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ADVERSAIRAL VS INQUISITORIAL LEGAL SYSTEMS:

ROUSSEAU, TRUTH, JUSTICE AND GOD

David Newlyn

School of Law, Western Sydney University, Sydney, Australia

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ABSTRACT

All countries have a legal system of some sort. Whilst not the only nor necessarily the main legal systems in existence, the adversarial and the inquisitorial legal systems have operated across much of the Western world for centuries. Fundamentally, each of these systems, each has at their core the pursuit of truth and the delivery of justice for all. However, the mechanisms they use to achieve these exalted goals are substantially different. In the philosophical context of Rousseau's view of God is the source of ultimate justice, this article discusses how the adversarial and inquisitorial systems view truth and seek to establish justice in the modern world.

KEYWORDS: *Adversarial Legal System, Inquisitorial Legal System, Law, Justice, Truth, Rousseau*

INTRODUCTION

> Lord Bacon: We will not at present inquire…whether it be right that a man should, with a wig on his head, and a band round his neck, do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire; whether it be right that not merely believing, but knowing a statement to be true, he should do all that can be done by sophistry, by rhetoric, by solemn asseveration, by indignant exclamation, by gesture, by play of features, by terrifying one honest witness, by perplexing another, to cause a jury to think that statement false.[1]

Law, justice, truth, Rousseau, and God, what do all of these have in common and how are they relevant to the adversarial and inquisitorial legal systems that operate across the planet? The struggle for truth and justice is a long -standing common problem that has been an issue of concern for human society for a significant period of time. Ignoring any differences between the two concepts, truth and justice are the goals of any valid legal system. [2] But how to ensure that these goals are systematically achieved has been problematic throughout history. Used throughout the Western world, the adversarial and inquisitorial legal systems both have very long histories. However, their effectiveness in achieving truth and justice for society is of concern when considering the true nature of truth and justice as promulgated by philosophers such as Rousseau. [3]

Perhaps representing a wider viewpoint, Rousseau makes certain claims about the value of justice and truth and how these are relevant to ordinary people and wider society. [4] A theorem that all justice comes from God becomes problematic in the context of how justice is achieved for ordinary people whilst they exist as physical entities on planet earth.

By focusing upon the concepts of truth and justice in this Rousseau a context an examination of the merits of the adversarial and inquisitorial methods of justice will be undertaken.

BACKGROUND

All justice comes from God, who is its sole source.[5]

These bold but plain comments from the well known eighteenth century Francophone Gene van political thinker and philosopher Jean Jacques Rousseau provide a somewhat felicitous starting point for this article. Rousseau had an adamant belief that it was God who would be the ultimate judge or a purveyor of justice in this world. Although, as is indicated in the following comments "(it is) doubtless there is a universal justice emanating from reason alone; but this justice, to be administered among us, must be mutual" [6] was a sentiment that for the physical beings on this planet, there needed to be a more formalized and systemised technique of providing law and order for the benefit of daily human existence and interactions. That is, whilst every human soul may ultimately be subject to the judgement of God, there is an explicit need for a system of justice to operate in the corporeal world. [7]

It was Rousseau's opinion, then that "conventions and laws are therefore needed to join rights to duties and refer justice to its object"[8] in order to provide people with a regulated system of rules to superintend their existence. It was further postulated by Rousseau that this justice would have to be administered in a systematic and formalized manner to ensure its consistent application. Given the connection and potential synonymity between justice and truth, this is where the courts ability to determine the truth of the matter at hand becomes important for this article, as it intimates that justice is being achieved for the parties to any legal proceedings. These ideas are well encapsulated by Rawls, who states "Justice is the first virtue of social institutions, as truth is of systems of thought."[9]

For if a judicial system is incapable of determining the truth of a matter, then it may well be that God is really the only source of justice and that justice could never be truly achieved whilst existing as a corporeal entity. [10]

The system proposed by Rousseau, was not new of nonpareil, in fact it had existed in virtually every formalized society since early recorded Roman history [11], but Rousseau's vision may be unique in certain ways and important to this article because he not only postulated that ultimate justice is in the hands of God but also realized that a formalized system was needed by people for their routine lives whilst they exist as corporeal beings. To this end the methods and procedures used in both the inquisitorial and adversarial systems for the establishment of truth and the pursuit of justice for all are important to understand as these systems provide concomitant examples of rules and processes imposed by the courts in order to regulate the lives of people whilst they exist as physical entities.

