The Search for Truth in Criminal Process

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I. INTRODUCTION

As the century limps to a close, the gaps seem to be widening between the views on truth prevailing in a variety of theoretical disciplines and the understanding of truth in the social practice of adjudication. ¹ Actually the views on truth went through a great change, no matter in theory or in practice, from objective truth to procedural truth. Truth, in the eyes of legal experts and laymen, represents total different things. Substantial questions about truth get much attention.

The following thesis is divided into four parts. In part I of this article, it presents the importance of truth-seeking from different perspectives. Based on the discussion of part I, it establishes the rationality of following discussions. In part II of this article, two different definitions of truth are fully presented. Is truth discovery a realistic objective and what are their relations to different procedural models including adversarial system and inquisitorial system? In part III of this article, there exist detailed information about above-mentioned two different procedural models and their relations with truth-seeking. In part IV of the article, it introduces some new developments in truth-seeking.

II. THE IMPORTANCE OF TRUTH-SEEKING

The criminal process is endowed with different goals.

In Continental legal thinking, the criminal process is said to be geared, alternatively or cumulatively, to enforcing the criminal law, creating the basis for a just and fair judgment, restoring social peace, or simply "finding the truth" about a criminal incident. ² It concentrates more on the social function of criminal process and contains the public interest. The public is involved as the third party. Knowing exactly what has happened, who the culprit is, and why he committed the offense, is a necessary prerequisite for any attempt to re-establish social peace through justice. So seeking truth and eliminating the real danger is in accordance with the expectation of the public.

Anglo-American writers, by contrast, tend to emphasize the conflict-resolving potential of the criminal process. Although Anglo-American system concentrates more on conflict-resolution, it still has to satisfy the basic or minimum needs about fair and justice. None of the potential purposes of the criminal process can be reached unless the judgment has been based on a search for the truth. ³ The determination of truth is indispensable for yet another reason—criminal sanctions are society’s most severe expression of moral blame. It is therefore imperative that criminal sanctions be imposed upon those who are in fact guilty. It is a protection of the innocence and litigant in criminal process. ⁴

¹ Mijan Damaska, Truth in Adjudication, 49 HASTINGS L.J. 289 (1997-1998)
³ id. 390
⁴ See Weigendt, supra note 2, at 389
III. DEFINITIONS OF TRUTH AND THE RELATION WITH DIFFERENT PROCEDURAL MODEL

A. Definitions of Truth

Before taking a closer look at the exact meaning of "truth," two caveats are in order with respect to the truth-orientation of the criminal process.

Firstly, even if the establishment of the "truth" about the relevant events is one of the goals of any criminal process conducted by the state, this does not mean that every participant is individually obliged to actively take part in the search for truth. It is a sign of authoritarian systems that they espouse the idea that "we all want to find the truth" and thereby deny the defendant's right to stay aloof from the process or even to impede the truth-finding by holding back crucial evidence. Freedom-oriented procedural systems, by contrast, grant the defendant the option of withholding cooperation without adverse consequences.

Secondly, there is consensus—even among those that emphasize the truth-finding function of the criminal process—that truth shall not be sought at any cost. All procedural systems recognize overriding concerns that restrict or prevent the admission of certain pieces of evidence even if they would be necessary for presenting relevant facts to the court. Human dignity (guaranteeing a core sphere of privacy) and professional secrecy are typical sources of such restrictions. Balancing such external interests against the overall interest in establishing the truth is particularly sensitive and important.

Based on the agreement that truth is an indispensable element in criminal process, it would be useful for us to find the exact definition of truth. That question has occupied theologians, philosophers, and lawyers for quite some time, and agreement has yet to emerge.

There are two approaches defining truth. Firstly, it is the correspondence theory. Truth, according to that theory, is like a "hidden piece of gold" waiting to be discovered and brought to light. Correspondence theory comports with popular notions of truth, but it has to presuppose that we are able to determine and to express through language what in fact is. To some extent, truth is objective in accordance with this theory. Secondly, it is the competing consensus theory. The competing consensus theories of truth dispense with the notion that "true facts" exist a priori; truth, according to these theories, is what reasonable people agree upon after a complete and fair discourse. Procedural truth is implicated in this theory.

