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**“THE TRIAL ON TRIAL- VOLUME TWO”**

**Edited by Anthony Duff, Lindsay Farmer, Sandra Marshall  
and Victor Taros.**

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This is the second book in a three-set academic series, exploring the jurisprudence of trials. It has a distinct European/Germanic flavour. It has fourteen chapters, each one a paper written by an academic. This volume consists of a set of theoretical examinations of ‘the trial’, questioning whether ‘the trial’ is always a ‘fair trial’; alternatives to ‘the trial’; and ‘the trial’ under the common law legal system (as in the UK and US- although the UK is not mentioned) as against ‘the trial’ under the civil law system of most of continental Europe.

The fourth chapter consists of a paper titled “The trial and its alternatives as Speech situations”. This Chapter is the contribution of Evi Girdling (a trained anthropologist who writes on topics such as fear of crime, identity and punishment and

children's understandings of justice and punishment; the other contributors of this chapter being Marion Smith (a language sociologist) and Richard Sparks, whose previous writings are on the topic of the sociology of punishment.

Chapter 7- "It's good to talk- speaking rights and the jury", is contributed by Burkhard , Schafer and Wiegand. Schafer has published widely on the interface between the natural sciences, computer technology and the law whilst Wiegand writes on semantics, although he previously studied German jewry.

Chapter 2 deals with criminal trials of offenders who committed acts of violence. The author discusses 'fair trial' as per the European Convention on Human Rights, Article 6. The argument in this chapter asserts that 'the trial' is both a means of identifying a defendant as an offender and of protecting defendants against abuse of state powers. It goes on to state that this implies "*more than a mechanical search for truth because it involves censure of the criminal act*".

I totally agree with this, and examining the German legal system which is an inquisitorial legal system, illustrates the first point that the author makes, that the trial is more than a mechanical search for truth. German law is based on an inquisitorial legal system and the principle of the immediacy of

evidence does not normally allow trials in the defendant's absence (Abwesenheitsverfahren) but only when the offence carries a minor sentence. A practising lawyer or a professor of law may be nominated as counsel for the defence at public expense. As far as evidence is, concerned, German procedure is guided by the principle of investigation or the principle of *factual* truth, which obliges a judge to seek out the truth in a case and to form an inner conviction without being bound by the statements recorded at the hearing. The result of this is that the accused gets the benefit of any doubt.

Chapter 2 continues with the assumption that 'the trial' is a nexus between human action and legal norms, 'legal norm' being referred to in a footnote which refers to Volume 1 one of the series, page 21. This is somewhat exasperating and although it neatly ties the volumes one and two together, they are separate books and may not have been both purchased. It continues with a paragraph about normative and imperative dimensions of legal norms, ('legal norm', as per page 21, Volume 1). Discussion continues and includes Wittgenstein's "Philosophical Investigations" (in my opinion, somewhat high-brow Austrian philosophy).

What strikes me in Chapter 2, is the method of writing, which, although it alludes to an exploration of the topic, explains and

instructs, rather than flowing to analysis and exploration. The author informs about the workings of 'the trial' in three types of theoretical societies :

- the non-state society of free men;
- the society ruled by government; and
- the society under the rule of law.

She says that in non-state societies, jurisdiction is voluntary and proceedings oral. She says that in a society ruled by government, the state "*holds a monopoly on violence and the competence to issue general commands in the form of legal rules*", (thereby making his second and third types of societies the same, in my opinion). She says that this makes for the inquisitorial trial which centres on the written file and the implementation of the written law, which, she holds, is the third type of society (ie, the society under the rule of law). No more is said on this third type of society.

This Chapter 2 then continues by instructing the reader on what a 'fair trial' is, then refers to citizenship, equality and community as enunciated by John Rawl, who was Professor of Philosophy at Harvard University at the time of writing his book. Professor Rawl termed it the '*veil of ignorance*' in his book, J.Rawls, *A Theory of Justice*, (Oxford, OUP 1999). Professor Rawl's theory is that citizens have to reinvent the 'criminal

trial' in a way that produces '*the freedom, equality and community that fit with the democratic constitutional state*'. In Professor Rawl's book on moral philosophy, is set out his theory of the principles of justice that free and rational persons would accept in a position of equality. Professor Rawl's theory is that in a hypothetical situation, no-one knows his place in society, his class, position or social status, and thus has no concept of good, and so, deliberating behind a *veil of ignorance*, men determine their rights and duties.

The author of Chapter 2 continues by examining the state of the defendant/offender and that of the victim also. She asserts that the victim has no legal standing in the inquisitorial system. I beg to differ, however. The many European states' inquisitorial legal systems, eg. France and Germany, allow for the victim to bring a criminal prosecution; allows for seizure of assets for victim compensation and in France, allows the victim to fully participate in the criminal process and trial.

The author of Chapter 2 states that in the US with its adversarial legal system, the victim has no legal standing and that in the US, 'legal standing' is a "*technical juridical term that refers to the constitutional right to file a lawsuit in a federal court*". She steers clear of the concept of plea -bargaining

which, in fact, keeps ninety percent of criminal cases away from the US criminal courts.

However, the author's reasoning comes full circle when she states that, as regards crimes of violence, 'punishment and trial' set the victim free to mourn the harm done and *"to pick up on life without the burden of revenge"*. She cites the 1985 Council of Europe Recommendation R(85)/11, 'on the position of the victim in the framework of criminal law and procedure' to affirm that as long as the state can protect its citizens as potential victims, then the criminal law creates a freedom that depends on the denial of 'legal standing' of the victim. I do not agree with this assertion and many now view the modern state is a blend of the adversarial and inquisitorial legal systems, diluting the distinctions that make for such tortuous academic reasoning. Nevertheless, this chapter and all thirteen others in the book, presented an enjoyable and difficult exercise in legal reasoning. It is therefore an challenging read and I wholly recommend this series of books about the 'trial on trial'.