

## Adversaries and Inquisitors: From Secret Court to Star Chamber?

With the Family Justice System under review and the present government's realisation that the current court process creates more problems than it solves (in relation to both divorce and children), a new power struggle is emerging as cutting edge family lawyers catch on to the implicit possibility of replacing the old adversarial system with an inquisitorial one.<sup>1</sup>

But what is an Inquisitorial system? The Free Dictionary describes it in part, as "a method of legal practice in which the judge endeavours to discover facts whilst simultaneously representing the interests of the state in a trial"<sup>2</sup>. The focus then, is on the judge: under the inquisitorial model his obligations are far greater and he is no longer a passive arbiter of proceedings but an active member of the fact finding process.

Quite what an inquisitorial system might look like for family matters remains unclear, but it is by no means a new phenomenon – the system itself originated here in Britain and is alive and well throughout Europe, Africa, South America and Asia and has more recently started to tip-toe its way back into our law as can be seen in Lord Woolf's Civil Procedure Rules, where case management systems have been put into place giving the presiding judge control by removing that control from the opposing lawyers.

In light of the recent seismic shifts in family policy and the proposed radical overhaul of the family courts sanctioned by Justice Secretary, Jack Straw the Judiciary may now be gearing itself up to save certain corners of the legal profession by securing a more prominent place for family judges in the family law process. Lord Justice Munby, handing down a judgement in a recent family law case relating to ancillary relief<sup>3</sup>, took the opportunity to express the observation that the adversarial process was susceptible to wasting vast amounts of time and money in a way which was unnecessary and perhaps also compromised the pursuit of truth. Of even greater interest was Lord Justice Munby's next observation, namely that "the inner realities of a case are often much more apparent to the judge who watches the battle played out before him than to those engaged in the fray"<sup>4</sup>.

Yet, the adversarial and inquisitorial models are not mutually exclusive (as both systems essentially engage the same parties and may share the same procedural rules to varying extents) and Lord Justice Munby's overt statement, made more powerful by its reaching presence in a publicly available report may signal the start of a move by the judiciary to push for greater input in family law cases; input that already exists but that is to date, nonetheless, relatively limited. Under an inquisitorial system, judges may have the power not just to command control of a case but to order reports and further investigations. There is of course scope in such Orders for these hearings to become just as drawn out as those in the current adversarial process but there are positive differences too.

The judge in an inquisitorial system is able to lead the questioning of witnesses which in turn reduces the levels of conflict between the two parties as he is, in effect, a neutral party gathering

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<sup>1</sup> John Bolch, Family Lore Article "The Consequences of the Adversarial Process" (23<sup>rd</sup> February 2010)

<sup>2</sup> The Free Dictionary Online "Inquisitorial System"

<sup>3</sup> H v H [2010] EWHC 158 (Fam) (2<sup>nd</sup> February, 2010)

<sup>4</sup> H v H [2010] EWHC 158 (Fam) Page 2, paragraph 3. (2<sup>nd</sup> February, 2010)

evidence without the often futile and lengthy banter of opposing lawyers in relation to evidence. Removing the competitive nature of the adversarial system (which places the focus on the lawyers in court and arguably grossly detracts from the pursuit of truth due to the lawyers' conflicts of interest present in a 'justice versus kudos' dilemma), would be a welcome change to the way the system functions at the moment but with the onus of fact gathering and questioning placed squarely on the shoulders of our judges in an inquisitorial system the question we may need to ask is this: are family law judges really equipped to take on such a challenge and would greater judicial input under such a model be better for families?

On one hand, under such a system, the judge would be able to ask the sorts of questions that are generally not allowed to be asked at present; questions which relate to the parties' history, for instance. This would be a positive move, as the details in family law cases are often where the heart of the matter lies. Yet in many respects, the inquisitorial model shares many of the faults which the adversarial system suffers with and judicial bias is unfortunately one of them. Regardless of which system we use, judging by appearance, as an example would continue to be a staple in the art of court culture. We already know from existing research that a judge's personal proclivities play a far greater role in judging than does his or her knowledge gained from law school or years of tenure serving on the bench<sup>5</sup>. Furthermore, we cannot eliminate intuition from judicial decision making not least of all because it is an integral part of how the human brain works. Yet, as with all things, intuition is neither good nor bad, it is simply a question of how it is used and this is perhaps where the difficulties set in.

