**Bond University**
**ePublications@bond**

Law Faculty Publications | Faculty of Law

1-1-1999

# Advantages and disadvantages of the adversarial system in criminal proceedings

William van Caenegem
*Bond University*, William_Van_Caenegem@bond.edu.au

Follow this and additional works at: http://epublications.bond.edu.au/law_pubs

 Part of the Criminal Procedure Commons

Recommended Citation
William van Caenegem. (1999) "Advantages and disadvantages of the adversarial system in criminal proceedings" ,, .

http://epublications.bond.edu.au/law_pubs/224

This Journal Article is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of ePublications@bond. For more information, please contact Bond University's Repository Coordinator.

1.3

# Advantages and Disadvantages of the Adversarial System in Criminal Proceedings

## INTRODUCTION

### General remarks

In this sub-section the advantages and disadvantages of the adversarial system are investigated with reference to the most well-known (and closely affiliated) alternative, the (so-called) inquisitorial system prevalent in continental Europe, and in a large number of other nations, including some in our region.

Although the adversarial system is *contrasted* with the inquisitorial system, the latter in fact also enshrines in law the right of the accused to oppose the evidence of the prosecution and introduce evidence to prove innocence; it is thus '*contradictoire*' (to use the French term) or adversarial in that sense. It is rather the structure and organisation of the forensic process or investigative method, than the adversarial nature of proceedings, that distinguishes the two systems.[1] In an adversarial system, the parties, acting independently and in a partisan fashion, are responsible for uncovering and presenting evidence before a passive and neutral trial judge or jury. In an inquisitorial system, the ultimate responsibility for finding the truth lies with an official body that acts with judicial authority, and gathers evidence both for and against the accused. Whereas the actors in an adversarial system are equal and opposing parties, in an inquisitorial system the accused is thus not a party to proceedings to the same extent.

Both the pre-trial *and* trial stages are covered in this sub-section. In civil law jurisdictions, the two stages (the *instruction* and the trial) tend to coalesce more into a seamless process, and one of the main areas of contention concerning reform of criminal procedure in adversarial jurisdictions is precisely the extension of judicial management and supervision into the pre-trial stage.

The theoretical distinctions between inquisitorial and adversarial jurisdictions

(primarily concerning party prosecution and presentation, judicial activism, and different fact-finding methods) translate into systems that operate quite distinctly at the practical level as well. The inquisitorial system is thus a useful reference point with a view to reform in Western Australia. Much of the criticism levelled at the adversarial system is centred precisely on the autonomous role of the accused as a party, and proposals have been put forward for greater judicial control over the actions of both parties before and during the trial.[2] Indeed, there have even been calls for the adoption of an inquisitorial model in Australian states.[3] A closer analysis of inquisitorial models facilitates a measured response to such calls, and to the various claims — some more justifiable than others — that are made on behalf of inquisitorial models; it permits realistic identification of 'transportable' elements.

The main inquisitorial jurisdictions that are taken into account are France, Belgium, Italy, the Netherlands and Germany. The most general common characteristics of inquisitorial systems are referred to, and detailed points of difference are only mentioned where it is relevant to do so.[4] This is done in full realisation of the fact that there are important differences between civilian jurisdictions in the area of criminal proceedings.

## Basic policy goals of the law of criminal procedure

Both adversarial and inquisitorial systems, which effectively monopolise the determination of the existence of a criminal offence and sentencing, in the hands of the state,[5] have as their primary and most fundamental purpose the prevention of private justice by retribution, i.e. *nec cives ad arma ruant.*[6] In this object both inquisitorial and adversarial systems have arguably been largely successful over long periods of time. Further, the goal of the law of criminal procedure in a democratic and rights-based jurisdiction is to ensure procedural fairness, while balancing the rights of the individual with the rights and interests of society as a whole.[7] And *public demonstration* of fairness, justice and respect for rights in criminal proceedings is important as it justifies the monopolisation of criminal justice by the state, and helps to maintain public confidence in the system.[8]

Strictly speaking the goals of the *law of criminal procedure* are different from, and more limited than, those of *substantive criminal law.*[9] The primary goals of substantive criminal law and the administration of sentences, are punishment, deterrence, prevention, and rehabilitation. The law of criminal procedure must be in tune with the goals of substantive criminal law, and *vice versa*; it is, in any case, not always possible or desirable to maintain a strict separation between the two areas of law.[10] Furthermore, there will always be areas of tension between the goals, rules and principles of substantive criminal law and those of the law of criminal procedure.

Achieving the aforementioned policy goals against a background of unavoidably limited, and also unequal, resources requires compromise. The nature of the

compromise may differ from jurisdiction to jurisdiction and from system to system.[11] Nonetheless, it is of cardinal importance that, in considering reform of criminal procedure, those principles that underlie each individual system, ensure justice, and justify public confidence, not be compromised on the basis alone of adverse prioratisation concerning expenditure of limited resources.

One final point, important given the apparent trend towards harsher criminal penalties and greater limitations on traditional judicial discretions: the role of the system of criminal justice in preventing crime will not be greatly emphasised, because deterrence is only a secondary goal of the law of *criminal procedur*e, and because in any case the effectiveness of the substantive criminal law in deterring criminal conduct is uncertain. Nonetheless, it is uncontroversial that a system of criminal procedure that is inherently adapted to producing correct outcomes quickly and fairly, will be more effective in delivering the goals that the substantive criminal law pursues, including deterrence. Further, the administration of criminal justice as opposed to the policing of criminal conduct, is the subject of this sub-section.

**Starting premises relevant to reform of adversarial criminal procedure**

Serious concerns about the law of criminal procedure are not unique to Western Australia or even to adversarial systems in general, and can be discussed in a dispassionate atmosphere, transcending national and jurisdictional boundaries. Nonetheless, the wholesale adoption of an inquisitorial system seems impractical in an adversarial jurisdiction such as Western Australia, and would not necessarily address many of the problems of the adversarial system. In any case, this sub-section does not consider adoption of an inquisitorial model, but the advantages and disadvantages of the adversarial model. And although some, even major, aspects of an inquisitorial system may be appropriate for adoption in Western Australia they will not necessarily be those that appear most enticing upon a cursory survey of inquisitorial models.[12]

Both adversarial and inquisitorial systems have advantages and disadvantages. Discussions as to which is better than the other almost invariably focus on one single aspect of each system, rather than on a balanced appraisal of the system as a whole, and are therefore misleading and unhelpful. Nonetheless, on a detailed analysis, most of the advantages and disadvantages of each system are readily identifiable. The overall effect of those disadvantages and advantages on the quality of justice though, is less easy to identify or assess.

The fact that despite important differences in the way the criminal law is administered, authorities in inquisitorial and adversarial jurisdictions struggle with similar problems, supports the point just made. On the one hand, each system has its inherent structural shortcomings, in terms of acceptable standards of prosecution of cases, in terms of rights, and in terms of outcomes. On the other hand, each type of jurisdiction also faces resource limitations in

a context of increasing criminalisation of conduct and public concern about criminality and victimisation. Interestingly enough, responses to these pressures in both inquisitorial and adversarial jurisdictions follow broadly similar lines and have already resulted in a degree of convergence.[13] Inquisitorial jurisdictions are engaged upon a search for reforms with equal urgency, and are subject to legal impulses from various quarters, just as much as common law jurisdictions are.[14] There is little evidence of a general movement only in one direction (ie towards the adoption of more inquisitorial models).

## THE MAIN CHARACTERISTICS OF THE INQUISITORIAL SYSTEM

A brief and generalised account of the basic theoretical characteristics of an inquisitorial system of criminal procedure follows.[15]

### Theoretical Characteristics of the Inquisitorial System

The deliberate use of the term 'theoretical' is motivated by the fact that the *theory* (i.e. the formal codified structures) of the law of criminal procedure is very different from its *practice* in inquisitorial systems. In other words, there is a *normative model* of the criminal process, and a quite distinct *practice* of the criminal process. Thus in theory the inquisitorial system (as described in many textbooks) may arguably be stronger and more reliable, but in truth the system may appear more attractive than the actual practice justifies.[16] Different *practice* may well be the effect, of course, of lax application of legal norms, but it may as well reflect, at least to some degree, the inherent impracticality of the complex theoretical model in modern conditions.[17] Conversely, the adversarial system, more organically grown from practice, is arguably less satisfying in theory, but at least its operation in practice approximates the theoretical model more closely.

The normative/practical divide in inquisitorial systems results in part from codification, based as it is, in theoretically conceived constructs. Codified structures also tend to rigidity, complexity, and piecemeal amendment. The result is a failure to adjust adequately to the present-day reality of a congruence between a rise in the number of offences and a decline in available resources (that is not to say that there have not been regular attempts to update the law of criminal procedure).[18] Another cause of the divergence between practice and theory is the legalistic nature of codified systems, with a general aversion to discretionary (judicial) decision making. In reality, of course, discretion on the part of all judicial and non-judicial officers is part and parcel of everyday life in the criminal law.

The codified inquisitorial system is based on a mandatory sequence of formally documented steps. In theory each decision *en route* from offence to conviction or acquittal, is circumscribed by legal rules (the principle of 'legality' as opposed to 'opportunity'). By law, judicial police officers (*police judiciaire*, effectively the CIB or equivalent)[19] have the power to investigate offences. They draw up documents (the *proces-verbal*) with a formal legal status concerning notification of an offence, and concerning each investigative measure. These documents

are gradually added to the file or *dossier.* In theory the prosecutor (*procureur*) must be notified in writing of every offence of which the judicial police has itself taken written notice, and must receive the relevant file (*dossier*). The prosecutor may then deal with the matter by filing the notification without further action (*le sepot*), for instance because the facts do not reveal any offence. Alternatively, he may instruct the judicial police to take further forensic and investigative measures. He is under an obligation to gather evidence for and against the accused in a neutral and objective manner, as the goal of the prosecution is not to obtain a conviction but to discover the truth and to apply the law. In complex cases, major offences, or politically sensitive matters, the investigation will be supervised and directed not by the prosecutor, but by an investigating magistrate (*juge d'instruction*), to whom the prosecutor transmits the file (*dossier*) until the investigation is complete.[20] In reality, in most ordinary cases the investigation is effectively completed by the judicial police even before the prosecutor receives the file or *dossier,* and few active steps remain to be taken under the instructions of the prosecutor.[21] Once the file or *dossier* is complete, the case may proceed to trial. The trial judge will largely base his or her decision upon the contents of the *dossier*. Hearsay rules are unknown in the inquisitorial system.

