Chapter – II

THE CRIMINAL JUSTICE SYSTEM

Introduction

Criminal justice system is a social institution, which control criminal activities thereby protecting the citizens from criminals. This is being done within limits prescribed by the procedural law. It is a complex process wherein the institution has to deal with conflicting issues and interests. The system is not designed to achieve a single goal. It has to protect the innocent persons from the arbitrary exercise of power by the authorities charged with the criminal justice administration. It affords protection even to suspects of crime from arbitrary and inhuman treatment. In order to balance the conflicting interests the system developed institutions, processes, rules and values.

State has to ensure an atmosphere conducive to the exercise of freedom by individuals and for that purpose individuals shall be provided security. Thus, the State is under an obligation to control violation of the freedom of one person by another. This is achieved by checking the violations and encroachments. The adoption of a criminal justice system, which lays down institutions and practices, to regulate criminal behaviour tries to achieve this objective. The system not only controls deviant behaviour but also ensure justness in that process. The law aims at humanization of the process of enforcement, by ensuring equal status and treatment to all citizens.

All countries maintain criminal justice system, which reflects their cherished values. It is often said that the criminal justice

administration prevalent in a society formed the yardstick of the level of civilization, which it reached. To ensure security and peace to the citizens, which are the bounden duty of the government, an effective mechanism for the administration of criminal justice is inevitable. This is reflected in the writings of Kautilya. According to him, rulers' duties in the internal administration of the country are three fold: viz., raksha (protection of the State from external aggression) palana (maintenance of law and order within the State) and yogakshema (safeguarding the welfare of the people).\(^2\) In order to achieve these objectives, there should be effective system for the maintenance of law and order as well as adequate administrative machinery for the same. It is further stated that maintenance of law and order encompasses prevention and detection of crime as well as punishment of criminals. If a good criminal justice system is absent, the society will disintegrate. Kautilya stated thus:

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\text{It is the power of punishment alone, when exercised impartially in proportion to the guilt and irrespective of whether the person punished is the king’s son or enemy that protects the world and the next.}^{3}
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This is undoubtedly ensured by an efficient and effective criminal justice system.

Criminal justice systems humanize the process of adjudication; control arbitrariness; guarantees equal status to all citizens; and promote a sense of security amongst the citizens. It motivates the public to participate in the crime prevention process.\(^4\)

\(^3\) Ibid.at.p.377.
Criminal Justice Systems

During the early period, several forms of trial existed, namely, trial by ordeal,\(^5\) trial by compurgation,\(^6\) and trial by battle.\(^7\) During 1215, two events occurred that caused a divergence in the criminal justice systems in England and Europe.\(^8\) One was the signing of Magna Carta in England and the other was the Fourth Lateran Council held in Rome.\(^9\) Magna Carta guaranteed certain procedural rights for the accused during the trial.\(^10\) It caused the introduction of ‘accused speaks’ trial.\(^11\) The Fourth Lateran Council prohibited clergy from officiating at trial by ordeal.\(^12\) Then it became necessary to appoint some persons in

\(^5\) Trial by ordeal was a judicial practice to determine the guilt or innocence of the accused by subjecting the person to a painful task. If the task is completed without injury or the injuries sustained are cured quickly, the accused is considered innocent. Generally, the test is against fire or water. Fire was used to test noble defendants, while water was commonly used for lesser folk. Priestly cooperation to trial by ordeal was forbidden by Pope Innocent III at the 4\(^{th}\) Lateran Council of 1215 and replaced by compurgation. en.wikipedia.org/wiki/Trial_by_ordeal, dtd.14-08-08.

\(^6\) Trial by compurgation is a medieval law practice among Christianized Anglo-Saxon tribes to determine innocence. The accused would publicly swear to his guilt. The judge would give him thirty days time to collect a number of ‘oath-helpers’, who would also swear to his innocence. If unable to find the required number, he was either found guilty or he could appeal to trial by ordeal. cn.edu/kwheeler/trial_ordeal, dtd. 14-08-08.

\(^7\) Trial by battle is also known as trial by combat. Two parties in a dispute will fight in a single combat. The winner of the combat declared to be right. It is a judicial dual. It was common in Roman empire from 11\(^{th}\) to 15\(^{th}\) century. It was thought that the God would favour the just. Women and children were allowed to appoint another person for them to participate in the dual. The Fourth Lateran Council deprecated it. It was known as wager of battle in England. en.wikipedia.org/wiki/Trial_by_combat. Dtd.14-08-08.


\(^9\) It was the ecumenical meeting summoned by Pope Innocent III at the Lateran Palace at Rome.

\(^10\) Charter 20 of the Magna Carta says that, “A free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity, saving his livelihood; and a merchant likewise, saving his merchandise; in the same way a villain shall be amerced saving his wainage; if they fall into our mercy. And none of the aforesaid amercements shall be imposed except by the testimony of reputable men of the neighborhood”.

Charter 40 states, “To none will we sell, to none will we deny or delay, right or justice”. For English translation see Holt, Magna Carta, Cambridge University Press, London, 1968, p.323, 327.

\(^11\) Infra p.5.

\(^12\) Supra n.5.
the place of clergy to decide the case impartially. This resulted in the evolution of two major criminal justice systems in the world namely, adversarial (accusatorial or the common law) system in England and inquisitorial (continental or civil law) system in other parts of Europe. The accusatorial system, which gives more importance to the accused and his rights, sometimes referred to as ‘adversarial system’ of justice. In this system the judge/jury decide on a verdict, after hearing two opposing parties, the prosecution and the defence. Both parties present their case, examine/cross-examine the witnesses. It is in fact a contest between two opposing parties and hence the term ‘adversarial’. However, in the continental European countries, constant supervision of the criminal process by the judiciary from the beginning of the investigation to the decision of the case is ensured. The investigation and prosecution are conducted in the form of judicial inquiry and hence the term ‘inquisitorial’ is used to address the system. The accusatorial system is accused centred, in the sense that a benevolent approach towards the accused is taken from the beginning of the investigation to the judgment of the case; while inquisitorial is inquiry centred because, the proceedings are strictly objective and procedure oriented with less discretion to the trial judge.

The English accusatorial system followed the Anglo-Saxon laws while the inquisitorial method derived their procedural laws from

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13 Countries like India, England, and U.S.A are following adversarial system while the continental European countries are following the inquisitorial system. In this study both terms adversarial and accusatorial are used as synonyms, although their meanings are not similar. “The conventional position attributes the same meaning to the words adversarial and accusatorial. But there is a slight difference in the meanings. Adversary process denotes only a method of finding facts and deciding legal problems and is characterized by the two sides shaping issues before a neutral judge. The accusatorial system, on the other hand, is a more encompassing concept, which includes the adversary method as its constituent element.” M. Damaska, ‘Adversary system’ in S. Kadish. (Edtd.), Encyclopedia of Crime and Justice.: New York : The Free Press, 1983 at 29, quoted in Salvatore Zappala, Human Rights in International Criminal Proceedings, Oxford University Press, 2003 at 14.
Roman law. The procedure used by the Anglo-Saxon adversary system and the continental inquisitorial systems are differing in scope and purpose. However, in general, both systems share the same goal for criminal process and procedure, to ensure procedural fairness by balancing the rights of the individual against the interest of the society as a whole. Though the end, which envisaged by both systems is one and the same the means they adopted are different.

