del Derecho penal ‘no es la pena’, sino ‘el derecho subjetivo de penar’ y (...) este derecho no puede ejercerse fuera del proceso.” (GOLDSCHMIDT, 1935, p. 26). He defends a specific function of the justice, which is the “right of sentence” that will impose a political measure of an accusatory system, of a “right of accusing” driven toward the punitive power of the judge. At this point, the expression “public prosecutor” itself makes it clear that he promotes the initiative of the persecution, in stead of promoting it by

that the conflict area, along which the judge should not walk, becomes nearer. In other words, the judge will not have the power of using persecution's activities, which contribute, sustain, maintain, and are related to the impositive right of accusing, which is typical of the Public Prosecutor; an example is the consequent prohibition that the judge declares someone convicted if the Public Prosecutor requests the acquittal, differently of what our procedural system allows (article 385, Code of Criminal Procedure). As an argument, it would be possible to say: the judge will be able to proceed to the judgment or to decide, when he does not acts like a part, that is to say, when he does not accumulate, not even indirectly, powers of persecution and of judgment.

It is trivial that, when someone proves, something is proved - something new is already being tried, so that will not be possible to ignore it anymore -, and, in the criminal procedure, it is the space of the evidence able to support the *accusatory pretension*. Proving is to go toward something. Since there is the interest on proving, exists a base as an element to be proved. And, concerning the criminal procedure, what is proved is the *criminal case* brought to judgment by the *accusatory pretension*. Any judicial move in this way draw near to the "right of action" itself, which is function of that titular of the criminal action. In other words, the binomial "power of acting" and "power of deciding" becomes indistinct.<sup>27</sup>

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recognizing a previously generated right. Thereby, we can specify the difference between seeing a *punitive demand* (right that is supposed to be existent), which is not appropriate to the criminal procedure, and the presence of a *pretension of accusation* (assertion of a right in the procedural sense). Differently from the civil procedure, the accuser does not allege a personal right and the petition of recognition, but, on the contrary, it is alleged by the accuser the idea of "nacimiento de un derecho judicial de penar y la solicitud de ejercer este derecho. Correspondiente es la diferencia entre conceptos de la acción por un lado y del derecho de acusar por otro", that is to say, he does not have another right, except by the one of accusation, of asking the judge the exercise of the power of punishing. In fact, there is an undeniable contradiction between *action* and *accusation*. Hence, the category "criminal action" is buried, at least in its traditional terms, because of the demonstrated configuration, attached with the model of the "civil action", since the "right of sentence" only can match a "right of accusation", nothing more. (GOLDSCHMIDT, 1935, pp. 28-34).

<sup>27</sup> "Gli aggettivi «inquisitorio» e «acusatorio» sono usati in almeno due significati: nel primo, sottolineano la differenza tra i procedimenti instaurati 'ex officio' e quelli nei quali la decisione presuppone una domanda (dove il binomio «potere d'agire» e «potere di decidere»). Nel secondo, configurano due modi, che stanno agli antipodi, d'intendere ciò che avviene nel processo: l'inquisitore è un giudice al quale la legge accorda un credito illimitato, e ciò spiega perchè all'inquisitio non sia permesso d'interloquire. Nei sistemi accusatori, al contrario, vale la regola del dialogo: ciò che si fa 'in iudicio', si fa pubblicamente. Si potrebbero enumerare altri caratteri differenziali ma questi sono i più interessanti. Lasciamo da parte il primo: il monopolio dell'azione penale, eccettuati pochi casi, spetta al pubblico ministero, sicchè, a prezzo di una piccola bizzarria d'espressione (da cui è consigliabile

Nevertheless, trying to escape from the concept of conflict of Carnelutti, without incurring in a structure that legitimates the penalty, is to invest in the subjective angle of the criminal procedural phenomenon. From an *economy of the normative concepts* (CORDERO, 2008, pp. 31-198), to realize this idea is to think about *powers and duties* which come from the rules<sup>28</sup>, and to identify the object of the *criminal procedure*, specially as a *power of the judge*, a reflexive activity (and also an introspective activity) related to the need of the criminal jurisdiction to the applying of a penalty, in which expressions like “right of punishing”, “criminal relation”, “punitive pretension” and so on, produce a weak link of meaning in relation to the verification of when someone will be convicted or not - process as the jurisdictional way *to prove the criminal fact*: under the *power of punishing* affixed by the judge, the limit tools to *suppress this punitive power*<sup>29</sup> are supposed.