The different approaches toward truth-finding connected with these competing theories have a direct impact on the function and structure of the criminal process. If

5 See Weigendt, supra note 2, at 392
6 See Weigendt, supra note 2, at 393
7 See Klaus Volk, Konfliktverteidigung, Konsensualverteidigung und die Strafrechtsdogmatik, in FESTCHRIFT FOR HANS DAHS 495, 496 (Gunther Widmaier et al. eds., 2005).
8 "Within the common law tradition, legal truth is seen as something which is contingent, existing not so much as an objective absolute but as the most plausible or likely account, established after the elimination of doubt." Matthew T. King, Security, Scale, Form and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Systems, 12 INTL LEGAL PERSP. 185, 188-89 (2002).
truth-finding connotes the revelation (or discovery) of an objective reality, it is the result that legitimizes the process. The judicial process is only the means to discover the hidden, "objective" reality and should be organized to optimize the chances of finding the "piece of gold." If, on the other hand, consensus theory is correct in postulating that whatever emerges from a fair and rational discourse among the parties can be accepted as the "truth," the content of the rules that determine the process becomes more important than the outcome itself, and adherence to these rules acquires paramount importance for truth-finding.  

B. The Relations with Different Procedural Models

Traditionally, correspondence theory has been regarded as congruent with inquisitorial procedural systems, whereas the adversarial process prevalent in common law countries has been said to reflect consensus theory. If we content ourselves with a very superficial sketch of the two models and disregard their complexities and variants, then the distinctive feature of the adversarial model is the assumption that an antagonistic presentation of competing versions of the "truth" by each party is the optimal device for bringing out the "real" truth. Hence, parties are given the power as well as the responsibility for presenting evidence to prove their respective versions of the truth, and each party is expected to rigorously test the opponent's version through cross-examination. In this circumstance, truth is not completely about what has happened in real life, provided it is plausible to laymen and is under the guarantee of reasonable discourse. Most importantly, truth is an outcome after an intense combat between the prosecutor and the defendant.

The inquisitorial system, by contrast, assumes that an "objective" investigation by a neutral judge is the best guarantee for bringing out the truth. In procedural systems that adhere to the inquisitorial principle, it is thus typically the responsibility of a judge-before trial, at trial, or both-to determine the scope of the investigation as well as the witnesses, experts, documents and other evidence to be presented. Modem inquisitorial systems have tempered the judge's omnipotence by giving the parties, and especially the prosecutor, the power to co-determine the scope of the search for the truth.

C. Is Truth-seeking a Realistic Objective

This question has occupied theologians, philosophers, and lawyers for quite some time. Renowned professor Mirjan Damaska had some discussions in his article truth in

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9 See Weigendt, supra note 2, at 395
10 An affirmative state interest in determining the truth also comports with the ideal type of an "activist" state in the typology developed by Mirjan Damaska. MIRJAN DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY 47-56 (1986).
11 See Weigendt, supra note 2, at 396
12 See weigendt, supra note 2, at 397
adjudication. He mentioned some theories about truth-seeking. The following table is a brief introduction about these theories.

| The conventional understanding of reality | Fact-finding involves establishing congruence between our statements about the world and the world itself. But most facts we seek to establish in adjudication are "social" facts rather than phenomena intrinsic to nature.¹³ |
| Post-modern view of reality | Posit a disjunction of language from external references and recognize no reality other than what one chooses to make of it. We presuppose a world beside our statements. Profound skepticism cannot account for existing fact-finding arrangements, and it does not provide workable ideas for their transformation.¹⁴ |
| The social construction of reality | Acknowledge reality beyond language games but insist that much of it—or all of it—is socially constructed.¹⁵ |
| The objectivity of knowledge in adjudication | But they are not in the business of seeking this metaphysical knowledge anyway: they seek to establish events and phenomena in the socially created world. What constitutes this world is objectively ascertainable: ontologically subjective matter can be epistemically objective.¹⁶ |

As far as I am concerned, on one hand, the objective truth happened in past is unknowable. The whole process is irreversible. All we can do is doing our utmost to approach the truth with all the admissible evidences we can find. On the other hand, totally objective truth is not necessary in criminal adjudication. The criminal process is target-oriented. Some truth is immaterial and fuzzy to the criminal process. All truth presented in criminal adjudication is deliberatively selected and is artifactitious. So the thesis is inclined to uphold the possessing of truth with human selection and the consequences properly justified.

