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The Indian Adversarial System of Criminal Justice

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ABSTRACT

For the process of criminal justice, the Criminal Procedure Code prescribes to the adversarial system based on accusatorial method. The responsibility for the production of evidence is placed on the party that seeks to establish guilt with the judge acting as a neutral referee between the opposing parties, both of which are allowed to introduce evidence and cross examine witnesses. However, there is a greater lacuna in this system of criminal justice as under the said model, there is no duty of the court to ascertain the truth. The judge acts like an umpire to see whether the prosecution has been able to prove the case beyond reasonable doubt and gives the benefit of doubt to the accused unlike the inquisitorial system which focuses on discovering the truth, this system largely focuses on the truth being discovered through respective versions of the facts presented by the prosecution and the defence before a neutral judge. Since the judge is merely an umpire and is bounded by rules, he/she is unable to be an active participant of the trial he/she is only concerned with the proof that each side presents to substantiate its argument and not the truth itself as it is believed that the truth emerges from this contest between the two parties. This undermines the efficacy of the Criminal Justice System as the trial merely comes a contest between the prosecution and the defence whereas the ultimate motive of discovering the truth tends to get lost somewhere in the numerous facts being presented to prove one's own side as right. Also, since the adversarial system in India is based on the 'innocence of the accused' the burden of proof falls on the prosecution. This further undermines the efficacy of the Criminal Justice System as the lawyers on both sides can manipulate their versions of the truth and the neutral judge at the end will give the judgement based on the evidences presented and in such a scenario if the accused was actually the offender but was not proved guilty on the bases of facts and evidences then this paves a way for a loss of faith in the system itself This is further explained in terms of how this system does not allow for direct participation of the victim in the trial process and how the interests of the offender are given a priority.

Keywords*: Adversarial system, judge, neutral, truth, evidence, Malimath Committee ,justice.*

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I. INTRODUCTION

The forthcoming research paper revolves around the basic question:

"How the lacuna in the adversarial system undermines the efficacy of the Indian Criminal Justice System?"

The research paper aims to analyze how the Indian adversarial system has been ineffective in serving the purpose of justice as it tends to substitute the discovery of truth with that of the efficacy of the evidence presented. Hence, evidences presented in front of the neutral judge tend to be the primary factor in play when arriving at a judgement as the truth is understood to emerge from the facts being presented. There are many problems with role that the adversarial system assigns to truth. Also, in an adversarial criminal justice system, the victim of crime is almost entirely eliminated from an active role in the process of responding to the convicted offender. The victim has been defined as one who is quite "overshadowed", the "forgotten man" or "non-person in the eyes of the professional participants"—the person who has lost property in his or her conflict and is reduced procedurally to the standing of a mere witness and informant for the prosecution.

Peter Murphy in his *Practical Guide to Evidence* recounts an instructive example. A frustrated judge in an English (adversarial) court finally asked a barrister after witnesses had produced conflicting accounts, 'Am I never to hear the truth?' 'No, my lord, merely the evidence', replied counsel.

The theory of how the adversarial model is structured to attain the truth involves a contest. The parties are supposed to engage in fierce combat, pulling apart each other's case and, once the dust has settled, the truth will emerge. It should be the only thing left standing after the battle. The model assumes that the parties' self-interest will ensure that all relevant material is presented and tested before the court. However, the judge needs to take into account the evidence presented and hope that the parties know what they are doing. The major implication is that the various narratives of the contesting parties are shaped and refined for the sole purpose of winning the case and supplementing this is the neutral role of the judge, as a result the purpose of finding the truth tends to get lost.

The research paper is divided into five parts. The first part provides a detailed explanation of the adversarial system as well as the inquisitorial system to provide a better understanding . The second part deals with highlighting the problem of the adversarial system by bringing the lacuna of the system into light . This is followed the Supreme Court's criticism of the adversarial system as indicated in a number of cases. The fourth part focuses on the Malimath

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Committee's Report on the adversarial system and its recommendations which focus on adopting features of the inquisitorial system. The final section further focuses on the conclusion and the suggested reforms.

