

Inquisitorial and Adversarial Legal System: Concept, Content and Major Differences

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1. Background

Every state is to be governed by some sort of legal system. Without an effective legal system, the autonomy of law and system of rule of law can never be achieved. Thus there must be well functioning of every part of the legal system within a state. The legal system itself covers not only the law, but it is more than the sum total of laws or legal materials and it represents the patterns of interrelation of the materials and differs from them also in its overall purpose and functioning.¹ As the railway system is not just the sum total of tracks and rolling stock stacked together; the system is the pattern of their linkage and distribution. In the same vein, as a generalization it may be stated that the pattern of linkage imparts unity to all its components, which can be discerned through the concept of validity and institutional structure.² From this analogy, the criminal justice system is not only criminal law, but it is an interrelation between the patterns of rules, legal principles, institutions and their jurisdictions as well. For the proper functioning of criminal justice system, the country is to have necessary laws, strong enforcement mechanism and their validity or recognition from the concerned society.

So far the criminal law is concerned, it is often considered as a branch of public law distinguished from a private law in the sense that some offences

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¹ DIAS, JURISPRUDENCE(5th ed), Aditya Book Private Limited, Delhi, 60, (1985)

² *Ibid* .61

primarily injure specific persons and only secondarily the public interest, while others directly injure the public interest and affected individuals remotely.³ The conducts which largely affect the public are treated as criminal offences and punishment is prescribed to prevent them. In the world, there are varieties of legal system practiced in course of dispensation of justice. The major legal systems are viz. common law system, civil law, socialist and some other Muslim and Hindu legal system. The common legal system is prevalent in those countries in which there was former British colonial rule and much largely influenced by English practices such as United Kingdom except Scotland, United States except Louisiana, Australia, New Zealand, Fiji, India, Singapore, Malaysia, Pakistan and Bangladesh, and the civil law system is prevalent in those countries which have been influenced by the Romano-Germanic system such as France, Spain, Portugal, Scotland, Italy, Switzerland and Germany etc. The religious legal systems are much rooted in those countries in which religious values are taken as laws in the society such as Lebanon, Syria, Egypt, Saudi Arabia, etc. Based on the legal culture and practice descending from long experiences in various countries of the world, there is a vast difference in criminal judicial procedures at different stages right from the pre-trial, trial and to the execution of the judgement. So it is herein this article aimed at critically analyzing the concept and contents of the inquisitorial and adversarial legal system, their major differences, and strengths and weaknesses and assessing an identity of Nepalese legal system, be it inquisitorial or adversarial or mixed or *sui generis*.

2. Concept of Inquisitorial and Adversarial Legal System

It is, of course, the case that criminal justice systems vary considerably from one country to another, and in particular criminal procedure rules vary widely. In relation to prosecution systems and trial, there is a huge variety of arrangements. While they can fundamentally be divided into common law, *i.e* an adversarial system and a continental legal, *i. e* inquisitorial legal system. The common law system exists in the countries mostly of former British colonial jurisdictions whereas the continental legal systems exists in the countries influenced by the Romano-Germanic legal traditions. While in common law systems, the prosecution is invariably a part of the executive, in civil law systems in some states it is part of the executive and in others it is part of the judiciary. There is division between countries operating a system of discretionary prosecution (the opportunity principle). The opportunity principle

³ PATON G.W, A TEXTBOOK OF JURISPRUDENCE(4th ed), Oxford University Press, 356, (2007)

of prosecution is commonly followed in common law countries and the mandatory principles is commonly followed in the civil law countries. and countries operating a system of mandatory prosecution (the legality principle), and while common law states operate a discretionary system whereas the civil law systems can fall into either category.⁴ Then there is also difference between those countries where each individual prosecutor is independent of every other, and those where the prosecution operates a hierarchical system. France is considered a country where the inquisitorial system had a citadel of its origin. The French inquisitorial system has its roots in the twelfth century. It was used by ecclesiastical courts to investigate charges of heresy, inquisitorial procedures were ultimately adopted by secular courts to replace adversarial proceedings.⁵ The inquisitorial system still employs tradition of an active judge who no longer remains just as a neutral arbiter as he/she in an adversarial system; rather, he become an active participant in the criminal proceedings. Further, in inquisitorial system, a judge himself engages in the investigation and also questions the witnesses outside of the presence of the defendant. However, both the inquisitorial and adversarial criminal systems are aimed at discovering the truth of an accusation, but the systems diverge in their definitions of truth.⁶

