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Adversarial v/s Inquisitorial Legal System

Whether Need of the Hour

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It is the spirit and not the form of law that keeps justice alive.

-Earl Warren

ABSTRACT

It is referred by British Raj that during the period of 1858 and 1947AD when the South Asia (or one can say the present-day India, Bangladesh, Pakistan, and Myanmar) was under the colonial control of the United Kingdom as part of the British Empire and rules by the British crown. In India, the East India Company established the court-rooms of British style in the year 1775, in which the local native settlement methods and controlled procedure of settlement in the court were neglected by the British, during the period of British law courts. Party controls over the growth of evidence in process has conventionally been an important distinctive feature of the American, British and Indian systems in comparison to the Continental European systems of Germany and France, and former colonies influenced by models of greater judicial control. The judiciary system of India has both the horizontal and vertical dimension structure which is more precisely detailed as a pyramid, arguably a comparatively flat one.

Judicial process is of two types: 1) Inquisitorial Judicial Process and 2) Adversarial Judicial Process. This paper will analysis whether there is a need to move from adversarial legal system to inquisitorial legal system?

I. INTRODUCTION

The There are two judicial system which are generally followed in various countries, i.e. Adversarial Judicial System and Inquisitorial Judicial System. The adversarial system is a legal system utilized in the precedent-based law nations, i.e. the common law countries. Here two legally established advocates speak for their respective teams or parties before an unprejudiced and impartial individual, more often a jury or judge, who endeavor to decide the reality but on the other hand, an inquisitorial judicial system is where the court of law effectively and enthusiastically engaged with researching and investigating the certainties and

¹ Author is a student.

details of the particular case, rather than an adversarial judicial system in which the job of the court of law is essentially that of an unbiased official in the middle of the indictment and the guard.—

(A) The Adversarial Legal System -

Over several hundred years the adversary judicial system of contemporary Anglo-Indian has been evolved gradually. This system is emerged in England and Germany. Indian jurisprudence structure is of such that, in case of a controversy between parties, a judge pass over the judgement that asserts contrary positions during the period of judicial review such as a trial. Indian courtrooms are mostly associated to battlegrounds or playing fields. In India all the legal arguments are settled through the adversary judicial system by which promotes the idea that legal controversies are battles or contests to be fought and won using all available resources².

Without being heard or called the party may not be judged as per the Anglo-Indian adversary judicial system. Both the parties should reveal in the course of time to each other true contentions supporting their cases, the methods for proof they present and the lawful contentions which depend on with the goal that every gathering must arrange its safeguard. Both the parties pick unreservedly the backer additionally to speak to them or to help them as per the requirements or permission of law. In the judge's chamber as per the requirement of law all arguments that are oral are held in public hearings. Either of parties to a question or they are square off by their advocates against one another, expect the jobs which are carefully unmistakable as per the chief, generally a jury or judge. According to his choice, the bench might think about wherefore, clarifications or reports depended on which is delivered by both the parties just, if both the parties had a chance to talk about themselves in an ill-disposed way. With regards to the legal arguments which he has raised suasponete without welcoming both the parties to remark consequently and he would not put in front his choice. It is required that the chief is to be the target and should be independent from inclination. Established in the faith or beliefs of the current India's judiciary framework, the contemporary adversary judicial system replicates the arrest that each one is entitled to get a day in court where there will be a free, fair, and independently appointed authority or judge who should act impartial and abide by the laws. It is held by the adversary theory that it is required by each side to create or introduce its very own confirmations and contentions is the unquestionable method in-order reveal the data which would empower the jury or bench to determine the contention.

² Section 18, Code of Criminal Procedure, 1973

In the framework of adversary judiciary system, the bench or jury is an impartial or aloof actuality discoverer, disinterestedly inspecting the proof introduced by the gatherings for the target of settling question in between them. The reality discoverer might stay inactive in an introduction of the contentions in order to abstain from achieving an untimely choice.

CHARACTERISTIC FEATURES -

A. Mechanism for Resolving disputes- The adversarial judicial system is a mechanism for resolving disputes. The two conflicting parties are the major actors or performers, the defendants and the plaintiff, adjudicator, the magistrate. The dispute is brought before the court by the litigants. The dispute is resolved by the court and the result are accepted after hearing from both the sides. In *Jones v. National Coal Board*³, It has been observed by Lord Denning thus: justice could only be done between the parties if the important facts are found properly and we are satisfied with it and looked into by the magistrate during an impartial trial and fair trial among the parties. As all of the main facts have been justly searched and agreed upon, all of us are in as capable as that of the adjudicator in order to make inductions and determinations from the facts that were established earlier, unless the base of the main facts is secure we cannot embark on this task.

