

RETHINKING THE SUBSISTENCE OF ADVERSARIAL SYSTEM IN INDIA : AN OVERVIEW

DR. SUNITA ADHAV*

1. Introduction :

Being succeeded on the British legal system, the Indian legal arena inherited myriad legal aspects from the common law ideologies. Amongst various such legacies the Adversarial Legal System has laid down the underpinnings of India's judicial process. The core enactment of Criminal Procedure Code, 1973¹ prescribes to the adversarial system based on accusatorial method. The connotation, "Adversarial" simply means that an obligation to collect and establish the pellucid evidence is placed on the party that seeks to establish guilt, i.e. prosecution. The most vital part of this system is the neutral character of the judge, who acts as a referee between the conflicting parties. The whole process can be described as both the parties are allowed to introduce evidence and cross-examine witnesses.²The most usual comparison of adversarial system with inquisitorial trial system is a quintessential phenomenon of contemporary legal arena. The very utility of these systems has become the topic of heated debate. The inquisitorial system simply implies that, the obligation is casted on the judge itself regarding for the production of evidence at trial. It's pertinent to note that, it is the trial judge who decides upon the relevance and preference of probable witnesses and permissions to both parties to ask questions to the witnesses. This system of criminal trial assumes that the state, on one hand, by using its investigative agencies and government counsels will prosecute the wrongdoer who will have equal opportunity also take recourse to challenge and counter the evidences of the prosecution.

2. Adversarial Underpinnings of Indian Legal System :

India's Criminal Justice System is not strictly adversarial. No system can be without irregularities, hence the mixture of useful elements in the interest of the justice becomes paramount important. Here, the interest of justice becomes important than that of the sanctity of the system. Indian system adopts a mixture of both adversarial and inquisitorial elements. Following are the elements from Indian legal systems which show compliance with inquisitorial model :

- **Inquisitorial components :**

Being a quintessential characteristic of the adversarial system, the magistrate is expected to perform the role of an observer towards the case and the whole investigation activities are to be carried out under his observation. However, such an arrangement doesn't allow him to be participatory within the trial and play some role. Contrary to which the inquisitorial system leaves wide scope to the magistrate and enables him to literally guide the case before him. The Magistrate assists the case towards justice, some notable examples of which are as follows:

- **The Criminal Procedure Code, 1973 :**

Being the core enactment governing the Criminal Justice System within India, the Cr. P. C. lays down the fundamentals of the investigation. The prevailing adversarial system although doesn't allows much active role for the magistrate, following are the provision within it shows the inquisitorial characters, viz., Sections 228³ and 240⁴ of Cr. P.C. of the Code suggest that charge against the accused is to be framed by the Court and not the Prosecution. This allows the court to refine the prosecution's accusations and only judge issues that have prima facie merit. Section 311⁵ empowers the court to examine any person as a witness though such person has not been called by any party as a witness similar power is also given to the court under Section 165⁶ of the Indian Evidence Act, 1872.⁷Section

313⁸ allows the court to examine the accused at any time to get an explanation regarding the trial. Section 321⁹ prohibits the prosecutor from withdrawing the case without the consent of the Court.

3. Efficacy of Adversarial System :

India inherited the adversarial system from its colonial masters, the British. In 1858 and 1947 of the Indian Subcontinent, or present-day India, Bangladesh, Pakistan, and Myanmar, during the period whereby these lands were under the colonial control of the United Kingdom as part of the British Empire.¹⁰ The adversarial system, presumes the the accused as innocent and the burden is basically kept on the prosecution to prove the guilt of the accused beyond reasonable doubt. In addition to this, the accused also enjoys the right to remain silence and cannot be compelled to reply. The said notion can also be reflected through the constitutional mandate under the Art. 20(3).¹¹ Unless the contrary appears the accused is considered as the non-guilty. Here, its pertinent to note that, the truth is to be emerged from the facts laid down and duly established presented defense before a neutral judge. The principles of natural justice also grant the protection to the accused person. The nature of the trial is mostly oral, continuous and confrontational. The parties are given opportunity to cross-examination of witnesses.

- **Advantages of Adversarial System :**

- a) **Fair Trial and Procedure :** In such cases nothing shall be kept confidential. Before passing any order or judgment the judge will allow each party to prove their respective case and it will be conducted in public. Since there is no scope for the parties to play hide and seek game the procedure secures fairness to both the parties.
- b) **Impartiality and Neutrality :** On account of impartiality of judges, they are not inclined towards either party and renders equal opportunity to both the parties.
- c) **Certain and binding character of Decision :** The procedural mandate laid down under various procedural laws such as Cr. P.C., 1978, C.P.C.1908 etc. made the judiciary more accountable towards the parties and renders the binding decisions on them.
- d) **Judicial Control :** As the judges are playing the observer's role, each and every development of the case remains subject to the judicial scrutiny.
- e) **Enforceability :** Judgment debtor is bound to follow the judicial orders and thus, judgment creditor gains the justice with utmost assurance.

