

2003

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Abstract

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Keywords

common law, civil law, adversarial legal systems

Cover Page Footnote

My thanks to Professor John Wade and Professor Laurence Boule of the School of Law, Bond University, for their comments on an earlier version of this article. I also thank the participants of the Bangkok Regional Education Conference of LAWASIA, 16 – 19 November 1998 who commented on the paper on which this article is based, and which was presented under the title 'Dealing with the civil law/common law divide in regional education projects'.

ADVERSARIAL SYSTEMS AND ADVERSARIAL MINDSETS: DO WE NEED EITHER ¹?

*William van Caenegem**

The Adversarial Setting of Legal Studies in Common Law Jurisdictions

The styles of teaching and studying law in civilian and common law jurisdictions are very different. In the context of a desire to make civil procedure in common law jurisdictions less adversarial, the greater emphasis on case based learning in the common law world is striking². The origins of this difference lie in the greater importance (at least doctrinally, if not in practice) of precedent. In the common law world much of the law is still found in binding judgments, and even where there is statute law, the emphasis in teaching is still on the cases, and their facts, rather than on a systematic and theoretical analysis of legislation or 'codes'³.

The central position of case based teaching has various effects on legal education in common law countries. For instance, it tends to skew the approach to an area of law towards controversial fine points that give rise to involved legal argument, away from issues that are more settled but may also be more important in day to day legal life. There is something of an obsession with hard cases. The apparent uncertainty of certain areas of law, flowing from the sheer multiplicity of judicial opinions, exacerbates this tendency, as well as giving rise to a more inventive or speculative attitude to litigation⁴.

But a more interesting effect in the context of civil and criminal process reform, is the adversarial mindset that results from case based learning. Every legal

1 My thanks to Professor John Wade and Professor Laurence Boule of the School of Law, Bond University, for their comments on an earlier version of this article. I also thank the participants of the Bangkok Regional Education Conference of LAWASIA, 16 – 19 November 1998 who commented on the paper on which this article is based, and which was presented under the title 'Dealing with the civil law/common law divide in regional education projects'.

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2 For a recent analysis of the two models of civil litigation, see JA Jolowicz, 'Adversarial and inquisitorial models of civil procedure' (2003) 52 Int & Comp LQ 281.

3 The case based method influences practice as much as teaching and learning law, of course. The first step of the civil lawyer when confronted with a legal question, will be to grab her learned tome on the relevant area, whereas the common lawyer will go for the case reports.

4 One also wonders whether such features of the common law system of adjudication as majority and minority judgements encourage litigation. It engenders uncertainty, which inflates the expectation of winning a case, i.e. if the law is uncertain, a good lawyer may be able to get you a win!

problem is considered against the background of two disputing parties fighting for ultimate victory. The centre of gravity of teaching and learning is thus an area of legal practice that in fact only constitutes a small fraction of what lawyers do. The preventative and organisational and social roles of law are given less attention.

Contrast this with education in law in a typical civil law system: its prime emphasis is the systemic study of legislation and codes, in other words a theoretical and analytical examination of the logical organisation and interconnectedness of various provisions, codes and statutes. Cases are not so central to study, merely filling up gaps or resolving points of uncertainty. There is traditionally little emphasis on analysis of factual details of cases, and thus on the empirical history of disputes; more theory and fewer stories. In civil law jurisdictions, the reported reasoning, even in courts of ultimate jurisdiction, is often scant and not likely to give rise to great scope for adversarial and position-based argumentation. The study of law, at least implicitly, relies less on dispute situations between rights-claimants, and more on theoretical study of legislative schemes; not so much on the dispute resolution aspect of law as on the organisational and technical aspects of law.

This goes hand in hand with a greater emphasis, in education in many civil law jurisdictions, on broader contextualising of the study of law. Law is presented as part of a wider system of social organisation, rather than a series of disputes. Students firstly study non-technical but law related subjects, such as sociology of law, moral philosophy, legal philosophy and legal history. They further study broader social science subjects such as economics, sociology, psychology and political history. In that manner the confrontational and adversarial elements of legal practice and study are de-emphasised, and the study of law should produce a graduate with a much broader educational basis who can more effectively place law in a wider perspective. In common law systems, the debate about the context of law seems often to progress little further than an analysis of the appropriate role of some of the actors in the system of adversarial litigation: in particular, whether or to what extent judges make law⁵.