Judges and *procureurs* alike make up the 'magistracy', but each has a defined role and obligations, and no person can be prosecutor and judge in the same case.[22] Judicial independence is guaranteed as, once appointed by the government, no judge can be removed other than by Parliament, but the procuracy is organised as a hierarchical corps and is subject to disciplinary supervision.[23] Each judicial region has an attachment of prosecutors (*procureurs*), known as the '*parquet'* attached to a given court in that region. The *procureurs* take control of the criminal investigation and supervise the appropriate conduct of the judicial police, and also act as prosecutors in court (in that guise they are collectively known as the '*ministere public'*).

Each region has one or more investigating magistrates (*juge d'instruction*), who combine control of major criminal investigations with certain judicial functions (ordering restrictive measures when required, for instance).[24] When the investigating magistrate is exercising his judicial function, the accused has the right to be heard, with counsel. The advantage of an investigating magistrate is that a judicial figure, closely engaged with the investigation, will be able to exercise effective control over the conduct of the investigation by the police. He will also be well placed to judge the real necessity of measures that affect the freedom, rights and integrity of the accused.

In some civil law jurisdictions a special court decides about the classification of offences. All criminal courts with the exception of the highest court (*Cour de cassation* in France) are specialised.

Prior to trial, the defence gets limited access to the *dossier*, and may make

informal suggestions to the prosecutor or investigating magistrate concerning further forensic measures. Proof of a trial is largely documentary, recorded in documents with a formal legal status (*proces-verbal*), although in theory all proofs, evidence of which is found in the file or *dossier* handed to the trial judge just prior to the trial, must be repeated orally before the court. But the trial judge has the discretion not to order such repetition, and usually does not. Only the judge questions witnesses; there is no cross-examination and expert witnesses are court appointed. The only rule regarding admissibility of evidence is relevance, but the presumption of innocence is also fundamental to civilian systems. The role of defence counsel at trial is restricted to making written submissions regarding the evidence and legal matters, but counsel may suggest to the judge certain questions that may be asked of witnesses and further investigative measures that should be ordered. Most often the case is largely determined on the basis of the written proofs in the *dossier*. Ultimately the trial judge is responsible for discovering the truth, and can thus theoretically order further investigative measures (which rarely happens). The *investigation* of the truth pre-trial, and the *determination* of the truth at the trial itself, are subject to judicial control and supervision.

Hearings and submissions regarding sentence and regarding guilt are not strictly separate as in common law systems. The history (antecedents) of the accused thus plays a greater role, as does evidence gathered regarding his 'character'. There are no rules excluding evidence of propensity (ie of previous criminal conduct or convictions); all this information is seen as relevant to the trier of fact forming its *intime conviction* (the relevant standard of proof in inquisitorial jurisdictions) concerning the guilt or innocence of the accused.

In some systems jury trials exist for major crimes (*cour d'assise*; see France and Belgium), the jury consisting of a varying mixture of judges and lay people (so-called lay judges). Different rules apply to jury trials, the evidence being presented orally and continuously, and something akin to cross-examination taking place.

Accused persons tend to spend longer periods in preventative detention (remand) and bail is less prevalent. There is greater discretion concerning the execution of sentences than in most common law jurisdictions.

## SOME STRIKING DIFFERENCES BETWEEN ADVERSARIAL AND INQUISITORIAL MODELS

### The law of evidence

As said above, there are no exclusionary rules of evidence in inquisitorial systems, materiality, relevance and legality determining admissibility. Before the trial takes place the evidence has largely been identified and gathered, in a statutorily determined documentary format, in the form in which it is to be heard (or more correctly, seen) at the trial. In some cases, the evidence has been received prior to the trial in an adversarial format (before the investigating magistrate, acting in his judicial capacity), but generally speaking the pre-trial stage (the *information*) is secret and not *contradictoire*. Nonetheless the accused has a limited right of access to the *dossier* at a given moment prior to the trial.

Exclusionary rules of evidence are said to originate in the predominance of jury trials in the common law system, dependent as they are on oral and continuous presentation of evidence. However, they also result from professionalisation of the representation of accused persons in an adversarial trial. Be that as it may, it is better accepted in civilian jurisdictions, where juries are very rare[25] that a professional judge (specialised in criminal matters to boot) will not be swayed by unreliable, unfairly prejudicial evidence. Nor are there strict rules excluding evidence about previous conduct of the accused. Again, a professional judge is thought capable of avoiding the trap of determining guilt by disposition, and to give full weight to the right to silence, and the presumption of innocence, of the accused. Conversely, there is not, in inquisitorial systems, the kind of adversarial pressure that results in partisan presentation of evidence in an adversarial trial.

The civil law system is thus said to be simpler, without the rules of evidence that are such an unpredictable factor in criminal prosecutions in adversarial jurisdictions, where late determination (ie at the trial) of admissibility may lead to a waste of resources on prosecutions and investigative measures, and can make planning a trial difficult. The strict rules concerning hearsay evidence also result in the loss of much valuable evidence gathered in a form that is not admissible during the early stages of a criminal investigation and prosecution.[26] In inquisitorial systems this does not occur, but to a common lawyer the secret compilation of a file with documentary evidence which cannot effectively be challenged naturally invokes concerns about the position of the accused. Nonetheless this must be seen in the totality of the system, which is less partisan by nature.

**Jury trials**

Jury trials are the exception rather than the rule in civil law jurisdictions; where they do occur, they are conducted more along adversarial lines. Jury trials, more prevalent in common law systems (although they occur in only a small percentage of cases), introduce an element of complexity and uncertainty that is virtually absent in civilian jurisdictions. They frequently misfire because of problems with the jury, requiring the empanelment of new juries, because of errors in summing up, because of complex appeals against guilty verdicts, etc. A system without (or with very few, as in France) jury trials will clearly be less complex, and less prone to mishaps.[27]

A jury trial is of necessity predicated on continuous and adversarial oral presentation of evidence, but such a method of determining criminal cases is time and resource intensive (as was, for instance, experienced in Italy when the adversarial trial was introduced in 1988).[28] Doing away with jury trials would thus probably reduce costs, and would also enhance opportunities to deal with matters in alternative ways not subject to the same concerns about admissibility and presentation of evidence, and hence possibly also increase predictability.

Nonetheless, juries fulfil an important function of civic involvement, democratic accountability, and possibly restrain the growth of a sense of alienation and distrust between the system of criminal justice and the wider community. As was established in *Stonehouse*, the jury is entitled to acquit, no matter how strong the prosecution case is. A judge is not entitled to direct the jury to convict. In other words, an element of subjectivity can enter a trial through the jury, without possible accusations of bias as could be leveled at a judge in such circumstances. Furthermore, in Australia there may be constitutional restrictions on the abolition of jury trials.[29]

The question of the survival of jury trials, however, must be anchored in the reality that a large and complex society cannot be universally engaged with the doing of justice, and that therefore resources must be allocated to specialised agencies to perform the task. Such resources will of necessity be limited. The question thus becomes a relative one: which cases should be tried before a jury? The answer depends on an objective element (the taxonomy of the offence) and on a subjective element (the exercising of the right to a jury trial by the accused). Certainly, in civilian jurisdictions where they do exist, jury trials only occur for the very gravest offences.

If exclusionary rules of evidence are necessary for the appropriate functioning of jury trials, both because of their continuous oral nature and because of the peculiar susceptibilities of juries, should jury trials and summary trials (trials before a judge alone) be subject to different rules of evidence?[30] One option for reform might be a system similar to that in France, with a very limited number of jury trials for the gravest crimes, subject to a separate body or rules of evidence and of procedure.

**Proposal 1**

Restrict jury trials to the gravest offences.

## Investigating magistrates (*juges d'instruction*)

The investigating magistrate conducts the investigation, either in person and/or through instructing the police, but is not a prosecutor. He alternates between this forensic role and the exercise of his judicial power in the context of the investigation. The *juge d'instruction* is sometimes identified as a powerful and valuable institution that common law jurisdictions would do well to emulate.[31] However, it should not be forgotten that in Italy, the institution of investigating magistrate was recently abolished.[32] Instead, and this is a more realistic model for an adversarial jurisdiction, as Italy now is for criminal matters, a 'judge of the pre-trial stage,[33] or alternatively a 'pre-trial court' (*juge de l'instruction*) was instituted. That court exercises purely judicial powers where required during the conduct of the prosecution and investigation of an offence

by the police and prosecution, but has no power to conduct the investigation and order forensic measures. It is indisputable that the traditional role of *juge d'instruction* is a difficult one, precisely because it combines two powers (judicial and investigative) that are at times incompatible.

The position has also been considered to be excessively powerful and not sufficiently subject to independent control.

### Codification of the law of criminal procedure

The complexity and uncertainty of the law relating to criminal procedure, including the law of evidence, in a jurisdiction such as Western Australia is possibly enhanced by the fact that there is no comprehensive and separate codification of the law of criminal procedure, as does exist in civil law jurisdictions (in most civilian jurisdictions there is a Code of criminal law and a Code of criminal procedure). In Western Australia and Queensland the substantive criminal law is of course found in the Griffith code. Nonetheless, many aspects of criminal procedure are either shaped by the common law, particularly the law of evidence,[34] or by disparate enactments. Arguably the enactment of a comprehensive code concerning the trial and pre-trial stage would generate greater certainty and clarity, and would shift the balance of determination of important issues in criminal procedure from the courts to the legislator. As it stands, much of the conduct of police in criminal investigations is ultimately only controlled by judicial discretions (by their nature uncertain in outcome) regarding evidence. On the other hand, as pointed out above, codification may result in rigidity, and the development of practices that ignore the codified rules, as has happened in various civilian jurisdictions. The *Criminal Procedure and Investigations Act* 1996 (UK) is an example of a statutory approach.[35]

**Proposal 2**

Adopt a code of criminal procedure.

### Guilty pleas and abbreviated processes

The guilty plea does not exist in inquisitorial jurisdictions.[36] It has been argued convincingly that the guilty plea flows from a belief in the accused's fundamental freedom to bargain (contractual freedom) in an adversarial systems, and the procedural freedom of the parties.[37] Thus the adversarial system conforms to a more liberal constitutional theory, which envisages that an individual is free to give up his or her procedural rights, whereas a more institutional theory emphasises the public interest in finding the truth above all else. Thus an accused can enter into informal negotiations with the prosecution to obtain a diminution of sentence in return for a plea of guilty. The plea obviates the need for a lengthy and expensive (jury-) trial. Guilty pleas do not figure in inquisitorial systems because the accused is not a fully-fledged party to the proceedings, and because it is ultimately always the responsibility of the trial

judge to ascertain the truth. The judge need not necessarily accept a confession of guilt in the form of a plea.

