# *The Adversarial v.* Inquisitorial Models of Justice

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## 1. INTRODUCTION

The purpose of any criminal justice system is to punish the offender and protect the innocent. Offenders are the threat to the society. State machinery is operative to prevent the crime and penalize the offender. But it is a matter of concern for all that innocent must not suffer in the name of justice. There seem two models in general, which provides different measures to deal with the offender to bring him to justice. They may be broadly termed as inquisitorial model and adversary model of justice. Both justice systems insist upon right adjudication of the accused and protection of the innocent. But there are basic differences as to rules of procedures in each of these systems. Each system has been developed in its own historical setting. Each system has its own advantages and disadvantage. Each system can serve the purpose of justice if it is aware of the disadvantages relating to it and has taken measures to minimize it.

## 2. THE INQUISITORIAL MODEL

The inquisitorial model of justice relates basically to Romano Germanic System of Law, which is also known as civil law system or continental law system. It aims to attain justice with the composite effort of the prosecutor, the police, the defense lawyer and the court. If the purpose





of justice is served minor error in the procedure is ignored. The court can play active role in procuring evidence, in the investigation of the case and the examination of the witness. The accused must help to the prosecutor and the court to attain the justice. Since the court itself is active to secure justice, legal representation from the side of accused is not regarded indispensable. This system has the following advantages.

## 3. ADVANTAGES OF INQUISITORIAL MODE OF JUSTICE

(a) The court plays substantive role in the trial to secure justice.

(b) Minor error in the procedure is ignored, if the purpose of justice is solved. Procedure is not held vital, ultimate justice is regarded as the goal.

(c) All the component of criminal justice system, i.e. the police, the prosecutor, the defense lawyer, the court and the accused must help to secure justice. So, the accused has no right to silence.

(d) Any distortion of evidence, dubious practice followed by the accused or by the lawyers can be easily detected with the effort of the court.

## 4. DISADVANTAGES OF INQUISITORIAL MODE OF JUSTICE

(a) Participation of the court in the inquisition of the case may lead it to biased attitude.

(b) Right to privacy of the accused is denied and that the accused is exposed to express everything which he need not express keeping in view of the merit of the case.

(c) The prosecutor or the police having separate law to deal with their conduct may misuse their power and is likely to exceed their authority, which they are not entitled to.

(d) Supremacy of law and equal treatment of the law for all segments of the society is not entertained.

## 5. ADVERSARY MODE OF JUSTICE

Adversary mode of justice is close to Anglo-American system and its past colonies. It advocates the supremacy of law, that is, equal treatment of law for all segments of society. It places the court in the neutral position equivalent to that of an umpire in a football game. Therefore legal representation from both sides is indispensable part of this system. It insists upon due process of law. That is strict observance of criminal procedure by the prosecutor and the police in the course of investigation and trial. It thinks that if both parties were to act according to the rules of procedure justice can be secured. The judge looks whether the evidence collected is in accordance with the law or not. He excludes any evidence, which is extorted through malpractices, such as, entrapment, deception practiced on the accused etc. It is expected that exclusion of evidence unfairly obtained leads the police or the prosecutor to work within the limit of his power. The neutral behavior of the judge promotes the sense of justice and fairness of the trial. The accused has right to silence. The police must interfere upon another's affair only if he has sufficient evidence to do so. He cannot expect any co-operation from the accused after the arrest. The accused need not co-operate with the police and he can remain silent in the court throughout the trial. The prosecutor must prove his guilt, ex-part beyond reasonable doubt. This system claims that it would promote the supremacy of law, fairness in the proceedings, secures right to privacy of the individual. Individual can work is their daily life without any fear, interference or undue encroachment upon their private life by public officials of the state. This is very much necessary to promote justice, freedom and progress.

## 6. ADVANTAGES OF ADVERSARY MODE OF JUSTICE

(a) It insists upon strict observance of procedural law. Due process of law is regarded as the most appropriated method to attain justice. Violation of procedure leads to exclusion of evidence in the court.

