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A Shift to Inquisitorial Model: Assessing the Challenges to India's Criminal Justice System

Merrin Muhammed Ashraf*

Abstract

The criminal justice system in India is largely adversarial in nature. The Malimath Committee Report (2003) found faults with the adversarial system for failing to secure conviction of the accused persons without delay and proposed a shift to the judge-controlled inquisitorial system. This recommendation of the Malimath Committee has now found favour with the Union Home Ministry that is reportedly deliberating wide-ranging changes to India's criminal justice system with a view to secure higher conviction rates and speedy disposal of cases. This article examines whether adoption of an inquisitorial system is an appropriate measure to salvage India's ailing criminal justice system. The article critically examines the arguments in favour of adoption of an inquisitorial system and the benefits that are claimed to flow from it. It is seen that though inquisitorial system is better at arriving at a less erroneous verdict, adversarial system ensures procedural fairness to the parties, especially the accused. Moreover, India's institutional preparedness to shift to a judge-controlled procedure under the inquisitorial system without jeopardizing the rights of the litigants is also doubtful. Therefore, instead of a shift to inquisitorial system, the article proposes reformation of the existing system so that it satisfactorily meets the ends of criminal justice. In that regard, the article highlights two out of the many issues that plague India's criminal justice system -- failure to ensure a level-playing field for the indigent accused and failure to adequately protect the rights of victims – and suggests solutions for the same.

Introduction

The Union Ministry is reportedly mulling wide-ranging changes to the criminal laws of the country by amending the Indian Penal Code, 1860, the Code of Criminal Procedure,

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1973 and the Indian Evidence Act, 1872.[1] One of the changes proposed is the adoption of inquisitorial system of criminal justice or at least some elements of it.[2] The expectation is that a judge-controlled procedure of the inquisitorial system will result in speedy disposal of cases and larger number of convictions than the lawyer-led trials of the adversarial system.[3] In fact, the Malimath Committee Report of 2003 also recommended a shift from the adversarial to the inquisitorial model.[4]

This article aims to examine whether adoption of the inquisitorial system would be an appropriate measure to cure India's ailing criminal justice system and whether higher conviction rate is a goal worth pursuing at the sake of fair trial rights of the accused. A change in the criminal justice system will have implications beyond the court-room; it has the potential to impact popular perception of legitimacy of the criminal law process.[5] An important issue to be considered is India's preparedness to deal with the consequences of giving more power to the judges, particularly for the rights of the parties involved. Instead of a wholesale shift to inquisitorial model, the author suggests reformation of the existing system in order to satisfactorily meet the ends of criminal justice.

Adversarial System *versus* Inquisitorial System – A comparison

Adversarial system and inquisitorial system are the two major criminal justice systems practiced in the world. While adversarial system emerged from the common law tradition, inquisitorial system owes its origin to Roman law and is adopted by civil law countries.[6] Though both systems have as their primary objective punishment of those guilty of crimes, the method adopted to achieve this objective differs greatly.

In an adversary system, as the name suggests, the trial is envisaged as a contest between the two parties (the prosecution, representing the victim, and the defence) who strive to establish their version of facts as the truth with the help of evidence. The prosecution is required to prove the guilt of the accused beyond reasonable doubt.[7] The accused is also

1 Rahul Tripathi, *IPC, CrPC in for change as Union home ministry tries to speed up justice*, The Economic Times (Jan. 7, 2020, 10:00AM), https://economictimes.indiatimes.com/news/politics-and-nation/ipc-crpc-in-for-change-as-mha-tries-to-speed-up-justice/articleshow/73063397.cms?from=mdr.

2 *Id.*

3 *Id.*

4 MINISTRY OF HOME AFFAIRS, GOVERNMENT OF INDIA, COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM 265 (2003) [hereinafter, *Malimath Committee report*].

5 Janet Ainsworth, *Procedural Justice and the Discursive Construction of Narratives at Trial: Global Perspectives*, 4 Languages Cultures Mediation 79 (2017), (Jan. 07, 2020, 11:00AM), https://digitalcommons.law.seattleu.edu/faculty/807.

