Chapter 2

JUDICIAL SYSTEMS IN U.S., U.K., FRANCE AND INDIA: A COMPARISON

2.1 Comparison of Judicial Systems

In order to have a comprehensive analysis of the process of judging in India it is better to have an awareness regarding the court systems, the nature and scope of the investigation and the nature of the trial in U.S., U.K. and France. A comparison of the judicial systems in the aforesaid countries with the Indian judicial system is done hereunder.

2.2 Judicial system in United States

The court system in the United States is divided into two separate systems namely federal and the state each of which is independent. This is because the United States Constitution creates a governmental structure for the United States which is known as Federalism. Federalism deals with sharing of powers between national government and state governments. The constitution gives exclusive powers to federal governments in some matters and exclusive power to state governments in certain matters. The state governments and federal government are supreme in these matters. This is known as separate sovereignty. So, both federal and state government need their own court system to apply and interpret their laws. Regarding the matters falling within federal government, state court will have no jurisdiction. Likewise with regard to matters within the powers of state government a federal court has no jurisdiction. This is why two court systems are required.
2.2.1 Federal Court System

As per Article 3 of the United States Constitution, the judicial power of the United States shall be vested with one Supreme Court and in such inferior courts as the congress may from time to time ordain and establish. The federal jurisdiction is divided into three main levels. At the bottom, there are the federal district courts which have original jurisdiction in most of the federal law. There are more than 1 to 20 judges in each district. The District Court judges are appointed by the President and they serve for life. Cases handled by the Federal District Courts include violations of constitution and other Federal law, maritime disputes, cases directly involving the State or Federal government etc.

Above the District Courts there are appellate courts known as United States Court of appeal. They were established in 1891. The courts of appeal consists of 11 judicial circuits throughout 50 States and in addition one in the District of Columbia. There are 6 to 27 judges in each circuit. In addition to the appellate jurisdiction over the District Courts, the Courts of appeal have original jurisdiction in cases involving challenge against order of federal regulatory agencies.

The highest court in the federal system is the Supreme Court of United States. It consists of one Chief Justice and 8 Associate Judges.

2.2.2 State Court System

The State Court System is complex. No two State systems are exactly alike. Roughly the State court systems consist of courts at three levels. The lowest level of State courts are generally known as inferior courts which include Magistrate Courts, Municipal Court, Justice of peace Court, Police Court, Traffic Court, County Court etc. They handle minor civil and criminal cases. More serious offences are handled by superior courts known as State District Courts or Circuit Courts. They hear appeal from inferior courts and original jurisdiction from major and civil cases. The major portions of the judicial trials occur in these courts. The highest State court is called the State of court of appeals or State
Supreme Court which hears appeals from State superior courts. In addition, it has original jurisdiction over important cases.

2.2.3 Criminal Process

The criminal process begins when a law is first broken and extends through the arrest, indictment, trial and appeal. There is no single criminal or civil court process in the United States. Instead, the federal system has a court process at the national level, and each State and territory has its own set of rules and regulations that affect the judicial process. Norms and similarities do exist among all of these governmental entities. But no two States have identical judicial systems and no State’s system is identical to that of the national government.1

An act is not automatically a crime because it is hurtful or sinful. An action constitutes a crime only if it specifically violates a criminal statute duly enacted by Congress, a State legislature, or some other public authority. A crime, then, is an offence against the State punishable by fine, imprisonment or death. A crime is a violation of obligations due to the community as a whole and can be punished only by the State. The sanctions of imprisonment and death cannot be imposed by a civil court or in a civil action (although a fine may be a civil or a criminal penalty). In the United States, most crimes constitute sins of commission, such as aggravated assault or embezzlement; a few consist of sins of omission, such as failing to stop and render aid after a traffic accident or failing to file an income tax return. The State considers some crimes serious, such as murder and treason, and this seriousness is reflected in the corresponding punishments, such as life imprisonment or the death penalty. The State considers others crimes only mildly reprehensible, such as double parking or disturbing the peace, and consequently punishments of a light fine or a night in the local jail are akin to an official slap on the wrist.2 The “mens rea” is the essential mental element of the crime. The U.S.

1 George Clack (ed), Outline of the American Legal System, Bureau of International Information Programs, United States Department of State, 2004, p.92
2 ibid
legal system has always made a distinction between harm that was caused intentionally and harm that was caused by simple negligence or accident.\textsuperscript{3}

2.2.4 Warning to be given to an accused at the time of arrest.

The following warning is to be given to an accused at the time of his arrest:-

“You are under arrest. Before we ask you any questions, you must understand what your rights are. You have the right to remain silent. You are not required to say anything to us at any time or to answer any questions. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we question you and to have him with you during questioning. If you cannot afford a lawyer and want one, a lawyer will be provided for you. If you want to answer questions now without a lawyer present you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.”\textsuperscript{4}

2.2.5 The Grand Jury Process

At the federal level all accused are entitled to have their cases considered by a grand jury as per the \textsuperscript{5} amendment. But, it is not binding on the State. Anyhow, about half of the States adopt the grand jury process in some cases.

Grand juries consist of 16 to 23 citizens, usually selected at random from the voter registration lists, who render decisions by a majority vote. Their terms may last anywhere from one month to one year, and some may hear more than a thousand cases during their term. The prosecutor alone presents evidence to the grand jury. Not only are the accused and his or her attorney absent from the proceedings, but usually they also have no idea which grand jury is hearing the case or when.\textsuperscript{5}

\textsuperscript{3} ibid p. 95
\textsuperscript{4} ibid p.99
\textsuperscript{5} ibid p.100
2.2.6 Investigation and Prosecution

The right of private prosecution and investigation by grand jury was established in American colonies. The colony of Virginia had established the post of Attorney General in 1643 to act as Public Prosecutor. The District Attorney (DA) was entrusted with the power to prosecute criminal offences on behalf of the people and to represent the people in the grand jury process. Now, in USA, the District Attorney plays a role in the investigation through the provision of advice, by providing access to investigative tools like grand jury.

Typically, the DA has an informal supervisory authority over investigators based on the investigator recognising that ultimately sanction of DA will be required to prosecute certain cases or that undercharging may attract the attention of the DA. In USA there is also special prosecutor’s office for investigation of allegation against President. A special prosecutor is a kind of fusion of investigator and prosecutor which provides an efficacious mechanism for the investigation and prosecution of allegations against the higher officials. Thus the prosecutor is involved in the investigative process rather than merely controlling the work of the investigator.

The process by which the defendant is brought before the judge in the court where he or she is to be tried is known as arraignment. The prosecutor or a clerk will read the charge against the accused in the open court. The defendant has several options regarding the plea. The most common pleas are that of guilty and not guilty. The accused may also plead guilty by reason of insanity or former jeopardy. He can admit the facts of the case but claim that it will not amount to a crime.

If the accused pleads not guilty, the judge will schedule a date for trial. If the accused pleads guilty he may be sentenced after accepting the plea. The judge

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has to certify that the plea was voluntary and that the accused was aware of the consequence of the plea.

