

Subject: **Law**

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Paper : **Judicial Process and Administration**

Module : **Models of Judicial Process**

Module Details

Subject Name:	Law
Paper Name:	Judicial Process and Administration
Module Name:	Models of Judicial Process
Module ID:	JP/LAW/04/Q-I
Pre-requisites:	The candidate should have a general understanding of constitutional law; an understanding of criminal law and the different stages in the criminal justice system is preferred but not mandatory.
Objectives:	To understand the different kinds of Legal Systems and respective types of judicial process.
Keywords:	Legal System, Civil Law, Common Law, Inquisitorial System, Adversarial System, Constitution, Precedent, Burden of Proof, Trial, Prosecution, Evidence, Defendant, Victim.

QUADRANT-I (E-TEXT)

MODELS OF JUDICIAL PROCESS

1. INTRODUCTION

Judicial process is the way by which courts affect the application and development of law. From the point of view of people governed by the legal system, it refers to a set of mechanisms of laws, binding norms, procedure, and institutions within which he or she can avail the fruits of law. However, across the legal systems of the world, countries do not follow the same models of judicial processes. Different models of judicial process adopted by legal systems ensue in assigning different roles and status to the courts in the system. A specific model grants specific rights and casts peculiar duties upon the parties in a case before the court and also upon the state functionaries. Often there are different powers given to the court, the parties to the proceedings, the prosecution and other state authorities, which lead to a unique nature of the process in a legal system. There are two dominant models of judicial process that are now followed across the world – the Common Law Legal System and The Civil Law Legal System.

The aim of this module is to understand the various features of the judicial process of common law and civil law countries. Accordingly, we will also analyse the difference between adversarial and inquisitorial systems, which are typically followed in civil and common law jurisdictions respectively. Following this, we will discuss the model of legal process followed in India – a mainly adversarial process with some inquisitorial elements.

Learning Outcomes:

The aim of this module is as follows:

- **To comprehend the difference between Common law and Civil law legal systems,**
- **Knowledge of different procedures adopted by adversarial and inquisitorial system,**
- **Apprehension of the form of judicial process adopted in India, and**
- **To discuss the possible ways to make the justice process in India more effective by mixing both inquisitorial and adversarial elements.**

2. COMMON LAW AND CIVIL LAW LEGAL SYSTEMS

A "common law system" is a legal system that gives great precedential weight to common law, which are primarily judges' made law. The name 'common' owes its origin to the historical fact that, in its early centuries the judges were supposed to be stating in the form of law the

common practices of subjects. The underlying principle of the common law is that it is unfair to treat similar facts differently on different occasions. Common law system is followed mainly in those countries which were parts of the British Empire unless they were already following a different system due to other previous colonial subjugation. Some of the countries which follow the common law system are: United States, Bangladesh, Pakistan, Nigeria, and Australia. India, being a former colony of the British, received and follows the common law system. However, there are certain inquisitorial elements in India's system as well. Further, the State of Goa does not follow common law and has a Portuguese Civil Code in place.¹

In common law countries, principles of law developed through cases are given great importance. Thus, judges play a crucial role in shaping the law and different branches of law are not codified. Consistency is maintained by the doctrine of *precedent*, whereby decisions of a higher court are binding on lower courts.

The civil law system originated in Europe and relies on codified statutes as the basis of law. Historically, civil law is derived from the Code of Justinian, but has been heavily influenced by Napoleonic, Germanic, canonical, feudal, and local practices, as well as doctrinal strains such as natural law, and legal positivism. Some of the countries that follow the civil law system are: Italy, France, Germany, Greece, Japan and Mexico. The codified law is derived from abstractions and there are extensive substantive and procedural laws. As a result of this, there are a large number of laws which provide protection of procedural and substantive rights – the courts refer to these laws and apply them to the cases before them, rather than developing the law majorly themselves.

In civil law systems, there is not much reliance on judicial precedent. Judges can decide independently of previous decisions and more force is given to statutory law. Thus, in civil law countries, the law is highly codified, through comprehensive, continuously updated legal codes. The marked feature of civilian systems is that they use codes with brief text that tend to avoid factually specific scenarios. This means that the law is not drafted in a way to allow for many different interpretations – it is to be followed strictly and courts do not interpret the law creatively in many circumstances.

