

The adversarial-non adversarial debate

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2.21 One further aspect of the Commission's inquiry deserves consideration. This review was directed to considering change to the adversarial character of the system. These premises call for consideration of adversarial and non adversarial processes and of the pace and approach to change in the federal civil justice system.

2.22 The call for change to the adversarial system can oversimplify the problems in our litigation system and solutions to those problems, at least as far as this debate concerns civil matters. (The Commission has no reference to consider criminal proceedings.) Such calls assume that the problems associated with say, the costs, delay or unfairness in the system, are attributable to the adversarial character of the system and that these problems can be 'cured' by transplanting or borrowing from the civil code systems. Relevant in this regard is Lord Woolf's diagnosis that litigation problems in England and Wales derive to a large extent from the unrestrained adversarial culture of their legal system.[37] His solution, discussed in chapter 9 of this paper, is to put judges in charge 'to run the show'. [38] Australia has had managerial judging for some years. This paper critiques the case management 'solution'. [39]

2.23 The debate on changing adversarial culture or processes also can be clouded by definitional questions as protagonists debate core values and practices in prototype legal models, sometimes comparing the perceived shortcomings of one system with an idealised version of the other. The term 'adversarial' connotes a competitive battle between foes or contestants [40] and is popularly associated with partisan and unfair litigation tactics. Battle and sporting imagery are commonly used in reference to our legal system. [41] These different meanings associated with an adversarial system have confused the debate concerning legal system reform. [42]

2.24 The terms 'adversarial' and 'inquisitorial' have no precise or simple meaning [43] and to a significant extent reflect particular historical developments rather than the practices of modern legal systems. [44] No country now operates strictly within the prototype models of an adversarial or inquisitorial system. The originators of those systems, England, France and Germany have modified their own, and exported different versions of their respective systems.

2.25 In broad terms, an adversarial system refers to the common law system of conducting proceedings in which the parties, and not the judge, have the primary responsibility for defining the issues in dispute and for investigating and advancing the dispute. [45] The term 'inquisitorial' refers to civil code systems in which the judge has such primary responsibility. 'Inquisitorial' also connotes an inquiry where the decision maker investigates a matter. Civil code proceedings represent, in procedural theory, 'judicial prosecution' of the parties' dispute, as opposed to 'party prosecution' of the dispute under the common law system. [46]

2.26 Notwithstanding variation between these models, in civil matters at least, there is a significant degree of convergence of the practices in common law and civil code countries. [47] German civil procedure, in particular, has many of the characteristics of civil process in adversarial systems, [48] and is generally described as an adversarial or party system. Parties

present the facts to the court and their lawyers have comparable roles to those in common law countries.[49] The court may only consider those facts brought before it; it may not investigate on its own.[50]

2.27 In private civil disputes in both legal models, the involvement of the parties in the presentation of the case extends to: initiating proceedings, determining the issues to be decided, investigating the case facts, selecting and presenting witnesses and other evidence. In common law systems, involvement of the parties also covers selecting and presenting experts (in civil code systems experts are appointed by the court), and presentation of oral evidence, argument and submissions by counsel at the hearing.[51]

2.28 In the Australian litigation and review system, processes such as case management,[52] court or tribunal connected ADR processes and discretionary rules of evidence and procedure have modified adversarial features of the system. The federal review tribunal system also has borrowed from civil code systems.[53]

2.29 A conference examining comparative legal systems, co-sponsored by the Commission, described the high costs and delays likewise afflicting the French and German systems (the systems discussed at the conference).[54] Lowenfeld, reviewing common law and civil code systems in the 1997 *American Journal of Comparative Law* symposium on civil procedure, commented that

one result of listening to and reading about each other's problem was the realization that none of the observers and commentators was satisfied with the system he or she knew best.[55]

2.30 In the Commission's view there is limited utility in simply elaborating and comparing the advantages and disadvantages of the present adversarial system of conducting civil administrative review and civil law proceedings in federal jurisdiction.[56] The relative merits and demerits of adversarial systems have been extensively debated. There is a variety of texts dealing with judicial impartiality,[57] independence, consistency, flexibility and the democratic character of adversarial processes,[58] or with the disadvantages of the tactical manoeuvring,[59] partisanship and unreliability of witnesses,[60] the obscured focus of many adversarial hearings,[61] and the unfairness that can result in such hearings when parties are unrepresented or there is inequality of legal representation.[62]

2.31 Reviewing the pros and cons of the United States adversary system, Luban justified retention of the current system on pragmatic grounds.