A. Adversary System

In a common law system, an adversarial approach is used to investigate and adjudicate guilt or innocence. English procedure was for centuries organized on the principle that counsel at trial should not represent a person accused of having committed a serious crime.\textsuperscript{14} Though there were complaints from the defendants, the judges never allowed the accused to be represented by another person. Hence, during the sixteenth and seventeenth centuries, the criminal trial was a lawyer free contest between the accuser and the accused. After hearing the ‘altercation’ between two sides the judge left the jurors to decide the case based on what they have heard and learned from the wordy exchange. The defendant appeared before the judge in two capacities, viz., the accused and the witness. The trial procedure put pressure on the accused to speak in person about the charges and the evidence levelled against him.\textsuperscript{15} In such circumstances even if he has good defence, he may not be in a position to highlight it; instead he unknowingly, to a certain extent disclose the information, which he has and get himself prosecuted. In 1696, the Treason Trial Act was enacted. The main attraction of this Act was that it recognised the right to

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\item \textit{Id.} at 20.
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defence counsel. But, this right was limited only to the offence of treason. In 1730, judges began to depart from the rule forbidding defence counsel in cases of ordinary felony.\textsuperscript{16} But, this was only to assist the defendant in examining and cross-examining witnesses. He was not allowed to address the court. The trial is termed as ‘accused speaks’ trial.\textsuperscript{17} The logic of the accused speaks trial was that “the innocent accused will be able to defend himself on a matter of fact, as if he were the best lawyer”. At the same time, “guilty, when they speak for themselves, may often help to disclose the truth, which probably would not so well be discovered from the artificial defence of others speaking for them”.\textsuperscript{18}

After 1730, the altercation trial gave way to a radically different style of proceeding, the adversary criminal trial. The defence lawyers assumed a commanding role at trial. Lawyers of prosecution and defence supplanted the victim and the accused. The advocates prepared the case in advance, conducted the examination and cross-examination of witnesses and raised question of law in the court. The judge became a stranger to the proceedings and the accused was silenced. Hence, lawyer free trial transformed into a lawyer dominated trial.

**Characteristic Features**

The adversary system has five main features, viz., conflict resolution, relatively passive and neutral role of the judge, active role of the counsels for each litigant, obligation of the accuser to establish the complaint beyond reasonable doubt and separate agency for investigation. These main features are the main differences between two systems.

\textsuperscript{16} Id. at.106
\textsuperscript{17} Id. at. 48
\textsuperscript{18} 2 Hawkins, PC 400, quoted in id. at.253.
a. Conflict Resolution System

The adversarial system is a conflict resolution mechanism. The principal actors of this system are two opposing parties, the accused and the prosecution, and an impartial umpire, the judge. Both litigants bring their dispute before the court. After hearing both sides the court resolves the dispute and the results are accepted. In *Jones v. National Coal Board*,¹⁹ Lord Denning observed thus:

...we can only do justice between these parties if we are satisfied that the primary facts have been properly found by the judge on a fair trial between the parties. Once we have the primary facts fairly found, we are in as good a position as the judge to draw inferences or conclusions from those facts, but we cannot embark on this task unless the foundation of the primary facts is secure.²⁰

The primary facts can be had from powerful examinations and it is only by cross-examination, the witness evidence can be properly tested.

There is no penal action without an accuser, who takes the initiative in it and the responsibility for proving it. The accusation is a social function, because the violation of law is considered as a social evil. Hence, the society takes lead and assumed the role of the prosecutor. Society brings the case before unbiased arbiters. The real fight between the accused and the accuser takes place there and in all the conflicts the arbiters tried to ascertain two things; first, whether the accused is the perpetrator of the crime and second, if so to what extent he is morally responsible for it.

²⁰ *Id.* at p. 157.
Personal presence of the parties is necessary in the system. Every combat presupposes the presence of two combatants. The adversaries are brought face to face in a contest, which takes place in public. Each of them produces at his discretion his means of proof. The proceedings resemble a duel with equal and fair weapons. An independent judge, who neither involved in the pre trial process nor assumed the role of the prosecutor in the trial phase, will resolve the conflict.

b. Passive Role of the Judges

It is the pre-requisite of criminal proceeding that the judge should be impartial. This requirement has two elements: first that the judge be free from personal involvement in or bias towards the case at issue, and secondly that they be institutionally impartial. The adversarial system places decision-making authority in the hands of neutral decision makers. The judge ascertains the applicable law and the jury determines the facts. In India, both law and fact will be analyzed and interpreted by the judiciary. In trial, the role of the judge is passive and he should not assume the role of the prosecutor. According to Glanville Williams, the relative inactive nature of the judge is a feature of English system, which actually prevailed in European Countries and even now, continuing in its original form in UK. In *Jones v. National Coal Board*, Lord Denning observed:

> The judge’s part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by the law; to exclude irrelevancies and discourage repetition;

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21 In India jury trials were abolished by the Government of India in 1960, on the ground that they would be susceptible to media and public influence.


23 [1957]2 All.E.R.155
make sure by wise intervention that he follows the points that advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of the judge and assumes the role of an advocate; and change does not become him well.24

In R v. Sharp,25 House of Lords took a strict view with regard to the role of the judge in the trial process. In this case, one of the grounds for appeal was that the judge made unnecessary interruption during trial and he has made his disapproval by showing demeanour during the closing argument of the defence counsel. Court observed:

In general, when a cross-examination was being conducted by competent counsel a judge shall not intervene, save to clarify matters he did not understand or thought the jury might not have understood… If the nature and frequency of the interruptions were such that defence counsel was seriously hampered in the way he properly wished to conduct the cross-examination, the judge’s conduct amounted to a material irregularity.26

The adversary presumption is that a judge who descends into the arena is liable to have his vision clouded by the dust of the conflict.27 In the adversary trial the judge is the prisoner of the adversary process at least so far as the evidence is concerned.28 Chief Justice Barwick of the Australian High Court in Ratten v. The Queen29 observed:

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24 Id. at p. 159.
26 Id at p. 235.
It is a trial, not an inquisition: a trial in which the protagonists are the Crown on the one hand and the accused on the other. Each is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or in cross-examination shall be asked; always of course, subject to the rules of evidence, fairness and admissibility. The judge is to take no part in that contest, having his own role to perform in ensuring the propriety and fairness of the trial and in instructing the jury in the relevant law upon the evidence and under the judge’s directions, the jury is to decide whether the accused is guilty or not.\(^\text{30}\)

The system presupposes that the duty of the judge is to hear and determine the issues raised by the parties. It never expected the judge to conduct an investigation or an examination on behalf of the society. In Australia, generally, the judge has no power to call witness without the permission of the party or to direct the prosecution to call a witness.\(^\text{31}\) This is maintained just to promote the impartiality of the judge. More over the judge may not know the possible implications of calling a witness, since he does not take part in the investigation of the case.

The judiciary shall not assume the role of a prosecutor in the adversary system and at the same time will allow the counsels to present their case before the court. Since the judge is a neutral umpire, one can expect a just decision. That idea is reflected in the following observation.

The adversarial system is based on the assumption that if each side presents its case in the strongest light, the court will be best able to determine the truth.\(^\text{32}\).

\(^{30}\) Id. at p.517.

\(^{31}\) Supra n.29

\(^{32}\) Commissioner, Federal Police v. Propend Finance Pty. Ltd. (1997)188 CLR 501, per Kirby, J.
Hence, trial judge ‘remains almost a stranger to what is going on the court room’.  

In the accusatorial system, each party in a case is interested in setting up his own case and demolishing the one set up by his opponent. The assumption is that through this process, each party to the contest will come with the best evidence against the opponent and as such, the judge could come to the right conclusion. The effective working of the system depends on the participation of well-trained lawyers in the trial system. If this is not the case, there is chance for the system to fail. There is a danger that the whole truth may not come out in the court. This is said to be the reason why wider powers have been given to the judges in India. The Judge can ask questions to the witnesses at any time regarding any fact relevant or irrelevant or to order production of any document or thing to elicit truth. Sir James Stephen justified the granting of such wide power to judges. He observed at the time of passing of the Indian Evidence Act in the Legislative Council thus:

'It is absolutely necessary that the judge should not only hear what is put before him by others, but that he should ascertain by his own enquiries how the facts actually stand. In order to do this, it will frequently be necessary for him to go into matters which are not themselves relevant to the matters in issue, but may lead to something that is, and it is in order to arm judges with express authority to do this that section 165, which has been so much objected to, has been framed.'