IV. TWO DIFFERENT PROCEDURAL MODELS AND THEIR ADVANTAGES AND DISADVANTAGES IN TRUTH-SEEKING

A. The Definitions of Two Procedural Models---Adversary System and Inquisitorial System

According to Black Law Dictionary, adversary system¹⁷ is a procedural system, such as the Anglo–American legal system, involving active and unhindered parties

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¹³ See Damaska, supra note 1, at 291
¹⁴ See Damaska, supra note 1, at 290
¹⁵ See Damaska, supra note 1, at 291
¹⁶ See Damaska, supra note 1, at 292
¹⁷ Black’s Law Dictionary
contesting with each other to put forth a case before an independent decision-maker; Inquisitorial system\(^\text{18}\) is a system of proof-taking used in civil law, whereby the judge conducts the trial, determines what questions to ask, and defines the scope and the extent of the inquiry. This system prevails in most of continental Europe, in Japan, and in Central and South America.

B. Truth-seeking in Adversary System

Many people have such an impression that adversary system does not put so much attention to truth-seeking in criminal process. Due procedure is more important in this system. As Marvin E. Frankel mentioned in his article “My theme, to be elaborated at some length, is that our adversary system rates truth too low among the values that institutions of justice are meant to serve.”\(^\text{19}\) He tends to recognize truth-seeking as the central or prominent goal of the criminal process. In practice, many aspects and institution design in adversary system are barriers to truth-seeking. Here are some aspects.

Firstly, the functions of adversary system are not designed for truth-seeking. The thesis will take Anglo-American system as an example. The Anglo-American adversary system serves two major functions. The first is the making, not the discovery, of law. The lawmaking function is not usefully thought of as a search for truth. The objective is not to uncover natural law, nor even to discern the intent of the drafters of a piece of legislation, but rather to decide whether, as a matter of policy, the case under consideration should fall within or without the ambit of a particular doctrine. The role of the advocate is to present the arguments for treating the case one way or another consistent with principles that are broadly accepted by those who perform in legal capacities. This function is the creation of social order.\(^\text{20}\) The second function, the finding of fact, is closer to our conceptions of the search for truth. One might argue that the adversary system is a mechanism for the finding of "true facts."\(^\text{21}\) Ideally, the result of an adversary trial should be the same as that which would result if this was an omniscient society, but the adversary system is not a machine for the discovery of "the truth, the whole truth, and nothing but the truth." The main purpose of the system is dispute resolution. To some extent, truth is not so important if a satisfactory outcome can be reached which is demonstrated by high-rate plea bargaining in pre-trial.

Secondly, adversary system rates truth too low among the values that institutions of justice are meant to serve. Quite obviously, however, truth-conducive values cannot be an overriding consideration in legal proceedings: it is generally recognized that several social needs and values exercise a constraining effect on attempts to achieve fact-finding precision. Various lists have been compiled of these countervailing considerations: privacy and human dignity, the demand for stability in decision-making, and cost figure

\(^{18}\) Black's Law Dictionary


\(^{21}\) id. 324
prominently among them.\textsuperscript{22} Thirdly, the institution design in adversary system is a barrier to truth-seeking. This point can be illustrated from several aspects. (1) The presupposition defects of the system. An adversary system based upon the presupposition that the most effective means of determining truth is to present to a judge and jury a clash between proponents of conflicting views. This theory also rests on a number of assumptions: first, each side presents part of the truth, and neither has it all; second, each side has a genuine interest in bringing out the truth; third, each side has equal opportunity to convince the trier of fact of the accuracy of its version. Obviously, these assumptions are not always justified.\textsuperscript{23} (2) The role of advocate. The plainest thing about the advocate is that he is indeed partisan, and thus exercises a function sharply divergent from that of the judge. Whether or not the judge generally achieves or maintains neutrality, it is his assigned task to be nonpartisan and to promote through the trial an objective search for the truth.\textsuperscript{24} The advocate in the trial courtroom is not engaged much more than half the time-and then only coincidentally-in the search for truth. The advocate's prime loyalty is to his client, not to truth as such. Here is a vivid display of this loyalty. Loyalty to the client is the requirement of ethical standards.