6 *Id.* at 79.

7 K.N.C. Chandrasekharan Pillai, R.V. Kelkar's Criminal Procedure 346 (6th ed. 2018).

given fair opportunity to defend himself and is also given important rights like the right to remain silent.[8] In an adversarial trial, it is the parties that control the narrative presented before the court; they decide the evidence to be presented, the witness to be examined etc.[9] Adversarial system lays emphasis on live testimony of witnesses before the court and their cross-examination by the opposite side.[10] Thus, adversarial system is based on the premise that 'contested and oppositional presentation of facts best reveal the truth'[11].

The role of the judge in an adversarial trial is limited and he is often equated to a neutral and passive umpire.[12] He is not involved in the pre-trial investigation. He also does not control the evidences to be presented and the witnesses to be examined. His role is limited to deciding the case in favour of one side or the other solely based on the controverted facts and evidences presented before him by the partisan advocates. He has no latitude to go beyond the evidence placed.[13] Therefore, adversarial system results in a party-controlled criminal trial.

Coming to inquisitorial system of criminal justice, we see a role-reversal. Here the judge plays an active role to determine the truth. The trial is preceded by an elaborate pre-trial investigation under the supervision of '*juge d'instruction'* or the investigating magistrate.[14] The investigation is conducted by the state officials in a neutral and objective manner by collecting both evidences that favour the accused and those against him.[15] In order to properly conduct investigation, the investigating magistrate is empowered to issue warrants, direct search, arrest the accused and examine witnesses.[16] The findings of the investigation are presented as a dossier to the trial judge.[17] Therefore, the judicial officials, rather than the parties determine what information should be presented in the trial, in what order, and for what purpose.[18]

8 *Id.*

9 Y.S. Vijay, *The adversarial system in India: Assessing challenges and alternatives* 3, (Jan. 08, 2020, 11:00AM), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2147385.

10 Ainsworth, *supra* note 5, at 80.

11 Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World,* 38 Wm. & Mary L.Rev.5,13, (Jan. 08, 2020,11:00AM) https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2757&context=facpub.

12 Vijay, *supra* note 9.

13 J M Adele, *Similarities and Comparative Analysis between Inquisitorial and Adversarial Legal Systems* 8, (Jan. 08, 2020, 11:00AM), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3077365.

14 *Adversarial and Inquisitorial System of Justice,* LawTeacher, (Jan. 08, 2020, 11:00AM), https://www.lawteacher.net/free-law-essays/criminal-law/adversarial-and-inquisitorial-systems-of-justice.php.

15 Vijay, *supra* note 9.

16 *Id.*

17 *Id.*

18 Ainsworth, *supra* note 5, at 81.

Before the trial judge also, the parties' role is limited to suggesting the questions to be put forward to the witnesses.[19] The actual questioning of witnesses is mainly done by the judges and the parties have very little say in the mode and manner of examination of witnesses. However, more than live testimony of witnesses, the judge largely relies on written statements.[20] The judge in an inquisitorial trial is therefore not tied down by the narratives presented by the parties. He is the ultimate fact-finder.[21]

There has always been a debate as to which of the two systems is preferable. While inquisitorial system is lauded for its ability to arrive at less erroneous verdicts, the adversarial system is perceived to be better at ensuring procedural fairness to the parties, especially the accused.[22] However, now very few countries follow the pure model of either adversarial or inquisitorial model. Now what we see is a convergence of legal systems – countries with inquisitorial systems are borrowing elements of adversarial system and vice-versa.[23] As Prof. Goldstein stated:

"It is becoming increasingly apparent to criminal justice scholars that single theory models of 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."[24]

Why is there a Demand to Change India's Criminal Justice System from Adversarial to Inquisitorial?

From the limited information available from news reports, the reason behind the present proposal of the Union Ministry to adopt an inquisitorial model seems to be to address the issue of low conviction rate in the country. As per the latest available data of NCRB, the pendency of criminal cases in the court has reached its highest level since the turn of the 21st century.[25] This delay in disposing of cases is also evidenced by the large number of under-

19 Vijay, *supra* note 9, at 4.

20 Ainsworth, *supra* note 5, at 81.

21 *Id.*

22 *Id,* at 87 and 90.