In inquisitorial legal system, the magistrate judge (*juge d'instruction*) has a major role in the investigation, prosecution and adjudication of the case. A judge is an active actor or participant of criminal justice system in civil law traditions. For example, a magistrate judge supervises the investigation of case and also consults the prosecution during pre-trial for the prosecution of case. The prosecution may also appeal over the decision made by the judge if he/she deems it to be otherwise than that of the decision of magistrate judge. However, in the common law or adversarial legal system, the investigation and prosecution of the criminal case is entirely considered as executive function and the responsibility is bestowed to the police and public prosecutor, and a judge has almost no rule at pre-trial. A judge works as an umpire or final arbiter of the case who is to speak at making final judgment based on the arguments of the legal counsels supported by the facts, evidences and laws.

⁴ MANSFIELD, G & PEAY, THE DIRECTOR OF PUBLIC PROSECUTIONS: PRINCIPLES AND PRACTICES FOR THE CROWN PROSECUTOR, London, Tavistock Publication, 27, (1987)

⁵ Finegan. Sharon., "Pro Se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice", Vol. 58 Issue 2 Winter Issue. CATHOLIC UNIVERSITY LAW REVIEW, 448, (2009).

⁶ *Ibid.* 463

An emphasis of the inquisitorial system is to seek the truth from the factual observation of case, deposition of defendants, of witness and verification of the documents that are hardly repeated at trial stage. All these things help to make a dossier (report) of case upon which the judge mostly relies on deciding a case. However, the adversarial system emphasizes on seeking the truth out of the adversaries of the parties and powerful argumentation of the prosecution and defense counsel. In the adversarial system, the judges do not involve in the investigation of the case and it is entirely left to the police or investigation officer. Therefore, a judge does not have power to make inquiry on the facts. In this way, the parties have a cross-examination between the defendant and the state or its prosecutor.⁷ The witness are examined through cross-examination to destroy witnesses' testimony by the opponent legal counsel.

Moreover, in adversarial legal system, the onus of proof lies in the state to prove a person guilty of crime beyond reasonable doubt and a defendant has a right to remain silent in all stages of criminal proceedings. The lawyers involved in the case are to represent the parties in the case with their argumentative points in their favor and other party has a chance to rebut it. Moreover, a judge finds out the truth out of the adversaries of the parties.⁸ However, in an inquisitorial legal system, the role of the judge in the investigation and prosecution of case is relatively limited, or almost very little. A judge sets the valuable decision of case through interpretation of case with propounding the legal principles that are followed as precedent in later cases.⁹

In some countries of continental legal system, the investigation of criminal case is also done by investigating magistrate and prosecutor. They look after the investigation of crime and filing charge-sheet in the court supervising the investigative process of the police and taking care of the protection of the human rights of citizens. In this way, in continental legal system, public prosecutor's office is considered as part of judicial organ rather than executive, however, in adversarial legal system, the public prosecutor's position is an executive one from the viewpoint of appointment and accountability.

As compare to the common law system, public prosecutor is more independent and impartial in continental legal system since there could be

⁷ *Ibid*

⁸ Surya Prasad & Rewati Tripathi, "Criminal Investigation and Prosecution in Nepal: A Critical Overview", 1. No. 1 PROSECUTION JOURNAL, Office of the Attorney General of Nepal, 50-52, (2011).

⁹ *Ibid* 51

less changes of the influence of the executive and accountable to it. The office of the public prosecution is more impartial and independent in continental countries than that of the common law since they are not to procure a conviction at any cost.

