



Does The Adversarial System Serve Us Well?

Professor Leslie Thomas KC

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Introduction To The Adversarial System

The adversarial legal system is a model of justice that is widely used in common law jurisdictions around the world. In theory under this system, two opposing sides, represented by lawyers, present their cases to an impartial judge or jury, who then decides the outcome of the case based on the evidence presented. This system is often presented as a way to ensure that both sides are able to vigorously advocate for their positions and that the truth is ultimately revealed through the adversarial process. However, as you will hear critics argue that the adversarial system can be flawed and that it may not always promote justice. In this lecture, we will explore the question of whether the adversarial system really promotes justice, and if not, whose interests it serves.

In England and Wales, we have a predominantly adversarial system of justice. Our criminal and civil trials are based on the adversarial system. The same is true in other common law countries whose legal systems are, to a greater or lesser extent, derived from ours. In describing the essential elements of the English adversarial system, I can't improve on the words of Lord Denning in *Jones v National Coal Board* [1957] 2 QB 55:

"In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question "How's that?" His object, above all, is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role. Was it not [Lord Chancellor Eldon] who said in a notable passage that "truth is best discovered by powerful statements on both sides of the question"?... and [Master of the Rolls Lord Greene] who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said Lord Greene, should himself conduct the examination of witnesses, "he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict"...

Yes, he must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth: and the less dust there is about the better. Let the advocates one after the other put the weights into the scales - the "nicely calculated less or more" - but the judge at the end decides which way the balance tilts, be it ever so slightly. So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties... So also it is for the advocates, each in his turn, to examine the witnesses, and not for the judge to take it on himself lest by so doing he appear to favour one side or the other... especially. and it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost..."

We can identify certain key features which characterise the English adversarial system of justice:

- First, as we just heard from Lord Denning, it is for the parties to decide which witnesses to call, and how to present their cases. The judge serves as a neutral arbiter. Although judges can and do intervene during argument and ask questions of witnesses, it is considered inappropriate for a judge to intervene too much and to assume the role of an advocate.

- Second, a lot of emphasis is traditionally placed on oral evidence. Parties who rely on a witness are generally expected to call them to give oral evidence in court, and opposing counsel has the right to cross-examine the witness. Cross-examination by a skilled advocate is seen both as an opportunity for the witness to answer criticisms of their evidence, and as a vital tool in getting to the truth.
- Third, there are technical rules of evidence. Just because evidence is relevant doesn't always mean it is admissible. Nowadays, the rules of evidence in civil cases have been significantly relaxed, but in criminal cases the rules of evidence continue to play an important role.
- Fourth, the system, at least in theory, strives for equality of arms. The prosecution and defence in a criminal case, or the claimant and defendant in a civil case, are in theory supposed to be on a level playing field. In reality, we all know that this is not always the case, especially when one party is represented by skilled lawyers and the other is unrepresented. But equality of arms is the theoretical underpinning of our system, even if it is sometimes more honoured in the breach than the observance.
- Fifth, what follows from these principles is that the adversarial system places a lot of reliance on the professional skills of lawyers. The adversarial system is at its fairest when the lawyers on each side are evenly matched. If a lawyer makes errors, their opponent can and often does exploit those errors.

What Are The Flaws Of The Adversarial System?

I want to cut straight to the chase and look at some of the problems there are said to be with the adversarial system.

One main criticism of the adversarial system is that it can be overly focused on winning and losing, rather than on finding the truth and promoting justice. In an adversarial system, lawyers are often motivated by a desire to win their cases, rather than to uncover the truth or to achieve justice. This can lead to a situation where lawyers are more concerned with scoring points and attacking the credibility of the opposing side, rather than with presenting a fair and balanced case.

Another problem with the adversarial system is that it can be heavily skewed towards those who have the resources to mount a vigorous defense or prosecution. In an adversarial system, the outcome of a case can often be determined by the quality of the legal representation that each side is able to secure. This can result in situations where wealthy individuals or corporations are able to hire the best lawyers and thus have an unfair advantage over less affluent individuals or groups.

A further criticism of the adversarial system is that it can be adversarial to the point of being hostile and confrontational. This can result in situations where witnesses and victims are treated poorly, and where the legal process can be intimidating and traumatic for those involved. This can be particularly true in cases involving sexual assault, domestic violence, or child abuse, where victims may be reluctant to come forward or may be subject to aggressive cross-examination.

