RESEARCH ARTICLE

INQUISTORIAL SYSTEM: A CRATOLOGICAL CRITIQUE

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Abstract:
This paper aims to examine the workings of an inquisitorial setup while weighing the pros and cons of such a system. The author has drawn upon the adversarial system so as to present a comparative approach. This paper focuses on a cratological system of evaluation. The author has dealt with the inquisitorial system in detail and with certain aspects of the adversarial system, in so far as it has aided comparative study. Procedural aspects of both the systems have been dealt with where deemed necessary. The author has formulated the following research questions to be looked into and has tried to evolve solution for it i.e, what are the modes of dispute resolution and how effective are they? How inquisitorial system works with reference to a cratological analysis? What is the best method of justice delivery system?

Key Words:
Justice, adversarial system, inquisitorial system, access to justice, parity of power etc.

1. Introduction

The primordial purpose of any legal system world over is to provide for justice to one and all in the society. “Justice is the ligament which holds civilized beings and civilized nations together,” said Daniel Webster. “What is Justice?”- The history of mankind evidences that this question has been perpetually asked by every generation and yet no objective answer has been found. From “retribution” to “fairness”, from “the advantage of the stronger” to “equality”, justice has been given diverse meaning depending upon the context it is used. However, a concept common to all definitions of justice is its intrinsic nexus with the dispute resolution. The primary goal of a dispute resolution mechanism is to do justice, yet dispute resolution and justice cannot be used interchangeably. The dispute resolution mechanism chosen by a society reflects the concept of justice in that society. Thus if each one is left to seek justice for oneself, then the concept of justice is retribution whereas if the State is interested in dispute resolution, but acts as an arbiter only, then the justice becomes synonymous with dispute resolution in that society. There is yet another paradigm – when the State considers its duty to provide equal protection of law to each citizen and takes affirmative action towards achieving the same, the concept of justice in that society is not merely confined to dispute resolution but also ensuring that everyone gets their due and equal opportunity to achieve a similar if not same status. Meaning of justice today by jurists appears to be that justice emanates from conforming to the Constitution, body of statutory law and common law. If litigants have been accorded the constitutional safeguards of due process, equal protection, statutory and common law consistent with the standards of conduct approved by society the result of the judicial process is deemed justice. Therefore justice is what the judicial process says it is. A natural corollary that flows from the concept of justice is “Access to Justice”. “Access to justice” means having recourse to an affordable, quick, satisfactory settlement of disputes from a credible forum. “Access to Justice” is an experiment in how far the welfare state and our legal institutions can go. But the reality today in our country does

not reflect a picture of inexpensive and prompt judicial resolution of disputes. Instead on the contrary the cost of legal representation, court fees, and procedural complexities, pathetic pace of the court proceedings and so on are adversely affecting the access to justice. Apart from the above mentioned factors it is important to understand that access to justice is significantly influenced by the mode of adjudication adopted. The two modes of adjudication prevalent currently are adversarial mode and inquisitorial mode. It will be the researchers endeavor to examine in detail these modes of adjudication with an emphasis on the inquisitorial system while analyzing them from the cratological perspective.

2. Modes of Adjudication

The two prevalent legal systems in the world are the Adversarial system (Accusatorial or the Common law system) and the Inquisitorial system (Continental or the Civil law system).

2.1. Adversarial System of Adjudication:

According to Advanced Law Lexicon\(^4\), adversarial procedure means, “A procedural system, such as the Anglo-American legal system, involving active and unhindered parties contesting with each other to put forth a case before an independent decision maker. Also termed as adversary procedure and (in criminal cases) accusatorial system or accusatory procedure. Cf. INQUISITORIAL SYSTEM.”

In a common law system, an adversarial approach is used to investigate and adjudicate guilt or innocence. The adversarial system assumes that truth is most likely to result from the open competition between the prosecution and the defense. Primary responsibility for the presentation of evidence and legal arguments lies with the opposing parties, not with a judge. Each side, acting in its self-interest, is expected to present facts and interpretations of the law in a way most favorable to its interests. The approach presumes that the accused is innocent, and the burden of proving guilt rests with the prosecution. Through counterargument and cross-examination, each side is expected to test the truthfulness, relevancy, and sufficiency of the opponent’s evidence and arguments\(^5\).