By this rhythm, yet according to Goldschmidt<sup>30</sup>, the virtue of using the *dispositive principle*, which establishes the accusatory procedure, stays exactly on letting the search for procedural materials on the account of the ones who pursues opposite interests and defends divergent opinions, in favor of the respect in relation to the dignity of the accused as citizen. Here, it is surpassed the so mentioned doubt about the “fault” related to the fact that, in the accusatory system, considering the inaction

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astenersi), si potrebbe persino dire che il nostro è un processo accusatorio. Ma il profilo più importante è il secondo. A questo riguardo non c'è alcun dubbio che il nostro ordinamento contenga istituti d'impronta inquisitoria; nè il legame con il passato si limita alle norme e a ciò che esse prescrivono: inquisitorio è anche lo spirito con cui le norme sono talvolta intese.” (CORDERO, 1966, p. 168).

<sup>28</sup> CORDERO, Franco. *Guida alla procedura penale*, pp. 14-17.

<sup>29</sup> “(...) gli ordinamenti evoluti impongono una riserva giurisdizionale; «nulla poena sine iudicio». Quest'ultimo è l'operazione riflessiva con cui l'investito del potere di punire accerta se debba condannare o assolvere”. Adiante resumindo em conclusão: “i giudici hanno il monopolio degli strumenti penali; se qualcuno debba essere punito e come, lo dicono norme legislative. Il processo è un'operazione riflessiva: uno o più giudice stabiliscono se, nel caso de quo, esista quel dovere (vecchie formule evocavano un 'diritto di punire' o 'pretesa punitiva', assimilando il fenomeno penalistico al credito). Notiamo come potere e dovere siano figure indipendenti: il giudice deve condannare solo chi risulti colpevole, ma l'atto (non riformato o annullato) varrebbe anche se esorbitasse dal limite; l'unico rimedio sta nei meccanismi correttivi endoprocessuali. Siano tutti esposti al potere di punire, colpevoli e no.” (CORDERO, 2003, pp. 10 e 13-14; from this idea, admirably, Miranda Coutinho formulated his *criminal case*: COUTINHO, 1989, pp. 134 ss.).

<sup>30</sup> “Al contrario, esta configuración del proceso ha de resignarse a las consecuencias de una actividad incompleta de las partes y ha de reconocer también el material defectuoso como base de la decisión.” (GOLDSCHMIDT, 1935, p. 69). In other work, about the behavior which is opposite from the dispositive principle: “la forma el de la investigación, que domina el procedimiento penal, y que recibe también los nombres de principio inquisitivo, de instrucción, o principio del conocimiento de oficio (principio de la verdad material).” (GOLDSCHMIDT, 1936, p. 204).

demanded by the impartiality, the judge have to decide based in a defective material presented to him. It is important to remember that the non-limitation to the incomplete proving material presented by the parts was the historical argument revealed by the Inquisition, with its cynical paternalism, and that showed itself, through the attribution of powers to search evidences to the judge, like a very serious behavior, which has catastrophic effects.<sup>31</sup>

The *position of the judge* is the sensible point of the imbroglio, because, in an accusatory procedure, this is the one of the *viewer-judge*, who stays dedicated, mainly, to the objective and impartial valuation of facts and, so, he must be more *clever* than ingenious; the inquisitorial way, however, claims for an actor-judge, who represents the punitive interest and, so, he must be *nosy*, expert about the procedure and able to investigate (FERRAJOLI, 1995, p. 575).

