THE ROLE OF JUDGES IN CRIMINAL TRIALS: A COMPARATIVE STUDY OF CIVIL AND COMMON LAW APPROACHES

BY

QUADRI KAFAYAT MOTILEWA

A dissertation submitted in fulfilment of the requirement for the degree of Masters of Comparative Laws

Ahmad Ibrahim Kulliyyah of Laws
International Islamic University
Malaysia

JULY 2012

ABSTRACT

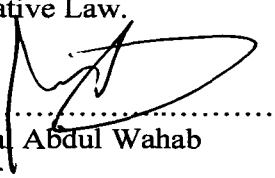
The court of law is the last hope of the common man and it is required that justice does not serve the purpose of the State alone but should be justice for the accused person; justice for the victim and finally justice for the society at large. In the adversarial system, the criminal procedure does not allow the judge to descend into the arena unlike in the case of inquisitorial system where the judge is expected to talk and also walk i.e. he must inquest into the evidence and physically investigate matters as presented before him. A well-rounded judge will better serve the interest of justice than a judge that is subjected to jurisdictional approach of adjudication rather an open approach inclusive of best practices. This study employed the use of doctrinal research methodology which will involve mostly a theoretical and pure legal point of view. This research discusses the concepts of law and justice according to the positivist and naturalist traditions and how it relates to the Adversarial/Common Law System and the Inquisitorial/Civil Law System. The role of judges in criminal trials was compared looking at the Malaysian and the French Criminal Systems with the aim of proffering best practices. The study also looked into the history of the jury system and how well a Common Law judge can function without a jury. The study found that the following mechanisms if properly managed and utilized will be a good fusion of best practices in any given jurisdiction and these practices include; the application of judicial precedent; the re-enactment of the jury system or the use of 2 or more judges in the court of first instance; the merging of a civil and criminal matter that have the same parties disputing on the same matter in both instances; oral submissions for inquisitorial proceedings; the eradication of secret trials; upholding the tenets of natural justice; and a better attitude towards openness and integration for the betterment of justice.

خلاصة البحث

المحاكم هي الملجأ الأخير لطلب العدلة والانصاف للضعفاء والمظلومين. فالعدالة يجب أن لا تنحصر فيما تخص الدولة والحكومة فقط، بل يجب أن تعم الجميع، مدع كان، أو مدعى عليه، أو الضحية. القضاة في نظام المرافعات الأنغلوا أمريكي لهم سلطة إلا النظام اللاتيني، حيث للقاضي البت في قاصرة بالمقرنة القضية وإجراء التحقيق والتدقيق. فالقاضي الذي يتمتع بهذه لسلطة والصلاحية لا شك أنه سيكون أحسن من المقيد بقيود فهذه الأطروحة اتخذ مسلك منهج البحث الاعتقادي الذي .النظام معين تة. فتناولتيتضمن جانب النظري أكثر والنظر القانوني البح .مفاهيم العدالة في القانون من وجهة نظر فلاسفة القانون الوضعي وأجريت المقارنة بين دور القضاة الماليزية وقضاة تحت قانون .اللاتيني في إجراءات الجنائية بنية كشف عن أفضل الممارسات فترق البحث لتاريخ نظام هيئة التحليف، وإمكانية العمل مريكي بدون وجود هيئة التحليف. وتوصلتللقاضي الأنغلو أ البحث إلى أن التكامل والاندماج بين التالية سوف تكون أفضل وجيد في خدمة العدالة وهي: استخدام فكرة الحكم المتقدم، إعادة تفعيل دور هيئة التحليف، تعيين أكثر من قاض في المحكمة ة والآخرالابتدائية، وجمع بين قضيتين واحد في محكمة الجنائي في المدنية إذا كان الأطراف واحدة، واتخاذ نظام استعراض الشفهي اللاتيني، وتخليص نظام المرافعات السرية، والالتزام بتعاليم العدالة الطبيعية واتخاذ أفضل موفق نحو الانفتاح والتكامل .لخدمة تحسين العدالة

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion; it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Law.