The broad approach to the study of law is more in tune with the undoubted fact that legal qualifications will only lead to legal practice for a small percentage of graduates, and to a life of litigation and dispute resolution for an even smaller fraction again of those. It is rooted in the view that the value of legal education lies in developing a broad educational base in social sciences and a broad skills base in terms of legal fundamentals and of legal research techniques. This allows law graduates to enter into areas of employment that are not 'core law'.

5 The most recent public expression of this debate in Australia was the speech by Justice Heydon before his elevation to the High Court bench: see JD Heydon, 'Judicial activism and the death of the rule of law' (2003) AIPJ 78 (also published in *Quadrant* and the *New South Wales Bar Review*).

ADVERSARIAL SYSTEMS AND ADVERSARIAL MINDSETS: DO WE NEED EITHER?

That, at least, is the theory. The teaching methodology may arguably result in many graduates missing out. And study of social sciences may be so theoretical, and so poorly integrated with the study of law, that, in terms of real events involving real people and the way they act, students may learn more from reading case reports in common law countries, than social science treatises in a civil law education.

But arguably a drawback of the common law, case-based approach, with its emphasis on reading accounts of events in the framework of resolving adversarial disputes, is that it engenders an adversarial mindset, a win/lose attitude in legal life. It generates graduates whose attitude is arguably too combative for the common good or even for the good of their clients. They search for conflict in every situation, and that has expensive consequences for society as a whole. The legal profession and academic lawyers have admittedly not ignored this, as the movement towards alternative dispute resolution models attests. The ADR movement emphasises the teaching and practice of mediation and negotiation. One of the main problems with adversarial litigation is the winner takes all result, which often does not reflect the true balance of right and wrong in a given case. ADR is seen as a cheaper, more flexible, more balanced and more responsive model of dispute resolution.⁶

There *may* be something wrong with producing graduates with such a mindset in general; but there *certainly is* if one accepts that the legal system as a whole is already too adversarial in common law countries. Is that the case? Should we strive for a less adversarial system in common law jurisdictions? Arguably, it would only make sense to contend that law students should have less adversarial training, if we accept that the system of civil and criminal litigation itself is too adversarial; to put it differently, if we accept that the system should adopt more inquisitorial characteristics from civil law jurisdictions.

The Position of the Courts From a Comparative Perspective

To come to some assessment of the position of adversarial adjudication in a common law jurisdiction such as Australia, a comparative examination of the civil law position may assist. The civilian tradition of adjudicative dispute resolution is without a doubt very different from the common law tradition. The two systems probably parted ways in the most profound sense because of codification, and because of the integration of courts and adjudication into the mechanism of the state on the continent of Europe during the early nineteenth century. In civil law jurisdictions, development of law ceased to be a role inherent in lawyers as a body and in the courts. The role of judges was then viewed, at least in theory, as a simple process of application of complete and clear codes, and the scope for

⁶ As to ADR in Australia see L Boule, 'Mediation: Principles, Process, Practice', (1996); and H Aster & C Chinkin, 'Dispute Resolution in Australia', (2002).

practising lawyers' input was consequently diminished. The state, through the courts, took greater control of adjudication of private disputes, both from the legal and from the fact-finding or investigative perspective⁷. Parties to a dispute became passive elements in a complete system organised by the state to resolve their differences according to law

In the United Kingdom the shock of codification and increased state control over the law and the mechanism of adjudication did not take place: courts even today still fashion the law through precedent, and the organisation of the courts and procedure are not so much matters for parliament as for the courts themselves. In Australia, the judicial powers are seen, in line with their English origins, as inherent in the courts, although formally vested or confirmed by constitutions. Parliament never imposed upon the courts the ideal, let alone the reality, of becoming interventionist inquisitorial dispute resolvers applying only the laws emanating from parliament, like the courts in codification-based civil law jurisdictions. The emphasis of the common law courts was more on law than on facts; facts were left entirely to the parties to present. It remained up to the parties to prosecute their cases before the courts as they saw fit, judges not becoming involved in party prosecution or presentation.