According to Leone<sup>32</sup>, the accusatory system has its bases in principles related to the power of decision of the cause conferred to a state organ, which, on its turn, is different from the one who controls the exclusive power of the procedure initiative (“il potere d’iniziativa, e cioè il potere di acusa spetta a persona diversa dal giudice”). He adds, though, that the fundamental, in all of this, is that “il giudice non ha libertà di ricerca e di scelta delle prove, essendo vincolato ad esaminare le sole prove allegate dall’acusa (‘iuxta allegata et probata’).” So it is that Conso (CONSO, 1964, p. 7), firstly, helps us on the preview (by the side of the need of the accusation to be offered by a different organ from the one who judges, there is the publicity, the oral aspect of the procedure, the equilibrium between parts) of “esclusione di qualsiasi libertà del giudice nella raccolta delle prove sia a carico che a discarico” e a “allegazione delle

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<sup>31</sup> The claim for the judge’s impartiality is related to all of these points. The fundament of the *dispositive principle* - it comes even before the lessons of the civil procedure, worried already about preparing itself, an even bigger reason to emphasize the worry about the envolved values of the criminal procedural space - is influenced by the opposite criteria of the inquisitorial search for the truth by the judge. Liebman says that: “ben lungi dall’essere una «arcaica reminiscenza di ordinamenti primitivi», esso appare come una necessaria garanzia del retto funzionamento della giurisdizione, così come questa dev’essere modernamente intesa, ed è innegabile il suo significato «liberale». Restringerne il dominio, per accrescere invece i poteri inquisitori del giudice, significherebbe in sostanza attenuare la distinzione tra funzione giurisdizionale e funzione amministrativa ed introdurre nel processo una tendenza paternalistica che non merita alcun incoraggiamento.” (LIEBMAN, 1960, p. 564).

<sup>32</sup> LEONE, 1988, p. 9; the same is asserted before, in other register: “esclusione di qualsiasi libertà del giudice di raccogliere le prove, le quali devono invece venire fornite dalle parte” (LEONE, 1951, pp. 06-07).

prove da parte dell'accusatore e dell'imputato". In the vital point, Barreiros (BARREIROS, 1981, p. 12) says that, about the relation between subjects, in the accusatory system, there must exist the equality of parts, in which the judge is an arbitrator and has no initiative about investigative issues. On the contrary, in the inquisitorial system, the judge, who stays in a higher position compared with the accused, guides the process, accuses and judges.<sup>33</sup>

Cordero, by exploring the privileged space too, calls the accusatory ritual "l'arte del contraddittorio"<sup>34</sup>, in which the litigants should allege and discuss the dates in a typical "spettacolo dialettico" - mainly, by avoiding the "sovraccarico ideologico da cui nasceva l'ossessione inquisitoria"<sup>35</sup> - in which, somehow, the methods of duel appear developed, keeping, however, the tensions of the combat, that is to say, "performance dei contendenti davanti al giudice-spettatore" (CORDERO, 1986, p. 37). The *culture of the accusatory ritual*, so, is full of worry about the enthusiasm of the social body, "tecniche simili presuppongono ambienti dove gli individui contino qualcosa", in which everything is in the *fair play*, thus, it is there where the judicial organ should weigh less and the ritual should weigh more. Through his own words:

"identiche cadenze formali nelle contese dialettiche: giudice-spettatore; agonisti, contraddittorio disciplinato, temi tassativi, lingua manierata, regole sulla decisione; anche dove sia esclusa ogni prova a effetto automatico; il processo non diventa mai puro affare gnoseologico; (...) nell'occhio impassibile del giudice un epilogo vale gli altri. (...) Operazione agonistica pubblica, 'trial', 'dibattimento': questa macchina scenica esclude indugi, perplessità, stalli; gli utenti esigono tecniche controllabili, discorsi chiari, conclusioni nette, tempi brevi. Usati bene, gli strumenti sviluppano un affilato e sobrio gusto dialettico; a cui fanno pendant goffe stravaganze