2.2.7 Plea Bargaining

At both the state and federal levels, at least 90 percent of all criminal cases never go to trial. That is because before the trial date a bargain has been struck between the prosecutor and the defendant’s attorney concerning the official charges to be brought and the nature of the sentence that the state will recommend to the court. In effect, some form of leniency is promised in exchange for a guilty plea. Since plea bargaining virtually seals the fate of the defendant before trial, the role of the judge is simply to ensure that the proper legal and constitutional procedures have been followed.7

There are three types of plea bargaining such as

(i) Reduction of charges
(ii) Deletion of tangent charges
(iii) Sentence bargaining

For the 1st two types of plea bargainings i.e. reduction of charges and deletion of tangent charges, some strict standards have been prescribed.

2.2.8 Advantages and Disadvantages of plea bargaining

As far as the accused is concerned the advantages are that he will be treated less harshly than an accused who was convicted and sentenced after full-fledged trial and that it lessens the publicity. It is a step towards rehabilitation since there is admission of guilt which is equivalent to recognizing his own fault.

As regards the state, there is certainty of conviction and saving of time of judge and prosecutor. Further, the police officers need not testify before court and they can utilize their time for preventing other crimes. The main disadvantage of plea bargaining is the non proportionality of the sentence in relation to the gravity of the offence. The possibility of innocent persons being compelled to undergo

7 supra note 1 p.101
plea bargaining is another disadvantage. When there is less chance of conviction there will be tendency on the part of the prosecutor for encouraging plea bargaining. Over charging offence by the prosecutor is another ploy adopted to compel the accused for plea bargaining. Another defect of the plea bargaining is that it is not made in open court; but in the cafeteria between the prosecutor and defence attorney.

2.2.9. Procedure during Trial

The system of justice is adversarial in USA and there is jury system. The 6th amendment guarantees right of speedy and public trial and right to have an impartial jury. The burden of proof is on the State. Accused is presumed to be innocent until the proof of guilty. The accused cannot be compelled to be a witness against himself.

At the formal trial, both the prosecution and the defence will make an opening statement outlining the major objective of each side’s case, evidence to be presented, the witness to be examined etc. An opening statement is not evidence in itself 8 and it is not argument. 9 The opening statement of counsel is generally no more than an outline of anticipated proof, and not intended as a complete recital of the facts to be produced on contested issues. 10 The proper function of an opening statement is to allow the party to inform the court and the jury of the nature of his case 11, what he intends to prove 12, to state what evidence will be presented 13, and to prepare the minds of the jury to follow the evidence and to more readily discern its materiality, force and effect. 14

A legal trial at common law presupposes and generally is predicated upon the presence at all stages thereof of a presiding justice under whose direction the

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8 U.S. v. De Peri, C.A.3(Pa.)778 F.2d 963
9 State v. Bernier, 486 A.2d 147
11 State v. Brooks, 618 S.W.2d 22
12 People v. Roberts, 426 N.E.2d 1104
13 U.S. v. Zielie, 734 F.2d 1447
14 Calhoun v. State, 468 A.2d 45
An essential element of the constitutional right to trial by jury is the superintendence of a judge having power to instruct the jury as to the law and advise them with respect to the facts. If it becomes necessary for the trial judge in a criminal case to leave the courtroom temporarily, the proper practice for him to follow is to announce his intention, suspend the trial, and declare a recess.

After the opening statements, the prosecutor will present the evidence collected by the State against the accused. Questions as to the propriety of the prosecuting attorney’s conduct in examining or cross-examining witnesses must ordinarily be left to the sound discretion of the trial courts. In the trial of a case, the court has the right to exclude witnesses from the courtroom. The purpose of an order excluding a witness from a courtroom is to prevent him from listening to testimony of other witnesses and then shaping or fabricating his testimony accordingly.

The general rule in criminal cases is that the prosecution, having the burden of proving the charge, has the right to open and close the evidence and the argument. Evidences are of two types namely physical evidence and testimony of witnesses. The physical evidence includes material objects, fingerprint, handwriting samples, blood and urine test and other documents. The District Attorney has the right to cross-examine the witness. The prosecutor may examine witness to clarify any points made during cross-examination. The evidence of the defence is also adduced similarly. After the completion of the defence evidence the prosecution has a right to produce rebuttal evidence. Rebuttal of an alibi is permissible even though the evidence offered for such purpose could not have been admitted in chief.

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15 Carpenter v. Carpenter, 78 NH 440
16 supra note 10, p.158
17 ibid p.159
18 Brown v. U.S., C.a., Cal., 222 F.2d 293
19 Tice v. Mandel (ND) 76 NW2d 124
20 Taylor v. United States (CA9 Wash) 388 F2d 786
21 Faulk v. State (fla) 104 So 2d 519
22 People v.Williams, 330 P.2d 942
The evidence offered by the prosecution in rebuttal in a criminal case generally must be related directly to the subject matter of the defence and ought not to consist of new matter unconnected with the defence and not tending to controvert or dispute it. But, the admission of evidence in a criminal prosecution as a part of the rebuttal, when such evidence would have been properly admissible in chief, rests in the sound discretion of the trial judge, and will not be interfered with in the absence of gross abuse of that discretion. Where the prosecution in rebuttal is permitted to introduce new matter, accused may and should be permitted to introduce evidence in surrebuttal.

Under the Federal Rules of Criminal Procedure, after closing of evidence, the prosecution shall be allowed to open the argument, defendant is then permitted to reply and the prosecution is then allowed to reply in rebuttal. The prosecution is permitted to reply in rebuttal to the defense’s reply to its closing argument, but the right is conditioned and limited by the defense’s closing argument. In the exercise of its power to control proceedings at the trial, it is the duty of the court, either of its own motion or impelled by the objections of adverse counsel, to exercise a sound discretion to compel counsel to keep within the bounds of the propriety during his argument to the jury.

2.2.10 Role of Judge

The judge conducting a jury trial is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and the fair and impartial administration of justice between the parties to the litigation. He must exercise the wide discretionary powers vested in him in a manner calculated to prevent abuses of justice. The court and jury have separate and distinct functions.

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23 Goldsby v. United States, 160 US 70
24 Moore v. U.S., C.C.A.Ga., 123 F.2d 207
26 ibid, p.151
27 New York C. R. Co. v. Johnson, 279 US 310
28 Glasser v. United States, 315 US 60
29 Miami v. Williams (Fla) 40 So 2d 205
It is the province of the court to determine and decide questions of law presented at the trial, and to state the law to the jury.\(^{30}\) The judge’s role in the trial, although very important, is a relatively passive one. In some jurisdictions, the judge is permitted to ask substantive questions to the witnesses and also to comment to the jury about the credibility of the evidence that is presented; in other States the judge is constrained from such activity. The judge is expected to play the part of a disinterested party whose primary job is to see to it that both sides are allowed to present their cases as fully as possible within the confines of the law. If judges depart from the appearance or practice of being fair and neutral to parties, they run counter to fundamental tenets of American jurisprudence and the risk of having their decisions overturned by an appellate court.\(^{31}\)

It is for the court in every case to say what is the law, to determine questions of law and to direct the application of the law to the facts of the case.\(^{32}\) One feature of ideal administration of justice by the jury system is that correct rulings of law shall be made by the presiding judge\(^{33}\) In the trial by jury, both the court and the jury are essential factors. To the former is committed a power of direction and superintendence, and to the latter the ultimate determination of the issues of fact. Only through the co-operation of the two, each acting within its appropriate sphere, can the constitutional right be satisfied. And so, to dispense with either, or to permit one to disregard the province of the other, is to impinge on that right.\(^{34}\) The primary rule in determining whether a question should be submitted to the jury is that it is the function of the jury to determine controverted questions of fact. In a case being tried by a jury, the court should not undertake to pass on and decide issues of fact and it is error not to submit questions of fact to the jury.\(^{35}\)