II. UNDERSTANDING THE TWO SYSTEMS IN CRIMINAL JUSTICE

(A) Adversarial System

India inherited the adversarial system from its colonial masters, the British. The adversarial system, is guided by the innocence of the accused and the burden is on the prosecution to prove beyond reasonable doubt that he/she is guilty. The accused also enjoys the right to silence and cannot be compelled to reply. The aim of the Criminal Justice System is to punish the guilty and protect the innocent. The 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 and gives the benefit of doubt to the accused. It is the parties that determine the scope of dispute and decide largely, autonomously and in a selective manner on the evidence that they decide to present to the court. The trial is oral, continuous and confrontational. The parties use cross-examination of witnesses to undermine the opposing case and to discover information the other side has not brought out

(B) Inquisitorial System

[2]The inquisitorial system of criminal justice as employed in countries such as Italy and France is guided by the 'Quest for Truth', it can be loosely defined as a procedure by which the judge attempts or tries to discover the raw facts regarding a particular case while at the same time representing the core interests of the nation in regard to the given trial. The judge in this particular system assumes a more proactive role and is chiefly accountable for overseeing the gathering of important facts that determine the case. Also the judge takes the lead in questioning the eyewitnesses and the defendant. The lawyers tend to take a more reactive role, proposing routes of investigation for the judge. The inquisitorial system puts the right of the accused secondary to the search for truth. The system neither assumes the guilt of the accused and nor has the presumption of innocence which is central to the adversarial system. We can take the example of France here. France follows the inquisitorial system and the power to investigate offences rests primarily with the judicial police officers (Police/Judiciare), they investigate and draw the documents on the basis of their investigation. Hence, the most important advantage

[2] Vijay, Yash S., The Adversarial System in India: Assessing Challenges and Alternatives (September 16, 2012). Available at SSRN: https://ssrn.com/abstract=2147385 or http://dx.doi.org/10.2139/ssrn.2147385

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of the system remains its ability to allow for a more substantial role of the judicial system in the trial process.

III. ADVERSARIAL SYSTEM-HIGHLIGHTING THE PROBLEM

(A) Lacuna With Respect To Discovering the Truth

The major problem related to this system is the role played by "passionate speeches" and creative arguments' in deciding the course of the trial process. This tends to pave the way for misinterpretations, exaggerations and other forms of evidentiary distortions where in both the parties present their respective facts to the judge, while they engage in this contest .Similarly, it can also be criticised for encouraging deception and other legal tactics , as the objective is to win at all costs, instead of evaluating the facts to learn the truth.

(B) Lacuna With Respect To Speed of Trial

The adversarial form of Criminal Justice is also a very tedious process, the judge can do little to hasten the process, not to mention that the evidentiary and procedural rules can slow down the process. Apart from that in an inquisitorial system you have several independent agencies working on the investigation this allows room for more opinion and presents various facets of the truth. On the other hand in an adversarial system there is largely a very restrictive group of people who participates starting from the police which carries out the investigation and presents the evidence in front of the judge and most importantly the prosecution and the defence which then present their arguments which further decide the course of the trial.

(C) Lacuna With Respect To Inactive Role of Judge

The Adversarial system puts magistrates in a duty bound position to subject themselves to the faults of the two parties that present arguments from both sides. Parts of the trial, including the presentation and questioning of witnesses depend upon the projection of their relevance by the prosecution and the defence. The judge cannot be an active member of the trial in terms of gathering evidence, cross-examining witnesses etc.

(D) Lacuna With Respect To Rights of Victim

Another disadvantage of the system is it's insensitivity to the victim as it is heavily loaded in favour of the accused. As mentioned earlier, it presumes the innocence of the accused and the burden of proof lies on the prosecution to prove without reasonable doubt that the accused is indeed guilty. [3]The system is highly concerned with the offender and ends up subordinating

[3] Reddi,P.V. '*Role of Victim in Criminal Justice Process',* Vol. 18, No. 1 (2006), jstor

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the interests of the victim. The main principle on which the system of legal jurisprudence is based *is to let ninety nine persons get away free than to have one innocent man punished.* This tenet, while preventing injustice to one innocent, denies justice to ninety nine victims of crime. In the existing criminal justice system, a crime victim does not have any significant role to play in the criminal process. The investigation process is largely a police function and the victim has a role only if the police consider it necessary. Similarly, the Code of Criminal Procedure confers a right of pre-sentence hearing to the accused to express his opinions on punishment but the code is silent regarding the right of the victim to narrate about the loss which he/she has suffered.