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Shamrahayu Abd. Aziz
Examiner

This dissertation was submitted to the Department of Civil Law and is accepted as a fulfilment of the requirement for the degree of Master of Comparative Law.

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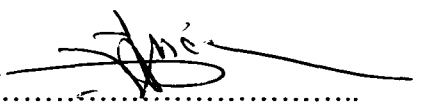
Puteri Nemie Jahn Kassim
Head, Department of Civil Law

This dissertation was submitted to the Ahmad Ibrahim Kulliyah of Laws and is accepted as a fulfilment of the requirement for the degree of Master of Comparative Law.



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DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that is has not been previously or concurrently submitted as a whole for my other degrees at IIUM or other institutions.

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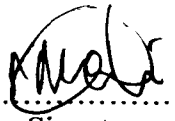

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This research is dedicated to my late father, U.K.K Quadri and to all our fallen heroes.

ACKNOWLEDGEMENTS

All Praise and Thanks is due to Almighty Allah, the Lord of the Worlds, The Most Gracious, The Most Merciful. I deny none of all the favours you bestowed upon me Oh Allah; unto you is due all Praise.

I am grateful to my mother who always gave me the necessary push anytime I doubted myself. May Almighty Allah keep you in excellent health and abundant wealth till my children become adults. AMIN. I'm grateful to the Director-General of the Nigerian Institute of Advanced Legal Studies for this opportunity. May Almighty God always keep you strong and safe. I am indebted to my supervisor, Dr. Iqbal for his guidance, support and devotion, which has contributed to the successful completion of this dissertation and for the opportunity he afforded me to tutor his students. I am grateful to Assoc. Prof. Dr. Shamrahayu for her assistance with my research proposal and Prof. Hunud for teaching me research methodology. May Almighty continue to bless my Islamic Jurisprudence lecturer, Assoc. Prof. Arifin and all the teachers that have taught me since I was born.

Special appreciation to the Oseni and Bakare Family for their support and hospitality. I am grateful to Prof Haseeb Ansari for his words of wisdom and support and to Dr. Khairil Azmin Mokhtar for his kindness.

And to every person I have ever met, I am grateful for the time spent. My family, linked by blood and other thick ties, I love you all. May Almighty Allah continue to keep us safe with excellent health, abundant wealth, peace of mind and love for our fellow human being. AMIN.

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CHAPTER ONE

GENERAL INTRODUCTION

1.0 INTRODUCTION

What amounts to a crime today is not very different in America, Africa or Asia but the processes by which criminal trials are conducted can be immensely different. In Continental Europe where the civil law system is majorly being practised; the inquisitorial method is used in the courts whereby the judge plays a dominant role in the control and management of the trial. In his judicial capacity, the judge plays an active role in the pursuit of truth and justice.[1] Somewhat contrary to this method is what is practised in common law country which is the adversarial method. In the adversarial trial, the defence and prosecution lawyers dominate the proceedings. The judicial function is thereof reduced to a referee in a football game. In a system where truth is expected to arise out of the powerful arguments of the lawyers; the accused may suffer in certain circumstances where the judge is unable to decipher by reasoning the state of things but is expected to depend only on the standard of proof and nothing out of it as he maintains order in the court while conducting the conflict between the prosecution and the defence.[2] This proceeding is normally governed by the strict rules of criminal evidence which exclude from consideration much evidence which ordinarily will be of much value. The inquisitorial and the adversarial systems have slightly different roles that will give a different perspective to the role a judge can play in criminal trials. But there is the conflict of which system is better. The