In continental countries, public prosecutors are liable to produce the evidences to the court even if it does not favor the prosecution since they are treated as the officers of the court to help to seek the truth. It is all about to seek the truth on the basis of factual observation, In this relation, the Supreme Court of Nepal emphasizes in a case *Appellate Government Attorneys Office v. Raju Thapa*,¹⁰ that the government attorney cannot omit or hide the evidences that are enclosed with the case file. In the name of seeking higher conviction success, no prosecution can undermine one's duty to uphold the rule of law and judicial system seeking the truth.

In inquisitorial legal system, judges or (judicial officers) are more involved in the investigation of crime whereas in adversarial system this job is rather carried out by the police or investigation officer working under the executive. The role of the judge in the adversarial is rather more like an impartial arbiter.¹¹

The inquisitorial legal system emphasizes on the investigation system, collection and screening of the investigation are made with due process by a magistrate judge. However, the adversarial system gives importance on the cross examination of evidences and the right to fair trial of the accused during the hearing of case.¹²

In the inquisitorial legal system, it is thus said that the role of the public prosecutor is not very broad in the investigation of a case. In this system, a magistrate judge has a direct query or question to the defendant and the accused is supposed to assist the court by giving his deposition. In this stage, the accused cannot exercise the right against self-incrimination. For the same token, the onus of proof largely remains on the defendant to prove oneself non guilty of crime.

However, in the adversarial legal system, a judge works as silent listeners or less active participant at trial who does not pose directly question to the parties, but poses questions to the lawyers representing the parties. The court has also minimum role in the examination of the evidences (oral) unless

¹⁰ SC Bulletin (2057) No. 3, Year 9. 9.

¹¹ *Ibid* 50-52

¹² *Ibid*

it is necessitated to do so by the law. The lawyers representing the parties are actually involved in the examination and cross examination of the witnesses. However, for the sake of seeking the truth, some laboratory or forensic tests are done with the help of experts who could further be cross-examined by the defendant if the expert report disfavors the defendant.

The parties of case deal with the case in a way that they assist the court to determinate the truth by putting their arguments through the appointed lawyers and the defendant may remain silent during pre-trial and trial process. The process of fair trial is strictly followed in the adversarial legal system and a judge minutely oversees the legal procedure as to whether the investigator follows it or not. For example, the right to counsel has been heralded as one of the guarantors of a fair trial in the United States. As for the right to counsel, it was held by the Supreme Court in the case of *Powell v. Alabama*¹³. In *Powell*, the Supreme Court held that when a defendant is unable to employ counsel and make his own defense, counsel must be assigned in a capital case, regardless of whether that case is in state or federal court. For the same token, the US Supreme Court did not declare the right to be of constitutional magnitude until the 1975 decision of *Faretta v. California*. Since the *Faretta* decision, the Supreme Court has addressed several cases dealing with the right to self-representation. In those decisions, the Supreme Court has examined a defendant's competency to assert the right to represent himself, and has limited the right in some respects.¹⁴ This is a recent development in the American Constitutional jurisprudence as to the right to self-representation which is akin to the inquisitorial legal system.

3. Some Major Differences Between Inquisitorial and Adversarial Legal System

Despite some similarities between two systems, there have been several distinctions between inquisitorial and adversarial legal at every stage of criminal proceedings including pre-trial and trial of case. However, based on the following grounds, there are some of the major differences found between these two systems as described below:

1. *Due Process in the Pre-Trial Process*

As the inquisitorial legal system concentrates on seeking truth or fact finding, a magistrate judge directly handles the investigation process and directs the

¹³ 287 U.S. 45 (1932)

¹⁴ *Ibid* 452

judicial police as to what evidences are to be collected and on how the defendants are to be interrogated of the incidents. A magistrate judge closely handles the investigation and also supervises the prosecution of case and thus, some tiny deviations of the legal procedures are not given much importance. A magistrate judge tries to seek the truth as to find out whether a defendant has committed crime or he is an innocent. So the issue of fair trial such as notice of the arrest, presence of the accused within certain time limitation before a competent judge, representation of defendant through legal counsel are not raised beforehand. However, a defendant is given an opportunity to be represented by a lawyer if one wishes so.