\(^{30}\) supra note 10, p.319.
\(^{31}\) supra note 1, p.110 &111
\(^{32}\) supra note 10, p.319
\(^{33}\) ibid, p.321
\(^{34}\) Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913)
\(^{35}\) supra note 10, p.321
2.2.11 Role of Jury

The jury are not judges of the law. They should take the law as laid down by the court and give it full effect, but its application to the facts, and the facts themselves, are for them to determine.\(^{36}\) Their job is to listen attentively to the cases presented by the opposing attorneys and then come to a decision based solely on the evidence that is set forth.\(^{37}\) It is the province of the jury to decide or determine the facts of the case from the evidence adduced, and to render a verdict in accordance with the instructions given by the court. To dispense with either court or jury, or to permit one to disregard the province of the other, is to impinge on the right to a jury trial.\(^{38}\) It is the policy of the law to protect the province of the jury from invasion by the courts.\(^{39}\)

2.2.12 Examination of Witnesses

A trial judge has the power within proper limits, to impose limitations upon the number of witnesses, and to control their examination.\(^{40}\) It is within his authority to propound questions to, and examine, witnesses for the purpose of eliciting facts material to the case.\(^{41}\) He may, in a particular case, be justified in examining some witnesses at considerable length, in an effort to bring out the true facts for consideration by the jury. But he should not by the form, manner, or extent of his questioning indicate to the jury his opinion as to the merits of the case.\(^{42}\)

2.2.13 Instructions to Jury

The judge must instruct the jurors about the meaning of the law and how the law is to be applied. A judge presiding over a criminal trial may speak to the

\(^{36}\) Hickman v. Jones, 76 Us 197
\(^{37}\) supra note 1, p.111
\(^{38}\) supra note, p.319.
\(^{39}\) supra note 10, p.319.
\(^{40}\) Chailland v. Smiley (Mo) 363 SW2d 619
\(^{41}\) Glasser v. United States,315 US 60
\(^{42}\) supra note 10,p.192.
jury at his discretion.\textsuperscript{43} But he should do so in a manner that is not prejudicial to accused.\textsuperscript{44} He should avoid in his manner or speech any intimation of his opinion of the guilt or innocence of accused.\textsuperscript{45} The judge must also remind the jury that the burden of proof is with the State and that the accused must be presumed to be innocent. Where the conduct or remarks of the trial judge are such as possibly to afford the jury an impression of the judge’s opinion on the merits of the case, the judge should emphatically caution the jury against any erroneous impression\textsuperscript{46}

After the instructions are read to the jury, the jurors will retreat into a deliberation room to arrive at a decision. The jury deliberates in complete privacy and no outsiders can participate in the debate or observe the same. During their deliberation, jurors may request the clarification of legal questions from the judge, and they may look at items of evidence or selected segments of the case transcript, but they may consult nothing else, no law dictionaries, no legal writings, no opinions from experts.

When it has reached a decision by a vote of its members, the jury returns to the courtroom to announce its verdict. If it has not reached a decision by nightfall, the jurors are sent home with firm instructions neither to discuss the case with others nor read about the case in the newspapers. In very important or notorious cases, the jury may be sequestered by the judge, which means that its members will spend the night in a local hotel away from the public eye.\textsuperscript{47}

2.2.14 Sentencing

If the accused is found guilty, what remains is sentencing. At the federal level and in most of the States sentence are imposed by the judge only. The judge will hear post trial motions for probation. The probation officer is a professional qualified in criminology, psychology or social work who will make

\textsuperscript{43} U.S. v. Rodriguez, C.A.11 (Fla.), 765 F.2d 1546
\textsuperscript{44} Brannon v. State, 295 S.E.2d 110
\textsuperscript{45} Lagrone v. State, 209 S.W.411
\textsuperscript{46} Butler v. U.S., 188 F.2d 24
\textsuperscript{47} supra note 1, p.112
recommendation to the judge. Several options will be presented to the judge regarding the sentence.

2.3 Judicial system in United Kingdom

United Kingdom does not have a single unified federal system. England and Wales have one system, Scotland has another system and Northern Ireland has a third system. In certain matters, the Tribunal constituted under immigration law has jurisdiction over the whole of United Kingdom. Certain other Tribunals constituted under some other laws have jurisdiction over England, Wales and Scotland. The court in England and Wales consists of senior courts and subordinate courts. Senior courts are Court of Appeal, High Court of Justice and Crown Court. Court of appeal deals with appeal from other courts.

The High Court of justice functions as a civil court of first instance and an appellate court as regards criminal and civil matters from subordinate courts. It consists of 3 divisions namely Queens’s bench, Chancery and Family divisions. These divisions are not separate courts but have separate procedures and practice adapted for their purposes. Each division is exercising the jurisdiction of the High Court.

Crown Court is a criminal court of both original and appellate jurisdiction and also handles certain civil cases of first instance and on appeal. It is the only court in England and Wales that has jurisdiction to try cases on indictment and regarding that matters it is the superior court and the high court has no appellate jurisdiction on that matters. Any judge of the High Court can sit to hear cases in the Crown Court.48 Regarding other matters crown court is an inferior court.

Subordinate courts consist of magistrate’s court, family proceeding court, youth court and county court. The Magistrate’s courts are presided over by a bench of lay magistrates or a legally trained District Judge. Lay magistrates are assisted in their work by legally qualified justice’s clerk. The task of these officials

is wider than the administrative role of many officials in other courts. They hear minor criminal cases. Youth courts deal with offenders to the age of 10 to 17. Some Magistrate’s courts also function as family proceeding courts dealing with family matters. The county courts have only civil jurisdiction. They are presided over by a District Judge.

2.3.1 Supreme Court of United Kingdom

Supreme Court is the final court of appeal in United Kingdom for civil cases. It is a final court of appeal for criminal cases from England, Wales and Northern Ireland. It was established by Constitutional Reform Act 2005. Prior to the establishment of the Supreme Court, this jurisdiction was with the House of Lords. The transfer of the authority from the House of Lords to the Supreme Court was effected on 1st October, 2009.

2.3.2 Judicial Committee of Privy Council

Privy Council is the highest court of appeal in some commonwealth countries and colonies and the Channel Islands. Judges who preside over the judicial committee of the Privy Council are also members of the Supreme Court. The jurisdiction to hear cases on devolution matters under the Scotland Act 1998, Northern Ireland Act 1998 and Government of Wales Act 2006 was transferred to the Supreme Court from the Privy Council.

2.3.3 Investigation and Prosecution

The English system continued to rely on essentially private investigations and prosecutions till organised police services were legislated in the Nineteenth Century. The office of the Director of criminal prosecution for England and Wales had a limited jurisdiction till the establishment of Crown Prosecution Services (CPS) in 1986. So, the police had developed their own arrangements for

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49 ibid, p. 57
50 supra note 6, p.127
conduct of criminal prosecution by appointing solicitors of their own choice. CPS ensured the independence of prosecution from the police. Further, prosecution control was centralized for England and Wales specifying that the CPS would maintain a strict divide between its work of the prosecutor and the work of the investigator.