<sup>33</sup> As it seems for everybody, the great inspiration taken from Carrara is the characterization, over all, of the accusatory system as specially the one that intend to assure the higher level of freedom to the accused: "1° La piena 'pubblicità' di tutto il procedimento. 2° La 'libertà' personale dell'accusato fino alla definitiva condanna. 3° La 'parità' assoluta di diritti e di poteri fra l'accusatore e l'accusato. 4° La 'passività' del giudice nel reccoglimento delle prove sì a carico come a discarico. 5° La 'continuità' di contesto. 6° 'Sintesi' in tutto il procedimento." (CARRARA, 1863, pp. 383-384).

<sup>34</sup> "Eristica". In greco, 'eris' significa «contesa», mitologicamente personificata in una figura dal parentado piuttosto fosco: è nata dalla Notte, come Morte, Sonno, Inganno, Vecchiaia, ma non spirano significati negative nel derivato che designa l'arte del contraddittorio; ovvio, anzi, che queste tecniche verbali siano tenute in alto conto negli ambienti a forte tensione politica." (CORDERO, 1986, p. 32).

<sup>35</sup> The accusatory style can be well summarized like this: "È spettacolo dialettico, tensione agonistica, partita aperta, oneri, autoresponsabilità: forme, termini segnalano una remota ascendenza agli iudicia Dei (duelli e ordaie: qualche residuo trapela da alcuni contesti); ridotto a pura operazione tecnica, dove l'unico valore sta nell'osservanza delle regole, il processo appare insensibili al sovraccarico ideologico da cui nasceva l'ossessione inquisitoria. L'azione penale obbligatoria e irrettrabile, poteri istruttori ex officio, petita mai vincolanti, distinguono il modello italiano dall'anglosassone." (CORDERO, 2003, p. 97).



barocche nell'area esposta ai metodi inquisitoriali (...)." (CORDERO, 1986, pp. 42-43).

#### 4. Conclusion: the decision about the module to differentiate the inquisitorial potency

The political game must be revealed: the fight for the principle reflects much more a *desire* that feeds the procedural machine. Bettiol brings to light the political choice involved in relation to the guarantee of the accused, according to the limit the State imposes against itself to the repression and the social control. And the proximity of models makes it possible that, in the inquisitorial processo, the accuser-judge builds a hypothesis and makes the verification:

"the truth, which is understood as 'adaequatio rei et intellectus' can be reached and it must be reached. This truth, which is a material truth, exists already as a hypothesis inside the thoughts of the accuser-judge. However, it must be excessively reached. The contradictory disturbs this search. The blemish of the proof of that already claimed truth is the higher danger." (BETTIOL; BETTIOL, 2008, p. 166)

Impartiality, central idea in the contemporary democratic constitutional pattern, can only be assured, for beyond the initial separation between the functions of accusing and judging - in other words, exhaustively -, depending on the conditions given to the judge of moving away/becoming extraneous of the investigative/proving activity. A constitutional procedural principle, with truly accusatory nature, demands not only an accusation, but also a judge who does not have psychological involvement, neither in the beginning, nor during the procedure, with the previously thought hypothesis, created by the accusation. Taking a decision means choosing, from equivalent points of reference and considering the contradictory, the "duo", from *dubium* and *duellum*.