Thus, in theory, the courts in common law jurisdictions have inherent powers of adjudication with a law making ability. They have no investigative but only a passive fact determining role (where the parties' versions of the facts do not correspond). In civilian jurisdictions, at least in theory, courts, deriving their powers from the constitution, and made up of officers of the state⁸, play a more direct role in formulating the factual basis of a dispute because of their investigative powers. They apply only the laws of parliament and have no overt law-making power.

Theory and Practice, Ubiquitous Problems of Cost and Delay, and the Broader Context of Reform

That at least is the theory⁹. In *practice*, as comparativists such as Jolowicz have illustrated, the degree of actual intervention of the courts in investigative functions, and in case management, was originally very slight in civil law

7 See van R.C. Caenegem, *An Historical Introduction to Private Law* (1992). I use the term fact-finding here more in the sense of investigation, i.e. searching out factual evidence or 'the truth'.

8 See ALRC, Issues Paper 20. One might say that in the civil law systems there are in fact no judges, only courts.

9 Much about the codes is theory: they are founded on induction from rational principles rather than deduction from case law or custom. Furthermore, because of their rigidity, many aspects of codified laws have been vastly modified or ignored in practice.

ADVERSARIAL SYSTEMS AND ADVERSARIAL MINDSETS:
DO WE NEED EITHER?

jurisdictions, although the codes appeared to grant judges extensive powers¹⁰. Only relatively recent reforms in France have meant that judges can play a truly active role in managing cases, i.e. in preventing unnecessary delay or strategic abuse of process, and therefore unnecessary cost, and in fact-finding by ordering investigative measures.¹¹ The legislator now clearly wants to encourage them to play an active part in the process of gathering the factual material upon which the adjudication will proceed, intervening in the process of circumscribing as well as resolving the dispute. Whether those reforms in France, and calls for more judicial intervention in other civil law jurisdictions, have in fact had much effect in the run of the mill case is questionable. The experience on the ground tends to be that the judges leave most aspects of the management of the case to the parties and intervene only rarely. Whether this is due to attitudes that had evolved before the call for more activism, or to a simple lack of time and resources, is unclear.

It is by now a commonplace, but it still bears repeating, that generally speaking the ideal picture of a civilian procedure is quite different from the reality; one must, in a comparative exercise, always heed that reservation, although comparison with the Platonic ideal is not necessarily irrelevant or without value.

It is quite clear that in civil law jurisdictions, the same issues of cost and delay that plague common law systems, have in the past led to analogous demands for reform, e.g. for greater judicial intervention in practice in the pre-trial stage. Jurisdictions can now learn a lot from the various approaches taken to similar structural problems in different places. The vast literature concerning comparative approaches to the reform of civil litigation attests to mutual interest in this regard¹².

One important point is that the perceived civil law/common law divide is no real barrier to the consideration of detailed solutions to various problems. In any case,

10 See JA Jolowicz, 'The Woolf Report and the Adversary System', (1996) 15 CJQ 198. Concerning Australia see also BC Cairns, 'Lord Woolf's Report on Access to Justice: an Australian Perspective' (1997) 16 CJQ 98. See also JA Jolowicz, 'Adversarial and Inquisitorial Models of Civil Procedure' (2003), *International and Comparative Law Quarterly*, p.281.

11 See The French Law No 95-125 of 8 February 1995 relating to jurisdiction and civil, criminal and administrative procedure.