The Royal Commission reviewed the prosecutor-investigator divide and recommended that the CPS shall not have a role in supervising police investigations apart from giving advice to police, which the Royal Commission encouraged. However, it also recommended that the CPS shall not have the power to direct the police to undertake further inquiries. Independent decision making as regarding the filing of charge is impossible for the prosecutor so long as he remains dependent up on the police for relevant information.

In 2001 in England and Wales, in response to the problems of police over-charging and of subsequent failed prosecutions, the Auld Report recommended that the responsibility for deciding whether to lay a charge should be transferred from the police to the CPS and the British Government has indicated that it intends to implement this recommendation. Once the prosecutor has charge responsibility, the prosecutor can require the police to investigate further before agreeing to the commencement of criminal proceedings.

2.3.4 Types of Trial

Criminal trials in England and Wales take one of two forms – they are either summary trials or trials on indictment. Summary trial takes place in magistrate’s courts. The judges are magistrates (also known as ‘justice of the peace’). As regards mode of trial there are three classes of offences:-

(i) An offence triable only on indictment is one for which an adult must be tried on indictment.

51 ibid. p.128
52 ibid. p.131&132
(ii) An offence triable either way is one for which an adult may be tried either on indictment or summarily.

(iii) An offence triable only summarily is one for which both adults and juveniles must be tried summarily.\(^54\)

### 2.3.5 Summary Trial

A summary trial commences with the charge or information being put to the accused by the clerk. For this reason summary trial is also known as ‘trial on information’. Where it is alleged that two or more persons acted together to commit an offence they may be jointly charged in one information, and will normally be tried together. This applies whether they were joint principal offenders or aiders and abettors or a combination thereof. An information must allege only one offence, but two or more informations may be tried together if either the accused (or all the accused where there is more than one) consents or the magistrates think that the informations are linked together so that the interest of justice are best served by a single trial.

If the accused pleads guilty to the information, there is no need for evidence about the offence to be called, and the magistrates commence the procedures leading up to sentence being pronounced.\(^55\) If the accused pleads not guilty, the prosecution makes a short opening speech; the prosecution witnesses are called, each witness being first questioned ‘in chief’ by the prosecution’s legal representative and then cross-examined by the defence. The defence may, if they so wish, submit that there is no prima facie case against the accused, and if the magistrates agree they acquit forthwith; if no submission of no case is made or if one is made unsuccessfully, the defence may (but need not) call witnesses who may (but need not) include the accused; after the defence evidence (if any) the defence legal representative makes a closing speech, and then the magistrates announce their verdict.\(^56\)

\(^{54}\) *ibid*, p.5 & 6.

\(^{55}\) *ibid*, p.1

\(^{56}\) *ibid*, p.1 & 2.
Where a person charged with having committed an offence not punishable summarily is brought before a magistrate's court, the court must hold preliminary inquiry for the purpose of determining whether, on consideration of the evidence there is sufficient evidence to put him upon trial by jury for any indictable offence.\(^{57}\) The function of such proceedings is to ensure that no one shall stand trial unless there is a prima facie case against him.\(^{58}\) Justices so acting are known as examining justices and their functions may be discharged by a single justice. They are not a court of trial.\(^{59}\)

Where a fact is admitted orally in court by or on behalf of the prosecutor or accused for the purpose of proceedings before a magistrate’s court acting as examining justices, the court must cause the admission to be written down and signed by or on behalf of the party making the admission.\(^{60}\)

The trial on indictment is nearly always preceded by committal proceeding which take place in a magistrates’ court.\(^{61}\) Except where a person is committed for trial without consideration of the evidence, a magistrate's court enquiring into an offence must cause the evidence of each witness, including the evidence of the accused, but not including any witness of his merely to his character, to be put into writing. Such records of the evidence are termed depositions. As soon as may be after the examination of such a witness, the court must cause his depositions to be read to him in the presence and hearing of accused, and must require the witness to sign the depositions.\(^{62}\)

After the evidence for the prosecution, including any written statement, has been given and after hearing any submission, if any, is made, the court must unless it decides not to commit for trial, cause the charge to be written down, if this has

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\(^{58}\) *R v. Epping and Harlow Justices, ex p Massaro* [1973] 1 QB 433

\(^{59}\) *Card v. Salmon* [1953] 1 QB 392

\(^{60}\) *supra note 57*, p.711

\(^{61}\) *supra note 53*, p.2.

\(^{62}\) *supra note 57*, p.713
not already been done, and, if the accused is not represented by counsel or a solicitor, must read the charge to him and explain it in ordinary language.63

2.3.6 Indictment

By the Courts Act 1971, assize courts and courts of quarter sessions were abolished and replaced by the Crown Court, which is part of the Supreme court of England and Wales. All proceedings on indictment must be brought before the Crown Court.64 The course of the trial is controlled by a professional Crown Court judge.65 If a Judge orders a preparatory hearing, the trial begins with that hearing and arraignment accordingly takes place at the start of the preparatory hearing.66

The most serious offences are triable only on indictment, e.g. murder, manslaughter, causing death by reckless driving, wounding/causing grievous bodily harm with intent, using a firearm to resist arrest, rape, buggery, incest, robbery, aggravated burglary, ordinary burglary if it involved the threat of violence to a person in a dwelling, blackmail, criminal damage with intent to endanger life and perjury in judicial proceedings.67

When an accused appears in the dock, he is called upon by name and is then arraigned by the clerk of the court. A trial on indictment begins with the clerk of court putting the counts in the indictment to the accused.68 The arraignment consists in reading out each count of the indictment, or the material parts (or an abstract) of it and asking the accused whether he is guilty or not guilty. The accused is entitled in all cases to make a plea of not guilty in addition to any demurrer or special plea; he may also plead not guilty in addition to any alleged in the indictment but guilty of another indictment.69 If he pleads guilty to all counts,

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63 ibid, p.717
64 ibid, p.802
65 supra note 53, p.4.
66 supra note 57, p.810
67 supra note 53, p.6.
68 ibid, p.3.
69 supra note 57, p.812
the court embarks upon the procedures leading up to the pronouncement of sentence.70

2.3.7 Summoning of Jurors

If the accused pleads not guilty to all the counts in the indictment, a jury is sworn in to try the case. The Lord Chancellor is responsible for summoning jurors for service.71 A jury consists of twelve men and women, drawn largely at random from a wide (but not complete) cross-section of the adult population under 65.72 Counsel for the prosecution opens the case to the jury by giving an outline of the salient features of his case and the nature of the evidence which he propose to call in support of it.73 The prosecuting counsel should regard themselves as ministers of justice assisting in its administration rather than as advocates.74 After opening his case, the prosecuting counsel calls his witness and tenders any written statements. When a witness is called, objection may be taken to his competence before he is sworn or affirmed. If there is no such objection or objection is made and rejected, each witness takes the oath or affirmation and is examined in chief. Then he may be examined by the accused or his counsel, and may be re-examined by the counsel for the prosecution.75

