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# Adversarial and Inquisitorial Models of Criminal Justice System: A Comparative Analysis

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## ABSTRACT

*There are two types of models of criminal justice system i.e. adversarial and inquisitorial system prevails in the world. Though these two models prevail in the world but in real sense no one has precise or clear meaning and not a single country of the world follow either of the models in toto. Both justice systems presumed that every accused person is innocent and shifted the burden of proof on prosecution to prove his guilt. It means both systems are firm about proper adjudication of the accused and protection of the innocent. But there are basic differences as to rules of procedures in each of these systems. Each system has its own merits and demerits while giving justice to victims of crime. The main aim of researcher is to know the basic features of each system and more particularly to know about the system followed in India. Through this article the researcher is trying to make comparative analysis and to give effective suggestions to improve the existing criminal justice system in India.*

**Keywords:** *Adversarial, Inquisitorial, Victim etc*

## I. INTRODUCTION

The purpose of any criminal justice system is to protect the life and property of person and punish the wrongdoer. Being a *parent patriae*, it is the duty of the State to take care of its citizen or person. State may employ its entire machinery to punish the wrongdoer and give justice to victims of crime. It is also the duty of the State to take utmost care and caution that innocent must not suffer in the name of justice. Two models of criminal justice provide different measures to deal with the offender and to give justice to victims of crime. Each system can serve the purpose of justice in a better way if it is aware of the disadvantages relating to it and has taken serious measures to minimize it.

## II. ADVERSARIAL CRIMINAL JUSTICE SYSTEM

This system followed in all those countries that follow common law inherited from the British Colonial Rulers. The countries like United Kingdom, United State of America and

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India follow this model. The adversarial model of justice is close to Anglo-American system and its past colonies. It advocates the supremacy of law, that is, equal treatment of law for all segments of society. In this system accused is presumed to be innocent and the burden is on the prosecution to prove beyond all reasonable doubt and if there is any doubt, the benefit of doubt goes in favour of accused. The accused also enjoys the right to silence and cannot be compelled to reply. This right is guaranteed by *Constitution of India* in the form of fundamental right<sup>2</sup> and also a universally recognized right of the accused<sup>3</sup>.

In the adversarial system truth is supposed to emerge from the respective versions of facts presented by the prosecution and the defense before a neutral judge. It means the trial is not structured as an investigation into the truth but to reach a just settlement between the parties. The role of the judge is that of impartial umpire to see whether the prosecution has been able to prove the case beyond reasonable doubt. The prosecution has to prove the guilt to the requisite standard. At the heart of the trial lies the principle of orality, which provides that evidence should generally be received through the live, oral testimony of witnesses in court<sup>4</sup>. The court is largely dependent upon the evidence presented by the parties. Moreover this system owing to the conceptualization of crime as an offence against the state, the criminal justice system is traditionally viewed as a system to facilitate a conflict between the state and the accused<sup>5</sup>. The victim is thereby inherently excluded.

In the adversarial system, the parties use cross-examination of witnesses to undermine the opposing case and to discover information and other side has not brought out. Hence we can say that, parties in the adversarial system enjoy a high degree of freedom of proof, which largely extends to the manner in which witnesses are cross-examined. As the adversarial system does not impose a positive duty on the judge to discover truth he plays a passive role. The judge neither takes part in investigation nor gives any instructions to prosecution.

As the researcher already discussed each system has its own merits and demerits, the adversarial system insists upon strict adherence of procedural law which results into less room for the state to be biased against the accused. It provides ample opportunity to uncover the truth in a laboratory of courtroom. This model allows both parties to fully air their grievances and reach a final solution by a disinterested and impartial judge. The main advantage of this system is that there is not a direct involvement of the judge in the investigation otherwise it will lead to his prejudice to decide the case. Along with this the

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<sup>2</sup> INDIA CONST. art.20, cl.3.

<sup>3</sup> ICCPR. art. 14.

<sup>4</sup> Jonathan Doak, *Victims Rights, Human Rights and Criminal Justice*, 34 (2008),

<sup>5</sup> *Id.* at 35.

individual's right to privacy is best preserved under it. In short there is a guarantee of fair trial.

The main disadvantage of this system is that, the system is heavily loaded in favour of the accused and is insensitive to the victims plight and rights. Another thing is that, in this system most of legal cases do not go to trial; this can lead to great injustice when accused has an unskilled or overworked lawyer. It fails to accurately resolve complex technical issue such as science, technology or tax or accounting regulations. Too much insistence on procedure may lead to unnecessary delay and that is the reason we can say that justice delayed is justice denied. When we discuss about the role of victim then we found that, victim act as a prosecution witness and he don't have any place or voice in the system and ultimately he becomes the neglected object and subject under the criminal justice system.

### **III. INQUISITORIAL CRIMINAL JUSTICE SYSTEM**

The inquisitorial model basically relates to Romano Germanic System of Law, which is also known as civil law system or continental law system. Inquisitorial system emerged in France and other European countries like Germany, Newzealand, Italy and Austria. This system tends to treat the court, police and prosecution as parties to crime or partners in quest for truth or justice. It aims to attain justice with the composite effort of the prosecutor, the police, the defense lawyer and the court. The court can play active role in procuring evidence, in the investigation of the case and the examination of the witness<sup>6</sup>.