As explained earlier, India, being a former colony of the British Empire, follows the common law system. At the time of independence except personal law, almost all aspect of the country

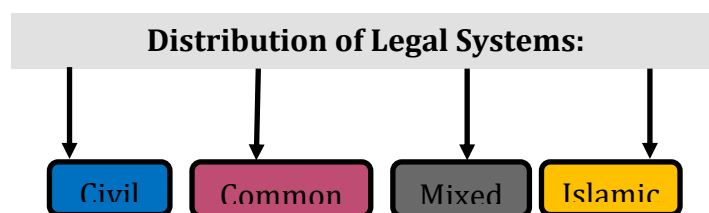
¹ Qutub Jehan Kidwai & Nandini Chavan, *Personal Law Reforms and Gender Empowerment: A Debate on Uniform Civil Code* (Hope India Publications 2006).

was governed by mainly received common laws. The system was continued and adopted by the Constitution by incorporating a 'saving clause' under article 372.²

The Constitution of India also incorporates the doctrine of binding precedent through article 141, which states that the decisions of the Supreme Court are binding on all lower courts.³ In addition essential elements of common law judicial process have been provided in important codes, such as Criminal Procedure Code (CrPC), Civil Procedure Code (CPC), Law of Evidence and the rules of the Supreme Court and high courts.⁴

There are two modes of judicial process – adversarial and inquisitorial. India largely follows the adversarial system. However, in some circumstances, India has adopted elements of the inquisitorial system, with an aim of ensuring justice.

(The map below shows the distribution of common and civil law countries across the world: Source of map: <https://en.wikipedia.org>)



² Durga Das Basu, *Introduction to the Constitution of India* (21st edn, Lexis Nexis 2013) 112.

³The Constitution of India 1950, art.141.

⁴Yash S Vijay, 'The Adversarial System in India: Assessing Challenges and Alternatives' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2147385> accessed 12 November 2014.

3. ADVERSARIAL AND INQUISITORIAL SYSTEMS

There are two forms of judicial process – inquisitorial and adversarial. These are followed in civil law and common law jurisdictions respectively. The form of judicial process affects the way in which disputes are brought before the court, the role of judges and lawyers, the investigation procedures and the rights of the defendant. Hence, it is crucial to compare and contrast the approach taken by different forms of judicial process. The difference between adversarial and inquisitorial systems can be explained as follows:

3.1 Burden of Proof

In an adversarial system, the accused is innocent until proven guilty and it is the duty of the prosecution to prove guilt beyond reasonable doubt. The aim of the criminal justice system is thus to punish the guilty and protect the innocent.

In an inquisitorial system, the accused is presumed to be innocent and it is the duty of the judge to determine the truth. Thus, the standard of proof required is the inner satisfaction or conviction of the Judge.

3.2 Conduct of Trial

In an adversarial system, the scope of the dispute is largely determined by the parties. They select the evidence that is presented before the court and the methods of examination and cross-examination are used to prove veracity of the information before the judge.

In an inquisitorial system, the role of the parties is restricted to suggesting the questions that may be put to the witnesses. It is the Judge who puts the questions to the witnesses and there is no cross-examination as such.

3.3 Investigation and Discretion to Prosecute

In an adversarial model, responsibility for gathering evidence rests with the parties. During the trial, a neutral judge evaluates the evidences produced. Determining whether or not there is sufficient evidence to go to trial, is a matter left to the discretion of the prosecutor. There is also an option for defendants to plead guilty and avoid trial.

In an inquisitorial model, the investigation is typically overseen by the Judge of Instruction, who can seek particular evidence; direct lines of inquiry favourable to either prosecution or defence; interview complainants, witnesses and suspects; and ultimately determine whether there is sufficient evidence to take the case to trial. The Judge of Instruction then prepares a

dossier and forwards it to the trial judge. Thus, the discretion of the prosecutor is limited and the defendant does not traditionally have the option to plead guilty.

3.4 Role of Judge

In an adversarial process, the Judge is a neutral referee during trial. It is the function of the judge to ensure that due process is observed. The Judge must also decide whether the defendant is guilty beyond reasonable doubt and accordingly determine the sentence. The lawyer's role is to introduce evidence in favour of his party, cross-examine the opposite party's witnesses and present arguments in favour of his client.

In an inquisitorial process, the Judge acts as the principal interrogator of witnesses and the defendant, and is under an obligation to take evidence until the truth is ascertained.