The general rule and practice in criminal cases is that witnesses as to fact should remain out of court until they are required to give evidence. When counsel for prosecution has called all his witnesses and tendered written statements of witnesses not called, he is entitled to close his case. After the close of the case by the prosecution, the accused or his counsel may submit that there is no case to go to the jury. The submission may be upheld if there is no evidence to prove that the accused committed the evidence. Same is the case where there is some evidence and it is such that the jury properly directed could not convict on it. In these

70 supra note 53, p.3.
71 supra note 57, p.825
72 supra note 53, p.4.
73 supra note 57, p.837
74 R v. Puddick (1865) 4 F&F 497
75 supra note 57, p838
circumstances, it is the judge’s duty, on a submission being made, to stop the case.\textsuperscript{76}

If there is no successful submission that there is no case to go to the jury, it is for the accused, if he so wishes, to adduce evidence. If he decides to give evidence, he must do so on oath and he is liable to be cross-examined. After the accused has given evidence, or forthwith, if he does not himself give evidence, the witness for the defence are called and examined; they may be cross-examined by counsel for the prosecution.\textsuperscript{77}

The general rule is that all matters of law are to be decided by the judge while all matters of fact are to be decided by the jury.\textsuperscript{78} The judge is not normally required to determine questions of fact. However, there are occasions when a disputed question of fact must be determined in order to decide whether an item of evidence should be admitted. On these occasions, the judge alone determines questions of fact. He normally hears witnesses in order to do so. The procedure is called “Trial within a trial” or “voir dire”\textsuperscript{79}

After the completion of the evidence of the prosecution and the accused, the counsel for both sides will address the court. At the close of counsel’s speeches the trial judge sums up the case to the jury, giving it directions on the matters in issue and on the points of law applicable, and such other assistance as may help it to reach a verdict. Every summing up must be regarded in the light of the course and conduct of the trial and the matter raised by counsel for the prosecution and the defence respectively.\textsuperscript{80}

\subsection*{2.3.8 Verdict}

At the conclusion of the summing up, the members of the jury consider their verdict. The members of the jury may award together then and there, but it is useful for a bailiff to be sworn and for the members of the jury to be conducted to

\begin{flushleft}
\textsuperscript{76} R v. Galbraith [1981]2 All ER 1060
\textsuperscript{77} supra note 57, p.843
\textsuperscript{79} \textit{Ibid}, p.26
\textsuperscript{80} supra note 57, p.847&848
\end{flushleft}
their retiring room to consider their verdict. Although there is nothing to prevent
the trial judge from exhorting the jury to reach a verdict, it is a cardinal principle
of the criminal law that, since the verdict of a jury involves the liberty of the
subject, the jury must deliberate in complete and uninhibited freedom,
uninfluenced by any extraneous consideration whatsoever.\textsuperscript{81}

Judgment must be pronounced orally in open court by the trial judge.\textsuperscript{82}
Sentence in the Crown Court is pronounced by a Crown Court judge. If the
offender comes before the Crown Court as a result of being committed for
sentence, the Crown Court judge must sit with two lay magistrates. This is subject
to detailed provisions in the Crown Court Rules 1982 which inter alia permit a
Crown Court judge and one lay magistrate to deal with a committal for sentence if
waiting for two lay magistrates would cause unnecessary delay.\textsuperscript{83}

\section*{2.4 Judicial System in France}

France has a system of civil law unlike English speaking countries which
use a system of common law. Civil law system was based on a code of law
whereas the common law systems were evolved over the ages and are mainly
based on consensus and precedents. In English speaking countries common law
forms the basis of the law whereas civil law system forms the basis of law in many
counties in the rest of the world except China and Islamic nations.

France has a Dual legal system. (1) Public and (2) Private.

\textit{Droit public} or public law governs the field of operation of the state of
public bodies. This branch of law is administered by administrative courts known
as \textit{Tribunaux administratifs}.

The private law or \textit{droit prive} applies to private individuals and private
bodies. This is administered by judicial courts. Basically the courts are divided
into two branches.

\begin{flushright}
\textsuperscript{81} ibid, p.856
\textsuperscript{82} supra note 57, p.870
\textsuperscript{83} supra note 53, p.36.
\end{flushright}
Ordinary courts or judicial courts which handle criminal and civil litigation known as *ordre judiciaire*.

Administrative courts which supervise government and public bodies (*Ordre administratif*).

Each branch has three tier hierarchical systems. The 1st degree courts are the inferior courts which are 3 in numbers each on civil and criminal side. On the Criminal side the three 1st degree courts are:

1. *Judge de proximité* (a local magistrate) or *Tribunal de police court*) which hears minor criminal offences such as traffic violations, minor assault and breaches of peace.
2. *Tribunal correctionnel* also called a Correctional court which hears less serious felonies and misdemeanors.
3. Court of *Cour d’ assises* or Assize Court also called a court of session which sits in each of the departments and France with Appellate and original jurisdiction over crimes and serious felonies.

Normally it is composed of 3 judges and 9 juries. In certain cases, for example, terrorism and illegal drug trade the court may sit with 3 judges alone. While sitting as a court of appeal also it will sit with three judges.

The three 1st degree civil courts are:

1. *Tribunal d’ instance* which hears minor civil cases
2. *Tribunal de grande instance* which has jurisdiction over civil matters over 10,000 euros
3. *Conseil de prud’hommes* (labour court) or *Tribunal Paritaire Des Baux Raraux* (land estate courts) or *Tribunal des affaires de securite sociale* (Social security court) or *Tribunal de Commerce* (business court). Labour court hears dispute between employers and employees. Land estate court hears cases dealing with leases or farm land estate. Social security courts hears suits concerning welfare and state benefit or business court hears suits regarding trade and business disputes.
The 2\textsuperscript{nd} degree court is \textit{Cour d’appel} (Court of Appeal) which hears appeal from lower courts. It is composed of three judges. It has several divisions for civil, criminal, social security and business.

The 3\textsuperscript{rd} degree court which is the highest court is the \textit{Cour de cassation} (the Court of Cassation). There are 120 judges serving in this court. Each case is heard by a minimum of seven judges. The court of cassation is the court of final appeal for civil and criminal matters. The Court of Cassation does not hear cases involving case against the government. This is heard by Counsel of State Acts which is Supreme Court of Appeal as regarding these matters.

\subsection*{2.4.1 Investigation and Prosecution}

In France, the criminal investigation is not the exclusive domain of the police as in England and Wales. This is also carried out by public prosecutor and investigating magistrates. They have the right to give police instructions during investigations.