12 See e.g. in the UK: *Access to justice*, Interim report to the Lord Chancellor on the Civil Justice System in England and Wales (1995) (the Woolf Report). See in Australia, 'Managing justice: a review of the federal civil justice system (ALRC 89; tabled in Parliament on 17 February 2000); at <http://www.alrc.gov.au/inquiries/title/alrc89/> is to be found the catalogue of preliminary consultation papers, issues papers, experts reports, discussion papers, research reports and background papers grounding the final report. As to both civil and criminal procedure, see Law Reform Commission of Western Australia, *Review of the criminal and civil justice system in Western Australia* (1999).

there appears to be little serious consideration of, or demand for, a wholesale importation of a civilian system.¹³ And, how far a common law system should go in adopting civilian models depends on the appropriateness of detailed reforms *within the broader context of the system*. There do remain profound legal-cultural and systemic differences between civilian and common law jurisdictions. Moving wholesale to a system of trial as process, almost exclusively based on written evidence, and presided over by a managerial and investigative judge would not necessarily resolve much, since such processes are subject to the same kind of problems of cost and delay.

Judicial Involvement: A Choice Between Efficiency, Truth and Procedural Justice

Thus the investigative role of the judge is likely to remain a striking point of difference; it is of the essence of an inquisitorial system that a judge, at least potentially, has an investigative or forensic (as opposed to determinative) role. Even if in reality it is rarely exercised independently, that power forms an important backdrop to a trial. It influences the behaviour of parties both in the conduct of the trial and with respect to the gathering and exchange of evidence. Whereas both legal systems have contemplated changes that increase the court's managerial responsibility for cases brought before them in the interest of litigants, common law systems as yet have largely rejected granting such powers to judges¹⁴. In the civil law systems a judge has an investigative function both during the trial and during the pre-trial stage, although the distinction between the two stages is less emphatically drawn and the trial in a civil law jurisdiction can be more correctly described as a process (a series of appearances) rather than an event¹⁵.

Jolowicz has pointed out that any system of civil procedure is an attempt to balance procedural and substantive justice¹⁶. To that one might add 'and productivity'. Procedural justice requires that each party has an equal right to fully develop and control its case: adversarial party disposition and party prosecution. Conversely, the state will normally not run a civil dispute on any civil

13 The ALRC rejected the idea, see Footnote 12.

14 However, the docket system introduced in the Federal Court (Australia) is a step in that direction. By 'investigative role in the pre-trial stage' I mean that the judge is acquainted with the case soon after it is initiated, and takes responsibility for ordering fact-finding measures, such as questioning of witnesses and ordering independent expert's reports, as well as framing the issues early in a manner which will circumscribe what is relevant factual proof. The debate about investigative powers for judges is more acute in criminal procedure.

15 Adopting an investigative role for judges in a common law system may not have a cost-reducing effect (as might a managerial role) but simply a cost-shifting effect. It may therefore be a matter of choice based on other considerations.

16 See above n 3.

ADVERSARIAL SYSTEMS AND ADVERSARIAL MINDSETS:
DO WE NEED EITHER?

litigant's behalf. In common law jurisdictions, the major emphasis of the system is on procedural justice, i.e. on a court achieving justice in the framework of the dispute as the parties present it, not on engaging in an exhaustive investigation of 'the truth'. The parties independently choose and circumscribe the facts that will form the basis for the legal determination of a judge, and the judge remains passive as far as garnering and delineating facts is concerned.

The problem is that strict adherence to this approach does not necessarily result in substantive justice. Absolute party control over evidence gathering and selection may result in relevant facts never coming to the notice of the judge, to the detriment of the just cause of one of the parties (maybe the less well resourced). In a period of escalating costs that may be even more apparent. Manipulation of rules of evidence by well-resourced parties may make it even more prevalent.

In contrast, the civilian system theoretically stresses the court's duty to find the truth, and as a result, places more emphasis on substantive justice. A greater fact-finding role for the court may reduce the risk of a determination on the basis of evidence that is incomplete. However, it impinges on the liberal model of the civil litigant free to determine the parameters of a dispute (and thus on procedural justice).

There are also implications as far as costs are concerned. The civilian system may be more expensive in terms of costs to the state, but may cost less to the litigant. The English system, not requiring as much state input, should be cheaper for the state, and consequently more expensive and time consuming for the parties. It is difficult to draw any sort of conclusion in terms of overall cost to society, and therefore to express any firm preference.

