

**Beiträge zum Internationalen und  
Europäischen Strafrecht**

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European Criminal Law and Procedure**

**Band / Volume 55**

# **The Procedure of Evidence Taking in the Brazilian Criminal Trial**

**An Analysis Inspired by Selected Features  
of the German Criminal Procedure and the US-American  
Criminal Procedure and Evidence Law**

**By**

**Christiane Floriani Bruhn**



**Duncker & Humblot · Berlin**

CHRISTIANE FLORIANI BRUHN

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European Criminal Law and Procedure

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*To my Parents*



## Foreword

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Freiburg, May 2023

*Christiane Floriani Bruhn*





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## List of Abbreviations

§, §§	Section, Sections
ABA	American Bar Association
ABA Model Rules	ABA Model Rules of Professional Conduct
ACHR	American Convention on Human Rights
ADI	Ação Direta de Inconstitucionalidade
ADCT	Ato das Disposições Constitucionais Transitórias
AG	Amtsgericht
AIJ	Audiência de Instrução, Interrogatório e Julgamento
AJUFE	Associação dos Juizes Federais do Brasil
AMB	Associação dos Magistrados Brasileiros
Am. J. Comp. L.	American Journal of Comparative Law
Art.	Article, artigo
B.C. Int'l & Comp. L. Rev.	Boston College International and Comparative Law Review
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
BVerfG	Bundesverfassungsgericht
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
Cardozo J. Int'l & Comp. L.	Cardozo Journal of International and Comparative Law
CF	Constituição da República Federativa do Brasil
Ch.	Chapter
Chi.-Kent L.	Chicago-Kent Law Review
CNMP	Conselho Nacional do Ministério Público
Colum. J. Eur. L.	Columbia Journal of European Law
Colum. L. Rev.	Columbia Law Review
CONAMP	Associação Nacional dos Membros do Ministério Público
CP	Código Penal
CPI	Comissão Parlamentar de Inquérito
CPP	Código de Processo Penal
Crim. Law Forum	Criminal Law Forum
D.	Decreto
DePaul L. Rev.	DePaul Law Review
DF	Distrito Federal
DJ	Diário de Justiça
DL.	Decreto-Lei
DOJ	Department of Justice
DRiG	Deutsches Richtergesetz
EC	Emenda Constitucional
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights

ed.	edition, edited by
e. g.	exempli gratia
et al.	et alia
et seq.	et sequentes
FRCP	Federal Rules of Criminal Procedure
FRE	Federal Rules of Evidence
GG	Grundgesetz für die Bundesrepublik Deutschland
GPA	grade-point average
GVG	Gerichtsverfassungsgesetz
Harv. Int'l L. J.	Harvard International Law Journal
Harv. J. L. & Pub. Pol'y	Harvard Journal of Law & Public Policy
Harv. L. Rev.	Harvard Law Review
Hastings L. J.	Hastings Law Journal
HC	habeas corpus
HK-StPO	Heidelberger Kommentar
i. a.	inter alia
IACHR	Inter-American Court of Human Rights
IBCCRIM	Instituto Brasileiro de Ciências Criminais
ICCPR	International Covenant on Civil and Political Rights
i. e.	id est
Ind. L. J.	Indiana Law Journal
J.D.	juris doctor
JECRIM	Juizado Especial Criminal
JGG	Jugendgerichtsgesetz
JVEG	Justizvergütungsgesetz und Justizentschädigungsgesetz
KK-StPO	Karlsruher Kommentar zur Strafprozessordnung
L.	Lei
LC	Lei Complementar
LG	Landgericht
lit.	litera
Loman	Lei Orgânica da Magistratura Nacional
Loy. L.A. Int'l & Comp. L. Rev.	Loyola of Los Angeles International and Comparative Law Review
LSAT	Law-School Admission Test
MG	Minas Gerais
Mich. J. Int'l L.	Michigan Journal of International Law
Mich. L. Rev.	Michigan Law Review
Minn. L. Rev.	Minnesota Law Review
MP	Ministério Público
MP-DF	Ministério Público do Distrito Federal
MPF	Ministério Público Federal
MPU	Ministério Público da União
MüKo-StPO	Münchener Kommentar zur Strafprozessordnung
n.	número
N.C. J. Int'l L. & Com. Reg.	North Carolina Journal of International Law and Commercial Re- gulation
Nr.	Nummer
N.Y.L. Sch. L. Rev.	New York Law School Review