The investigating judges have both investigative powers (e.g. giving the police instructions and interrogating the suspect and witnesses directly) as well as judicial powers (e.g. decisions about delicate matters such as those concerning the personal liberties of those who are under investigation). However, the investigating judge is not involved in the investigative phase in all cases. His or her involvement is only obligatory in the more serious ones. In less serious cases, such as the delits, the supervision of the police is normally entrusted to public prosecutors. For this type of crime, the investigating judge is involved only following a specific request made by the public prosecutors.\textsuperscript{84}

Upon termination of investigation of the more serious and complex crimes, the investigating judge decides whether the case should be closed or taken to court. If the public prosecutor, upon receiving the documentation from the investigating judge, deems that the case be judged by the Cour d’assises, then it is transferred to the \textit{Chambre d’instruction} (this is a judicial office created in 2000 to

\textsuperscript{84} supra note 6, p.138
substitute the Chambre d’Accusation). It is composed of a panel of 3 judges who act as a further filter aimed at ensuring that evidence justifies a public trial. For all other violations of criminal law that are investigated by the police under the supervisory powers of the Prosecution Office, that is, for the great majority of cases, the decision whether to commence court proceedings is taken by the public prosecutor. 85

The French criminal system still relies on the investigation system under the direction of an instructing judge or judge d’instruction. Only major “défts” (such as robberies) and all “crimes” (such as murders) are brought before the instructing judge by the public prosecutor’s office prior to the court hearings. This represents seven percent of criminal proceedings. At the end of the instruction period, at the request of the public prosecutor’s office, the instructing judge refers the penal dossier to the Tribunal correctionnel or Cour d’assises, if substantial evidence has been gathered on the facts and on the offender’s intent. The victim of an offence is also entitled to summon a suspected perpetrator before a court or before the instructing judge in order to vindicate his rights. Prior to court hearings, evidence is gathered either by the instructing judge or by the public prosecutor through the police services. Victims can also gather evidence and ask either the instructing judge or the public prosecutor to initiate proceedings. 86

Under the inquisitorial procedure, the judge is an officer of justice vested with a social function. The judge’s investigation is thus not limited to the evidence before him, but the law allows him to make any search for evidence. This inquiry is meant for the judge’s own determination of the issue of guilt or innocence. The proceedings remain written, though secret, and are not meant to be confrontative. 87

The pre-trial period when managed by the public prosecutor is rather inquisitorial. No proceedings have yet been decided, as there might not be a case.

85 ibid, p.138
86 ibid, p.139
But the 15th June 2000 law has curtailed the prosecutor’s discretion. Any person submitted to police remand can demand after a six-month period to know what has occurred in the enquiry. The public prosecutor must shelve the inquiry if no charges are brought about. If he wishes to pursue police investigations, he must then ask permission to do so from the judge des libertés et de la détention. This occurs after a hearing held in the presence of the person put under police custody at the beginning of the enquiry. Permission to continue can be granted only for an extra six months. 88

The pre-trial phase ends when it appears that the dossier is complete and that sufficient evidence exists to bring a case to court. If not, proceedings are dropped either by the public prosecutor or by the instructing judge. French proceedings had a clear-cut inquisitorial outline due to the long-lasting influence of Napoleonic rules. But since the 1808 Criminal Instruction Code the law has evolved and moved slowly away from the inquisitorial approach. In 1990 a reform commission (Commission Delmas-Marty, called the “Commission Justice pénale et droits de l’homme”) drafted far-reaching proposals overhauling the traditional French system in order to introduce a more accusatorial system. 89

2.4.2 The process of Trial

The forums of trial defer depending upon the seriousness of the offence. The Tribunal de police comprises just one judge, the Tribunal correctionnel a bench of three judges (although in certain situations listed in the code of procedure the court will be comprised of just one judge), and the Cour d’assises is a jury of nine sitting with three judges. In cases before the Cour d’assises, the judges will have studied the case dossier prior to trial and the presiding judge will have the dossier on the bench throughout the trial. The jurors have no access to the dossier.

88 supra note 6, p.140
89 ibid, p.140
In the French system of trial which is inquisitorial there is no plea of guilty as is done in the adversarial system of trial. The court must be satisfied of the accused’s guilt. However, since 2004 there has been a procedure of plea bargaining whereby the defendant will appear in court following a prior admission of guilt that may only be made with the assistance of a lawyer. Even in such case the presiding judge will review the genuineness of the facts before registering the declaration of guilt by the accused and penalty suggested by the prosecutor. Even though the judge cannot alter a suggested penalty, he can and must accept or reject it. This procedure is in respect of cases where the punishment is maximum sentence of 5 years of imprisonment.

The presiding judge is entitled to question the accused. The judge may examine only key witnesses orally in most of the cases. The accused has no choice as to whether he should be questioned or not. But, he may remain silent. Questions may relate to matters which would be inadmissibly under the Indian Evidence Act. The presiding judge has power to require further investigation before or during the trial.

After oral evidence has been heard, the prosecutor will address the court elaborating upon the evidence and requesting a particular punishment. The defendant’s lawyer will be heard next, usually on issues of criminal liability and sentence. In addition to this, lawyer, if any, for the victim may also be given a closing address. A majority of two-thirds is necessary for conviction in the Cour d’assises; that is, eight of the 12 judges and jurors. At the conclusion of the trial, the trial court will impose the sentence.

2.4.3 Role of the Victim

An important peculiarity in the system of French trial is the role of the victim during the investigation and trial. As per the preamble to the Criminal Procedure Code, the judiciary is duty bound to safeguard the interest of the victim and to give guidance and assistance to him. The victim can make himself or herself a party to the case and can involve himself or herself from the stage of
investigation of the case. Legal aid will be extended to the victim. In cases where the prosecutor decides not to proceed with the investigation, the victim is entitled to get it investigated by a Judge d’ instruction on deposit of cost of the proceedings. The compensation awarded to the victim is payable by the State which it can realize from the accused.

2.4.4 Appeal

A conviction in the Cour d’assises may be appealed to a second Cour assises (the Cour d’assises d’appel) where the appeal will be heard by way of a retrial. There is a right of appeal to the Cour d’appel from the Tribunal de police and the Tribunal correctionnel. An appeal takes the form of a retrial based on the case dossier and issues of conviction and sentence based on points of law or fact. Actions for review of decisions made by the trial court on a point of law may be taken in the Cour de cassation.

2.5 Present Judicial System in India

Unlike United Kingdom and United States, India has a single court system. The highest court of nation is the Supreme Court of India. Next below is the High Court. Each State has a High Court. States of Punjab and Haryana have a common High Court. Below the High Court there are District and Sessions courts which will be preceded by a District Judges. Below the District Judges there are Subordinate Judges and Chief Judicial Magistrates. In some states, Additional District Judges act as Chief Judicial Magistrates. But, in many states, the Sub Judges and Chief Judicial Magistrates are of similar designation. They are mainly known as Senior Civil Judges. Below the Sub Judges/ Senior Civil Judges are the Munsiffs/ Junior Civil Judges and Magistrates. In civil matters, the Senior Civil Judges have appellate jurisdiction over Junior Civil Judges in certain matters. The appellate jurisdiction over the Magistrates is with the District and Sessions Judges.
High Courts and Supreme Court are courts of record. Unlike the United States and United Kingdom, the Supreme Court of India has jurisdiction over all the courts in India.

2.5.1 Investigation Process in India

Investigation is the most important part of criminal justice system. It is during investigation that the basic facts relating to crime committed are enquired into. Unless there is an efficient, prompt, fair and impartial investigation, justice in criminal cases cannot be ensured. With the evolution of modern states, sophisticated legal mechanism of investigation, inquiry, trial and justice delivery system also took their respective positions. Investigation and prosecution in India are two separate aspects of criminal justice administration. Formation of opinion as to whether a case is to be sent to the court for trial is the exclusive function of the police. The role of the prosecutor commences only after the investigating agency files the report before the court. The police may seek legal opinion of the prosecutor; but it is not obligatory. The separation of the prosecution agency from the police after the Code of Criminal Procedure, 1973 was to ensure that the police have no control over the prosecutors. During the investigation the police officer can examine witnesses u/s.161 Cr.P.C. After the completion of the investigation he shall file a report u/s.173 Cr.P.C.