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[1] John H. Langbein, *The Origins of Adversary Criminal Trial*, Oxford University Press, 2003, General Editor's Preface.
[2] W.A.N. Well, *Law, Judges and Justice For the Community*, Butterworths, 1991, pp 52 - 53

protagonists of Common Law system (Adversarial Methods) will say that the Continental system (Civil Law System/Inquisitorial Methods) is irrational while the protagonists of the Continental system will argue that the Common law system is irresponsible. According to Engel,[3] observing from the surface, the conflict can be shallowly restricted to an obviously technical issue in the law of evidence. On the European continent, for instance, for the court to hold against the defendant, the judge must be convinced that the facts brought forward by the plaintiff in support of the claim are indeed true and in principle, continental law does not make a difference between civil law and criminal law. The standard of proof is intime conviction throughout.[4] However, the adversarial system has three different standards of proof.[5] In criminal law, the charge must be established 'beyond a reasonable doubt'. In civil law, normally the plaintiff wins if only the preponderance of the evidence is in her favour. Engel, however, contends that at closer sight the conflict between the two systems goes deeper. The Adversarial System is not only different; it also conceptualizes proof differently. In the Continental system, proof is understood as the strictly subjective impression in the judge's mind (intime conviction). By contrast, in Adversarial System, proof is an objective concept. The Adversarial law of evidence aims at objectivity. The conflict in the law of evidence is closely related to a fundamental divide in epistemology and jurisprudence.[6]

There is no doubt that the courts hold a very sensitive role in the hearts of the members of the society. It is where most people hope to get their justice.

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[3] Christoph Engel, *Preponderance of the Evidence versus Intime Conviction: A Behavioural Perspective on a Conflict between American and Continental European Law*, Preprints of the□Max Planck Institute for Research on Collective Goods Bonn 2008/33, 2008, p. 2

[4] French Code de Procédure Pénale, Art. 3531; German Zivilprozes- sordnung, § 286 I 1; German Strafprozessordnung, § 261

[5] Addington v. Texas 441 U.S. 418, 422 (1979)

[6] Engel, supra

According to Hon. Justice Oputa:[7]

> There is a very close affinity between the law, the judicial system and the people's rights. Judgements handed down by the courts are more, much more than mere words, mere ink on paper. These judgements involve analysis of executive and legislative actions as well as issues in dispute between individuals per se, or between the individual and the state. Court decisions influence a host of people. They influence powerful companies and monopolies; employers and employees; voters, candidates and returning officers; parents and children in diverse and matrimonial causes, school proprietors, principals, students, policemen and other law enforcement agencies, etc. The list is unending. The answers worked out by the courts become law by the theory of precedent and judicial law making (in common law jurisdiction). The people in their own interest should therefore be very conscious of and very alert, and very concerned with the type of judiciary they enthrone; for any judgement is but a reflection of the court that delivered.

It has been said that justice is the greatest interest of man on earth. It is the ligament which holds civilised nations together.[8] Justice requires that freedom, equality and security be accorded to human beings to the greatest extent consistent with the common good and in its administration, justice must involve an impartial and fearless act of resolving disputes within a legal order having regard to the human rights which that order protects.[9]

This study is divided into five chapters. Chapter one will give an introduction to the study. Chapter two will discuss the concept of law and justice from the positivist and natural law school of jurisprudence and what it entails in the adversarial and inquisitorial systems through the mechanisms of natural justice, standard of proof, relativism of justice and the separation of powers, independence of the judiciary, impartiality and intime conviction and how it affects the quality of justice been served by the judges. Chapter three will discuss the role of judges during criminal trials in the

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[7] Chukwudifu Oputa, "Towards Greater Efficiency in the Dispensation of Justice in Nigeria' in Law, Justice and Stability in Nigeria, *Essays in Honour of Justice Kayode Eso*, 1993, p. 8

[8] Daniel Webster quoted by Forer, Lois G, *The Death of The Law*, David Mckay Co. Inc. New York, 1975, p. 131

[9] Yemi Akinseye-George, *Justice Kayode Eso and the Challenge of Substantive Justice in Nigeria*, p. 1

Adversarial and Inquisitorial systems while emphasizing on the unique role each judge plays depending on the jurisdiction; with references to the Malaysian Law as a model of the Common Law system and the French Law as the model for the Continental system.