OAB	Ordem dos Advogados do Brasil
Ohio St. L. J.	Ohio State Law Journal
OLG	Oberlandesgericht
p., pp.	page, pages
para., paras	paragraph, paragraphs
PL.	Projeto de Lei
RBCCrim	Revista Brasileira de Ciências Criminais
Rev.	Review
Rn.	Randnummer
RS	Rio Grande do Sul
sent.	sentence
SK-StPO	Systematischer Kommentar zur Strafprozessordnung
SP	São Paulo
SSW-StPO	Satzger/Schluckebier/Widmaier-Kommentar zur Strafprozessordnung
StA	Staatsanwaltschaft
Stan. J. Int'l L.	Stanford Journal of International Law
STF	Supremo Tribunal Federal
StGB	Strafgesetzbuch
STJ	Superior Tribunal de Justiça
StPO	Strafprozessordnung
Súm.	Súmula
SV	Súmula Vinculante
T.	Turma
TJ	Tribunal de Justiça
TRF	Tribunal Regional Federal
U. Chi. L. Rev.	University of Chicago Law Review
U. PA. L. Rev.	University of Pennsylvania Law Review
Urt.	Urteil
U.S.	United States
U.S.C.	United States Code
v.	versus
Va. L. Rev.	Virginia Law Review
Vol.	volume
Wash. L. Rev.	Washington Law Review
Wash. U. Global Stud. L. Rev.	Washington University Global Studies Law Review
W. Va. L. Rev.	West Virginia Law Review
Yale J. Int'l L.	Yale Journal of International Law
Zbornik PFZ	Zbornik Pravnog fakulteta u Zagrebu



# Introduction

## I. Research Subject

The Brazilian criminal procedure needs reform. The reasons for this are manifold. The current Brazilian Federal Constitution passed in 1988 sets out many procedural rights and guarantees applicable to both Brazilians and foreigners residing in Brazil. In contrast to the very progressive Constitution, the current Code of Criminal Procedure of 1941 was enacted during a dictatorship under a repressive ideology. To adapt the Code of Criminal Procedure to the Constitution, numerous modifications were made to the former, the most important of which took place with the enactment of several laws from 2008 onwards. These laws partly modified both procedural and evidence law and changed the trial setting from an officialized fact-finding to a setting which – although the judge continues to conduct the trial and to be responsible for finding the material truth – allows for a more party-controlled presentation of evidence.

Despite these reforms, the desired changes to the trial setting and, more importantly, in effectively safeguarding the accused's procedural rights were not achieved. Instead, these reforms led to incoherent cross-references and to a mixture of elements of both inquisitorial and adversarial evidentiary arrangements. The latter feature alone is not problematic, as it is rare for a country to have a pure inquisitorial or a pure adversarial procedural model, and it is not uncommon for countries to have features of their legal systems that start converging towards one another. The problem in the current Brazilian criminal procedure lies, however, in the inability in pinpointing its most problematic features and in finding concrete and effective solutions in countering them.

I believe this problem can be largely explained by the lack of tradition of conducting studies in the field of comparative law and namely, in the area of comparative criminal procedure. Furthermore, the basis for comparative law – i. e., conducting systematic and thorough studies on foreign legal systems – is also deficient. For these reasons, many problems arise, such as the misapprehension of fundamental terminology, e. g., *inquisitorial*, *accusatorial*, and *adversarial*, and the resulting arguments made from incorrect premises and inaccurate perceptions. Most importantly, a prevalent unawareness remains concerning the fact that – regardless of a legal system having a predominantly adversarial or a predominantly inquisitorial evidentiary arrangement – specific procedural safeguards must be in place to counter each system's inherent structural deficiencies in an effective manner.

Thus, in view of these blind spots, scholars and practitioners alike have been unable to find helpful solutions to various problems in the Brazilian criminal procedure. Particularly, in finding effective safeguards to protect the defendant's constitutional and procedural rights at trial. I believe the reason for this is not due to a lack of will or effort, but rather, on account of looking for answers in places that are not conducive in finding effective solutions.

