

Adversarial vs. Inquisitorial: A Comparative Analysis of Criminal Justice in the U.S and Italy

The following paper is a comparative analysis between the adversarial system in the United States versus the inquisitorial system in Italy with the purpose of; understanding the differences and origins of these systems, how they operate, the strengths and weaknesses of each and to reflect on whether the adversarial system as practiced in the United States is fair and balanced and whether it should be changed.

The adversarial system, also referred to as the accusatorial system, refers to a legal system in which two opposing sides - the defense and the prosecution engage in fair fight to prove their side. Both parties put forth evidence and the defense aims to absolve the defendant of guilt while the prosecution aims to prove the defendant's guilt beyond reasonable doubt. In this system, the judge acts as a neutral referee whose purpose is to ensure the trial remains fair by ensuring everyone's legal rights are protected. Alternatively, the inquisitorial system is a legal system that requires the judge to have a more active role in the trial by examining evidence and asking questions to both the defendant and witnesses.

As described in the *Origins of Adversary Criminal Trial in America* by Carlton F.W. Larson (2023, p. 16), the adversarial criminal justice system in the United States originated with the influence of seventeenth century English common law and went into practice in the eighteenth century, developing throughout the nineteenth century. Some legal researchers and authors, such as Randolph N. Jonakait, argue that the origins of the adversarial process in the United States can be traced back even earlier and, to some extent, can be separated from the influences of English common law. In *The Rise of The American Adversary System: America Before England* (2009), Jonakait states, "Early Americans rejected the English common law restrictions on defense lawyers and instead widely guaranteed the right to counsel" (Jonakait, 2009, p. 323) along with similar corroborative arguments. Nonetheless, it is widely accepted that the adversarial system in the United States developed during the from the eighteenth century onward. By the end of the 18th century, several distinct features

of the adversarial system were established such as the right to counsel established in all states, 6th Amendment's federal protection of the right to jury trial and the 5th Amendment's right to protections against self-incrimination (Larson, 2023, p. 32). This system in practice continued to evolve as the defense gained more influence in the courts.

The historical development of the inquisitorial system and the principles of criminal law in Italy are deeply rooted in European history and tradition, with the most prominent influences originating from Roman law, the French Enlightenment as well as the French Revolution and Napoleonic Code (Marongiu P. & Biddau M., (1993), p. 3). The historical development of the legal system was marked by the differentiation of public and private interests as Roman law initially lacked such a differentiation. With the collapse of the Roman Empire, an accusatorial system influenced by Germanic origins emerged in Italy. However, due to Canon law, the inquisitorial model prevailed throughout the Middle Ages (Illuminati, 2009, p. 301). During the thirteenth and fourteenth centuries, the accusatorial process was common in Italy. However, as crime increased, the inquisitorial process became the dominant system due to the application of the *motu proprio* principle—Latin for “on his own impulse”, which allowed official actions to be taken without the formal approval from another party. A shift to such a system was well-suited considering the everchanging political climate of Italy during this period (Illuminati, 2009, p. 302). After centuries of the inquisitorial process dominating Europe's legal systems, the French Revolution, influenced by the Enlightenment, marked an attempt to introduce the adversarial system with reference to the English model, prioritizing citizen protection from the state. Ultimately, this attempted change in the legal system was short-lived as Napoleon came into power and reaffirmed an inquisitorial system in the proceedings of criminal law in 1808 (Illuminati, 2009, p. 304), which spread across Europe. Approximately a hundred years later, the fascist Italian government did not see the need to stray far from the model as “it met the needs of the regime perfectly” (Illuminati, 2009, p. 306).

Italy today follows the Italian Penal Code established by Royal Decree in 1930, which largely reflects an inquisitorial system. The most prominent attempted amendment was the 1988 Code of Criminal Procedure which aimed to reform the system once again adapting elements of an Anglo-American adversarial system. Ultimately, Italy's system remains

largely inquisitorial having moved away from the Anglo-American system, which was conceptually foreign to Europe (Illuminati, 2009, p. 316).

The main differences between the adversarial system and the inquisitorial system can be seen in the nature of how trials are conducted and the way in which evidence is handled, particularly in terms of who presents and evaluates the evidence. In an adversarial system, the conduct of criminal trials is confrontational, with two clear sides – the defense and the prosecution – engaging in fair fight in order to win their side. Moreover, the conduct of criminal trials in the U.S and other countries who follow this model, are characterised by oral argumentation, such as in court hearings, and motion. In contrast, the inquisitorial system in Italy relies on written documentation and places greater emphasis on hard evidence. And while cross examination exists both in the criminal courts of the United States and Italy, the nature of cross examination in the U.S takes place in a more confrontational back and forth manner. In contrast, it is more judicially controlled in Italian courts as described in the *Italian Code of Criminal Procedure* (1989).

