



Does the adversarial system serve us well?

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Key features of the adversarial system

- The parties decide what witnesses to call and how to present their cases
- The judge serves as a neutral arbiter
- A lot of emphasis on oral evidence and cross-examination
- Technical rules of evidence
- Equality of arms
- Relies heavily on the skill of lawyers



Flaws of the adversarial system

- **Overly focused on winning and losing, rather than on finding the truth and promoting justice**
- **Heavily skewed towards those who have the resources to mount a vigorous defense or prosecution**
- **Can be hostile and confrontational, and victims and witnesses can be treated poorly**



Whose interests does the adversarial system serve?

- Lawyers and the legal profession
- Those who benefit from the status quo, e.g. large corporations and wealthy individuals



The inquisitorial system

- Judges responsible for investigating cases, calling witnesses and gathering evidence
- Used in England and Wales for coroners' inquests and public inquiries
- Used in the French criminal justice system and other systems derived from it
- The difference between adversarial and inquisitorial systems is often a spectrum rather than a binary



Which is better: adversarial or inquisitorial?

- Some argue that the adversarial system is bad at discovering the truth, e.g. Ray Finkelstein (2011)
- Richard Lomax (2019) argues that the inquisitorial system is superior: he argues that the English adversarial system spends much more on criminal defence than other systems, but that police, prosecutors and judges are “starved of resources”
- He argues that inquisitorial systems are faster, commence fewer weak cases, and allocate the necessary resources to those they prosecute
- But there are reasons to doubt Lomax’s conclusions – see e.g. Jacqueline Hodgson’s research on coerced confessions in the French system, which shows that judicial oversight of investigations is often not effective to protect the rights of suspects
- Lomax argues that prison populations are lower in countries with inquisitorial systems, but he does not adequately justify this



Is cross-examination beneficial?

- The English system traditionally places a lot of emphasis on cross-examination of witnesses and “putting your case”
- There are reasons to be sceptical of cross-examination
- Cross-examiners often assume that inconsistency means falsehood, but evidence shows that inconsistency is a normal feature of human memory and is exacerbated in people with mental health problems, e.g. Cameron (2010), Neale and Blair (2021)
- Oral evidence may cause judges and juries to rely too much on a witness’s demeanour
- Cross-examination often depends on the experience and skill of the advocate and the witness
- Cross-examination creates major problems for unrepresented litigants, leading to inequality of arms



Looking further afield: restorative justice

- Restorative justice is a non-adversarial, non-punitive form of justice
- 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
- Sometimes rooted in non-Western traditions, e.g. African tradition, Maori tradition, the Navajo “peacemaker program”, the Rojavan Peace and Consensus Committees
- Widely used in criminal justice, usually as an adjunct to the formal justice system rather than a replacement for it

Limitations of restorative justice

- Not always appropriate for severe harm or unrepentant offenders
- Not designed to settle factual disputes
- Some feminists have been critical of its use in the context of sexual and gender-based violence, see e.g. Deer and Barefoot (2018) and Deer (2009); though it can be effective in some such cases, see e.g. McGlynn, Westmoreland and Godden (2012), and the Rojavan women's peace committees
- Some people call for more radical alternatives – e.g. “transformative justice” which is abolitionist and rejects integration into the criminal justice system

Conclusion

- The adversarial system has numerous flaws, is not always effective in getting to the truth, and can be profoundly unfair
- But we should be cautious about replacing it – the inquisitorial system may not necessarily lead to fairer trials or better outcomes
- Restorative justice and peacemaking should be embraced, but not appropriate in every case – we still need a means of resolving factual disputes and deciding who is telling the truth
- Increasing legal aid funding significantly would mitigate some of the adversarial system's problems