

## ADVERSARIAL AND INQUISITORIAL LEGAL SYSTEMS OF DISPENSATION OF JUSTICE – A PERSPECTIVE

By

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“Every trial is a voyage of discovery in which the truth is the quest”<sup>2</sup> is often quoted in the annals of justice system. Therefore, the goal of a Judge in the administration of justice whether civil or criminal is that truth must triumph at any cost and by any means. To achieve that goal different countries, prescribe and follow different methods. The two prominent methods mostly in vogue world over are adversarial and inquisitorial systems. This paper aims at discerning the two legal systems, their relative merits and draw backs and the distinct advantage of one over the other from the Indian standpoint.

### *Adversarial (Accusatorial) System:*

“Adversarial system is the Court system where a Judge decides on a case argued by a prosecutor who is suing the plaintiff and the defence attorney who defends their plaintiff. A jury has also been used to decide such cases”<sup>3</sup>. In this system judicial precedents have a binding force. It is the responsibility of the parties, namely the prosecution and the defence in prosecution cases and the plaintiff and the defendant in civil proceedings to produce evidence in support and in defence of their claims and counter-claims. There is no examination phase, which results in leaving the evaluation of evidence collected during the investigation to trial. The examination of witness (chief, cross and re-examination) becomes part and parcel of the trial. A systematic categorization is followed as to the rules of evidence such as admissible and inadmissible, ocular and hearsay, direct and circumstantial evidence.

Lawyers are primarily responsible for introducing evidence and questioning witnesses. The State prosecutes the criminal and generally the victim is not a party. The Judge plays the role of a referee and remains neutral at the hearing to ensure that the Court case is conducted in a manner that observes due process. The Judge decides whether the defendant is guilty beyond reasonable doubt (except in jury trials where the jury performs that role) and determines the sentence. The adversarial system is followed in the common law countries such as UK, Australia and India including USA.

### *Inquisitorial (Non-adversarial) System:*

The inquisitorial system is, “proof taking used in civil law, whereby the Judge conducts the trial, determines what questions to ask, and defines the scope and extent of inquiry”<sup>4</sup>. In this system judicial precedents are not given that much importance. Judges are free to decide each case independently of previous decisions basing on the relevant statutes.

In an inquisitorial legal system, a typical criminal proceeding is divided into three stages *i.e.*, the investigation, the examination, and the trial. In the investigative stage, a Government official (generally the Public Prosecutor) collects evidence and decides whether to press charges. Prosecutors carry out investigations themselves or request Police to do so. The prosecution can give general instructions to the Police regarding how particular cases are to be handled and can set areas of priority for investigations. In

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2. Quoted in *Ritesh Tewari and another v. State of U.P. and another*, (2010) 10 SCC 677.
3. Black’s Law Dictionary.
4. Ibid.

some inquisitorial systems a Judge may carry out or oversee the investigative phase.

It is the Judge that carries out most of the examination of witnesses, arising from their obligation to inquire into the charges and to evaluate all relevant evidence in reaching their decision. Due to thoroughness of the examining stage, a record of evidence has already been made and is equally available to the prosecution and defence well in advance of the trial.

The main function of a trial is to present the case to the Trial Judge and, in some cases, the jury, and to allow the lawyers to present oral argument in public. While there is no cross and re-examination of witnesses, witnesses are still questioned and challenged. However, it is now accepted that the defence should have the right to confront each witness during at least one stage in the proceedings. Traditionally there is no ability for the defendant to plead guilty.

Judges are required to direct the Courtroom debate and to come to a final decision. The Judge assumes the role of principal interrogator of witnesses and the defendant and is under an obligation to take evidence until he or she ascertains the truth. Juries are generally only used for the most serious cases. The rules around admissibility of evidence are significantly more lenient. More evidence is likely to be admitted, regardless of its reliability or prejudicial effect. Evidence is admitted if the Judge decides it is relevant. In many inquisitorial systems, there is no hearsay rule (*e.g.* France, Belgium, and Germany). It is upto the Judge to decide the value of such testimony.

At the stage of the examination itself evidence is recorded, and the witnesses are challenged, though there is no cross and re-examination. The victim is treated as a party in the trial. This system is followed in civil

law countries such as France, Germany, Italy, and other continental countries.

### *Practice in India:*

In India, during the reign of kings administration of justice was one of the principal functions of the king and who used to fulfill it with the help of justice department after putting the case at hand to thorough investigation and hearing<sup>5</sup>. The king was regarded as the fountain of justice. This system was comparable to inquisitorial. But with the advent of the British and their rule, the British Courts in India switched over to their common law practice of adversarial system. These Courts introduced Common Law Criminal Jurisprudence in the dispensation of criminal justice. The fundamental cannons of the Common Law Criminal Jurisprudence are that (i) the accused shall be presumed to be innocent until proved guilty; (ii) the accused shall not be compelled to be a witness against himself<sup>6</sup>; (iii) the prosecution must establish the case against the accused beyond all reasonable doubt.

In case of civil suits it is for the parties and their Advocates to establish their case by bringing all the evidence required in the form of documentary and oral evidence by way of producing witnesses. The Judge maintains complete neutrality. Based on the evidence accepted followed by the arguments the Judge decides that case.

So far there is no serious debate, as to whether present legal system is alright or any systematic change has to be effected, and which type of legal system suits to our native gene and which is nearer to our culture.

### *Practice in France:*

Administration of justice in France is worth noting in view of the distinct

5. Justice M. Rama Jois, Legal and Constitutional History of India. Universal Law Publishing Co. Pvt. Ltd., 2001 Pp.489-510.