From a metaphysical and hermeneutical point of view, the issue of establishing the truth in any given matter, whether it be through the adversarial or inquisitorial models, may be somewhat problematic. [12] If we take Rousseau's metaphysical vision of God being the supreme arbiter and the definitive user of discretion in the sense of deciding what is virtuous or inauspicious or who has been propitious or pythonic, then there are some connatural and probably unsolvable problems associated with the nature and the establishment of truth and justice in the modern judicial system. [13] For if law and its discretionary elements are represented as concepts of hermeneutics or epistemological interpretation, then this will result in a highly abstract interpretation of every persons differing view of what truth is and how it should be determined, both in a day to day manner and in the future sense of God being the ultimate judge or source of truth. [14]

GOOD VS EVIL

Ultimately, it may be argued that there is a good and an evil and that laws and justice should be shaped around the enforcement of these standards. [15] [16] But this too stretches into the realms of metaphysics, because what are laws or rules besides arbitrary constructs of society? Truth is merely a particular person's conception of an event or incident compared to another person's; it is a highly ambiguous term which is open to a state of flux. [17] Which views are we to trust in the accepting of right from wrong and good from evil or truth from fiction?

For the purposes of this article a more concrete and therefore by necessity a less abstract/philosophical approach will be taken to analyze how both the inquisitorial and adversarial systems endeavor to obtain the truth of a matter. This in turn leads to promulgating what each system undertakes to deliver justice in any given situation. We may accept, as Rousseau has suggested, that God will be the conclusive judge of truth and justice, but the inevitable functional reality is that courts, two days need a much more formalized and rigid interpretation of what the notions of justice and truth are concerned with so that people can have confidence in living their day to day lives.

Indeed it is indispensable in any civilisation that there be a formal system of laws which its citizens have faith in, a trust which cannot exist unless there is a confidence in those whose task it is to explicate and enforce the law; the majority of the public would surely not be entirely pleased if this job was purely left to God. [18] The public need to be critically cognizant of the extreme powers of discretion that courts have in determining what is veridical and whose views they will accept in the establishment of the truth, and they need to be sure that they are living their lives in such a way that they will not attract the wrath of the courts.

Rousseau may be correct in stating that we need a system of recognised conventions to administer justice in a fair and equitable way to the citizens of a state and that even though God may indeed be the ultimate judge, we must all be concerned with the present and endeavour to provide equality for all; for by doing this we may well all be acting as the natural extensions of God as his willing servants. [19] Indeed the notions of truth and fairness in all judicial systems are historically based on religious dogma and accepted custom and practice; a tradition which has developed two different legal systems in the Western world, but which have increasingly obscure borders.[20]

THE ADVERSARIAL LEGAL SYSTEM

The adversarial system is the system favored in common law countries like Australia, New Zealand, Canada, Great Britain and the United States of America. The system is dominated by a litigant's legal counsel, who have the task of presenting evidence and arguments, and thus their version of the truth, to the court. The parties are presumed to be in an equal position with an objective moderator in the form of a judge to determine relevant points of law and to instruct the jury, if there is one, in the particular case. sertoma provides a useful analysis of the adversarial system in the following extract: "An accusatory (adversarial) system is essentially a party process. It involves a two-sided contest between prosecution and defendant in a judicial arena."[21]

In this context, the problem of finding the veracity in the case and thus delivering justice becomes problematic. This point is well expressed by former United States District Court judge Marvin Frankel, who states that the process "often achieves truth only as a convenience, a by-product, or an accidental approximation."[22] The way 'truth' is defined in this system is special and is directly contrasted with the truth that will be determined in the inquisitorial systems favored

in Europe. Here verisimilitude is determined by the facts that the litigants present to the court as a "product of the collaboration between the parties to the proceedings" [23] and not by whatever means the court may like to use. Instead the truth will be limited to the issues raised in the courtroom and thus vital pieces of evidence may not be presented by a defendant in a criminal case, for example, if the evidence would necessarily damage their case, but the evidence may still involve elements necessary for the establishment of the truth. [24] In the context of judicial fairness, if the truth is not borne out by the trial, then justice can never be said to have been achieved. The *gladiatorial* context that Brouwer describes the American legal scene as, makes it increasingly unlikely that a party would be able to assist the court to find the truth lest the information they divulged might be unfavorable for their client. [25] Of course, a problem may present itself here in situations in which the defendant in a criminal trial was not represented by counsel but instead represented them self. In such a situation the power base shifts as the judge is no longer completely passive and has to instruct the defendant of their rights and obligations. Some judges, of course, may be more helpful during this process than others. But in either situation the 'truth' may suffer.

The adversarial system is largely constrained by formal rules of evidence, especially the hearsay rule, which may prevent vital pieces of evidence from being admitted into court because the evidence is considered inadmissible. [26] The hearsay rule operates to prohibit witnesses repeating out of court statements made by other people. This would directly affect the matter of truth at the adversarial level. The theory being that the information should come directly from the person who made the comments, rather than someone who claims that they overheard the comments.