Chapter four is the part that focuses on the jury system; its role in the court and its fall and rise in the world system. This chapter will entail the historical background of the jury system, the gradual fall of the jury system and the consequences of the presence of the jury or their absence in a criminal trial and how it affects the role of the judge.

Chapter five which is the concluding chapter will consist of the summary of findings, the conclusion and recommendations.

1.1 SUMMARY OF PROPOSED DISSERTATION

This research will start with a summarised exposition of the concept of Law and Justice according to the natural and positivist schools of jurisprudence looking into the commentaries made on the works of Justice Holmes, Lon Fuller, John Finnis while discussing the role of justice in other legal mechanisms such as natural justice, standard of proof, relativism of justice and the separation of powers, independence of the judiciary, impartiality and intime conviction. The role of the judges via the criminal procedure of France and Malaysia will be enumerated and discussed with more emphasis on the adversarial method as practised in the Common Law countries. A journey will then be taken into the world of jurors; the historical antecedents of the jury system as practised in Common Law jurisdictions, the gradual fall of the jury system, the consequences of the presence or absence of a jury during a criminal trial and the role of a judge when there is a jury and when there is no jury. This research

hopes to make recommendations for more openness of the adversarial system in order to best serve the interest of justice and rule of law.

1.2. STATEMENT OF PROBLEM

The cultural foundation of the adversarial system is the pursuit of individual rights [10] and with regards to its criminal aspect; it comes down to what the State wants. In the adversarial system, the criminal procedure does not allow the judge to descend into the arena; like in the case of inquisitorial system whereby the judge is allowed to talk and also walk i.e. he may inquest into the evidence and physically investigate matters as presented before him. This will help the judge immensely in the determination of the innocence or guilt of the accused. Some argue that allowing the judge to do the inquest will be a miscarriage of justice, as it will make him to be vulnerable to bias.

The court of law is the last hope of the common man and it is required that justice does not serve the purpose of the State alone but should be justice for the [person] accused of a heinous crime; justice for the victim and finally justice for the society at large.

Notwithstanding, the following are some of the problems facing the court system today: abuse of integrity by lawyers, helplessness of judges (especially when a lawyer is not doing his job well), prolonged submissions and evidence tendering which is sometimes used as a means by lawyers to acquire more money from their clients, etc. It may be contended that a biased judge is easily protected in an adversarial setting because most of the time he is not saying anything. The speaking and active judge's mind is better discernible than the one that keeps quiet in the face of the uncertainties and obscurities that surround most criminal trials.

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[10] Helen Stacy and Michael Lavarch, *Beyond the Adversarial System*, The Federation Press, 1999, p. xii

1.3 OBJECTIVES OF THE PROPOSED THESIS

The objectives of this research include;

1. Clarifying the differences and similarities of the Positivist and Naturalist theory of law and linking this to the Adversarial and Inquisitorial sense of justice
2. Making comparison of the Role of Judges in the Adversarial and Inquisitorial Criminal Systems in order to foster best practices
3. Discussing the re-invention of the Jury system and how it may serve the interest of justice.
4. Focus on the role of the judge and how his role can be more tolerant towards an all-encompassing and well-rounded criminal justice system while referring to some of the practices of the inquisitorial system in order to advocate for a more open and flexible Adversarial system.

1.4 HYPOTHESIS

This research is based on the hypothesis that though the adversarial and inquisitorial systems in general have their merits and demerits; they can adopt practice and procedure from each other in order to better serve the interest of justice and rule of law. By understudying the role judges play in criminal trials in other jurisdictions such as in the inquisitorial systems, where the adversarial method is alien or practised in part; recommendations can be made for practices that will benefit not only the criminal justice system of Common Law countries but hopefully the whole world in general.

