

ADVERSARIAL V INQUISITORIAL: A PREFERRED CRIMINAL JUSTICE SYSTEM FOR INDIA

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ABSTRACT

The criminal justice system embraces, within its fold all those processes and institution, which concerns themselves with the formulation and enforcement of penal prohibitions, the adjudication of concrete cases relating to violation of such prohibitions and dispositions of those who are held guilty of violation. The ultimate objective of criminal justice system is the protection of society and preservation of such values as are considered, in point of their quality and nature, as appropriate for imposition of punishment. The criminal justice system in India is facing some challenges which it must overcome in order to survive by earning faith of the people for which it exists. The common man has no idea of the inherent lacunas in it and he is surprised when he finds that he does not get the relief or remedy which he may have justly expected and ultimately he loses faith in the system. It is therefore repeatedly felt that there is urgent need to review the entire criminal justice system.

Key Words: Adversarial, Criminal Justice System, neutral Judge, access to justice, prosecution

Introduction

The criminal justice system embraces, within its fold all those processes and institution, which concerns themselves with the formulation and enforcement of penal prohibitions, the adjudication of concrete cases relating to violation of such prohibitions and dispositions of those who are held guilty of violation. The ultimate objective of criminal justice system is the protection of society and preservation of such values as are considered, in point of their quality and nature, as appropriate for imposition of punishment.

The criminal justice system has been viewed by jurists mainly as the justice-oriented model (or the due process model) and the crime control model. In the crime control model, the criminal process is seen as a screening process in which each successive stage-investigation, arrest, post-

arrest investigation, enquiry pending investigation, trial, trial or entry of plea, conviction, and punishment-involves a series of operations whose success is gauged primarily by their ability to pass the case along to a successful conclusion. It's ideal would be a crimeless society.¹

The core values underlying the due process model are liberty of individuals and presumption of innocence of the accused. Since liberty and freedom are the underlying principles of any democratic society and the criminal justice system seeks to take away from accused/individuals this very same freedom, this model seeks to impose adequate and suitable checks and balances, in order to preserve the guaranteed freedom. The due process model argues that since the criminal justice system rests ultimately upon the decisions and predilections of human beings, errors will abound.²

These two models are better understood in terms of adversarial (due process model) and inquisitorial system(crime control model) of criminal justice administration. In this paper in the light of these two models of criminal justice system suggestions are made as to which shall be the better system for the Indian scenario.

Problem of Criminal Justice System in India in the Dispensation of Justice

The criminal justice system in India is facing some challenges which it must overcome in order to survive by earning faith of the people for which it exists. The common man has no idea of the inherent lacunas in it and he is surprised when he finds that he does not get the relief or remedy which he may have justly expected and ultimately he loses faith in the system.³ It is therefore repeatedly felt that there is urgent need to review the entire criminal justice system, especially investigation of crime by the police and the prosecution machinery due to which the conviction rate is declining at a very rapid pace and there is huge pendency of criminal cases and delay in disposal of criminal cases. This has also been attributed to the lack of continuous and effective co-ordination among the law enforcement agencies.

There is a gap between the two vital units of criminal justice system, namely, the police and the prosecution at the operational as well as organisational level. This has led to state of frustration and ambiguity. It has also been considered a sorry state of affairs in the sense that police and

¹Herbert.L.Packer *The Limits Of the Criminal Sanction* (Stanford University Press, California, 1stedn 1968)

²*Ibid.*

³Anup Kumar Varshney "Problems of Criminal Justice System in the Dispensation of Justice" 24 *The Indian Journal of Criminology and Criminalistic* 9 (2003).

prosecution are the two sides of the same coin as the police functioning have a direct bearing on the success and failure in the prosecution criminal cases in court. The police have a vital role in marshalling facts, while the prosecution has a very crucial role in the effective presentation of the facts before the court during the trial proceedings.⁴

It has been observed since long that in most of the states, police are facing serious problems of proper coordination and cooperation with the prosecution due to their casual approach in dealing with the cases in the courts, want of adequate follow-up action of cases on their part and due to lack of proper legal advice available to the investigating officers on complicated legal matters which come up during investigation.⁵

Another serious problem is the non-registration of case by the police so as to keep the recorded crime figure low so that that they can claim that crime has been well controlled and is going down because of the effective and efficient police administration. Further the police power to arrest is also grossly misused in addition to the high custodial crimes.