(E) The Supreme Court's Criticism

The Malimath Committee has pointed out that the adversarial system has not been entrusted with a positive duty to discover truth as in the Inquisitorial System. When the investigation is ineffective, Judges seldom take any initiative to remedy the situation as it lacks flexibility due to its rule bound nature. The adversarial system also requires a greater degree of proof for the conviction of the accused. This is an element missing from inquisitorial systems, where judges have a greater flexibility in deciding upon the guilt of the accused.

A strong dissident to the adversarial system Dr. R.Venkataraman, former President of India also held the adversarial system opposite in spirit to our ancient ethos 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 adversarial procedure, the Judge does not seek the truth, but only decides whether the charge has been proved by the prosecution. The Judge is 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 apex court has reiterated the above mentioned views in its various judgements and has criticized the non-dynamic nature of adversarial adjudication on many occasions.

[4] In **Ram Chandra vs. State of Haryana**, the Supreme Court opined:

"[…] *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 **State of Rajasthan vs. Ani Alias Hanif** the Ram Chandra opinion was affirmed as an

[4] https://indiankanoon.org/doc/525079/

important consideration to be taken into account in assessing the role of the court in criminal trials. Also, in [5]**Mohanlal vs. Union of India**, which raised the issue of the prosecutor's negligence in bringing the best available evidence to the notice of the court, the Supreme Court observed as follows:

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 defence to establish its respective 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 defence to examine any particular witness or witnesses on their sides. Nonetheless if either of the parties with-holds any evidence which could be produced and which, if produced, be unfavourable to the party withholding such evidence, the court can draw a presumption under illustration (g) to Section 114 of the Evidence Act. In such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? 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.

IV. JUSTICE MAILMATH COMMITTEE'S REPORT ON THE ADVERSARIAL SYSTEM

Malimath Committee submitted its report in April 2003. 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. [6]The two-volume report, over 600 pages in length contained 158 recommendations for 'reforming' the Criminal Justice System (CJS).

The Committee has given its anxious consideration to the question as to whether this system is satisfactory or whether we should consider recommending any other system. The Committee examined in particular the inquisitorial system followed in France, Germany and other Continental countries. The Committee concluded in relation to the type of criminal justice system ideal for India that a fair trial and in particular, fairness to the accused, are better protected in the adversarial system. However, the Committee felt that some of the good features

[5] https://indiankanoon.org/doc/129387304/
[6] Deepalakshimi, K. '*The Malimath Committees recommendations on reforms in the criminal justice system'*, January,17,2018 .The Hindu,

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of the Inquisitorial System can be adopted to strengthen the Adversarial System and to make it more effective. This includes the duty of the Court to search for truth, to assign a proactive role to the judges, to give directions to the investigating officers and prosecution agencies in the matter of investigation and leading evidence with the object of seeking the truth and focusing on justice to victims.

The committee suggested 20 broad reforms some of the important ones include:

(A) Borrowing From Inquisistorial Sysytem

As mentioned above, the panel was in favour of borrowing features from the inquisitorial system of investigation practised in France and Germany, where a judicial magistrate supervises the investigation. The committee recommended that courts be bestowed with powers to summon any person for examination, if it felt necessary.

(B) Right To Silence

The panel recommended a modification to Article 20(3) of the Constitution that protects the accused from being compelled to be a witness against himself/herself. The Committee suggested that the court be given freedom to question the accused to elicit information and draw an adverse inference against the accused in case the latter refuses to answer. The Committee also felt that the accused should be required to file a statement to the prosecution disclosing his/her stand.

(C) Rights of the Accused

The Committee suggested that a Schedule to the Code be brought out in all regional languages so that the accused knows his/her rights, as well as how to enforce them and whom to approach when there is a denial of those rights.