1.5 LITERATURE REVIEW

This research topic is an issue that should be bothering the minds of any serious government in the world today in order that a reliable criminal justice system is established and adopted by as many jurisdictions as possible. Many writers have written extensively on the pros and cons of the various criminal systems operating in different countries and how it can be improved to ensure that the principles of justice and equality are preserved. As a result of the past studies that have been done with regards to this topic, a review of the relevant authorities in this area is necessary to enhance the credibility of this study and to bring to light the various unclarified and unsolved issues in order to proffer concrete and relevant solutions and recommendations.

According to John H. Lagbein,[11] the adversarial system of trial was introduced late in the legal history of England. Before this period, defendants were forbidden to have counsel and lawyers seldom appeared for the prosecution. Defendants were expected to appear on their own before the court to answer to the charges levied against them. The use of lawyers in criminal trials was introduced gradually within the period of 1690s to the 1780s. It was also during this period that the law guiding the tendering of criminal evidence was formulated. The book exposes a contemporary pamphlet account of the trials in Old London's Bailey and gave a detailed account of how the law of criminal evidence was established. As a result of the expertise of the prosecution in making worthless most of what the accused persons had to say in order to prove their innocence and the professional use of crown witnesses; the court in the 1730's started to allow the accused person to have a counsel for proper representation and the cross-examination of the accusing witness. However, things gradually got out

[11] Ibid.

of hand as the lawyers tactfully took over the whole proceedings rarely giving room for the accused person to speak at all except when examined or cross-examined. According to the writer, it was at this point that the whole essence of the criminal trial was lost and it stopped being the opportunity for the accused person to speak but instead became an occasion for the defence counsel to test the prosecution case. The writer, however, did not make reference to the role of judges and how it changed in the course of the history of England. The paper was more focused on how the role of the witnesses shifted and how they became less involved while the lawyers became more vocal without making reference to the changing role of judges. This research will look into this untouched area.

In the contention of Louise Ellison,[12] the adversarial criminal trails feed off the vulnerability of witnesses. Ellison testifies that there are a host of factors that have aided the courts in denying itself access to the best evidence potentially available and relevant to most trials. The book focuses on the aspect of prosecuting witnesses as being vulnerable and criticises the English method of examination and cross-examination which is however changing fast into a better and more amiable method especially after the Youth Justice and Criminal Evidence Act 1999. The Act in all embodies a new process called accommodation which seeks to reduce the traumatisation and intimidation experience by the victims and witnesses alike while testifying during criminal trials. The Act seeks to improve the quality of the evidence received by the court by ensuring that witnesses are as comfortable as possible. One of the special measures introduced is the video recording of the witness' testimony rather than the rigid adversarial rule that oral evidence must always be direct in line with the principles of orality. The book however criticizes the Act that it did not seek to

[12] Louise Ellison, *The Adversarial Process and the Vulnerable Witness*, Oxford University Press, 2001.

regulate the excesses of cross-examination. It concludes with an insight into the inquisitorial method of criminal trial with particular reference to some rape proceedings in Netherlands. It was contended that a general tolerance of hearsay evidence and the reliance on judge-led interrogation greatly enhanced the integration of the witness's perspective to the whole process. The book however did not give a proper exposition to the general notion of the inquisitorial method vis-a-vis the differences it has with the adversarial method especially with regards to criminal trials. This research will give a proper exposition to the inquisitorial method and compare it with the recent development brought about by the Youth Justice and Criminal Evidence Act 1999 in order to trace the root of the provisions of the Act.

Jonathan Doak[13] in line with Ellison's opinion with regards the protection of the rights of witnesses complain that victims in common law jurisdiction have traditionally been unable to participate in criminal trials. He advocates for victims to have participatory rights. He notes that there has been commendable changes as to the welfare of victims in recent years such as the creation of a 'Victims' Commissioner in the UK who promotes and protects the interests of victims and witnesses but that the grace of things needs to be taken further. He admits that the prospect of victim participation in criminal trials is clothed with some obstacles.