The failure of public prosecution occurs due to variety of reasons: the foremost reason can be the lapses committed by the investigation agencies. Another problem is the poor quality of entrants in prosecution agency. Further the earning in the open market is higher than what the Govt, offers to the prosecutors. Resultantly competent advocate shy away from joining the prosecution agency.⁶

Also the public prosecutors are overburdened with cases and number is not efficient enough to handle the case. Further the performance of public prosecutor is largely dependent upon the presiding officer and other collateral factors. The pay scales are rather low and there is problem of promotion in the cases of asst, public prosecutor. There is dire need to improve the pay scale so as to make the job attractive and to have quality prosecutors. This enhancement has to be drastic.⁷ There is also problem of the appointing authority as well as corruption, dishonesty etc which has been mentioned earlier.

⁴*Supra* note 35 at 142-143.

⁵*Ibid.*

⁶M. L. Sharma "Role and Function Of Prosecution In Criminal Justice" C. B. I. Bulletin, 9 (1997).

⁷*Ibid.*

Lastly there is virtually no accountability on the part of prosecution agency. Though through the 2005 amendment, efforts have been made to bring transparency in the prosecution system yet there is need for more.

Preferred System for Indian Criminal Justice System

This deteriorating condition of criminal justice administration and laymen losing faith in the entire system has resulted into an urgent need to overhaul the entire criminal justice system. To achieve this in 2003, the committee on reforms on the criminal justice system submitted a report to ministry of home affairs on overhauling of the system.

The committee firstly seeks to root out incompetency among the police, prosecutor, and the judges by improving training, standards, and accountability and to overall increase the efficiency of the court system. Secondly, it seeks to dramatically increase the power of judge and the police by altering the fundamental principle of criminal justice system and obliterating many rights of the accused, and by disregarding the injustice of false conviction⁸

The most radical suggestion of all is that the committee seeks to move from adversarial system to inquisitorial one, giving tremendous power to the judiciary. Also the committee seeks to introduce POTA provision in the Scheme of code, Along with, reducing the burden of proof from ‘beyond reasonable doubt’ to ‘clear and convincing proof’.⁹

This proposal of the Malimath committee of shifting India’s adversarial system to inquisitorial system modeled on continental Europe particularly that of France is not a new. Many common-law countries are growing toward this idea. But what need to be analysed is whether for reforming the criminal justice system is it feasible to shift. This approach has been criticised by most of the authors who feels the improvement does not mean change in the whole system.

There has been a steady trend across the world towards the hybrid legal systems, with countries with adversarial system borrowing aspects and practices from inquisitorial and vice versa.¹⁰ The serious dangers inherent in this practice have been described by Prof. Abraham s. Goldstein:

⁸ Government of India, Report: *Committee on Reforms of Criminal Justice System* (Ministry of home affairs 2003)

⁹*Ibid.*

¹⁰ Ravi Nair “The Malimath Committee’s Reforms in Criminal Justice In India: A Human Right Reflection”, in K.I. Vibhute(edn), *Criminal Justice-A Human Right Perspective of Criminal Justice Process In India*, 142, (Eastern Book Company, Lucknow, 1sted 2004.)

“there is little doubt that when borrowing occurs national and systemic lines, there is a great risk that stereotypes will be imported, without appreciating the distinctive relation of the borrowed practice to the premises of the system in which it has evolved and the living context in which it has taken it form. Indeed, it is commonly assumed that such borrowing are, at best, risky and, at worse calamitous.”¹¹

The moot question here is whether the problem of inefficiency of the present adversarial system can be solved by incorporating or moving toward the inquisitorial system without taking into account the basic social and economic character of the country.¹²The unsatisfactory state of criminal justice in India has nothing to with the adversarial system. The reason for that unsatisfactory situation lies elsewhere. India’s social structure and attitudes are very much conditioned by entrenched habits of discrimination. There are various forms of discrimination, among which one may mention caste discrimination, discrimination of indigenous (tribal) people, and minorities.