23 Abraham S. Goldstein, *Converging Criminal Justice Systems: Guilty Pleas and the Public Interest*, 49 SMU L. Rev. 567 (1996), (Apr. 09, 2020, 11:00 AM), https://scholar.smu.edu/smulr/vol49/iss3/13

24 *Id.*

25 Deepti Jain and Tadit kundu, *Why the wheels of justice turn ever slower in India,* Livemint (Dec. 25, 2019, 09:00AM), https://www.livemint.com/Politics/1vsBJNtsqgpzUlV31BbmWL/Why-the-wheels-of-justice-turn-ever-slower-in-India.html.

trial prisoners languishing in jails.[26] The data also reveals that conviction rate is quite low in case of serious crimes like rape, rioting etc.[27] Even as far back in 2003, the Malimath Committee had noted that India's criminal justice system is virtually collapsing under its own weight as it is slow, inefficient and ineffective[28] and that people are losing confidence in the system[29]. One of the major recommendations of the Committee for remedying the situation was also adoption of inquisitorial system or at least certain elements of it.[30]

A major criticism against the adversarial system is the passive role played by the judge. Instead of endeavoring to ascertain the truth, the system requires him to confine himself to the facts and evidences presented by the parties, however faulty or convoluted they may be. The Malimath Committee Report noted:

"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."[31]

In an adversarial system what the judge looks for is not truth but proof[32] and whichever side is able to put forward the best proof according to the evidentiary rules wins the case, regardless of whether it is the actual truth. Since the trial is envisaged as a combat between the two parties, each of them put forward only that evidence which favour them.[33] Such an approach fails to give complete presentation of facts and thwarts the discovery of truth. As a consequence, in many cases there seems to exist "a gap between judicial truth and what actually happened"[34]. This leads to many guilty persons escaping and sometimes innocent persons getting convicted. It is expected that a transition to an inquisitorial model with a judge-controlled investigation and trial will remedy this situation by enabling the judges to determine the truth without being tied down to procedural rules and parties' version of facts.

26 Vrinda Bhandari, *India' s criminal justice system; An example of justice delayed, justice denied,* (Dec. 25, 2019, 09:00AM), https://www.firstpost.com/long-reads/indias-criminal-justice-system-an-example-of-justice-delayed-justice-denied-3475630.html.

27 Jain, *supra* note 25.

28 Malimath Committee Report, *Supra* note 4, at 181.

29 *Id.* at 186.

30 Malimath Committee Report, *supra* note 4.

31 *Id.* at 27.

32 Dr R.Venkataraman, Former President of India as quoted in Malimath Committee Report.

33 Adele, *supra* note 13, at 8.

34 Daniela Berti and Gilles Tarabout, *Questioning the Truth. Ideals of Justice and Trial Techniques in India 1* (Mar. 5, 2020, 09:00AM), https://hal.archives-ouvertes.fr/hal-01612781.

Another criticism usually raised against the adversarial system in India is the high standard of proof required to establish the guilt of the accused. This is proffered as another reason for the dismal rate of convictions. The standard of proof required is 'proof beyond reasonable doubt'. The Malimath Committee observed in its report that such a high standard of proof would make it difficult to secure the conviction of accused "on whom the burden is very little and who hires a very competent lawyer, while the Prosecution, on whom the burden is high, is very often represented by persons of poor competence."[35] The Committee, therefore, recommended a lowering of standard to the inquisitorial system's "the court's conviction that is true" that requires only the inner satisfaction of the Judge".[36]