B. Judge should be Passive – The judges shall be impartial in criminal proceedings as it is one of the important elements. For this necessity there are two major components: first that the appointed magistrate is liberated from individual inclusion for predisposition to the case of the particular issue, and besides this they are fair-minded. Dynamic experts keep the Nonpartisan chiefs in the hands of an ill-disposed framework. An adjudicator finds out all material law and the panel or jury decide the realities. The law would be evaluated and interpreted by the courts in India. During the trial procedure, judges should play the passive role and his role should not be assumed that of the prosecutor. As per Glanville Williams, according to the feature of English system the nature of judge is relative inactive, continuing in its original form in the UK, which also existed in European countries⁴.

C. Counsels Competing - The way of going on with the adversary criminal trial replaced altercation trial⁵ during the last quarter of eighteenth century. Lawyer dominated process was developed by this system. Commanding roles at trial were assumed by the lawyers for the prosecution and defence. By adducing facts examination and cross-examination of the witness and rising matters of law, both counsels conduct a trial. Counsel

³ [1957] 2 All E.R.155

⁴Ibrahim Husen v. State, A.I.R. 1969 Goa 68

⁵John H. Langbein, From Altercation to Adversary Trial, *The Origins of Adversary Criminal Trial* 252–344 (2005)

in the adversary judiciary system, bears the load of accusing active cases of client in front of the judiciary. The opponent's case is disproved by the counsel and they submit their case. In true fact, it is a legal dispute between two goods and the focus is primarily based not on actual facts but on bystanders who testify in open court. It's the province of counsels to present the facts and evidence and the work of gathering. It is presumed by the system that the Government uses its fact-finding tools and hires a capable prosecutor to prosecute the accused, who may select a qualified advocate to preserve the case of prosecution. The people have more trust and faith on lawyers. It is assumed that the truth will be emerged from the influential speeches of both the sides on question. The parties of both the sides will aim to success and their success will give the image to lawyer. It is expected by the lawyer to protect the client through any legal, necessary and mean.

D. Innocence is Presumed - In the criminal justice system innocence is presumed as the major protections which is given to accused. The presumption of innocence is praised by good men everywhere⁶, this principle is integrated by both accusatorial and inquisitorial judicial system. There are two elements in this doctrine: first is the standard of proof is high and the another is that the prosecution side has to prove the case and the onus is on them. This has come from the principle has the maxim Nulla poena sine culpa – A man shall not be charged unless he is guilty.

E. Investigation by the Police – Pre-trial stage is referred as investigation. It includes arrest, filing of final report, questioning the accused, seizure and search, information to the police. The criminal proceedings are initiated through this stage where for the trial before a judicial tribunal the case is prepared. The police here enjoy the wide choice in prosecuting the offender.

(B) Inquisitorial System

In the inquisitorial judicial system, the investigating judge conducts the inquiry in order to figure out the fact. In a process of investigation legal officer is involved energetically. In order to find out truth of the case the entire investigation is an official inquiry. The ideology of this system is that the citizens of state, denoted by its public organizations, are the only cluster of people who are capable to look for facts and make the case justly disposed. The result of the official inquiry, in this system, is considered as true and the trial is conducted on this inquiry report, the 'dossier'⁷. The constant judicial overview of the criminal process is

⁶George P. Fletcher, Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases, 77 The Yale Law Journal 880 (1968)

⁷ Dossier is the counterpart of Indian —final report filed by the police after the completion of the investigation

ensured from the start of the investigation till the judgement of the case, in the Continental European Countries. Inquisitorial judicial system is oriented through inquiry, as the supporters of the inquisitorial judicial system appealed that it is a persistent search for the fact by the members in this system.

FEATURES

A - Role of Judiciary is Active - The State embodied in the judiciary takes vigorous role in regulating State policies, in the continental system. Investigatory function is played by the judiciary. The investigation is supervised by the judicial officer and energetically engrossed in the preparation of the ‘_dossier’. Both the role of prosecutor and the decision maker is played by the judge in the courtroom. In the starting process or involvement in the examination and preparation of proof, judge is considered to be their central figure in this system. On the similar period judge instructions has no power to regulate the trial of the case⁸. There is the essential difference between the Continental and Anglo- American criminal procedure trial as per the theory and the practice he embodies. It was observed by Prof. Morris Ploscowe: On the mainland, the roles and purposes are assigned to the police, judges, jury, commissioning magistrate and defense counsel by the accusatory judicial system are concentrated in the hands of the investigating magistrate. His responsibility is to conduct a detailed inquiry of criminal charges and to make the suits for trial, performing not in the benefits of either accused or defence, but in the benefit of the State to conclude his inquiry. He does not actually carry out all the inquiries, but mostly uses the police, other administrative officials and experts, as authority over their activities is concentrated on him⁹.

B - Role of the Counsels is passive - The lawyer is generally assumed to have a passive role, in the inquisitorial system. All the evidence, prosecutes, examination of the witness, the offenders are collected by the judges. The counsel has no role to perform in the trial. The roles of the prosecutor as well as the decision maker is undertaken by him. The position of prosecutor and defence attorney might be combined by the judge, the fact finder¹⁰. The process of trial is based on the investigative report, an assumption is that an investigation or inquiry exposed to facts along with this the report has the facts or the truth alone. According to the choice of the accused he can select the counsel to assist him but he does not have the

under sec.173 Cr.P.C.