(b) The position of the court is regarded as that of an umpire. Both parties contest in the court. The court is to see whether the game being played before it is fair and conducive to justice or not.





(c) The representation of lawyer from both sides is indispensable.

(d) The accused has right to silence. He need not give evidence from his side. Prosecution must prove the guilt beyond reasonable doubt. The accused may claim benefit of doubt.

(e) Individual's right to privacy is best preserved under it.

## 7. DISADVANTAGES OF ADVERSARY MODE OF JUSTICE

(a) The accused does not help the police. The police must work on his own strength against the accused.

(b) Too much insistence upon procedure some time may lead to acquittal of the accused and impunity on the offence.

(c) The judge in the court as an umpire is a misleading conception. It is desirable to expect that the judge is there to do justice and that justice is done by whatever means it is possible.

(d) Contest on technical error in the court is possible. The court is helpless to correct it.

(e) The police sometime may not be able to find sufficient evidence against the accused. He cannot expect any help from the accused. This leads to dropping-out of the case.

## 8. OUR LEGAL SYSTEM

(a) **Historical background -** We do not have long legal history. The first written court was enacted in 1910 B.S. under the titled *'Muluki Ain'* immediately after return of Janga Bahadur Rana, the then Prime Minister from his visit to England and France[1]. He may have been influenced by the well-working legal system and supremacy of law prevalent in England and the written and codified legal system of France. Before 1910 there was not written law in the country. Command of the sovereign, customs and the religious scriptures were the sources of the law. The code *Muluki Ain* was a landmark

[1] J.B. Rana visited England from 1906 Magh 4 to 1907 Bhadra, Janga Bahadur Ko Belaiet Yatra, Madan Puraskar Pustakalaya 2014 B.S.

to establish rule or law in our country. It was the constitution and also the general law of the land. It contained civil law, criminal law, and civil and criminal procedural law - all in one book. Rana Regime lasted until 2007 B.S. The traditionalism in law and the uncontrolled power of the Prime Minister lasted until then. With the advent of democracy a new sprit of law and ideology took momentum from that time. Separation of power in the governance of the country took place. The first democratic constitution, the Constitution of the Kingdom of Nepal 2016 was promulgated. The second constitution came into being in 2019 with the declaration of Panchayat Democracy. The third constitution, "The Constitution of the Kingdom of Nepal" came into force in 2047. In each change of course in the politics and the law we have made certain developments in pursuing new knowledge and new ideology. However, our practicality and style of working did not change. Therefore, we are struggling between traditionalism and modern ideology. A practical way along with some established norms and values is a need for today.

(b) **Start with Inquisitorial System -** We started with inquisitorial mode of justice. This lasted until 2017. Any person aggrieved of any crime could report the case direct to the court. The court used to send inquisition team on the spot of crime to inquire about the case. This was popularly known as "Sarzamin". It was the group of the people gathered under the order of the inquisition team to give information about the crime. In fact it worked like a jury to ascertain whether the accused committed the crime or not. It played vital role in the adjudication of the case by the court. Where the accused is arrested, his confession before the police used to be the main focus point in the adjudication. The police was empowered to administer torture against the suspect to procure confession. *(See Chori Ko Mahal, Muluki Ain 1910)*. The person who initiated the criminal justice into motion used to be penalized if he could not proved the case or if the case failed from the court. People were illiterate, simple and ignorant. So, only those types of cases used to go to the court in which lower case had committed crime against persons having upper socio-economic status. Direct examination of





the persons involved in the litigation used to be the usual course of action in those days.