An adversary system implicitly trusts that parties with opposing interests are motivated to discover and present all of the facts relevant to the dispute. Indeed, it is generally in the parties’ best interest to do so. A system of adversarial justice therefore places chief responsibility on the parties to gather the facts supporting their respective cases and to present these facts at trial. In most cases, parties interview witnesses in advance, in search of those favorable to their causes. Although judges, and in some jurisdictions, even jurors may question witnesses, parties choose which witnesses testify; they also conduct the main questioning of these witnesses.

In the adversarial model, the parties are responsible for initiating and conducting the litigation. The judge decides a verdict based on the evidence presented by the competing parties. It is expected that they will do so impartially, after the parties have presented to them all relevant evidence. Hence in adversarial, or adversary, systems, judges play a role more like a referee at a sporting event in which the parties are the athletes. Underlying principle of adversarial system is “innocent-until-proved-guilty” The adversarial system (or adversary system) of law is the system of law, generally adopted in common law countries like India and USA. Under the Indian system, the magistrate acts only as an umpire, basing his decisions on what the prosecution had been able to prove or not.

2.2. Inquisitorial System of Adjudication:

Advanced law lexicon\(^6\) defines inquisitorial procedure as, “A Court procedure commonly practiced in Continental Europe whereby the trial judge conducts inquiry into the facts, rather than the parties. The judge will lead the investigations, examine the evidence and interrogate the witness.” An inquisitorial system is a legal system where the court or a part of the court is actively involved in determining the facts of the case. Inquisitorial systems are used in most countries in Western Europe and Latin America.

Historical Perspective

Until the Medieval inquisition in the 12th century, the legal systems used in medieval Europe generally relied on the adversarial system to determine who could be tried for a crime and whether they were guilty or innocent. Under this system, unless a person were caught in the act of committing a crime, they could not be tried for a crime until they had been formally accused, either by the voluntary accusations of a sufficient number of witnesses or by an inquest (an early form of grand jury) convened specifically for that purpose. A weakness of this system was that because it relied on the voluntary accusations of witnesses, and because the penalties for making a false accusation were severe, would-be witnesses could be hesitant to actually make their accusations to the court, for fear of implicating themselves.

Beginning in 1198, Pope Innocent III issued a series of decretals that reformed the ecclesiastical court system. Under the new processus per inquisitionem (inquisitional procedure) an ecclesiastical magistrate no longer required a formal accusation to summon and try a defendant. Instead, an ecclesiastical court could summon and interrogate witnesses on its own initiative, and if the (possibly secret) testimony of those witnesses accused a person of a crime, that person could then be summoned and tried. In 1215, the Fourth Council of the Lateran affirmed the use of the inquisitional system. As a result, in parts of continental Europe, the ecclesiastical courts operating under the inquisitional procedure became the dominant method by which disputes were adjudicated. In France, the parlements -lay courts- employed inquisitorial proceedings. In the development of modern legal institutions which occurred in the 19th century, for the most part, most jurisdictions did not only codify their private law and criminal law, but the rules of civil procedure were reviewed and codified as well. It was through this movement that the role of an inquisitorial system became enshrined in most European civilian legal systems.

In inquisitorial systems, judges play an active role in investigating the truth of matters and in rendering decisions accordingly. An inquisitorial system places on judges the chief role in discovering and developing evidence in a case. In the inquisitorial system, the magistrate formed part of the investigation. A proactive role, without compromising his neutrality, had been assigned to the magistrate, who could at any stage of trial give a direction to the investigation for ferreting out the truth. Parties to a matter may disclose to court relevant evidence, such as documents and witnesses with knowledge of pertinent facts. Judges, however, call and question witnesses. Parties are allowed to question the witnesses at trial, along with the questioning conducted by the judge, but are generally not allowed to interview witnesses in advance of their appearance at a trial. Lawyers only play minimal role in an inquisitorial system. They only prepare written pleadings on behalf of their clients and may also prepare amended pleadings in civil cases. They also make closing arguments at the end of trial.