II. Role of the Judge in Criminal Proceeding

The role of the judge in inquisitorial and adversarial system also differs a lot from one to another. In the pre-trial stage, it is the fundamental characteristic of the inquisitorial legal system of investigation by a magistrate, known as the *juge d'instruction*, of the crime and the circumstances of its commission. The function of the *juge d'instruction* is to seek out the truth-to get to the bottom of an affair. For example, in France, the prosecutor works with a magistrate judge just to collect the evidences in the case to ensure that the prosecution is well founded and he has the responsibility to produce the evidences in favor of prosecution during trial.¹⁵

The *juge d'instruction* remains as an active participant of criminal proceeding such as he interrogates witnesses, may confront them with each other. Not only this, he also carries out necessary searches and seizures, either at the home of the accused or of a third person. In this relation, he may also seek expert assistance. He may order the detention of the accused and he decides upon the application of the accused for provisional liberty.¹⁶

Over the *juge d'instruction*, the prosecuting attorney has some measure of surveillance. He may demand communication of the documents in the case at any time. If he believes certain steps are necessary, he may request the *juge d'instruction* to take them. In making certain important decisions, the latter must consult the prosecuting attorney, but is not bound by the opinion of the prosecuting attorney. If the prosecuting attorney disagrees with the decision taken by the *juge d'instruction*, he may make an appeal to a higher authority.¹⁷

¹⁵ Ploscowe. Moris, "Development of Inquisitorial and Accusatorial Elements in French Procedure", JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, Vol 23, Issue 3, 373.

¹⁶ *Ibid.*

¹⁷ *Ibid.* 374

Unlike in the Common law countries, a judge in inquisitorial system plays a much more active role in the trial process. It is thus said that an inquisitorial judge remains to be proactive than the “neutral and detached” arbiter which is observed in an adversarial system. Moreover, the proactive nature of the judge’s role in inquisitorial proceedings represents the “affirmative obligation upon state officials to insure that state policies, both substantive and procedural, are carried out.”¹⁸

In this way, a judge has to control all the processes right from the investigation to the trial of the case including the examination of evidences. Not only this, a judge also ensures that all the laws, polices and provisions of criminal laws are enforced and punishment are well executed.

In the same plane, in the inquisitorial system, judiciary is very much accustomed to participating in and directing investigative and administrative processes which, in adversarial system, are controlled by the police, prosecutor and defense counsel etc. In the inquisitorial legal system, the defendant and defense counsel are not asked for their primary roles but are to assist the judicial process to seek the truth.

An inquisitorial judge must be aware of the facts of a case before it is testified to a trial. For example, in the French system, a judge relies on a “dossier” containing all relevant facts of the case. In this way, a judge is aware of what facts are important to elicit from a witness and can more effectively call and question witnesses regarding those facts. In an adversarial system of justice, a judge oversees the trial process, but does not control the course of presentation and examination of witness. The legal counsel of the parties are involved in the examination of the evidences presented by either party.

III. Role of the Prosecutors and Defense Counsel

The prosecutor has individual independence in discharging his/her duty. He or she also follows the direction given by a magistrate judge in collecting the evidences and making the prosecution well founded. The role of the public prosecutor is not to win the case but to work for fact finder. The fact finder means the dossier upon which the judge declares whether a defendant is guilty or not. The prosecution is considered to be close to the judiciary rather than to the executive. It is a magistrate judge who examines the witness. The defense counsel for the accused has no right to be present when

¹⁸ *Ibid*

witnesses are being examined or at any other operation of the judge with the exception of the interrogation of the accused. So in this system, it is the concept that the defendant, defense counsel and citizens should help the judicial process and not to tell lie. For the reason, the defense counsel makes his/her submission to the court for lesser term of imprisonment if an accused is found to be guilty rather than entirely denying the accusation. So in the inquisitorial legal system, justice is considered to be a collative part of all stakeholders unlike in the adversarial legal system.