[F]irst the adversary system, despite its imperfections, irrationalities, loopholes and perversities, seems to do as good a job as any at finding truth and protecting legal rights . . . Second, some adjudicatory system is necessary. Third, it's the way we have always done things. These things constitute a pragmatic argument: if a social institution does a reasonable enough job of its sort that the costs of replacing it outweigh the benefits, and if we need that sort of job done, we should stay with what we have.[63]

2.32 The Commission considers that the adversarial-non adversarial construct is too elusive to base analysis of the problems or to formulate change to the system. Such debate assumes that borrowing from different political and cultural systems will work in similar ways in our legal system, that such change can be engineered and that it will improve the system.[64] The

Commission does not advocate change to implement a non adversarial federal civil litigation system; we do advocate change to judicial and administrative processes and informal dispute resolution schemes. The Commission's analysis focuses upon judicial, administrative and alternative dispute resolution processes because these are the distinctive, interrelated processes which comprise federal civil justice. These are well understood concepts and provide an explicable basis for change. The adversarial-non adversarial debate simply obscures effective reform. Sir Anthony Mason commented that a wholesale change by Australia to an inquisitorial system of civil justice would be

an extraordinary act of faith. It would be contrary to our traditions and culture; it would generate massive opposition; and it would call for expertise that we do not presently possess. And at the end of the day we would have a new system without a demonstrated certainty that it is superior to our own.[65]

Footnotes

[37]Lord Woolf *Access to justice: Interim report to the Lord Chancellor on the civil justice system in England and Wales* Lord Chancellor's Dept London 1995, 7

Without effective judicial control . . . the adversarial process is likely to encourage an adversarial culture and to degenerate into an environment in which the litigation process is too often seen as a battlefield where no rules apply.

[38]G Watson 'From an adversarial to a managed system of litigation: A comparative critique of Lord Woolf's interim report' in R Smith (ed) *Achieving civil justice: Appropriate dispute resolution for the 1990s* Legal Action Group London 1996, 65; Lord Woolf *Access to justice: Interim report to the Lord Chancellor on the civil justice system in England and Wales* Lord Chancellor's Dept London 1995, 26: 'in order to achieve both the overall aim and the specific objectives, there is no alternative to a fundamental shift in the responsibility for the management of civil litigation in this country from litigants and their legal advisers to the courts.'

[39]See ch 9.

[40]The Macquarie Concise Dictionary 2nd ed defines 'adversary' as an 'unfriendly opponent; an opponent in a contest; a contestant'; R Eggleston 'What is wrong with the adversary system?' (1975) 49 *Australian Law Journal* 428, 429.

[41]R Eggleston 'What is wrong with the adversary system?' (1975) 49 *Australian Law Journal* 428, 429; Denning LJ in *Jones v National Coal Board* [1957] 2 QB 55, 63; J Hunter & K Cronin *Evidence, advocacy and ethical practice* Butterworths Sydney 1995, 50; A Crouch 'The way, the truth and the right to interpreters in court' (1985) 59 *Law Institute Journal* 687, 690.

[42]The Commission received a number of submissions concerned with 'adversarial' conduct. As discussed later in this paper, particularly in ch 5, the Commission supports eliminating the excesses of partisan practice.

[43]For a critical analysis of the use of these terms see M Damaska 'Structures of authority and comparative criminal procedure' (1975) 84 *Yale Law Journal* 480. See also ALRC Issues Paper 20 *Review of the adversarial system of litigation: rethinking the federal civil litigation system* ALRC Sydney 1997, ch 2, which summarises the features taken to be general characteristics of adversarial and non adversarial models.

[44]In England the common law, 'adversarial' system developed in the Middle Ages and was exported to countries such as Australia, Canada, New Zealand and the United States through colonisation. In Europe, civil law inquisitorial systems had their basis in Roman law. The Napoleonic Codes (1804-1811) in the French civil law system; the German Civil Code (1896) in Germany. Civil law systems in Europe and Asia have generally styled themselves on either the French or German model.

[45]'In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries': *Jones v National Coal Board* [1957] 2 QB 55, 63 (Denning LJ).

[46]LCA *Submission 126*.

[47]The European Union is contributing to convergence of the common law and civil code procedures. An indication of convergence in Australia is seen in the adoption of case management and managerial judging (see ch 9). This convergence will not necessarily conclude with the same, integrated systems; it is more an indication of the adoption by one system of the principles and procedure used in another. Some important differences remain. These may be so entrenched that there is never complete convergence. See the work of the American Law Institute *Transnational rules of civil procedure* Discussion draft American Law Institute Philadelphia 1 April 1999, which aims to establish a single system of civil procedure across national boundaries.