Before proceeding to examine whether an adoption of the inquisitorial system is the most appropriate way to strengthen the criminal justice system in India, the author would like to point out certain faults in the Malimath Committee's arguments for a shift to an inquisitorial model. Firstly, it is important to note that India's criminal justice system is not truly adversarial but it contains some elements inspired from the inquisitorial system. Our criminal laws already contain provisions to enable a judge to play a more active role in a criminal trial. For instance, Section 311 of CrPC allows the court to examine any person as a witness even if he was not called as one by the parties. Similar power is given to the court under Section 165 of Evidence Act also. Section 319 of CrPC empowers the court to proceed against persons other than the accused if it appears from the evidence that such person/persons is also concerned in that very offence or in a connected offence. This section is premised on the doctrine *judex damnatur cum nocens* a*bsolvitur* (judge is condemned when guilty is acquitted).[37]

More importantly, the presence of Section 313 of CrPC puts into doubt whether the judge in a criminal trial in India is expected always to be a silent spectator to the contest between the two sides. This section permits the court to question the accused at any stage of a trial without previously warning him, with a view to enable the accused to personally explain the circumstances appearing in evidence against him. The section also imposes a duty on the court to question the accused generally on the case after the witnesses for the prosecution have been examined and before he is called or his defence. While the statement of the accused under Section 313 is not substantive evidence, according to Section 313(4), it may be taken into consideration at the trial.[38] Section 313, hence, makes way for a direct interaction between the judge and the accused in order to get a wholesome picture of the

35 Malimath Committee Report, *supra* note 4, at 125.

36 *Id,* at 270.

37 *Arun Dube v. State of Madhya Pradesh*, 11991 Cri LJ 840, 845 (MP) (India).

38 PILLAI, *supra* note 7, at 447.

facts.[39] However, the courts have repeatedly warned that the above-mentioned sections should not be regarded as authorizing an inquisitorial interrogation of the accused.[40] The judges should make use of these sections *"without unduly trespassing upon the functions of the Public Prosecutor and the defence counsel, without any hint of partisanship and without appearing to frighten or bully witnesses".*[41]

Secondly, the Malimath Committee's recommendation to lower the standard of proof to establish the guilt of the accused will constitute a violation of India's obligation under Article 14(2) of ICCPR which makes it a human right for a person charged with a criminal offence to be presumed innocent until proven guilty according to law[42]. Commenting on this right, the Human Rights Committee stated that by reason of presumption of innocence, the burden of proof is on the prosecution which has to prove the charges beyond reasonable doubt.[43] Therefore, convicting an accused without proving his guilt beyond reasonable doubt will constitute a serious violation of human rights.

The Malimath Committee's recommendation to adopt the standard of proof used in French and German inquisitorial systems i.e. 'the court's conviction that is true' seems to be based on a wrongful understanding that this standard is same as 'proof on preponderance of probabilities'. As the International Commission of Jurist pointed out, what this standard actually refers to is the free reign given to judges in an inquisitorial system to assess the legality, admissibility, and persuasive force of evidence according to their inner conviction, without being tied down by evidentiary rules as in the adversarial system.[44] When it is said that the guilt of the accused is determined based on the 'inner conviction of the court', what it actually demands is a persuasion of the court, based on its free conviction, that the accused is guilty beyond reasonable doubt.[45] Hence, the standard of proof required in both adversarial and inquisitorial system to convict the accused is the same.[46] It is also to be noted that the European countries that have adopted the inquisitorial system are also

39 *Id,* at 443.

40 41st Law Commission Report, The Code of Criminal Procedure, 1898 (1969) 204.

41 *Ram Chander v. State of Haryana,* AIR 1981 SC 1036 (India).

42 International Covenant on Civil and Political Rights, art. 14(2), Dec. 16, 1996, 999 U.N.T.S. 171.

43 UN Human Rights Committee, General Comment 13, art. 14.

44 International Commission of Jurist, *Review of the Recommendations made by the Justice Malimath Committee from an international human rights perspective* 21, 22 [hereinafter *ICJ Position Paper*], (Apr. 19, 2020, 08:00AM) https://www.icj.org/criminal-justice-reform-in-india-icj-position-paper-review-of-the-recommendations-made-by-the-justice-malimath-committee-from-an-international-human-rights-perspective/.

