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CRIMINAL JUSTICE REFORMS: A CASE FOR ADOPTION OF AN INQUISITORIAL SYSTEM

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[The paper has been authored considering the 146th Report of the Parliamentary Standing Committee on Home Affairs which had recently recommended that there is a need for a comprehensive review of the criminal justice system of the country.]

For the deliverance of criminal justice, the Criminal Procedure Code[2]is centred around an accusatorial method prescribed by the adversarial system. The onus for the proof of evidence is placed on the side that is trying to establish guilt while the judge acts as a unbiased referee between the two parties, either of whom are permitted to cross-examine witnesses and introduce any evidence. Alternatively, the onus for the proof of evidence in an inquisitorial system is on the trial judge, who in turn, decides upon the validity and relevance of probable evidences and accordingly permits either party to pose questions to a witness if required. Such a system of criminal trial is based on the assertion that it is the state which must prosecute the wrongdoer by using its superior investigative methods and agencies, while at the same time, granting the wrongdoer an equal opportunity to take recourse to a fair challenge and thereby counter the evidences of the state prosecution.[3]

I. UNDERSTANDING THE TWO CRIMINAL JUSTICE SYSTEMS

To achieve a better understanding of the issue, it is important to briefly understand the intricacies of each system before addressing the nuances associated with each system:

Adversarial system:

The current-day adversarial system prevailing in India is an inheritance from British rule. In our system, there is a presumption of innocence for the accused, and the burden of proof 'beyond reasonable doubt' lies on the prosecution. The accused is also permitted a right to

[1]Advocate, Delhi High Court
[2] Hereinafter 'the Code' or 'CrPC'
[3] K.N.C. Pillai (ed.), R.V. Kelkar's Criminal Procedure, at 336 (5th edn.)

silence by virtue of which they cannot be mandated to be a witness against any circumstances.

The truth is characterized to emerge organically from the facts presented by either side before an unbiased judge or jury. The onus on the judge is only to examine whether the prosecution has proved the accused's guilt beyond reasonable doubt and, if not, then whether a benefit of doubt must be allowed to the accused. Hence, the scope of a case is primarily decided by the parties themselves selectively and autonomously depending upon the evidence that stands in their favor in course of the trial. The trial itself is a continuing process of verbal confrontation. The method of cross-examination is allowed to the parties against the other's witnesses to facilitate the further discovery of information relevant to the course of proceedings.

Inquisitorial system:

In an inquisitorial system, the power to investigate the accusations lies primarily with the 'judicial police officers.'[4] In countries where such a system prevails, the judicial officers are empowered to investigate and draw inferences based on the documentation of their investigation. These judicial police officers have to file a written notification of every offence they have found during their investigation and submit this prepared dossier to the prosecutor concerned with the case.[5]

The judicial officers are presumed to conduct the investigations objectively and unbiasedly and serve the prosecution to discover the truth. The prosecutor may in his opinion, call for further research or in the absence of any documentary evidence, reach for the closure of the case. Suppose the case involves offenses of serious and sensitive nature or complex politically matters. In that case, he or she can file a motion for the judge of instructions to assume the responsibility of an investigating supervisor for the said case. In the inquisitorial system, the judge is empowered with the provisions to order search, issue warrants, arrest the suspects, and examine the evidence.[6] On the other hand, the accused has a right to be heard,

[4] Police or Judiciare in France
[5] Block, M., Parker, J., (2000). *An Experimental Comparison of Adversarial versus Inquisitorial Procedural Regimes*. American Law and Economics Review,2(1), 170-194
[6] Id.

and he can hire a counsel to engage in the investigation proceedings conducted before the judge of instructions and present his case.[7]

The judge of instructions, in turn, collects evidences from either side and prepares a dossier which is then forwarded to a trial judge. The accused's presumption of innocence also exists in the inquisitorial system, and the onus lies on the judge to facilitate the discovery of the truth.[8] The statements recorded by the witnesses during the investigation by the judge of instructions are made admissible to make a formidable case for the prosecution during the final trial.