The impartiality of the judge, a supreme principle of the process<sup>36</sup>, should have some valid expectation related to the guarantee that the judge will not adopt for prior the accusatory hypothesis, what could cause an anticipated result; strictly speaking, this previous premise would exactly turn into dispensable the process itself, as a convincing

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<sup>36</sup> ARAGONES ALONSO, 1997, p. 127, not without firstly refer to the lesson of GOLDSCHMIDT, 1950: "La imparcialidad del juez, que a la par se refiere a la comprobación de los hechos como a la aplicación del Derecho, parece la barrera infranqueable de la justicia en el proceso, y ella, a su vez, supone que el juez no sea parte." That is how such principle will be linked with a particular kind of motivation, that is to say, "imparcialidad conota una relación entre los móviles de una persona y un acto procesal." (pp. 15 e 30).

tool of the judge, once the decision would be previously defined, without influence of proving activities<sup>37</sup>. The appreciation of these ones cannot be affected by any foregone judgment - the biggest one of these judgments, without many doubts, will be verified through the influence provoked by evidences.<sup>38</sup>

The position of being beyond the involved interests, in stead of being above them, requests a spirit of the judge different from the *partialities* that will give him opinions about the decision<sup>39</sup>, and that attract him to this higher point always that proving or investigative powers are conferred to him. Hence, a great violation to the judicial impartiality is revealed, either related to the *objective* aspect (it is about the situation of the judge who has enough guarantees into dissipate any doubts about his impartiality, which is caused not because of the relations between the judge and the parts, but between the judge and the *object of the process*), either to the *subjective perspective* (the idea linked with the personal *convictions* of the judge in concrete, who knows a certain theme and this knowledge affects his lack of previous judgments), so

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<sup>37</sup> Perhaps, it was about this search for a *Political Justice* that once KIRCHHMEIMER, 1968, p. 472 talked: “la justicia política está destinada a seguir siendo un eterno atajo, necesario y grotesco, benéfico y monstruoso pero de todos modos un atajo. Es necesaria y benéfica, porque sin la intervención del instrumento jurídico la lucha por el poder político continuaría siendo igualmente implacable pero mucho más desordenada.”

<sup>38</sup> “(...) los caracteres fundamentales del proceso acusatorio son: a) El juez no procede por iniciativa propia «ex officio». Ni poner en marcha el procedimiento, ni investigar dentro de éste los hechos, es misión suya. Su papel consiste exclusivamente en examinar lo que las partes aporten y decidir sobre su verdad. Dirige el combate e anuncia el resultado.” (GÓMEZ ORBANEJA; HERCE QUEMADA, 1987, p. 117).

<sup>39</sup> So that the process does not become a pathological phenomenon and so that it establishes itself as a way of the controverted right, the process “supone dos tesis opuestas y un juez que con imparcialidad dicte el fallo. La imparcialidad del juez sólo prospera a base de la unilateralidad de las partes. (...) La imparcialidad del juez es la resultante de las parcialidades de los abogados.” Mainly, the accusatory procedure configuration, through the use of the dispositive principle, obliges to tolerate the incomplete activity of the parts and the recognition of a faulty material as the base of the decision: “Esta configuración del proceso, es decir, la aplicación del principio dispositivo o de instancia de parte al procedimiento criminal, es la acusatoria. Parte del enfoque de que el mejor medio para averiguar la verdad y verificar la justicia es dejar la invocación del juez y la recogida del material procesal a aquellos que persiguen intereses opuestos y sostienen opiniones divergentes, descargando de esta tarea a quien ha de fallar el asunto y garantizando de este modo su imparcialidad. Al mismo tiempo se manifiesta de este modo el respecto de la dignidad del procesado como ciudadano. En cambio, esta configuración del proceso ha de tolerar como contrapartida las consecuencias de una actividad incompleta de las partes y ha de reconocer también el material defectuoso como base de la decisión. A los peligros que de ello nacen, se previene por medio de la institución de la abogacía: por la parte acusadora especialmente la del ministerio público y por la del procesado la de la defensa.” (GOLDSCHMIDT, 2005, pp. 321 e 587-588). Abridged version, cf. GOLDSCHMIDT, 1963.

that it is possible to establish the *partiality presumption of the active-judge* (cf. LOPES JR., 2012, pp. 187-195).