Whose Interests Does The Adversarial System Serve?

Given these flaws, it is worth asking whose interests the adversarial system serves. Critics argue that the adversarial system primarily serves the interests of lawyers and the legal profession, rather than the interests of justice or the wider community.

In an adversarial system, lawyers are often able to charge high fees for their services, which can make the legal system prohibitively expensive for many people. This can result in situations where justice is not available to all, but only to those who can afford to pay for it.

In addition, the adversarial system can be seen as serving the interests of those who benefit from the status quo. In many cases, the adversarial system is used to protect the interests of large corporations or wealthy individuals, who may be able to use their resources to defend themselves against legal challenges. This can result in situations where powerful interests are able to use the legal system to avoid accountability or to maintain their dominance over others.

The Inquisitorial System

Traditionally, the adversarial system is usually contrasted with the inquisitorial system, in which judges are responsible for investigating cases, calling witnesses and gathering evidence. In England and Wales, we do use an inquisitorial system for certain proceedings. The best-known example is the coroner's inquest. We looked at coroner's inquests in detail in a previous lecture series. But, in brief, coroners are responsible for investigating certain deaths, such as those where the cause of death is unknown or the deceased died in

custody or state detention. In an inquest, there are officially no “parties”, no one wins or loses, and the goal is to find out the cause of death. The coroner carries out their own investigation, gathers evidence, and decides which witnesses to call at the inquest. Another, similar, example of inquisitorial justice is the public inquiry.

But as I have said many times in the past, even though inquests and inquiries are formally inquisitorial processes, they are often in reality highly adversarial. The interested persons and their lawyers will fight hard to secure the findings that they want. Whether a person is represented or unrepresented, and how skilled and well-resourced their lawyers are, matters a great deal. The difference between an adversarial and an inquisitorial system is not a binary, but a spectrum. Many proceedings have features of both systems.

The same is true when we look at countries outside the common law world. The most famous example of an inquisitorial system is the French criminal justice system, and the numerous other criminal justice systems around the world that are derived from it. The origins of the French system lie in Napoleon’s 1808 Code of Criminal Instruction.¹ The paradigmatic feature of this tradition is the investigating judge, who oversees the preliminary investigation of the case against the accused. However, in France today only a small minority of criminal investigations are actually overseen by an investigating judge.² Most French criminal investigations are instead overseen by prosecutors, who in the French system are also part of the judiciary.³ Some other systems that were originally based on the French model have abandoned the investigating judge altogether.⁴

Conversely, as John Spencer highlights, the English system has also adopted many features over the past two centuries that would once have been regarded as inquisitorial. At the time when Napoleon laid the foundations of the French inquisitorial system, England and Wales did not have professional police forces or prosecutors, and most criminal cases were brought by the complainant themselves or their relatives. Professional policing was introduced in all parts of England and Wales by the mid-nineteenth century, and in 1879 the post of Director of Public Prosecutions was created. In 1985, the Crown Prosecution Service was created, creating a full-time corps of professional prosecutors for the first time. The Police and Criminal Evidence Act 1984 codified and extended the powers of the police, giving them power to detain suspects at the police station for questioning. And the traditional paradigm institution of English law, the jury trial, is now only used in a small percentage of all criminal cases.⁵

It’s also the case that Article 6 of the European Convention on Human Rights, which prescribes the minimum standards of a fair trial, has had an impact on both inquisitorial and adversarial systems in Europe.

The Court clearly accepts that Inquisitorial and adversarial systems can co-exist in Europe and that both can be compliant with Article 6.⁶ However, there have been areas where the Article 6 jurisprudence has required changes in inquisitorial systems. For example, the Court has taken the view that it is a breach of Article 6 for an investigating judge to sit as a trial judge in the same case.⁷ Similarly, although the Court accepts that whether to call a witness at trial is a matter for the domestic courts, it has on occasion found a refusal to call defence witnesses to be unfair.⁸

We can see, therefore, that the difference between adversarial and inquisitorial systems is a spectrum rather than a binary. Continental European inquisitorial systems incorporate some elements of adversarial justice, while our own system incorporates some elements that would once have been regarded as inquisitorial. Nonetheless, there are still significant differences between the two types of system.