- **Disadvantages of Adversarial System :**

There are few demerits attached with adversarial system as follows:

- a) **Rigidity :** The parties cannot, as per their discretion, choose time and place of hearing. The judges can't follow the procedure out of the box. Both the disputing parties cannot withdraw from the adversarial process at any time without assigning proper reasons.
- b) **Overburdened Judiciary :** On account of matrix of numerous procedural stages and provisions thereto, the rate of disposal of cases remains slow.

- **Inquisitorial System :**

The system of inquisitorial model like adversarial empowers the investigation officers to investigate the crimes. The prevalence of the inquisitorial system is mostly seen in civil law countries like France, Germany and other European Union nations. 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. This facilitates the transparency and accountability in the process of collection of evidence and promotes the free and fair investigation for the investigation agencies. The prosecutor in inquisitorial system, has the power to close the case in case he finds that case is made out. If, however he feels that further investigation is warranted he can initiate the suitable action to undertake further investigation. The judicial polices are expected to act with utmost neutrality and they are instructed to carry out their duty in objective manner. It's their obligation to carry out the investigation with assistive and supportive role to the prosecution. The prosecutor plays more active role whilst keeping due diligence and attention on the case. If he feels that, the case involve serious offences or offences of complex nature or politically sensitive matters, he can move the judge of instructions to take over the responsibility of supervising the investigation of such cases. For serious and complex offences the investigation is done under the supervision of an independent judicial officer who for the purpose of discovering truth collects evidence for and against the accused.

As the inquisitorial system is mostly prevailed in European nations, it becomes important to explore the advantages of it in comparison with the adversarial system. For example, in France the role of Magistrates and Prosecutors are interchangeable. This enables them to rotate their roles to each other. It simply means that, if person 'A' is appointed as a Magistrate for one term and the prosecutor for the next term. Their selection is done by the common-selection method. its pertinent to note that, they are given the common training.

4. Nexus between Adversarial System and Legislative Aspects :

The Adversarial system ties the judicial magistrates in a certain framework by which they become part and parcel of the case. Parts of the trial, including the presentation and questioning of witnesses depend upon the projection of their relevance by counsels. The landmark findings of the Malimath Committee¹² explains that magistrates are obliged with a duty to discover truth as in the Inquisitorial System. The advantages of adversarial system can't be overlooked. As, whenever, the investigation goes ineffective the magistrates have no merits to do anything. The dormant role casted on them doesn't allow them to be more active like higher judiciary. The adversarial system also emphasizes on the utmost diligent and unfeigned level of proof for the conviction of the accused. It can be said in comparison that, such factor is somewhere missing from the framework of the inquisitorial system. The flexibility of the judges in the inquisitorial system sometimes overlooks the rigidity of legal constrains and thereby leaves room for irregularities.

- **Indian Perspective:**

In India the adversarial system has reached at the periphery of inefficiency. The prophecy laid down by the former President of India Dr. R. Venkatraman in this regard is worth noting, as he rightfully warned that, "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."¹³

5. Judicial Notions :

The Supreme Court of India has time to time made critical analysis on the subsistence of adversarial system in India. A landmark judgment in *Ram Chandra vs. State of Haryana*,¹⁴ the Supreme Court observed that, "there is an unfortunate tendency for a Judge presiding over a trial to assume the role

of referee or umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortion flowing from combative and competitive elements entering the trial procedure.” In furtherance to this, in the case of *State of Rajasthan vs. Anil Alias Hanif*¹⁵ the verdict of Ram Chandra was reiterated whilst assessing the role of the judiciary in criminal trials. Similarly, the Apex Court in *Mohanlal vs. Union of India*,¹⁶ on the issue of the prosecutor’s negligence opined 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. It is a well-accepted and settled principle that a Court must discharge its statutory functions-whether discretionary or obligatory-according to 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.”

- **Scrutiny of Malimath Committee Report on the adversarial system in India :**

The Committee on Reforms of the Criminal Justice System (Popularly referred to as the Malimath Committee) submitted its report in April 2003.¹⁷ The Malimath Committee however noted 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 on account of errors or omissions on the part of the investigation agency, the prosecution or the faulty attitude of the parties, the witnesses or inadequacies in the principles and laws regulating the system. There is no provision in the Code which expressly imposes a duty on the court to search for truth. It is a general feeling that it is falsehood that often succeeds in courts.”

