

Rethinking Criminal Justice Models: Comparative Insights from Accusatorial, Inquisitorial, and Bi-Judicial Systems

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Abstract

The article is a comparative analysis of the primary models of criminal justice systems: the accusatorial model of criminal justice, the inquisitorial model of criminal justice, and the bi-judicial model of criminal justice. By way of case study of South Africa, Germany, and Scotland, the article examines the rules of procedure that regulate criminal trial procedures of adults in the jurisdictions of these countries. While examining the theoretical bases of the respective systems and their practical manifestations in working methods of the judiciary officials, standards of evidence, and procedure safeguards, the article critically examines the hybridization of the systems in practice in jurisdictions that had traditionally been linked to only one model of criminal justice. In that way, the article dissects strict categorization and ensures the plasticity of criminal justice processes. From the research comes the fact that each jurisdiction tends to be predominantly located in one model of procedure yet has infusions of the other models to ensure fairness, efficiency, and justice. This work contributes to criminal procedure reform debate in that it furnishes information on the way competing interests in the administration of justice are reconciled in various legal traditions.

Introduction

Criminal justice systems of various nations are usually grouped in the following three procedural models: the accusatorial, inquisitorial, and bi-judicial systems. Each of these models has its own unique philosophical and procedural methods of handling criminal cases. Nevertheless, in practice, the strict classification of jurisdictions according to these models does not adequately express the complexity and hybridization in current legal systems.

The following article performs a comparative examination of these three procedural models and their application in South Africa, Germany, and Scotland. South Africa is a largely accusatorial model, Germany is the inquisitorial type, and Scotland exhibits elements of a bi-judicial model that combines aspects of the prior two. Through examining the functions of the judicial officials, the evidentiary process, and the procedures to protect against abuse of power in these jurisdictions, the research examines to what extent these systems match their presumed classification and where the convergence of procedures takes place.

The importance of this analysis is that it contributes to current discourse concerning criminal procedure reform. In a globalized legal landscape, comprehending the details of various procedural systems helps in gauging their effectiveness in the protection of the accused's rights, fair conduct of trials, and preservation of confidence in the justice delivery system. This paper addresses only criminal procedures laid against adults and is not concerned with juvenile justice or civil proceedings.

Comparatively, in seeking to look beyond strict dichotomies and examine the dynamism of contemporary criminal justice systems, this paper delves into the theoretical bases of the accusatorial, inquisitorial, and bi-judicial models, their operationalization in the jurisdictions sampled, and the consequences of their converging procedures.

Methodology

This article uses a comparative legal approach to explore how criminal justice procedures work in South Africa, Germany, and Scotland, focusing on three major models: the accusatorial, inquisitorial, and bi-judicial systems. By comparing these countries, the study aims to understand both the similarities and differences in how they handle criminal trials for adults.

These specific jurisdictions were chosen because each one clearly aligns with a different legal tradition:

- (i) South Africa mainly follows the accusatorial (or adversarial) model, which is rooted in common law.
- (ii) Germany represents the inquisitorial model, typical of civil law systems.
- (iii) Scotland follows a unique bi-judicial system that blends features from both the accusatorial and inquisitorial approaches.

This framework allows for a detailed look at how each system operates in theory and in practice. The study focuses on key areas such as the role of judges, the standards for handling evidence, the rights of the accused, and the safeguards in place to ensure fair trials.

To support this analysis, the article draws on key legal sources like the South African Criminal Procedure Act 51 of 1977 and the German Code of Criminal Procedure, along with court cases and legal commentaries. Academic research is also used to provide context and critique of each model.

By comparing both the formal rules and how they are applied in real cases, this study aims to show not only how these systems differ but also where they overlap. Ultimately, the goal is to better understand how each system works to deliver fairness and justice in criminal trials.

I. The Accusatorial System

The accusatorial model, also known as the adversarial system, is widely used in common law countries like South Africa, Canada, the United States, and Zambia. In this system, the prosecution and defense

are clearly separated, and each side is responsible for presenting evidence and arguing their case. A neutral decision-maker—usually a judge or jury—oversees the trial but does not actively investigate.

At the heart of this model is the idea of a legal contest. The truth is believed to emerge through the structured debate between opposing sides. The judge plays a passive role, simply ensuring the rules are followed and making decisions based on the evidence provided. This approach was emphasized in **Thomson v Glasgow Corporation**, where the court described litigation as “a trial of skill between hostile parties,” with the outcome depending on who makes the more convincing case.