¹ See John R. Spencer (2016) Adversarial vs inquisitorial systems: is there still such a difference?, *The International Journal of Human Rights*, 20:5, 601-616, at 603-604

² See Spencer, *op. cit.*, at 608; Jacqueline Hodgson (2001). The police, the prosecutor and the juge d’instruction: Judicial Supervision in France, *Theory and Practice*. *British Journal of Criminology*, 41(2), 342-361
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1674409

³ Hodgson, *op. cit.*

⁴ Spencer, *op. cit.* at 604

⁵ *Ibid.*, at 605-607

⁶ The European Court of Human Rights has held that Article 6 requires an “adversarial” hearing, although it appears to define this expression rather narrowly. To the Strasbourg Court, an “*adversarial trial*” means, in a criminal case, that “*both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.*” *Brandstetter v Austria* (1993) 15 EHRR 378 at [66]-[67]. So, it doesn’t mean that a state can’t adopt an inquisitorial system of criminal justice.

⁷ *De Cubber v Belgium* (1985) 7 EHRR 236 and *Pfeifer and Plankl v Austria* (1992) 14 EHRR 692

⁸ *Vidal v Belgium* (application no. 12351/86, 22 April 1992)

Which Is Better: Adversarial Or Inquisitorial?

So, which is better: the adversarial system or the inquisitorial system? Many people have strong views on this question. The Australian judge, Ray Finkelstein, argues that the adversarial system is bad at discovering the truth. He says:

“...the parties’ self-interest does not aid the search for truth in a system where it is routine:

(1) for opposing testimony to be discredited regardless of whether it is true or not;

(2) for the incompetence of opposing counsel to be exploited;

(3) for material facts to be omitted from pleadings or withheld due to privilege;

(4) for probative evidence to be excluded; or

(5) for counsel to indulge in sophistry and rhetorical manipulation of which the primary aim is to obscure the truth.”⁹

Finkelstein’s arguments are focused on civil cases. He recommends a number of reforms. He calls for judges to have a more active role, including the power to call a witness where the interests of justice so require, the ability to question witnesses beyond their present restricted role, and primary control over the questioning of witnesses. He also calls for judges to have the power, in appropriate cases, to appoint an independent examiner to question witnesses prior to trial. And he calls for the court to control the appointment of expert witnesses.¹⁰

However, it is in the context of criminal cases where the adversarial versus inquisitorial debate tends to be most heated. Richard Lomax, in his report “Reforming Justice” for the charity Toynbee Hall, robustly argues that the inquisitorial system of criminal justice is superior to the adversarial system. He argues that significantly more resources are expended on criminal defence in the English and Welsh adversarial system than in continental European inquisitorial systems. He states that the cost of legal aid in England and Wales is about 15 times the European median, and that whereas the European median for the cost of defence is about 25% of the cost of prosecution, in England and Wales it is nearly 400% more. By contrast, he says, *“We spend significantly less on police, prosecutors, and on professional judges. Evidence gatherers, case presenters, and assessors of evidence in comparative terms are all starved of resources.”* He goes on to argue that England and Wales and other common law systems tend to have higher rates of imprisonment per capita than European civil law systems.¹¹

Lomax argues that *“inquisitorial trials are capable of working much faster, giving rise to higher conviction rates, higher public confidence and less probability of being distracted by irrelevant considerations.”* Pausing there, you and I might wonder why Lomax sees higher conviction rates as a good thing. But Lomax addresses this in a footnote, where he asserts *“It would be an error to imagine that continental courts are all biased. Their systems commence fewer weak cases and allocate the necessary resources to those that they prosecute.”* He goes on to argue that the adversarial model means a lower probability of the truth being discovered, meaning both that there are greater prospects of the innocent being wrongly convicted, and the guilty being wrongly acquitted. He argues that in order to maintain the principle of deterrence, adversarial systems have to punish more severely, which he argues is why these systems tend to have higher prison populations.¹²

So, what do we think of Lomax’s argument? Is he right that inquisitorial systems are better at getting to the truth? There are perhaps reasons to be sceptical about whether judicial supervision of the investigation makes the process any fairer. Jacqueline Hodgson, an academic at the University of Warwick who has written extensively on the differences between the British and French justice systems, told the Select Committee on European Union in 2005:

“My own empirical research in this area suggests that suspects in France are just as vulnerable to the hostility of the police environment as in England and Wales. Judicial supervision in most instances is conducted by the procureur (the prosecutor, who also enjoys a judicial status as a magistrate) and exists as a form of

⁹ Ray Finkelstein, (2011). The adversarial system and the search for truth. Monash University Law Review, 37(1), 135-144

¹⁰ Ibid.