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35 Per James Stephen, Quoted in Rattan Lal and Dhiraj Lal, *The Indian Evidence Act*, p.1638.
The Indian criminal justice system clearly shows that the judge is not a spectator and a mere recording machine. But, he must show active interest by participating in the trial to find out truth and administer justice with fairness and impartiality. Courts administering justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to the proceedings. However, while doing so he should not descend into the arena and should not give an impression that he assumed the role of the prosecutor. In Ramchander v. State of Haryana, court observed:

…it is the duty of a judge to discover the truth and for that purpose he may ask any question, in any form, at any time, of any witness or of the parties, about any fact, relevant or irrelevant. But, this he must do, without unduly trespassing upon the functions of the public prosecutor and the defence counsel, without any hint of partnership and without appearing to frighten or bully witnesses. He must take the prosecution and the defence with him. The court, the prosecution and the defence must work as a team whose goal is justice, a team whose captain is the judge. The judge like the conductor of a choir must by force of personality induce his team to work in harmony, subdue the raucous, encourage the timid, conspire with young, flatter the old.

The judge should not assume the role of a prosecutor, but take part in the trial process as an independent, impartial umpire in order to arrive at the truth. He should not, by putting questions, frighten, coerce, confuse or intimidate the witnesses. In this system it can be

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38 Dani v. State of Kerala, 1993(1) KLT 408
40 Id. at p.1037.
41 Ibid.
guaranteed that his decision is not the result of outside pressure, or of arbitrary and subjective ideals but strictly adhere with the law prevailing in the State. At the same time, neither the parties can make any objection to the question put by the judge. Similarly, no party can, as of right, cross-examine the witness upon the answers given on the question put by the judge. The judge has an unlimited power to make the matter clear.\(^{42}\) This power is given to the judge in accusatorial system is to elicit the truth and to minimize the errors in the process of trial.\(^{43}\) So, it is clear that the intention behind the granting of such wide power is to make the judge as a participant in the trial by evincing intelligent and action interest by putting questions to witnesses in order to ascertain truth.\(^{44}\) However, this does not mean that the judge will become a partisan participant in the trial process. He is expected to participate in the trial to ascertain the truth as an independent and impartial umpire. He is duty bound to explore the truth and for which he can explore new avenues. In short, the power will make the judge an independent umpire, who is trying to find out the truth.

**c. Competing Counsels**

During the last quarter of the eighteenth century, the altercation trial\(^ {45}\) was replaced by a style of proceeding, the adversary criminal trial. The system developed into a lawyer dominated process. The Lawyers for the prosecution and defence assumed commanding roles at trial. Both counsels are conducting the trial by adducing facts

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\(^{45}\) John H.Langbein, *The Origins of Adversary Criminal Trial*, 2003, Oxford University Press, at p.253. Earlier the criminal trial was a lawyer free wordy altercation between the accused and the accuser. Prosecution counsels were never used; defense counsel was forbidden. The accuser explains the complaint and the accused conducted his own defense. In fact it was a running bicker among the accuser and the accused. The judge questions the accusers and then calls upon the accused to respond.
examining and cross examining witnesses and raising matters of law. In the adversary system, counsels bear the burden of actively prosecuting client’s cases before the judiciary. Counsels are to submit their case and to disprove the opponent’s case. In fact, it is a legal battle between two interests and the contest focuses largely not on real evidence but on witnesses who testified in open court. The work of gathering and presenting facts and evidences became the province of counsels. The system presumes that the State using its investigative resources, and employing a competent prosecutor to prosecute the accused, who will appoint an equally competent lawyer to defend the prosecution case. Public has more confidence in the lawyers. The assumption is that truth will emerge from the powerful statements of both sides on the question. Both parties’ aim is to win and winning will give the lawyer an image. Lawyer is expected to save the client by any means, legal and necessary.

In short, the business of the advocate is to win his case, without violating the law, on behalf of his client. The adversary system allow the advocates to state their case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost.\textsuperscript{46} Lord Denning was specific in lawyer’s duties and their individuality while deciding the case. He observed;

\begin{quote}
It is the lawyer’s duty to take any point, which he believed to be fairly arguable on behalf of his client. He is not to determine what shall be the effect of legal argument. He is not guilty of
\end{quote}

\textsuperscript{46} Abraham v. Jutsun [1963] 2 All. E. R. 402. In this case the appellant filed an appeal against the decision of the trial court to dismiss the admissibility of two informations which he preferred. This was allowed by the QBD and ordered the respondent solicitor to pay the costs personally to the prosecution. The solicitor filed an appeal which was allowed.
misconduct simply because he takes a point, which the tribunal holds to be bad.\(^{47}\)

Therefore, as far as the case is concerned, the advocate is the sole authority in deciding how to conduct the trial within the parameters of law. No authority, even the court, can direct him the way in which he has to conduct the trial. His prime duty is to protect the interest of his client by any legal means.

d. Presumption of Innocence

The presumption of innocence is one of the main safeguards offered to the suspect/accused in the criminal justice system. Good men everywhere praise the presumption of innocence,\(^{48}\) and both accusatorial and inquisitorial system incorporates this principle. This doctrine contains two elements: one is high standard of proof and the second is the burden of the prosecution to prove the case. This principle comes from the maxim *nulla poena sine culpa* – no man should be punished unless he is guilty.

The conviction of the innocent must be avoided. In order to legitimize the punishment, ‘a moral license is required in the form of proof that the person punished broke the law’.\(^{49}\) It is fundamental to the adversary trial that the prosecution must prove its case beyond the shadow of doubt.\(^{50}\) Though these are attempts to take care, that miscarriage of justice does not take place by convicting innocent persons. The law relating to criminal procedure controls how the guilt of the accused is to be proved. In the accusatorial system, the object of trial is not to establish the truth but to verify whether there is sufficient

\(^{47}\) *Id.* at p. 404.


\(^{50}\) *Kali Ram v. State of H.P.* 1973 SCC (cri.) 1048.
evidence to establish that the accused is guilty of the offence. Hence, the trial is the quality control mechanism, which ensures that only the demonstrably guilty are convicted and punished.\textsuperscript{51} As far as the common law is concerned, this is one of the valuable rights guaranteed to the accused. The burden of proof is described as the ‘golden thread’, which ran throughout criminal law. It was further observed that the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.\textsuperscript{52}

The hard rule that the prosecution has to prove their case beyond the shadow of doubt may result in acquittal of the guilty person. This is the price, which the system affords to pay to preserve the freedom. Though the presumption of innocence along with defects in investigation brings chaos in the system, it is justified in a democracy for the reason that it is very important to protect the liberty and dignity of the individual. Under this arrangement, it is believed, the police will be compelled to fabricate evidence to prove the effectiveness of their investigation. Such a practice undoubtedly impedes ‘effective’ law enforcement. In this context, it is to be remembered that the unrealistic emphasis on the burden of proof, which prompts the police to manipulate the available evidence, results in the failure of the criminal justice system. This unhappy result could be avoided by taking balancing approach by the court.


\textsuperscript{52} Woolmington \textit{v. DPP}, [1935] AC 462 per Viscount Sankey LC.
In *Shivaji Sahabrao Bobade v. State of Maharashtra*, Krishna Iyer, J warned the judges about the undue adherence to the fundamental principles. He observed:

> The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand special emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or the golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every haunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubt belongs to the accused. Otherwise any practical system of justice will then break down and loose credibility with the community.