## **II. Research Objectives**

This study has five main objectives. The first objective is to examine the development of the normative framework of the Brazilian criminal procedure. This has the purpose of having a better grasp of the mindset behind the enactment of the current Code of Criminal Procedure, the changes in its outline after successive reforms, and to start identifying its most problematic features, particularly regarding the defendant's position at trial.

The second objective is to examine two foreign legal systems in a succinct way, and thus to provide a sample of an adversarial evidentiary arrangement and that of a predominantly inquisitorial one. By way of this examination, I wish to attain the first steps necessary to conduct a study in comparative law, i. e., of having an overview of foreign legal systems.

The third objective is to provide key concepts of comparative law as to fill the gap stemming from the lack of tradition in conducting studies in this area.

The fourth objective is to identify the predominant evidentiary arrangement of the Brazilian criminal procedure and its legal culture as to correctly identify the most problematic features of this legal system.

The last objective is to address the main problematic features of the Brazilian criminal procedure by means of a comparative study in order to make suggestions for its improvement. However, the concrete suggestions themselves are ancillary, as the main focus of this work is to identify the nature of the safeguards needed in countering the main weaknesses of the Brazilian code of criminal procedure.

## **III. Research Method and Scope of Analysis**

I will answer the four last objectives by means of a comparative study using the functional method. The importance of the field of comparative law in fulfilling the objectives set out above and in offering suggestions to the Brazilian criminal procedure cannot be understated. Despite the results of the legal comparison itself being an important aim of this study, its primary contribution is of being a powerful means

to better understand and discern the (domestic) legal system under analysis.<sup>1</sup> Thus, conducting comparative studies is an important tool in which to highlight the structural strengths and weaknesses of the Brazilian criminal procedure. To achieve these objectives, I selected the German and US-American legal systems for three main reasons.

First, both countries have influenced and continue to influence many legal systems worldwide.<sup>2</sup> In the Brazilian context, elements of German law have influenced the development of criminal law, while various features of US-American law have influenced the Brazilian criminal procedure.<sup>3</sup>

Second, the United States and Germany have two of the most influential and (possibly) most researched legal systems in the field of comparative criminal procedure and evidence law. This feature coupled with the prolific high-quality research conducted by international scholars on these legal systems result in a substantial amount of literature on these fields of law.

Third, as I wish to furnish two legal systems with different evidentiary arrangements at trial, the United States' adversarial system<sup>4</sup> and Germany's predominantly inquisitorial system are fitting for this task. The examination of these legal systems will provide insights on how each respective trial phase is structured and to give concrete examples on how both these countries counter the inherent structural deficiencies in their respective trial settings. I believe this last feature to be important to this study since it is not uncommon for Brazilian scholars to import elements of foreign legal systems to the Brazilian legal system without having a wider view of how these legal ideas and institutions function in their countries of origin.

For the aforementioned reasons, I believe the analysis of these two legal systems will help address misunderstandings that stem from the lack of systematic research on concrete adversarial and inquisitorial procedural models. And, more specifically, this study will address the misconceptions concerning the German and US-American criminal procedures and evidence law.

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<sup>1</sup> See *infra* footnote 1 (Part 3).

<sup>2</sup> Krey, *Characteristic Features*, p. 59; Grande, *Italian Criminal Justice*, pp. 230 et seq.; Langer, *Legal Transplants to Legal Translations*, pp. 1, 2.

<sup>3</sup> The US-American law influenced the Brazilian system in two respects. First, the development of exclusionary rules were based on the US-American case law, see *infra* Ch. 3 C. IV. 2. b). Second, there has been an increasing development of an institute akin to plea bargaining in the Brazilian criminal procedure ("*acordo*"), in this sense, see Zilli, *Iniciativa Instutória do Juiz*, p. 24.

<sup>4</sup> Concerning the criminal cases that are disposed of by trial, the US-American trial phase has possibly one of the most adversarial systems in the world. In this sense, see Pizzi, *Trials Without Truth*, pp. 118, 139 et seq. However, this does not apply to the sentencing phase, as this phase greatly differs from the trial phase, in this sense, see *infra* Ch. 2 B. IV. 2. e).