[T]he reader [should be] in no doubt that convergence is taking place . . . There is thus a convergence of solutions in the area of private law as the problems faced by courts and legislators acquire a common and international flavour; there is a convergence in the sources of our law since nowadays case law *de facto* if not *de jure* forms a major source of law in both common and civil law countries; there is a slow convergence in procedural matters as the oral and written types of trials borrow from each other and are slowly moving to occupy a middle position; there may be a greater convergence in drafting techniques than has commonly been appreciated . . . there is a growing rapprochement in judicial views: B Markesinis 'Learning from Europe and learning in Europe' in B Markesinis *The gradual convergence: Foreign ideas, foreign influences, and English law on the eve of the 21st century* Oxford University Press Oxford 1994, 30. See further for example R David and J Brierley *Major legal systems in the world today* 3rd ed Stevens & Sons London 1985, parts 1 and 3.

[48]G Wittuhn & R Stucken 'Germany' ch 7 in C Campbell (ed) *International civil procedures* Center for International Legal Studies and Lloyd's of London Press Ltd London 1996, 297.

[49]J Langbein 'The German advantage in civil procedure' (1985) 52(4) *University of Chicago Law Review* 823, 824.

[50]G Wittuhn & R Stucken 'Germany' ch 7 in C Campbell (ed) *International civil procedures* Center for International Legal Studies and Lloyd's of London Press Ltd London 1996, 297.

[51]ibid; C Lécuyer-Thieffry 'France', ch 6 in C Campbell (ed) *International civil procedures* Center for International Legal Studies and Lloyd's of London Press Ltd London 1996, 258; R David and J Brierley *Major legal systems in the world today* 3rd ed Stevens & Sons London 1985, parts 1 and 3.

[52]J Jolowicz 'The Woolf report and the adversary system' (1996) 15 *Civil Justice Quarterly* 198, 200.

[53]T Thawley 'Adversarial and inquisitorial procedures in the Administrative Appeals Tribunal' (1997) 4 *Australian Journal of Administrative Law* 61; J Dwyer 'Fair play the inquisitorial way: A review of the Administrative Appeals Tribunal's use of inquisitorial procedures' (1997) 5 *Australian Journal of Administrative Law* 5, 19; L Certoma 'The non-adversarial administrative process and the Immigration Review Tribunal' (1993) 4(1) *Public Law Review* 4.

[54]K Glomb 'Roles and skills of a German judge' *Paper Beyond the Adversarial System* Conference Brisbane 10-11 July 1997; W van Caenegem 'Changing roles and skills of practitioners in civil litigation: A comparative perspective' *Paper Beyond the Adversarial System* Conference Brisbane 10-11 July 1997; M Lemonde 'Educating French legal professionals' *Paper Beyond the Adversarial System* Conference Brisbane 10-11 July 1997; J Staats 'Educating German legal professionals' *Paper Beyond the Adversarial System* Conference Brisbane 10-11 July 1997.

[55]A Lowenfeld 'Introduction: The elements of procedure: Are they separately portable?' (1997) 45 *American Journal of Comparative Law* 649, 651.

[56]A view confirmed by the Law Reform Commission of Western Australia *Review of the civil and criminal justice system -- Consultation draft: The advantages and disadvantages of the adversarial system in civil proceedings* LRCWA Perth November 1998, 1.

[57]The common law imperative is 'that justice should not only be done, but should manifestly and undoubtedly be seen to be done': *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259; [1923] All ER 233, 234 (Lord Hewart CJ). See also A Amerasinghe 'Judicial independence -- Some core issues' (1997) 7 *Journal of Judicial Administration* 75. Judge Glomb of the German District Court has commented on German civil procedures: 'It will be apparent that the judge virtually knows the result of the case before the hearing': K Glomb 'Roles and skills of a German judge' *Paper Beyond the adversarial system* Conference Brisbane 10-11 July 1997, 3. On impartiality issues in civil code systems, see: C Lécuyer-Thieffry 'France', ch 6 in C Campbell (ed) *International civil procedures* Center for International Legal Studies and Lloyd's of London Press Ltd London 1996, 261.

[58]The adversarial nature of litigation is said be democratic by allowing the parties to define and control the dispute -- litigation is essentially a participatory process where competing versions of the dispute are publicly aired and debated. One of the advantages of the common law system of party control is that the parties may pursue all avenues of inquiry perceived to be to their advantage. Adversaries 'sometimes do bring into court evidence which, in a dispassionate inquiry, might be overlooked': J Frank *Courts on trial: Myth and reality in American justice* Princeton University Press Princeton 1949, 80.

