**How inquisitorial is different do adversarial, and an example of a non-common law country.**

Adversarial trail: The adversarial system is a legal system based on the principle that justice is best served by allowing competing parties to present their arguments to an impartial third person for adjudication.

Inquisitorial trial: In the inquisitorial trial the judge administers the pre-trial investigation, examines the evidence, determines the facts of the case, and sets the penalty or sanction. Civil law countries such as France and Germany use this approach.

What is meant by codified: Codification is the systematic collection and recording of laws and rules into written codes. Civil law codes are equivalent to statutes in the adversarial system. Codification of the law means transparency. It is easy for lawyers and citizens to know the law because it is published in a source that is easily accessible to everyone.

Inquisitorial procedure: The inquisitorial system is common in countries that base their legal systems on civil or roman law. Under the inquisitorial procedure, the pretrial hearing for bringing a possible indictment is usually under the control of a judge whose responsibilities include the investigation of all aspects of the case, whether favourable or unfavourable to either the prosecution or defence. Witnesses are heard, and the accused (who is represented by counsel) may also be heard. However, he is not required to speak, and if he does, he isn’t put under oath. In France, the prosecution presents its recommendations only at the end of the hearing. The investigating magistrate in France will only recommend a trial only if he is sure that there is sufficient evidence of guilt. The entire dossier of the pretrial proceedings is made available to the defence. At the trial, the judge, assuming a direct role, conducts examination of witnesses, often basing his questions on the material in the dossier. Neither the prosecution nor the defence has the right to cross-examine, but they can present effective summations. The jury does not consult the dossier, instead relying on the facts brought out in trial.

Distinguishing features.

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|  | Inquisitorial | Adversarial |
| Seeks truth? | Yes. | No. |
| Conceals evidence? | No. | Yes. |
| In charge of evidence? | Judges. | Lawyers. |
| Length if civil hearings. | About a day. | Months, years. |
| Innocent in prison. | Rare. | 1-5% |

**Processes of the French inquisitorial system:**

**Pretrial:**

Role of the Parquet: Office of the prosecution. Responsible for presenting legal cases at criminal trials against individuals suspected of breaking the law. In France specifically- public prosecutor’s office of the appellate court or the Supreme Court.

Role of the juge d’instruction: The judge responsible for conducting the investigative hearing that precedes a criminal trial. In this hearing the major evidence is gathered and presented. Witnesses are heard and depositions taken. If the judge Is not convinced there is sufficient evidence of guilt no trial will occur.

Role of the gendarmerie: They conduct criminal inquiries and have dedicated labs for forensics. They are the 2nd of 2 branches of law enforcement- the other is the National Police. Judges may choose either service for the investigation and can use the other if disappointed. Gendarmerie has tactical units, armoured and paratroop squads, and military force.

Rights of the accused:

* The police inform the accused of their rights orally and in writing.
* Right to inform a relative.
* Right to be examined by a doctor.
* Right to be assisted by a lawyer.
* Right to remain silent.
* Right to be informed of the allegation set against you.
* Right to interpretation.
* Presumption of innocence has improved since 2001- more limited right to silence.

Dossier: Ensemble of written documents and depositions which record the results of investigations into the crime made by police, prosecutor and juge d’instruction. Presiding judge is able to check the testimony of witnesses and the accused.

Types of cases heard in the Assize court:

* Criminal trial court.
* Original and appellate jurisdiction.
* Hear cases involving defendants accused of felonies.
* Only French court consisting of a jury trial.
* Serious crimes- murder, rape etc.
* Had the death penalty up until 1981.

How many trial judges are used in the Assize court: Cases are tried by a jury of 6 jurors. There’s a panel of 3 active judges. One judge is in charge, known as the president of the court. There’s 2 associate judges, known as Assesseurs.

Different roles of the judges:

* The president is similar to a presiding judge, but they’re assisted by assesseurs. They’re known as the head judge.
* The assesseurs are judges who sit in court with the head judge (President) who hears the parties in court and participate in the deliberation to reach a verdict.

Key rules of evidence:

* All evidence is shared to the defence- no element of surprise.
* Judge has a wide range of power- may issue warrants allowing authorities to search the accused’s residence and seize necessary evidence.
* Evidence collected and witness testimonies are compiled into the dossier.
* Not as guarded against relevance, hearsay, opinion etc.

Parties involved in the trial stage & the ‘order’ the trial takes:

* The court will ask the accused a few questions on their status- identity, past criminal history- eg. Madame Steinheil was charged with murder of her mother and husband and had to deny that she had an affair 23 years prior.
* Court will summarise the charges against the accused.
* Court will question the accused on the facts- can remain silent.
* Witnesses are called and examined.
* Court will ask all parties- prosecution, defense, accused and victim if they have any more questions.
* Prosecution have a chance to recommend a punishment.
* All parties have a chance to ask to questions/discuss their side.
* Judges retire to decide verdict.