3.5 Admissibility of Evidence

In the adversarial system, evidence which is prejudicial or of little probative value, is more likely to be withheld from juries, as they are not well-versed with the amount of importance that is to be given to such evidence. Hearsay evidence, which is a statement made by a person other than the witness is usually admissible if it is considered to be reliable.

In an inquisitorial system, the admissibility of evidence is dependent on the Judge's evaluation of it being relevant. Thus, evidence is likely to be admitted regardless of its reliability and prejudicial nature, as long as the Judge deems it to be relevant.

3.6 Rights of Defendant

In an adversarial system, the accused enjoys the right to silence and cannot be compelled to reply to a question put to him. The trial is oral, continuous and confrontational. The parties use cross-examination of witnesses to undermine the case of opposite party and to discover information the other side has not brought out. In both inquisitorial and adversarial systems, the accused is guaranteed the right to a fair trial and is protected from self-incrimination.

However, in an inquisitorial system, the defence has only a limited right of suggesting questions to the Judge. It is left to the discretion of the Judge whether to accept the suggestions or not.

3.7 Role of Victim

In adversarial proceedings, victims (criminal law cases) are not a party to the proceedings. Prosecutors are appointed to act on behalf of the State and do not specifically represent the victim.

In an inquisitorial system, victims have a more formal role in the pre-trial investigative stages, including a recognised right to request particular lines of inquiry or to participate in interviews

by the investigating authority. Some civil law jurisdictions also allow the victim to be represented by a lawyer during the trial stage.

Difference between Common Law and Civil Law Legal Systems		
	Common Law System	Civil Law Legal System
Nature of the Judicial Process	Adversarial: The Judicial Process is a battle between the parties to be won or lost	Inquisitorial: The dispute is treated as a problem to solved by all participants, including the Court
Role of the Court	Neutral referee	Principal investigator to ascertain the truth in the dispute
Role of Lawyers	Principal actor to establish the claims of parties they represent	They are one of the actors in pursuit of truth in the dispute
Burden of Proof	Accused is assumed to be innocent until proven guilty beyond all reasonable doubt	The standard of proof required is the inner satisfaction or conviction of the Judge
Role of Victim	The victims (criminal cases) are not a party to the proceedings	The victims have a more formal role
Legal Reasoning	Largely inductive	Generally deductive
Emphasis of trial	Procedural Correctness	Factual certainty

1. INQUISITORIAL ELEMENTS IN INDIA'S TRIAL SYSTEM

1.1 Constitutional Provisions

While India follows the adversarial system, there are several instances where the judicial process has incorporated inquisitorial elements. In *Maria Margarida Sequeria Fernandes v Erasmoo Jack de Sequeria (Dead) through LRs*,⁵ the Supreme Court held that truth should be a guiding star in entire legal process, thereby referred to the truth-finding aim of an inquisitorial process.

In *Ram Chandra v State of Haryana*,⁶ the Supreme Court criticised the adoption of a purely adversarial process by courts as it leads to an inevitable distortion due to a competition between the opposing counsels. An adoption of inquisitorial elements by the court would thus help reduce the reliance on advocates of the parties and thereby protect weaker sections before the court, who are always at a disadvantage in terms of resources.

⁵2012 (3) SCALE 550.

⁶ AIR 1981 SC 1036.

Article 32 of the Constitution, which provides the right to Constitutional remedy is an example of incorporation of inquisitorial elements in judicial process. While dealing with matters under article 32, the Supreme Court is not restricted by adversarial procedure, as in such procedures, a poor person is always at a disadvantage as compared to a rich person. When a poor person approaches the court under article 32, it is often necessary to devise a different procedure to secure protection of fundamental rights. Therefore, the power under article 32 is not just limited to issuing writs, it is much wider and includes taking all such actions that are appropriate.⁷ This power was analysed in the case of *Bandhua Mukti Morcha v Union of India*,⁸ where the Supreme Court appointed two persons as commissioners to investigate and make a report 'on the condition' of the petitioners, who were workmen. The respondents argued that the report of these commissioners would not have any evidentiary value, as it was based on ex-parte evidence that had not been subject to cross-examination. However, the court rejected this argument and held that such appointment of the commissioners and the reliance on the report submitted by them was within the scope of powers of the Supreme Court under article 32.