Cratological Analysis of Inquisitorial System

A simplistic definition of power can be given as, “the ability to affect another by its exercise”. Mary Parker Follett defined power as “the ability to make things happen, to be a casual agent, to initiate change”. Power is intricately related to the human behavior as the acts of people living in a society are influenced by the exercise of the power by the power holders. Existence of state was necessitated for according legitimacy to the exercise of the power. Karl Loewenstein’s idea of power is that the term is strictly neutral, functional, and non-evaluative term. Power as per such an understanding is denominative of a real factual situation or interplay with no value judgments attached. Society as a whole is a system of power relations- political, social, economic, religious, moral, cultural and others. Power is sociopsychological relationship operating reciprocally between who hold and exercise power, here called the “power holders”, and those to whom it is directed, spoken of here as the “power addressees”. Julius Stone in his explanation of the interrelations between law and power mentioned six aspects of power relations which helps us to recognize the great complexity of the phenomenon of power as related to one or more of the following six elements. In order to predict the quantum of power, its impact is observed, and no other method is possible to

7 Dynamic Administration – Mary Parker Follet
8 Political Power and the Governmental Process by Karl Loewenstien
quantify power. These bands “are not measurable in any metric sense, but rather in terms of degrees which can be represented each on its own spectrum.”

In describing the cratology of access to justice under the inquisitorial system we must examine those aspects of the power spectrum that are relevant in this regard. These bands, which act as a benchmark to verify the proper exercise of power, are used to filter the laws on the basis of their adherence or non adherence to the power spectrum. The two modes of adjudication being discussed attract two bands of the power spectrum i.e. ethical count and time count for specific discussion.

**Ethical Component**

This count deals with the questions pertaining to ethics and moral aspects of law and it highlights that every law, act, or policy must satisfy minimum standards of ethics and morality of the society, which are liable to differ from one society to another. A uniform standard of ethics cannot be laid down for it differs from society to society. One of the major advantages of an inquisitorial system is that it strives to bring about Parity of Power. A great defect of adversary system is inequality of weapons i.e. inequality of counsel. Very little is done to match the two sides. There are so many instances where a litigant lost a case because of counsel. On the other hand in inquisitorial system active role which a judge plays limits to a great extent injury that bad lawyering can play on the litigant. Advocates become indispensable aspect of adversarial system. In the adversarial system truth is assumed to emerge from the respective versions of the facts and laws presented by the prosecution and the defense before a neutral judge. Thus ‘money power’ and ‘influence power’ comes into the picture because in this scenario the affluent would be in a better position to influence the justice than the poor. Thus the principle of equality as envisaged under Article 14 of our Indian constitution stands violated under the adversarial system of dispensing justice. Therefore, an inquisitorial system is biased against poor defendants, who are incapable of engaging expensive advocates to argue their case. The main emphasis in an inquisitorial system is the search for truth, whereas under an adversarial system, truth is ancillary to the goal of reaching the fairest resolution of the dispute. However the inquisitorial system, with its goal of finding the truth, is a more just, ethical and equitable legal system.

**Time Count Spectrum**

This count of the power spectrum assumes utmost importance, as the violation of this count would amount to nullifying all the other five bands of the power spectrum. Needless to say justice delayed is justice denied. A system heavily dependent upon the advocates whereby according centrality to their role is bound to be characterized by tardy pace of progress and delays. Early resolution of the dispute somehow seems antithetical with the personal interests of the advocates thereby bringing about a paradoxical situation. The working of the adversarial system in our country is a testimony to the fact that time count is being violated thereby also violating Article 21 as rights under Article 21 includes right to speedy justice. On the other hand in an inquisitorial system because of the active participation of the judge and practically ‘no role’ of advocate’s, decisions come in relatively in minimum possible frame of time. This is so very vital because Justice, which is not available within a reasonable time frame, is equivalent to inaccessible justice.  Strict adherence to the time-count spectrum is absolutely essential because it concerns itself with the stability of the other power spectrums through time.