A key principle of the accusatorial system is the presumption of innocence—the accused is considered innocent until proven guilty. The burden of proof lies entirely with the prosecution. Judges are expected to stay neutral and only intervene to address legal or procedural issues. As noted in **R v Hepworth**, even though judges in South Africa's system are passive, they still have a duty to make sure the trial is fair and conducted according to the law.

While this model is designed to promote fairness by giving both sides an equal chance to argue their case, it's not without flaws. When there's an imbalance in legal representation or resources, one side may be disadvantaged. Also, in systems that use juries, there's a risk that decisions might be based more on persuasive arguments than objective evidence.

In South Africa, the accusatorial model is guided by the Criminal Procedure Act 51 of 1977, which outlines the responsibilities of the courts and the parties involved. However, even though the system is fundamentally adversarial, it includes some inquisitorial features. For instance, Section 186 of the Act allows judges to call and question witnesses if it's necessary for a fair outcome—an approach that aligns more closely with inquisitorial practices.

Overall, South Africa's criminal procedure demonstrates that, while grounded in accusatorial principles, the system can include elements from other models to ensure justice is served. This blending shows that legal systems often operate more flexibly than strict classifications might suggest.

II. The Inquisitorial System

The inquisitorial model, commonly used in civil law countries like Germany, works very differently from the adversarial approach. Instead of having lawyers lead the investigation and argue the case, the judge plays a central, active role in gathering facts and guiding the process from start to finish. In this system, the focus is on the court's responsibility to uncover the truth, rather than letting each party battle it out.

In the inquisitorial system, the judge leads the investigation and trial. Lawyers still play a role, but their functions are more procedural and supportive. They don't take the lead in building the case. Although the burden of proof still technically rests with the state, it's handled more flexibly, and in some cases, the accused might be expected to respond to or clarify allegations early in the process.

Germany's system breaks the process into three main stages:

1. **Investigation** – Led by the public prosecutor, who is required to collect not only evidence that supports the case but also anything that could help the accused. This is written into law under Section 160(2) of the German Criminal Procedure Code, showing the expectation of neutrality in how cases are prepared.
2. **Decision to proceed to trial** – The prosecutor applies to the court to move forward, but the court can reject the application if the evidence doesn't meet a certain threshold. This filtering step helps avoid unnecessary trials.
3. **Trial** – At this stage, the judge is in charge. They direct the questioning of witnesses and determine the order of evidence. There is no separate cross-examination, as seen in adversarial systems. Instead, the judge leads the questioning, and the lawyers step in only to clarify points or discuss legal issues.

When someone is arrested in Germany, the law (Sections 51 and 115a) requires that they see a judge quickly—usually within 24 hours. During this early court appearance, the judge reads the charges, informs the accused of their rights (like staying silent), and hears any immediate responses. This step helps protect the accused and allows weak cases to be identified early.

Once in court, the judge runs the proceedings. Witnesses stay outside until called, and the judge decides who to hear from and in what order, based on the case's needs. Section 243 of the Criminal Procedure Code sets out how these hearings should be conducted, emphasizing the judge's duty to manage the process and question the accused.

While this system may seem heavily controlled by the state, it's designed to reduce bias and avoid the theatrics of adversarial trials. The judge seeks the truth—not a “win”—and the prosecutor acts more as a neutral figure than an opponent of the defense.

One major advantage of the inquisitorial model is its efficiency. Judges manage witness schedules carefully to avoid delays and keep courtrooms from becoming overcrowded. Only strong, well-prepared cases go to trial, and trials are usually concise and organized.

In short, the inquisitorial model puts the court in charge of investigating and deciding the case. It avoids the competitive nature of adversarial trials and emphasizes fairness, neutrality, and thorough judicial oversight.

III. The Bi-Judicial System

The **bi-judicial system**, sometimes referred to as the **mixed system**, represents a synthesis of accusatorial and inquisitorial procedural elements. Although this model is less commonly acknowledged in legal scholarship as a distinct category, **Scotland** exemplifies its practical application, blending characteristics from both legal traditions. Other jurisdictions, including **South Africa**, occasionally incorporate bi-judicial elements despite being predominantly accusatorial.

The bi-judicial system operates on the recognition that no criminal justice model exists in isolation. In practice, jurisdictions integrate mechanisms from both the accusatorial and inquisitorial systems to

balance procedural fairness, truth-seeking, and efficiency. The Scottish legal system, for example, combines adversarial advocacy with significant judicial intervention. Judges possess the authority to direct evidence collection, question witnesses, and ensure that the factual matrix presented at trial sufficiently supports a just decision.