(D) Presumption Of Innocenece

The courts follow “proof beyond reasonable doubt” as the basis to convict an accused in criminal cases. This, the Committee felt gives “very unreasonable burden” on the prosecution and suggested that a fact be considered proven “ if the court is convinced that it is true” after evaluating the matters before it.

(E) Justice To Victims Of Crime

The Committee made a series of recommendations to ensure justice to the victims:

- The victim should be allowed to participate in cases involving serious crimes and should be given adequate compensation.

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- If the victim is dead, the legal representative shall have the right to implead himself/herself as a party, in case of serious offences
- The State should provide an advocate of victim's choice to plead on his/her behalf and the cost has to be borne by the State if the victim cannot afford it.
- A Victims Compensation Fund can be created under the victim compensation law and the assets confiscated in organised crimes can be made part of the fund.

(F) Police Investigation

The Committee suggested hiving off the investigation wing from Law and Order. It also recommended setting up o fa National Security Commission and State Security Commissions , to improve the quality of investigations.

(G) Dying Declarations

The Committee favoured dying declarations, confessions and audio/video recorded statements of witnesses be authorised by law. It also sought amendments to the law to allow thumb impressions only if the witness is illiterate.

(H) Public Prosecution

It suggested that a new post, Director of Prosecution , be created in every State to facilitate effective coordination between the investigation and prosecuting officers under the guidance of the Advocate General. The appointment of Assistant Public Prosecutors and Prosecutors , it was recommended , should be made through competitive examination.

Apart from these suggested reforms some other recommendations of the Committee focused on witness protections, trial procedures, perjury, vacations for the courts, sentencing and reclassification of offences as social welfare code, correctional code, criminal code and economic and other offences code.

The effect of these changes would have been a shift towards the inquisitorial system with judges duty bound to be dynamic in their approach towards effective investigation and the objective of justice. The committee was critical of the adversarial system and attributed many of India's judicial failings to the system.

Over the years taking advantage of several lacunae in the adversarial system large number of criminals are escaping convictions. This has seriously eroded the confidence of the people in the efficacy of the System. Therefore it is necessary to examine how to plug the escape routes and to block the possible new ones."

The committee laid emphasis on the quest for truth as it believed that the placing of a lofty

ideal to achieve would stir the judiciary into proactiveness,

"It is of seminal importance to inject vitality into our system if we have to regain the lost confidence of the people. Concern for and duty to seek truth should not become the limited concern of the courts. It should become the paramount duty of everyone to assist the court in its quest for truth. It is the duty of a Court not only to do justice but also to ensure that justice is being done."

V. SUGGESTED REFORMS

In order to deal with the lacuna of the adversarial system of Criminal Justice it is important that the reforms be divided into three categories respectively:

- Proactiveness of judges
- Role of lawyers
- Protection of Rights of victims

(A) Proactiveness of judges

Beginning with the role of the court, an obvious area for reform is the judge's role in relation to the trial. At present, a judge's role for gathering evidence at trial is largely passive. At present there are a number of restrictions on the role of the judge Hence, the following suggestions can be made . First, a judge should have the power to call a witness where the interests of justice so require. Second, a judge should be able to question witnesses beyond the judge's presently restricted role. Third, the judge, rather than the parties, should have primary control over the questioning of witnesses. When a witness is called, the witness should be able to give evidence to the judge in a relatively uninterrupted manner, as directed by the judge. All of these suggestions are subject to the overriding qualification that a judge should always be aware of the potential limitations of her or his knowledge of the case, seek the assistance of the parties where necessary and allow the parties proper opportunity to elucidate any points which might have been overlooked.

(B) Role of lawyers

The lawyers should not make the trial process a ground for contestation but should have a positive duty to discover the truth. Although the reform has its own limitations with respect to the role of lawyers but the basic idea is to ensure that truth does not get lost in a series of confrontational arguments and presentation of facts.

