

# COMMUNIQUÉ ON THE ROUNDTABLE ON THE ADVERSARY SYSTEM: A FAILED PROCESS?

## INTRODUCTION

The adversarial system of justice is the cornerstone of the Anglo-Saxon legal system. The system as adopted in Nigeria has several misgivings which have prompted questions as to how the system has fared and whether the system has failed or not. This is very vital at this point in Nigeria's history as the Roundtable discussed how the adversarial system has fared especially in view of the prevalence of corruption and criminality. Do we move towards a hybrid system that is a midway system between the adversarial method and the inquisitorial system? The Roundtable raised and addressed some fundamental defects in the adversarial system.

The Roundtable on **Adversary System: A Failed Process** was convened by the Nigerian Institute of Advanced Legal Studies, held on Tuesday, 22<sup>nd</sup> March 2011 at the Professor Ayo Ajomo Auditorium of the Institute at the University of Lagos Campus, Lagos.

In attendance were stakeholders and interested persons from a cross section of the society. Notably present were legal practitioners, the academia, the media and the general public.

### Perspectives for the Roundtable included:

1. An Overview of the Adversarial Process
2. Advantages and Disadvantages of the Adversarial System in Civil Disputes
3. Popular Culture and the Adversarial Process
4. Adversarial versus Inquisitorial Legal Systems
5. Squaring Victims Rights and the Adversary System

## OBSERVATIONS

### The Roundtable observed as follows:

1. An adversarial system is where the role of the court is primarily that of an impartial referee between the prosecution and the defence
2. Under the adversarial system, two or more opposing parties gather evidence and present the evidence, and their arguments, to a judge or jury.
3. Judges decide, only when called upon by counsel rather than of their own motion, on admissibility of evidence; costs; and procedural matters
4. The adversarial system as practiced in Nigeria is an offshoot of the Common Law and by implication the inquisitorial system is of the Civil law
5. Inherent in the adversarial system is the accusatorial procedure which is a system of criminal justice in which conclusions as to liability are reached by the process of prosecution and defence
6. The accusatorial system is the cornerstone of the Anglo-Saxon system of justice where the accused is presumed innocent until proven guilty
7. It is the duty of a party to litigation to prove a fact or facts in issue
8. Generally, the burden of proof falls upon the party who substantially asserts the truth of a particular fact
9. The inquisitorial procedure on the other hand is a system of criminal justice in force in some European countries but not in England

10. The inquisitorial system applies to questions of (criminal) procedure as opposed to questions of substantive law; that is, it determines how criminal enquiries and trials are conducted
11. In the inquisitorial system, the judge is not a passive recipient of information. Rather, the judge is primarily responsible for supervising the gathering of the evidence necessary to resolve the case. He or she actively steers the search for evidence and questions the witnesses, including the respondent or defendant
12. The inquisitorial system was first developed by the Catholic Church during the medieval period. The ecclesiastical courts in thirteenth-century England adopted the method of adjudication
13. The inquisitorial system flourished in England into the sixteenth century, when it became infamous, England gradually moved toward an adversarial system
14. In the inquisitorial system the court or a part of the court is actively involved in investigating the facts of the case
15. The inquisitorial system is now more widely used than the adversarial system. Some countries, such as Italy, use a blend of adversarial and inquisitorial elements in their court system
16. The distinction between an adversarial and inquisitorial system is theoretically unrelated to the distinction between civil and common law systems. Many jurisdictions adopt a blend of both. E.g Pre-Trial proceedings under Lagos State High Court Rules
17. Countries using common law, including the United States, may use an inquisitorial system for summary hearings in the case of misdemeanours such as minor traffic violations
18. In some jurisdictions, particularly in juvenile proceedings the trial judge may participate in the fact-finding inquiry by questioning witnesses even in adversarial proceedings
19. In France, generally the office of the examining or investigating judge (*juge d'instruction*) conducts preliminary investigation or hearings into all or certain crimes
20. As members of the judiciary, the investigating judges are independent and outside the province of the executive branch, and in many jurisdictions separate from the Office of Public Prosecutions which is supervised by the Minister of Justice
21. There are variations in existing inquisitorial systems
22. In France, prosecutors under Ministry of Justice working with police and examining judges are used only for severe crimes, e.g., murder and rape, as well as for moderate crimes, such as embezzlement, misuse of public funds, and corruption, when the case has a certain complexity
23. In Italy, prosecutors as part of the judiciary, wield coercive interrogatory powers and control investigations by the police. They must file an indictment with the trial court if there is sufficient evidence and are not at liberty to discontinue an investigation
24. The goal of both the adversarial system and the inquisitorial system is to find the truth
25. The adversarial system encourages competition and individual rights whereas the inquisitorial system places the rights of the accused secondary to the search for truth
26. The most striking differences between the two systems can be found in criminal trials
27. Privilege against self-incrimination, presumption of innocence and the burden of proof is reflected in most inquisitorial systems as a criminal defendant does not have to answer questions about the crime itself but may be required to answer all other questions at trial
28. These other questions concern the defendant's history and would be considered irrelevant and inadmissible in an adversarial system
29. Cross examination or law on perjury does not play any role in the inquisitorial system as the defendant's statement is usually procured unsworn
30. In an adversarial system, the defendant is not required to testify and is not entitled to a complete examination of the government's case