From the identification of this element that differentiates both styles, like a rule over the gray area between the systems - the *proof management trusted to the judge* cannot be a point contaminated by the commonplace, but a point from where must be taken coherent fruits and lessons. From the analysis of any concrete procedural systems - *mixed* only through this perspective -, we have grades of *inquisitorial aspect*, which is element that remains in the criminal procedural culture. And, so, the privileged point of installation to be occupied is referred to the confusion of functions that are practiced by the judge, specifically on what concerns to evidences. About him - the position occupied by the judge while he exercises the function of part -, we can identify the most sensitive point, the one more able to suffer contractions and properly authoritarian turns - where stays what can be called the *inquisitorial potency*. If there stays the *module that differentiates* and the differentiation point of the styles - at least since the breakthrough of the simple existence of a model of procedural parts, and knowing that it is not the only element which will adequately compose the accusatory system<sup>40</sup> -, the evidence management as a responsibility of the parts ends up being itself the nucleus, the aim of the separation of the parts from the impartial subject. In other words, the reason of the *actum trium personarum* goes beyond the fact of being the accusation conducted by a different organ from the one which judges, and it reaches the issue about the fact that this third judge does not have the *right of accusing* - of arguing, of helping at *proofs* and completing the accusatory hypothesis alleged in the *accusatory pretension*.

Hence, when in debate the proof management, it is in question the kind of inquisitorial identity of the concrete ways of operating the criminal procedure. On the

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<sup>40</sup> The accusatory way can be pointed out by: clear distinction between accusation and judgment; the initiative of bringing evidences is function of the parts; the judge is an impartial third subject, who must be extraneous to investigation and passive on what concerns to the search for evidences, either by the accusation, either by the defense; equal treatment of the parts (equal opportunities in the process); generally, it is an oral procedure (or mainly oral); the entire procedure is public (or its great part); there is contradictory and it is possible to resist (defense); lack of evidence's price, so that the sentence is based in the free motivated persuasion of the jurisdictional organ; it is established the *res judicata* according to criterias of juridical (and social) safety; it is possible to contest decisions and there is a double stage of jurisdiction (LOPES JR., 2012, pp. 117-118). To an adequate analysis of the dimensions of the characteristics of the accusatory system, beyond the evidence management, which is our central worry, see FERRAJOLI, 1995, pp. 616-623.

other hand, this management as a turn point, as a difference between systems, it must be emphasized that, at the same time, the political dispute will be focused on this point, obviously, on what concerns to the criminal procedural area. In addition, there is the excuse that it is through this point that the authoritarian style elements will have the possibility of easily entering. Thus, concerning to the main point of turn, it is possible to deduce that, by there, the inquisitorial activation (or even inversion) will be more functional. In other words, it means that the *strong* point of the accusatory system - the evidence management in the hands of the parts - does not abandon some “weakness”, because it makes possible the influence of the inquisitorial turn through an even more strong deep way. The complexity of the coexistence of virtues and weakness related to the same point is exactly what confers its fundamental value.

The development of the criminal procedure, as it is known, is part of a bloody history of social relations, and, mainly, of political relations. Through a brief but deep way, the historical diversity of the two different concepts which coexist in the judicial order becomes clear. In a final synthesis, Legendre says:

“D’un côté, une conception, que je qualifie parfois de sportive et que le langage académique désigne en évoquant la formule de procédure accusatoire; ici, le juge est un arbitre qui compte les corps (tendance du droit anglais depuis le XIII siècle). De l’autre côté, une conception militante à laquelle on accole l’étiquette de procédure inquisitoire; là, le juge est mis en position de vouloir tout savoir (tendance long-temps dominante en France et dans les pays de la Contre-Réforme).” (LEGENDRE, 1983, p. 180)

Basically, he questions exactly the position of the judge in the *scene*, either if he is *in the position of needing to know*, or placed as the referee of the conflict, so that the points of view related to the political use of the coercitive tools in each criminal procedural system become evident.<sup>41</sup>

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