Discrimination weighs heavily on the justice system. This has created severe obstacles for development of India’s justice system in general and the criminal justice system in particular. The investigative machinery regarding crimes is terribly underdeveloped, both in terms of attitudes as well as facilities. Further, the justice that one may get is also associated with poverty. The level of poverty in India is so appalling that the result is that the poor cannot afford justice. Beside this, the management of the criminal justice system is backward, inefficient and obsolete. Poor human resources and technical resources affect every area of the system.¹³

Under these circumstances it can be said that the adversarial system has never stood a real chance in India. To the extent it has been effective it has mitigated the operation of traditional prejudices, however India continues to subsist under the Law of Manu, instead of modern rules of justice. It is against the background of the real history of India that the legal norms established by the British must be judged. In that light we see two things: first, new rules helped bring down the rigour of repression in the old system; second, old habits and practices prevented wholesome developments under the new principles.¹⁴

¹¹ A.S. Goldstein “Converging Criminal Justice Systems: Guilty pleas and the Public Interest”, 49 *SMU Law Review* 567 (1996).

¹² Vijay Kumar “Recommendation of the Malimath Committee- A Critical Approach in Human Right Perspective”*Cri. L. J* 33 (2008).

¹³ Available at www.ahrck.net/ua/india_cjs/related_html (visited on 14th April 2020).

¹⁴*Ibid.*

First it should be noted that many aspects of the inquisitorial system have come under heavy criticism in the European Court of Human Rights, and also from many French jurists. Now the tendency is to modify the inquisitorial system by incorporating many aspects of the adversarial system. It is naïve to think that the civil law system merely involves having an inquiring judge. That system has had its own historical development and one of its major advantages is its mechanism to guide police investigators to act legally. That system requires a very highly developed police force. If India could develop such police, then there would be no need for any change because the adversarial system itself would function well with such an advanced policing system.¹⁵

It must also be noted that a civil law system would be more expensive. In the place of one judge required for a court, there would have to be two - one inquiring judge and a trial judge - doubling the problem of finding good magistrates in India. It is already difficult to find one judge for every court. Secondly the danger of judges being involved in the investigation has been recognised in countries with inquisitorial systems. For example, recently the Cour de Cassation, the French ultimate judicial court, recognised the danger for impartiality and equality of arms between the parties when judge were cumulating the function of enquiring, investigation and judging. Thus while inquisitorial system is recognising the danger of both investigatory and judicial roles, and is reforming the role of the judge d'instruction, we are seeking to introducing this potential danger into the Indian Criminal Justice System.¹⁶

The view that under the adversarial system, the judges plays a passive role and never take initiative to discover the truth in his anxiety to maintain his position of neutrality and in absence of positive duty on the judge to discover truth. It may be mentioned that under the present system the judge views the whole case unfolded before him through evidence including statement and cross-examination of witnesses and arguments, besides the examination of accused under section 313¹⁷ of the Code, with a view of discovering truth only i.e., whether the accused has committed

¹⁵JayatilakGuha Roy, Yatish Mishra, "Criminal Justice Administration in India: Emerging Trends and Futuristic Introspection" 43 *Indian Journal of Public Administration*,799 (1997).

¹⁶ Ravi Nair "The Malimath Committee's Reforms in Criminal Justice In India: A Human Right Reflection", in K.I. Vibhute(edn), *Criminal Justice-A Human Right Perspective of Criminal Justice Process In India*, 164, (Eastern Book Company, Lucknow, 1sted 2004.)