When the case goes before the trial judge, the victim and the accused have a right to participate in the hearings. The parties' entitlement, however, at this stage is restricted to the mere suggestion of questions to be put to the witnesses.[9]Hence, it is the judge, in an inquisitorial system, who puts the witnesses to question, and cross-examination by the parties is not allowed as such. Antecedents of the accused, such as previous conduct, character, or convictions, become relevant evidence for establishing the guilt or innocence.

Thus, in the inquisitorial criminal system, the judge of instructions is a combined position of a judge and an investigator. The right of defence is limited only to the right of suggestions to the judge, which may or may not be accepted based on the judge's discretion. Hence, a biased evaluation of evidence from either side is limited in an inquisitorial system by the judge's discretion.[10]

Convergence of the Two Systems

Contrary to popular opinion, the criminal justice system in India is not entirely adversarial. Specific provisions in the Codemark down the observance of the negative+-7 trial in the greater interest of equity and justice. This is present since, while the adversarial system mandates the magistrate as the observer of the trial, it only sometimes takes away his foremost responsibility to assist the trial proceedings. Even within the procedural system, magistrates are empowered to direct the case along equitable justice. For instance, the court is

[7] Deffains, B., & Demougin, D. (2008). The Inquisitorial and the Adversarial Procedure in a Criminal Court Setting. Journal of Institutional and Theoretical Economics (JITE) 164(1), 31-43
[8] Deffains, B., & Demougin, D. (2008). The Inquisitorial and the Adversarial Procedure in a Criminal Court Setting. Journal of Institutional and Theoretical Economics (JITE) 164(1), 31-43
[9] Stuntz, W. (2008). Inequality and Adversarial Criminal Procedure: Comment. Journal of Institutional and Theoretical Economics (JITE) 164(1), 47-51
[10] Sklansky, D. (2009). Anti-Inquisitorialism. *Harvard Law Review,122*(6), 1634-1704

authorized by §311 to examine any person as a witness even if the person has not been called uponas a witness by either party (to be read with §165 of the Indian Evidence Act, 1872).[11] Similarly,§228 and §240 of the Code provide that the charge against the accused is to be framed by the judge and not the prosecutor.[12] This gives the judge to validate the veracity of accusations and examine the issues on *prima facie* merit. This is coupled with §321,which bars the prosecution from withdrawing a case without the court's consent. Additionally, §313 gives power to the court to examine the accused at any point to facilitate an explanation regarding the proceedings during the trial.[13]

Therefore, it is safe to infer that while Indian criminal justice is majorly adversarial, adopting certain inquisitorial practices provides an element of safeguard against the inherent problems of adversarial adjudication.[14] The need for convergence of these two criminal systems and the naturality of such further synthesis has been pragmatically captured in these Abraham Goldstein's seminal work when he said: "*Virtually everywhere, formal systems of charge and adjudication cannot possibly be enforced in accordance with the premises underlying them. There are simply too many offenses, too many offenders, and too few resources to deal with them all. One result has been a steady movement towards a convergence of legal systems - towards borrowing from others those institutions and practices that offer some hope of relief"*.[15]

A furtherance of this can also be found in the analysis of the converging elements of the Indian legal system by the Malimath Committee reports,[16] especially in terms of the developing jurisprudence of the trial court mechanisms and legislations such as the Prevention of Terrorism Act.[17]

II. FAILINGS OF THE ADVERSARIAL SYSTEM

[11] K.N.C. Pillai (ed.), R.V. Kelkar's Criminal Procedure, at 336 (5th edn.)
[12] Id.
[13] K.N.C. Pillai (ed.), R.V. Kelkar's Criminal Procedure, at 336 (5th edn.)
[14] Keally McBride (2016) Macaulay to Malimath: The Man Who Made the Rule of Law, Oxford University Press, New Delhi
[15] Abraham S. Goldstein, Converging Criminal Justice Systems: Guilty Pleas and the Public Interest, 49 SMU L. Rev. 567 (1996), reprinted in 31 Israel L. Rev. 169 (1997)
[16] Amnesty International, *India: Report of the Malimath Committee on Reforms of the Criminal Justice System: Some observations*, 19 September 2003
[17] Ujjwal Kumar Singh, State and Emerging Interlocking Legal Systems: 'Permanence of the Temporary,' Economic and Political Weekly, Vol. 39, No. 2 (Jan. 10-16, 2004), pp. 149-154

The adversarial system duty-bound the magistrates to be subject to the faulty premises of both the parties that present their arguments from a biased perspective. Majority of the trial proceedings vis-à-vis the presentation of witnessing and series of questioning is dependent on the valuation of their relevance by the counsels instead of the court.