31. Since a case will not be instituted against a defendant unless there is evidence indicating guilt, the presumption of innocence – so fundamental in the adversarial system - is of little significance in the inquisitorial system
32. There are also variations in existing adversarial systems
33. In the United Kingdom, the court is permitted to make inferences on the accused failure to face cross-examination or to answer a particular question
34. In the United States, Fifth Amendment has been interpreted to prohibit a jury from drawing a negative inference based on the defendant's invocation of his right not to testify, and the jury must be so instructed if the defendant requests
35. In many inquisitorial systems the concept of mandatory prosecution generally reduces the level of political interference in prosecutions
36. In the French system, the prosecutor exercises wide discretion in referring a case to the investigating judge; in any case only few matters are ever referred. However, once a case is referred it can only be stopped with leave of the judge
37. There is no agreement as to which system has the most advantages
38. Proponents of the adversarial system claim it is fairer and less prone to abuse than the inquisitorial approach, because it allows less room for the state to be biased against the defendant
39. They argue that the system also allows most private litigants to settle their disputes in an amicable manner through discovery and pre-trial settlements in which non-contested facts are agreed upon and not dealt with during the trial process
40. Others argue that the inquisitorial court systems is overly institutionalized and removed from the average citizen
41. Proponents of inquisitorial justice dispute these points. They point out that most cases in adversarial systems are actually resolved by plea bargain and settlement
42. In addition, proponents of inquisitorial systems argue that the plea bargain system causes the participants within the system to act in perverse ways, in that it encourages prosecutors to bring charges far in excess of what is warranted and defendants to plead guilty even when they believe that they are not
43. Proponents of inquisitorial systems also argue that the power of the judge is limited by the use of lay assessors and that a panel of judges may not necessarily be more biased than a jury
44. The adversarial system has also been attacked for failing to accurately resolve complex technical issue such as science, technology, or tax or accounting regulation.
45. In the adversarial system, juries encounter such complex technical cases for the first time. This would lead to unjust outcomes for one or both of the litigating parties due to the lack of understanding of the evidence presented
46. In the inquisitorial system, the judge, though not an expert in each technical subject, would have gone through similar tax, forensic, or accounting related issues countless times, and is thus unlikely to be confused or manipulated
47. Judges in Nigeria have the power to deal with both issues of law and fact
48. In Nigeria, it appears that the adversary system is aiding injustice instead of justice
49. There is something fundamentally wrong with the adversary system. It has not entirely failed but has generated several questions that require answers
50. As far back as 30 years ago, it had been acknowledged that the adversarial system has not served its purpose
51. Without doubt, it is quite manifest that the adversarial system of litigation can no longer sustain the justice delivery process as the only access to justice
52. Legal scholars agree that the litigation process is grossly inadequate to serve as the sole dispute resolution mechanism in a developing society