¹⁷(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the court-(a) May at any stage, without previously warning the accused put such questions to him as the court considers necessary; (b) Shall after the witnesses for the prosecution have been examined and before he is called on for his defence question him generally on the case:Provided that in a summons-case where the court has

the crime alleged against him. He may be neutral, in the sense that he is expected to favor neither the prosecution nor the accused which, indeed, is the requirement of justice. It is general belief that the fairness of trial is better assured in adversarial system due to neutrality of the judges and full opportunity of adducing evidence and cross-examining the witnesses available to the parties. It may be pointed out that discovery of truth by the judge requires neutrality. How can a judge true to a justice if acquires the role of prosecutor?¹⁸

According to Wolpin “the Proponents of the inquisitorial system argue that when lawyers interview and prepare witnesses in the adversarial system, they are suborning perjury. Conversely, they argue that this does not occur in the inquisitorial system because lawyers are generally not allowed to interview witnesses before the judge has done so. Instead, the judge acts as the examiner-in-chief, with counsel relegated to a limited role in questioning a witness. Supposedly, the purpose of this is to keep the witness "pristine and pure." But does anyone genuinely believe that, because the lawyer may not talk to a witness, other persons less ethically bound will not talk to the witness and, perhaps more directly, accomplish the perjury? In addition, why should anyone suggest that a poor and un-refreshed recollection wears the halo of purity and trust that furthers the fact-finding process?”¹⁹

What our system provides is a more likely avoidance of inadvertently erroneous testimony. We all know that Alzheimer's disease is not the only reason for failed recollection. We all have been through totally innocuous situations of being certain of something only to recognize our error when faced with a document, picture, or even just a reasoned review that causes a sudden recall of the correct facts. A lawyer can and should challenge a witness's recollection. This is not inducing perjury, but eliciting the truth. I grant that a gray area exists between witness

dispensed with the personal, attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub-section (1).

(3) The accused shall not render him self-liable to punishment by refusing to answer such question, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he had committed

¹⁸ Vijay Kumar “Recommendation of The Malimath Committee- A Critical Approach in Human Right Perspective *Cri. L. J* 33 (2008).

¹⁹ 178.G. Wolpin “America’s Adversarial and Jury System-: More Likely to do Justice 26 *Har.J. Law and Policy* 175 (2003).

preparation and suborning perjury. I will also concede the probability that some lawyers actively participate in getting witnesses to testify falsely. But there is no reason to believe that a greater amount of incorrect testimony is given in the United States than in inquisitorial procedure countries. The word perjury exists in the German language because, as in all countries, perjury exists. That is due to human nature, not to either institutions in a specific country or a specific legal system.²⁰

The suggestion of lowering the standard of proof from the present system of ‘proof beyond reasonable doubt’ to ‘clear and convincing standard strikes t the core values of the Criminal trials in India. In the given societal set-up and police system, this will affect the poor people adversely particularly in the rural areas where false accusation prevails due to enmity and the nexus of the police with village headmen and the feudal element including tout.²¹To effect such a change goes against the very fundamentals of criminal trial, which deal with the life and liberty of individuals. Civil disputes deal mainly with property matters and criminal trials deal with the life and liberty of people. If a person is to be sentenced to death on the preponderance of probabilities then it can only be regarded as mockery of justice. The same applies to imprisonment. Such a change to the standard of proof would trivialise criminal justice. A direct outcome would be the further degeneration of the police investigators and prosecutors. It would open the road for miscarriages of justice, which even now take place under a stricter burden of proof.²²

The requirement of proof can obviously not have its basis in surmises and conjectures. The doubt in order to be reasonable has to be free from zest for abstract speculation and an over emotional response. The Supreme Court observed in this regard: “Doubt must be actual and substantial doubt as to the guilt of the accused person arising from the evidence, or from lack of it, as opposed to mere vague apprehensions. A Reasonable doubt is not an imaginary, trivial or merely possible doubt upon reason and common sense. It must grow out of evidence in each case”²³

The effect of doing with present standard of proof is that the accused would not be presumed to be innocent. The presumption of innocence is a fundamental principle of our criminal justice system. Protection of the innocent is as much the duty of the society. The protection of the

²⁰*Ibid.*

²¹*Supra* note 16 at 35

²²PurviPokhral, “Criminal Justice System: Little done, Vast Undone”, 1 (2) *Gujarat Law Herald* 6 (2007).