How witnesses give evidence during a trial:

* The judge and not lawyers interrogates the accused.
* The judge questions witnesses.
* The judge already has the dossier but checks the witness statements in the trial are accurate.
* Not examined and cross examined like in Australia.
* No strict rule about admissible or relevant evidence like in AUS, as long as it is somewhat relevant it can be included.

Who determines the verdict; how it is voted; acceptance of the verdict; & determining the sentence:

* Each charge against the accused is broken down for jury.
* Questions are put together regarding the culpability of the accused, the extenuating circumstances, excuse or justification and whether the accused understood the nature of the act.
* These questions form the jury’s verdict.
* Meet with the judges to determine the punishment.
* Voting is secret.
* Invalid votes are in favour of the defendant.

Burden and standard of proof: The burden of proving the accused guilt is on the prosecution. They must have affirmative evidence to justify conviction. In French law, evidence must induce a moral certainty in the minds of the jury that the accused is guilty. The decision of guilt must be reached upon the basis of evidence presented in open court.

French case example:

* Charlie Hebdo
* January 2015 attacks on the magazine Charlie Hebdo, police officers and a supermarket in Paris
* 17 people killed over 3 days
* Led to a major manhunt
* Discovered the 2 suspects who exchanged gunfire with police
* 16 December 2020 14 people who were accomplices were convicted- charged with providing some sort of support
* 3 of these accomplices were not yet found and so were tried in absentia

The process of Charlie Hebdo case:

* The police (gendarmerie) would be responsible for making arrests and conducting some of the investigation at the will of the juge d’instruction.
* The juge d’instruction will then compile the dossier of evidence and witness statements.
* Evidence in this trial could include the CCTV footage of the attacks.
* Witness statements could include bystanders, victims and a woman and child who worked at Charlie Hebdo who were forced to put in the code to the building.

Trial:

* Once the juge d’instruction has completed their pre-trial investigation, they decide if there is sufficient evidence to go to trial
* In this case, on 2 September 2020, 14 people went on trial in Paris at the Assize court
* Charged with providing logistical support and procuring weapons

Verdict: The judges and jury would then retire to discuss the verdict and sentencing. The defendants were found guilty on different charges. Verdicts announced by Regis de Jorna the president judge. Hearing lasted 54 days- put 11 people in the dock and tried 3 in their absence Some received a sentence of 30 years in prison.

**Strengths and weaknesses of Common Law System:**

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| Feature. | Strengths. | Weaknesses. |
| The role of parties. | The parties are able to engage legal representation to present their case in the best possible light. | Party control can lead to high costs of legal representation. Therefore, the decisions are very dependant on skills of lawyers. |
| The role of the judge. | The judge is impartial and:   * Make sure that both parties are treated fairly. * Creates more confidence as they are an independent decision maker on matters of law. | The judge cannot offer the parties assistance. This may lead to a judges experience being wasted. |
| Burden of proof. | The party bringing the case has to prove the facts to the standard of proof required. | Parties will only seek to present evidence that is advantageous to their case. |
| Rules of evidence and procedure. | Rules of evidence and procedure make the process fair:   * Oral evidence helps reveal if the witness is sincere. * The process of examination-in-chief and cross-examination allows both parties to present their cases and test evidence of the other party. * All parties are treated alike. * Some types of evidence are not permitted to protect the parties and in the interests of justice.   The requirement that courts follow precedent means that similar cases are treated alike and this creates fairness in the legal system. | Problems could arise from the following:   * Witnesses may be intimidated and traumatised in court and may say something misleading. * Witnesses can only respond to questions and cannot tell their own stories in their own words. * Expert evidence could be unduly relied upon. * Not all evidence can be brought out.   Both parties can call their own expert witnesses, and this is likely to create confusion for the judge and jury.  Juror confusion resulting from conflicting expert evidence is often cited in juror research. |
| Legal representation. | Each party has a right to choose a legal representative. In this way, they choose someone they believe will present their case in the best light. | The adversarial system relies on both sides being equally represented so the truth can come out. |

**Strengths and weaknesses of the Non-Common Law system:**

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| Feature | Strengths | Weaknesses |
| The role of parties. | The cost of a criminal trial for all parties is mainly borne by the State. | The parties may feel at the mercy of the investigating judge rather than being in control of their own cases. |
| The role of the judge. | The investigating judge takes an active role in the investigation to find the truth.  The investigating judge and trial judge control the production of evidence and it is more likely that all the relevant evidence will be brought out. | Too much power in the hands of one individual (judge). The investigating judge and the senior judge at trial are involved in all aspects of the dispute and could e influenced by outside issues. The trial judge may be less impartial than in the adversarial system. However, the professional ethics of the judiciary in the non-common law system would require the judge to be impartial. |
| Burden of proof. | There is no formal burden on either party. It is truer to say that there is a shared burden in non-common law systems than in common law systems. |  |
| Rules of evidence and procedure. | The use of mainly written evidence reduces the length of trial. It may be truer to say that the trial is much quicker because all the parties know what is going to be discussed at trial, and so the trial goes straight to the crucial points.  Witnesses tell their stories uninterrupted by questions and are then questioned by the judge and each of the parties.  Witnesses are mostly called by the trial judge rather than the parties and are therefore likely to be less biased. | Character evidence and past criminal record history are always exposed and this could mean that biases are formed against the accused which could be outdated and inaccurate. Greater reliance on written evidence which denies the parties the same opportunity to test the evidence that is possible in the adversarial system. For example, each party is able to cross examine the evidence of witnesses and show any flaws in the statements made. |
| Legal representation | Less reliance on legal rep. |  |