¹¹ Richard Lomax, Reforming Justice, Toynbee Hall, 3 June 2019

¹² Ibid.

bureaucratic and retrospective review: the police are required to inform the procureur of a suspect's detention in custody and the file is later reviewed. The procureur remains in her office and is responsible for supervising tens of cases at any one time. Whilst this procedure is able to weed out obviously weak cases early on, and to review the outcome of investigations, it provides no real guarantee as to the reliability of the evidence gathered. The process of investigation and evidence gathering is shielded from scrutiny."¹³

In a 2001 article, in which Hodgson reported findings from an empirical study of the French pre-trial process, she described how French *procureurs*, the prosecutors who oversee most pre-trial investigations, were tolerant of aggressive questioning by police to pressure suspects to confess. She described a “*general tolerance... of the kinds of pressure that the police might need to exert to make the suspect tell “the truth”*”. And the crime control ideology of the procureur means that in most instances, “*the truth” is a confession.*” She described a lack of interest in investigating whether the police had abused suspects: “*In one area observed there was concern that suspects were being brought to court bloodstained and untidy. The police were instructed by the procureur that this was not acceptable and that it did not look good before the court. No enquiry was made, however, into why suspects arrived in this state.*” She went on to say that “*Even questioning which might be classed as overbearing or oppressive by a British court is considered acceptable, and at times necessary, to get at “the truth”*.”¹⁴

I acknowledge of course that Hodgson's study is two decades old, and that it is specific to France. Inquisitorial judicial systems are widely varied, and the French system itself has undergone significant reforms. So I'm not saying that Hodgson's study is necessarily representative of how all inquisitorial systems operate, or even of how the French system operates today. But the point is that judicial supervision of the pre-trial investigation is not in itself a guarantee of justice. Both the inquisitorial and the adversarial system allow opportunities for oppression and miscarriage of justice.

I would also question whether Lomax is right in his assertion that inquisitorial systems tend to have lower rates of imprisonment. According to the Council of Europe, on 31 January 2020 the English and Welsh prison population was 138.8 per 100,000, only slightly ahead of the European average of 124.0. Numerous European countries with civil law systems had higher rates of imprisonment, including Poland, the Czech Republic, the Slovak Republic, Estonia, Latvia and Lithuania. Conversely, the Republic of Ireland, which has an adversarial system based on the English model, had a rate of imprisonment of only 81.6, significantly below the European average.¹⁵

In my view, Lomax doesn't adequately justify his claim that there is a direct link between the adversarial system and higher rates of imprisonment. There are numerous other factors that we would expect to affect the rate of imprisonment, including sentencing policy, judicial attitudes, crime rates, and social inequality. Lomax doesn't attempt to control for these factors. There is no doubt that we imprison far too many people in England and Wales, and many factors are to blame for this. But I am unconvinced that switching to an inquisitorial system would bring those numbers down.

Is Cross-Examination Beneficial?

I want to turn to the question of cross-examination. One of the distinctive features of the English adversarial system is the importance placed on cross-examination of witnesses. The traditional rule, in both criminal and civil cases, was that a party wishing to rely on the evidence of a witness had to call them to give evidence at trial. Hearsay was inadmissible except in very limited cases. And an advocate cross-examining a witness had to “put their case” to the witness. If the advocate failed to challenge the witness's evidence in cross-examination, they would not be able to ask the judge or jury to disbelieve that evidence in their closing speech.¹⁶

To some extent, English law has departed from the traditional position. Hearsay is now generally admissible in civil cases. And even in criminal cases, there have been changes in recent years, such as the curtailing of