A plea bargaining process may lead to excessive emphasis on confessions.[38] As a consequence police use unacceptable methods to put pressure on an accused to confess, since a confession is in principle sufficient basis for a conviction. This leads to miscarriages of justice. The guilty plea procedure may also result in a lack of public confidence in criminal justice, since justice is seen to be 'for sale', and offenders are seen to get off too lightly.[39] But the major potential drawback of guilty pleas is that the rights of the accused may be compromised if unlawful or unethical pressure is brought to bear in circumstances where the plea does not reflect the truth.

Despite the drawbacks of the system, the attractiveness of a simplified and cheaper procedure has induced various European jurisdictions to investigate the introduction of guilty pleas, or to introduce similar procedures, although in most cases subject to some form of judicial supervision. In France, the *Commission Delmas-Marty* proposed such a scheme in 1990, but the government did not act upon the recommendation. In the Netherlands the ministerial *Commissie Herijking Wetboek van Strafvordering* also proposed the introduction of a guilty plea procedure in 1992, but the proposed new structures were not uniformly well received. Alternatively, as in Belgium and the Netherlands for instance, there is the possibility of a '*minnelijke schikking*' (an 'amicable settlement'), where the prosecutor can propose that the accused pay a certain sum of money (at most the amount of the maximum fine for the offence concerned) to 'settle' the case. The free choice of the accused determines whether to accept the proposal or proceed via the traditional judicial route, but if he does, he forfeits the right of access to a court. Alternatively the *bemiddeling in strafzaken* (mediation in criminal cases) procedure may be used, whereby the prosecutor proposes that the accused pay compensation in relation to the offence and agree to certain conditions. If the accused consents, and then complies with all the conditions, the prosecution lapses.

Similarly, the German *Strafbefehlverfahren*, permits the trial judge to decide the case purely on the basis of the *dossier*, and upon the request for the imposition of a certain fine by the prosecution. If the accused is not satisfied, he can appeal the decision within one week, and the case is then heard in a 'regular' public trial. A similar process exists in France and is known as the *ordonance penale*. (All the simplified procedures apply only to relatively minor offences). The advantage of this process over a common law guilty plea, is that the bargained fine is subject to the independent control of a judge, whose decision is subject to an appeal, thus guaranteeing the rights of the accused and preventing excessive pressure. A similar procedure exists in Italy.[40]

## SOME RECURRENT THEMES IN COMPARISONS BETWEEN ADVERSARIAL AND INQUISITORIAL SYSTEMS

### Truth and justice

The adversarial system, typified by party disposition and party prosecution, is often criticised because it is not sufficiently concerned with finding the truth, as parties, rather than state agencies, control and circumscribe the forensic process, and judges do not participate actively in the search for truth. Injustice may result, as prosecuting authorities pursue convictions while disregarding the truth, and because judges are passive adjudicators, neither concerned with nor responsible for identifying the truth. There is no neutral forensic process, as is said to exist in inquisitorial systems.

In the inquisitorial system the emphasis is on outcomes, in the common law systems on process. The process-focused, mechanistic common law principle may be described as follows: the result of the two parties vigorously defending their version of the facts from legally equal positions and before a neutral and unprejudiced arbiter will be that the truth comes out. The inquisitorial attitude is that a search for the truth by an impartial officer of the state is the best method. It is important in that system that the judicial officer, be it judge or prosecutor, is indifferent as to whether a conviction results or not. Thus a prosecutor in a civil law system demands little more than the application of the law; in the common law system the prosecutor demands a conviction.

One of the problems with the civil law approach is that even if justice is ultimately done, there may be injustice along the way. For instance, a person ultimately acquitted may have spent an inordinately long time in preventative detention, because the system did not offer a sufficient opportunity to intervene in the forensic process at an early stage. Possibly the major problem with the common law approach is that the theoretical legal equality of parties in the system will be subverted by actual inequality of means, favouring the prosecution in most cases.

However, although the excessive vigour of the prosecution and manipulation of the forensic process by police in common law systems frequently come under attack, at the same time the system is accused of being potentially skewed in favour of the accused. This criticism takes two forms: first, a general criticism of the traditional view of common law systems, that ten guilty persons escaping punishment is better than one innocent party being convicted. Too many guilty persons are said to be acquitted as a result. The appropriate response, however, is not to attack the traditional maxim, but to implement a system that will produce a correct result more frequently (ie more effective identification of the truth). Secondly, criticism is aimed at the fallibility of the process in relation to a certain class of offender. Party prosecution, rules of evidence and judicial passivity all combine to make the system open to manipulation by smart, wealthy and determined criminals. (It could, of course, be argued that all socio-economic groups can 'benefit' from these factors, not simply the wealthy and smart) Naturally, these attacks rarely emanate

from the same source as the complaints about the excessive vigour of the prosecution.

Because in the inquisitorial system the accused is not a party, and neutral officials pursue the truth rather than convictions, these critiques are said not to apply there. Further, courts play a greater role in the pre-trial stage, and will therefore prevent manipulation of the process by the parties. However, the rich and influential accused may be able to manipulate the system in different ways in civil law jurisdictions (e.g. by political influence that filters down to prosecutorial ranks), where common law systems are less open to such manipulation. Further, the belief in the neutrality of the prosecutor and investigating magistrate, and the active interest in the truth of the trial judge, represent a *normative* picture of criminal proceedings in inquisitorial systems. The role that the trial judge actually plays *in practice* in any given case is quite limited. For instance, a judge in a civil law jurisdiction will rarely conduct a vigorous examination of the evidence at the trial, normally rather relying on the contents of the *dossier* without much question, simply checking that there are no formal irregularities. And the prosecutor naturally and instinctively assumes a partisan position, in spite of normative statements to the contrary.

It is important also to focus on the ability of the system *as a whole* to discover the truth. Factors other than the nature of the forensic process affect systemic efficiency. For instance, even though in an inquisitorial system the role of the prosecution is that of a neutral searcher for the truth (not partisan pursuit of convictions), and this may arguably benefit the finding of 'the truth', other factors such as very long delays between offence and trial, powerlessness of the accused in the forensic process and at the trial, a lack of emphasis on the innocence of an accused until proven guilty, the use of disposition and character evidence may affect the ability of a system as a whole to find 'the truth'. Further, a lack of vigour in prosecution (the ready filing of complaints without consequence, and forensic dilatoriness, partly because nothing much is to be gained from achieving convictions) may also result in a systemic failure to pursue those in fact guilty of offences.

## Truth and evidence

But in any case, the ultimate aim of the system is to deliver *justice*, rather than truth. If the ultimate goal of the system were to deliver truth above all, it would no doubt have a totally different, and not necessarily edifying aspect. From that perspective, forensic effectiveness is only one, if vital, element of a system with the prime goal of doing justice. But forensic effectiveness is always to be balanced with other factors in a human system, both practical (limited resources) and legal (respect for the rights of the individual). The whole aim of the law, and the complex nature of its rules, is exactly aimed at finding a balance between a number of constraining factors.

But the previous statements do not detract from the fact that finding and

presenting relevant facts in evidence is of the greatest importance to an accused in any given case. The adversarial system has come under attack for its insistence on the oral delivery of evidence by first hand witnesses at the trial, and also for party control over the pre-trial stage with limited judicial intervention, resulting in delay. The result is an unfortunate congruence of factors. On the one hand, considerable delays occur between commission of an alleged offence, and the trial, which means that the recall of witnesses is diminished and that witnesses are subject to all sorts of influences between the events and the trial. On the other hand, insistence that evidence gathered before the trial (e.g. immediately after the events) should largely be rejected in favour of evidence given at the trial results in the trial itself being a flawed forensic process with a propensity for missing 'the truth'.[41]

The fact that party prosecution renders the accused largely responsible for finding and adducing evidence in his favour also contains a fundamental flaw where the accused is not in a position to commit sufficient resources to the search for evidence.[42] The truth is not likely to be found because the evidence of the prosecution is in the end all that is heard by the court. This criticism is doubtless justified, even more so in a period of diminished resources for legal aid. Nonetheless, continental writers often overstate their case in this regard, ignoring that the accused in the adversarial system is not obliged to present evidence *a decharge*, ie is not obliged to disprove guilt. They tend to ignore the fact that, because of the absolute right to silence, and the presumption of innocence, the accused may simply rest his case and let the crown meet the high standard of 'beyond reasonable doubt'. There is no obligation on the part of the accused, either to prove innocence, or to collaborate with the case against him or her.[43]

Cross-examination constitutes at least a partial response to the criticism of the adversarial system rehearsed above. Vigorous cross-examination allows the accused to undermine the prosecution case, even without adducing evidence of his own. This opportunity barely exists in a civilian jurisdiction. It is seen as 'the motor of truth'. Nonetheless, when brought to bear on witnesses long after the event, cross-examination may have the unfortunate effect of painting a witness in a far less favourable light than is fair. Much of the apparent effectiveness of cross-examination in breaking down a case, is arguably more the result of exposing the kind of normal psychological processes that affect recall, than with a truly effective way of getting to the truth. It is in this sense an essentially negative tool, apparently rendered effective more by the structural characteristics of the system, which encourage delay between facts and trial, than by any inherent usefulness in finding the truth. The accused, whose lot becomes dependent on such unnecessarily unreliable processes, may find this whole event both illogical and pointless, as may many honest witnesses.

In this respect the inquisitorial system differs substantially from the adversarial. The strict rules of evidence concerning hearsay do not exist, relevance and legality being the only restraining factors. The early stages of inquisitorial criminal prosecutions tend to be characterised by the gathering of evidence for all sides, that will be placed in the *dossier* and presented to the court at the trial in that form. Various measures may take place to gather admissible evidence, rendered in official documentary form (*proces-verbal*), that do not exist in common law jurisdictions. For example, witness statements, so-called *confrontations* (between accused and a witness), the production of official statements of evidence concerning the conduct of the accused immediately after the commission of an alleged offence, the *garde a vue* (where the accused is held in a police station for an extended period) with interrogation, documentation regarding character and antecedents. Undoubtedly, much evidence that is relevant and significant is thus collected, and collected at a stage when recollections are fresh and there has been less reflection on the consequences of making statements. It is precisely the more limited basis for suspicion towards officialdom in a non-adversarial system that makes this possible.

But although civil law systems may have the advantage of gathering admissible evidence at an early stage after the occurrence of an offence, the clear disadvantage lies in the excess pressure on the accused that goes with this evidence gathering, and on the lack of genuine opportunity to question such evidence vigorously before the ultimate fact-finder. Further, in reality the civilian system struggles from a lack of resources to fully investigate the truth, because this process is entirely dependent on the extent of resources available to state institutions, and such resources have come under severe stress in recent times. Thus the resources expended on any given prosecution are entirely outside the control of an individual accused; this does not always benefit the finding of the truth.