1.2 Criminal Law

The adoption of inquisitorial elements is more pronounced in the criminal justice system. While, in an adversarial process, the judge should remain neutral, there are points where the judge assists the case towards justice, thereby introducing inquisitorial elements. In *State of Rajasthan v Ani Alias Hanif*,⁹ the Supreme Court confirmed that in criminal trials, the judge has to play an assessing role and not be merely a neutral third party. Further, the Supreme Court observed in *Mohanlal v Union of India*,¹⁰ that such an assessing role is required to bring the best available evidence to the notice of the court and avoid issues of prosecutorial misconduct.

The charge against an accused is framed by the judge and not by the prosecution. Thus, the judge has the role of refining the prosecution's findings and determining the existence of a prima facie case. These powers are given to the judge and magistrate under sections 228 and 240 of the CrPC respectively.

Section 165 of the Indian Evidence Act enables the court to ask a witness any question in any form at any time and to order the production of a document or a thing. The judge also has the power to examine any person as witness even if he has not been called by any party under section 311 of the CrPC. Under section 313, the judge can examine the accused at any time to

⁷*Rashid Ahmad v Municipal Board Kairana* AIR 1950 SC 163.

⁸ 1984 AIR 802.

⁹ (1997)6SCC162.

¹⁰ (1991) Supp 1 SCC 271.

get an explanation. Further, the prosecutor has to take permission of the court under section 321 before withdrawing a case.

The residuary powers of the High Court under section 482 of the CrPC states that nothing in the Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under the Code or to prevent the abuse of the process of any Court or otherwise to secure the ends of justice. The inherent powers in civil matters are conferred to all courts under section 151 of the CPC.

Another area which deviates from a strictly adversarial process in India is the concept of class action suits for certain environmental matters. Traditionally, the power to prosecute under Indian environmental laws belonged exclusively to the government. The Environment Act has provided for a 'citizens suit' and thereby expanded the concept of *locus standi* in environmental prosecutions. S. 19 of the Environment Act provides that any person, in addition to authorized government officials, may file a complaint with a court alleging an offence under the Act. However, the person must have given notice of not less than 60 days of the alleged offence and the intent to file a complaint with the government official authorized to make such complaints. Thus, this provision if applied properly could empower victims of environmental accidents to get some compensation and reprieve for the damage suffered by them. However, presently, this provision is merely like a paper tiger as it has not led to many successful class action litigations against polluters. Further, the requirement to give 60 days' notice dilutes the power by giving sufficient time to the polluter to clear up evidence and thereby weaken the cause of action of the complainant. Similar provisions allowing citizens participation in the enforcement of pollution laws are now found in section 43 of the Air Act and section 49 of the Water Act.¹¹

1.3 Civil law

The call for inclusion of inquisitorial elements in civil law can be traced to the Woolf Committee of UK on civil reforms, which discussed the need to eliminate the defects in the civil justice system which were identified as being: too expensive, too slow, lacking equality between powerful and wealthy litigants and under-resourced litigants, too uncertain in terms of the length and cost of litigation, too fragmented and too adversarial. The adoption of certain inquisitorial elements would help ensure that the outcome of a dispute does not depend solely on the economic strength of the parties, would allow for faster disposal of cases and allow for quicker resolution of disputes. The report was also centred around avoiding litigation and

¹¹The Air (Prevention and Control of Pollution) Act 1981; The Water (Prevention and Control of Pollution) Act 1974.

promoting settlement between parties at dispute.¹² A similar initiative was taken by the Law Commission in its 238th Report, which suggested amendments to section 89 of the CPC to facilitate the resolution of disputes via alternative dispute resolution mechanisms.¹³ In its 240th report, the Law Commission also expressed concern over frivolous litigation and suggested that the awarding of costs could be useful mechanism to curb frivolous litigation. The aim is to simplify the expenditure incurred during litigation by amending schedule providing for the Advocate's fees in the Supreme Court Rules.¹⁴ This is in tandem with inquisitorial procedures where fees charged by advocates are lower and more regularised than adversarial systems.