IV. Defendant's Participation in Pre-Trial and Trial Process (Right to Remain Silent)

In inquisitorial and adversarial system there seems to be a vast difference on the ways the judiciary keeps control on investigation and prosecution. In the common law countries, a defendant is charged by a formal indictment, information, or complaint. It is the Constitutional provision to produce an accused publicly before a judge hearing the case within certain hours, such as twenty-four or forty-eight hours depending on the countries local system. A judge oversees the investigation process to make sure that the right of the accused within the custody are not violated. In this concern, a judge needs to see the probable cause for the arrest and detention of the suspect. In the adversarial legal system, the accused is given constitutional guarantee to consult a lawyer during custody and an investigator and judge stop the process if the accused demands for the legal counsel's consultation.

Unlike in the inquisitorial legal system, in adversarial legal system, the judiciary cannot directly control on the investigation and prosecution and these two institutions work for the purpose of effective investigation and prosecution. In the adversarial system of justice, the prosecutor and police run the investigation and determine what charges to file against a defendant.

V. Examination of Evidences and Use of Evidentiary Rules

Inquisitorial system typically focuses more on the substantive rights of a defendant than on procedural rights. In an inquisitorial trial, by contrast, less emphasis is placed on procedural rules and more weight is given to the substantive rights of the defendant. Because an inquisitorial judge is assigned to the ultimate task of eliciting information to determine the truth of the defendant's guilt or innocence, the court is not significantly restricted by strict evidentiary rules.¹⁹

¹⁹ *Ibid*

A dossier of case in the inquisitorial system is permitted to consider all relevant information, regardless of its reliability. It is left to the finder of fact to determine which facts should be given greater weight, and which facts should be discounted as unreliable or unimportant. However, in the adversarial legal system, the burden of proof lies on the state to prove an accused is a guilty of crime beyond reasonable doubt. So the judge actually decides the case based on the evidences collected by the investigation, cross-examination by the parties (legal counsel) and verified by the court within the adversaries of parties at trial.

In inquisitorial system, a defendant is expected to be competent to defend himself or herself and can speak before a judge. A defendant has an active participation in pre-trial and trial process in response to the queries put forth by the court. However, a dossier cannot be taken as an evidence of case. A defendant is not supposed to sworn as a witness in a case and he is not subject to prosecutor for perjury. However, in the adversarial system, a defendant is to sworn in subject to perjury.

In adversarial legal system, if a defendant tells lies in his testimony, he is subject to perjury charges. Thus, the defendant's role in an adversarial proceeding varies from that of a defendant in an inquisitorial proceeding.

VI. The Defendant's Right to Represent Himself at Trial

In inquisitorial legal system, a defendant can represent himself/herself in the court without the assistance of legal counsel and the court inquires directly about the fact of case and also examines witnesses in presence of the defendant. However, an accused is also given opportunity to consult a lawyer if he/she wishes. In this situation, a magistrate judge may not ask questions to the accused unless his/her attorney is present, and the accused may not refuse assistance of counsel.

In inquisitorial legal system, a defense lawyer does not merely represent the defendant, but also assists the administration of justice. The interest and autonomy is subordinate to the ultimate investigation of case towards finding out the truth. However, in the adversarial justice system, the interest and autonomy of the defendant is addressed through his/her representation by the defense counsel. And, the defendant is given constitution guarantee for a legal representation.

In nutshell, the main goal of the inquisitorial legal system is to seek the truth whereas it is the fair trial and due process in the adversarial legal system.

4. An Identity of Nepali System as a Mixed Legal System

The ancient judicial system of Nepal was largely developed on the basis of indigenous religious and legal practices. It was closed to the inquisitorial system or the continental legal system in which the investigation was carried out by the court officials. The judicial officials were involved in finding the truth from the observation of facts. The indigenous legal practice was prevalent in Nepal till 1951. However, after Nepal came to be exposed to the western democratic polity, she has been more influenced by the adversarial notion. Especially after the enactment of State Cases Act, 1960 (2017), the country came to adopt an adversarial model.

Afterwards, the Police Act, 1955 (2012) and the State Cases Act, 1960 (2017) were enacted with objective to make separation between the judicial function and investigative and prosecutorial function. These Acts solely gave the power of investigation and prosecution to the police and prosecutor respectively. However, there was the system of joint investigation and prosecution under the State Case Act, 1960. During this period, both investigation and prosecution office used to carry out investigation and prosecution jointly. And, in the lack of reaching to a concurring opinion in filing a charge-sheet, separate opinions would be submitted in the charge-sheet and the court could accept either's opinion to proceed the case. However, The State Cases Act, 1992 (2049) ended this system of joint prosecution with the repeal of earlier State Cases Act, 1960.