¹³ Memorandum by Dr Jacqueline Hodgson, Select Committee on European Union, 2005

<https://publications.parliament.uk/pa/ld200405/ldselect/ldecom/28/28we07.htm>

¹⁴ Jacqueline Hodgson (2001). The police, the prosecutor and the juge d'instruction: Judicial Supervision in France, Theory and Practice. *British Journal of Criminology*, 41(2), 342-361

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1674409

¹⁵ Council of Europe, Prisons and Prisoners in Europe 2020: Key Findings of the SPACE I report at 2

https://wp.unil.ch/space/files/2021/06/210329_Key_Findings_SPACE_I_2020.pdf

¹⁶ *Browne v Dunn* (1893) 6 R 67

cross-examination in some cases for vulnerable witnesses, and the use of Achieving Best Evidence (ABE) interviews. But it's still the case that in both criminal and civil cases, oral evidence and cross-examination are considered to be of great importance to the English system of justice. Cross-examination is one of the central skills in which English barristers are trained.

There are, however, a number of reasons to be sceptical about the value of cross-examination in getting at the truth. The first is that cross-examination technique often relies on catching the witness in an inconsistency. It relies on the assumption that if a witness contradicts themselves, they must be lying. But we know from decades of psychological research that that assumption is false. Human autobiographical memory is highly fallible. We have a very poor memory for temporal information such as dates, durations and sequences, for proper names, and for the exact words used in a conversation.¹⁷ And people can experience hypermnesia, remembering more over time, so a witness's earlier account is not necessarily more accurate than their later account.¹⁸ We also know that all of these problems are exacerbated in people with mental health problems. Depression and post-traumatic stress disorder can cause over general memory, which make it more difficult to remember specific events in one's past.¹⁹

The second is that the process of giving oral evidence may induce judges and juries to rely too much on a witness's demeanour: whether they look and sound credible when giving evidence. Such assumptions are unreliable, because many factors may affect a person's demeanour in court, such as cultural background, trauma, and neurodivergence. In the past, appellate courts referred to the advantage that the trial judge gained from seeing and hearing the witness,²⁰ but today there is increasing judicial recognition that demeanour is an unreliable guide to credibility.²¹

The third is that the cross-examination process relies heavily on the experience and skill of the advocate. A seasoned barrister who has cross-examined hundreds of witnesses will generally do a better job than a pupil barrister doing their first trial. To an extent, it also depends on the witness. An expert witness who's been cross-examined hundreds of times will generally fare better than a nervous witness who's in court for the first time. In short, how well a witness performs under cross-examination is not necessarily a reliable guide to whether they are telling the truth.

A particularly serious problem in this regard has been the proliferation of unrepresented litigants, following the swingeing cuts to legal aid made by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. A litigant in person cannot be expected to cross-examine effectively and is therefore at a huge disadvantage.

And in some cases, this creates an even bigger problem. It is obviously inappropriate that a person accused of sexual violence, for instance, should cross-examine their victim in person. But in the family courts, many people accused of sexual violence are now unrepresented. This sometimes forces the judge to descend into the arena by questioning the witness themselves, which can compromise the fairness of the proceedings.²²

You might think that the solution is simple: just expand legal aid and fund it properly, so that everyone who needs to be represented is represented. And I agree that we should do that. But it isn't a complete answer. It will still be the case that some counsels are better at cross-examination than others, and that some witnesses withstand it better than others, for reasons unrelated to the truth or falsehood of the evidence.

On the other hand, this doesn't necessarily mean that the inquisitorial system would be better. As we have seen, that system suffers from its own problems. And it doesn't escape the fundamental problem, which is that decision-makers are simply bad at assessing credibility. As Hilary Evans Cameron states, "*when it comes to assessing credibility, police officers, prosecutors and judges, as well as lay people, have 'hit rates just above the level of chance'.*"²³ This problem will persist whether we have an adversarial system or an inquisitorial one.

¹⁷ Hilary Evans Cameron (2010). Refugee status determinations and the limits of memory. *International Journal of Refugee Law*, 22(4), 469-511

¹⁸ Ibid.

¹⁹ See for instance David Neale and Jennifer Blair, Bridging a Protection Gap: Disability and the Refugee Convention, April 2021, at 38-48, and the references cited therein <https://www.helenbamber.org/sites/default/files/2021-04/Bridging%20a%20Protection%20Gap%20-%20Disability%20and%20the%20Refugee%20Convention.pdf>

²⁰ See for instance *Clarke v Edinburgh and District Tramways Co* 1919 SC (HL) 35

²¹ *SS (Sri Lanka) v Secretary of State for the Home Department* [2018] EWCA Civ 1391 at [33]-[43]

²² See for instance *S v P* [2018] 4 WLR 119.

