

## Adversarial and Inquisitorial Systems\*

*David F. Jackson QC has been at the Bar since 1964. He became a Queen's Counsel in 1976. He was a Federal Court judge in the mid-1980s. He has held numerous senior positions with the Bar Association of Queensland and the New South Wales Bar Association. He has held government inquiries, including the inquiry in 2004 known as the Jackson Inquiry into aspects of the James Hardie arrangements. He has had a distinguished career as an appellate counsel, especially in constitutional law. He was made a Member of the Order of Australia in 2007.*

### Introduction

The terms 'adversarial' and 'inquisitorial' derive from the procedures used to resolve curially the issues which arise to be determined by litigation under the criminal and civil laws of those countries. Very broadly speaking, in an 'adversarial' system, the parties choose what material is to be placed before the court or tribunal. In an 'inquisitorial' system, the court or tribunal may itself play a part in investigating the evidence upon which the matter is decided, or in investigating the ultimate issue.

'Inquisitorial' is also often used popularly in a narrower sense, as referring to a perception of the role of the investigating judge or magistrate in France or Italy. Sometimes, however, the terms are used more broadly, to refer to the entire legal system of a country.

The two systems are frequently regarded as entirely disparate; however the practical differences between the systems have diminished over time. It is unlikely that 'the twain shall meet', but their operations today have many similarities and, in the future, are likely to have more.

### The basic nature of the adversarial system

The nations which have systems described as adversarial are those that have their legal origins in the United Kingdom. They are places which were at earlier times British colonies - for example Australia, New Zealand, India, Pakistan, Canada, South Africa, the United States, Malaysia, Hong Kong - and countries which in turn have been their colonies, or under their governance, such as the Philippines or, to use an Australian example, Papua New Guinea. The New Guinea part of Papua New Guinea was a German colony until given to Australia under a League of Nations mandate following World War 1.<sup>1</sup>

A very important feature of the adversarial system was reliance on a judge-made system of substantive law. It was judge-made in a number of respects.

First, there was the concept of the 'common law'. It involved a fiction that there was an underlying body of law which revealed itself case by case as the need arose.<sup>2</sup> The fiction extended to the identification, and creation, of criminal offences and to the doctrines of what we today regard as common law (principally contract and tort), equity (trusts, equitable remedies etc.), administrative law and other areas. The fiction has long gone: it is recognized that the judges make law.

A system of judge-made law necessarily involves some rationalisation of views. Two different judges confronted by the same facts might perfectly reasonably arrive at opposing conclusions as to the principle of law which should be applicable to resolve the issue.<sup>3</sup>

A product was a notion of judicial precedent. It meant that a judge at a level in the court system was obliged to follow the central legal reasoning (the *ratio decidendi*) of decisions of courts at a higher level in the judicial hierarchy. That did not mean that observations by higher courts which were not part of the *ratio decidendi*<sup>4</sup> could be disregarded, or that the decisions of courts in other jurisdictions could be disregarded. They were, however, to be treated as 'persuasive', rather than binding.<sup>5</sup>

A further consequence was that the higher a court's place in the judicial hierarchy the fewer decisions by which it was bound, and the more it was free to declare the law.

The judges, however, were not the only lawmakers. There was Parliament. It could make, and change, the law and, in doing so, adopt or reject or modify the law as it had been declared by judicial decision. Parliament's laws prevailed over judge-made decisions; the judges were obliged to apply the laws made by Parliament. Even then, however - and this is the second aspect of judge-made law - the judges developed their own principles for interpretation of statutes<sup>6</sup> and applied those principles when dealing with cases involving the statutes of the Parliament.<sup>7</sup>

### The basic nature of the inquisitorial system

The position in inquisitorial systems tends to be different. The substantive law, both criminal and civil, is codified. The French *Code civil*, and *Code d'instruction criminelle*, introduced originally in the early part of the 19th century, became prototypes for the codified laws of many other European countries.<sup>8</sup>

The underlying approach of these codes is that each judge is to interpret the law and apply the relevant code provision directly to the particular case. As Cairns and McKeon have said<sup>9</sup> in relation to the inquisitorial system: 'The English system of judicial precedent is an anathema to this legal philosophy. There is no such thing as judge-made law; in fact Article 5 of the Civil Code states that "the courts shall be prohibited from issuing rules which take the form of general and binding decisions on those cases which are submitted to them".'