Another factor which may prevent the truth from being divulged is the concept of legal professional privilege. So that information may well be known by counsel of one party which would provide for an opportunity for the truth to be expressed at the trial but counsel is prevented from disclosing that information because of the notion of privilege. [27] This limitation on discovering the truth in a case is discussed extensively by Finkelstein, who sums up the matter when he states:

> This is a classic example of where the search for the truth may conflict with other values of our legal system. the legal system resolves this conflict by giving paramountcy to legal professional privilege. [28]

Finkelstein is not alone in noticing this problem. Many others, including some judges, have also noticed and commented upon the disparity between the rights of the clients and the paramountcy of finding the truth of the matter. The comments by Lord Taylor in the case R v Derby Magistrates' Court; Ex parte B are indicative of the types of comments that have been made. In that case, noting the primacy of legal professional privilege against finding the truth of the matter, his honor noted:

> …if a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the sixteenth century, and since then has applied across the board in every case, irrespective of the client's individual merits.[29]

The judge in the adversarial system is expected to have little or no involvement in the process of the trial. In a much-quoted statement from the English case of Jones v National Coal Board [1957] 2 QB 55, Lord Denning outlined his view of the purpose and function of the judge in the adversarial system. His honor stated at page 63 of the judgement:

> In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.

Lord Denning further stated at page 64 of the judgement that, in the United Kingdom, the immediate function of a judge was to "find out the truth, and to do justice according to the law." The conflicting problems with these two statements are self-evident. Lord Denning proposes a system in which he sees the need to find the truth of the matter at hand. But he proposes that this capacity to determine the truth will be limited to the evidence presented by the parties to the case because the judge should not become actively involved.[30] This is more patently enshrined by his further comments that:

> So firmly is all this established in our law that the judge is not allowed...to call a witness whom he (sic) thinks might throw some light on the facts. He (sic) must rest content with the witnesses called by the parties. [31]

This situation is also recognised by Viscount Simon LC in the case of Hickman v Peacey [1945] AC 304 at 318 where his honour stated "A court of law…is not engaged in ascertaining ultimate verities: it is engaged in determining what is the proper result to be arrived at, having regard to the evidence before it."

What should be patently obvious is that a judge or a jury may be forced to determine the outcome of a case without knowing all of the pertinent facts or information and thus may not resolve the case according to the complete truth of the matter.

The theme of judicial non-intervention during a trial is well recognized and is specifically commented on in the case of Laker Airways Ltd v Department of Trade [1977] 2 All ER 182 by Lord Justice Lawton when his honor makes the following observation of his role: "I regard myself as a referee. I can blow my judicial whistle when the ball goes out of play; but when the game restarts I must neither take part in it nor tell the players how to play."[32]

Australian, and other common law countries, courts have also taken a similar stance and this is one of the fundamental differences between the adversarial and inquisitorial legal systems.[33] The adversarial system seeks the truth but is constantly restrained by its own formalistic procedures.[34]

In particular in the High Court case of R v Apostilides (1984) 58 ALJR 371 the court expressly approved of the decision of Justice Dawson in the case of Whitehorn v R (1983) 49 ALR 448 where Justice Dawson stated that the court may fail to find the truth in a particular instance because of the deficiencies that the court could not be concerned with or try to actively overcome because to do so would be a breach of process. This is noted in the following comments by Justice Dawson, who clearly states at page 467 of the judgement:

> A trial does not involve the pursuit of truth by any means...the judge's role in that system is to hold the balance between the contending parties without himself taking part in their disputations. It is not an inquisitorial role in which he (sic) seeks to remedy the deficiencies in the case on either side.

So from Justice Dawson's own admissions, it becomes clear that the purpose of the court in the adversarial system is not necessarily to discover the absolute truth but instead it is to determine *a* truth and do justice according to which side presents the strongest case to the court in the context of limitations of the evidence.[35]

THE INQUISITORIAL LEGAL SYSTEM

An alternative to the adversarial system is the inquisitorial system (sometimes referred to as the inquiry system, the investigatory system or the *judicial* system) which is broadly centred in Europe, particularly in the countries of France, Belgium, Germany, the Netherlands and Italy; although in reality, particularly in Australia, the practical differences between the two models has become blurred.[36] The inquisitorial system is a codified system. In this system, the judge is a much more active participant in the proceedings.

