



LAW·COMMISSION

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ADVERSARIAL AND INQUISITORIAL SYSTEMS: A BRIEF OVERVIEW OF KEY FEATURES

Blurring of the distinction between adversarial and inquisitorial models

The terms “adversarial” and “inquisitorial” are used to describe models of justice systems. In reality these terms have no simple or precise meaning and no one country’s system can be described as demonstrating the “pure” version of either model. Nevertheless, we have attempted to set out the key characteristics and differences of the two models in order to give a sense of each.

It is important to note that over recent years, adversarial models have begun to incorporate some of the features of inquisitorial systems. Indeed, many of the reforms in the Criminal Procedure Act 2011 do have inquisitorial features to them – for example, the development of obligatory pre-trial case management processes. At the same time, inquisitorial models (which have generally been criticised for being inefficient, overly bureaucratic and placing too little weight on the presumption of innocence) have undergone significant reforms that call on elements of adversarial models.

For this reason, the key differences between the two models as we have set them out below, are in much sharper relief than is now currently the case in any system.

Key characteristics of adversarial systems vs inquisitorial systems

1. Responsibility for marshalling evidence for trial

- In an adversarial model, responsibility for gathering evidence rests with the parties – police and defence – and an independent evaluation of that evidence by a neutral judge is left to the trial.
- In an inquisitorial model, criminal investigation, at least in serious cases, is typically overseen by either an “independent” prosecutor or an examining magistrate (in France termed a “juge d’instruction”). The prosecutor or examining magistrate can seek particular evidence; direct lines of inquiry favourable to either prosecution or defence; interview complainants, witnesses and suspects; and ultimately determine whether there is sufficient evidence to take a case to trial.

2. Relative faith in the integrity of pre-trial processes

- An adversarial model is based on mistrust in the reliability of the prosecution evidence. It proceeds on the assumption that mistaken verdicts of guilt can best be avoided by allowing the defence to test and counter that evidence at the trial itself, largely in the manner in which it chooses to do so. The trial is the exclusive forum for seeking out and determining the truth – or, perhaps more accurately, for determining whether there is a reasonable doubt as to guilt.

- An inquisitorial model has faith in the integrity of pre-trial processes (overseen by the prosecutor or examining magistrate) to distinguish between reliable and unreliable evidence; to detect flaws in the prosecution case; and to identify evidence that is favourable to the defence. In many jurisdictions, this culminates in the preparation of a “dossier” for the trial court that outlines all aspects of the case and forms the basis for the trial itself. Pre-trial processes are therefore an indispensable part of the process for seeking out the truth. By the time a case reaches trial, there is a greater presumption of guilt than in an adversary model.

3. *The extent of discretion*

- Because in an adversarial model decision making is left largely in the hands of the parties, there is a recognised prosecutorial discretion not to proceed with the case, even when there is evidence to support a criminal charge. There is also an ability, recognised in statute, for the defendant to plead guilty and avoid a trial.
- In an inquisitorial model, discretion is much more limited. In some jurisdictions, “the legality principle” dictates, in theory if not in practice, that prosecution must take place in all cases in which sufficient evidence exists of the guilt of the subject. Moreover, there was traditionally no such thing in civil law jurisdictions as a plea of guilty. Regardless of the accused’s wishes, trial processes continued, albeit on a sometimes more accelerated path.

4. *The nature of the trial process*

- In an adversarial model all parties determine the witnesses they call and the nature of the evidence they give, and the opposing party has the right to cross-examine. The court’s role is confined to overseeing the process by which evidence is given (to ensure that it is within the rules) and then weighing up that evidence to determine whether there is a reasonable doubt. There are strict rules to prevent the admission of evidence that may prejudice or mislead the fact finder.
- In an inquisitorial model, the conduct of the trial is largely in the hands of the court. With the dossier of evidence as its starting point, the trial judge determines what witnesses to call and the order in which they are to be heard, and assumes the dominant role in questioning them. Cross examination as we know it does not exist, although the parties and their counsel are generally permitted to ask questions. There are far fewer rules of evidence and much more information available to the court at the outset. The offender’s criminal history, for example, may be read to the court before the trial begins.

5. *The role of the victim*

- In an adversarial model, the victim is largely relegated to the role of witness. They have no recognised status in either the pre-trial investigation or the trial itself.
- In an inquisitorial model, on the other hand, victims have a more recognised role. In some jurisdictions they have a formal role in the pre-trial investigative stage, including a recognised right to request particular lines of inquiry or to participate in interviews by the examining magistrate. At the trial itself, they generally have independent standing. Although this is partly for the purposes of claiming compensation, they are sometimes also permitted to ask questions of witnesses.