[59]R Eggleston 'What is wrong with the adversary system' (1975) 49 *Australian Law Journal* 428, 430, S Parker 'Islands of civic virtue? Lawyer and civil justice reform' (1997) 6 *Griffith Law Review* 1; E Whitton *Trial by voodoo* Random House Sydney 1994; E Whitton *The cartel: Lawyers and their nine magic tricks* Herwick Sydney 1998.

[60] '[T]he partisan nature of trials tends to make partisans of the witnesses', including experts: J Frank *Courts on trial: Myth and reality in American justice* Princeton University Press Princeton 1949, 86. See ch 13.

[61]For example, the debate over whether it is an objective of a common law hearing to discover the truth. In civil law countries the responsibilities of the judge to discover the truth go beyond the determination of the dispute between the parties: J Jolowicz 'The Woolf report and the adversary system' (1996) 15 *Civil Justice Quarterly* 198, 208. 'Within the adversarial system, despite some statements to the contrary, the function of the courts is not to pursue the truth but to decide on the cases presented by the parties': A Mason 'The future of adversarial justice' *Paper* 17th Annual AIJA Conference Adelaide 7 August 1999, 13 -- draft. However, others believe that 'truth is best discovered by powerful statements on both sides of the question' Lord Eldon LC quoted with favour by Denning LJ in *Jones v National Coal Board* [1957] 2 QB 55, 63, or that '[s]uccessful cross examination is the most effective means of discovering the truth': G Downes 'Changing roles and skills for advocates' *Paper* Beyond the adversarial system Conference Brisbane 10-11 July 1997, 5. See also R Gerber 'Victory vs trust: The adversary system and its ethics' (1987) 19(3) *Arizona State Law Journal* 3. It remains a moot point which system offers the best method for ascertaining the truth. Critics familiar with both systems do not agree: 'The argument as to whether the truth is best obtained by the adversary system or by something more closely approximating to the civil procedure adopted on the Continent is of course incapable of being resolved': R Eggleston 'What is wrong with the adversary system?' (1975) 49 *Australian Law Journal* 428, 433.

[62]The adversarial system has proceeded on the assumption that the fairest and most effective method of determining the truth of a matter is to allow the parties to put their respective cases in their own way. This assumption depends upon the parties being able to identify their own interests and fight their own battles. The extent to which a party can do that will depend upon their own qualities and resources and those of their legal representatives and experts: *Dietrich v R* (1992) 177 CLR 292, 335 (Deane J); *Giannarelli v Wraith* (1988) 165 CLR 543, 556 (Mason CJ).

[63]D Luban *Lawyers and justice: An ethical study* Princeton University Press Princeton 1988, 92.

[64]W Pizzi & L Marafioti 'The new Italian Code of Civil Procedure: The difficulties of building an adversarial trial system on a civil law foundation' (1992) 17 *Yale Journal of International Law* 1, 22-3; M Hooker *Legal pluralism* Clarendon Press Oxford 1975.

[65]A Mason 'The future of adversarial justice' *Paper* 17th Annual AIJA Conference Adelaide 7 August 1999, 16 -- draft.

[66]For a discussion of the role of courts see eg J Doyle 'Administrative law and the rule of law: Still part of the same package?' *Paper* 1998 Administrative Law Forum Melbourne 18-19 June 1998, 1; J Raz 'The rule of law and its virtue' (1977) 93 *Law Quarterly Review* 195, 198-201. J Doyle 'The well-tuned cymbal' in *Fragile Bastion: Judicial Independence in the nineties and beyond* Judicial Commission of NSW Sydney 1997, 40-41.

[67]See further ch 5.

[68]M Kirby 'The future of courts -- Do they have one?' 1999 8(4) *Journal of Judicial Administration* 185, 186.

[69]However, in relation to tribunal proceedings, inquisitorial procedures do not offend the Constitution. A dual system operates in Australia of courts, emphasising more traditional adversarial proceedings, and tribunals, which provide a mix of adversarial and inquisitorial procedures. Federal tribunals currently use a blend of adversarial and non adversarial processes. The High Court acknowledged the inquisitorial nature of procedures in the AAT in *Bushell v Repatriation Commission* (1992) 175 CLR 408, 424-5.

[70]*Polyukhovich v Commonwealth* (1991) 172 CLR 501, 703 (Gaudron J).

[71]*Bass v Permanent Trustee Co Ltd* [1999] 161 ALR 399, 417 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[72]*Harris v Caladine* (1991) 172 CLR 84, 150. This is reiterated in *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496 and *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 703-4.

[73]*Leeth v Commonwealth* (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ).

[74]J Thibaut & L Walker *The social psychology of procedural justice* Plenum Press New York 1988.