A useful comparison made by Zeidler between the two systems is that in the adversarial system the judge is an umpire watching the game whereas the judge in the inquisitorial system is the: "director of an improvised play, the outcome of which is not known to him (sic) at first but depends heavily on his (sic) mode of directing."[37]

The judge is the center of the court in the inquisitorial model; he/she combines the roles of both judge and prosecutor and is the controller of the acervation of evidence. Emphasising the idea that there is a significant difference in the role of the judge in the two legal systems, Weeramantry states very clearly: "In the adversarial system the judge becomes more authoritarian and remote than his (sic) inquisitorial counterpart." [38]

The judge in the inquisitorial system seems to be aptly charged with the task of finding the truth at all costs as directly compared to the judge in the adversarial system who is largely constrained from obtaining the truth by ponderous rules and procedures which preclude their direct involvement. [39] As just one example of this, the judge in the inquisitorial system may not be bound by strict rules of evidence in the same way as the adversarial judge.

Indeed many of the countries which have an inquisitorial model have inscribed in their Parliamentary statutes a duty to find the truth in the case, no matter how deeply it may be concealed, by whatever means the court thinks it requisite to employ.[40] Such that in Germany, under section 139 of the so-called ‘Magna Charta’, a breach of the judges duty to actively discover the truth would promulgate a procedural error which may provide grounds for an appeal. [41]

In this way the judge in the inquisitorial system has the task of determining the truth of the matter by whatever means they feel necessary to use. The judge is not bound by the evidence which the parties provide to him/her, as in the adversarial system, but is instead free to utilize their own enterprise to locate appropriate information which could assist them to ascertain the veracity of the matter and thus to do real justice to the parties concerned. [42] In doing so the judge is seeking the truth in a much more objective way that might be described of the adversary system; they are clearly seeking a more complete record of the specific facts. Indeed the judge may look behind the specific facts and issues of the case if they feel that the information that they will find may help to discover the truth of the matter, the only ostensible circumscription is that the evidence which the judge seeks must be relevant (although relevance is given a much broader definition then it might get in the adversarial system). [43]

To this end, Brouwer states that the search for truth is paramount and reflected in the wide-ranging powers given to the judiciary when he comments that:

> The examining magistrate can conduct searches and seizures, examine evidence either on the spot or in his office, hear witnesses or make any further Inquiries which may supplement those already conducted by the judicial police. [44]

Further, the judge has the power to order the appearance before the court any person they think may help with their inquiries into the truth of the matter.

Problems arise from this idyllic vision, however, when we accept that if the court insisted upon exploring every possible avenue of determining the true facts of the case then the administration of justice would become very expensive and time-consuming. So while it is the intention of the inquisitorial system to seek the absolute truth, what is in reality determined is in fact, the approximate truth.[45] For in order to achieve otherwise would necessitate long delays in the judicial process.

CONCLUSIONS

The conclusions to this article are predicated on the view that truth and justice are inextricably linked. It is, of course, noted that this is not a universal view and before making some final comments it would be remiss not to direct the reader's attention to these alternate views.[46]

Truth and justice are important constructs to be held in high regard for any well-established stable society. The adversarial and inquisitorial legal systems seek to achieve these goals via different mechanisms. If courts are not concerned with finding the truth then injustices will occur. Rousseau argues that ultimately there may be no need for either system as God will be the final arbiter of both truth and justice, but whilst humans live as physical beings on the planet earth then there remains some need for a system to operate to achieve a veneer of truth and justice. This provides a perception that people will be treated equally and fairly before the courts.

Of course, there are differences present in the adversarial and inquisitorial legal systems. Fundamentally this can be illustrated with just one critical difference, although of course there are many others. This difference relates to the presumption of innocence. In England where the adversarial system operates, a person is presumed innocent until proven guilty by a court. Whereas in France where the inquisitorial system operates, a person is considered to be guilty until they can prove otherwise in a court.[47]

Both the adversarial and inquisitorial systems have advantages and disadvantages in obtaining the truth in any given matter. If we take the inquisitorial systems idealized task of discovering the truth by whatever means necessary, then a trial may become hideously expensive and may involve considerable delays or place unnecessary demands on people who are only remotely connected with the case. However, if we take the adversarial system of constraining and contriving the truth then there is a real chance, on occasions, that the truth will never be borne out and injustices may be done to parties.

In reality, there is no system in the world today which can claim to be truly adversarial or inquisitorial in nature; all systems throughout the world borrow from each other. Opinion is divided as to whether the adversarial model or the inquisitorial system is better for achieving the truth in a particular case, although more evidence is apparent for the virtues of the inquisitorial system. For example, Eggleston clearly believes that the adversarial system is unlikely to discover the whole truth of a matter[48], whereas Brouwer recognzses that the search for truth at any costs in the inquisitorial system can result in serious delays and large trial costs.[49] There should be no doubt that when directly contrasted with each other, that the inquisitorial legal system is more adept at determining truth as compared to the adversarial model, but neither model can claim to be perfect at this task.

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