²³*State of Madhya Pradesh v Dharkole alias Govind Singh* (AIR 2005 SC 44).

innocent is the very basis of the Constitutional Articles 20 and 21; that is why the innocent is entitled to the highest normative consideration. The moment normative standards of proof are substituted by preponderance of probabilities; there would be a violation of the basic human rights that have been embraced by our Constitution.

Under the Scottish law, for instance, the concept of a fair trial is not solely a question for the accused. Lord Wheatley had said, "While the law of Scotland has always very properly regarded fairness to the accused persons as being an integral part in the administration of justice, fairness is not a unilateral consideration; fairness to the public is also a legitimate consideration." The judge went on to say, "It is the function of the court to seek a proper balance to secure that the rights of individuals are properly preserved."²⁴

The recommendation that like in inquisitorial systems the history as well as the past conduct of the accused is taken into consideration. This will not be correct proposition as it ignores the reasoning behind this centuries-old rule of evidence, which is that guilt of the accused must be established by the proof of the facts alleged and not by the proof of his character, and such evidence may lead to prejudice of the accused.²⁵

There After a great deal of debate on the relative merits of the inquisitorial system and the adversarial system of justice. It must be made clear at the outset that under Indian law, inquisitorial system would be unconstitutional. It would completely militate against the principle of separation of powers, enshrined under article 50 of the constitution; further this is a part of the Indian democracy and constitutional framework. It would be impossible for a judge to distance himself from an investigation. It is only because of that separation that there can often be an acquittal of the innocent.

Conclusion and Suggestion

The problem of the criminal justice system cannot be viewed in isolation as they are inextricably linked with the economic and societal set-up beside the legal system. The systemic factors like feudal nature of our economic and social system, poverty and illiteracy control the operational legal system, hence, the criminal justice system too. In the view of this borrowing feature of the inquisitorial system into the existing legal system may not bring about the desired result particularly in punishing the economically and politically hardened criminals.

²⁴ William. J. Stuntz, "The Uneasy Relationship between Criminal Procedure and Criminal Justice" 107 *Yale. L.J.* 55 (1997).

²⁵*Supra* note 14 at 157.

The effect of abandoning the adversarial system will be negative for the people who have been less powerful in society throughout Indian history. Under the pretext of abandoning the adversarial system what seems to be underway is an effort to in fact abandon the more progressive aspects of the law, for the purpose of getting more easy convictions. Instead it would be better to seriously address the defects of operation in the adversarial system in a comprehensive manner, and improve its real operation. This would mean improving the policing system, prosecution system and judicial system - particularly in the lower courts and those excising criminal jurisdiction. Like in Hong Kong where adversarial system is followed, there has been no effort to shift but there are constant efforts in reforming the existing system by having major changes in police, prosecution as well as judiciary.

The first and the foremost area in India criminal justice administration which is to paid urgent attention is in professionalization of police. The Bangalore declaration on “Police Autonomy and Accountability” adopted at the XXIV Criminological Congress, 1996 unequivocally expressed the need for professionalization of police in its very resolution: “The quality of police determines the quality of society and governance. Competence, integrity, professionalism and commitment to rule of law and public service have to be hallmark of policing. This is possible only if the investigative function is exclusively with the police without any sort of interference from outside authority whatsoever. The power of superintendence of the state government over the police should be limited for the purpose of ensuring that police performance is in strict accordance with law.”²⁶

Torture by police, police misbehaviour, custodial crimes, and corruption in police should be deal with strictly and effectively. Senior police officers must constitute a committee to look after this aspect seriously and they should deal with the problem severely and guilty police personnel be punished and disciplinary proceeding be initiated against erring police personnel and they should be made liable to pay compensation to victims of their atrocities. Police forces and investigating agencies should be given extensive training and necessary modern equipment and infrastructural facilities²⁷.