## Documentary evidence

As has been pointed out repeatedly above, the evidence for a criminal trial in an inquisitorial system will be built into a *dossier* in documentary form, which forms the principle basis for the decision of the trial court. Such a *dossier* contains not only forensic evidence, but also evidence about the character and antecedents of the accused, since guilt and sentence are considered simultaneously by the court. As a consequence, the *objecitivite du dossier* (objectivity of the case file) is a vital goal for the system of criminal proceedings in inquisitorial countries, since the *dossier* will be largely determinative of the outcome of the case at trial. The main guarantees of the objectivity of the *dossier* are twofold: first, that the obligation of the prosecution is not to obtain a conviction but to reveal the truth, and thus to gather in the *dossier* evidence for and against the accused. And secondly, the intervention, first, of the prosecutor, whose role at least in part is to supervise the police, and secondly, of the investigating magistrate, who, being a judicial officer, will

supervise the police and the prosecutor and ensure that an objective balance is struck in all investigative measures. In particular, he or she will be able to ensure that no excessive pressure is used to obtain a confession, the latter being the principal goal of police conduct of the investigation in most cases.

The problems, however, with both those guarantees of objectivity, are, first, that the prosecutor (*parquet*) is naturally inclined, because of the nature of his role, to take a partisan position against an accused, of whose guilt he may have become convinced, and is often in the power of the police, rather than effectively supervising police conduct of the investigation; and secondly, that the investigating magistrate, key figure in the process, because of lack of resources, is only involved with a minimum of cases (less than 10 per cent in Belgium, for instance), and then often only for the purpose of ordering specific measures in his judicial capacity, rather than to conduct and supervise the investigation. The instinctive scepticism about a system based on documentary proofs of evidence experienced by a common lawyer is thus in part justified. The dilemma facing many inquisitorial jurisdictions, however, is how to counterbalance these long-standing developments. A clearer taxonomy of cases to be submitted to the investigating magistrate is a common focus of the search for solutions.

**Balancing rights**

Ensuring systemic respect for rights is a primary goal of the law of criminal procedure.[44] At the whole-system level there is a balance to be struck between the rights of society and the rights of individual accused persons: a balance between private rights and public efficiency.[45] A system of criminal law must not amount to a system of repression. At the level of a given prosecution a balance must be struck between the rights of the individual and the rights of the prosecution. The individual has a basic right both to procedural justice and to respect for human rights, but the rights of the prosecution are exclusively concerned with procedural justice. In more recent times, more emphasis has also been put on the rights of the victim(s) of an offence, which are manifold (the right to prosecution, the rights to be heard, the right to compensation etc), and on respecting those rights through appropriate involvement with the process of criminal justice. The rights of witnesses have also received wider consideration.

Although victims can play a more active role in civil law jurisdictions, similar concerns have been expressed there. Victims in civil law jurisdictions can appear as civil claimants (for damages) in criminal cases ('*party civil*') and their claim for compensation can be heard at the same time as the criminal case. Victims can also have recourse to the investigating magistrate and demand that a criminal investigation be undertaken in cases where the *parquet* refuses to prosecute (at least in Belgium). The investigating magistrate is then obliged *ex officio* to investigate the matter. The advantage to the civil claimant lies partly in so obtaining proof that may assist him in establishing his civil claim.

Furthermore, once there is a civil claimant, the prosecutor can not classify the case without further action or proceed with the case by way of a non-judicial measure.

At the same time, in inquisitorial systems, witnesses, including victims, are not subjected to the rigours of cross-examination, their written depositions as they appear in the *dossier* amounting to the full extent of their involvement in the process in most cases. This obviates the many concerns about the adversarial system expressed on behalf of youthful victims, victims of sexual offences, and witnesses of minority and disadvantaged backgrounds.

There is another interesting contrast in the matter of rights, between civilian and common law jurisdictions, that flows from the fact that civil law jurisdictions are code-based, and in particular, from the existence of a detailed separate code of criminal procedure as well as a substantive criminal code. The codes are rights-based, in the sense that they are expressed in terms of procedural rights: for instance, the accused has a statutory right to representation and the right to have all forensic measures repeated before the trial court. But the reality is often different, either because those rights are expressed in a manner that can not possibly be sustained in practice, or because those rights are subject to judicial discretion. There is a great gap between legalistic prescripts and reality in many civilian systems, which may be the inevitable effect of codification and its attempts to formalise and circumscribe discretionary decision making in an unrealistic manner. Adversarial systems are less concerned with rights, because the relationship between the accused and other parties, and the officials and institutions that conduct the investigation and prosecution is not as central as it is in an inquisitorial system.

Ultimately the balance of rights that is struck in Western Australia, in the absence of a bill of rights, is a political matter. Nonetheless it is important that rights are emphasised and suggestions are made concerning an appropriate balance when conducting a legal analysis of the system of criminal prosecutions. The process must be conducted in an atmosphere of vigilance concerning human rights. There is a limit on the extent to which a government can, on the one hand, criminalise more forms of conduct, or impose greater criminal sanctions for the same conduct, and on the other hand decrease the rights of the accused person, either by express measures to that effect, or by allocating fewer resources for the conduct of criminal proceedings. There are absolutes, expressed in terms of rights and principles, that must stand in the way of such moves in a democratic state. It is obvious that the right to silence of the accused is an important issue in this respect.

## The presumption of innocence and the right to silence

Adversarial jurisdiction, greatly emphasise the right of the accused not to contribute to the case against him (the right to silence). This question of the presumption of innocence is often raised in a comparative context, because

it is sometimes presumed not to exist on the continent of Europe, and it is probably worth saying a little more about the issue here. It is also appropriate to do so in the context of the revision of the right to silence in some Australian jurisdictions.[46] It is sometimes argued that the right to silence forms an unnecessary barrier to the finding of the truth in adversarial jurisdictions.

Many of the methods used to obtain evidence in inquisitorial jurisdictions have come under severe criticism, both from courts and commentators, for their deleterious effect on the right of silence and the presumption of innocence of the accused. There is considerable concern that a suspect is put under excessive pressure at the early stage after an offence is committed (eg during the *garde a vue*), and that confessions are sought in an atmosphere where an accused is powerless.[47] It is not clear that the accused who has confessed has sufficient opportunity to recant or put forward his or her version of events before the court at the trial stage either, and from this perspective important questions may be asked about the 'presumption of innocence' in inquisitorial systems.

There is certainly a greater tendency towards undermining the right to silence and a surreptitious reversal of the onus of proof in civil law systems. Thus it is arguable that in an inquisitorial system, there will be greater pressure on an accused to explain away certain evidence gathered against him, irrespective of how probative that evidence may be, subtly shifting the onus away from the prosecution. (Note in this respect that the *garde a vue* is used for the purpose of questioning a suspect and provides an opportunity for undue pressure). The common law more emphatically denies this avenue, through strict adherence to the right of the accused to stay silent at all times: he need not contribute to (either his own or) the prosecution's case, and nothing can be said about his unwillingness to do so.[48] Changes to the right of silence of the accused are considered in sub-section 4.2 of this review.

### The standard of proof

One important safeguard for an accused person in the common law world is the high standard of proof that applies in criminal matters: beyond reasonable doubt. This standard is higher than in civil matters (on the balance of probabilities). The standard in civilian jurisdictions is both universal and also more subjective: it is the standard of *intime conviction*, the inner certainty of the trier of fact (whether judge or jury). Indeed civilian jurists have some difficulty with the concept of different standards of proof in civil and criminal actions: either the judge of fact has an inner or moral certainty or not; there can not be any in-between standard. To achieve inner certainty the trier of fact can only benefit from being in possession of the fullest possible range of information, and thus exclusion of relevant evidence must be kept to an absolute minimum. The standard of moral certainty is obviously less open to appeal, no standard of reasonableness being involved. Whereas the guilty

verdict of a jury in an adversarial trial is open to appeal if it could not reasonably be entertained on the evidence, appeals in civil law jurisdictions will be limited to legal matters or formal defects in proceedings. The *intime conviction* can not be double-guessed by an appeal court. This obviously lends an element of greater certainty and predictability to criminal proceedings in civilian jurisdictions, even though it arguably increases the chance of error and bias to the detriment of the accused.

## SIMILARITIES IN CONCERNS, PROBLEMS AND RESPONSES OF ADVERSARIAL AND INQUISITORIAL SYSTEMS

The relevance of what follows below lies in the realisation that *both* inquisitorial *and* adversarial systems face considerable internal criticism, and both are actively engaged in a search for solutions for perceived problems. The following paragraphs only sketch them briefly. They are relevant to any comparison of advantages and disadvantages of the two systems, and it is apparent that whereas the fundamentals of each system are probably difficult to transport, solutions to common problems offer interesting ways forward across jurisdictional boundaries.

### Common problems and concerns

#### *Increased demand and stagnant or decreasing resources*

The literature concerning difficulties faced by the system of criminal proceedings in inquisitorial and adversarial jurisdictions shows striking similarities. Both clearly face increased case loads due to criminalisation of conduct and greater incidences of urban and white-collar crime, in an environment of decreasing resources available for courts and prosecuting and forensic authorities in general because of fiscal, budgetary and political constraints. Two common concerns result: first, an increased tendency to exercise executive discretion not to prosecute on the part of police and prosecutors; and secondly, considerable delays in adjudication of criminal cases, resulting in unfairness and injury to accused persons, as well as to others. In Australia maybe more than in most civil law jurisdictions (partly because the issue carries less weight because of the non-adversarial nature of those systems), there is also concern about the under-represented accused, ie the lack of private or taxpayer funded resources available to accused persons.

#### *The problem of delay*

Delay has been a major concern in civil law as well as common law jurisdictions. In civilian countries excessive terms spent on remand ('preventative detention') as a consequence of delay are regularly condemned. Delays between the commission of an offence and trial are said to be due to the inherent complexity of the system at the pre-trial stage, which is formal and in which duplication of tasks often occurs. On the other hand, delays are also due to the inability of courts to deal with the workload, and the unavoidable prioratisation that flows from it. In common law systems, party prosecution is said to cause delays either through dilatoriness or because of strategic considerations, and the courts are also insufficiently resourced to deal with the case load. Many cases are still dealt with by way of jury trials, that could arguably be dealt with summarily. This is despite the high proportion of accused

persons who plead guilty. The problem of delay is universal, in that it always affects the quality of justice and results in great personal and financial costs.