The trial in civil law systems is not a single staged battle but a series of events, some of a fact-finding nature. In spite of recent reforms, that is still not the way we think of a trial in common law jurisdictions; rather, it is a series of small events leading to the major battle at the end. As I pointed out above, if judges become investigators in the pre-trial stage, that stage will inevitably take on trial-like characteristics of adversarial testing of evidence (paraphrasing the French *contradictoire*, it will become 'contradictory'). In other words, it will become part of a long drawn-out process trial rather than a trial as a single and continuous event. Thus what would initially appear to simplify and abbreviate procedures and reduce cost, because it permits judges to prevent parties from pursuing cost and time inflationary tactics, may in fact lead to equal delays and simple private-public cost transferrals.

The benefits of adopting the inquisitorial court, are thus by no means self-evident.¹⁷ Rather than one system being better than another, it may simply be a matter of choice, depending on efficiency considerations, but also on social and political priorities and legal and socio-cultural context and tradition. Yet the inquisitorial court is the most strikingly different feature of civil procedure in civilian jurisdictions. In other matters such as judicial management of case-flow, the systems are much closer aligned than one is sometimes led to expect. The same can be said of the judge as instigator of mediations, a recent reform common to both jurisdictions.¹⁸

The Rule of Law, Normative Sufficiency and Other Functions of Adjudication

Having thus argued that looking at procedural aspects of foreign jurisdictions may be fruitless and inconclusive if no regard is had for the broader characteristics and principles of legal organisation of our own system, I now turn to the exploration, by way of example, of a few of those broader issues. Again, a comparative approach may assist us to focus clearly on the broader functions of adjudication in our own social and legal order, and whether we should be concerned, and to what extent, to make adjudication cheaper, faster and more accessible in general. The conclusion of such a comparative exercise may well be that adjudication by the courts has different goals and purposes in civil and common law jurisdictions.

Two questions arise: first, what is the role of adjudication in a common law system? And secondly, if we change the nature of our system of civil procedure fundamentally, will that affect the position and broader functions (i.e. beyond mere dispute resolution) of adjudication? Thus apart from issues of socio-political prioritisation and of cost, and the balance between procedural and substantive justice, I want to consider implications for the rule of law and judicial independence, as well as the question of normative development. They are the foundations upon which the courts operate, extending the impact of adjudication beyond the confines of any given dispute.

I have already pointed out that the investigative function of the judge in civil law jurisdictions is a striking point of difference with common law systems. What would be the implications of granting such powers to judges in common law countries, in terms of one of the broader functions of adjudication: maintenance of the rule of law? Two elements seem basic to the rule of law in this context: that citizens' disputes are, or at least can be, resolved on the basis of legal rights; and that such disputes are determined by an independent tribunal.

17 The ALRC rejected adoption of inquisitorial courts; see above in 12.

18 See e.g. in France, Art 21ff of The Law No 95-125 of 8 February 1995; and court ordered mediation and case appraisal in Australia.

ADVERSARIAL SYSTEMS AND ADVERSARIAL MINDSETS:
DO WE NEED EITHER?

In this context, Justice Mason has made significant comments concerning wholesale changes to the adversarial system of litigation and the constitutional issues that may arise¹⁹. The points he raises revolve around the fundamental nature of the role of the courts. In a general sense a Commonwealth court can not, in accordance with High Court jurisprudence, be given a non-judicial role. Justice Mason argues that fundamental changes to civil procedure may alter the position of the courts in society to the extent that they are rendered constitutionally unacceptable. It seems that managing a case, in the sense of setting time limits and requiring regular communication with the courts, would cause little difficulty, but is the investigative function a judicial function in the common law tradition?