### **The inquisitorial system's use of common law approaches**

However, whilst the decisions of courts may not directly reflect the reasoning in other cases, any legal system has a need for certainty. Modern commentators have noticed that legal textbooks in inquisitorial systems are placing more emphasis on other judicial decisions<sup>10</sup>, and academic writings play a significant part in judicial decisions.<sup>11</sup>

There are also other significant influences. For example the *Cour de cassation* in France is a final court of appeal. One of the reasons for its existence is to unify interpretation of the law. This gives it a great deal of authority.<sup>12</sup> Other practical matters also militate in favour of the use by courts in the inquisitorial jurisdictions of decisions by courts in the common law system. They include the following:

- (a) Many codifications of the laws of inquisitorial systems have provisions expressed in broad terms, leaving much to be determined by judicial decision. Many problems which arise are similar to those which arise in common law jurisdictions. It is not surprising that, in seeking a solution to those problems, resort is had to decisions from the common law world. That is particularly so because the decisions from the common law jurisdictions will state detailed reasons.
- (b) Many decisions are to be made in circumstances where it is desirable that there be uniformity of interpretation in countries which have different heritages. This has been the case in relation to the law of the sea (including maritime law), in relation also to aviation (including the carriage of goods and passengers), other aspects of international trade, international tax treaties, atomic energy, the disposal of radioactive and other waste and numerous other matters.
- (c) The influence of European Community law, and the European Convention on Human Rights.

### **The common law's inquisitorial influence**

Another feature which has reduced the difference between the systems is in the changes which have occurred in the common law systems. A particular matter is the extent to which statute law has intruded upon the common law. In Australia, the laws establishing criminal offences are, or in some States are, almost entirely codified.<sup>13</sup> So too are many other areas of the law. Sometimes the provisions of statutes are expressed extremely broadly - as in provisions of the [Trade Practices Act 1974](#) - leaving it to courts to give meaning to the terms in particular cases. The substantive laws in the two types of jurisdiction are moving more closely together although, needless to say, they are never likely to be exactly the same.<sup>14</sup>

### **Civil litigation - what is it?**

In the common law system, we divide litigation into, broadly speaking, civil and criminal. Civil litigation is where, to express it in the simplest form, one party sues another to establish an entitlement to a right or privilege or to deny the other's entitlement. There may be many parties involved, the parties may be individuals, corporations, governments or governmental instrumentalities. The relief claimed may be debt or damages, declaration, injunctions to restrain or compel various conduct, and many other forms. There may be cross-claims. The one thing that can be said is that the judgment against a losing party will not involve the party being sent to prison.<sup>15</sup>

### **Civil litigation - adversarial procedure**

A short description of a very common type of civil proceeding in Australian courts is as follows.

The plaintiff will deliver a statement of claim setting out the facts on which the plaintiff relies, and the relief sought in consequence. The defendant will deliver a defence which admits or denies those facts and sets out any defences, of law or fact, on which the defendant relies. Then follows mutual discovery of each party's documents which may be germane to the resolution of the matters at issue. There may be interrogatories - questions in writing by one side to the other which have to be answered on oath or affirmation - which can be tendered as evidence at the trial by the interrogating party.

The culmination is a trial. At the trial, the plaintiff presents its case. The plaintiff's counsel examines each of the plaintiff's witnesses-in-chief, the defendant's counsel cross-examines each such witness, the plaintiff's counsel has a limited right to re-examine. The plaintiff's counsel then 'closes' the plaintiff's case, and the defendant's case commences, the positions being reversed. At the conclusion of the evidence the parties' counsel address the court and the judge either gives a decision *ex tempore* or, as very often happens, reserves decision and delivers a written judgment at a later date. The plaintiff bears the ultimate burden of proof in the proceeding, the standard of proof being on the balance of probabilities. If the plaintiff does not satisfy that burden, the plaintiff's case fails.