**Comparison of common law and non-common law.**

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|  | Western Australian Adversarial System/Common Law system. | French Inquisitorial System/non-Common Law system. |
| Binding force of case/common law. | Previous decisions by higher courts are binding on lower courts. | There is little use of judicial precedent and judges are free to decide each case independently of previous decisions, by applying the relevant statutes. There is, in theory, therefore heavier reliance on comprehensive statutes/codes of law. |
| Investigation. | Criminal proceedings only contribute when a case is well-founded with reliable and admissible evidence. There must be a prima facie case, meaning a case for the accused to answer with evidence where a jury of trier of fact may conclude beyond reasonable doubt that the offence as been committed. Any matters proceeding in the supreme court’s jurisdiction are taken in the Magistrates court first. The accused has opportunity to ask for bail. A police prosecutor represents the state here. A lawyer from the Office of the Director of Public Prosecutions (ODPP) represents the state from this point onwards. The states record of evidence must be fully disclosed to the accused. Even evidence that may not be relied upon by the state must be disclosed, and this includes both incriminating evidence and evidence that is favourable to the accused. There is no requirement for the accused to disclose anything to the state, except in limit circumstances such as notice of alibi or provision of expert evidence. | The typical criminal proceeding is divided into 3 phases: the investigation phase, the investigating Judge phase, and the trial. In France in the investigation phase, the police under the control of the prosecutor collect evidence. The prosecutor instructs the police on how particular cases are to be handled and can set areas of priority for investigations. The prosecutor decides whether to press charges.  An investigating judge (juge d’instruction) takes control of the matter quickly for serious criminal offences such as those in jurisdiction of the Court of Assize. |
| The investigating judge phase. | There is no investigating judge phase. Independent evaluation of the evidence is collected during investigation is to be left to the trail.  After the State has disclosed its entire record of evidence (the brief) to the accused, the defence is given an appropriate amount of time to review the case and then the accused must plead guilty or not guilty. If the accused pleads guilty the matter proceeds to sentencing. If the accused pleads not guilty, the matter proceeds to trial. | The investigating judge phase is always conducted in writing. The investigation file is always open to both parties.  The police are now under control of the investigating judge. The investigating judge has powers that the police don't have. At this stage, the investigating judge would direct expert analysis from the Court, such as DNA analysis.  The court uses its own experts, however each party can seek expert analysis from non-court appointed experts. |
| The trial. | Parties in matter are the prosecution and the defence. The burden of proof is on the prosecution. The standard of proof is beyond reasonable doubt. The accused is presumed to be innocent until proven guilty. The prosecutor, acting on behalf of the State of WA, and the defence counsel, acting on behalf of the accused, offer their versions of events and argue their case before an impartial judge or jury. The defence is not required to present any evidence. The lawyers for each party are primarily responsible for introducing evidence and questioning witnesses. | The parties in matter are the prosecution, the accused and the victim are entitled to be a special party. The burden of proof, compared to the common law system, is shared. There is burden of production of evidence and burden of persuasion. The investigating judge and senior judge at trial have the burden of production of evidence: the responsibility for preparing the investigation file and for bringing out all the evidence in the investigation file and for bringing out all of the evidence in the investigation file at trial. The prosecution has the responsibility for persuading the judges and jurors that the accused is guilty and the defence aims to create doubt.  The standard of proof is inner conviction. The inner or moral certainty of the trier.  Innocent until guilty. |
| Role of the trial judge and counsel. | The judge ensures there is a fair hearing of the matter, ensures both parties follow the roles of the Court, settles legal argument between parties including the admissibility of evidence, summarises evidence as agreed by both parties and instructs the jury on matters of law.  If the accused is found or pleads guilty, the judge sentences the offender as per the penalties identified in the WA criminal code. The judge is guided by precedents when sentencing, and is assisted by submissions from both the prosecutor and defence council. The judge is often referred to as judge of law. | The trial judges are different to the investigating judge. Of the three judges, only the senior judge has access to the record of evidence prior to the trial, The other trial judges only hear whats said in court. The senior judge is required to direct the court room debate and to come to a final decision. The senior judge assumes the role of principal interrogator, of witnesses and the accused, and is under an obligation to take evidence until all of the relevant material has been submitted. The senior judge directs the court room debate and to come to a final decision. The senior judge assumes the role of principal interrogator of witnesses and the accused and is under an obligation to take evidence until all of the relevant material has been submitted. The senior judge carries out most of the examination of witnesses. The role of the three judges to ensure a fair trial, settle any legal argument and determine compensation. |