The then State Cases Act, 1992 made a paradigm shift from joint investigation and prosecution to a separated system. This Act separated the prosecution system from investigation and gave the final authority to Attorney General to take decision regarding the prosecution.²⁰ Further, Section 6(2) of State Cases Act, 2049 (1992) stated that Government Attorney shall have the power to give directions to the investigation officer to be followed by him/her in carrying out the investigation.

While taking into account into the existing Nepali legal provisions on the criminal justice system, it is very hard to deny that there is not a single system in the world which is solely an adversarial or inquisitorial one. Because, the countries in which an adversarial legal system is dominant may have some features of inquisitorial one or vice versa. For the same token, countries like France and Italy which have been influenced by the inquisitorial legal

²⁰ State Cases Act, 2049 (1992). Section 17(1) and 17(2)

system also urge to follow the adversarial practices for the protection of fair trial and right of defendant. Even in the inquisitorial legal system, one cannot say that the burden of proof does not remain in the plaintiff because, it is more than clear that the defendant is proved to be guilty in a case beyond reasonable doubt. The value of this kind which is of adversarial one actually is widespread and is hardly denied in inquisitorial legal system. In nutshell, every system has more or less rests on the features of others with the purpose of making own system workable and less disputed in entire legal practice.²¹

From this analogy, Nepali legal system is mixed one with its own indigenous values and influences of both adversarial and inquisitorial legal system. In other words, some of the provisions in the Nepalese legal system imbibe the values of its own Hindu indigenous legal jurisprudence; however, most of the provisions of laws incorporate the notion of adversarial legal system. For example, the Constitution of Nepal clearly enshrines that the defendant has a right to remain silent as a fundamental right²² and at the same time, other prevalent criminal law has also incorporated the provision that the “burden of proof” rests on the plaintiff to prove an accused guilty of crime beyond reasonable doubt.²³

So Nepali legal system is now more influenced by the adversarial legal system in which there is very little role of the judge in the pre-trial investigation of case.

To mention the influences of adversarial legal system into Nepal legal system are the reflections, such as Nepal has followed the principle of rule of law, independent of judiciary, judicial review, and separation of power and protection of the fundamental rights since 1990. At the same time, the State Cases Act, 1992 came into existence which ended the previously existed system of joint investigation by the government attorney and police. It separated the investigation from prosecution. Consequently, the police have been mandated to carry out the investigation and government attorneys have been mandated to prosecute the case. The adjudication of the case became a matter for the court to settle without much significant role of judge in the investigation and prosecution of case unlike the provision of earlier State Cases Act, 1960. There are several special Acts relating to special offenses, which provide special provisions for investigation. These include the Narcotic Drug (control)

²¹ *The Report of the Royal Commission Report* (1993) England and Wales 4

²² CONSTITUTION OF NEPAL, Article 20, 2072(2015)

²³ The Evidence Act, 25, (2031) 1974

Act, 2033 (1976) and Human Trafficking and Transportation (control) Act, 2064 (2007). However, the provisions of these special Acts are not exclusive in them with regard to the investigation and prosecution process.

In addition to the adversarial practice, there are some scattered provisions in the then *Muluki Ain* (Country Code), 2020 (1960) in which there was little space for the court in the collection and examination of the evidences. To illustrate, Section 139 of the Court Management under the *Muluki Ain* stated that the court may summon the person in a case who is deemed to be necessary to call upon from the description of the plaintiff and defendant and also is considered necessary to put such person as the parties of case or witness based on the circumstance of case.²⁴ In the same way, Section 115 of the Court Management under the *Muluki Ain* (Country Code) also provided that the court may summon the person on its own by issuing directly a summon order especially in the criminal case in which it is quite- essential to inquire him/her to do so. Besides this, the court may also ask the statement of the witness from its side if the party asks the court to do so during the process of the examination of witnesses.²⁵