As highlighted by the Malimath Committee reports,[18] the judge is no where assigned with a positive duty to investigate the truth, as in the case of the inquisitorial system. Hence, in ineffective or biased investigations, judges rarely display an enterprise to correct the situation in favor of justice. The adversarial system also mandates a higher degree of evidence for conviction, thereby further restricting the flexibility of judges to decide upon the guilt of the accused.[19]

In a strong dissent to the adversarial system, former President of India R. Venkataraman, had also suggested that the system stands in opposition to the very spirit of our ancient traditions of justice. He stated:

"The Adversarial System is the opposite of our ancient ethos. In the panchayat justice, they were seeking the truth, while in the adversarial procedure, the Judge does not seek the truth but only decides whether the prosecution has proved the charge. The Judge is not concerned with the truth but only with the proof. Those who know that the acquitted accused was, in fact the offender, lose faith in the system"[20]

Even the Supreme Court, on many occasions, has critiqued the static nature of adversarial trials:

In Ram Chandra vs. the State of Haryana,[21] the Supreme Court held: *"[...] there is a rather unfortunate propensity for a judge ruling over a trial to take upon himself the role of an umpire or a referee and to permit the trial to grow into a contest of the prosecution versus the defense with the unavoidable distortion flowing from comparative and competitive evidences being admitted into the trial."*[22]

[18] Amnesty International, *India: Report of the Malimath Committee on Reforms of the Criminal Justice System: Some observations*, 19 September 2003
[19] Pizzi, W. (1995). Lessons from Reforming Inquisitorial Systems. Federal Sentencing Reporter, 8(1), 42-43
[20]Keally McBride (2016) *Macaulay to Malimath: The Man Who Made the Rule of Law*, Oxford University Press, New Delhi
[21]Ram Chandra vs. State of Haryana, AIR 1981 SC 1036
[22] Id.

The same opinion was further affirmed in the *State of Rajasthan vs. Ani Alias Hanif*[23]and *Mohanlal vs. Union of India*,[24] where the concerned issue was the counsel's negligence in presenting the existing evidence to the court. The Supreme Court then held that:

"It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defense to establish its individual case by adducing the best available evidence, and the Court is not empowered under the provisions of the Code to compel either the prosecution or the defense to examine any particular witness or witnesses on their sides. Nonetheless, if either of the parties withholds any evidence which could be produced and which, if produced, be unfavorable to the party withholding such evidence, the court can draw a presumption under illustration (g) to Section 114 of the Evidence Act. It is a well-accepted and settled principle that a Court must discharge it's statutory functions-whether discretionary or obligatory-according to the law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done."

The Malimath Committee, however, notes that:*"The Judge, in his anxiety to demonstrate his neutrality opts to remain passive and truth often becomes a casualty. Failure to ascertain truth may be due to errors or omissions on the part of the investigation agency, the prosecution, or the wrong attitude of the parties, the witnesses, or inadequacies in the principles and laws regulating the system. No provision in the Code expressly imposes a duty on the court to search for truth. It is a general feeling that falsehood often succeeds in courts."*

In its 600-page report, the committee had proposed a hundred and fifty-eight different recommendations for criminal justice reforms, the most pertinent among which was the question as to whether there should be a consideration for another system. The committee compared our approach to the prevailing inquisitorial systems in France and Germany. It concluded that with respect to the kind of criminal justice system, protecting the right of a fair trial to the accused, the adversarial system would serve the country better. However, at the same time, the committee recommended certain features of the inquisitorial system that could be adopted to better the adversarial system and make it more efficient and effective.

[23] State of Rajasthan vs. Ani Alias Hanif, AIR 1981 SC 1036
[24] Mohanlal vs. Union of India, 1991 AIR 1346

Among these was the imposition of a duty on the court to search for truth of its own accord, to allow a more proactive character to the judges to provide directions to the prosecuting agencies and investigating officers in the matter of evidence collection to find a more veracious version of truth and deliver greater justice to the victims.