***Municipal criticism of systemic failings***

As well as at the resource and efficiency level, both adversarial and inquisitorial systems face systemic criticism from within jurisdictions concerning justice, fairness and effective protection of rights, although with differing emphases. Thus civil law systems are criticised (by courts, academic authors, the media, and agents of the system) for impinging on the rights of the accused, and particularly the rights to silence, the presumption of innocence, excessive reliance on confessions and concomitant pressure to confess (see the maxim '*la confession est la reine des preuves*'), associated long periods in preventative detention, the lack of 'equality of arms', and under-prosecution of certain types of offences. Common law systems face criticism regarding effectiveness of forensic methods both in pre-trial and trial stages; equality of arms, particularly in the case of indigent accused persons; universal right to legal representation; improper prosecution and forensic methods; excessive pressures on witnesses and victims of crime, particularly at trials; lack of pre-trial supervision and judicial management and control; because rules and procedures often impede establishing the truth; and juries being given sanitised and fragmented versions of events in a manner not conducive to identifying the truth, to name but some.

***Concerns about victims of crime***

Both jurisdictions are typified by increased concern regarding the rights and involvement of victims of crime. At the level of efficiency, both in civil law and in common law jurisdictions there is great concern about the perception of victims that nothing is done to deter re-offending and endemic crime in certain areas. There is also concern at the inadequacy of compensation available to victims of crime. At the level of systems-design, there is concern in common law systems that victims and witnesses are subject to great strains in undergoing cross-examination, and in facing the accused in court. In both jurisdictions, victims complain of a sense of powerlessness and a lack of respect and comprehension in the criminal courts.

## Common responses to common problems

***Devising a wide spectrum of alternative responses to criminal conduct***

Both in civil law and in common law jurisdictions considerable attention has been focused on devising a wide spectrum of alternatives to the 'orthodox' system of criminal procedure (that is, the judicial determination of criminal matters). There is a move away from a unified system where there is one way of doing things, plus some lesser alternatives, to one where the essence of the system is flexibility and the availability of alternatives of equal value that are well adapted to the circumstances of each case (if you like, a holistic approach to criminal conduct). There is a common attempt to devise a system in which the response is more finely attuned to the nature of the offence and the circumstances of a case. At one level that is because such alternative responses may be cheaper and quicker, but there is a genuine belief as well

that the responses can be rendered more effective by such an approach. Only in a minority of cases is the traditional judicial route seen as the most appropriate. Thus the development of alternative response systems is a quality alternative, one that can improve the results of the system as a whole, not one where cheaper but less desirable alternatives are substituted for 'the one right way' in a search for savings.

At the same time both systems have engaged in a search for acceptable *incentives* to take up alternatives, and to find in those incentives, an acceptable balance between the extent of the incentive and respect for the rights and freedom of choice of the accused. Appropriate circumstances for making the choice must be devised. Above, under the heading 'Guilty pleas and abbreviated processes', some of the alternatives used in civil law jurisdictions are mentioned; below under 'Conclusions', some further discussion of alternatives is to be found.

Irrespective of alternatives to the judicial approach (that is, 'diversion'), neither inquisitorial nor adversarial systems are monolithic and without choice. Both common law and civil law jurisdictions have for a long time now been marked by the development of two tiers within the orthodox structure of criminal proceedings (ie, ones that are centred on adjudication by a judicial body). In common law jurisdictions, the full jury trial (with a jury) versus summary proceedings and guilty pleas; in civil law jurisdictions, major cases conducted under the control and supervision of an investigating magistrate versus more summary processes in other cases. The balance between those two systems, and the accessibility of the 'Rolls Royce' system, are a matter of concern in both systems. Naturally that concern cannot be analysed in isolation from consideration of the development of non-judicial methods of dealing with offences.

Underlying the question of alternatives and diversion is the issue of cost. Certainly in common law jurisdictions, the full-blown trial is seen as cost-intensive, and therefore there is pressure to limit the incidence of full-scale trials. In the civilian system, trials themselves are on the whole less expensive, being less time consuming and involving fewer personnel. Jury trials are extremely rare. Nonetheless, the degree of duplication and waste of resources because of the statutorily prescribed involvement of judicial police, prosecutors, and investigating magistrates (the latter at least in major cases) may significantly affect the cost to the state of such a system.

***Addressing the problem of delay***

There is also a common desire to find solutions for the problem of delay. In common law countries there has been a call for more summary trials. Ways of dealing informally with matters soon after the commission of an offence (diversion) have been introduced in both kinds of jurisdictions. Again, the difficulty experienced in both jurisdictions is how to devise an acceptable

balance in the imposition of diversionary measures between *discretion and legality*. In other words, most systems want to give more discretion to (non-judicial) officers who come into contact with an offender early in the piece, but on the other hand seek to retain judicial and legal control and supervision over those processes. Supervision and control, however, add to delay and cost. In all these matters, the issue of choice is the key, ie to ensure that there is a genuine choice for an alleged offender to have recourse to the courts, and not be under excessive pressure to submit to diversionary measures, which lack judicial supervision and impartiality.

### The supervision of the pre-trial stage

One of the main issues in considering reform of the adversarial system, is how to introduce both greater judicial *management*, and also greater judicial *control and supervision*, over the pre-trial stage of criminal procedure. This is both with the aim of avoiding unnecessary costs and delays, and with the aim of improving the forensic process and the protection of the rights of the accused. The difficulty facing us is how to introduce effective change of that nature within the framework of an adversarial system.

Although the extent of judicial control and management in the pre-trial stage is far greater in inquisitorial systems (indeed this is in a sense the essence of the difference between the two), controversy over appropriate judicial supervision of the pre-trial stage rages in inquisitorial nations also. The issue takes the following form: should the position of investigating magistrates (combining investigative and judicial functions) be abolished in favour of a supervising court or judge? The pros and cons of such a move are constantly debated; Italy has abolished the position of investigating magistrate (*juge d'instruction*) in favour of a specialist supervising court (*juge de l'instruction*;).[49] Some argue that there are many benefits in retaining the position of investigating magistrate, as it allows for close supervision of the police investigation of an offence, rather than a hands-off role in which the investigating judge is little more than the puppet of the police.[50] If in an adversarial system one were to introduce greater pre-trial judicial responsibility, it would tend to take the form of the *juge de l'instruction*, rather than that of the *juge d'instruction,* because the latter, with its joining of judicial and investigative functions in a single person, would be so fundamentally incompatible with an adversarial system that its introduction cannot realistically be contemplated. That is not necessarily the case with the former, as is further debated below.

### Common interest in different jurisdictions

It is striking to what extent both systems have looked to each other for solutions. The most radical experiment in this regard was probably undertaken in Italy, which in 1988, substituted an adversarial system of criminal proceedings for its old inquisitorial model. However, after a short delay, with realisation dawning about the costs of an adversarial system, because of inherent legal-cultural attitudes, and partly out of a desire to deal with matters in more consensual ways by way of diversion or alternative judicial processes, Italy has

substantially (at least in terms of practice) reverted to its old inquisitorial ways due to recent amendments, as pointed out above. This reversionary trend lends some support to the thesis that there are limitations on the amount of borrowing from an inquisitorial jurisdiction that is possible in Western Australia.

### Hybrid models

Of interest is also the development of hybrid models with multinational scope. Presumably such a hybrid model will result from the work undertaken under article 15 of the Rome treaty establishing a permanent international criminal court.[51] A Committee is developing rules of criminal procedure that will apply in the court, and that will presumably borrow from both types of jurisdictions.

In the European Union, uniform provisions of criminal law and criminal procedure are being developed for the purpose of the protection of the financial interests of the European Union (ie, a unified European Union criminal law dealing with fraud).[52] Again the procedures developed borrow from both adversarial and inquisitorial systems. Reference should also be made here to the procedure that applies before the war crimes tribunal concerning the former Yugoslavia, and the Rwanda war crimes tribunal. All these developments are giving rise to the emergence of a body of law with common and hybrid characteristics in criminal procedure that is relevant to the law reform process in any national or sub-national jurisdiction.

### Conclusion

The inevitable conclusion flowing from the striking parallels in problems and solutions is that, on the one hand, many of the difficulties that seem restricted to our jurisdiction are in fact generic; and maybe more relevantly in the context of this inquiry, that the adoption of a civil law system, or some elements of a civil law system, may resolve some of our current concerns, but would most likely import a whole new set of different problems, equally pressing. In any case, it should not be forgotten that both jurisdictions are marked by the same history of, and trends towards, the rule of law, respect for human rights and effective administration of justice. In that light, it appears unlikely that either would show fundamental failures that are not replicated in the other system. In the meantime, there is a risk that with the bath water (the adversarial system), some important babies (certain basic rights that the common law has jealously guarded) may be thrown out. That leaves the question open of what advantage could be derived from borrowing some elements from the inquisitorial system. The unanswered question, and one that is inherently difficult to answer, remains as to the differential cost-structure of both systems. It may be that so many factors come into play in making such a comparative calculation anyway, that it will never be very useful to undertake it. Ultimately the matter of cost is one that is closely connected to values, democracy, and political choice, rather than only to efficiency, when one considers criminal

justice, which is so intimately concerned with people's most basic rights and freedoms.

## DISADVANTAGES OF THE ADVERSARIAL SYSTEM, WITH REFERENCE TO THE INQUISITORIAL MODEL

Some disadvantages of an adversarial system can be identified. The main themes are as follows:

1. the congruence of party prosecution and the rules of evidence;
2. 'equality of arms' in the adversarial system; and
3. judicial management and supervision of the pre-trial stage.

### Results of the congruence of party prosecution and the rules of evidence

It is arguable that the congruence in an adversarial system of, on the one hand, the rules of evidence that require testimonial proof at the trial, and, on the other hand, party prosecution, with its attendant potential for stratagems and delay, have a detrimental effect on the capacity of the system to identify the truth. The fact that both sides are subject to the same handicaps gives scant comfort. The equality of handicaps, if it exists, will not guarantee a fair outcome. It is unsatisfactory at the conceptual level. Furthermore, the actual inequality of means between the parties arguably results in an unfair advantage for the prosecution. On the other hand, concerns are often expressed that the whole trial process, and rules of procedure and of evidence, are in fact heavily weighted in favour of the accused.

The obvious solution, which would in effect result in an approximation of the inquisitorial system, might then to be to abolish party prosecution and oral and continuous trials. Exclusionary rules of evidence would lose their significance as well. A necessary consequence would be the abolition of jury trials. However, it is undeniable that the rules of evidence, although they are to a large extent inspired by the risks inherent in jury systems, also embody important guarantees for an accused. Thus wholesale abolition may have detrimental effects on the rights of the accused; it would also affect the advantages derived from immediacy and reliability-testing.

A more acceptable solution would be one that focuses primarily on accelerating the trial process. The oral presentation of evidence, with its advantages of directness and testability through cross-examination, is less subject to the vagaries of memory and external influences on witnesses, *the closer to the actual events it takes place*. Speedy trials, of course, have important benefits in terms of the accused, certainly where he is on remand, and in terms of the victim and society as a whole. In more ways than one, justice delayed is justice denied.