In terms of evidence, in an adversarial system, the two opposing parties gather and present their evidence independently, while the judge and the jury play the role of impartial third parties. The judge explains the law relevant to the criminal case and the jury must reach a unanimous verdict, meaning that all must agree on the guilt or innocence of the defendant by assessing the evidence of the case. Ultimately, based on the jury's verdict, the judge formally announces the verdict to the court and pronounces the defendant guilty or not guilty. If the defendant is determined to be guilty, the judge then announces the imposed sentence. Alternatively, in Italy's criminal court it is not an independent jury as seen in the U.S courts that decides the verdict, but the judge and/or multiple professional judges for more serious crimes. Additionally, Italian criminal courts use lay judges, which are ordinary citizens that assist the judge in proceedings, serving a similar purpose that the jury in U.S courts does, however Italian lay judges and U.S jurors differ in their requirements as well as when they are used. An example of such requirements for Italian lay judges is outlined in "Juries, Lay Judges, and Trials", which states that they "must be Italian citizens of 'good moral conduct', between the ages of 30 and 65 years, with at least a high school diploma." (Goldbach & Hans, 2014, p. 8). Additionally, while in the U.S the defendant has the 6th Amendment Constitutional right to jury trial – meaning all criminal cases could go to jury

trial unless that decision is waived in appropriate circumstances—Italian courts bring in lay judges only in cases of severe crimes.

The advantages and limitations of the two models in criminal court will be assessed in terms of the following variables: 1) the effectiveness of each system, 2) the protection of the rights of defense against the power of the state. In the adversarial system, although the jury provides independent judgement, if the jury fails to reach a unanimous verdict, the case may have to be retried, which takes up more time and resources, reducing the effectiveness of the system in reaching justice in a timely manner.

Ultimately, the judges, not the lawyers, control the trial in the Italian criminal courts. A limitation of the inquisitorial system is that there is more room for an abuse of power by the state as the system allocates greater power to the government due to the involvement of the judge. The judge's bias can directly affect the verdict and sentence, which differs from how the U.S has the jury and judge as more impartial players, aiming to remove that layer of bias.

The adversarial justice system as practiced in the United States has its advantages and disadvantages as aforementioned. The most significant strength of the system is in the balance of power in regard to the major players in the courtroom. First of all, the fact that the judges and jury are supposed to act as impartial third parties distributes the power in the way that neither the prosecution or defense hold excessive power over one another, but are ultimately evaluated by the third party. The jury and judge aim to determine the verdict with as little bias as possible. Additionally, this closely relates to the rights of the defendant. The U.S Constitution grants rights to the individual that aid with ensuring fairness in the criminal justice system. Every individual has the right to due process—to not “be deprived of life, liberty, or property without due process of law”—and the right against self-incrimination (U.S Const. amend. V, XIV). In all criminal prosecutions, the defendant has the right to trial (U.S Const. amend. VI). Thus, the adversarial system seems to be more congruent with the framework of a democratic society and fair legal system unlike inquisitorial systems which, as seen historically, were favored by more authoritarian regimes.

On the other hand, the system has its limitations. Firstly, with the existence of private and public defenders, there is a disparity in legal representation as the wealthy can afford top-tier lawyers who pride themselves on getting charges, even serious ones, dismissed. Alternatively, those who cannot afford private attorneys, will be appointed public defenders, which limits their choice of legal representation. The case of O.J Simpson can be taken as an example of how money can help buy a strong legal defense. The highly publicised trial of the former NFL star, who was facing charges of two counts of murder in the first-degree, ended in his acquittal despite an overwhelming amount of evidence against him, including DNA evidence at the crime scene. It is reported that O.J Simpson spent between \$3-\$6 million on his defense, which consisted of high-profile lawyers (Brownell, 2016). Nonetheless, in the court of public opinion, many believe he is guilty, which raises questions on the ethics of the legal system in which, in some cases, it appears one may evade consequences for serious crimes if they can afford the right attorney(s). This closely relates to the second limitation, which is that there is a significant emphasis on argumentation in an adversarial system. It can be reasoned that outcomes of trials strongly depend on the lawyers – if the same case were to be handled by different defense lawyers, one of them may be able to utilize a more effective legal strategy and craft more compelling and persuasive arguments and successfully counter the prosecution. Conclusively, while it is a significant challenge to reform such major systems such as the criminal justice system in the U.S, especially given existing strong historical roots in their development, change is also inevitable. The legal system faces its fair share of challenges and this reflects the politics of the nation.

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