The Committee has laboriously scrutinized the various aspects of the criminal jurisprudence and administration of justice methodologies in India. The Committee whilst examining the particulars of inquisitorial system concluded that, as far as the ideal criminal justice system for India is concerned, which will encompass the elements such as fair trial, and utmost diligent handling of criminal justice, etc. the advantages of the adversarial system are immensely important. Moreover, India cannot afford to leave the resort of adversarial system. However, the Committee felt that whatever the best practices and normative principles from the inquisitorial are beneficial for the Indian context, can be adopted forthwith and be made operative. It’s not gainsaying to say that, such a transformation would lead to the increasing the judicial accountability and enable the judges to play a statutorily active role of truth finding. Whilst giving direction to the investigation process they can be able to keep watch on the investigation process. This will facilitate transparency and fairness in investigation. The interests of both accused and victims can be balanced and best served with this. Some recommendation of the committee is worth noting,

- Section 311 of the Code be substituted on the following lines: “Any Court shall at any stage of any inquiry, trial or other proceeding under the Code, summon any person as a witness or examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined as it appears necessary for discovering truth in the case.” Here, the present connotation “if his evidence appears to it to be essential to the just decision of the case” shall be substituted with above text.
- Provision similar to Section 255¹⁸ of the Code relating to summons trial procedure be made in respect of trial by warrant and sessions procedures, empowering such court to take into consideration, the evidence received under Section 311 (new) of the Code in addition to the evidence produced by the prosecution.

- Section 482¹⁹ of the Code be substituted by a provision on the following lines : “Every Court shall have inherent powers to make such orders as may be necessary to discover truth or to give effect to any order under this Code or to prevent abuse of the process of court or otherwise to secure the ends of justice.” Here, the more emphasize has been given on the element of the justice apart from the mere procedural corrections.

It is not gainsaying to expect that, such abovementioned changes may lead to the efficacy into the presently operative adversarial system. The element of binding with obligation may enable the judges to adopt more pragmatic approach and to break the obsolete presumptions and procedural laches. At the same time, its pertinent that, such changes ought not be considered as the full-fledged solution to the enigmatic situation of present day. There needs a drastic changes for this.

- **Challenges Before Adversarial System :**

The Criminal Administration System prevailing in India is currently facing many impediments. The extent to which such hurdle will be tackled by the adversarial system is less adequate. The pendency of the cases, overburden of judiciary, procedural delay etc. is making the law reforms ineffective. Following are the challenges before it:

Scarcity of human resources: the vacancy of posts in higher judiciary and the dilemmas of judicial appointments are well evident in India. Thus, to make trial speedier with the help of mere inquisitorial elements is difficult task. An intrinsic changeover is required in this regard. Similarly, lack of human and technical resources, lack of investigation expertise, a confession oriented approach to interrogation, lack of punitive action against abusers of human rights, and a level of corruption are some of the major challenges.

In the light of above issues and challenges, the time has come for the India legal system to rethink on the subsistence of the adversarial system.

6. Conclusion :

The Indian Criminal Justice System has suffered with inherent dilemmas and hurdles of procedural overburden. Merely criticizing the situation won't suffice the purpose, as the delay in disposal of cases right from the simple civil wrongs to death penalty cases has vitiated the legal process and judicial process as whole. With this backdrop, the Indian justice system must be infused with dynamism in its style of adjudication in line with the Malimath Committee report. The precisely connoted by the Apex Court in, *TashiDelek Gaming Solutions v. State of Karnataka*²⁰ was observed, a person must be held to have access to justice if his right in any manner whether to carry on business in infringed or there is any threat to his liberty. Access to justice is a human right.” Thus, time has come for the Indian legal system to revamp its procedure and substance towards more just way of justice delivery.

(End notes)

* Principal, Modern Law College, Pune.

1 Hereinafter also referred to as ‘the Code.’

2 K.N.C. Pillai (ed.), R.V. Kelkar’s Criminal Procedure, 336 (5th edn.).

3 Framing of charge

4 Ibid

5 Power to summon material witness, or examine person present.

6 Judge’s power to put questions or order production.

7 Act no 1 of 1872

8 Power to examine the accused.

- 9 Withdrawal from prosecution.
- 10 Bernard C. Cohn, Some Notes on Law and Change in North India, 8 Econ. Dev. & Cultural Change 79,90 (1959)
- 11 Protection against Self Incrimination
- 12 12. Justice Malimath Committee Report on the adversarial system - pt. 5
- 13 Keally McBride , Mr.Mothercountry: The Man Who Made the Rule of Law, available at <https://books.google.co.in/books?id=K3DADAAAQBAJ&pg>, last seen on 28/11/2016
- 14 AIR 1981 SC 1036 , (1997)6SCC162
- 15 AIR 2004 SC 2735
- 16 (2012) 7 SCC 719
- 17 It was constituted by the Ministry of Home Affairs of the Government of India in November 2000 and headed by former Chief Justice of Kerala and Karnataka, and former member of the National Human Rights Commission (NHRC), Justice V.S. Malimath. The two-volume report, over 600 pages in length contained 158 recommendations for 'reforming' the Criminal Justice System (CJS).
- 18 Acquittal or Conviction
- 19 Inherent powers of the high court
- 20 (2006) 1 SCC 442