Recall Lord Brougham's familiar words: an advocate, in the discharge of his duty, knows but one person in the entire world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.\textsuperscript{25} Also, courtroom is recognized as an arena for the advocate to display their prowess to challenge the evidence presented by the prosecution, dig up exonerating evidence and present it in court. Most importantly, employing an advocate is a luxury for an impoverished man. All in all, the advocate, to some extent, impedes the process of truth-seeking and its full disclosure in courtroom. (3) The passive role of judge in criminal process. The passive role of judge results in the lost control of the whole process. The fact is that the system does not allow much room for effective or just intervention by the trial judge in the adversary fight about the facts. The judge views the case from peak of Olympian ignorance.\textsuperscript{26} Without an investigative file, the American trial judge is a blind and blundering intruder, acting in spasms as sudden flashes of seeming light may lead or mislead him at odd times. The ignorant and unprepared judge is, ideally, the properly bland figurehead in the adversary scheme of things. Because the parties and

\begin{itemize}
\item \textsuperscript{22} See Damaska, supra note 2, 301. Some commentators consider factual findings in other spheres (e.g. in the media) as rivals of forensic truth. They then proceed to examine the interaction of judicial and extra-judicial fact-finding, rather than values and needs that compete with fact-finding accuracy in adjudication. These inquiries are interesting, but should not be confused with those to which this symposium is devoted.
\item \textsuperscript{23} Thomas Weigendt, Is The Criminal Process about Truth? A German Perspective, 26 Harv. J. L. & Pub. Polly 159 2003
\item \textsuperscript{24} See Frankelt, supra note 19, at 1035
\item \textsuperscript{25} See Frankelt, supra note 19, at 1036
\item \textsuperscript{26} See Frankelt, supra note 19, at 1042
\end{itemize}
counsel control the gathering and presentation of evidence, we have made no fixed, routine, expected place for the judge's contributions. It is not a regular thing for the trial judge to present or meaningfully to "comment upon" the evidence. As a result, his interruptions are just that-interruptions; occasional, unexpected, sporadic, unprogrammed, and unduly dramatic because they are dissonant and out of character. (4) Almost all crime laboratories are situated within law enforcement agencies, leading to the risk that the laboratories will be captured by police and prosecutor interests in obtaining convictions rather than pursuing objective truth.27

Fourthly, the rule of evidence in adversary system, to some extent, is stricter than inquisitorial system. The system surely has some advantages in presenting the evidence in courtroom. First, it saves judicial time since the parties do the initial winnowing. Second, it avoids the appearance or practice of the government constructing a case history which is designed to disadvantage one party. But this system has more restrictions in presenting evidence. Based on its respect to human dignity and individual rights, the defendant is also a subject, no longer an object, in this process and possesses the rights to stay silent and not cooperate with the prosecutor. Under this circumstance, much information will be missed. Also, there are some rules of evidence in this system such as exclusionary rule28 and Miranda rule29. All these rules will exclude some evidences.

Lastly, deeply permeated adversary culture cultivated some features in adversary system such as extreme individualist, polybasic participation, competitive etc.

C. Truth-seeking in Inquisitorial System

An inquisitorial system is said to be more focused on truth-finding than the adversarial system. Does the inquisitorial system fare better? The historical record does not so indicate. Although the inquisitorial system introduces the inquisitorial magistrate, a professional third party officially interested in determining the truth, and thus avoids the party-motivation problem that characterizes the adversarial system.30 This can be demonstrated by the comparison of American prosecutor and German prosecutor (the representative of inquisitorial system). For example, under the German Code of Criminal Procedure (which reflects an inquisitorial system in which a neutral prosecutor is charged