45 *Id.*

46 *Id.*

signatories to the ICCPR and are also bound by the European Convention on Human Rights, both of which require a proof beyond reasonable doubt to rebut the presumption of innocence of an accused.[47]

With these pointers in mind, the next section critically examines the benefits to India's criminal justice system that are claimed to flow from a shift to an inquisitorial system.

Is Inquisitorial System a Panacea to India's Ailing Criminal Justice System?

According to Malimath Committee, shift to a criminal justice system that has 'quest for truth' as its focus will *'reduce the level of criminality in society by ensuring maximum detection of reported crimes, conviction of the accused persons without delay, awarding appropriate punishments to the convicted to meet the ends of justice and to prevent recidivism'*[48]. The committee proceeded on the rationale that giving judges investigative powers and more control over the trials will lead to higher rate of conviction. One cannot help note the fact that securing higher rate of convictions seems to be the primary concern of the Committee and rights of the accused takes a back-seat. No doubt, determination of guilt is the main objective of any criminal law process. However, in the pursuit of this objective, considerations of ensuring a fair trial and protection of rights of the parties, especially the accused, should not be ignored.

Inquisitorial system is definitely preferable to the adversarial system in terms of the latitude given to the judge to find out the truth for himself, instead of being subjected to the materials presented by the partisan advocates. His control over the entire process of trial and investigation helps to ensure that important evidences are not overlooked and that the trial process is not unduly delayed by the dilatory tactics adopted by the counsels. However, with an active judge taking center-stage, there also comes the danger of departure from impartiality and objectivity that is expected from a judge. This is because when the judge plays the dual role of an investigator and a judge, it makes it difficult for him not to be prejudiced against the accused at the start of the trial.[49] Moreover, the limited role of the defence counsel in an inquisitorial system makes it even more difficult to persuade the judge to give due weight to the exonerating factors. That inquisitorial system allows for a greater scope of bias was also expressed by Prof Lon L. Fuller and according to him, "an

47 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 6(2); ICCPR (n 42).

48 *Malimath Committee Report, supra* note 4, at 21.

49 Adele, *supra* note 13, at 7.

adversary presentation seems the only effective means for combating this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known"[50]. His proposition was later confirmed by an empirical social experiment conducted by two professors of psychology and a professor of law which suggested that adversary evidentiary presentation is better at overcoming the biasing effect of pre-trial expectancies about a defendant's guilt than the inquisitorial model.[51]

It is also said that adversarial system does a better job in securing procedural justice.[52] Procedural justice is different from substantive justice. While the latter occurs when there is an accurate determination of facts and application of law to the facts, the former occurs when the litigant is satisfied that the system has operated in a fundamentally fair manner.[53] Thus, an individual may feel that he has been treated fairly even when the judgment actually went against him. Similarly, a person who has won the case may not be satisfied with the system if he feels that he has not been treated fairly.

Experiments conducted by social psychologist Tom Tylor suggests that procedural justice or feeling of 'being treated fairly' has three components – (i) the party felt able to give voice to their side of the story; (ii) the adjudicator gave evidence that they had been listened to; and (iii) throughout the process, the party felt that they were treated with dignity and respect. Inquisitorial system, with its judge-controlled procedure, provides limited opportunity for the parties to shape their cases. The judge decides what information are relevant and written witness statements are preferred over oral examination of witnesses. All these contribute to the parties ending up feeling totally excluded from the trial process. In contrast, adversarial system provides litigants a greater control in shaping the narrative through their lawyers. Witnesses are also examined live before the court and this gives them a chance to tell their story directly. As a result, parties' perception of procedural justice is said to be greater in an adversarial system.[54]

Further, shifting to an inquisitorial model necessitates an examination of India's preparedness for the same. Giving judges more power will have implications for the entire system, especially for the rights of the accused. Safeguards need to be created in order to check the possibility of abuse of power by the judges. It is highly doubtful whether our

50 Lon L. Fuller, *The Adversary System, in* TALKS ON AMERICAN LAW 34 (Harold Berman ed., 1971).

51 Allan Lind et. al., *A Cross-Cultural Comparison of the Effect of Adversary and Inquisitorial Processes on Bias in Legal Decision Making*, 62(2) Virginia Law Review 271, 282 (1976).