⁸ French Code of Criminal Procedure (herein after known as CCP), Art. 49[2] states, He (examining Magistrate) may not participate in the trial of penal matters with which he was acquainted in his position as examining magistrate, or the action shall be void.

⁹Morris Ploscowe, *The Investigating Magistrate (Juge d'Instruction) in European Criminal Procedure*, 33 Michigan Law Review 1010 (1935)

¹⁰P.M. Bakshi, *Continental System of Criminal Justice*, 36.J.I.L.I, 419

authority to examine the witnesses. An interrogation will be conducted by the president and the witnesses might be questioned asked by the prosecutor. Counsel for the accused or the complainant could put questions to the President¹¹. Unlike the common law system, counsel loses the right to question the witnesses or to test them on their own.

C - Innocence is Presumed - France's presumption of innocence and Germany's *unschuldsvermutung* speak innocence is presumed to be in their respective code. The importance of trial is approved through the French Code¹², he shall remain notified that the search of fact is conquered by expert benches or magistrates. The dossier is arranged by these experts and devised to be used as part of the evidence base of the judgement¹³. It is such a situation, that one could not give entire thought to principle of French - presumption d'innocence.

D - Investigation by Judiciary - In France, as per the inquisitorial judicial system, in France, the stage of pre-trial is subject to guidance and controller of the judge. No investigation would take place by the police without the supervision of the prosecutor, or the magistrate who is investigating or judge, instruction. In France, the criminal hearings are introduced through two ways¹⁴ first grievance is filed which is accompanied by an entitlement for civil compensations. Here, the magistrate has jurisdiction¹⁵ to proceed with his investigation¹⁵ Another is the grievance is filed without claim for compensations. For such circumstances the grievance would be forwarded or given to the local prosecutor, notifies an examining magistrate or judge in case he has decided to pursue the matter. The authority to examine a crime which is basis of the preliminary application. The magistrate is free to investigate the offence relating to the allegations set out in the complaint as soon as the investigation begins, and may proceed to examine any of the persons who may appear to be involved.

II. CONTRAST BETWEEN TWO SYSTEMS

It has been argued by many of the jurists that, the adversary judicial system is better than the inquisitorial judicial system, which encourages to seek faith and maintaining dignity of human. At the same time proponents of the inquisitorial system claim that, it is cent percent truth seeking¹⁶. The truth is revealed in the midway by the close examination of both the system. Both of these systems have the gains and loss of its own. The fair and just

¹¹ Article 312, Code of Criminal Procedure France, 1834

¹² Article 427 [2], Code of Criminal Procedure France, 1834

¹³ John H. Langbein and Lloyd L. Weinreb, *Continental Criminal Procedure: —Myth and Reality*, *The Yale Law Journal* 1549 (1978)

¹⁴ Gerald L. Kock, *Criminal Proceedings in France*: 9 *Am. J. Comp. L.* 253, (1960)

¹⁵ Article 85, Code of Criminal Procedure France, 1834

¹⁶ *Supra* 15

investigation, fair trial, human dignity maintenance, seeking truth are different and distinctive features of both the systems criminal procedure. According to the ideologies of both the system truth must be brought with all the reasonable and genuine means. Searching of fact or truth and justice are the most valued principles of all criminal justice systems. Both of these systems, however, vary in their fundamental assumption as to how best to achieve the objective or goal.

III. CONCLUSION

The utmost essential and mutual characteristic of both the adversarial as well as the inquisitorial judicial systems of criminal justice management is that two of these gives the scheme to investigate for the crime. In both of these systems, the achievement of the criminal justice system depends on the report of investigation. Therefore, the trial majorly dependent on the report of investigation. The agency which conducts the investigation creates the change considering the pre-trial phase. When enquiries are conducted by the police in the judicial structure of adversary, judge instruction conducts the same in the inquisitorial judicial system with police assistance. It shows police are an unavoidable and significant factor in the administration of criminal justice system. An agency which conducts an investigation and their ability decides the success of the prosecution. The system's efficiency is mostly depended on the pre-trial process. The system could well-function if it is fair, proper, reasonable, legal. The interest of public as well as the accused should be protected by the designed investigatory process. Therefore, in general, police are made biased in the adversary system or framework by the contribution they give while investigating the crime facts. Magistrates are the only ones who can be trusted to be detached or neutral. Since, the investigation process does not have direct control or supervision over the police, they might hide or in substitute, fabricate the evidence and might breach the privileges of the accused. This gives the point of importance of creating a new agency or institution in order to control the process of inquiry. For many purposes, we cannot bring in the investigation done by the judiciary. As it is said that the umpire is required to be neutral. Investigation should not be given to him. Many times, the judges or magistrates become the lawyer or advocate of their own cause. If the judiciary is entrusted with the power of controlling the pre-trial stage then all the evidence collection and it will be presumed by them that all the process would be completed in the stage of pre-trial is legal and also correct. In-order to clarify the reason of its own this would give the way for interpretation of the evidence.