27 Keith A. Findley, Adversarial Inquisitions: Rethinking the Search for the Truth, 56 N.Y. L. Sch. L. Rev. 915 (2011-2012)
28 1. Evidence. Any rule that excludes or suppresses evidence <despite many exceptions, hearsay has long been inadmissible under an exclusionary rule>. 2. Criminal procedure. A rule that excludes or suppresses evidence obtained in violation of an accused person's constitutional rights <in accordance with the exclusionary rule, the court did not admit the drugs into evidence because they had been obtained during a warrantless search of the defendant's home>
29 The doctrine is that a criminal suspect in police custody must be informed of certain constitutional rights before being interrogated. The suspect must be advised of the right to remain silent, the right to have an attorney present during questioning, and the right to have an attorney appointed if the suspect cannot afford one. If the suspect is not advised of these rights or does not validly waive them, any evidence obtained during the interrogation cannot be used against the suspect at trial (except for impeachment purposes). Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).
30 See Weigendt, supra note 23, at 160
with searching for the truth) a German prosecutor "does not function as a party but rather as a 'second judge,'" who functions "from a neutral, detached, and objective perspective." According to one observer, German prosecutors are seen as "guardians of the law," who "lack the thirst for winning that their American colleagues display in the courtroom.” Indeed, consistent with this role, German prosecutors even present evidence that favors the accused, and at the close of trial are free to recommend an acquittal. Consistent with this commitment to neutrality, and in stark contrast to American practice, German prosecutors do not meet with the witnesses prior to trial or try to prepare them or the case to be as convincing about the defendant's guilt as possible.” Thus, in an inquisitorial system, "both the legitimacy of criminal justice and the fate of the individual in terms of fair trial depend to a large extent on the integrity of state officials and their visible commitment to nonpartisan truth finding." Even within the inquisitorial tradition, steeped in its commitment to neutrality and objectivity, it is often too much to expect police and prosecutors to remain truly impartial in every case. Increasingly, inquisitorial systems have witnessed breakdowns when prosecutors succumb to law-and-order pressures and fail to adhere to norms of neutrality.31

This system also suffers from a psychological flaw—it overlooks the fact that truth cannot reliably be extracted from a person unwilling to reveal what he knows. In this aspect, the inquisitorial system is not so good compared with adversary system. In adversary system, the litigants in the process have more power to procure and collect relative evidences. They are the subjects of the process and are positive, target-oriented.

V. SOME NEW DEVELOPMENTS AND TRENDS ABOUT TRUTH-SEEKING

According to the aforesaid discussions about the advantages and disadvantages of the two approaches in truth-seeking, none of the systems is perfect. They have some flaws in different perspectives. So many experts propose some solutions to these problems and prompt the fusion of these two systems. These break the boundaries between them, and these two systems can absorb some good stuff from each other.

Here are some new developments in adversary system. "The search for the truth" has in recent years received substantially increased emphasis in American law. Three areas in particular stand out. First, some states have enacted constitutional amendments labeled, or designed, to promote "truth in evidence", that is, to restrict the scope of exclusionary rules, and require admission of all relevant evidence. Second, there has been a fairly dramatic shift in the norms of professional responsibility, placing stricter duties of disclosure on defense counsel who knows their client is lying, or who gain control of or know the location of incriminating evidence. A third area in which the search for the truth has recently received strong endorsement is in the Supreme Court's constitutional decisions.32

The first "reform" model in inquisitorial system was introduced on the European continent in the 19th century in the wake of the French Revolution. The figure of the

32 id. 824
inquisitorial judge was retained, but he had to share his authority and his fact-finding role with other agents most importantly, the public prosecutor (who moved a case from the investigatory stage to the trial stage) and the trial jury (which participated in determining the verdict). Moreover, legal systems began to acknowledge parties (i.e., the defendant, but also, to some extent, the victim) as subjects instead of mere objects of the process, and they were given a right to be heard and to have input into the fact-finding process. On the other hand, the suspect’s right to withhold information and even to refuse cooperation (beyond physical presence at the trial) in the criminal process gradually evolved.33

VI. CONCLUSION

Actually in practice, pure adversary system or inquisitorial system may not exist. Hybrid system prevails in some countries. To some extent, China’s criminal process is inquisitorial system. Truth-seeking is the basic value in Chinese criminal process. The dominant role of Chinese judge in criminal process greatly connects with the social environment, public policy and governance structure. But in recent years, China has adopted some features in adversary system and the position of the defendant has greatly improved.

33 See Weingendt, supra note 23, at 161