The point of focus of reform should thus be *party prosecution*, rather than party presentation and orality. Greater judicial intervention at the early pre-trial stage should prevent delaying tactics, clarify issues, allow the identification early on of the most appropriate way to proceed, and speed up trials.

**Lack of equality of arms**

Maybe the most fundamental reason for the lack of equality of arms in the common law system of criminal procedure, is the major role ascribed to the accused's legal representative. A considerable forensic responsibility rests on the shoulders of lawyers for the accused, unlike in inquisitorial systems, where officialdom takes all such responsibility. The barrister or solicitor is the key to the effective and fair operation of the system, with an obligation both to the client and to the court. Nonetheless this is a potential weakness of the system as well, evidently where the accused is not represented, but also in cases where the accused is under-represented. In such circumstances the accused may be encouraged not to pursue a potential chance of acquittal because this route in some way (eg because of lack of resources, time or other factors) is not in the interest of the legal representative. To simply impose a greater moral obligation on lawyers is not the solution, since the under-funding of a system, be it systemic or fiscal, cannot be solved by exhortations that in truth amount to an obligation to work without adequate reward: the system should not be systematically dependent on professional altruism, even if it may depend substantially on professional ethics.

A further major difficulty that enhances the potential for grave imbalance is that more often than not, for various reasons both social and systemic, the clientele of the criminal justice system, is on average less well resourced and less educated than the population in general. In a period of hardening of attitudes towards law and order, this unfortunate effect is further enhanced, because increased criminalisation, the imposition of more frequent and harsher penalties, and less emphasis on rehabilitation, will have the effect of rendering those likely to come into contact with the criminal justice system even less able to ensure their own fair and just treatment within that system.

It is worthy of note that although the question of equality of arms is a critical issue in adversarial systems, it is equally problematical in inquisitorial jurisdictions (but on different grounds), as is revealed by the jurisprudence of the European Court of Human Rights concerning article 6 thereof. The concern is that the inquisitorial system, which relegates the accused to the second rank, denies the accused the right to put his side of the case. In particular, he or she is not in a position effectively to cross-examine witnesses or test evidence, nor independently to introduce evidence at trial.[53]

So although greater official responsibility for truth finding may solve the problem of inequality of arms that exists in adversarial systems, wholesale importation of the inquisitorial model may also systematically disadvantage the accused.

**Ineffective supervision at the pre-trial stage**

Because the pre-trial stage is secret and not normally *contradictoire* in a civilian jurisdiction, the accused does not have any great role to play at that stage. Nonetheless there is more judicial supervision of processes and procedures at that stage, and the power of supervision is far more systematised. There

are various layers of pre-trial supervision in the inquisitorial systems, at least in theory: the prosecutor supervises the police; the investigating magistrate supervises the prosecutor; and the *chambre d'accusation* supervises the investigating magistrate (by way of appeals against the judicial determinations of the investigating magistrate). A further move in civil law countries would see the *accused* given a greater role at the pre-trial stage, through the introduction of a *juge de l'instruction* as opposed to a *juge d'instruction*. In effect this would enable the accused to request the ordering of certain investigative measures from a court; however, the result may be a cumbersome and inefficient process.

Such supervision is lacking in adversarial systems. Supervision is, however, more important at the pre-trial stage in inquisitorial systems than in adversarial systems, to ensure the objective composition of the *dossier*, since the latter will be communicated to the trial court in a manner less *contradictoire* than the presentation of evidence in an adversarial trial court. Hence in the inquisitorial system, strict and continuous supervision of the police, both by the *parquet* and by the investigating magistrate, is of crucial importance.

That is less the case in adversarial systems, and a greater focus on judicial *management*, rather than judicial *supervision* may be more appropriate in such systems. Obviously, where an investigating magistrate is involved, there is effective judicial management of the progress of a case. But the Italian model may be of more relevance to Western Australia, with a *juge de l'instruction* who does not conduct the investigation but provides judicial control over various vital steps in the process (eg measures affecting rights or liberty of the accused; classification of offences; appropriateness of diversionary measures or summary procedures), and has a judicial management function.

## CONCLUSIONS

Some of the disadvantages of the adversarial system have been discussed earlier in this sub-section. Irrespective of those advantages and disadvantages, the attempts to tackle the common problems of both adversarial and inquisitorial systems have provided interesting comparative insights. Those attempts reveal important contemporary goals of criminal procedure: the development of alternative processes of equivalent value, based on an appropriate taxonomy of cases;[54] the development of an incentive structure to motivate offenders to adopt alternatives to judicial determination of their cases; the maintenance of effective guarantees that the choice of the accused to forgo judicial determination is made freely and competently; and the maintenance of a fair, effective and well adapted system of judicial determination of cases. The broad realisation that *alternative ways of dealing with offenders can be both more effective, cheaper and faster* than the judicial method, underlies the search for more flexibility. But choice and flexibility are subject to the crucial proviso that the accused's right to have his case

considered judicially, with all the guarantees of fairness, civil rights and objectivity that that implies, must be effectively maintained.

The inquisitorial system, with its established level of supervision and judicial control at the pre-trial stage, *theoretically* lends itself better to a more flexible process in which the trial is only one of a number of options of equal value; whether it does so in practice is less certain. Nonetheless, there is no reason in principle why an adversarial system could not adapt, while yet ruling out a wholesale adoption of an inquisitorial model.

In both systems a large number of cases is effectively determined before trial. Considerable discretion has been conferred on non-judicial bodies in the pre-trial stage. In the common law world this occurs, *inter alia*, through guilty pleas and plea-bargaining and in the choice of various diversionary processes made available to non-judicial authorities by statute. In civil law countries this occurs through the development of extra-legal discretion on the part of judicial police and prosecutors, as well as through various statutory diversionary powers (more assumption of discretionary powers than conferral by law).

It is clear though that there is major concern both about the *nature and quality of the choices* available at the early stage of the process, and about the *manner in which the choice is executed*. Given that fact, and certainly if *further* non-judicial alternatives and alternative adjudicative processes are to be developed, there is a greater need for both effective judicial (ie objective and non-partisan) control and supervision of pre-trial decision making, and for greater judicial management. However, the risk of increasing cost unnecessarily through the creation of new supervisory structures must be avoided. Greater judicial management has the potential of saving costs and sparing resources, and greater judicial supervision could result in increased use of cheaper (and possibly more effective) diversionary measures. With those goals and concerns in mind, the *centralisation of existing functions in a pre-trial court, with some additional powers of supervision* is one possible option.

**Proposal 3**

Adoption of a pre-trial court.

The following brief paragraphs give some indication of how a 'pre-trial court' may be introduced while maintaining some of the advantages of a basically adversarial model. The resulting system would have much in common with the Italian law of criminal procedure.

These suggestions are embryonic and are put forward for consideration and comment.

### A pre-trial court

The specialised pre-trial court would effectively have as its exclusive jurisdiction the management, supervision and control of all the incidents of the pre-trial stage. Its powers would be, inter alia, to review decisions about diversionary measures (eg an agreement between the prosecution and accused to resolve a case in a certain way, for instance by the payment of an agreed fine, or performance of community service). Alternatively, it would determine or review a decision to proceed with a case in a certain judicial manner, for instance on the basis of a written file only, or by a summary trial or a full jury trial. It could also determine which court should hear a case.

The court would also be responsible for the *granting of investigative or forensic powers* such as search and seizure, remand, issuing of warrants (all measures that affect the rights and freedoms of the accused) upon the application of the police or prosecution.

The pre-trial court would further have an important role relating to *evidentiary matters*. It could resolve questions relating to the admissibility of evidence at an early stage. It would be responsible for the appointment of neutral experts, maybe even for the taking of evidence in cases where there will be no opportunity to repeat the evidence in oral form if an oral trial is ultimately ordered. Such a court could also have a more extensive management role, with the ability to impose time restraints upon parties, to order the exchange of information between parties and the identification of issues in dispute. The powers of such a court could incorporate the conduct of committal hearings if such proceedings are to be retained.

The advantages of such a specialised pre-trial court would be early and appropriate intervention; preventing the loss of certain forms of evidence; more effective management of cases; judicial supervision of the free choice of the accused, and consistent policy development, amongst others. Early intervention at a judicial level can prevent party dilatoriness. It can also speed up the occurrence of the trial, thus improving the quality of evidence heard at a trial, and also benefiting the accused. Greater judicial supervision may also allow a case to proceed without jeopardising both the rights of the accused to prepare an adequate defence, and the rights of the prosecution to prepare a case thoroughly.

The development of an effective taxonomy of cases (and incentives) would also allow the most appropriate choice between the various courts (if the powers of all those courts over criminal matters at first instance must be retained), and between jury and summary trials.

### Forensic responsibility, the rules of evidence, and codification

Adopting a pre-trial court would not necessarily entail the adoption of some of the more debatable aspects of the inquisitorial systems. The insistence in common law systems on the presumption of innocence and right to silence is a healthy aspect of the system which it is in the long term interest of society

to maintain. Nonetheless, in some circumstances certain aspects of the right to silence could be analysed more closely. Further, the opportunity for an accused to challenge the prosecution evidence effectively at a trial is of vital importance. As far as fact-finding and rules of evidence are concerned, some modest changes could probably be made without threatening some of the basic aspects of an adversarial system, even if that would in fact result in bringing the adversarial system a little closer to an inquisitorial model. The forensic responsibility of trial judges could be modestly increased, and the rules of evidence relaxed in some circumstances. The main focus should be on admitting evidence that is taken soon after the facts and is reliable, but that would be excluded at present as hearsay.

**Proposal 4**

Relaxing the rules of evidence, particularly the rule against hearsay evidence.

It is obvious that a trial judge with ultimate responsibility for fact finding is not an aspect of the inquisitorial systems that is appropriate for introduction in a basically adversarial system. Such a change would amount in effect to a wholesale introduction of an inquisitorial model. Nonetheless, a more interventionist brief could be given to trial judges within the confines of an adversarial model. For instance, by the grant of power and incentive to stop inappropriate or irrelevant cross-examination (even though the power exists, it is too infrequently exercised); of power (though limited and closely circumscribed) to ask questions of a witness; or power to order further forensic measures in cases where there is a clear need.

**Proposal 5**

Giving judges greater control over the forensic process at trial.

Judges could also be responsible for the appointment of independent experts who can be cross-examined by both sides, and that have to provide expert evidence in written form to both parties prior to trial. The appointment of the expert could be made by the pre-trial court.

**Proposal 6**

Court-appointed experts.