Therefore, while introducing the golden rule the judge must make sure that the guilty man does not escape from the net of law. Maximum care should be taken to protect the innocent and to make sure that the guilty is punished.

**e. Investigation**

Investigation refers as pre-trial stage, which includes information to the police, arrest, search and seizure, interrogation of the accused and filing of final report. It is the initiation of criminal proceedings wherein the case is prepared for starting criminal trial before a judicial tribunal. Here the police enjoy wide discretion in prosecuting the offender. The entire investigation in the adversary system is being conducted by the

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53 1973 SCC (cri.) 1033.
54 *Id.* at p. 1039.
police without judicial supervision. In the cases of indictable offences in England and cognizable offences in India, police conduct investigation, decide whether to prosecute and often conduct the prosecution itself in the trial court. The police in India enjoy ample freedom to decide whether to prosecute the offender depending on the availability of the evidence against him.

Similarly, in India police have enough power to conduct further investigation also. Even after taking cognizance of the offence by the magistrate it is permissible to conduct further investigation.\textsuperscript{55} In \textit{State of Andhra Pradesh v. A.S.Peter}\textsuperscript{56} court stated that, the law does not mandate taking prior permission from the magistrate for further investigation. Moreover conducting further investigation even after filing the charge sheet is the statutory right of the police.\textsuperscript{57}

As per the scheme of accusatorial criminal justice system judiciary have no authority to supervise the process of investigation. The system wants to preserve the independence and individuality of the judiciary. Investigation is an arduous task, which needs full freedom to collect the evidence. The primary focus of investigation is to solve the crime. The solution will be analysed independently by a judicial officer. So, the decision taken by the police in the pre-trial stage to prosecute a person will be probed afresh in the trial stage by the judge. In order to ensure an independent and impartial decision the judge should not participate in the pre-trial process. Thus, the accusatorial system ensures the preliminary assessment of the case in two stages by independent agencies.


\textsuperscript{56} A.I.R. 2008 SC 1052.

\textsuperscript{57} \textit{Id. at p. 1054.}
B. Inquisitorial System

In inquisitorial system the investigating magistrate, *juge d'instruction*, with a view to find out the truth, conducts the inquiry. The judicial officer is actively involved in the process of investigation. The whole investigation is an official inquiry to find out truth of the case. The philosophy of this system is that the people of the State, represented by its public institutions are the only group competent to search for truth and to make a just disposal of the case. The result of the official inquiry, in this system, is considered as true and the trial is conducted on this inquiry report, the ‘*dossier*’.  

In the Continental European countries, constant judicial supervision of the criminal process from the beginning of the investigation to the decision of the case is ensured. Inquisitorial system is inquiry oriented, because the proponents of this system claimed that it is a relentless search for the truth by all participants in the system.

**Characteristic Features**

The inquisitorial system has four main distinguishing features viz., active role of the judiciary, comparatively passive role of the counsels, diluted principle of the presumption of innocence, and judicial investigation.

**a. Active role of the judiciary**

In the continental system the State personified in the judiciary, takes an active role in pursuing State policies. Here the judiciary has an investigatory function. The judicial officer has to supervise the investigation and actively involve in the preparation of the ‘dossier’. In the courtroom, the judge plays the role of both prosecutor and the

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58 Dossier is the counterpart of Indian “final report” filed by the police after the completion of the investigation under sec. 173 Cr.P.C
decision maker. In this system, the *juge d’instruction* continued to be their central figure in the preliminary procedure and involves in the investigation and preparation of evidence. At the same time *juge d’instruction* have no authority to conduct the trial of the case. In theory and in practice he embodies the essential difference between the Continental and Anglo-American criminal procedure preliminary to trial. Prof. Morris Ploscowe observed:

> On the continent, all functions which the accusatorial system entrusts to the police, prosecutors, jury, committing magistrate and defence attorney are concentrated in the hands of the *juge d’instruction*. It is his duty to make a thorough investigation of criminal complaints and to prepare case for trial, acting not in the interest of either prosecution or in the defence but in the interests of the State to further his investigation. Although he does not necessarily perform all the acts of investigation himself, often using police, other administrative officials and experts, authority over their activities is concentrated in him.

The *juge d’instruction* doesn’t act on his own motion. Usually he begins an investigation only when authorized by the prosecutor. Even without authorization, he can start investigation in serious offences. The investigation by *juge d’instruction* is secret. The public is excluded from any of his operations. Even the rights of the accused are limited. They cannot attend the examination of the witnesses. Since the judge involved in the criminal process from the investigation stage there is less scope for contest between two parties and protection of

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59 French Code of Criminal Procedure (herein after known as CCP), Art. 49[2] states, He (examining Magistrate) may not participate in the trial of penal matters with which he was acquainted in his position as examining magistrate, or the action shall be void.


61 *Ibid*.at.p.1014
rights of the accused. In the accusatorial system, the judge will usually have little knowledge about the case before the trial and he can decide the case impartially, based on the factual matrix presented before him in conformity with the law of evidence.

The trial is controlled and directed by the presiding judge. In France, the evidence is not led by the advocates but by the president of the court in the interest of justice. At first, the court interrogates the accused and receives his statements, if any. The parties can ask questions to the accused only through the agency of the president. After the interrogation of the accused, the witnesses, if any, will be questioned by the court, and the attorneys through the medium of the court. The system permits the president to observe the dossier at the trial when the witnesses are deviating from their previous statements. Hence, he is in a position to examine the witnesses effectively and to challenge them with any apparent contradiction. Since the judge is presenting the evidence he, unlike the judge in the accusatorial system, should be well informed about the charges levelled against the accused and the evidence points to his culpability. The judge’s investigation is not limited to the evidence brought before him. The judge proceeds of his own accord with the enquiry with every search for evidence allowed by the law. This enquiry is not confrontative. The open duel between the accuser and the accused is replaced by the insidious attack of the judge.

62 CCP Art.442, ‘Before proceeding to hear witnesses the president shall interrogate the accused and receive his statement. Official counsel, the civil party and the defense, the latter two through the agency of the president, may ask questions.’

b. Passive role of the counsels

In the inquisitorial system, the lawyer generally assumes a passive role. It is the judge who collects the evidence, prosecutes the offender and examines the witnesses. The system leaves virtually no role for the counsels to play in the trial. Thus he assumes the functions of the prosecutor as well as the decision maker. The judge, the fact finder, may combine the roles of prosecutor and defence attorney.64

The trial is based on the ‘dossier’, the inquiry report, on the assumption that the inquiry revealed the truth and the report contains truth alone. Though the accused is allowed to select a counsel to assist him, the counsel has no authority to examine the witnesses. The president of the court will conduct the interrogation and the prosecutor may question the witnesses after it. Counsel for the accused or the civil claimant could submit questions to be asked by the president.65 Unlike the common law system the counsel is devoid of the authority to examine the witnesses in his own right.

After the interrogation, the civil claimant66 and the prosecutor argue their position. The defence will also submit their arguments. If the civil claimant or the prosecutor replies to the defence, the accused will get another opportunity to speak, because as per the Code the defence has a right always to have a last word.67 So, in French system counsels have no major role to play in the trial. Everything depends upon the sum

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64 P.M.Bakshi, “Continental System of Criminal Justice”, 36.J.I.L.I,419 at. p.421
65 CCP Art.312; reads, ‘Subject to the provisions of article 309, the prosecution, the accused, the civil party, the counsel of the accused and of the civil arty, may pose questions, through the agency of the president, to the accused, to the witnesses, and to any person called to the stand’.
66 Civil claimant is the person who claims to be injured by a felony or delict, brought a complaint against another person (Art.85 CCP)
67 CCP Art.346[3]; ‘A reply shall be permitted to the civil party and to official counsel, but the accused or his counsel shall always have the last word’
and substance of the investigation, which is a judicial procedure. Since
the dossier is the result of a judicial process, much sanctity is conceded
to it and falsification of the same is an impossible task. Thus many
defects, which creep into the investigative process, are overlooked and
left unremedied. This is the outcome of the unwarranted presumption
that the investigation is correct and the dossier contains only the truth.
This will affect the credibility of the judicial system and people may
lose confidence in the system.

c. Presumption of innocence

*Presumption d’innocence* of France and *unschuldsvermutung*
(innocence-presumption) of Germany speak of presumption of
innocence in their Code respectively. The French Code, though
approved the importance of trial,\(^\text{68}\) it should be noted that the fact
finding is dominated by professional judges. The dossier is prepared by
these professionals and intended to be used as part of the evidentiary
basis of the judgment.\(^\text{69}\) This being the situation, one cannot give full
consideration to the French principle - *presumption d’innocence*.