(C) Protection of rights of victims

The law needs to be sensitive to the interests of the victim who has suffered the loss, this

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requires that the victim must also be allowed to put forward his/her opinions or experience just how the accused is permitted to do so in the pre-sentence hearing. Similarly, there must be certain degree of direct participation of the victim in the trial to guide the course of the same. Malimath Committee has also suggested that victims of rape, domestic abuse , etc must receive mandatory therapy and counselling in order to cope with the trauma.

VI. CONCLUSION

To conclude, it can be said that the adversarial system of criminal justice has an unfilled gap with respect to how it strives for justice as justice comes about from a better version of presented facts and evidences, this unfilled gap is further supplemented with the lack of proactive role attached to the judges and strict adherence to procedure and rules that take little account of the interest of the victim into consideration. Also, the judge finds himself/herself in a very restricted position wherein he/she is bounded by a series of rules when formulating a judgement .

It is important to remember that the truth in such a situation is not completely forgotten but rather is neglected as the purpose is to win the case by refining and shaping the narratives of one's own side. However the purpose of the research here is not to criticise the practioners : lawyers are just doing their job. Their approach is a rational response to a system which not only permits lawyers to take liberties with the truth, but actually encourages it. The system also infuses a kind of frustration among the judges as they are unable to be an active part of the investigation and function in a highly restrictive manner. Similarly, it also infuses a sense of dissatisfaction and loss of trust, on part of the victim, in the judiciary.

With respect to the same if we look at the recommendations of the Malimath Committee report we realise that there are several shortcomings of the adversarial system and how we need to adopt certain features of the inquisitorial system.[7]It is important to note here that the idea is not to make a shift from the adversarial system to the inquisitorial system, both system have there own pros and cons, but to rather make the adversarial system more dynamic and inclusive of certain features of the inquisitorial system with respect to shifting the focus to discovering the truth and assigning a more proactive role to the judges in the trial stage. Hence, what we need is a convergence of legal systems.

Prof. Abraham S. Goldstein states:

"It is becoming increasingly apparent to criminal justice scholars that single theory models of

[7] Menon, Madhava. '*Towards Restorative Criminal Justice'*. September 09,2016, The Hindu

criminal procedure – whether termed inquisitorial or adversarial – are being stretched beyond their capacity by the phenomena they are designed to control. 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 home of relief"

Further proof of Goldstein's conviction is found in [8]Prof. Ujjwal Kumar Singh's analysis of the elements of a converging legal system in India using the Malimath Committee, the evolving attitude of the trial courts in India and the Prevention of Terrorism Act as evidence.[5]

Hence, The Indian justice system must be infused with dynamism in its style of adjudication in line with the Malimath Committee report.

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[8] Jain ,Chitrakshi. *'Examining the Special Prosecution Needs of Criminal Justice'*, September 09,2020, The Outlook India

 [ISSN 2581-5369]

VII. BIBLIOGRAPHY

1. Vijay, Yash S., The Adversarial System in India: Assessing Challenges and Alternatives (September 16, 2012). Available at SSRN: https://ssrn.com/abstract=2147385 or http://dx.doi.org/10.2139/ssrn.2147385
2. Reddi,P.V. '*Role of Victim in Criminal Justice Process',* Vol. 18, No. 1 (2006), jstor
3. https://indiankanoon.org/doc/525079/
4. https://indiankanoon.org/doc/129387304/
5. The Hindu. 2021. The Malimath Committee's recommendations on reforms in the criminal justice system in 20 points. [online] Available at: <https://www.thehindu.com/news/national/the-malimath-committees-recommendations-on-reforms-in-the-criminal-justice-system-in-20-points/article22457589.ece> [Accessed 10 August 2021].
6. The Hindu. 2021. Towards restorative criminal justice. [online] Available at: <https://www.thehindu.com/opinion/lead/towards-restorative-criminal-justice/article8433634.ece> [Accessed 10 August 2021].
7. Jain, C. and Ranjan, A., 2021. Examining The Special Prosecution Needs Of Criminal Justice. [online] OutlookIndia. Available at: <https://www.outlookindia.com/website/story/opinion-examining-the-special-prosecution-needs-of-criminal-justice/360054> [Accessed 10 August 2021]..

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