Secondly prosecution agency be separately constituted and they should be drawn from the bar with adequate experience in criminal cases. Since they are the most important officer in court in assisting and arriving at conclusion they should be given training periodically and their work

²⁶JayatilakGuha Roy, Yatish Mishra, “Criminal Justice Administration in India: Emerging Trends and Futuristic Introspection” 43 *Indian Journal of Public Administration*,795(1997).

²⁷ R. K. Raghvan, “Reforming Criminal Law: A police Persepective” *Delhi Law Review* 15 (1999).

should be carefully examined and supervised by senior prosecuting officer.²⁸The adversarial system has improved its prosecution systems during the last century. The prosecutors' branch in the UK, US and Australia has developed more sophisticated prosecution strategies. One area of improvement is that investigators must keep prosecutors informed of cases from the very start, and be guided by their legal advice. To achieve that, the prosecutors' branch has spread competent prosecutors throughout all parts of the judicial system in these countries. The central body provides guidelines and supervises the work. This way the excesses of investigators can be prevented and negligence addressed. Thus, bringing criminals before courts becomes a joint responsibility of prosecutors as well as investigators. Hence the improvements of these common law jurisdictions must be studied and adopted.²⁹

Thirdly to deal with the delay in cases it is necessary that the judicial system to be reformed, the strength of the judges in subordinate courts and High courts be adequately increased. The vacancies in court should not remain unfilled. The service conditions of judicial officer to be improved. The judicial officer must be given extensive training, also given training in forensic science. Refresher programme be organised for them. Their initial training period be enhanced. Keeping in view the inadequacy of judicial officer to dispose of the arrears of cases in criminal courts the services of retired judge or judicial officer can be utilised. Since the judiciary is the wing of government, there should be as much vacation in courts as apply to executive wings of the government. There should be no summer vacations in the courts.³⁰ The working hours of the court should be alike the normal working hours of any governmental department. Above all the change needed is one of mentality. Judges must be able to use modern communication and administration methods. However, for that they must feel that the system they are leading is really working. Above all they need higher morale.

No one with litigation experience would claim that every lawyer or each judge is identical in ability, energy, work ethic, or the extent of bias brought to any case. These realities, these differences between human beings, do not disappear because the human being becomes an inquisitorial judge. The specific question to be answers is whether the inquisitorial system or the adversarial system is more likely to result in justice being done.

²⁸Carrie Menkel Meadow "Is Adversary System really Dead? Dilemmas of Legal Ethics as Legal Institution and Roles Evolved. 15 *Bond Law Review* 79 (2003).

²⁹.A.S. Goldstein "Converging Criminal Justice Systems: Guilty pleas and the Public Interst", 49 *SMU Law Review* 567 (1996)

³⁰*Supra* note 14 at18-19

Wolpin say “Neither the "fact-searching" system nor the "fact-presenting-leading-to-fact-finding" system has any fixed plan or procedure that must be followed. The reality is that, whether that task of searching for and presenting facts is delegated to an inquisitorial judge or adversarial lawyers, the facts made available for consideration will depend on the ability, initiative, bias, determination, thoroughness, energy, aggressiveness, interest, knowledge, and motivation of the specific human being acting as inquisitorial judge or as adversarial lawyer in that specific case.”³¹ That person, whether judge or lawyer, can do a great job, a passing job, or a poor job. The attributes of the specific person in that role, which determines how that person performs his duty, can result in benefit to one of the litigating parties and detriment to the other.”³²

Also whenever it is argued that the inquisitorial system is best way of discovering the truth, this argument presuppose and places complete faith in the integrity of the system and players within. As history has shown, faith has often been misplaced. It should always be kept in mind that the success and failure of every system depends upon the faith which it has earned by its people. Whether it be adversarial or inquisitorial system the purpose is only to find truth and do justice. Every system has a history and depends upon its own factors and has to been in that light. Above all it would take a long time to create the mental habits needed to operate this new system. Under all the best circumstances it might even take over half a century to get used to this new system. Given the slow Indian capacity to adjust to change, it may take even more time.

³¹ Supra note 17

³²Supra note 17 at 179.