The French *presumption d’innocence* derives from section 9 of
the Declaration of Rights of Man 1789, which states that everyone is
presumed innocent until proven guilty. Continental countries invoke the
maxim, *in dubio pro reo*, means a precept requiring triers of fact to
acquit in cases of doubt. The doctrine of presumption of innocence is
not mentioned anywhere in the Code. The Code of Criminal Procedure
of France provides that the triers of fact should evaluate the evidence
freely and the judicial finding of guilt is supported by an opinion setting

\(^{68}\) CCP Art.427 [2] ‘The judge may found his decision only on the evidence that is brought
to him in the course of the trial and discussed before him by the parties’.

\(^{69}\) John H.Langbein and Lloyd L.weinreb, “Continental Criminal Procedure: “Myth” and
forth the facts deemed proved. Though in theory in the inquisitorial systems also, the burden of proof is on the Prosecution, the French consider the outcome of the investigation conducted by the magistrate as true and the trial is taken place on the dossier only. From the very beginning of a French criminal trial, the record of the preliminary investigation has a notable effect on the proceedings. The advocates of inquisitorial method of trial claim that they have only one aim- the discovery of truth. But, since everything depends on the dossier, one can say that the result is pre-determined and the trial is only a demonstration trial. According to the proponents of continental system only the guilty has to face the criminal trial and the investigation is fool proof. The justification for the so-called judicial investigation explains how the system waters down of the ‘presumption of innocence’ in its strict sense.

The prosecutor, in France, has to prove the actus reus, the mens rea and the legal validity of the regulation with which the person is charged. However, the burden is lightened by three ways. Firstly, there are certain presumptions in favour of the prosecution. In some cases, when the prosecution proved that the accused committed the material elements of the crime, then the guilt of the accused is presumed. For example, the non-payment of alimonies is presumed to be voluntary. Secondly, the accused is under an obligation to prove the facts when he pleads justifications and excuses. Finally, the burden is reduced by the role of the juge d’instruction, who plays an active role in the search for evidence. The interrogation of the accused has several aspects, aiming to protect the interest of the accused. The accused must

70 Supra n. 14 at p.881.
72 Ibid.
be given an opportunity to explain his position. So, the investigating magistrate is under an obligation to question the accused at least once in the process. The accused need not take oath during interrogation by the investigating magistrate. One of the important feature of the French system is that, the accused is assisted always by an attorney, if he desires, through out interrogation.  

When the examining magistrate interrogated the accused, he can exercise his right to silence. This is limited to the first appearance before the examining magistrate. Whether this right is extended to the police interrogation is not clear from the statute. But, some writers considered it as a right which is available to all phases in the criminal proceedings. It is a warning given by the magistrate in the first appearance itself, which is applicable to all further proceedings.

This will help the accused to protect his interest and to mould his defence. All these features depict how the French Code is trying to help the accused to preserve his innocence. But, the determination of guilt or innocence of a man basically depends upon the dossier; the rights of the accused may become useless.

d. Judicial Investigation

In the inquisitorial system, in France, the pre-trial stage is subject to the control and guidance of a magistrate. Generally, the police have no authority to conduct the investigation without the supervision of the

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73 Id. at p.129.
74 CCP, Article 114[1] provides that, “At his first appearance, the examining magistrate shall establish the identity of the accused, acquaint him expressly with each of the acts that are imputed to him and advise him that he is free to make no statement. Mention of that warning shall be made in the official report”.
prosecutor, or the investigating magistrate, *Juge d’instruction*. In France, the criminal prosecutions are initiated by two ways.\(^{77}\) First, by filing a complaint accompanied by a claim for civil damages. Here, the magistrate has jurisdiction to proceed with his investigation.\(^{78}\) Second is to file complaint without claim for damages. In this situation the complaint will be forwarded to the local prosecutor, if he decided to pursue the matter he notifies the examining magistrate in this regard.\(^{79}\) The jurisdiction to investigate an offence is based upon this initial application. Once the investigation is started, the magistrate is free to inquire into the offence related to the allegations stated in the complaint and may proceed to examine any person who may appear to be involved.\(^{80}\) The French code of criminal procedure contemplates four types of investigations. The power to arrest and the collection of evidence under each type of investigation are also mentioned in the code. The types of investigations comprises of investigations of ‘flagrant’ offences, preliminary investigations, identity checks, and the formal judicial investigation by the examining magistrate.\(^{81}\) The judicial investigation and the investigation of flagrant offences\(^{82}\) are powerful and the other two involve the narrowest powers. All investigations will have to comply with two general principles. First, the investigation should be fair so as to bring into light both evidences favourable and unfavourable to the accused without resorting to deceptive or brutal


\(^{78}\) CCP Art.85 deals with the right of the civil party to file a complaint before the examining magistrate. Art.86 states the procedure for proceeding with the complaint.

\(^{79}\) CCP Art. 80[3] states that, the examining magistrate have the power to charge any person in the acts that are referred to him.

\(^{80}\) CCP Art.81 [1] reads, ‘The examining magistrate shall undertake, in conformance with law, all acts of investigation that he deems useful to the manifestation of the truth’.


\(^{82}\) In France the offences are classified into felonies (*enflagrant delit*), misdemeanors (*delits*), and petty offences (*contraventions de simple police*).
methods. Secondly, all investigatory steps must be fully documented in writing, irrespective of the agency of investigation.\textsuperscript{83}

The discretionary role of the police in France is very limited and confined only to minor offences. If the offence reported is not \textit{enflagrant delit} the police can conduct preliminary investigation\textsuperscript{84}, searches\textsuperscript{85} and can detain persons who have useful information about the crime for up to 24 hours for interrogation.\textsuperscript{86} But in other cases on getting information about an offence the police must report the matter to the prosecuting attorney and he will inform the matter to an examining magistrate who will assume the investigation and will authorize the police to conduct the investigation. The inquisitorial law has changed the magistrate into an investigation expert. The duty of the magistrate is to investigate judicially all matters connected with the case. He has the power to receive the testimony of witnesses under oath. In all cases, except in felonies, the case will automatically be referred to an indicting chamber, where the dossier will be reviewed, hearing both sides and will decide the question whether the facts developed will justify trial on felony charge and if so, it will be referred to an Assize Court for trial. The remaining cases will be referred to the correctional court or to the police court.

Searches and seizures are permitted only when there is a reasonable probability of the discovery of criminal objects. Police, as

\textsuperscript{83} \textit{Supra} n.81 at p. 9.

\textsuperscript{84} CCP Art.75 - ‘The officers and, under their control, the agents of the judicial police…..shall undertake preliminary investigations either on the instructions of the prosecuting attorney or on their own authority’.

\textsuperscript{85} CCP Art.76 states that the search and seizure may only be made with the express, hand written consent of the person affected.