**Cons**

Needless to say in order to get a holistic understanding of any system the flip side also needs to be examined. The inquisitorial system has its share of critics as well. The primary criticism revolves around the judges assuming all roles in a trial, including those of fact finder, evidence gatherer, interrogator, and decision maker. Critics argue that this places too much unchecked power in the examining magistrate and judge, who both investigates and adjudicates (legally determine) the case. Further, because of these sometimes-conflicting roles, judges may tend to prejudge a case in an effort to organize and dispose it off. They say that the inquisitorial system provides little, if any, check on the judge’s excess and invites corruption, bribery, and abuse of power.

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10 Ibid
The inquisitorial system is also criticized on the ground that the underlying principle upon which it is based i.e. “Guilty until proved innocent” is flawed. It is argued that there should not be any pre assumption of guilt until it is established so in a court of law. Critics also point out that inquisitorial courts are far less sensitive to individual rights than are adversarial courts, and that inquisitorial judges, who are government bureaucrats (rather than part of an independent judiciary), may identify more with the government than with the parties. Proponents of the adversary system maintain that the truth is most likely to emerge after all sides of a controversy are vigorously presented but under the inquisitorial system with the scope for advocacy being limited such exhaustive hearing may not always be possible.

Advocates of the adversarial system often argue that the system is fairer and less prone to abuse than the inquisitional approach, because it allows less room for the state to be biased against the defendant. It also allows most private litigants to settle their disputes in an amicable manner through discovery and pre-trial settlements in which non-contested facts are agreed upon and not dealt with during the trial process. In addition, adversarial procedure defenders argue that the inquisitorial court systems are overly institutionalized and removed from the average citizen. They argue that common law trial lawyer has ample opportunity to uncover the truth in a laboratory called the courtroom, as most cases that go to trial are carefully prepared through a discovery process that aids in the review of evidence and testimony before it is presented to judge or jury. It is assumed that the lawyers involved have a very good idea of the scope of agreement and disagreement of the issues to present at trial, which develops much in the same way as the role of investigative judges.

Inquisitorial system and India

In order to make this discussion relevant and pertinent to the Indian context, the researcher felt the need to examine the feasibility of adopting such a system in India. In India all the power being exercised by the state derives its legitimacy from the constitution. In this regard it would be the endeavor of the researcher to try and analyze the inquisitorial system with regard to its consistency with certain vital provisions of the constitution.

Article 14 of the Indian Constitution states that “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.” Basically article 14 strives to bring about and protect the right to equality of all before the law. This would also involve ensuring equality with regard to Accessing of Justice thus making it obligatory on the state to provide justice to all at their doorstep. Adversarial system is biased against poor defendants, who cannot afford to pay for expensive lawyers to prove the accusation. Advocacy being at the heart of the adversarial system would amount to the affluent being able to get the better of the have nots by indulging in costly litigation through engaging expensive advocates. This would mean fight for justice in an unjust manner i.e. two grossly unequal parties left to contest on their own. In such a scenario the outcome is anybody’s guess i.e. triumph of the rich, trouncing of the poor and travesty of the justice.

This is violative of Article 14 because there is no equality. Rather than delivery of justice it is a mockery of justice. The principle of “Parity of Power” which forms the bedrock of any justice delivery system is blatantly violated under the adversarial system. Article 14 of the Indian constitution makes it obligatory on the state to provide justice to all at the doorstep. Under the inquisitorial system there is only a marginal role given to the advocates as the active role-played by the judge limits to a great extent injury that bad lawyering can play on the litigant. Moreover, it is the duty of the state to marshal all its resources in the endeavor to unearth the truth. Thus Indian constitution necessarily envisages an inquisitorial mode of adjudication.