6. Incorporated as a fundamental right in Article 20(3) of the Indian Constitution.

advantages in it. In France administration of justice is undertaken by dual type of Courts viz., administrative Courts and law Courts. In both the Courts inquisitorial system is adopted. In the administration of criminal justice, when the offence is more serious the Trial Judge (Magistrate) himself/herself conducts investigations. As a member of judiciary, the Magistrate carries on the investigations independently of the department of public prosecutions. Generally, the case is brought before the investigating Judge by the Public Prosecutor or rarely by the victim himself. The duty of the investigating Judge is not to prosecute the accused but to gather evidence and order for an adversarial trial by the jury if he is satisfied that there is a case which is subject to an appeal either by the prosecution or by the defence. The Judge who investigated the case will not sit on the trial and he is not also allowed to deal any matter relating to the same party in future<sup>7</sup>.

#### *An overview:*

In both the legal systems the accused is protected from self-incrimination and guaranteed the right to a fair trial. The object of both the systems is to find out the truth but through different approaches. In the adversarial system the defendant can plead guilty (plea bargain) for reduced sentence. In the inquisitorial system confession of guilt is not a ground for conviction.

In the adversarial legal system, the Judge maintains complete neutrality leaving it to the parties to establish their case. It is common knowledge that going by the socio-economic disparity and wielding of power both the parties cannot avail similar quality of legal service. As a result, the stronger party will always have an edge in establishing more evidence than the other party. Whereas in the inquisitorial system, the Judge plays investigative role in the collection and preparation of evidence. He is, therefore, able to decide what evidence is admitted by

both parties, before questioning the witnesses himself.

In the inquisitorial system the initial investigation being judicial, it is supposed to be free from procedural irregularities and not executive as in the case of adversarial system which is prone to technical flaws and subjected to prejudices. Another merit in the inquisitorial system is that when the investigating Judge decides that the evidence is weak, it would not reach for trial, which saves the time and expenditure apart from giving great relief to the innocent. The inquisitorial legal system controls docket explosion and brings down pending litigation.

The Malimath Committee on Judicial Reforms heavily relied on the fact that in discovering truth, the Judges of all Courts need to play an active role. The Committee observed thus :

“In the adversarial system truth is supposed to emerge from the respective versions of the facts presented by the prosecution and the defence before a neutral Judge. The Judge acts like an umpire to see whether the prosecution has been able to prove the case beyond reasonable doubt. .... The Judge in his anxiety to maintain his position of neutrality never takes any initiative to discover truth. He does not correct the aberrations in the investigation or in the matter of production of evidence before Court.....”<sup>8</sup>

As a result, the innocent gets convicted and culprit escapes. Same is true in civil matters. In the adversarial system, where there is no responsibility on the judiciary or investigating authorities to find truth. The investigation authorities feel that they should build evidence by any means and get conviction. They simply weigh pros and cons of evidence let in and see which way the pendulum swings. In the inquisitorial system responsibility will be on the Judge and

7. Wikipedia, Inquisitorial System.

8. Malimath Committee Report 2003.

investigating authorities to find truth. This leads to a high rate of conviction, instead of the 'adversarial system' followed in India where lawyers represent their parties' case.

The adversarial system aims to get to the truth through the open competition between the prosecution and the defence to make the most compelling argument for their case. Critics of the adversarial approach argue that the pursuit of winning often overshadows the search for truth. There is no responsibility on the judiciary/prosecution to find truth and there is no accountability for false or even for deliberate falsehood of judiciary or prosecution in civil or criminal matters. Even if there is any such it is sheer impossible to invoke the same. Ultimately the justice made mockery.

The inquisitorial system is generally described as a system that aims to get to the truth of the matter through extensive investigation and examination of all evidence. The Malimath Committee observed on the functioning of adversarial legal system thus :

"The Adversarial System lacks dynamism because it has no lofty ideal to inspire. It has not been entrusted with a positive

duty to discover truth as in the Inquisitorial System. When the investigation is perfunctory or ineffective, Judges seldom take any initiative to remedy the situation. During the trial, the Judges do not bother if relevant evidence is not produced and plays a passive role as he has no duty to search for truth". [Malimath Committee Report 2003]

Truth being the cherished ideal and ethos of India, pursuit of truth should be the guiding star of the Criminal Justice System. For justice to be done truth must prevail. It is truth that must protect the innocent and it is truth that must be the basis to punish the guilty. Truth is the very soul of justice. Therefore, truth should become the ideal to inspire the Courts to pursue. This can be achieved by statutorily mandating the Courts to become active seekers of truth. It is of seminal importance to inject vitality into our system if we must regain the lost confidence of the people. Now there is total immunity to the Judges. Even corrupt Judges go scot free. Inefficiency, not following law, personal prejudices, likes and dislikes, helplessness due to lack of understanding of basics have become normal. Special Tribunals established are still worse. This is high time to consider switching over to inquisitorial system.

## TO BAIL OR NOT TO BAIL: CAN TRIPOD TEST ALONE BE DETERMINING FACTOR IN USING DISCRETION BY THE COURTS IN INDIA?

By

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### 1. Introduction :

Justice *V. Krishna Iyer* more than four decades ago observed that 'Bail or jail ?- at the pre-trial or post-conviction stage- belongs to the blurred area of the criminal justice system and largely binges on the hunch of the bench, otherwise called judicial

discretion.<sup>1</sup> The situation has not changed yet. Judicial discretion in respect of bail is still a blurred area of Administration of Justice. The Code of Criminal Procedure (CrPC)<sup>2</sup> while granted limited discretion to the Magistrate Court but it empowers Superior Court much wider discretion to grant of bail.<sup>3</sup>

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1. *Gudikanti Narasimulu and others v. Public Prosecutor*, 1978 AIR 429.

2. Code of Criminal Procedure, 1973 (Act II of 1974).

3. See Sections 436 to 439 of the CrPC.