### **Civil litigation - inquisitorial procedure**

There are considerable similarities conceptually in the various inquisitorial systems. This paper refers, for purposes of convenience, to the French system contemplated by the [Code de procedure civile](#) (1975).<sup>16</sup> The Code envisaged the institution of proceedings by statement of claim. Ordinarily such proceedings are commenced by private litigants. (Judges may take the initiative to bring a case, but this is rare.)

The plaintiff has to file a statement of claim, which is to set out the facts and law on which the plaintiff relies. There is an exchange of pleadings, and disclosure of documents. The aim is to ensure that all points have been raised and the arguments in support of them advanced. (None of this seems very remote from a modern civil case in an Australian superior court.)

Except in simple cases, there will be one or more hearings before a preparatory judge, the *juge de la mise en etat*. The judge, broadly speaking, has two functions - to direct the parties to take all the steps necessary to ensure the matter is ready for a final hearing, and to require witnesses to give oral evidence before that judge.<sup>17</sup>

In due course, the judge will order a closure of the proceedings and transmit the case for trial. Most often, the trial involves little more than closing speeches by the advocates for the parties, but the court may permit oral evidence in an appropriate case.<sup>18</sup> At the conclusion of the proceedings, the court retires to consider its decision, which it gives in due course. A useful summary of the procedure can be seen in Elliott and Vernon.<sup>19</sup>

### **Similarities in civil procedures**

As is apparent from the above observations, a very significant function of the *juge de la mise en etat* is to give directions in relation to conduct of the proceedings. That function is very largely mirrored in the superior courts in Australia, where judges have been given similar powers.<sup>20</sup> The practical differences between the adversarial and inquisitorial systems have also been reduced in many cases by the requirement in the adversarial system that the parties exchange the statements of the witnesses before trial, thus potentially reducing the scope for conflict.

Differences between the inquisitorial and adversarial procedures

In the end, the differences between the inquisitorial and adversarial procedures seem to come down fundamentally to two aspects - the ability of the judge to direct the obtaining of evidence, and the stage of the proceedings at which the evidence is taken.

It is difficult to see any very significant differences in relation to the latter aspect, the stage at which evidence may be addressed. Surely this is a matter on which different nations may have different views. There is no absolute rule, and nations are entitled to decide their own ways of arriving at a just result.

As to the former aspect, the author wonders if the entitlements given to a judge by the inquisitorial system are in fact exercised as much as is sometimes suggested. In his paper, [Adversarial Systems and Adversarial Mindsets: Do we need either?](#)<sup>21</sup> Associate Professor William van Caenegem has suggested: 'The experience on the ground tends to be that the judges leave most aspects of the management of the case to the parties and intervene only rarely.' This is rather supported by conversations the author of this paper has had over the years with those who have participated in, or observed, the systems operating in Western Europe, where it has been said that whilst the procedures were at different stages, the reality was that civil cases, particularly commercial ones, were not conducted on lines very different from similar litigation in Australia or in the United Kingdom, and had very similar results.

### **Which system?**

Assuming that the judge does exercise any available powers as to evidence, the author sees no particular disadvantage with the inquisitorial system. But, as one always asks - why should the state be involved in doing something that no party to the litigation has asked it to do?

### **Criminal procedure in the adversarial system**

Criminal procedure in the common law system has an apparent simplicity. Relatively serious crimes are investigated by the police. The police charge an accused with the offence. There is a committal proceeding before a magistrate. If the magistrate commits for trial, the trial takes place in a Supreme (or District or County) Court before a judge and a jury.<sup>22</sup> The prosecution is conducted on behalf of the Crown, usually by counsel who is an officer of, or retained by, the relevant Director of Public Prosecutions. What charges will be laid or proceeded with and what evidence will be called in support of the Crown case are matters for the Crown. The judge's powers are very limited in this regard. It is also a matter for the accused or his counsel to decide whether the accused will give evidence, or whether any other witnesses will be called for the defence.

The standard of proof is 'proof beyond reasonable doubt'. The burden of establishing all elements to that standard rests on the Crown, although some matters of positive defence must be established by the accused, but on the lower standard of 'the balance of probabilities'.

