

## STRENGTHS AND WEAKNESSES OF ONE COMMON LAW SYSTEM AND ONE NON COMMON LAW SYSTEM STUDENT RESOURCE

Read the Strengths and Weaknesses Common Law and Non Common Law Systems tables below and mark each item with a tick or a cross. A tick indicates that you agree with that suggested strength or weakness and a cross indicates that you disagree with that suggested strength or weakness.

*The following tables reflect general strengths and weaknesses of the common law and non common law systems and add further comments specific to the strengths and weaknesses of the West Australian common law system and the French non common law system.*

### Strengths and Weaknesses of the Common Law System

	<b>Strengths</b>	<b>Weaknesses</b>
<b>The role of the parties</b>	The parties are able to engage legal representation to present their case in the best possible light. <sup>1</sup> <input type="checkbox"/>	Party control can lead to high costs of legal representation. <sup>2</sup> <input type="checkbox"/>  <i>The costs of legal representation and significant decline in the funding of Legal Aid, the Aboriginal Legal Services and Community Legal Centres makes this point very topical.</i>  Decisions are too dependent on the skills of lawyers involved. <sup>3</sup> <input type="checkbox"/>
<b>The role of the judge</b>	The judge is impartial and:	The judge cannot offer the parties assistance. <sup>5</sup> <input type="checkbox"/>

<sup>1</sup> Margaret Beazer, Michelle Humphreys and Lisa Filippin, *Justice and Outcomes 11e: Legal Studies for VCE Units 3 & 4* (23 July 2010) Oxford >[http://www.oup.com.au/titles/secondary/businesscommercelegal/legal\\_studies/victoria/9780195571028/Ch7.pdf](http://www.oup.com.au/titles/secondary/businesscommercelegal/legal_studies/victoria/9780195571028/Ch7.pdf)< 345.

<sup>2</sup> Ibid.

<sup>3</sup> John Wilmott, *Civics and Citizenship: an introduction to politics and law in Australia*, (Politics Law Publishing 2008) 200.

	<ul style="list-style-type: none"> <li>• makes sure that both parties are treated fairly; <input type="checkbox"/></li> <li>• creates more confidence as s/he is an independent decision maker on matters of law.<sup>4</sup> <input type="checkbox"/></li> </ul>	<p><b><i>This may lead to a judge's experience being wasted as s/he cannot provide assistance to either party.</i></b></p>
<b>Burden of proof</b>	<p>The party bringing the case has to prove the facts to the standard of proof required.<sup>6</sup> <input type="checkbox"/></p>	<p>Parties will only seek to present evidence that is advantageous to their case.<sup>7</sup> <input type="checkbox"/></p> <p><b><i>It is important to note that members of the legal profession have a duty to the court and must not mislead the court.</i></b></p>
<b>Rules of evidence and procedure</b>	<p>Rules of evidence and procedure make the process fair:</p> <ul style="list-style-type: none"> <li>• oral evidence helps reveal if the witness is sincere; <input type="checkbox"/></li> <li>• the process of examination-in-chief and cross-examination allows both parties to present their cases and test the evidence of the other party; <input type="checkbox"/></li> <li>• all parties are treated alike; and <input type="checkbox"/></li> <li>• some types of evidence are not permitted to protect the parties and in the interests of justice.<sup>8</sup> <input type="checkbox"/></li> </ul> <p>The requirement that courts follow precedent means that similar cases are treated alike and this creates fairness in the legal system.<sup>9</sup> <input type="checkbox"/></p>	<p>Problems could arise from the following:</p> <ul style="list-style-type: none"> <li>• witnesses may be intimidated and traumatized by appearing in court and may say something misleading; <input type="checkbox"/></li> <li>• witnesses can only respond to questions and cannot tell their own stories in their own words; <input type="checkbox"/></li> <li>• expert evidence could be unduly relied upon; and <input type="checkbox"/></li> <li>• not all evidence may be brought out.<sup>10</sup> <input type="checkbox"/></li> </ul> <p>Both parties can call their own expert witnesses and this is likely to create confusion for the judge and jury. <input type="checkbox"/></p> <p><b><i>Juror confusion resulting from conflicting expert evidence is often cited in juror research.</i></b></p>

<sup>5</sup> Above n 1.

<sup>4</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid. 340.

<sup>8</sup> Ibid. 345

<sup>9</sup> Above n 3. 200.

<sup>10</sup> Above n 1.

<b>Legal representation</b>	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. <sup>11</sup> <input type="checkbox"/>	The adversarial system relies on both sides being equally represented so the truth can come out. <sup>12</sup> <input type="checkbox"/>
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1. Identify what you think are the two main strengths of the common law system.