53. A lot of disaffection has been generated by the monopolistic hold of litigation in the administration of justice in common law jurisdictions. They range from the congestion of the court dockets, inordinate delays occasioned by the inflexible technical and cumbersome procedural system of litigation coupled with the unencumbered access by litigants from the court of first instance to the Supreme Court on the flimsiest and frivolous applications which may be totally unrelated to the substantive issues before the court
54. Judges are often helpless in such situations, watching helplessly in deference to the hallowed principle of fair hearing and the antiquated aphorism that "a Judge must not descend into the arena," the resultant effect is that the life spans of cases are unduly elongated
55. By virtue of our Commonwealth heritage of the Common Law, received English Law and its accompanying adversarial system of litigation, the Nigerian judiciary and invariably other Common Law jurisdictions have been faced with or are facing similar problems arising from our dependence on these inherited systems
56. The cradle of the Common Law practice and adversarial system has not been insulated from the malaise inflicting the administration of justice system, as cases take on average of 168 and 189 weeks to progress from institution to trial
57. The multi-door court system was conceptualised in the United States as a judicial panacea to overhaul the justice process and to ameliorate the problems in the traditional court system
58. Frontloading is a good faith effort to assist the adversarial system but has its own challenges
59. India has departed from the adversary system and appoints commissioners for the purpose of investigating facts with a view to gathering material data bearing upon the issues involved in a case
60. When the report of the commission is filed copies are made available to both sides of the dispute. Then on the basis of the report which is prima facie evidence and the affidavits the court decides the case and gives relief
61. There is no uniformity in the award of damages in human rights cases in Nigeria
62. Challenges to victim's rights in adversary system include poverty, ignorance, justiciability of social and economic rights, conservative judges and long hand recording of proceedings

## RECOMMENDATION

1. There is need to introduce the jury system as in most Common Law systems. This encourages natural justice as people of your own status/background sit over you in judgement. The concept of justice is too important to be left in the hand of a judge sitting alone
2. Non-lawyers should be allowed to play a fundamental role because of the level of allegation of corruption. A judge working with a non-lawyer may find it difficult to compromise
3. Advocacy should be cut off in trials because advocacy and brief writing cannot be reconciled
4. The concept of judicial precedent should be minimised because it stalls the imaginativeness, initiative and thought of the judges. This is not the case in the inquisitorial system
5. A judge should 'descend into the arena' where it is necessary in order to clarify issues
6. The role of the judge as far as facts are concerned should be whittled down. Provisions of the Evidence Act should be revisited
7. A review of the Constitution, Criminal Procedure Act and Civil Procedure Act should be undertaken
8. Oath-taking has served little purpose and should be discarded
9. Pre-trial processes such as discoveries and interrogatories should be reduced to save time
10. The presumption of innocence should be retained only in capital offences such as cases of murder but eliminated in other cases
11. There must be a review of the burden of proof principle
12. The concept of justice that is amorphous should be discouraged
13. Nigeria should employ the new method of investigating facts adopted in India

14. The Nigerian Courts should introduce the epistolary jurisdiction of the High Court as in the case of India. This is the process whereby by a letter addressed to the judge of the high court, an action alleging violation of human rights has lawfully commenced
15. Human rights litigation should be treated as an emergency and given priority in deserving cases
16. In deserving human rights cases, the court should award exemplary damages to reflect the extent of damage done to the applicant
17. The Human Rights Commission should assist financially other NGOs that have take up violations of rights cases before the courts
18. The new rules have watered down the harsh application of the locus standi rules and so more public spirited associations should prosecute violations of human rights on behalf of the poor
19. Jobs should be created by the federal, state and local governments to consciously deal with the issue of unemployment
20. The Inherited adversary system should be redefined to meet Nigerian needs and realities. The delays inherent in the system must be removed
21. There must be wholesale reform of the system not piecemeal reform
22. Whatever system is practiced, it is important that justice should not only be done, but it must be seen that the guilty person is adequately punished