

The Liberal Tension of the Adversarial Criminal Procedure

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Abstract : The picture of an adverse contest between two parties has often been used as an archetypal description of the Anglo-American adversarial criminal trial. However, in actuality, guilty pleas and plea-bargains have been dominating the procedure for over the last half-a-century. Characterised by two adverse parties, the court adjudicative system in the Anglo-American world adhere to the adversarial procedure, and while further features have been attributed and the values that are embedded within the procedure vary, it is a system that we have no adequate theory. Damaska had argued that the adversarial conflict-resolution mode of administration of justice stems from a liberal laissez-faire concept of a value neutral liberal state. Having said that, the court's neutrality has been additionally rationalised in light of its liberal end as a safeguard from the state's coercive force. Both conceptions of the court's neutrality conflict in cases where the by-standing role disposes of its liberal duty in safeguarding the individual. Such is noticeable in plea bargains, where the defendant has the liberty to plead guilty, despite concerns over wrongful convictions and deprivation of liberty. It is an inner liberal tension within the notion of criminal adversarialism, between the laissez-faire mode which grants autonomy to the parties and the safeguarding liberal end of the trial. Langbein had asserted that the adversarial system is a criminal procedure for which we have no adequate theory, and it is by reference to political and moral theories that the research aims to articulate a normative account. The paper contemplates on the above liberal-tension, and by reference to Duff's 'calling-to-account' theory, argues that autonomy is of inherent value to the criminal process, being considered a constitutive element in the process of being called to account. While the aspiration is that the defendant's guilty plea should be genuine, the guilty-plea decision must be voluntary if it is to be considered a performative act of accountability. Thus, by valuing procedural autonomy as a necessary element within the criminal adjudicative process, it assimilates a liberal procedure, whilst maintaining the liberal end by holding the defendant to account.

Keywords : liberal theory, adversarial criminal procedure, criminal law theory, liberal perfectionism, political liberalism

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