52 Ainsworth, *supra* note 6, at 90.

53 *Id.* at 88.

54 *Id.* at 90.

existing institutions and laws are capable of facilitating a transition to inquisitorial system without jeopardizing the rights of the litigants. It is also wrong to assume that a shift to an inquisitorial system will make India's criminal justice system more efficient when other deeper-rooted causes for its failure, unconnected to the type of system, are left unaddressed. These include lack of resources, both in terms of funding and personnel, inefficient police investigation, corruption, confession-oriented approach, police torture etc.[55]

Finally, whether we adopt an adversarial or inquisitorial system, it is of utmost importance that the system complies with the human rights principles. As the International Commission of Jurists observed: "*Human rights must be the benchmark for any criminal justice system... the rights of the accused must be at the center of all proceedings, and the rights of the victim must be protected at all stages*"[56]. When the Malimath Committee recommended lowering of safeguards available to the accused in order to secure greater conviction, it proceeded on the wrongful assumption that all accused are well-informed of their rights and are capable of engaging counsels to defend their case.[57] This is anything but the truth. A large number of criminal defendants and prisoners are poor who are unaware of their rights.[58] Even if securing higher rate of conviction is assumed as the aim of an effective criminal justice system, lowering the protections available to the accused is not the right way of achieving it, taking into consideration the inherent imbalance in the position of prosecution (backed by the state apparatus) and the accused, in terms of power and resources.[59] It is interesting to note that India is reconsidering the Malimath Committee's recommendation to adopt inquisitorial elements at a time when many countries that were traditionally following the inquisitorial model are shifting to an adversarial system of criminal justice in order to infuse greater procedural fairness.[60] In fact, the Malimath committee had also admitted that the fair trial rights of the accused are better protected in an adversarial system.[61]

Given the uncertainty about the supposed benefits that may flow from adoption of an inquisitorial system and the lack of institutional preparedness to make such a shift, a better alternative would be to reform India's existing criminal justice system by infusing it with dynamism and efficieny. Apathy of the judges and the consequent judicial gaming at the

55 *ICJ Position Paper, supra* note 45, at 11.

56 *Id.*

57 *Malimath Committee* Report, *supra* note 4, at 19.

58 Ministry of Law and Justice, Government of India, Report of the Expert Committee on Legal Aid: Processual Justice to the People, 70 (1973)

59 *ICJ Position Paper, supra* note 44, at 23.

60 Ainsworth, *supra* note 5.

61 Malimath Committee Report, *supra* note 4.

expense of justice[62], no doubt, lead to acquittal of guilty persons and conviction of innocents. As mentioned earlier, Indian criminal laws already contain provisions to enable the judges to play an active role during criminal trials by calling for witnesses and questioning the accused in order to get a complete picture of facts. However, as Justice Sudhansu Dhulia commented, these provisions remain largely a dead-letter as it is very rarely that a trial judge calls upon persons as witnesses on their own.[63] Judges must shed this reticence when the need demands and must endeavor to "discover the truth and advance justice"[64] by making use of the powers given to them by the criminal laws. However, whenever he endeavors to don such an active role, care must be taken not to step into the shoes of the prosecution or the defence counsel. He must act "without any hint of partisanship and without appearing to frighten or bully witnesses"[65]. Suitable training must be imparted to judges, especially at the trial level, on how to make use of these provisions at appropriate times without affecting the impartiality and objectivity expected from them and without prejudicing the rights of the litigants.

Suggestions for Reforms

A shift to an inquisitorial system, without adequate safeguards and institutional reforms, is likely to do more harm than good. However, this is not to suggest that the adversarial system practiced currently in India is without any problems. In this part of the article, the author highlights two of the many issues that plague the criminal justice system of our country – *first*, failure to ensure a level-playing field for the indigent accused and; *second*, failure to adequately protect the rights of the victims.

