Political Science
Legal Studies 217
The Investigatory System

Justice and Procedure
- Importance of fairness
  - Substantive justice
  - Procedural justice
- Adversarial system as our norm
  - Can justice be obtained without an adversarial process?
  - Is another system “better”?
    - Faster
    - Cheaper
    - More just results

Structures of Authority
- Tension between uniformity of decision making versus obtaining just results
- Coordinate Model
  - Emphasis on particularized justice
    - "every case is different"
  - Justice as bottom up
- Hierarchical Model
  - Emphasis on uniformity of justice
  - Justice as top down
Coordinate Model

- Need to see the case from the perspective of the disputants
  - Primacy of parties in judicial process
  - Decisionmaker needs to be close to the concrete situations related to the case
    - Local judges
    - Lay decisionmakers
- Appeal is relatively rare and limited
  - Judiciary itself is NOT a professional hierarchy
  - Power is centrifugal not hierarchical or centripetal
  - Emphasis on discretion to achieve justice
    - Rules should be flexible

Hierarchical Model

- Applying law is a nondiscretionary activity
  - Certainty requires uniform policies
- System is highly centralized
  - Power is hierarchical and centripetal
  - Judiciary is professionalized and centralized in a bureaucratic form
    - Judges are not tied to local community
    - Lay decision making is minimized
    - Promotion determined by superiors
- Appeal is common and expected
  - Necessary to insure uniformity
  - “Brooding omnipresence” of hierarchical review

Models vs. Reality

- Models abstract reality
  - “Ideal Type” as a model
  - “Delegate” vs. “Trustee”
- Models can be extremely useful as analytic tools
  - Focus attention of some features
  - Allow comparisons of otherwise dissimilar phenomena
- Models can be dangerous
  - Tempting to see model as the way the world is
Adversary System as Realization of Coordinate Model

- Party-centered process puts emphasis on justice
- Local judges and lay juries reduce certainty and uniformity
  - Decisionmakers not dependent on centralized hierarchy for promotion
- Judges as wise elders rather than legal technicians
- Limited appellate review except for questions of law enhances role of local decisionmakers
  - Orality limits potential for review

Investigatory System as Realization of Hierarchical System

- Investigatory=Inquisitorial
- Process is judge-centered
  - Judge runs “pretrial” process rather than simply setting schedule
- Emphasis on documentary evidence makes hierarchical oversight easier
- State receives special treatment as litigant
  - Specialized courts for administrative matters

Categories of Law

- Public law vs. Private law
  - Civil law
  - Commercial law (lex mercatoria)
  - Penal law
  - Administrative law
  - Constitutional law
- Separate courts
  - Civil, commercial, and penal
  - Administrative
  - Constitutional
Civil Proceedings

- Three stages at First Instance
  - Preliminary stage
  - Evidence gathering stage
  - Decision stage
- Nothing comparable to adversarial trial
  - No jury
  - No need for a “concentrated” event
  - Court of “First Instance” rather than “trial” court

Evidence Gathering

- This is the key stage
  - Pleadings are very general
  - Issues are defined as evidence is gathered
- Evidence is submitted at a series of hearings or conferences
  - Little or no discovery in adversarial sense because no trial focus
- Evidence gathering supervised by judge
  - May be same or different judge from ultimate decision-maker

Emphasis on Written Record

- Seriatim nature of process requires reduction to writing
- Decision by someone other than the investigating magistrate requires reduction to writing
- Potential review of factual determination requires reduction to writing
Testimony

- Questions submitted/suggested by parties
  - "Articles of Proof" submitted in advance
  - Goes to both judge and opposing side
- Questions asked by judge
- Parties, family members, and others with important relationship with parties may not testify in some jurisdictions

Process

- Offer of Proof
- Opposing side may object
  - Set hearing on admissibility
  - Briefs and arguments taken
  - Judge will rule on whether to take testimony
- If favorable, date for hearing to receive testimony will be set
- At hearing, Judge will ask questions, take notes, and dictate a summary
  - Lawyers and witnesses are asked if summary is accurate, and if so, it becomes part of the record

Decisory Oath

- Party A could demand that Party B swear to the truth of an issue of fact that B alleged
  - If B swore, the fact was taken as proved true
  - If B declined to swear, the fact was taken as false
- FRCP: Request for Admissions
Decision and Appeal

- Judge makes decision once all proof is submitted
- Parties may appeal, both on questions of fact and questions of law
  - Court of Appellate Instance
  - Reviews evidentiary record and arrives at an independent determination of the facts
- Further appeal on law: Cassation

Other Key Differences

- Enforcement of decisions
  - Only against property in civil law system \((in\ rem)\)
  - No contempt power against the person \((in\ personam)\)
  - Possible to refer for criminal prosecution
- Damages for compensation of actual loss only
  - Fee shifting
  - No punitive damages
  - No damage multiples

Criminal Procedure

- No guilty plea in the adversarial sense
  - Defendant can confess
  - Guilt must still be determined by court
- Three phases
  - Investigative phase
  - Examining phase
  - Trial
Investigative Phase

- Under control of the public prosecutor
- Prosecutorial function is highly centralized not localized
- Prosecutorial corp is a separate career, or part of the magistrature (judiciary)
- "Investigating" magistrate
- Prosecutor decides whether to bring charges

Examining Phase

- Examining judge or magistrate compiles a complete written record of evidence
- Not a public process
- Counsel for accused participates to protect rights of the accused and to direct the examining judge to relevant evidence
- Defendant may be questioned by does not give sworn testimony
- At conclusion of this phase, examining judge determines whether a crime was committed and whether the accused committed that crime

Trial Phase

- Public event
- Juries or mixed tribunals are common
- May not be available for minor offenses
- May be replaced by a panel of judges
- Evidence assembled during the Examining Phase is presented to the court
- Testimony primarily from defendant
- Lawyers present arguments
Which Is Better?

- Is lay or professional decision making better?
- Is truth more likely to come out through the clash of adversaries or the investigation of a neutral third party?
- Is it better to concentrate the presentation of evidence at trial or develop the evidence over a sequence of hearings?