III. FAILINGS WRONGLY ATTRIBUTED TO THE ADVERSARIAL SYSTEM

The criminal justice system in India has various inherent problems that cannot be attributed to the adversarial system alone.[25] Reports from many human rights organizations highlight that the criminal justice system is rendered ineffective as a result of various other problems vis-à-vis high levels of corruption, discrimination at the hands of inefficient law enforcement agencies, paucity of human and capital resources, dearth of investigative expertise, a confession centric approach to evidence, lack of stringent legal action against violators of human rights.[26] The most pertinent among them are:

Lack of resources: The law enforcement and criminal justice system faces a serious paucity of capital and human resources, contributing to its inefficiency. There exists a need for better training and coaching of police personnel, judicial officers, and court administrators than what is currently being provided.[27] With no substantial rise in budgetary provisions, the pendency of cases and undecided appeals continue to increase exponentially.

Torture: The fact that suffering is prevalent in India is acknowledged even by the police personnel and authorities and has been widely documented.[28] The poor training of police personnel concerning investigative procedure and methods and the lack of awareness against its absolute prohibition and ramifications is one of the root causes behind this. The majority of the instances of torture by the state occur within police custody, and governmental and non-governmental studies have extensively documented it that the police mechanism operates in an environment conducive to the use of torture and investigatory malpractices. Acts of corruption by police personnel further encourage the practice of threats and extortion through the abuse of state powers.

[25] Sivanandan, T. (2015). *Need for reform of criminal justice system: Malimath*. The Hindu
[26] Ministry of Home Affairs. Committee on Reforms of Criminal Justice System. Government of India, Mar. 2003. Web. (Justice Malimath Committee Report)
[27] National Human Rights Commission of India, Annual Report 2000-2001, paras 3.62 et seq (available at http://nhrc.nic.in/); Concluding observations of the Human Rights Committee: India, 4 August 1997, CCPR/C/79/Add.81, para 27; Amnesty International, Annual Report 2002 (India) and Annual Report 2003 (India).
[28] Sivanandan, T. (2015). *Need for reform of criminal justice system: Malimath*. The Hindu

The introduction of some aspects from the inquisitorial system has the potential to address these problems. Observance on the practice of police torture has also been taken into account by the Supreme Court in Kartar Singh's case[29], where the court opined that:

"It is heart-rending to note that day in, and day out we come across with the news of blood-curdling incidents of police brutality and atrocities, alleged to have been committed, in utter disregard and all breaches of humanitarian law and universal human rights as well as in total negation of the constitutional guarantees and human decency."

With the Supreme Court taking a stance on the issue and facilitating investigations in specific cases of custodial torture, the police machinery can be held accountable for most such instances of power abuse and human rights violation.

Corruption and discrimination: Most importantly, their corrupt practices take place at all levelsof the criminal justice system and especially at the lowest levels, which contributes to the legitimizingof such malpractices and worse, to more excellent discrimination and miscarriage of justice. In such a scenario, an inquisitorial system granting the judges more power could backfire in a situation where there is a more incredible abuse of such power, thereby solving one problem while creating another.[30]

IV. CONCLUSION

The fault lines of the criminal justice system in India are a matter of systematic lacunae, which the mere application of an inquisitorial system cannot mitigate. Further, an alternative system provides greater scope for the abuse of power and related consequences vis-à-vis corruption and inherent discrimination by the law enforcement and judiciary. The assessment made by this paper serves as an adequate evaluation of the role of magistrates in the adversarial and inquisitorial criminal justice systems. Hence, it is safe to conclude that while the justice system in India must be imbued with greater flexibility and effectiveness in adjudication in line with the Malimath Committee report, the systematic faults of the inquisitorial method and the implications of the broader powers to the judges must be studied in greater detail and practicality to ensure the better enforcement of such reforms.

[29] Kartar Singh vs. State of Punjab, 1994 SCC (3) 569

[30] Pizzi, W. (1995). Lessons from Reforming Inquisitorial Systems. *Federal Sentencing Reporter, 8*(1), 42-43