²³ Cameron, op. cit.

Looking Further Afield

I want to come back to the question I asked: does the adversarial system serve us well. You might think that my discussion so far has been somewhat conservative and Eurocentric. After all, I've only talked about the English adversarial model and the French inquisitorial model. Both essentially European ideals of justice, although the legacy of colonialism means that they have been exported to every part of the world. What about other conceptions of justice that are rooted in other traditions? As I have stated earlier the adversarial system of justice has been criticised for being overly focused on winning and losing rather than promoting justice. This has led to calls for alternative models of justice that prioritize collaboration and restoration over confrontation and punishment.

Restorative Justice

Restorative justice is a victim-centred approach that focuses on repairing the harm caused by the offence rather than punishing the offender. In a restorative justice model, victims, offenders, and community members come together to discuss the harm that has been caused and work together to find a way to repair that harm. Restorative justice has several potential benefits. It can provide victims with a greater sense of closure and satisfaction than traditional criminal justice processes. It can reduce recidivism rates by addressing the underlying causes of criminal behaviour. It can foster a sense of community and promote healing among those affected by the offense.

Some forms of restorative justice are rooted in non-Western traditions of justice and have been heralded as an antidote to the punitive and fault-based European tradition. As Archbishop Desmond Tutu said:

*"We contend that there is another kind of justice, restorative justice, which has characteristics of traditional African jurisprudence. Here the central concern is not retribution or punishment but, in the spirit of ubuntu, the healing of breaches, the redressing of imbalances, the restoration of broken relationships. This kind of justice seeks to rehabilitate both victim and the perpetrator, who should be given the opportunity to be reintegrated into the community [they have] injured by [their] offence."*²⁴

Around the world, restorative justice has increasingly been recognised in law, not as a replacement for the judicial system but as an adjunct to it. There are numerous examples around the world of restorative justice programmes in the criminal justice system. In some instances, criminal cases are referred to a restorative justice process as an alternative to prosecution. In other cases, a restorative justice process takes place prior to sentence and is taken into account in sentencing. In New Zealand, the Māori people have been using restorative justice practices in their communities for centuries.²⁵ Another example in from the UK is the Youth Conference Service in Northern Ireland, which was introduced in 2003..²⁶

The Navajo Nation Peacemaker Program is a good example of a non-Western, non-adversarial tradition of justice coexisting with the formal judicial system. Within the Navajo Nation, the Peacemaker Program coexists with the formal tribal court system. As described by the Judicial Branch of the Navajo Nation in 2004, the role of the peacemaker is *"to bring parties together to talk out disputes and to reach a consensual agreement. A Peacemaker is not an adjudicator and does not sit in judgment, rather [they facilitate and guide] disputing parties to reach and decide for themselves."*²⁷ Although rooted in a particular cultural tradition, the Navajo Peacemaker Program has inspired initiatives elsewhere.²⁸

Another example of voluntary dispute resolution in a non-Western cultural context is the Peace and Consensus Committees of Rojava, which respond to crime and conflict by seeking to reach a consensus between the parties. There are also separate women's committees which deal with violence against women.²⁹

²⁴ Quoted in V. E. Jantzi -- Restorative Justice in New Zealand: Current Practise, Future Possibilities, August 2001 at 3 <https://emu.edu/cjp/docs/rj-in-newzealand.pdf>

²⁵ [Restorative justice in a Māori community - E-Tangata](#)

²⁶ See the Justice (Northern Ireland) Act 2002

²⁷ A Guide to the Peacemaking Program of the Navajo Nation, Judicial Branch of the Navajo Nation, September 2004 <https://www.pokagonband-nsn.gov/sites/default/files/assets/group/tribal-court/2014/peacemaking-program-navajo-1345.pdf>

²⁸ For instance the Red Hook Peacemaking Program: see Center for Court Innovation, Peacemaking Program <https://www.innovatingjustice.org/programs/peacemaking-program>

²⁹ See New Compass, Consensus is Key: New Justice System in Rojava, 13 October 2014 <http://new->

For those of us who are worried about the impact of the carceral justice system on marginalised people and communities, restorative justice and peace making are very attractive options. Clearly, these programmes do have a great deal of promise in resolving conflicts and addressing harms outside the formal justice system.