Even though the separation of the prosecution agency from the police as envisaged by the Code of Criminal Procedure, 1973 is for removing police control over prosecution, the exclusive authority given to the police in the field of investigation resulted in malpractices such as distortion of cases, filing false reports, labelling genuine cases as false and also cooking up false cases. Rights of an accused are often violated by police or other investigating agencies. The essential preconditions for a successful prosecution are an impartial and independent investigation into the crime and an equally independent prosecuting

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91 ibid, p.81
agency. These are the sine qua non for the proper functioning of the criminal justice system. Increasing violence and torture in custody and protest against it by the society led the Supreme Court of India, in D.K.Basu.V State\textsuperscript{92} to lay down specific requirements to be followed by the police for arrest, detention and interrogation of a person.\textsuperscript{93}

In India, the police force works under the control of the government. Even as regards the Central Bureau of Investigation, it is under the control of the Prime Minister of India. In the adversarial system of criminal proceeding unless and until the investigating agency is independent, the crippled authority of the police may not further a true and proper investigation. Recently the Hon’ble Supreme Court of India has asked the Government of India to come out with a law to insulate the Central Bureau of Investigation from “external influence and intrusion” while observing that the agency was a “caged parrot speaking in master's voice” and the situation was far worse now, 15 years after the Supreme Court’s judgment in the Vineet Narain’s case\textsuperscript{94} which had aimed for CBI's autonomy.\textsuperscript{95}

2.5.2 Indian Trial

The process of trial in India is regularized by the Code of Criminal Procedure, 1973. Before the enactment of 1973 Code, the system of jury trial was in existence in India. It was terminated by the enactment of the 1973 Code. The court of the lowest jurisdiction on the criminal side is the Judicial First Class Magistrate, higher to which there are Assistant Sessions Courts, Sessions Courts, High Courts and the Supreme Court. Except regarding matters for which original jurisdiction was given to the sessions court in very rare matters, all the proceedings begin before Magistrate’s Courts.

\textsuperscript{92} D.K.Basu v. State of West Bengal, AIR 1997 SC 610
\textsuperscript{93} \textsuperscript{supra} note 90, p.103
\textsuperscript{94} Vineet Narain v. Union of India, 1998 AIR SCW 645
\textsuperscript{95} The Economic Times, May 9, 2013.
Proceedings before Magistrate’s Courts are mainly of three types namely summons case, warrant case and committal proceedings. These proceedings can either be on the basis of police report or otherwise than on police report, for example, by filing a private complaint. The proceedings before the Magistrate commences by taking cognizance of an offence. Thereafter if the Magistrate is satisfied that there is sufficient ground for proceeding he will issue process to the accused.

In summons case, whether it is on the basis of a police report or private complaint, when the accused appears before the Magistrate's court, the particulars of the offence shall be read over to him and he shall be asked as to whether he pleads guilty or not. If he pleads guilty, the Magistrate, after satisfying that the plea was voluntary and that the accused is guilty of the offence and after deciding the question of probation, impose sentence on him. If the accused pleads not guilty, the Magistrate will proceed to record the evidence of the prosecution. After the evidence of the prosecution was closed, the accused will be examined under Sec. 313 Cr.P.C. This is for giving opportunity to explain the incriminating circumstance appearing in the evidence against him. Thereafter, defence evidence, if any, will be recorded and after hearing both sides the Magistrate may either convict or acquit the accused. In case of conviction, after deciding the question of probation he may impose sentence on the accused.

Regarding a warrant case on police report, after appearance of the accused, the Magistrate will hear both sides and will either discharge the accused or frame a charge against him. Thereafter, he will follow the procedure mentioned above and will either convict or acquit the accused. In case of conviction, he will hear the accused on the question of sentence and after deciding the question of probation he may impose sentence on the accused.

In case of warrant trial otherwise than on police report, after appearance of the accused, the Magistrate will proceed to record the evidence of the complainant and after hearing both sides, he may discharge the accused or frame charge against
him. If charge is framed, further proceedings will be the same as that of a warrant case on police report.

Committal proceedings are in respect of offences exclusively trial by the Sessions Court. In such case when the accused appears before the Magistrate's court, if it is satisfied that the offence alleged is exclusively trial by the Court of Session, it will commit the case for trial to the Sessions Court.

As regards the Sessions Court, the accused appears before the court after committal. The court, after hearing both sides, will either discharge the accused or frame a charge against him. When charge is framed the court will record the evidence of the prosecution and will examine the accused u/s.313 Cr.P.C. Thereafter, the court will hear the prosecution and the defence and if it considers that there is no evidence that the accused committed the offence, the court will acquit him u/s.232 Cr.P.C. If he is not acquitted, he shall be called upon to enter on his defence. After recording defence evidence, if any, and after hearing, the court will either acquit or convict the accused. In case of conviction, after hearing on the question of sentence, the court will pass sentence on him.

2.5.3 Plea bargaining in India

By the amending Act of 2005, Cr.P.C. was amended by incorporating provisions of plea bargaining in certain limited category of cases. Plea Bargaining is applicable only in respect of those offences for which punishment of imprisonment is upto a period of 7 years. It does not apply where such offence affects the Socio-economic condition of the country or has been committed against women or a child below the age of 14 years. The plea bargaining in India is not as similar to that of the United States. Anyhow, it is a deviation from the conventional procedure of the trial of criminal case existed in India.

2.6 Differences and Similarities

Three out of the four systems discussed above i.e., the system of trial in U.S., U.K., and India follow the adversarial system of trial whereas France follows inquisitorial system of trial.
### 2.6.1 Adversarial and Inquisitorial Systems - Difference

The broad differences between the two systems of trial can be summarized as follows:

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Area of Application</th>
<th>Adversarial System</th>
<th>Inquisitorial System</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Nature of arriving at the truth</td>
<td>Arriving at the truth through the open competition between the prosecution and the defence to make the most compelling argument for their case.</td>
<td>Arriving at the truth of the matter through extensive investigation and examination of all evidence</td>
</tr>
<tr>
<td>2</td>
<td>Investigation</td>
<td>The responsibility for gathering evidence rests with the parties (the Police and the defence).</td>
<td>A government official (generally the public prosecutor) collects evidence and decides whether to press charges. Prosecutors carry out investigations themselves or request Police to do so. The prosecution can give general instructions to the Police regarding how particular cases are to be handled and can set areas of priority for investigations. In some inquisitorial systems, a Judge may carry out or oversee</td>
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<tr>
<td></td>
<td>Examination phase</td>
<td>No Independent evaluation of the evidence collected during investigation by independent agency</td>
<td>An examining Judge records evidence and reviews the written record and decides whether the case should proceed to trial. In some inquisitorial systems, the rule is that the prosecution must take place in all cases where there is sufficient evidence and the prosecutor or the judge has no discretion in this regard</td>
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<tr>
<td>3</td>
<td>Faith in the Pre-trial process</td>
<td>Mistrust in the reliability of the prosecution evidence. It proceeds on the assumption that mistaken verdicts of guilt can best be avoided by allowing the defence to test and counter that evidence at the trial</td>
<td>Faith in the integrity of pre-trial processes to distinguish between reliable and unreliable evidence; to detect flaws in the prosecution case; and to identify evidence that is favourable to the defence. In many jurisdictions, this culminates in the preparation of a “dossier” for the trial court that outlines all aspects of the case and forms the basis for the trial itself</td>
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<td>5</td>
<td>Nature of the trial</td>
<td>The prosecutor, acting on behalf of the State and the defence lawyer, acting on behalf of the accused offer their version of events before the judge</td>
<td>Record of evidence has already been made during the examining phase and is available to the prosecution and defence well in advance of the trial. The main function of the trial is to present the case to the trial Judge/Jury and to allow the lawyers to present oral argument in public.</td>
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<tr>
<td>6</td>
<td>Plea of guilty</td>
<td>The accused can plead guilty and avoid a trial.</td>
<td>There is no plea of guilty as in adversarial system. Regardless of the accused’s wishes the trial will continue</td>
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<tr>
<td>7</td>
<td>Summoning of Witnesses</td>
<td>The parties determine the witnesses they call and the nature of the evidence they give</td>
<td>The trial judge determines what witnesses to call and the order in which they are to be heard</td>
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<tr>
<td>8</td>
<td>Examination of witnesses</td>
<td>Each witness gives their evidence-in-chief (orally) and may be cross-examined by opposing counsel and re-examined</td>
<td>While there is no cross- and re-examination of witnesses, witnesses are still questioned and challenged. In some systems, (eg:- Germany), there is a preference for narrative testimony, in which the witnesses give their</td>
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<tr>
<td></td>
<td>Oral Arguments</td>
<td>Has significance</td>
<td>version of events without being shaped by questions from the prosecution or defence.</td>
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<tr>
<td>9</td>
<td></td>
<td></td>
<td>Written submissions have pride of place and oral arguments are relatively insignificant</td>
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<tr>
<td>10</td>
<td>Role of the judge</td>
<td>The Judge is a referee at the hearing. It is the Judge’s function to ensure that the court case is conducted in a manner that observes due process. The Judge decides whether the defendant is guilty beyond reasonable doubt and determines the sentence.</td>
<td>Judges are required to direct the courtroom debate and to come to a final decision. The Judge assumes the role of principal interrogator of witnesses and the defendant and is under an obligation to take evidence until he or she ascertains the truth. It is the Judge that carries out most of the examination of witnesses arising from his obligation to inquire into the charges and to evaluate all relevant evidence in reaching the decision. The judge’s role is more active than that in the adversarial system</td>
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<tr>
<td>11</td>
<td>Role of the victim</td>
<td>No recognised status either in the pre-trial investigation or the trial itself except that of a witness</td>
<td>Victims have a more recognised role. In some jurisdictions they have a formal role in the pre-trial investigative stage, including right to request particular lines of inquiry or to</td>
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participate in interviews by the examining Magistrate. At the trial itself, they generally have independent standing.

2.6.2 Difference among the Adversarial Systems

Even within the adversarial systems of trial there is vast difference between the trial in USA, England and India. As far as England and USA are concerned there is jury trial in existence. As regards India, after the enactment of Code of Criminal Procedure, 1973, the trial by jury came to an end. Even regarding the jury trial, there is difference in the approach between USA and UK. As regards USA, where there is prosecutor control over the investigation, many movements are towards inquisitorial approach. As regards allegations against the President the entire investigating power is with the Special Prosecutor.

The submission of no case by the accused or his counsel after the close of the evidence by the prosecution in U.K., resembles the hearing under Sec. 232 Cr.P.C. during the sessions trial in India. Such a procedure is not there after framing of charge in the cases triable by the magistrates.

In USA, there is dual court system such as federal and state. In U.K. even the Supreme Court of United Kingdom has no jurisdiction over the criminal cases from Scotland. After the Crown Prosecution Service was implemented, there is prosecutor control over the investigation to a certain extent. Even though it ensures independence of the prosecuting agency from the police, it has not that much control over the investigation as in the case of USA.

Even though India is following adversarial system of trial, recent movement in India like plea bargaining is a deviation from the conventional Indian method. The power of the Magistrate to monitor the investigation as held by the Hon’ble Supreme Court in Sakiri Vasu’s case\textsuperscript{96}, the concept that the judge is not an Umpire, the broad interpretation of the power of the judge u/s. 165 of Evidence

\textsuperscript{96} Sakiri Vasu v. State of U. P., AIR 2008 SC 907
Act etc. are approaches towards an inquisitorial system. Anyhow, it is entirely different from the inquisitorial system of trial which is followed in France.

Preliminary investigation in the European countries with an inquisitorial system of procedure has remained with the judge of the court of first instance. His extensive powers include hearing of witnesses, interrogation of the accused, inspection on the spot, ordering searches and seizures, apprehension and arrest of the accused to put him in the hands of the law.97

The continental procedure has often been criticised for the use of non-confrontative information in the dossier. The criticism is based on the fear that the source of such information can lie in the rack and thumbs-crew techniques, which may be deployed for the purpose. The apprehensions are not illusory. However, the same can be said about the common law countries where despite the protective rules of procedure the police modes of torture are not unknown.98

In the inquisitorial system, the case diary contains inter alia the first information report which form the basis of the dossier, information received by the police officer in connection with the investigation, reports of inspection of the spot visited, statement of witnesses, any action required to be taken or directions given by a court in the course of the police investigations or the inquiry by the court and any facts ascertained as a result thereof. The case diary is available to the magistrate. This gives him a complete picture of the case before he proceeds to examine the complaint with a view to determining further action, if necessary, by way of summoning the accused, issuing warrants of arrest, and subsequently to decide whether to frame a charge against any person. This procedure is materially different from the one prevailing in English law and procedure. It is true that the courts in India get a previous knowledge of the case, which is not the case under the English law.99

In the system of trial in France, even though there is decline in the percentage of cases conducted by a Judge d’instruction, still no effective

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97 supra note 87, p.23.
98 ibid, p.23
99 ibid, p.24 & 25.
alternative has been found out. In France, the Reform Commission in 2009 recommended abolition of the office of the *judge d'instruction* with the prosecutor taking responsibility for all investigations. But, due to controversy, the proposal was postponed. Still there is doubt about the effective investigation by the prosecutor in case of abolition of the office of *judge d'instruction*.

As regards the plea of guilty, there is vast difference between the system of trial in France and that in the remaining countries of common law jurisdiction. The procedure of plea bargaining was implemented in France in the year 2004 which is different from that in U.S.A. It is only in respect of cases where maximum punishment is sentence of imprisonment for 5 years. Even though there are slight movements in India which indicate inclination towards an inquisitorial system of trial, the prospects of the same seems to be doubtful without having an effective control over the investigating agency. At least prosecutorial control over investigation is warranted with sufficient safeguards. If it is not feasible, at least the independence of the investigative agency from the clutches of the Government requires urgent consideration. The fact that even the Central Bureau of Investigation in India is not an independent agency for the time being is to be remembered in this context. Reforms in the Indian Judicial system that promote movement to find out the truth without prejudice to the right of the accused to a fair trial are to be welcomed.