A further area for reform may concern the general applicability of exclusionary rules of evidence. Naturally, some rules of evidence are the necessary consequence of having oral trials, be they before juries or judges alone; even so, where an oral trial is conducted before a judge it may be that many of the exclusionary rules of evidence could be further relaxed. In other words, there could be, like in some civilian systems, one set of rules applying to jury trials, and one to non-jury trials.

**Proposal 7**

Introduction of a dual system of rules of evidence and procedure.

A possible model, and a process that is of course typical of inquisitorial systems, is to have at least the option of a documentary summary proceeding (as per the European models discussed above, see 'Guilty pleas and abbreviated processes'). Such evidence may well be open to challenge by the accused, in the form of witnesses, but any disputes about the documentary evidence itself could be resolved at pre-trial hearings. Naturally, proceeding via this route should be subject to the freedom of choice of the accused, even if appropriate incentives could be made available, and to appeal to a court that would re-hear the case on a more adversarial basis.

**Proposal 8**

Introduction of an abbreviated documentary procedure, along the lines of existing models in certain European jurisdictions.

Development of a code of criminal procedure may also be considered worthwhile.

**Proposal 9**

Development of a code of criminal procedure.

**Further comparative study**

The most useful comparative investigations would be into the abbreviated processes being developed in various inquisitorial jurisdictions, such as the *incidente probatorio* and the *guidizio abbreviato* on the basis of the *dossier* alone,[55] or the German or French models mentioned above. In general, a closer study of the Italian model as a whole may provide useful insights, as well as of some of the hybrid multinational models being developed.

**Proposal 10**

Investigation and possible adoption of abbreviated procedures in certain inquisitorial jurisdictions.

## SUMMARY OF PROPOSALS

(Although sub-section 1.3 is primarily concerned with identifying advantages and disadvantages of the adversarial system, a number of proposals have been formulated in the course thereof. A summary of the proposals outlined follows. Major options are found under the heading 'Conclusions'.)

**1.** Restrict jury trials to the gravest offences.

**2.** Adopt a code of criminal procedure.

**3.** Adoption of a pre-trial court.

**4.** Relaxing the rules of evidence, particularly the rule against hearsay evidence.

**5.** Giving judges greater control over the forensic process at trial.

**6.** Court-appointed experts.

**7.** Introduction of a dual system of rules of evidence and procedure.

**8.** Introduction of an abbreviated documentary procedure, along the lines of existing models in certain European jurisdiction.

**9.** Development of a code of criminal procedure.

**10.** Investigation and possible adoption of abbreviated procedures in certain inquisitorial jurisdictions.

## ENDNOTES

1 See further below. See also B De Smet, 'De inquisitoire onderzoeksmethode op de beklaagdenbank' ['The inquisitorial method of investigation in the dock'] (1995) *Panopticon* 341.

2 See the various public submissions made under this reference to the LRCWA.

3 See eg in E Whitton, *The Cartel, Lawyers and Their Nine Tricks* (1998).

4 For a useful recent work describing the various European systems of criminal procedure, see C van den Wyngaert (ed), *Criminal Procedure Systems in the European Community* (Butterworths, 1993). See also for a less theoretical account, B McKillop, *Anatomy of a French Murder Trial* (1997). A useful description in English is also given in Royal Commission on Criminal Justice (L Leigh, L Zedner), *A Report on the Administration of Criminal Justice in the Pre-trial Phase in France and Germany* Research Study No 1 (London: HMSO, 1992). Some detail concerning the distinctions between various systems is also given in JF Nijboer, 'Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective' (1993) 41 *American Journal of Comparative Law* 299 (an article that also reviews William Twining's, *Rethinking Evidence* (1990)). As to the law in Belgium, in Dutch: see C van den wyngaert , *Strafrecht en strafprocessrecht in hoofdlijnen* (MAKLU, 1994). Although Italy is listed here as an inquisitorial system, that is no longer truly the case, since the introduction of the New Code of Criminal Procedure, the *Codice Vassalli*, in 1989, which substituted an adversarial system of criminal proceedings for the inquisitorial model represented by the previous *Codice Rocco* (1930).

5 Although in both systems individuals can set the machinery of the state in motion, eg by launching a private prosecution in common law countries, or by requiring the *juge d'instruction* to undertake an official investigation by a requisition by the *partie civile*, where the prosecutor has refused to take the case any further.

6 The monopolisation of criminal prosecutions, and of the use of force and compulsion in the hands of the state, has as its counterpart the prohibition of the use of retributory force by private citizens.

7 In this context the law of evidence relating to criminal cases, is treated as part of the law of criminal procedure.

8 Note Geoffrey Davies J, 'Fairness in a Predominantly Adversarial System' (1997) 71 *Reform* 47.

9 For an interesting perspective on this question, see WJ Stuntz, 'The Uneasy Relationship Between Criminal Procedure and Criminal Justice' (1997) 107 *Yale Law Journal* 1, and the response by DK Brown, 'Criminal Procedure, Justice, Ethics and Zeal' (1998) 96 *Michigan Law Review* 2146.

10 For instance, a totally inefficient system of criminal procedure will defeat the goal of deterrence that substantive criminal law pursues. Conversely, substantive criminal law that strives for absolute, rather than relative deterrence, will place unbearable strain on the law of criminal procedure.

11 For instance, the standard of proof 'beyond reasonable doubt' is not a standard of absolute certainty; such a standard would have important resource implications; it is also not the same as the civilian standard of proof, the *in time conviction*, which applies in civil and criminal cases alike.

12 For a discussion concerning possible limitations on reform of an adversarial system, see DA Ipp, 'Opportunities and limitations for change in the Australian adversarial system' (Paper presented at the Australian Institute of Judicial Administration Conference, Brisbane, August 1997).

13 See eg Phil, Fennell (ed), *Criminal Justice in Europe: A Comparative Study* (1995), Ch 19 (Conclusion: Europeanization and Convergence: The lessons of Comparative Study). See also CM Bradley, 'The Convergence of the Continental and the Common Law Model of Criminal Procedure (1996) 7 *Criminal Law Forum* 471.

14 Most striking example is the introduction of an adversarial system of criminal procedure in Italy (see above n 4). But other inquisitorial jurisdictions are showing a keen interest in adversarial systems; see eg B De Smet, 'De versnelling van de strafrechtspleging met instemming van de verdachte; is de invoering van een 'guilty plea' naar Angelsaksisch model wenselijk?' ['Accelerating criminal procedure with the consent of the accused; is the introduction of a 'guilty plea' after the Anglo-Saxon model desirable'] (1994) *Panopticon* 420; see also the report of the French parliamentary mission to the UK to look into the functioning of the adversarial system.

15 See, J Pradel, Ch 4 'France'and P Corso, Ch 8 'Italy' in C van den Wyngaert (ed), *Criminal procedure systems in the European Community* (1993) 105-135 and 223-259.

16 A seminal contribution to the understanding, in common law jurisdictions, of this dichotomy was made in S Goldstein and M Marcus, 'The myth of judicial supervision in three 'inquisitorial' systems: France, Italy and Germany' (1977) 87 *Yale Law Journal* 240.

17 Which is what has given rise to major concerns about the divergence from the legal model, for instance in France: see H Haenel, 'Les infractions sans suite ou la delinquence mal traitee' in Commission des finances [of the French Senat], *Rapport d'information* (1997/98) 513; and to calls for a return to the legal model, for instance in Belgium: see De Smet B, *'Le juge d'instruction: obstructionniste ou acteur indispensable dans le proces penal?'* (1996) 67 *Revue Internationale de Droit Pena* 417 [calling for retention and revitalisation of the role of the investigating magistrate (*juge d'instruction*)].

18 See the Italian example, as explained in C van den Wyngaert, above n 15, Ch 8: Italy; and in France, where the old *Code d'instruction criminelle* of 1808 was replaced with the *Code de procedure penale* 1959, which was revised at various times, with two important revisions in 1993, by the laws of 4 January and 28 August of that year. Since then the *Commission Justice penale et droits de l'homme* (otherwise known as the *Commission Delmas-Marty* after its President) has made further proposals for important changes, notably to the role of the investigating magistrate. For a comment in English on some reforms in France, see S Field and A West, 'A Tale of Two Reforms: French Defense Rights and Police Powers in Transition' (1995) 6 *Criminal Law Forum* 473.

19 Some police officers are not judicial police, and some non-police have the status of judicial police (eg some customs officers).

20 In the original Napoleonic code the investigating magistrate was supposed to supervise and control every case, but now he is only involved in about 10% of cases in Belgium, and even fewer in France.

21 Much duplication results, and many reform proposals are aimed at cutting out the duplication by either personal contact or by skipping some of the steps in favour of immediate appearance before a court.

22 Prosecutors are sometimes known as the *Magistrature debout* (standing magistracy), whereas judges are known as the *Magistrature assise* (seated magistracy).

23 In France and Belgium the *Procureurs* are subject to a *Procureur-general*, and ultimately to the *Procureu-General aupres de la Cour de Cassation.* For some comparative information concerning the functions of the prosecution in various jurisdictions, see JE Hall Williams (ed), *The Role of the Prosecutor* (1988). See also J Fionda, *Public prosecutors and discretion, A comparative study* (1995). (England, Scotland, the Netherlands and Germany; with extensive bibliography).

24 Note that there is a *juge d'instruction* in France, Belgium and the Netherlands, but not in the German or Italian system, the latter having abolished the position in favour of a '*juge de l'instruction'*. Supervision of the police investigation in Germany and Italy is thus in the hands of the prosecutor alone.

25 However, as stated, the limited number of jury trials that does occur in certain civilian jurisdictions is subject to special rules or orality, immediacy and continuity, similar to adversarial trials in common law jurisdictions.

26 On this point, see A Palmer 'Guilt and the Consciousness of Guilt: The Use of Lies, Flight and Other "Guilty Behaviour" in the Investigation and Prosecution of Crime' (1997) 21 *Melbourne University Law Review* 95. Also RD Friedman 'Thoughts From Across the Water on Hearsay and Confrontation' (1998) *Crim Law Review* 697.

27 It should be noted that decisions in inquisitorial systems are always of the court, and not of individual judges. Thus, although the identity of judges is of course known, and may become widely known to the public via the media, there is probably less of a tendency towards public criticism of individual judges, for instance for perceived inappropriate leniency or inconsistency in sentencing. Adversarial jury trials can give little comfort to individual judges on this score, since sentencing is always a matter for the judges, unlike in the inquisitorial systems.