However, it is important to note that restorative justice processes do have certain limitations. Restorative justice is not appropriate for all cases, particularly those involving serious offenses or repeat offenders. In these cases, the harm caused may be too severe or the offender may be unrepentant, making it difficult to achieve a meaningful restoration of relationships. Moreover, restorative justice requires a willingness to participate from both the offender and the victim.

Restorative justice is also not designed to settle factual disputes. It isn't equipped to deal with a situation where the accused denies that they did what they are accused of.³⁰

Second, some feminists have been critical of the use of restorative justice in the context of sexual and gender-based violence, on the ground that it might serve as an opportunity for the abuser to re-victimise and re-traumatise the victim and might not lead to effective action being taken against the perpetrator to protect other victims.³¹

On the other hand, this is not to say that restorative justice is always inappropriate for cases of sexual and gender-based violence. As I highlighted earlier, Rojava has adopted a system of women's peace committees that deal with violence against women. And in the West, other feminist legal scholars have identified a positive case for restorative justice in some cases of sexual and gender-based violence.³²

It is also important to note that implementing restorative justice can be challenging in large, complex legal systems where resources may be limited, and there may be resistance to change from those invested in the existing system.

What can we learn from all of this? Restorative justice remains a promising alternative to traditional punitive approaches in cases where it is feasible and appropriate. We can say that restorative justice and peace-making models have significant advantages as an alternative to punitive justice. But they aren't suitable for every case. And in the places where they have been deployed on a large scale, they have tended not to be a replacement for the traditional justice system, but an adjunct to it.

While these alternative models of justice have their own advantages and disadvantages, they all share a focus on collaboration, problem-solving, and community involvement, rather than adversarialism and punishment.

There are also more radical alternatives. Some people on the anti-carceral left, who believe in the full abolition of police and prisons, have instead adopted the idea of "transformative justice" which rejects this kind of integration into the carceral system. That's a whole complex topic in itself, with a number of arguments for and against, and time doesn't permit me to do it justice today. We will be looking at restorative and transformative justice in a future lecture where I will consider whether we need criminal law.

Conclusion

In conclusion, the adversarial system of justice in England and Wales has numerous flaws that have been extensively discussed in this lecture. While it can be effective in certain cases, it is not universally effective in getting to the truth, and it can become profoundly unfair when one party is unrepresented or there is a significant inequality of resources between the parties. However, we should be cautious about replacing it with another system, as the inquisitorial system may not necessarily lead to fairer trials or better outcomes. We should also be sceptical of the belief that continental European systems are superior to our own.

Restorative justice and peace making should be embraced, but it is important to recognize that they are not appropriate in every case and are not a complete replacement for the adversarial system. In many cases,

compass.net/articles/consensus-key-new-justice-system-rojava

³⁰ See for instance Sarah Deer and Abigail Barefoot (2018). The limits of the state: Feminist perspectives on carceral logic, restorative justice and sexual violence. *Kansas Journal of Law and Public Policy* 28, 505, at 519-520

<https://heinonline.org/HOL/LandingPage?handle=hein.journals/kipp28&div=25&id=&page=>

³¹ Deer and Barefoot, op. cit. at 521-522; Sarah Deer (2009). Decolonizing rape law: A native feminist synthesis of safety and sovereignty. *Wicazo Sa Review*, 24(2), 149-167 at 156-157 <https://www.jstor.org/stable/40587785>

³² Clare McGlynn, Nicole Westmarland and Nikki Godden (2012). 'I just wanted him to hear me': Sexual violence and the possibilities of restorative justice. *Journal of Law and Society*, 39(2), 213-240.

<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1467-6478.2012.00579.x>

we still need a means of resolving factual disputes and deciding who is telling the truth.

Therefore, mitigating some of the adversarial system's problems by increasing legal aid funding significantly is the most effective measure when it comes to mitigating inequality of arms. We must also strive to address the systemic biases and inequalities present in the current system and work towards more equitable and just outcomes for all parties involved.

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