### **Criminal procedure in the inquisitorial system**

The inquisitorial system is different structurally from the common law system. Whilst it involves an investigation and a trial, the roles of the investigation, and of the investigators, differ. It is also a little more murky as to the precise standard of proof.

Once again this paper follows, and abbreviates, the course of French procedure referred to in Cairns and McKeon.<sup>23</sup> When a serious offence has been committed and the initial police investigation carried out, the material from the police investigation goes to the public prosecutor's office. If it is a clear case, the public prosecutor may bypass an investigating judge and put the accused up for trial. When an investigation is required, however, the prosecution may issue to a *juge d'instruction* a requisition to open a judicial investigation into the matter.

In conducting the inquiry the *juge d'instruction* has wide powers: to visit the scene, to conduct searches, to seize articles. And, importantly, to question anyone who may assist, including the accused. Whilst these powers are wide, in reality they have to be exercised in conjunction with the police and the investigating judge is very reliant on the intelligence, skill and integrity of the police. (In Italy, the course was taken of placing police officers in a unit with the magistrate and directly under the magistrate's command. This seems a somewhat preferable approach.) At the conclusion of the examination, the *juge d'instruction* draws up an official report and the report and the file, together with a document indicating the charges which should be brought, are sent to the Ministry.

If it is decided to prosecute, the main trial occurs. Serious cases go to the *Cour d'assises*, where the witnesses for the prosecution and then the witnesses for the defence give evidence. There is provision for questioning by the other side in each case, although it is not the same as cross-examination as we would know it.

Then there are closing speeches. After that, the three judges and nine jurors retire to consider their verdict.<sup>24</sup> At least eight must agree for a guilty verdict.

### **The Australian position regarding an inquisitorial approach to crime**

In Australia, whilst there has not been an acceptance of the inquisitorial procedure within trials, there are now many more occasions when there has been an inquisitorial procedure before trial. Bodies such as ASIC, ACCC, Crime and Misconduct Commissions, Independent Commissions Against Corruption, Royal Commissions, Special Commissions of Inquiry and coronial inquiries have conducted investigations before anyone is charged with an offence. In many cases, a potential accused is compelled to give evidence, albeit with certain protections as to its later use. This suggests that the adversarial and inquisitorial systems are not always so far apart.

### **Some concluding views**

Comparisons of the two systems tend to produce heated views one way or the other, as reflected in the following two examples. In 1990 Marcel Berlins, at a time when the British system was under attack, said<sup>25</sup>:

'It can never be fully proven but the evidence suggests strongly that the French inquisitorial process leads to fewer innocent people being convicted and fewer guilty acquitted than under the English adversarial system. But along the way many more possibly innocent suspects are held in custody, and for longer periods. The final verdict, though, comes down firmly in favour of the French system: it's only the people that let it down, not the procedure.'

On the other hand, Gerald Walpin, in 2003, supported the adversarial system in the United States, lauding its fluidity<sup>26</sup>: 'to re-engineer parts of the procedure as needed in each case to do justice'. He thought that the United States was 'blessed with' the adversarial system.

There have been serious complaints about each system. Recently in France, President Sarkozy has proposed a shift towards a more adversarial system. The author's views are that each system is a product of the society in which it operates, but each depends on the dedication and honesty of those administering it.

One final comment: if there were a question of the author's involvement in a serious criminal offence, the author would prefer the inquisitorial system if he were not guilty, but the adversarial system if he were.

\* DF Jackson QC acknowledges the assistance of Ms Louise Moore in the preparation of this paper.