The *Muluki Criminal Procedure Code*, 2017 (2074) has also continued the earlier legal provisions of No. 115 as was incorporated by the *Muluki Ain*, 1963 (2020).²⁶

Not only this, there are some specific provisions in the Special Acts which have put the burden of proof on the defendants to prove oneself non-guilty of crime. A few provisions in this relation are discussed herein. To mention them, the Section 12 of the Narcotic Drugs (Control) Act, 2033 (1976) states that in case any narcotic drug is found to be in possession of any person or if any evidence is found that cannabis/marijuana, opium or coca is being cultivated or had been cultivated in any farm of a person or if any substance that has been partly processed for the manufacture or production of any narcotic drug or any residue left after such production is found to be in possession of any person, such person shall have to furnish proof to that effect that he/she has obtained or possessed such substance under this Act or the Rules framed or orders issued hereunder, be deemed to have to committed an offence punishable under this Act.²⁷

²⁴ Court Management, *The Muluki Ain* (Country Code, Section 139, 2020) (1963), *The Muluki Ain* (Country Code, 2020) (1963)

²⁵ The Evidence Act, Section 50(4), 2031 (1974)

²⁶ *Muluki Criminal Procedure Code*, Section 12, 2017 (2074)

²⁷ Narcotic Drugs (Control), Section 12, 2033 (1976)

In the same way, Section 20(1) of the Corruption (Prevention) Act, 2059(2002) also provides the onus of proof on the defendant to prove the source of his/her income of the assets as a legal one. The Section reads that in case the statement of property submitted in accordance with prevailing laws by a public servant deemed to have held a public office in accordance with prevailing laws seems to be incompatible or unnatural or in case he maintains an incompatible or unsuitable lifestyle or it is proved that he was given someone a donation, gift, grant, present or has lent money beyond his capacity, he shall prove the sources from which he has acquired such property and if he fails to do so, such property shall be deemed to have acquired in an illegal manner.²⁸

For the same token, Section 28 of the Anti-Money Laundering Act, 2070 (2013) states that in case assets for the person sued for offence under this Act is found to be unnatural in comparison to his income source or financial condition or he is living a life unnaturally high in standard or proved to have donated, granted, gifted, provided loans, contribution or endowment more than his/her capacity, he/she is required to prove the sources of earnings and in case he/she fails to prove, so he/she shall be deemed to have earned such assets by committing offences under this Act.²⁹

In the same way, the Section 9 of the Human Trafficking and Transportation (Control) Act, 2064 (2007) states that notwithstanding anything contained in the prevailing law, a person accused of an offence under this Act shall provide evidence proving that he/she did not commit the offence.³⁰

In inquisitorial system, the magistrate judge and prosecutor both are involved in the investigation of case. However, in the adversarial legal system, the role of public prosecutor in investigation is not directly common. In Nepal, public prosecutors' role has been accepted as a supervisory and an advisory for making the effective investigation of case.³¹ Nepal has mostly adopted the adversarial legal system in which the role of the court is more like that of an umpire and is based on the adversaries of the parties. And, the court does not have significant role in the investigation and prosecution of case and is rather laid on deciding the case based on the examined facts and evidences

²⁸ The Corruption Act ,Section 20(1) 2059 (2002)

²⁹ The Anti-Money Laundering Act, Section 28, 2064 (2007)

³⁰ The Human Trafficking and Transportation (Control) Act, Section 9, 2064 (2007)

³¹ The State Cases Act Section 6(1) and 6(2), 2049 (1992)

justified with the legal provisions. A judge is supposed to decide a case on the top of the evidence passed through cross examination by the parties before a judge. However, the role of a judge in the cross-examination is very minimal except to avoid unnecessary leading question to the witnesses.