From a comparative perspective, it is clear that courts in civilian systems are structurally less independent than in common law jurisdictions such as Australia²⁰. Judges are seen as officers of the state, and courts do not have the *inherent* powers and independence of the English tradition²¹. In common law systems judges are perceived more as an integral part of an independent legal profession, with which they are intimately linked in origin and in their day to day operation. The courts greatly depend on the assistance and co-operation of practitioners in the system, above all of specialised barristers. After all, the practitioner's first duty is to the court and to the justice system, rather than to the client. There is an intimate relationship between bench and bar in the professional sense. The courts also have an independent law-making power through the mechanism of precedent. In this function too the court is assisted by the independent bar.

The question is whether judges will remain part of a clearly and visibly independent profession and inherently autonomous group, or whether by giving them an investigative role, they become more aligned with the state, in the process representing the public interest. That would seem to represent a fundamental shift in attitude towards the responsibility of the state in civil

19 See A Mason, 'Judicial independence and the separation of powers - some problems old and new' (1990) 13 (2) UNSW Law Journal 173; A Mason, 'The independence of the bench; the independence of the bar and the bar's role in the judicial system' (1993) 10 Aust Bar Rev 1. See also ALRC, *Review of the adversarial system of litigation*, Issues Paper 20, at 92: "Consequently, Chapter III [of the Commonwealth Constitution] may limit the ability of the legislature to alter some adversarial features of federal civil litigation." (footnoted to: A Mason, 'A new perspective on separation of powers' (1996) Canberra bulletin of Public Administration 1, 7). See also *Giannarelli v Wraith* (1988) 165 CLR 543.

20 The position of the courts in Australia, at least at the Commonwealth level, is remarkably strong, combining as it does historically grown inherent independence on the English model, with the written guarantees of an entrenched Constitution.

21 See ALRC, Issues Paper 20, above n 6, at 19: "As officers of the state the judiciary possesses no separate and inherent power to adjudicate [in civil law jurisdictions]".

disputes²². Since the existing structures contribute to an inherently independent judicial branch, there should be a very strong case in favour of changing to an investigative judicial role, which seems to inevitably carry with it a subtle realignment of the judicial power and an important redefinition of judicial powers; it is not at all clear that such a strong case exists.

Apart from the question of the subtle effect on the inherent independence of courts that granting an investigative role may have, there are well-known concrete concerns about judicial neutrality and independence (and thus the rule of law) that result from investigative judicial capacity. As a preliminary point, it seems inevitable that granting an investigative role to a judge would lead to a transformation of trial as event to trial as process. There is after all little point in giving the judge investigative power at the trial (e.g. to cross examine a witness) without giving those powers at the pre-trial stage. Investigative measures ordered or carried out before the trial would inevitably have to be adversarial or '*contradictoire*', thus transforming the process into a series of trial like events. What is more, it would have to follow that the judge of the final decision is the judge of the investigative pre-trial stage: otherwise the whole transformation would have little point.

Matters of concern about bias and neutrality flow from that result: for instance, that a judge who is involved in fact-finding in the pre-trial stage may not bring an entirely independent mind to the trial of the issues. A further concern is that the mixing of two roles seen as distinct generates confusion about the judicial role in the public mind, and risks greater descent into controversy. Ultimately, the success of the system of civil dispute adjudication relies on the willingness of the parties to put their trust in the courts and to accept its decision whether favourable or not. Civil disputes, although possibly devoid of the impact of criminal prosecutions, are not without emotion, bitterness and publicity, and in many cases it is a remarkable achievement that litigants accept the outcome of adjudication. If the perception of independence is as significant as actual independence, it may be important that the courts remain aloof of matters of fact delineation that ultimately concern the parties, and maintain clear role definition.

A further preoccupation revolves around the role that adjudication plays in normative development. Here too there is a considerable difference between civil law and common law jurisdictions. The courts in, for instance, Australia, have an inherent power to fashion law with the binding force of precedent. Not all law is derived from statutes: the courts thus have a normative function in that they effectively pronounce rules of conduct. This the courts in civil law jurisdictions do not do, or at least do not do as effectively or as openly (it is however true to say

22 Similar issues arise in the context of the reform of criminal procedure: some commentators have advocated the introduction of a *juge d'instruction* in line with the civilian model.