In this system power to investigate rests primarily with the judicial police officers (Police/Judiciary). They investigate and draw the documents on the basis of their investigation. The judicial police officer has to notify in writing of every offence which he has taken notice of and submit the dossier prepared after investigation to the concerned prosecutor. If the prosecutor finds that no case is made out he can close the case. If however he feels that further investigation is called for, he can instruct the judicial police to undertake further investigation.

The judicial police are required to gather evidence for and against the accused in a neutral and objective manner as it is their duty to assist the investigation and prosecution in discovering truth. The judge has unlimited power to obtain and evaluate evidence. It is the judge who calls and examines the evidence and it is the lawyers who are there largely to ensure that the proceedings are fair. The fundamental idea of inquisitorial proceeding is that

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<sup>6</sup> Prof. Madhav Prasad Acharya, *The Adversarial v. Inquisitorial Models of Justice*, 01KATHMANDU SCHOOL LJ. 44 (2014).

the judge himself must investigate a complaint. The judge plays a very active role and the court dominates proceedings and actively searches for the truth.

The main feature of this system is that the accused is presumed to be innocent and it is the responsibility of the judge to discover the truth. The statements of witnesses recorded during investigation are admissible and form the basis for the prosecution case during final trial. The exclusionary rules of evidence hardly exist and at the same time hearsay evidence (rules) is unknown.

The important thing is that before the trial, the judge, the accused and the victim are entitled to participate in the hearing. However the role of the parties is restricted to suggesting the questions that may be put to the witnesses. It is the judge who puts the questions to the witnesses and there is no cross-examination as such.

The evidence regarding character and antecedents of the accused such as previous convictions or conduct are relevant for proving the guilt or innocence of accused. When we discuss about the main advantage of this system then we cannot ignore one thing that to prove the case, the standard of proof required is the inner satisfaction or conviction of the judge and not proof beyond reasonable doubt as in the adversarial system. It means the court exercises an affirmative role, rather than the role of an umpire in the conduct of the prosecution<sup>7</sup>.

Victim plays an important role at every stage of the case. The victim may be made a party to assist the court in discovering the truth. He may be permitted to put questions or suggest questions to be put by the court to the witnesses produced by the parties. He can also point out the availability of other evidence that would assist the court in discovering truth. On the victim furnishing such information the court may cause production of such evidence as it considers necessary to discover the truth. Victim also has right to appeal against any adverse order.

It means the victim of the offence is a full party and also intervenes as a '*partie civile*' in the pre-trial investigation and in the trial and have his claim to the civil relief (arising out of the crime) adjudicated in the criminal proceedings. The right to act for the civil party arises of the right to get compensation for the damages caused.

The disadvantage of inquisitorial system is that there is lack of chances of fair trial and another thing is that participation of the court in the investigation of the case may lead to biased attitude while deciding the case. The country like France, the positions of magistrate and prosecutors are inter-changeable. So it is likely to cause an apprehension in the mind of

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<sup>7</sup> 8 George H. Dession, "Criminal Law", Encyclopedia America.

the accused that he may not get a fair trial at the hands of such judge. Right to privacy of the accused is denied and the accused is exposed to express everything which he need not express keeping in view of merit of case. Moreover the standard of proof is the inner satisfaction of the judge and not proof beyond reasonable doubt may lead to injustice with accused. Ultimately it is contrary to the cardinal principals of justice that justice should not only be done but should appear to be done.

#### IV. INDIAN CRIMINAL JUSTICE SYSTEM

The system followed in India for dispensation of criminal justice is the adversarial criminal justice system derived it from British model. But when we try to trace the history of Indian Criminal Justice System we found that there are different phases of this criminal justice system. With the passage of time the changes took place from time to time as there was no uniform criminal justice system in India. The criminal justice system in India has evolved over a period of three thousand years. Initially, the Law or Dharma, as propounded in the *Vedas* was considered supreme in ancient India and the King had no legislative power. But gradually, this situation changed and the King started making laws and regulations keeping in view the customs and local usages.

The punishments during ancient India were cruel, barbarous and inhuman. As regards the procedure and quantum of the punishments there were contradictions among various *Smritis* and in certain cases even among the provisions found in one *Smriti* itself. The system of awarding punishments on the basis of *Varna* contravened the concept of equality of all human beings as propounded by the *Vedas*. The penalty for crime was increasingly severe the higher the *Varna* of the victim and lower the *Varna* of the perpetrator<sup>8</sup>. The discriminatory system of inflicting punishments and contradictory provisions in different legal literature made the criminal justice system defective and confusing.