Adversarial system of criminal trial proceeds on the assumption that "State using its investigative resources and employing competent counsel will prosecute the accused who, in turn, will employ equally competent legal services to challenge the evidence of the prosecution"[66]. In other words, the system pre-supposes equality of arms between the parties involved and the truth is expected to emerge from their confrontational presentation of facts. Hence, if the parties are not equally situated in terms of resources, the narrative presented before the court is likely to be one-sided, resulting in factually wrong decisions. In India, it is a known fact that many of the accused persons are poor and lack resources to engage the

62 Allan Lind et. al., *supra* note 51, at 271.

63 Justice Sudhansu Dhulia, *Role of courts in the administration of criminal justice*, (Jan. 20, 2020, 09:00AM), http://ujala.uk.gov.in/files/ch2.pdf.

64 *Ram Chandra v. State of Haryana (*1981) 3SCC 191 (India).

65 *State of Rajasthan v. Ani alias Hanif & others* (1997) 6 SCC 162 (India).

66 *Supra* note, 59.

services of a competent lawyer.[67] Many of them are also uneducated and therefore incapable of defending themselves in the court of law and asserting their constitutionally guaranteed rights.[68] Without ensuring adequate representation for the accused, much of the ideals that our criminal justice system seeks to achieve, like equal rights, fairness, and accuracy remain as just ideals. In order to remedy this situation, our laws confer on the accused the right to get legal aid for his defence at State's cost.[69] However, more often it is seen that the defence counsels employed by the government for the accused do not take much interest in their case due to the low amount of honorarium paid and lack of any incentive from the government.[70] As a result, even state legal aid fails to create a level-playing field for indigent accused. In such situations, the judge should play an important role to ensure that the rights of the accused are adequately safeguarded during both the investigation and the trial phase. Also, the government must take steps to strengthen the legal aid service by creating incentives for competent lawyers to come forward.

The second issue that the author would like to focus is on the limited participation of victims in the criminal proceedings. Earlier the author mentioned about how the adversarial system gives more control to the litigants to shape their case than the inquisitorial system. However, in practice, as litigants are represented by the lawyers before the court, the creation of legal narratives is often done by them and the litigants have very little say in it. The lawyers carefully prepare the answer that their clients need to say before the court, as a result of which the litigants are deprived of the ability to tell their story in the terms that they think are significant.[71] Such an approach is especially disadvantageous to the victim, whose role in the criminal justice process in India, is limited to that of a prosecution witness.[72] Even though the victim is the prime source of evidence and we rely on them for reporting the crime, representation of victim's interest and their participation in the trial is very limited.

67 PILLAI, *supra* note 7, at 346.

68 *Id.*

69 Code of Criminal Procedure, 1973, s. 304; Indian Const. art. 21, as construed by the Supreme Court in *Hussainara Khatton (4) v. State of Bihar*, (1980) 1 SCC 98 (India).

70 Mitali Vani, *Right to Free Legal aid and Legal Aid Functionaries under the Legal Services Authority Act, 1987*, 44 (Apr. 19, 2020, 07:00PM), http://nja.nic.in/Interns_Report_2015-16/Research%20Report%20Mitali%20Vani%2027-11-15.pdf.

71 Ainsworth, *supra* note 5, at 91.

72 Anupama Sharma, *Public Prosecutors, Victims and the Expectation Gap: An Analysis of Indian Jurisdiction*, 13 Socio- Legal Review 87, 98, (Apr. 19, 2020, 07:00PM), http://docs.manupatra.in/newsline/articles/Upload/116BE5E2-14EF-4753-BD49-3E308403D5E7.pdf.