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2. Identify what you think are the two main weaknesses of the common law system.

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### Strengths and Weaknesses of the Non-Common Law System

	<b>Strengths</b>	<b>Weaknesses</b>
<b>The role of the parties</b>	The cost of a criminal trial for all parties is mainly borne by the State. <input type="checkbox"/>	The parties may feel at the mercy of the investigating judge rather than being in control of their own cases. <sup>13</sup> <input type="checkbox"/>

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Above n 1, 350.

<p><b>The role of the judge</b></p>	<p>The investigating judge takes an active role in the investigation to find the truth.<sup>14</sup> <input type="checkbox"/></p> <p>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.<sup>15</sup> <input type="checkbox"/></p>	<p>Too much power in the hands of one individual (judge). <input type="checkbox"/></p> <p>The investigating judge and the senior judge at trial are involved in all aspects of the dispute and could be influenced by outside issues. <input type="checkbox"/></p> <p>The trial judge may be less impartial than in the adversarial system. <input type="checkbox"/> However, the professional ethics of the judiciary in the non-common law system would require the judge to be impartial.<sup>16</sup></p> <p><b>Non common law practitioners and judges often strongly disagree with the assertion that "the trial judge may be less impartial than in the adversarial system". They note the judge is more involved, and is looking for the truth instead of only having to deal with evidence and sentencing, but note that more involved does not mean less impartial. Also impartiality is one of the core principles for a judge, mentioned in the French Constitution and in the European Convention for Human Rights.</b></p>
<p><b>Burden of proof</b></p>	<p>There is no formal burden on either party.<sup>17</sup> <input type="checkbox"/></p> <p><b><i>This element is strongly disputed by practitioners in non common law systems.</i></b></p>	

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid. 353.

	<p><b><i>It is truer to say that there is a shared burden in non common law systems in comparison to common law systems: A burden of production of evidence AND A burden of persuasion.</i></b></p> <p><b><i>For example:</i></b></p> <p><b><i>Burden of production of evidence: the investigating judge and senior judge at trial have this responsibility.</i></b></p> <p><b><i>Burden of persuasion: the prosecution has the responsibility to persuade the judges and jurors to the standard of proof that the accused is guilty and the defence aims to create doubt.</i></b></p> <p><b><i>In France, in the Court of Assize, the investigating judge is responsible for preparing the investigation file and the senior judge at trial is responsible for ensuring all of the relevant evidence has been submitted at trial. Hence the investigating judge and senior judge at trial have the burden of production of evidence (Note: both the prosecution and the defence have input to the contents of the investigation file). Whereas the prosecution has the burden of persuasion.</i></b></p>	
<p><b>Rules of evidence and procedure</b></p>	<p>The use of mainly written evidence reduces the length of trial. <input type="checkbox"/></p> <p><b><i>It may be truer to say that the trial is much quicker because all the parties know what</i></b></p>	<p>Character evidence and past criminal record are always exposed and this could mean that biases are formed against the accused which could be outdated and inaccurate. <input type="checkbox"/></p>

	<p><b><i>is going to be discussed at trial, and so the trial goes straight to the crucial points, and each party has the right to basically ask every question they want (even leading ones).</i></b></p> <p>Witnesses tell their story uninterrupted by questions and are then questioned by the judge and each of the parties. <input type="checkbox"/></p> <p>Witnesses are mostly called by the trial judge rather than the parties and are therefore likely to be less biased, e.g. an expert witness is mostly a court appointed expert.<sup>18</sup> <input type="checkbox"/></p> <p>The more relaxed rules concerning the admission of evidence also promotes speedier resolution of disputes and prevents parties to a dispute manipulating the rules of evidence to frustrate the search for the truth.<sup>19</sup> <input type="checkbox"/></p>	<p>Greater reliance on written evidence which denies the parties the same opportunity to test the evidence that is possible in the adversarial system, e.g. each party is able to cross-examine the evidence of witnesses and show any flaws in the statements made. <input type="checkbox"/></p> <p><b><i>Non common law practitioners and judges often strongly disagree with this assertion especially in judge and jury trials as all of the evidence must be put before up to 3 judges and 6 jurors, i.e. all evidence is presented orally.</i></b></p> <p>A court appointed expert in non common law systems may get it wrong.<sup>20</sup> <input type="checkbox"/></p>
<b>Legal representation</b>	There is less reliance on legal representation. <sup>21</sup> <input type="checkbox"/>	

3. Identify what you think are the two main strengths of the non common law system.

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<sup>18</sup> Ibid. 350.

<sup>19</sup> Above n 3, 442.

<sup>20</sup> Above n 1, 350.

<sup>21</sup> Ibid.

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4. Identify what you think are the two main weaknesses of the non common law system.

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