(c) **Mixed Model in the Mid-term Period -** The inquisitorial pattern of prosecution got a change formally in 2017 when "Sarakari Mudda Sambandhi Ain" was enacted and implemented in practice. The informant who gives first information report to the police, now, was regarded as witness for the prosecution. He was revealed from the risk of being penalized from the court, should the case failed ultimately. The police and the government attorney jointly carried on the investigation of the case. If there is any discordance between the police and the government attorney as to whether the case must go to the court, they were supposed to submit the case to the court for final decision. If the court finds that there is sufficient ground to try the case, it was empowered to give direction to the same line. The court was also empowered to conduct further investigation to the police if it finds the evidence collected so far was not sufficient against the accused. The court itself, on the request of the litigant, could examine the witness in the presence of the opponent. Evidence Act 2031 came into being with the notion of privileges of the witness, limit and extent of the admissibility of oral evidence classification of documentary evidence and their admissibility, presumption of law and fact, burden of proof, and relevancy of personal opinion. Owing to lack of training among the judges and the lawyers the act has not yet been fully implemented. The traditional style of working still prevails. The evidence act has made no difference in our method of working before and after it. "Sarzamin" was regarded as hearsay evidence as early as 2019 in Bir Bahadur, *Krishna Bahadur* v. *Krishna Maya Tamangni*, N.K.P 2019, p. 240, unless the witness stated therein testify in the court. But the"Sarzamin"or"Bastusthithi Muchulka" is taken as evidence even today.

Witnesses are examined without administering the oath in the proceeding. They, often, take place in the absence of the judge and are conducted by the clerk of the court. Witness are not held liable for perjury and penalized by the court. So we can find any type of witness giving any type of deposition in the court. The court helplessly observes all these traditional style of working in a routine

way. Even witness who have not observed the fact by their own senses and who can be regarded as completely hearsay evidence come to court and give testimony without any objection from the opponent and without any control from the court. Almost sent percent of the case as judicated by the lower court go to appellate court owing to various reasons. No wonder that under such situation our courts have heavy caseload, lengthy trial procedure and delay in justice.

We pursued a mixed pattern in the proceeding of court in between 2017 to 2049. We allowed intervention of the court in deciding whether there is sufficient evidence to proceed the case in the trial. We allowed the court to examine the witness on the application of the litigant. At the same time the investigator that is, the police enjoyed considerable liberty in the course of investigation. The law empowers him to detain the suspect up to 25 days under the supervision of the court. The prosecution still relies upon the confession of accused made before him even though the court is unwilling to rely upon such confession without corroborative evidence. Defence of alibi is the main point of pleading of the accused who denied confession made before the police as voluntary and claims that he was some other places at the time in question. He adduces his witness to prove this claim. There is no mechanism as yet been develop to check concocted witness from giving the testimony. We still put much importance upon first information report even though it is purely hearsay. The case is named in the traditional style as follows"

"With the information of so and so, H.M.G. v. and so and so."

This shows that the government has yet not been ready to shoulder the whole responsibility of the case on its own hand and wants to rely to great extent upon the first informant.

(d) **Adopting Adversary Model** - With the enactment of "Sarkari Mudda Sambandhi Ain, 2049" the court was placed as a neutral body in the trial. Now, the police took the whole responsibility to investigate the case while the government attorney got the job to take the case to the court and plead on. But there seems lack of co-ordination between the two components if the case fails from the court, the police charges the government attorney for mis-handling the case, the attorney charges the police for insufficient investigation. The court charge both of them for their, insufficient performance. Corruption prevailing upon the whole units relating to criminal justice system has led us nowhere. Representation of the accused by a lawyer from the moment of arrest could be one solution to check the police from malpractices upon the accused. Examination of the accused as a witness within the court could be another-solution to control fabrication and concoction of evidence in the court. Enactment of law relating to perjury could be another solution to check the witness from giving false evidence. Guilty plea followed by lenient punishment is another means to secure justice and reduce the load of the court. Enactment of the law requiring the accused to put his defense of alibi within 24 hours of arrest and on his first appearance in the court may discourage him to give false evidence as an attempt to escape from criminal liability. Prosecutors are to be trained to draft the charge-sheet and place before the court only relevant evidence during the trial.

We adopted adversary model of justice placing the court in a neutral position at the same time increasing the important of lawyers during the trial. Due process of law can be up held by a practical approach to attend justice. Let us identify the problem in its right perspective and evolve a solution that is practical to suit the condition of this country.

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