\textsuperscript{86} CCP Art.77 [1] - “When for the necessities of the preliminary investigation the Officer of the judicial police is led to hold a person at his disposal for more than twenty-four hours, he must be taken before the prosecuting attorney before the expiration of that period.
part of investigation, can interrogate any person, who, according to them, has some connection with the crime, either as accessory or as witness. Arrest of the accused can be made upon ‘probable cause’ to believe that the arrestee has committed an offence.

**Contrasting Two Systems**

Many jurists argue that, adversary system is better than inquisitorial system, which promotes the goal of truth seeking and maintain human dignity. At the same time proponents of the inquisitorial system claim that, it is cent percent truth seeking. A close examination of both the systems will reveal that the truth is in the midway. Both systems lack in some respect and gains strengths in some other respect. Both systems claim that fair investigation, fair trial and maintenance of human dignity, truth seeking are distinctive features of their criminal procedure. It is fundamental that for both systems that the truth should be established by using fair and legitimate means. Truth finding and fairness are the most cherished aims of both systems of criminal justice administration. However, these systems differ in their fundamental assumption as to the best way through which this objective is to be achieved.

**i. Fair Investigation - a Myth?**

Investigation is the preliminary step to bring the offender before a court of law. It is a systematic search to find out the culprit and the evidence against him. It ends by bringing the person responsible for the perpetration of the crime before a judicial tribunal. The laws relating to criminal procedure regulate the investigative mechanism in all the countries. It is presumed that the investigation is conducted in the best

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interest of the country by protecting the rights of all concerned. But in reality, under the cover of investigation of a crime, the authorities are violating the constitutional norms and other relevant laws; thus violating the rights of the suspected persons. This often happens where the system gives over emphasis to the needs for crime control ignoring the need to give a fair dealing to the accused.

The criminal justice system should aim at both crime control as well as upholding of human rights values. When these two elements are combined, the system becomes effective and efficient. Protection of the rights and the protection of the life and property of the citizens are the cynosures for the law enforcement machinery in a country. So, the task is very much complex and important. Successful balancing of this conflicting interests is the result of the investigative process, which is just, fair, and reasonable. Greater fairness to all is possible, without either undermining the ability of the system to bring the guilty to justice or to protect the innocent.

In the adversarial tradition the police conduct the investigation. The state agencies control and circumscribe the investigative process. Judges and juries do not participate actively in the investigation of a case. The police take all the pre-trial proceedings including the decision to prosecute the offender. The authority in this regard is well reflected in the decisions of courts. In *R v. Metropolitan Police Commissioner*\(^8\), Lord Denning observed:

> I hold it to be the duty of the Commissioner of police, as it is of every Chief Constable, to enforce the law of the land. He must take steps so to post his men that crime may be detected; and that honest citizens may go about their affairs in

\(^8\) [1968]1 All.E.R.763.
peace. He must decide whether or no[t] suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save the law itself.\(^89\)

In *Alexandrou v. Oxford\(^{90}\)*, the allegation against the appellant was that he was negligent in preventing the theft occurred in the plaintiff’s premises even after the activation of burglar alarm. The trial court found against the police and ordered, the Chief Constable of Police, to pay a sum of £7500 to the plaintiff. The appellate court reversed the decision and ruled that, the police owed no duty to take care to prevent loss to a person caused by the activities of another person, unless he stood in a special relationship to the defendant from which the duty of care would arise. In another case, *Osman v. Ferguson\(^{91}\)*, court stated that, the existence of a general duty on the police to suppress crime did not carry with it liability to individuals for damage caused to them by criminals whom the police had failed to apprehend when it was possible to do so. In the absence of any special characteristic or ingredient over and above reasonable foreseeability of likely harm, which would establish proximity of relationship between the victim of a crime and the police, the police did not owe a general duty of care to individual members of the public to identify and apprehend an unknown criminal.\(^{92}\) However, the situation may be different when the police knew that there was real risk to the life of a person and that the risk was immediate. In such situation police should

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\(^{89}\) *Id.* at p. 769.


\(^{91}\) [1992] 4 All. E. R. 344. The fact of the case was that the husband of the first plaintiff murdered and the second plaintiff was severely injured. Police failed to apprehend criminal prior to crimes, though they have knowledge about the strained relationship of plaintiff with the accused.

have done all that could reasonably have been expected of them to minimize or avoid the risk. The responsibility for law enforcement lies on the police agency and so, the police officer is answerable to law.

The situation is the same in all countries following adversary system. No court can or should give the police direction on investigation. The success of the case depends on the available admissible evidence. Often the success of prosecution is considered as the success of investigation itself. This may prompt the investigating agency to manipulate investigative process. Undoubtedly, this would result in the violation of human rights, putting the ethos of the adversary system in peril. The police may fabricate evidence or obtain evidence by illegal means. The judicial system reacts to the violation of law by the investigators in different manner. The exclusionary rule in US, the judges’ rule in UK, arrest rules in India are emerged as a result of the police failure to obey constitutional, statutory or judicial rule. Whether it is in UK or US or in India, the complaint is common that the police are resorting to illegal methods to obtain confession and to fabricate evidence against the suspected persons.

The British police are considered as good and efficient. Whatever evidence they collected, will be produced before the court,

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95 Exclusionary rule is that the evidence illegally obtained by law-enforcement officers cannot be received in criminal prosecution, provided the accused objects to its admission. See Monard G.paulsen, “The Exclusionary Rule And Misconduct By The Police”, 1961 J.Crim.L.C & P.S. 255.
irrespective of the fact that, it is in favour of the accused. Harold Scott in his book, ‘Scotland Yard 98’, observed:

In UK successive generation of the police officers have been taught to be scrupulously fair so much so that if there is anything to be said in favour of the accused, it must not be withheld from the Court, and if a piece of evidence favourable to the accused comes to light during investigations, it must as a matter of course be communicated to the defence.  

The reason for this situation is that it is free from direct political control or interference in operational matters. However, this is not the situation prevailing in all the countries. Even in UK, the situation is changed during the passing of time, at least after the passing of the Police and Magistrates’ Courts Act, 1994, whereby political subordination is created in the police structure. Independence in the functional side is the bedrock of democratic governance. The political or any other intervention in the law enforcement process will affect adversely the criminal justice system of the country.

The secret nature of the pre-trial stage in the accusatorial system makes it possible to concoct evidence in favour or against the accused as a result of external interference. Since the police are very much interested in the success of their investigation, they will foist evidence, plant witnesses and will suppress the evidence, which is in favour of the accused.

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100 Ibid.
The police, who wielded maximum authority in the process of investigation, in the adversary system, sometimes act against the legal and constitutional norms.

In France, the system maintains judicial control of the pre-trial investigation. The police must report all offences to the prosecutor, who then opens a file- dossier- and refer the matter to the judge for examination. Police are placed at the disposal of the examining magistrate. He has given power to order arrests, searches, interrogation of the witnesses, and accused and record the result of the interrogation in the dossier. The charging and investigative decisions are to be made by the judge.

Though in principle, the police in France is under judicial control and they conduct the investigation under strict judicial supervision in reality, the judicial police investigates the cases even before judicial investigation opens. The police officers (officier de police judiciaire) can receive complaints, conduct investigations, hear individuals and carry out searches and seizures.\(^1\) They have the power to detain a person in police custody for up to twenty-four hours. After the preliminary inquiry of the judicial police officer, the case has to be submitted to the juge d’ instruction in cases of crimes, and in relation to delits it is optional. So, the theory that, in inquisitorial system, the investigations of crime is conducted by judicial officer is not fully correct. In France, most of the investigation work would be completed by the police before the prosecutor or the examining magistrate enters

\(^{101}\) CCP Art.17[1] “The Officers of the judicial police shall perform the duties defined in Article 14: they shall receive complaints and denunciations; they shall conduct preliminary inquiries under the conditions provided by Articles 75 to 78”.