ADVERSARIAL SYSTEMS AND ADVERSARIAL MINDSETS:
DO WE NEED EITHER?

that the judgements of higher courts in civil law jurisdictions have much persuasive force and therefore also indirectly contribute to the setting of prospective rules). It is an important function of adjudication in common law jurisdictions, and leads to an effective requirement for a sufficient and sufficiently varied spread of cases before adjudicative bodies (normative sufficiency), in a manner that is not required in the civil law world.

This obviously affects the question of appropriate reforms to the system of civil litigation, and the position of relative importance that it must maintain in relation to alternative dispute resolution fora. From this perspective, not only must adjudication remain as affordable and as open to all as possible, it must not be slanted towards certain categories of disputes or disputes involving certain categories of litigants. The adjudicative system must remain sufficiently flexible and multi-faceted to accommodate all kinds of litigants and all kinds of disputes. To achieve this result, for instance, rather than granting courts a managerial role in all cases, it may be appropriate to grant them such a role in certain categories of cases only, or for certain categories of litigants. Why put the means of the state at the disposal of litigants who may not appreciate the interference and do not need the support in terms of levelling the playing field between litigants with markedly unequal resources?.An interesting question that has arisen more and more in the recent past is whether there should be special powers in the court in a case where a non-legally qualified litigant appears in person against a legally represented adversary²³.

Judicial independence and the rule of law (access to one's rights), and normative sufficiency are important factors in assessing the importance of the adversarial model of dispute resolution. Adjudication plays a broader role in the common law system, than simply resolving disputes between parties. Arguably that role is intimately linked to adversarial processes and attitudes.

A further important point of distinction is that orality and visibility play a very important role in the common law world. It may be that the importance of those two factors is in fact far smaller in civil trials than in criminal matters, where the public nature of the trial and a vigorous defence are undoubtedly more critical.

Yet the importance of the oral tradition and the openness even of the civil trial can not be discounted entirely. If not for the public in general, it is often important for litigants to witness the open resolution of their disputes, in a manner that in the civil law systems is virtually unknown.

The adversarial nature of the common law approach seems to lend itself more to developing aggressively independent attitudes in lawyers, not leaving

23 See eg Dewar, Smith, Banks, 'Litigants in person in the Family Court of Australia', A report to the Family Court of Australia (Research Report No 20, 2000).

investigation and questioning to the state. The advocate's role in the civil law systems is more passive: to submit written submissions and supervise the case. The adversarial system with the continuous trial as its great ideal, is undoubtedly more confrontational and more oral.

Conclusion: Legal Studies and Procedural Reform

Adoption of civil law models would result in different skills being required and developed, at least for some parts of the profession, and possibly in old skills being lost. In terms of more technical roles and skills of practitioners, a less adversarial system would thus affect the traditional skills required. Oral skills, skills such as cross-examination, would diminish in importance. Early advices on evidence or on prospects would presumably also become less important, since such matters would be addressed in early appearances before judges, rather than in communications between client and practitioner, or solicitor and barrister. The loss of skills of oral confrontation and vigorous questioning of evidence or perceived truth, may have a profound effect. In a sense it represents the great ideal of a system of law, and the visible pursuit of truth and justice. Ultimately it contributes to the independence of the legal profession and of the judiciary.

Evaluating the evolving attitudes and skills of lawyers is a process that is inextricably linked to a reassessment of the whole system of adversarial adjudication. That particular system naturally needs to be evaluated on the basis of narrow cost-benefit analysis, or the efficient resolution of private disputes. But comparative analysis highlights how much more broadly significant adversarial adjudication is even in a modern common law system. The possible importation of inquisitorial elements into a common law system must be considered against this background and the broader legal culture and tradition.

In terms of legal education, the set of skills, attitudes and abilities that we invest law graduates with modifies over time. It changes in line with evolving attitude towards various aspects of the legal system. In assessing the extent to which legal education should continue to adopt and instil adversarial attitudes and skills, depends on a continuous and broad evaluation of the importance of adversarialism in common law systems.