South Africa, although classified as an accusatorial system, demonstrates hybrid features through specific legislative provisions. Notably, Section 186 of the South African Criminal Procedure Act 51 of 1977 empowers the court to subpoena and examine any person whose testimony appears essential to the fair resolution of a case. This mirrors inquisitorial elements, where the court actively seeks evidence rather than relying solely on party-driven discovery. Similarly, Section 167 allows the court to recall and re-examine witnesses, ensuring that gaps in evidence are addressed.

The German Code of Criminal Procedure exhibits parallel provisions. Section 244(2) mandates that the court, on its own motion, extend evidence collection to all relevant facts and means of proof essential for the decision, thereby institutionalizing judicial involvement in fact-finding. This illustrates that even in systems perceived as predominantly inquisitorial, procedural overlaps with adversarial models exist.

In Scotland, this bi-judicial approach manifests through a combination of adversarial trials—where prosecution and defense engage in advocacy—and judicial discretion in evidence gathering and witness examination. The Scottish judiciary plays a more active role than in purely adversarial systems, facilitating procedural fairness and the efficient administration of justice.

One of the key advantages of the bi-judicial system lies in its flexibility. It draws from the rigorous contestation of the adversarial model and the structured investigation of the inquisitorial model. This allows courts to balance fair trial guarantees, such as the presumption of innocence and the right to legal representation, with proactive judicial oversight to ensure comprehensive evidence evaluation.

However, critics argue that the hybrid nature of bi-judicial systems may lead to ambiguities in procedural safeguards. The extent of judicial intervention is not always clearly delineated, which could risk perceptions of bias or inconsistency in judicial conduct. Furthermore, the blending of systems requires judicial officers to navigate complex procedural frameworks, demanding a high degree of judicial competence and adaptability.

In conclusion, the bi-judicial model exemplifies the pragmatic fusion of legal traditions, demonstrating that criminal justice systems are often fluid and adaptable, rather than rigidly confined to theoretical categories. This system highlights the importance of flexibility in criminal procedure, enabling jurisdictions to craft processes that respond effectively to the demands of justice, efficiency, and fairness.

IV. Comparative Analysis of Criminal Justice Systems

The comparative evaluation of the accusatorial, inquisitorial, and bi-judicial systems across South Africa, Germany, and Scotland reveals both distinct procedural characteristics and areas of significant convergence. While each jurisdiction adheres to foundational principles inherent in their respective

models, practical realities demonstrate that criminal justice systems increasingly adopt hybridized approaches to enhance fairness, efficiency, and truth-finding.

1. Judicial Role and Intervention

A principal distinction lies in the degree of judicial intervention. In the accusatorial system (South Africa), the judicial officer maintains a passive role, acting as an impartial arbiter who ensures adherence to procedural rules and legal standards. The judge refrains from investigating or questioning witnesses, leaving the fact-finding process to the prosecution and defense.

Conversely, the inquisitorial model (Germany) positions the judge as the central figure in the investigation and trial process. The judge not only leads the inquiry but also determines which witnesses are summoned and what evidence is examined. This active engagement reflects a system designed to uncover the truth through judicial oversight rather than adversarial contestation.

The bi-judicial system (Scotland) occupies a middle ground, combining adversarial advocacy with significant judicial intervention. Judges may direct evidence collection, question witnesses, and clarify ambiguities, thus balancing the passive role of the adversary system with the proactive inquiry of the inquisitorial model.

2. Evidentiary Procedures

In accusatorial systems, party-driven discovery dominates, with the prosecution and defense controlling the presentation of evidence. While the judge rules on admissibility, the responsibility for unearthing facts rests with the litigants. This can lead to uneven evidentiary outcomes, especially where disparities in legal representation exist.

The inquisitorial process employs a court-driven evidentiary approach. Judges ensure that both inculpatory and exculpatory evidence is gathered systematically, often filtering weak cases before trial. This reduces the likelihood of unnecessary prosecutions and ensures that trials focus on substantive issues, a feature highlighted in Germany's two-tier prosecution system.

The bi-judicial model allows for party-led evidence presentation while granting judges the authority to direct further inquiry when necessary. In South Africa, despite its accusatorial framework, provisions like Section 186 of the Criminal Procedure Act empower the court to summon additional witnesses, mirroring inquisitorial practices.

3. Presumption of Innocence and Burden of Proof

The presumption of innocence and the burden of proof resting on the prosecution are hallmarks of the accusatorial system. These safeguards ensure that the accused is not compelled to prove innocence, thereby upholding fundamental rights.

In inquisitorial jurisdictions, while the presumption of innocence remains a legal principle, the procedural framework places greater emphasis on the accused's participation in clarifying facts. The judge's active role in questioning the accused and evaluating evidence can lead to perceptions that the burden of proof is shared or fluid, although it technically remains with the state.