Art14[1] “According to the distinctions established in this title, the judicial police shall investigate breaches of the penal law, collect evidence and seek out the perpetrators, even if a judicial investigation has not been opened”.

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the picture. They generally confirm what the police have already
done. Vouin stated:

It frequently happens that an examining
magistrate, seized of a crime committed the day
before, delegates the examination and hears no
more of the crime for several months.

In France, the judicial examination is mandatory only for
*crimes*. But, in crimes also, the prosecutor may ignore the
aggravating circumstances and treat the offence as a lesser one, *delit*.
This process is known as ‘correctionalisation’.
By correctionalising a
crime, the prosecutor can by-pass the judicial examination.
Only limit
on the prosecutor’s discretion is that imposed by the nature of a
particular case. Some crimes cannot be correctionalised because of its
serious nature on the publicity it received. In reality, the judge is not
conducting the investigation in all cases. So, Prof. Goldstein claims that
it is a myth to state that all the investigations are conducted by the judge
or under his direct supervision. He observed:

A ‘judicial examination’ generally means only
that a judge must formally authorize certain
aspects of the criminal investigation in advance-
for example, the length of the detention, the
interrogation, the search, the medical tests… this

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102 Abraham S. Goldstein and Martin Marcus, “The Myth of Judicial Supervision in Three
103 Vouin, “Protection of the Accused in French Criminal Procedure”, 5 Intl. Comp. L.Q, 1 at
p. 9 (1956) quoted in ibid.
104 Under French law three types of criminal offences, viz., *crimes*, *delits* and *contraventions*. *Crimes*
are serious offences. *Delits* are offences punishable with up to five years
imprisonment. *Contraventions* are offences punishable with up to two months
imprisonment.
105 French, CCP, Art.40[1]: “The prosecuting attorney shall receive complaints and
denunciations and decide what to do with them. He shall inform the complainant, as well
as the victim, if identified, of the decision not to prosecute.
106 Correctionalisation is a process, which allows provable delits to be sent to police court
and tried as contraventions. See, Gerald L. Kock (Edtd.), *The French Code of Criminal
107 *Supra* n.102 at p.251.
authorization often occurs after the fact and confirms the validity of informal measures already taken by the police. The judge’s investigative role, therefore, is essentially reactive and interstitial.  

The police have wider authority to conduct search incidental to arrest. In the case of felonies, there need no prior judicial authority to search, to seize, and to summon witnesses. So, police, regularly characterize ordinary offences as felony in order to avoid the restrictions that would otherwise apply.

In the adversarial system, the investigation is conducted by the police and they themselves prepare the final report, which the system never accepted as substantive evidence. The reason is that the adversary systems do not have confidence in their police system and one cannot expect an objective and dispassionate attitude from the police. The prosecution does the evidence collection and the report prepared by them is primarily an internal police document. This is used by the prosecutor as an unofficial document without evidentiary significance. By their attitude, police can ensure good result as well as shatter the case. In short, the accusatorial system heavily depends on the police and the outcome generally reflect the efficiency of the police.

In the inquisitorial tradition, investigation of the crime is conducted by the juge d’ instruction. The juge d’ instruction has two types of power at his disposal. One is that he can either carry out the investigation himself or delegate to the police by means of a formal instruction- commission rogatoire. Secondly, he can exercise judicial power: he may decide to keep the suspect in custody, to conduct search

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108 Id. at p.250
109 Supra n.87 at p. 1554.
and he can decide how the matter is to proceed thereafter. The police act under the control and supervision of the judge and the dossier prepared in that process contains all relevant piece of information. The outcome of the investigation is generally considered as true. This is because of the fact that the judge supervises and controls the investigation and the preparation of the case file.

It is believed that the investigation in this system is conducted in a detached and impartial way. The investigative process presupposes that the procedure adopted is fair and legitimate. However, as per Art.51 (1) of Code, an examining magistrate has no power to open an investigation unless he is requested to do so by the prosecuting attorney or the victim. Similarly, during investigation, if any new facts are obtained, he must obtain a further request to investigate those facts. This shows that the examining magistrate’s power to investigate is a limited one and the concept of judicial inquiry is only a myth in the system. In most of the cases the role of juge d’instruction has been perfunctory and the dossier is not the product of a judicial enquiry but of a police inquiry which is not contemplated in the inquisitorial system.

In the adversarial tradition, the assumption is that equality of opportunity to parties will lead to the emergence of truth. So, fairness of the proceeding and the truth finding are related in this system. It


111 Dossier is a complete record of all events leading to and constituting the crime, a portrait of the persons involved in it and a record of the judicial proceedings which has followed upon it. It has four sections. i. include all documents of secondary interest, copies of the list of witnesses and the orders for the appearance of the accused. ii. Contains all evidences relating to accused’s history and personality. iii. contains papers relating accused’s detention in custody awaiting trial. iv. Contain all documents basic to the appreciation of accused’s guilt.

112 French, CCP, Art.80[4]: “When facts not included in the petition are brought to the attention of the examining magistrate, he must immediately communicate the complaints or official reports that set them out to the prosecuting attorney”.
requires faith that even if there is partisan manipulation of evidence, the independent judge can infer the truth from evidence adduced. A major criticism of the adversary system is that its judgments are not based on truth, but upon the ability of advocates to adduce the best evidence and put forth the best arguments while engaged in a verbal contest. This criticism is based on the assumption that absolute truth can be ascertained in some other way. But it is true that absolute truth is not possible to be ascertained and at the most one can hope for the most probable truth.

The judge is an alien to pre-trial stage of a case in the adversarial system, whereas he is a participant, at least in theory, in the continental system. Non-participation makes the trial an independent process, but participation may create a tendency to have a fixed conclusion at an early stage. Moreover, all the evidences that run counter to the result of the investigation may receive a diverted attention since one judge is involved in the process. In this way, the trial judge becomes an advocate for the investigative judge’s view of the case and may not be impartial.113

Hence, the accusatorial type of investigation is good to follow.

ii. Fair trial – a Myth?

The trial is conducted to determine questions of fact. The basic purpose of trial is the determination of truth,114 and to arrive at the right result, trial process is required. The conflict resolution between adversaries is a powerful means to hammer out the truth and all facts may come out. The defence under the cover of presumption of

innocence, wanted to hide facts so as to avoid a conviction. At the same time, prosecution will try to gather all available evidence to avoid the risk of acquittal. No party in the proceeding really desirous that the whole truth regarding the controversy be exposed to scrutiny. The question in a trial in the adversary system, is not the guilt or innocence, but only whether guilt has been shown beyond the reasonable doubt.\textsuperscript{115} But, inquisitorial system is based on the idea that it is the chief function of the court of law to find out the truth and not merely to decide who has adduced better evidence.\textsuperscript{116}

In the adversarial tradition, the assumption is that equality of opportunity to parties will result in emergence of truth. The truth finding is attempted by ensuring fairness of the proceedings. Even if there is manipulation of evidence by one party the other is free to disprove the same. The parties on each side present their case, examine and cross-examine witnesses. Thus, the accountability is divided among the parties to the procedure.

The trial court proceedings are like a scene of drama, wit, humour, and humanity along with the sorrows and the stretches of boredom.\textsuperscript{117} The trial is instructive and creative and so, to arrive at a definite conclusion is a satisfying challenge. The judge sits as an impartial umpire and the contention of parties enables him to arrive at a right and balanced conclusion.