In its 221st report, the Law Commission dealt with reforms in the civil justice system and specifically targeted adversarial procedures that tend to be too complicated and time-consuming. The Commission suggested amendments to the Civil Procedure Code and the Criminal Procedure Code in order to do away with multiple forums to resolve the same issue and allow for a uniform process instead. It also suggested amending the Transfer of Property Act, requiring that all payments should be made by Bank draft, so as to do away with unnecessary litigation surrounding payment.¹⁵

2. COMPARATIVE ANALYSIS OF INQUISITORIAL AND ADVERSARIAL SYSTEM IN INDIA

The Justice Malimath Committee on Reforms of the Criminal Justice System discussed the merits and demerits of adopting an adversarial process in India.¹⁶ The Committee noted that the benefits of an adversarial system in criminal trials is that the rights of accused are better protected, ensuring a fair trial. However, the committee felt that certain inquisitorial elements should be included in the Indian judicial process to make it more effective. For instance, the present adversarial system is not geared towards protection of weaker communities, minorities and indigenous people. The adversarial system requires high burden of proof and correspondingly involves a high cost, making justice inaccessible to the poor. The adversarial process also takes a long time for trial, as a result of which several thousands of people are

¹²Lord Woolf, *Access to Justice: Interim Report* (Lord Chancellor's Department, 1995)
<<http://www.dca.gov.uk/civil/interim/chap1.htm>> accessed 12 November 2014.

¹³Law Commission of India, *Report on Amendment of Section 89 of the Code of Civil Procedure, 1908 and Allied Provision* (238th Report, December 2011).

¹⁴Law Commission of India, *Report on Costs in Civil Litigation* (240th Report, May 2012).

¹⁵Law Commission of India, *Need for Speedy Justice – Some Suggestions* (221st Report, April 2009).

¹⁶*The Report of the Committee on Reforms of Criminal Justice System*, Government of India, Ministry of Home Affairs (April 2003).
<http://www.mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/criminal_justice_system.pdf>
(accessed 5 July 2014).

languishing in courts as under trials. There is limited availability of legal aid, due to which they are not able to get sufficient representation.

Another problem identified with the present system was that a difficulty it created for the prosecution. The committee said that it should be enough for the accused to be proven guilty if the evidence against him is "clear and convincing". The standard of proof -- "beyond reasonable doubt" -- was in the opinion of the committee a very high burden on the prosecution which led to acquittal due to lack of sufficient evidence in many cases.

The Malimath Committee also suggested apart from ensuring prosecution and punishment of the wrongdoer, finding of the truth should be included as one of the aims of the criminal justice system in India. This includes the duty of the Court to search for truth, to assign a proactive role to the judges, to give directions to the investigating officers and prosecution agencies in the matter of investigation and leading evidence with the object of seeking the truth and focusing on justice to victims. This would allow for greater judicial oversight in the trial and investigation process to ensure that prosecutorial negligence does not result in acquittal.

Further, the adversarial process needs to be modified to allow for better protection to the victims of the crime. Presently, the focus is on punishing and deterring the wrong-doer, rather than providing any sort of rehabilitation or protection to the victim. Thus, the Malimath Committee made several recommendations which include the right of the victim to participate in cases involving serious crimes and to adequate compensation.

The committee also commented on the present state of investigative authorities in India. A prompt and quality investigation is the bedrock of an effective criminal justice system. Police are employed to perform multifarious duties and quite often the important work of expeditious investigations gets relegated in priority. The Committee suggested the setting up of a separate wing of investigation, from the law and order wing of the police system. The aim is to create a reliable and trustworthy wing which can conduct efficient investigations so that the best possible evidence is put before the court. This is another example of an inquisitorial element that could be incorporated into India's criminal justice system to allow for effective dispensation of justice.

Improvements needed in the Indian System

1. Greater role of judges judicial and oversight in the trial and investigation	4. Better protection to the victims	7. Curb misuse of procedures by lawyers to adopt dilatory tactics or making money
2. separation of investigation, from the law and order wing of the police	5. Discourage frivolous litigation	8. Rationalising legal profession
3. Incorporate Inquisitorial features	6. The reduce the rigors of adversarial system which requires high burden of proof and correspondingly involves a high cost, making justice inaccessible to the poor	9. Facilitate the resolution of disputes via ADRs

3. SUMMARY

From the discussion about the various forms of judicial process outlined above, one thing is clear – both the inquisitorial and adversarial system have their respective advantages and disadvantages, and neither can claim to be perfect. It is generally accepted that rights of the accused are better protected in an adversarial system, while rights of the victim have better mention in an inquisitorial system. The correct approach would then be to try to move away from strict compliance with any one particular system. It is possible to adopt measures from both these systems to develop a system which could work efficiently. Special focus should be laid on the provision of free legal aid, allowing for expedient disposal of cases and removal of barriers to access to justice.