

# Adversarial or inquisitorial: which mode of trial system is better? essay



Our present day legal systems have acquired a series of rules designed to level out to some extent the inescapable imbalance of power between the accused and the state.

Nations that adhere to the tenets of democracy naturally wants everyone who is accused of a certain crime to undergo a “ fair” trial until he or she is proven guilty. In effect, authorities are supposed to play by the judicial rules rather than assert naked power when dealing with an accused person.

Protecting the rights of accused persons is not the only reason governments have rules of criminal procedure.

These rules have been drafted in order to guide the many people engaged in the criminal justice process, to provide a certain predictability to the process, and to legitimize the government’s effort to maintain a criminal justice system (Fairchild 2001, p. 138).

With the present-day highly bureaucratized society, detailed judicial rules are a familiar way to frame legal processes and reduce the discretionary power of law enforcement officials. With the perpetual debates of what type of litigation should an accuse undergo, any determination must rest on the human shortcomings of the fact-finder – these rely on biased reaction to evidence or the issues of the case – as well as the fact finder’s willingness to spend time considering all available evidence and to search for additional relevant facts.

These human elements control the ultimate judgment regardless of whether the fact-finder is a lawyer for one of the parties, a juror, or a judge in either the inquisitorial or adversarial system (Walpin, 2003). And the one million <https://assignbuster.com/adversarial-or-inquisitorial-which-mode-of-trial-system-is-better-essay/>

dollar question remains unanswered, which of the two better embodies a “true blue” justice system – the adversarial trial or the inquisitorial trial?

The adversarial system is often compared to a game or contest in which both sides are trying to win and a neutral umpire decides two things: (1) whether they are playing by the rules and (2) which side wins. Often, the judge acts as umpire for both these aspects of the contest. In some cases, the judge’s chief responsibility is to make decisions that ensure a fair contest, while a jury declares the actual winner (Fairchild 2001, p. 140).

The advocates of the adversarial system of justice support that the basic respect for human dignity (paramount importance) is at the heart of the adversary system. Korac-Kakabadse, Kouzmin & Knyght (2001) delineated that the central theme presented in favor of the adversary system is the “umpire”-role played by the judge; the judge being a listener and decider of a dispute and not a participant in the fray of examination and cross-examination as occurs in the inquisitorial system.

However, the major assumption underlying the adversarial discourse model is that the ordinary processes of relationships and identity management are irrelevant to establishing the facts of the matter (Penman, 1987), standing in direct contradiction of human rights principles.

Such processes include the freedom to negotiate the right to speak; to qualify what is said; to demand respect; and to distance or withdraw, if necessary, to save face (Penman, 1987). In a typical courtroom procedure, these types of actions are prohibited. This is especially true in respect to the “face” needs of witnesses (Eiser, 1980, p. 214).

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Comparatively, in an inquisitorial trial, the judges play a much more active role rather than being just the listener or decider. Inquisitorial system is defined as “[a] system of proof-taking used in civil law, whereby the judge conducts the trial, determines what questions to ask, and defines the scope and the extent of the inquiry. The system prevails in most of continental Europe, in Japan, and in Central and South America” (Black’s Law Dictionary 1999, p. 796).

In Germany (which follows the inquisitorial system), the judge has the responsibility of examining the pleadings and appending documents, scheduling hearings, maintaining the court’s official dossier, and deciding the case in a written judgment.

The judge, rather than the parties, is responsible for developing the evidence, calling and questioning witnesses himself or herself. In a minority of civil law jurisdictions this may include access to the dossier compiled prior to trial.

By its nature this includes written statements (so that the judge is not confined to oral evidence led in court) (SALRC Discussion Paper). Thus, the inquisitorial trial features the judge as the central “actor”. The judge “runs” the trial, conducts most of the questioning, and shapes the introduction of evidence.