The common law system very often fails to achieve its objective. The main reason for not achieving the object of trial is the partisan and

\textsuperscript{117} Supra n. 115 at p. 1032.
unqualified investigatory process. The court will wait passively for what parties will present without knowing or trying to know what the parties have chosen not to present. If the investigation is prompt, fair, and accurate, then the trial will be an impartial ritual to do justice to the accused. But, since there is no effective control on the police, and there is no agency to supervise the investigation, police can conceal certain evidences, which are important and at the same time add or fabricate evidences. The judiciary has no control over the investigation by the police. The court has no authority to intervene in the investigative process. By producing fabricated or partly concealed evidences, the prosecution can mislead the court regarding the genuineness of the evidences. In this situation, the court is facing a fundamental limitation regarding the ascertainment of truth.

In the inquisitorial system, one judge maintains the control over the pre-trial proceedings and another judge conducts the hearing at trial. Both are judicial functions. It is the duty of the judges to find out the law and the facts of the case. This system presupposes the impartiality of the judge. But there is a strong tendency by the judge to reach a conclusion at an early stage and to adhere to that conclusion even if there are conflicting considerations. Then the question may arise as to the validity and purpose of trial. The only purpose is to convince the accused about what is revealed in the investigation and about the contents of dossier, which is prepared in secret.

The trial in the inquisitorial system is described as an active enquiry by the court into the defendant’s guilt. It is claimed that the

118 Supra n. 115 at p. 1038.
120 As per article 49 of the Code, the examining magistrate who conduct the investigation shall not participate in the trial of the same case.
system gives importance to the search for truth. The judge questions the accused and the witnesses, using the *dossier*. *Dossier* is meticulously prepared by the *juge d’instruction*, or the prosecutor before trial. In the actual practice, the presumption is that the truth has already found out and the *dossier* contains the truth. The trial heavily depends upon the *dossier* and it is the product of a ‘judicial examination’.

At the trial, the court will not allow the parties to develop the facts of the case and so, the role of the counsels is passive. They can ask questions to the accused and the witnesses only through the judge. In the French system, trial is conducted only for namesake, to convict the accused by accepting the *dossier*. As per the Code, the President of the court interrogates the accused and the witnesses. Hence, the trial is only a method to reassert the evidence, which they gathered in the investigation. In principle, all evidences collected during the investigatory stage are examined anew. The presiding judge not only interrogate the accused and the witnesses, but also, authorized to raise all issues relevant to the charge. If necessary, he must even hear evidence not normally put forward by the parties. The system neither gives freedom to the accused to prove his innocence nor disprove the prosecution case against him. The trial rests on the presumption that the dossier contains truth and truth only. Hence, there is no chance to contradict the contents of the dossier. It is no fun in considering the trial in the inquisitorial system as an *ex-parte* procedure to legalize the outcome of the investigatory process. The only safeguard provided in

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121 Art.312 CCP: “Subject to the provision of Article 309, the prosecution, the accused, the civil party, may pose questions, through the agency of the president, to the accused, to the witnesses, and to any person called to the stand”.

the code is that the judge who has involved at the investigative stage cannot participate in the judgment, which he has investigated. In short, the purpose of criminal trial in the inquisitorial system is to convict the suspect and to find out a justification for the same.

The trial in the common law system gives ample opportunity to both parties to ventilate their viewpoints and evidences before an independent and impartial judge, who is free to come to an inference after hearing both parties. Hence, the trial in the adversary system is better than the trial in the inquisitorial system because, it protects the human rights and public interest.

iii. Truth Seeking – a Myth?

The ultimate aim of all criminal justice systems is said to be truth finding, but the way adopted by different systems to achieve the goal is different. Proponents of each system boast of their system as the best and fair in the pursuit of the goal. In the inquisitorial system, the investigative procedure is thought to be best suited to come forward with an objective truth. It presupposes that the investigative procedure is fair and legitimate while the adversary system presumes that its trial procedure is fair and legitimate.

The accusatorial system, though it is claimed, never aimed at the discovery of truth. Instead, the judge comes to an inference after analyzing the evidence adduced by both sides. The outcome of trial depends heavily upon the evidence adduced. The probing never goes beyond what is alleged and tried to be proved. Hence, the adversary system, at least in practice, is not truth seeking.

123 Art: 49[1] CPP: The examining magistrate is charged with conducting judicial investigations as provided in chapter 1 of Title 111.
Art:49[2]: He may not participate in the trial of penal matters with which he was acquainted in his position as examining magistrate, or the action shall be void.
In the French system, the investigation is conducted in a detached and impartial way. The preparation of the *dossier*, they claim, is the most efficient way to discover the truth. The *dossier* expresses a coherent system of supervision and control. The president of the court will study the *dossier* before the trial to observe whether the witnesses are departing from the evidence during trial from which they are given to the *juge d’instruction* at the time of investigation. He is then in a position to interrogate them properly and to ascertain whether they are giving false testimony.

The impartiality of the trial and the investigating judge is the much-acclaimed element of the inquisitorial system. The judicial control of investigation and the presumption regarding the truthfulness of ‘*dossier’*, prepared by the investigating judge, the chance of acquittal is rare if not impossible. The trial is aimed only at checking the veracity of the statements given by the witnesses. When a judge is involved in the investigation, and he concludes his findings, it will have an impact on the trial judge also. The trial judge becomes an advocate of his own colleague and is hardly impartial. The trial in this system is to ascertain the correctness of the pre-trial procedures. So, when a man is put on trial in the accusatorial system, in France it is the dossier. This proves that the efficiency and personality of the magistrate determine the efficiency of the whole process and the revelation of truth. Because of this reason, we cannot depend on this system as an answer to all queries regarding the loopholes of the adversarial system.

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Conclusion

The most important and common feature of both accusatorial as well as the inquisitorial systems of criminal justice administration are that both provides for a mechanism for investigation of crime. In both systems, the success of the criminal justice administration depends on the investigation report. Hence, the trial depends heavily on the investigation report. Regarding the pre-trial phase, the difference lies in the agency, which conducts the investigation. While police conduct investigation in the adversary system, juge d’ instruction with the assistance of police conduct the same in inquisitorial system. It shows that police is an inevitable and important element in the criminal justice administration. The success of the prosecution depends on the investigation, which depends on the ability of the agency, which conducts the investigation.

The efficiency of the system generally and mostly depends upon the pre-trial process. If it is fair, reasonable, proper and legal, the system can function well. The investigatory process must be designed to protect the interests of the public as well as the accused. However, in reality, in the adversary system, the police are made partisan by the role they play in searching out the facts of the crime. Only judges can be trusted to be neutral and detached. Since there is no direct control or supervision over the police in the investigatory process, they may conceal or in the alternative, concoct evidence and may violate the rights of the suspects. This points to the importance of having a new agency to supervise the investigation.

We cannot introduce the ‘judicial examination’ because of several reasons. The umpire must be impartial. He should not be entrusted with the investigation. If so, happened, no accused can expect
a fair trial from the judiciary. In such cases, judges may become advocates of their own causes. If the control of the pre-trial stage is entrusted with the judiciary, they will take part in the evidence collection process and they will presume that what they have done in the pre-trial stage is correct and legal. This will pave way for interpreting the evidence and law in such away to justify their own reasons.

In the adversary tradition, the judges do not decide the cases in vacuum but in the light of the material collected by the respective lawyers. The respective parties’ views and supporting materials are presented and the judge analyses the issue and write the discourse on the dispute. To come to an inference is the duty of the judge, which will be an analysis of the presentations of both sides along with the reasons for his choice. He must give justification for the rejection of evidences also. After the pronouncement of the judgment, it will become a public document and open for analysis by legal luminaries. Therefore, there will be chances for checking and correction through the process of discussions and deliberations. This will help to have a community of thought between Bench and the others and also in the progress of legal field of the country.

The inquisitorial trial is also not acceptable, because it gives no opportunity to the accused to prove his innocence. Moreover, instead of becoming an impartial umpire, he tries to establish the guilt of the suspected person. Therefore, we need a system, where the pre-trial process is fair and legal, and a trial process upholds human dignity.