5. Some Strengths and Weakness of the Inquisitorial and Adversarial Legal System

There are some strengths (advantages) and weaknesses (disadvantages) of inquisitorial and adversarial legal system.³²

1. Inquisitorial Legal System

Strengths	Weaknesses
1. It is easy to seek truth in case with the involvement of court or a judge.	In seeking truth, court may be stranded at doubt whether it is favoring either party of case.
2. It is realized that the ultimate job of the court is to seek the truth and dispense justice.	In seeking truth, a risk may be there on the protection of the rights of the accused.
3. For the sake of justice, minor legal procedures are not given much significance and thus speedy justice may be dispensed.	The principle of rule of law, fair trial and supremacy of law may be violated.
5. It shall be duty of the court, public prosecutor, police and defense counsel to work for a collaborative venture of justice dispensation.	There may be chances of stepping into the jurisdiction of other agencies as the court exercises wide power in the investigation and prosecution of case.
6. The defendant also helps the court for justice dispensation. And, the defendant cannot exercise his/her right against self-incrimination.	A defendant may feel that he is unaddressed and prejudiced in a case.
7. The court may easily find out the situation at which the party is telling lie.	The right to privacy of the accused may be at risk.

³² Madhav Prasad Acharya. "Adversarial v. Inquisitorial Model of Justice", KATHMANDU SCHOOL OF LAW JOURNAL Vol.1, Kathmandu School of Law, Bhaktapur 4-6.

II. Adversarial Legal System

Strengths	Weaknesses
1. The procedural aspects are given much emphasis and therefore the judicial function can be made just, fair and reasonable.	Due to over emphasis on minor procedural matters, administration of justice may become complex.
2. An accused may experience that he/she is imparted justice since the adversarial legal system emphasizes on the supremacy of law, rule of law and fair trial.	Minor procedural fallacies may frustrate the judicial process and opportunity to seek the truth.
3. A neutral and impartial role of a judge may help in maintaining fairness and independence of judiciary.	
4. An accused is constitutionally guaranteed a right of legal consultation of one's choice. This also helps to ensure the right to fair trial.	Over activism of a defense counsel may, sometimes, defeat the realities in a case.
5. The onus of proof lies on the plaintiff to prove a defendant guilty beyond reasonable doubt and therefore the accused may exercise right to remain silent.	There may be chances of low conviction of case if the investigation and prosecution is not done properly.
6. The institutional independence and autonomy is highly protected and promoted as there is relatively clear division of powers and functions of the court, police and prosecution.	Judicial administration may become dysfunctional if there remains no cooperation and coordination among the concerned stakeholders as expected.
7. As the court is a final arbiter, the parties may have much trust on it.	Justice may be frustrated due to excessive adversaries of parties and little role a judge.

6. Conclusion

Both the inquisitorial and adversarial criminal systems are aimed at discovering the truth of an accusation, but the systems diverge in their definitions of truth. As some scholars have written, truth in the adversarial system is actually

determined on the basis of “adversaries of parties” with a “neutral and detached” role of judge in criminal proceedings. On the contrary, the inquisitorial system means that a truth can be ascertained by assembling all available evidences collected and examined by the court.

In this system, every effort of reason and all scientific knowledge need to be directed towards finding the truth. A guilty can be determined with the depositions made by the defendant, evidences and truth found from the examination of evidences. And, minor procedural fallacies are not give due weight. Confession is a significant part of inquisitorial system because the overwhelming burden of proof is required for the conclusiveness of fact which remains on the defendant. However, the adversarial system largely give rooms for the right to fair trial, right against the self-incrimination and onus of proof on the state to prove the accused a guilty of crime beyond reasonable doubt. These two systems have their strengths and weakness. However, no system is there in the world which is in isolation and not influenced by the other and therefore there are many good features of adversarial system incepted into the inquisitorial system for ensuring the right to fair trial. So also the adversarial system has also many good features of inquisitorial system for the justice dispensation by seeking the truth.

In conclusion, so it is rightly said that almost all modern criminal justice systems combine procedural features of both traditions, there cannot be found a criminal justice system which is totally an adversarial or inquisitorial and there has been found a continuum process of inhibiting good features from other system to make own system modernized, scientific and functioning. Nepali legal system is not very far from the process of shaping and reshaping it for achieving better destination and has come at the stage of getting an identity of a mixed or legal system or *sui generis*.

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