## End-notes

- 1 Not all countries which have been under the control of Britain or its former colonies have adversarial systems. Some Islamic states have rejected it. Many countries have modified, indeed much modified, versions. And there are some historical curiosities such as Vanuatu, which had earlier had both British and French law applicable, and a final court which consisted of a French judge, and English judge, and a Spanish judge to resolve differences. Problems arose about his replacement when the Spanish regime which had appointed the Spanish judge no longer existed.
- 2 The fiction existed well into the 20th century, though by then it was much derided.
- 3 One can see that today in a 4-3 decision of the High Court of Australia. A difference of views between intermediate appellate courts in Australia is a reason why special leave to appeal to the High Court may be given.
- 4 The *obiter dicta*.
- 5 The House of Lords took the doctrine of precedent to great, indeed absurd, lengths. Despite the fact that the doctrine of precedent was judge-made, the view was adopted that its own previous decisions could not be overruled, except by Parliament. The Privy Council on the other hand (which might be composed of the same judges) could over-rule its own decisions. In the end, in 1966, a more enlightened House of Lords over-ruled its previous decisions not to over-rule its previous decisions and did so simply by a Practice Direction.
- 6 For example, the principle that a state could not acquire property without compensation unless the statute authorising the acquisition made it clear that that was what the legislature had intended.
- 7 Many rules of statutory interpretation are now found in legislation such as the [Acts Interpretation Act 1901](#) (Cth) but many common law approaches are adopted, or otherwise remain.
- 8 Cairns W. and McKeon R., [Introduction to French Law](#) (Cavendish, 1995) p. 51; Vogler R., [A World View of Criminal Justice](#) (Ashgate, 2005) at 56.
- 9 n.7 at 16.
- 10 Elliott C. and Vernon C., [French Legal System](#) (Longman 2000) at 52; Hodgson J., [Codified Criminal Procedure and Human Rights: Some observations on the French experience](#), Crim.L.R. 2003, Mar, 165 at 167, 168.
- 11 Elliott and Vernon n.10 at 55.
- 12 'It would be a bold *Tribunal d'instance* - or even a brave *Cour d'appel* - which presumed to contradict *la jurisprudence constante* (the established case law)'. Cairns and McKeon n.8 at 17.
- 13 For example, the Criminal Codes of Queensland, Western Australia and Tasmania derive from Sir Samuel Griffith's [Criminal Code 1899 \(Queensland\)](#), itself influenced by the Italian Penal Code.
- 14 Who will get the French to drive on the left hand side of the road? Or the British or the Japanese, to drive on the right?
- 15 Contempt of court during the hearing, or non-compliance with certain orders, of course, might have that effect.
- 16 The author relied on the summary of it in Elliott and Vernon, n.10 at 119-140.
- 17 n.10 at 131: 'Civil procedure in France, as in England and Wales, is based on adversarial principles. The parties bring, prepare and present their case on their own initiative. The judge plays no active part, merely serving as arbiter. As we have seen, the preparatory stage is still, in the simplest and more straightforward cases, conducted largely on this basis. The judge simply checks the materials prepared by the parties and decides whether the matter is ready for trial. However, in more complex cases, the judge takes a more active role in preparation. The procedure accordingly incorporates many inquisitorial elements. The judge tries to ensure that the parties do as much of the preparation as possible themselves. But, if necessary, the judge will interfere - interview witnesses, conduct expert investigations and do whatever is required to complete the investigation. The hearing, on the other hand, is always held on an adversarial basis. The parties present the findings of the investigation, present the file containing these findings and put forward their cases. The procedure is oral and carried out in public.'
- 18 Elliott and Vernon n.10 at 133-4; Cairns and McKeon at 180-181.
- 19 n.10 at 131.
- 20 See, for example, the Federal Court of Australia's promotion of its 'rocket docket' procedure.
- 21 (2003) 15 [Bond Law Review](#) at 115.
- 22 The jury may be dispensed with by agreement in some cases. It cannot be dispensed with in the case of the trial of indictable offences against laws of the Commonwealth, because [s.80 of the Constitution](#) requires such cases to be tried by jury.
- 23 n.8 at 169-177.
- 24 European jurisdictions have had varying views about the participation of juries. An interesting survey may be seen in Vogler, n.8 at pp.233-253. The author was a little surprised to read that President Putin had been in favour of an extension of the role of juries in Russia: Vogler n.8 at 253.
- 25 *The Guardian*, 10 January 1990.
- 26 Wolpin, G., *America's Adversarial and Jury Systems: More Likely to do Justice*, (2003) 26 [Harv. J.L. and Public Policy](#) 175 at 185.