The victims rely on the prosecutor to prosecute their case with efficiency and to secure them justice. However, the role of a prosecutor is perceived as a minister of justice and it is considered that his duty is to place before the court whatever evidence is possessed, whether it is in favour of or against the accused.[73] The court in several cases has opined that the 'impartiality of prosecutor's conduct is as vital as the impartiality of the court itself'[74] and that he must not be overly concerned with securing convictions[75]. However, such an approach may run contrary to a victim's expectation from his/her prosecutor. Added to this is the prosecution lethargy resulting from overload of cases, unsatisfactory remuneration and lack of competency. The option of private prosecution is also limited in India as CrPC requires the private prosecutor to act under the directions of the public prosecutor.[76] All these lead to a sense of dissatisfaction among the victims who feel that their grievances are not adequately represented by the prosecutor. Their role during the trial is also limited to answering questions put forward by the counsels. In this respect, inquisitorial system seems to be better accommodative of the interests of the victims as they play a more active role in the investigatory and trial stage. They get an opportunity to say their version of the story directly to the judge. 'The victim is given voice, validation and respect in more, and better, ways than in the adversarial system.'[77]

In order to meet the expectations of victims from our criminal justice system, several steps can be taken. One is to institute a mechanism to enable the victims to complain about the unsatisfactory performance of their prosecutor like, failure to present crucial evidences or to adequately represent their interest before the court. There is also a need to give more participatory rights to the victims. Today we see the sorry situation of victims receiving little to no communication about the status of their case from the prosecutor and they having to helplessly depend on case diaries to know the progress of their case.[78] In this regard, Malimath Committee's recommendation is truly notable. It recommended giving the victims the right to participate in the proceedings which includes right to advance arguments after the prosecutor, right to know about the progress of the investigation and right to move to the court to ask for further investigation etc.[79]

73 *Ghirrao v. Emperor*, (1933) 34 Cri LJ 1009, 1012.

74 *State of Tamil Nadu v. L. Ganesan*, 1995 Cri LJ 3849; *Manu Sharma v. State* (NCT of Delhi), (2010) 6 SCC 1 (India).

75 *Sheonandan Paswan v. State of Bihar*, (1983) 1 SCC 438 (India).

76 Code of Criminal Procedure 1973, s. 302 (India).

77 Arie Freiberg, *Post-Adversarial and Post-Inquisitorial Justice: Transcending Traditional Penological Paradigms*, 8 Eur. J. Criminology 82, 93 (2011).

78 Sharma, *supra* note 73, at 102.

79 Malimath Committee Report, *supra* note 4, at 270-271.

Lastly, the author also suggests the infusion of restorative justice principles while prosecuting crimes. Restorative justice essentially calls for restoring the parties, especially the victim, to the position that he/she occupied before the commission of the crime. While the usual sentencing practices may fulfill the state's interest in creating deterrence, it may not alleviate the physical/psychological impact of the crimes on the victim. Though India has taken some steps in this direction by introducing victim compensation scheme[80], it is cumbersome and largely inadequate to practically help the victim.[81] Restorative justice requires giving the victims a say in the sentencing process. Other means of achieving restorative justice like victim-offender mediation, family or community group conferencing, community service[82] are also worth considering. Adopting restorative justice principles will not only repair the injuries and trauma suffered by the victims and improve their satisfaction of the criminal justice system, but it will also help to ease the pressure on our over-crowding prisons.

Concluding Remarks

Adoption of an inquisitorial system is not going to be a panacea to all the problems that currently plague India's criminal justice system. Instead, it may give rise to new issues like abuse of power by courts, derogation of the rights of accused etc. Therefore, a better approach would be to reform and strengthen the existing system by tackling issues like crunch of resources and man-power, inefficiency in police investigations, corrupt practices etc. Moreover, while safeguarding the rights of the accused, it is important not to forget the victims. Their confidence in the criminal justice system must be improved by ensuring their adequate representation and participation and not by achieving higher rate of conviction and lowering the safeguards available to the accused.

80 Code of Criminal Procedure, 1973, S. 357 (India).

81 Mehak Bajpai, *Advancing of Restorative Justice in Criminal Law in India and Germany: A Comparative Study* (Jun. 19, 2018), https://journals.sagepub.com/doi/full/10.1177/2516606918765495.

82 See, *What is Restorative Justice?,* Centre For Justice & Reconciliation at Prison Fellowship International (May 2005) https://www.d.umn.edu/~jmaahs/Correctional%20Assessment/rj%20brief.pdf.