It would be natural to assume that our judges have superior deliberating powers to the ordinary man or woman, this is after all what we expect from our justice providers, but the truth is quite different. Just like us, judges make most of their analyses intuitively rather than deliberately; that is to say, judges tend to go on hunches rather than considered and lengthy reflection. And no wonder; with so little time to make decisions and with such heavy workloads, time is a luxury they do not have. Under the inquisitorial process which aims to offer an "expedited form of justice"<sup>6</sup> this problem would only be made worse and where the issues in the main, focus not on law but on the human condition, having judges preside over largely psychological factors must be considered irrational unless we train our judges in psychology and give them the insight they need to bolster their intuition on such matters as how the court process affects individuals, why first impressions may be incorrect due to one's own environmental programming and how family breakdown contributes to communication breakdown.

Unwittingly, Lord Justice Munby, in *H v H*, goes on to illustrate the very reason why an increase in judicial intervention has its pitfalls by referring to "the priceless advantage of hindsight" in relation to watching submissions being made by opposing counsel in hearings. Psychologists continue to warn us about the "hindsight bias" which is explained as "the tendency to overestimate the predictability of past events"<sup>7</sup>. The research in this area of judicial decision making shows clearly that learned outcomes from past experiences of things like hearings influence future assessments in

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<sup>5</sup> Harvard University, John F Kennedy School of Government "Is there a psychology of judging?" October 2007, Frederick Schauer (page 2)

<sup>6</sup> The Free Dictionary online "Inquisitorial System"

<sup>7</sup> "For Those Condemned To Study The Past: Heuristics and Biases in Hindsight" 1975 Baruch Fischhoff

the same context<sup>8</sup>. Studies do show that judges are sometimes capable of resisting this kind of bias<sup>9</sup> but the fact still remains that our judges would need to be trained by those at the cutting edge of psychiatry to make sure they use their experience to deliberate effectively; and that costs money and time the system simply does not have.

Another flaw in the inquisitorial system, as with the adversarial system, is that its roots historically are enshrined in criminal law. Many of the current judges in our family courts hail from the criminal law sector and this has contributed to fundamental misunderstandings about how to deal with families going through the family justice system; the element of punishment is one of them. How much longer we must persist with such outdated notions of retribution is not known but one thing is clear: families in crisis need support not sanctions. They also don't want to feel more anxious or distraught than they already are and the looming and long arm of the law tends to heighten such emotions in ways that are detrimental to families. The system is not dealing with hardened criminals; rather, it is playing host to delicate and vulnerable family structures and as the system stands, has no place offering its brand of support.

And the re-creation of a process which was founded by the Catholic Church during the medieval period may well not sit comfortably with our more secular society in today's Britain. The now infamous Star Chamber, an inquisitorial court itself, made famous by King Henry VIII's less than civil approach to its witnesses was the reason why Britain moved towards the adversarial process in the first instance and whilst many countries have adopted the inquisitorial process for its criminal cases and continue to use and evolve them, very few have been set up with a view to dealing with civil matters. There is then, a real risk that such a system may also fall foul of the move towards transparency not least of all because it is mainly a criminal law construct and occupies itself with the question of removing juries and allowing the judge ultimate control over a case, which could also be susceptible to miscarriages of justice.

Provocative though it may be, there is no system that is ultimately the right system; much depends on who is manning that system and what kind of culture that system operates under. And to my mind, that is the acid test. Will a change of system really bring about a change in the State of mind? The answer must be no, unless the fundamental flaws in the system are addressed and are allowed to be the focus upon which new foundations are built. Our first step surely, must be to accept that in matters relating to family, before any groundwork can be done and any important decisions made, partners and parents must be given the opportunity to re-group, heal and balance. Under our current system, which leans heavily in favour of legal intervention as the first port of call, none of this will be possible and services such as mediation, with looming legal actions in the background, are unlikely to be effective with both partners remaining guarded for fear of what's to come.

In reality, there is very little difference at the end of the day between the adversarial model and the inquisitorial one. Yet we can make a real difference if we start to try and understand how these processes affect families and why they should not come to them unless absolutely necessary. And when they do, they must come always, in a position of strength.

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<sup>8</sup> "Blinking on the Bench" Cornell Law review, Volume 93 (page 125)

<sup>9</sup> As above