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Book Review

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THE CRIMINAL TRIAL

Reviewing:

> Anthony Duffy, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds.), *The Trial on Trial*, Oxford and Portland: Hart Publishing, 2004, 207 pp.

"The trial is central to the institutional framework of criminal justice." With this very first sentence of the first volume of *The Trial on Trial*, the editors emphasize the importance of their work and reveal the slight common law predominance of the project. In 2003 this project brought experts from accusatorial and inquisitorial jurisdictions together for a workshop addressing the theme "Truth and Due Process in Criminal Trial." The topic of the relationship between truth and due process is a basic one, even from a continental law point of view. Yet, in civil law jurisdictions, substantive law is regarded as important for an institutional framework of criminal justice.

The first printed outcome of this overall 3-year project covers many different aspects of criminal trials, including changing conceptions in national trials with regard to the law of evidence (namely in Scottish criminal trials, presented by Peter Duff), differences between the adversarial and inquisitorial models of criminal trial ("Ritual, Fairness and Truth" by Jenny McEwan), specialities of the jury trial ("Truth and Jury Nullification" by Matt Matravers), as well as the conceptual and factual interdependence of "The Criminal Trial and the Legitimation of Punishment" (Markus D. Dubber), and

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details of certain forms of evidence, namely "Testimony" (by Duncan Pritchard). A rather functional approach on the working of a criminal trial is taken in the second half of the book. This half includes chapters such as "Managing Uncertainty and Finality: The Function of the Criminal Trial in Legal Inquiry" (by John D. Jackson), "Nothing but the Truth? Some Facts, Impressions and Confessions about Truth in Criminal Procedure" (by Heike Jung), "The Distinctiveness of Trial Narrative" (by Robert P. Burns), and "The Objections that Cannot be Heard: Communication and Legitimacy in the Courtroom" (by Emilios Christodoulidis).

This review can – unfortunately – analyze only some of the papers presented in the 200 pages of this very interesting collection. It will focus on two discussions of "truth" in the framework of a criminal trial.

Is the adversarial trial the embodiment of procedural justice as legal traditionalists in the United Kingdom claim? Or do inquisitorial models carry preferable features, which are better suited to discover truth? Surely enough, the adversarial and inquisitorial models of criminal trial converge. This is the first finding of Jenny McEwan's paper on "Ritual, Fairness and Truth." She clearly explains that discovery of truth is only one objective of a criminal trial, which itself is constrained by other rationales such as autonomy, dignity and respect – aiming at a "fair trial." Both models, the adversarial as well as the inquisitorial, strive for these goals in different but converging ways. McEwan shows that the Anglo-Saxon tradition gives the defendant traditionally more control over the trial, whereas the civil law tradition perceives him or her rather as an object in the authoritarian search for truth. McEwan also paints the other side of the coin: the aggressive, often humiliating features of cross-examination of witnesses in an adversarial trial. Such a treatment appears unacceptable for continental lawyers and will surely be a source of friction in a European area of justice where in the future evidence shall be collected according to the law of the requesting state (*forum regit actum*). To illustrate potential difficulties, one can hardly picture a German judge allowing cross-examination of a rape victim according to English rules in his court room. Focusing on national trials, McEwan points out that all legal systems operate on an evolutionary process of continuous reform, sometimes adapting better to challenges, sometimes doing worse. McEwan rightly elaborates the idea of an ideal criminal trial as one where both society at large and, equally as important, the defendant, perceive the trial as fair.

''Nothing but the truth?'' asks Heike Jung, while analyzing ''Some Facts, Impressions and Confessions about Truth in Criminal Procedure.'' Discovering the truth, whatever that may be, is still regarded not only as an ideal, but as an essential element of criminal trials which are, in many ways, undiluted by the knowledge that truth is only an illusion. Jung points out that the process of discovery in a criminal trial does not only address the legal issue of rehabilitation (at the very end of a criminal trial), but also settles a social conflict. Like McEwan, he shows that the striving for material truth is always constrained by respect for its human participants. Jung wants this respect not to be perceived as inherent restrictions of a criminal trial, but instead as based on normative presuppositions of autonomy, dignity and respect. Jung explains how ''it would not be compatible with the peace-keeping function of the criminal process for the procedure to end with the destruction of those who are involved in the evidentiary process''. Nevertheless, Jung appropriately concludes that for all jurisdictions, a system would not be acceptable which starts out from the assumption that striving for the ''real''' truth is immaterial.

These two variations on truth are one valuable contribution to the development of a normative theory of the criminal trial. In this way, the authors have fulfilled one of the project's primary objectives. In their introduction, the editors set out to sketch a first glimpse of such a theory when – among others – pondering the questions: ''What is truth?'' and ''Does Truth matter?'' – and more precisely: Should a ''guilty'' verdict be read simply as asserting that the defendant is guilty, or rather as asserting that he has been proved guilty by an appropriate (or ''due'') process? The basic dilemma of which is best suited to answer these questions, an inquisitorial or adversarial process, must remain unsolved for now. The project resolves normative issues surrounding the relationship between the verdict and the process that leads to it: ''Which trial, whose truth?''

While the idea of developing a normative theory of the criminal trial is not new, the project's bringing together of lawyers and philosophers from adversarial and inquisitorial jurisdictions is an especially promising start to ground a normative theory of the criminal trial on interdisciplinary work. Thus, we may look very much forward to the second volume.