Jackson and Doran[14] made special reference to the jury system in their book. They argued that the jury process is the bane of every adversarial trial. However, a lot of common law countries are now excluding the jury from their courts. Some still operate the jury but in exceptional circumstances or with regards to specific offences like it is practised in the UK. The opponents of the jury system have argued that the

[13] Jonathan Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation', *Journal of Law and Society,* Vol. 32, No 2, June 2005, pp. 294-316

[14] John Jackson and Sean Doran, *Judge Without Jury: Diplock Trials in the Adversary System*, Oxford University Press, 1995.

members of the jury are usual unequipped for the work entrusted upon them and that they are easily intimidated by the whole trail itself. Another problem with the jury is that its decisions are usually difficult to override and appellate courts are said to avoid overriding their decision. The book went further to say that if the jury is going into extinction; it will affect the role of the judge since the judge's role in the adversarial system is limited since he is expected to be helped by the jury. They argued that if there will be no jury then the judge will have to do more than just sit down on the bench as an umpire. He will have to start taking some of the role of the judges in the inquisitorial jurisdiction especially with regards to the tool of inquest.

In other words, the fact-finding role of the jury will have to sit on the laps of the common law judge whenever the relevance of the jury has been excused. The book then focused on the Diplock Court of Northern Ireland and how it functioned without the jury. The Diplock court came about the political instability in Northern Ireland and the subsequent emergency cases that came along with the unrest.

The book even though, it exposed the importance of the jury system did not make reference to how other common law countries are operating without it or whether an adversarial judge can actual function without the jury with its fact-finding role and how all these issues affect the victim, the witnesses and the prosecution. This research will ask all the above questions and seek to proffer answers.

Kristi O'Malley's article[15] analyzes how the Russian Supreme Court has been overturning the decision of the jury overtime; especially the acquittals made by the jury. He opined that because juries acquit defendants/accused persons more often than judges, a lot of legal writer and practitioners have expressed doubts about whether the

[15] Kristi O'Malley, 'Not Guilty Until the Supreme Court Finds You Guilty: A Reflection on Jury Trials in Russia', Demokratizatsiya: *The Journal of Post-Soviet Democratization* Volume 14, Number 1 / Winter 2006.

jury system is in the best interest of a nation as vast as Russia is since yearly statistics provided by the Russian Supreme Court confirm that acquittals are appealed more often than convictions. Not only this but that the Supreme Court allows the appeal a much higher percentage of appealed acquittals than appealed convictions, most often because jury question lists fail to conform to the Criminal Procedure Code. While the Supreme Court has the legal authority to overturn acquittals, this article suggests that overturning acquittals in such high numbers undermines the future viability of jury trials. This article encourages the Russian Supreme Court not to be so quick to overturn acquittals. In a country where people were oppressed for so many years, jury acquittals play a vital role in protecting the fundamental rights of citizens. This research will give its contribution by looking into the historical antecedents of the jury system and why it may not be viable in today's world.

Motoo Noguchi[16] in his article exposes the criminal justice system as it operates in Japan and how the procedural aspect is similar to the practice in the International Criminal Court. This article touches on an interesting aspect which brings to light that the Japanese Criminal law and procedure are a hybrid of civil law and common law legal systems. The writer boasts that Japan did not just imitate the civil and common law legal systems but that it incorporated only the good areas that were in harmony with the Japanese situation and legal culture. He pointed out that after the two systems were merged into the traditional Japanese system, the new system continued to evolve with the accumulation of case law and practice. The system in Japan is similar to that of the International Criminal Court which has the habit of adopting best practices from countries around the world in order to preserve a well-balanced system that is acceptable to as many countries as possible. The writer

[16] Motoo Noguchi, 'Criminal Justice in Asia and Japan and the International Criminal Court', *International Criminal Law Review* 6: 585–604, 2006. 585 © 2006 Koninklijke Brill NV.