A glaring defect of the adversarial system of adjudication lies in the inordinate delay associated with it. This is primarily because of the paradoxical position of the advocates wherein professionally they are supposed to work towards expeditious resolution of the disputes but their personal interests (monetary) augur in favor of delaying the proceedings. Further the procedural complexities involved also contribute towards the delay in the proceedings. This is a clear-cut violation of article 21 of our constitution as it provides for the right to speedy justice. Further the hindered access to justice is would mean that it is violating the ‘right to live with humane dignity’ under Article 21.

An inquisitorial system characterized by the active participation of the judge and practically ‘no role’ of advocate’s coupled with the emphasis on the substance rather than on the procedures per se brings forth an environment where in the decisions come in a minimum frame of time.

12 http://www.answers.com/topic/adversarial-system
The adversarial system being practiced in India is also in contravention of article 39A of our constitution as this article provides that the state “shall ensure that the opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities”. As discussed earlier, when there are two unequal parties contesting a contest, generally the weaker one would end up on the losing side. The inquisitorial system to a great extent addresses this flaw.

Under Article 256, the executive power of every state shall be so exercised as to ensure compliance with the laws made by the parliament and any existing laws, which apply in that state. Since it is the state’s duty to ensure compliance with the law, any violation of law signifies lapse of duty on the part of the state. To rectify this lapse, the state is supposed to take corrective measures and hence play a pro-active role. The onus is on the state to rectify the lapse rather than on the citizen. This pro-active role envisaged under article 256 is better addressed under the inquisitorial system than the adversarial system.

While discussing the suitability of a particular mode of adjudication for our country it would only be appropriate to examine the system of justice dispensation that existed in our country in the ancient times. The system of justice dispensation we had in ancient India was known as ‘Rajadharma’. This signifies the duty of the king towards his subjects with regard to the dispensation of justice. According to the concept of ‘Rajadharma’ the law was the king of kings and nothing was superior to it. Accordingly if anyone was injured because of the violation of law, all that he had to do was to just inform the king. This would automatically make the matter fit for judicial proceeding. Great importance was given to the administration of justice and it was stated that it was the personal responsibility of the King himself to see that justice is done to anybody approaching him.

Contrary to the adversarial system under the rajdharma model of justice dispensation the affected party would just have to inform the king about the injustice meted out to them and nothing else. From then on it would be the responsibility of the king to perform the roles of a fact finder, evidence gatherer, interrogator and finally the decision maker. This is quite similar to the way in which a judge would function under the inquisitorial system. The parity of powers between the parties was maintained under the rajadharma as the king was entitled to form his own opinion on the question of facts though he was entitled to take advise from the judges. The room for advocacy was merely limited to seeking assistance from the learned scholars.

**Conclusion**

Having examined both the systems with a cratological perspective and having done a comparative analysis, the researcher would like to conclude this paper by putting forth three logically connected observations. Firstly, the adversarial system, which is being practiced in India and many other common law countries, is in direct contravention to sacrosanct legal principles of Parity of Power and Equal Access to Justice. Further, when viewed from the cratological perspective it is found to be violating the bands of the power spectrum given by Julius Stone specifically the Time and the Ethical counts. Moreover the functioning of the adversarial system in India more than adequately brings out the fact that there is a lot left to be desired under this mode of adjudication. Secondly, the inquisitorial system that is being practiced in France and certain other civil law countries is found to be in tune with important legal principles of Parity of Power and Equal Access to Justice. Further, it also stands the cratological test of passing through the bands of the power spectrum, i.e. Time and Ethical counts. Moreover, when looked at from the Indian perspective it is in total consonance with article 14, article 21, article 39A and article 256. In addition to these there is a close semblance between the inquisitorial system and the system of justice dispensation prevalent in ancient India. Finally, I would strongly recommend a change in the mode of adjudication by switching over from the adversarial to the inquisitorial system in India. This I believe would help in reversing the Fatal Triangle i.e. Triumph of the rich, Trouncing of the poor and Traversy of justice. However, keeping in view the criticisms of the inquisitorial system discussed above adequate care should be taken to not blindly ape the inquisitorial system of any particular country as such. The modeling of the inquisitorial system can be based upon the ancient Indian model of ‘Rajadharma’. An indigenous inquisitorial system is perhaps the crying need of the hour.

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