28 See C van den Wyngaert, above n 15, Ch 8: Italy: 'The trial was [that is, before the introduction of the 1988 *Code of Criminal Procedure*] basically conducted on the basis of this *dossier* and the elements collected in the *dossier* by the public prosecutor constituted the evidence for the prosecution. The new *Code of Criminal Procedure* has abolished this system, and requires all evidence to be produced in court, in front of the trial judge, who must evaluate and assess it on the basis of the initiatives of the parties and of the confrontation between them (*iudici fit probatio*). The legislator wished to avoid the situation in which preliminary investigations conditioned the trial and influenced the trial judge. *However, recent legislative reforms and developments in case-law have greatly mitigated this rule, following the principle that evidence should not be dispersed* (art *500)* [emphasis added]' (art 235). There are two exceptions to this rule. The first is the *incidente probatorio:* this is a procedure 'which can be used if there is a risk that evidence available during the preliminary investigation may be dispersed by the time the case is referred to the trial court. In such cases, the evidence may be produced before the judge for the preliminary investigations, in the same way as the evidence would be produced before the trial judge, with the exception, however, that the *incidente probatorio* takes place *in camera*' (art 235).

29 As to the limitations imposed by the Constitution of the Commonwealth, section 80, in relation to indictable offences against Commonwealth laws, see *Cheatle v The Queen* (1993) 177 CLR 541. Note also that, where separation of powers in enshrined in the Constitution, there may be a limit on the powers of the Parliament to determine the laws of criminal procedure, since such determination may be within the province of the judicial power.

30 See further below; as stated above, such a system applies in inquisitorial jurisdictions that retain trials by jury for major offences (eg Belgium and France).

31 Apparent admiration for this position seems to have swept through the media at the time of the investigation into the death in a motor vehicle accident in France of Diana, Princess of Wales.

32 With the introduction of the new *Code of Criminal Procedure* of 1988; see above n 28. It was felt desirable to maintain a stricter separation between investigative and judicial functions.

33 This term is difficult to translate; the Italian term is *guidici per le indagini preliminari*, or judge for the preliminary investigations, as opposed to the investigating magistrate, the *giudice istruttore* (now abolished). In French, the distinction is made between the *juge d'instruction* (investigating magistrate, as at present), and the *juge de l'instruction* (judge or magistrate of the investigation, as proposed by some).

34 For instance, under this model, police conduct during the investigation is circumscribed not so much by specific statutory rules, but by the - at times uncertain - evidentiary rules applying to the exclusion of illegally or improperly obtained evidence.

35 The *Police Powers and Responsibilities Act 1997* (Qld) is an example of a clarifying statute of limited scope in this area. However, its consequences are not directly related to the trial, but to disciplinary matters; in other words, although it regulates police conduct, it does not regulate criminal proceedings directly.

36 Indeed, even in Italy, where the adversarial system was adopted (see above n 28), the guilty plea was not.

37 See De Smet, above n 14.

38 Ibid.

39 Ibid. See also K Mack and S Roach Anleu, 'Reform of Pre-Trial Procedure: Guilty Pleas' (1998) 22 *Criminal Law Journal* 263.

40 See P Corso, Ch 8 'Italy' in van den Wyngaert above n 15, 223-259.

41 See eg Palmer, above n 26; and Friedman, above n 26. See also Sir Richard Eggleston, *Evidence, Proof and Probability* (1978)

42 The French Commission Delmas-Marty found that if an adversarial system were introduced in France this could only be fair if it was underpinned by a system of generous legal aid for all accused persons.

43 Inquisitorial systems sometimes come in for this latter criticism, since they tend to allow a greater degree of pressure on the accused to confess, through the ready imposition of preventative detention and the right to interrogate an accused after arrest.

44 On rights issues in criminal procedure, see JA Andrews (ed), *Human Rights in Criminal Procedure* (1982). (with chapters on many European national systems).

45 In Europe, a remarkable convergence between systems (that of the UK and those of the civil law jurisdictions) is occurring, through the unified jurisprudence of the European Court of Justice, so that the balance is altering in both kinds of jurisdictions. See eg Jorg, Field and Brants in Phil Fennell (ed), above n 13, ch 3 'Are inquisitorial and adversarial systems converging?'; and Swart and Oung in Phil Fennell (ed), above n 13, Ch 4 'The European convention on human rights and criminal justice in the Netherlands and the United Kingdom'. In Australia as well, there is an increased tendency to refer to individual rights in the context of criminal prosecutions, both at the level of jurisprudence and at the legislative level. Thus there is a degree of congruence between Australia and civil law jurisdictions in terms of certain aspects of the law of criminal procedure as well. See eg *Cheatle v The Queen*, above n 29; and *Dietrich v The Queen* (1992) 177 CLR 292.

46 See for instance, NSW Law Reform Commission, *The Right to Silence,* Discussion Paper 41 (May 1988).

47 On this point the Report by Leigh and Zedner, see above n 4, makes interesting reading. Preventative detention is obviously sometimes (mis-) used to put pressure on an accused to confess.

48 That 'strict adherence' is undermined in some ways, however, by the case law: see J White, 'Silence is golden? The Significance of Selective Answers to Police Questioning in NSW' (1998) 72 *Australian Law Journal* 539.

49 See Corso, above n 40.

50 See for example, De Smet B, above n 17 (in favour of retention of the positions).

51 Rome statute of the international criminal court (adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court, 17 July 1998).

52 See Corpus Juris introducing penal provisions for the purpose of the financial interests of the EU, *Direction Generale du Controle Financier*, under the direction of Professor Delmas and M Marty, Economica Paris 1997.

53 But the Court has found that if the accused has the opportunity at least once to question the evidence against him or adduce evidence in his favour, procedural justice is safeguarded, even if the questions are actually put through a judge (as cited in De Smet, above n 17, 436, 73).

54 An appropriate taxonomy of criminal conduct would also allow the more rational expenditure of resources, with an eye to optimal outcomes. For instance, now we may spend the least on a first

offence by a juvenile, the most on a recidivistic violent offender: is this the most rational way of expending resources, ie is the gravity of the potential sentence the only indicator of the amount of resources that should be spent? Or should the chances of rehabilitation, the age etc.. in fact lead to greater resources being allocated (not to less, as so often seems to be the case) whatever form the expenditure of those resources may take?

55 See Corso, above n 40, 235.

## TABLE OF AUTHORITIES


Andrews, JA, *Human Rights in Criminal Procedure* (The Hague; Boston, Martinus Nijhoff, 1982).

B De Smet, B, 'De inquisitoire onderzoeksmethode op de beklaagdenbank' ['The inquisitorial method of investigation in the dock'] [1995] *Panopticon* 341.

Bradley, CM, 'The Convergence of the Continental and the Common Law Model of Criminal Procedure (1996) 7 *Criminal Law Forum* 471.

Brown, DK, 'Criminal Procedure, Justice, Ethics and Zeal' (1998) 96 *Michigan Law Review* 2146.

*Commission des finances* [of the French Senat], *Rapport d'information* (1997/98) 513.

Davies, Geoffrey, 'Fairness in a Predominantly Adversarial System' (1997) 71 *Reform*, 47.

De Smet B, 'Le juge d'instruction: obstructionniste ou acteur indispensable dans le proces penal?' (1996) 67 *Revue Internationale de Droit Penal* 417.

De Smet, B, 'De versnelling van de strafrechtspleging met instemming van de verdachte; is de invoering van een 'guilty plea' naar Angelsaksisch model wenselijk?' ['Accelerating criminal procedure with the consent of the accused; is the introduction of a 'guilty plea' after the Anglo-Saxon model desirable'] (1994) *Panopticon* 420.

Delmas, Prof and Marty, M, 'Direction Generale du Controle Financier' (1997) *Economica Paris*.

Eggleston, Sir Richard, *Evidence, Proof and Probability* (London: Weidenfeld & Nicolson, 1978).

Fennell, P (ed), *Criminal Justice in Europe: A Comparative Study* (Oxford: Clarendon Press, 1995).

Field S, West A 'A Tale of Two Reforms: French Defense Rights and Police Powers in Transition' (1995) 6 *Criminal Law Forum* 473.

Fionda, J, *Public Prosecutors and Discretion: A Comparative Study* (Oxford: Clarendon Press, 1995).

Friedman, RD, 'Thoughts from across the water on hearsay and confrontation' [1998] *Crim LR* 697.

Goldstein, S, and Marcus, M, 'The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany' (1977) 87 *Yale Law Journal* 240.

Haenel H, 'Les infractions sans suite ou la delinquence mal traitee' in Commission des finances [of the French Senate], *Rapport d'information* (1997/98) 513.

Ipp, DA, 'Opportunities and limitations for change in the Australian adversarial system' (Paper presented at the Australian Institute of Judicial Administration Conference, Brisbane, August 1997).

Mack, K and Roach Anleu, S, 'Reform of Pre-Trial Procedure: Guilty Pleas' (1998) 22 *Criminal Law Journal* 263.

McKillop B, *Anatomy of a French murder trial* (Sydney: Hawkins Press, 1997).

New South Wales Law Reform Commission, *The Right to Silence* Discussion Paper 41 (May 1988).

Nijboer JF, 'Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective' (1993) 41 *American Journal of Comparative Law* 299.

Palmer, A, 'Guilt and the Consciousness of Guilt: The Use of Lies, Flight and Other "Guilty Behaviour" in the Investigation and Prosecution of Crime' (1997) 21 *Melbourne University Law Review* 95.

Royal Commission on Criminal Justice (Leigh L, Zedner L), *A Report on the Administration of Criminal Justice in the Pre-trial Phase in France and Germany Research* Study No 1 (London: HMSO, 1992)

Stuntz, WJ, 'The Uneasy Relationship Between Criminal Procedure and Criminal Justice' (1997) 107 *Yale Law Journal* 1.

Twining, William, *Rethinking Evidence* (Oxford: Blackwell, 1990).

van den Wyngaert C, *Criminal Procedure Systems in the European Community* (London: Butterworths, 1993) Ch 4 and Ch 8.

van den Wyngaert C (ed), *Strafrecht en strafprocessrecht in hoofdlijnen*, (MAKLU, 1994).

White J, 'Silence is Golden? The Significance of Selective Answers to Police Questioning in NSW' (1998) 72 *Australian Law Journal* 539.

Whitton, E, *The Cartel: Lawyers and Their Nine Tricks* (Sydney: Herwick, 1998).

Williams, E, Hall, *The Role of the Prosecutor* ( Aldershot, England: Avebury, 1988).


## Statutes


QUEENSLAND — *Police Powers and Responsibilities Act* 1997 (Qld)

ITALY — *New Code of Criminal Procedure 1988* (the *Codice Vassalli*)
Codice Rocco 1930


## Cases


*Cheatle v The Queen* (1993) 177 CLR 541.

*Dietrich v The Queen* (1992) 177 CLR 292.