During the Muslim rule in India though enlightened monarchs like Sher Shah Suri and Akbar showed great zeal to administer justice impartially, yet as a whole the administration of justice during the Muslim period in India suffered from defects. The concept of equality was applicable only to the Muslim population in India and thus the bulk of the population, i.e. non-Muslims, was subjected to humiliating discrimination. The Hindus suffered in almost similar manner as the people of lower Varna suffered at the hands the people of higher Varna among the Hindus. The major defect of Muslim criminal law was that most of the crimes

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<sup>8</sup>.Das R.M., Crime and Punishment in Ancient India: with Special Reference to the Manusmiriti 66 (1<sup>st</sup> ed.1986).

were considered private affairs of the individuals. Many offences, including murder, could be compounded by the payment of *ditya*, i.e. blood money and human life was considered rather cheap, capable of assessment in terms of money. The criminal justice system developed by the Muslim rulers continued in India even after the British took control of India. It was in 1860 that the codification of laws changed the discriminatory provisions of Muslim criminal law.

The Britishers after assuming power in India found the then prevailing criminal justice administration is defective and decided to bring the drastic changes in it. The major credit goes to Lord Cornwallis who made detailed studies of the existing conditions of the criminal justice administration and introduced many reforms to revamp the whole system. Lord Hastings took special interest in reorganizing the police force to deal with the criminals and maintain law and order in the country. At the same time we cannot ignore the work of Lord Macaulay who is considered as father of *Indian Penal Code* which was passed by the British Parliament in 1860. Hence this was the first step to supersede the Mohammedan criminal law and applies the code uniformly to all the people apart from their caste and religion.

The Britishers introduced reforms wherever necessary. They adopted new principles by modifying the existing laws wherever required and made new laws where they felt it was a must. The institutions of police, magistracy, judiciary and jails developed during the British period still continue without significant changes in their structure and functioning. However, the British rulers also, while restructuring the criminal justice system, did not fully implement the concept of equality. The reforms introduced by them treated all Indians and non-British Europeans equally but the Britishers always enjoyed special privileges. It was only with the Constitution of India coming into existence which fully recognized the right to equality before law and incorporated the same as a Fundamental Right.

From above discussion it is clear that the Indian criminal justice system mainly based on British model as Britishers ruled this country for hundreds of year and passed several laws and codes which are the basic foundations of present criminal justice system. One thing is certain that due to the arrival of Britishers and the efforts taken by them, it is possible to establish uniform criminal justice system in India.

## V. VIEWS OF HIGH COURTS

In India there is contrary views about this model, the various High Courts of India expressed their views about the present criminal justice system. The High Courts of Allahabad, Andhra Pradesh, Kerala, and Punjab & Haryana have said that the present system is satisfactory. The

High Courts of Jharkhand and Uttaranchal have opined that the Adversarial System has failed. The High Courts of Bombay, Chhattisgarh, Delhi, Himachal Pradesh, Kolkata, Madras, Madhya Pradesh and Orissa have expressed that the present system is not satisfactory. Some of them say that there is scope for improving the Adversarial System by adopting some of the useful features of the Inquisitorial system<sup>9</sup>.

The majority of High Courts give stress on to make some changes in the existing criminal justice system. The former President of India, Dr.R.Venkataraman also made observation about present system:

*“The Adversarial System is the opposite of our ancient ethos. In the panchayat justice, they were seeking the truth, while in adversarial procedure, the Judge does not seek the truth, but only decides whether the charge has been proved by the prosecution. The Judge is not concerned with the truth; he is only concerned with the proof. Those who know that the acquitted accused was in fact the offender, lose faith in the system”.*

The former President of India, Dr.R.Venkataraman rightly pointed out the drawback of our system. It is important that the judge should play active role to find out the truth, but in reality he concerns only about the proof as the evidences which lead before him on that basis he decides the case. The judge doesn't have any role in the matter of investigation though he acted neutrally to decide the case. The Supreme Court has criticized the passive role played by the judges and emphasized the importance of finding truth in several cases. It is the duty of a court not only to do justice but also to ensure that justice is being done.

Moreover this system is more accused oriented where victim becomes neglected person and his role is restricted to a prosecution witness. In fact, victim should have more participation in the trial and investigation. At all stages the prosecution must keep the victims aware of all that happening in their cases. The last word on these issues must be left to the victims and more compensation must be granted to victims. Though the Criminal Law (Amendment) Act, 2008 brought major changes to uplift the status and position of victim under criminal justice system. But still few more changes are essential as like provisions as to victim protection, right to legal aid, right to rehabilitation, victim impact statement and mainly the participation in the proceedings have to be incorporated.

## VI. CONCLUSION

Though there are two models of criminal justice system but there is no watertight

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<sup>9</sup>01 Justice Mallimath Committee Report on Reforms of Criminal Justice System 27 (2003).

compartment to distinguish between them. The basic difference between the two systems lies in their approach to justice or truth of the case. India follows adversarial model to dispose the criminal matters but in reality India also follow some of the features of inquisitorial model. No model is complete in itself; one or other has few merits as well as demerits. When we think from Indian perspective, we observed that the various committees and various High Courts expressed their views that it is the time to incorporate useful features of inquisitorial model to make a balance to protect the rights of victims of crime and the accused so ultimately it will be useful to achieve the ends of justice.

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