The bi-judicial system adheres to the presumption of innocence while allowing judicial officers to actively pursue the truth, which may involve questioning the accused or ordering additional evidence. This blending of responsibilities reflects a more integrated approach to adjudication.

4. Efficiency and Fairness

Efficiency and fairness manifest differently across the systems. The inquisitorial system's case-filtering mechanism—requiring prosecutorial applications to proceed to trial and judicial assessments of evidence—enhances efficiency by reducing unnecessary trials and streamlining proceedings.

The accusatorial model, though emphasizing fairness through equal contestation, may suffer from delays due to complex evidentiary disputes and resource disparities between parties. The bi-judicial approach seeks to balance these concerns, leveraging judicial discretion to correct evidentiary gaps while retaining the adversarial structure.

In sum, while theoretical distinctions persist between these models, the practical convergence of procedural elements—such as judicial intervention, evidentiary control, and case management—demonstrates that criminal justice systems operate on a continuum rather than in isolation. The South African, German, and Scottish examples illustrate how procedural adaptations serve to balance fairness, efficiency, and truth-seeking, ultimately reinforcing the necessity for hybrid approaches in modern criminal justice systems.

Conclusion

This comparative look at the accusatorial, inquisitorial, and bi-judicial systems—as reflected in South Africa, Germany, and Scotland—demonstrates that rigidly defining criminal justice systems into fixed categories often overlooks the nuanced and blended realities within modern legal practice. While each country may exhibit a dominant procedural philosophy, in practice, these models intersect, overlap, and borrow from one another.

In South Africa, although the accusatorial approach places emphasis on party-led litigation and judicial neutrality, courts retain the authority to intervene when necessary, especially to safeguard the fairness and integrity of proceedings. Germany, traditionally aligned with the inquisitorial model, centers judicial authority in both investigation and trial stages. It achieves procedural efficiency and comprehensive fact-finding, while still embedding key safeguards to uphold the rights of the accused. Scotland's bi-judicial framework, meanwhile, merges elements from both adversarial and inquisitorial traditions, offering a more flexible model that allows judicial discretion within an adversarial setting.

These cross-jurisdictional overlaps signal how fluid and adaptive criminal justice systems have become. No country strictly follows a single model; instead, legal frameworks tend to evolve, drawing from multiple traditions to address ongoing challenges around fairness, efficiency, and the pursuit of truth. Such hybridity complicates binary classifications and highlights the dynamic nature of procedural reform.

For scholars and reformers, this analysis points to the value of learning across legal systems. By studying how different jurisdictions implement and adapt procedural models, there's potential to extract practical lessons that enhance both the fairness of trials and the efficiency of judicial processes. Continued research should consider how this hybridization affects real-world outcomes, especially concerning access to justice, discretionary judicial practices, and compliance with human rights norms.

Ultimately, while the accusatorial, inquisitorial, and bi-judicial traditions each represent distinct procedural logics, their application in real-world contexts reflects an evolving conversation between legal systems. This exchange enriches global legal discourse and opens new avenues for building more responsive and balanced systems of criminal adjudication.

Reference

Legislation

1. Criminal Procedure Act 51 of 1977 Laws of South Africa
2. German Code of Criminal Procedure
3. Criminal Procedure Code, Chapter 88 of Laws of Zambia

Case Law

1. *Thomson v Glasgow Corporation* 1961 SLT 237, 246 (Scotland)
2. *R v Hepworth* 1928 AD 265, 277 (South Africa)
3. *Alfred v Lansdown* [citation unclear – may need verification or removal if not a published decision]
4. *Jones v National Coal Board* [1957] 2 QB 55, 64 (UK)
5. *S v Jacobs* 1970 (2) PH H152 (C) (South Africa)
6. *S v Rousseau* 1979 (3) SA 895 (T) (South Africa)
7. *S v Dladla* 1975 (1) SA 811 (T) (South Africa)
8. *S v Titus* 1974 (2) PH H95 (C) (South Africa)
9. *Mngadi* 1973 (4) SA 540 (N) (South Africa)
10. *S v Eshumael* 1973 (2) PH H83 (RAD) (South Africa)
11. *Yuill v Yuill* [1954] 1 All ER 183, 189 (UK)
12. *S v Sigwahla* 1967 (4) SA 566 (A) (South Africa)

Statutory Provisions Quoted (Germany)

1. German Code of Criminal Procedure, ss 51, 115a, 136, 160(2), 207, 243, 244(2)